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14 PLANTRONICS, INC.

15 UNITED STATES DISTRICT COURT
16 NORTHERN DISTRICT OF CALIFORNIA
17 SAN JOSE DIVISION
18

19 PHIL SHIN on behalf of himself and
20 all others similarly situated,

21 Plaintiff,

22 v.

23 PLANTRONICS, INC.,

24 Defendant.

Case No. 5:18-cv-05626-NMC

**DEFENDANT PLANTRONICS, INC.'S
MOTION TO DISMISS FIRST
AMENDED COMPLAINT**

Date: March 27, 2019
Time: 1:00 p.m.
Place: Courtroom 7 – 4th Floor

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NOTICE OF MOTION AND MOTION

PLEASE TAKE NOTICE that on March 27, 2019, at 1:00 p.m., or as soon thereafter as the matter may be heard, in Courtroom 7 of this Court, located at 280 South 1st Street, San Jose, CA 95113, before the Honorable Nathanael M. Cousins, defendant Plantronics, Inc. will and hereby does move under Federal Rule of Civil Procedure 12(b)(6) to dismiss plaintiff’s First Amended Complaint (“FAC”), ECF No. 1.

RELIEF SOUGHT

Dismissal of all claims in defendant’s favor.

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

Plaintiff alleges that Plantronics BackBeat FIT wireless headphones (“Headphones”) contain “one or more defects” that cause their battery to fail prematurely. Based on these purported defects, plaintiff asserts claims for breach of warranty, failure to disclose, and false advertising. But the only facts he alleges in support of these claims are that his own headphones failed to hold a charge and that some anonymous consumers reported online that their Headphones also failed. That is not enough to support a claim. It does not show that the Headphones contain a product defect, as opposed to some individual units failing. Nor is it sufficient to support plaintiff’s conclusory allegation that Plantronics knew of any alleged defect.

The FAC should accordingly be dismissed. The courts have repeatedly dismissed complaints just like this one that seek to predicate warranty and false advertising claims on the failure of the plaintiff’s own product and those of anonymous internet reviewers. The result should be the same here. Plantronics sold over 1 million Headphones. The alleged premature failure of a small fraction of these devices—and plaintiff’s allegations show nothing more than that—does not establish any product defect that could support a lawsuit like this. If it did, virtually every manufacturer of a consumer product could be sued for false advertising—except perhaps manufacturers whose manufacturing and distribution process has achieved such a state of perfection that no units of their product line ever fail prematurely. At best, plaintiff has shown only that he or other consumers may be entitled to seek repair or replacement under Plantronics’

1 limited warranty, not that Plantronics breached that warranty, let alone that it engaged in
2 consumer fraud or false advertising.

3 Plaintiff's consumer fraud claims also fail because the bare existence of some consumer
4 complaints does not show that the manufacturer knew that the product was allegedly defective.
5 To the contrary, courts in this district have found that consumer complaints are insufficient to
6 establish the requisite knowledge to trigger a duty to disclose. And the alleged consumer
7 complaints here are particularly insufficient because the vast majority were posted after plaintiff
8 purchased his headphones and therefore prove nothing about Plantronics' purported knowledge at
9 the time plaintiff purchased his Headphones.

10 Plaintiff's breach of warranty claims fail as well. The sole warranty covering the
11 Headphones is Plantronics' express Limited Warranty—which disclaims all other warranties and
12 provides that Plantronics will repair or replace any defective product. Plaintiff concedes
13 Plantronics honored the warranty by sending plaintiff replacement headphones. And he makes no
14 claim that Plantronics failed to honor the warranty for any other consumer who submitted a valid
15 claim. That defeats his breach of warranty claims. Plaintiff alleges the replacements he received
16 were defective. But this Court and others have rejected that as a valid basis for asserting a breach
17 of warranty claim. The relevant question is whether the manufacturer responded appropriately
18 under the express warranty—and the facts alleged here show that Plantronics did.

19 In short, the FAC is devoid of non-conclusory factual allegations sufficient to support a
20 claim. The Court should dismiss the FAC in its entirety.

21 **STATEMENT OF ISSUES TO BE DECIDED**

22 1. Has plaintiff stated a valid claim for breach of express and implied warranty when
23 Plantronics fulfilled its obligations under the applicable Limited Warranty?

24 2. Has plaintiff alleged a valid claim for breach of implied warranty even though he
25 lacks the requisite vertical privity with Plantronics?

26 3. Has plaintiff stated a valid claim for breach of the implied warranty of fitness for a
27 particular purpose, when he does not allege any facts showing that he had a particular purpose for
28 Plantronics' Headphones different from their ordinary purpose?

1 4. Has plaintiff stated a valid claim for breach of express and implied warranty when
2 he failed to give Plantronics pre-suit notice of the alleged defect?

3 5. Has plaintiff alleged sufficient facts to show, for purposes of plaintiff’s fraud-
4 based claims, a defect in the Headphones and that Plantronics knew of the alleged defect and false
5 statements?

6 **BACKGROUND**

7 Plaintiff sues on behalf of an alleged nationwide class of consumers who purchased
8 Plantronics’ BackBeat FIT wireless headphones. FAC ¶ 50. For the Court’s reference, a photo of
9 the headphones is provided below:



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19 According to plaintiff, Plantronics markets the Headphones as being sweatproof and
20 waterproof, and having a battery life that lasts “up to 8 hours,” all the while allegedly knowing
21 that these statements are false and misleading. *Id.* ¶¶ 1–9, 14–34. Plaintiff asserts the
22 Headphones “contain one or more defects that cause the battery life to diminish and eventually
23 stop retaining a charge after normal usage, especially when the Headphones are exposed to sweat
24 or water.” *Id.* ¶ 4. Plaintiff alleges that Plantronics knew of this alleged defect and fraudulently
25 omitted and misrepresented these qualities to consumers. *Id.* ¶¶ 5–7.

26 Plaintiff asserts that he purchased his Headphones in March 2015 from Amazon.com. *Id.*
27 ¶ 36. He says that, before purchasing them, he reviewed “marketing information” on Amazon’s
28 website that described the Headphones “as waterproof and sweatproof, and as providing up to

1 eight hours of listening time on a single charge.” *Id.* ¶ 37. According to plaintiff, however, his
2 Headphones “experience rapidly diminishing battery life” “in part due to the Headphones’ failure
3 to resist sweat and water.” *Id.* ¶ 7. Plaintiff alleges he used the Headphones “during runs” and
4 “exposed” them to “sweat *and/or* water.” *Id.* ¶ 39 (emphasis added). Ten months later, in mid-
5 January 2016, he says he noticed the “Headphones were becoming difficult to charge” and one
6 week later they “failed to power.” *Id.* ¶ 40.

7 Nowhere does plaintiff allege any facts regarding which part or component of the
8 Headphones is defective or the nature of the defect. He does not, for example, state whether the
9 defect is in the battery itself or in some other part of the Headphones that affects the battery.
10 Instead, he alleges only that either “flimsy plastic” or “the inadequate acquisition, installation,
11 construction and manufacture of the rechargeable batteries” causes the alleged battery failure,
12 “especially when the Headphones are exposed to sweat or water.” *Id.* ¶¶ 29, 4. Nor does plaintiff
13 allege how much sweat or water he exposed the Headphones to. In fact, he appears to be unable
14 to decide whether he exposed them to sweat, water, or both. *Id.* ¶¶ 4, 39. Instead, plaintiff asks
15 the Court to trust his personal judgment that, because of alleged exposure to some unidentified
16 quantity of sweat *or* water, the batteries systematically fail in all of the over one million
17 Headphones Plantronics has sold.

18 Plaintiff also does not allege that he tested the Headphones’ resistance to moisture or offer
19 any other facts to show that the Headphones’ battery is diminished as a result of exposure to
20 moisture. Plaintiff does not even allege how long the batteries last. He claims the Headphones
21 “regularly fail to retain a charge” and “diminish over time,” but does not allege after how much
22 time of use the battery diminishes or for how many hours the battery retained a charge before
23 failing to “hold a charge.” *Id.* ¶¶ 4, 6. Based on plaintiff’s experience and that of a handful of
24 anonymous consumers who posted online reviews, he alleges that “*none* of the Headphones” sold
25 by Plantronics “have a battery that can be consistently used for eight hours without further
26 charging.” *Id.* ¶ 18 (emphasis added).

27 Plaintiff further alleges that, under “Plantronics’ one-year warranty,” he and other
28 consumers have returned defective Headphones but the replacements have contained the “exact

1 same defects.” *Id.* ¶¶ 7, 41. But plaintiff does not allege when his replacement Headphones
2 stopped working and why. *Id.* ¶ 41. Nor does he allege why the replacement Headphones of
3 unidentified consumers stopped working. *Id.* ¶ 7.

4 Plaintiff’s sole claim of injury is that, if he had been informed of the alleged unidentified
5 defects, he “would have paid less” to purchase the Headphones. *Id.* ¶ 8. He does not identify
6 how much he was willing to pay for the Headphones versus the amount he paid. *See id.*

7 Based on these vague and conclusory allegations, plaintiff asserts claims for violation of
8 express and implied warranties under the Magnuson-Moss Warranty Act and California Song-
9 Beverly Act, as well as claims under the California Consumer Legal Remedies Act (“CLRA”),
10 California’s Unfair Competition Law (Bus. & Prof. Code § 17200 *et seq.*) (“UCL”), and common
11 law fraud.

12 ARGUMENT

13 I. LEGAL STANDARDS.

14 To survive a motion to dismiss, a complaint must plead sufficient factual matter, if
15 accepted as true, to state a claim for relief that is plausible on its face. *See Ashcroft v. Iqbal*, 556
16 U.S. 662, 678 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Plaintiff must plead
17 “factual content that allows the court to draw the reasonable inference that the defendant is liable
18 for the misconduct alleged.” *Iqbal*, 556 U.S. at 678. While allegations of material fact are
19 assumed to be true and viewed in the light most favorable to the plaintiff, the Court need not
20 accept as true allegations that are conclusory, legal conclusions, unwarranted deductions of fact,
21 or unreasonable inferences. *Id.* at 678–79. Courts are “not bound to accept as true a legal
22 conclusion couched as a factual allegation.” *Id.* at 678 (internal citation omitted).

23 When alleging a claim sounding in fraud, a plaintiff must plead the fraud with
24 particularity. *See* FED. R. CIV. P. 9(b); *see also Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097,
25 1103 (9th Cir. 2003). “Averments of fraud must be accompanied by the who, what, when, where,
26 and how of the misconduct charged.” *Vess*, 317 F.3d at 1106 (internal quotation marks omitted).
27 A “plaintiff must set forth what is false or misleading about a statement, and why it is false.” *Id.*
28 (internal quotation marks omitted). This is true as well for claims under the UCL or CLRA that

1 are “‘grounded in fraud’ or . . . ‘sound in fraud.’” *Kearns v. Ford Motor Co.*, 567 F.3d 1120,
2 1125 (9th Cir. 2009) (*quoting Vess*, 317 F.3d at 1103–04); *see also Elias v. Hewlett-Packard Co.*
3 903 F. Supp. 2d 843, 853 (N.D. Cal. 2012) (“Claims sounding in fraud . . . are subject to the
4 heightened pleading requirements of Federal Rule of Civil Procedure 9(b)”); *Rasmussen v. Apple*
5 *Inc.*, 27 F. Supp. 3d 1027, 1043 (N.D. Cal. 2014) (analyzing UCL and CLRA claims under Rule
6 9(b)); *Cullen v. Netflix, Inc.*, 880 F. Supp. 2d 1017, 1025 (N.D. Cal. 2012) (“Rule 9(b)’s
7 heightened pleading standards apply to all UCL . . . or CLRA claims that are grounded in
8 fraud.”).

9 **II. PLAINTIFF CANNOT MAINTAIN HIS BREACH OF WARRANTY CLAIMS.**

10 **A. The Breach of Express Warranty Claims (I & III) Fail Because Plantronics**
11 **Complied with the Limited Warranty.**

12 Plaintiff’s breach of express and implied warranty claims (I–V) must be dismissed
13 because Plantronics’ Limited Warranty is his “exclusive remedy” for the alleged defective
14 Headphones. The Limited Warranty provides in relevant part:

15 During the Warranty Period Plantronics will repair or replace, at its option,
16 products that manifest defects in materials or workmanship if you provide notice
17 to Plantronics and return the product to Plantronics in the manner described
below.

18 * * * * *

19 In the unlikely event that your product has recurring failures or Plantronics is
20 unable to repair or replace the product, Plantronics will provide you with a
21 replacement product selected by Plantronics that is the same or equivalent to your
product in performance. **This is your exclusive remedy for a defective product.**

22 PLANTRONICS MAKES NO OTHER EXPRESS WARRANTY WHETHER
23 WRITTEN OR ORAL AND PLANTRONICS **EXPRESSLY DISCLAIMS**
24 **ALL WARRANTIES AND CONDITIONS NOT STATED IN THIS**
25 **LIMITED WARRANTY. . . . PLANTRONICS DISCLAIMS ALL**
26 **IMPLIED WARRANTIES OR CONDITIONS, INCLUDING ANY IMPLIED**
27 **WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A**
28 **PARTICULAR PURPOSE.**

26 Eister Decl. Ex. 1 [ECF No. 30-2] at 2–3 (emphases added).¹

27 _____
28 ¹ Plantronics requests that the Court take judicial notice of the Limited Warranty. “[A]

1 Plaintiff acknowledges Plantronics' warranty applies, but alleges that, because he was
 2 given defective replacements, he can assert claims for breach of implied and express warranties.
 3 FAC ¶¶ 7, 41, 61–134. But plaintiff cannot bypass the Limited Warranty simply because the
 4 replacements he received allegedly had an unidentified defect or did not function properly.
 5 Instead, under the Limited Warranty, plaintiff may only receive another replacement product

6
 7 court may take judicial notice of a material that is submitted as part of the complaint, or is
 8 necessarily relied upon by the complaint, as well as matters of public record.” *Lee v. Thornburg*
 9 *Mortg. Home Loans Inc.*, No. 14-CV-00602 NC, 2014 WL 4953966, at *4 (N.D. Cal. Sept. 29,
 10 2014). Plaintiff’s allegations explicitly refer to the warranty. FAC ¶¶ 7, 41. As explained in the
 11 declarations of Sharon Easterly (“Easterly Decl.”) and Robert Eister (“Eister Decl.”), the Limited
 12 Warranty was the applicable warranty when plaintiff purchased his Headphones and during the
 13 alleged class period. *See* ECF Nos. 30-1, 30-3.

14 Because plaintiff refers to the Limited Warranty in the FAC, the Court may treat the
 15 warranty as “part of the complaint, and thus may assume that its contents are true for purposes of
 16 a motion to dismiss under Rule 12(b)(6).” *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir.
 17 2003). Courts in this district have taken judicial notice of warranties referred to in a plaintiff’s
 18 complaint. *See, e.g., Johnson v. Nissan N. Am., Inc.*, 272 F. Supp. 3d 1168, 1176 n.5 (N.D. Cal.
 19 2017) (“Because plaintiffs’ allegations explicitly refer to and rely on Nissan’s
 20 express warranty and its terms, . . . I GRANT Nissan’s request for judicial notice.”); *Cover v.*
 21 *Windsor Surry Co.*, No. 14-CV-05262-WHO, 2016 WL 520991, at *2 (N.D. Cal. Feb. 10, 2016)
 22 (granting the defendant’s request for judicial notice of a warranty because the plaintiff did not
 23 dispute the accuracy of the warranty and quoted directly from it in his complaint); *Hoey v. Sony*
 24 *Elects. Inc.*, 515 F. Supp. 2d 1099, 1103 (N.D. Cal. 2007) (granting Sony’s request for judicial
 25 notice, at the motion to dismiss stage, of the express warranty provided for in its VAIO
 26 notebooks); *Nygren v. Hewlett-Packard Co.*, No. C 07-05793 JW, 2008 WL 11399759, at *6, n.2
 27 (N.D. Cal. Oct. 24, 2008) (“Although Plaintiffs did not attach the Limited Warranty to the
 28 Amended Complaint, it is referenced in the pleadings and thus, the Court considers it in its
 analysis”); *In re Google Phone Litig.*, No. 10-CV-01177-EJD, 2012 WL 3155571, at *7 (N.D.
 Cal. Aug. 2, 2012) (considering Google’s terms of sale in ruling on a motion to dismiss the
 plaintiff’s breach of warranty claims because the terms were referenced in the complaint and
 there was “no dispute as to [their] authenticity”). The Court should take judicial notice of the
 Limited Warranty because the warranty is relevant and plaintiff acknowledges and refers to it in
 his complaint. Moreover, the viability of plaintiff’s breach of express and implied warranty
 claims are dependent on the limitations and disclaimers in the Limited Warranty.

23 The Limited Warranty may be considered on this motion to dismiss under the
 24 incorporation-by-reference doctrine. Under the doctrine, courts may treat certain documents as
 25 though they are part of the complaint once the defendant “attaches the document to its motion to
 26 dismiss.” *Knieval v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005). The doctrine prevents plaintiffs
 27 from selecting only portions of a document to support their claims, while omitting parts that
 28 weaken their claims. The doctrine may be applied “to situations in which the plaintiff’s claim
 depends on the contents of a document, the defendant attaches the document to its motion to
 dismiss, and the parties do not dispute the authenticity of the document, even though the plaintiff
 does not explicitly allege the contents of that document in the complaint.” *Id.* The doctrine is
 applicable here. Plaintiff refers to the Limited Warranty but omits attaching it to the FAC.
 Accordingly, the Court may consider it.

1 “that is the same or equivalent” to the Headphones in performance as provided for in the
2 warranty. Eister Decl. Ex. 1 at 3. Moreover, the Limited Warranty applies equally to a
3 replacement product for a period of twelve months following the replacement. *See id.*

4 Consistent with this explicit language, courts in this district have held that an express
5 warranty is not breached merely because a manufacturer provides a defective replacement. *See,*
6 *e.g., Nygren*, 2008 WL 11399759, at *5 (“Courts have held that a manufacturer does not breach
7 an express warranty if it offers to provide the remedies specified in the warranty.”). This Court
8 recently followed this authority in *Weeks v. Google LLC*, No. 18-CV-00801 NC, 2018 WL
9 3933398 (N.D. Cal. Aug. 16, 2018). The plaintiffs there sued for breach of express warranty. *Id.*
10 at *1–2. They alleged that Google sold them smartphones with defective microphones and that,
11 when they submitted a claim to Google under the one-year limited warranty, Google gave them
12 equally defective replacements. *Id.* As plaintiff does here, they argued that the defective
13 replacements gave them a viable claim. *Id.* at *4–8. This Court disagreed, ruling that merely
14 providing a defective replacement is not a breach of warranty. *Id.* at *5. The Court reasoned that
15 the language of the warranty governs and no breach occurs when the warranty provides only that
16 a replacement will be given, with no promise that the replacement might not itself require repair
17 or replacement. *Id.* at *7 (“The question of whether it was valid under the express warranty to
18 replace a defective [smartphone] with another defective [smartphone] must be answered in the
19 affirmative based on a plain reading of the Limited Warranty.”).

20 Other courts have similarly found that when a defendant provides a replacement under a
21 warranty, even if it is defective, a plaintiff cannot maintain a viable claim for breach of express
22 warranty. *See, e.g., In re Seagate Tech. LLC Litig.*, 233 F. Supp. 3d 776, 782 (N.D. Cal. 2017)
23 (“[T]he Court holds that failure of a replacement drive—which Plaintiffs characterize as
24 ‘replac[ing] defective Drives with defective Drives,’ . . . is not in itself a breach of the express
25 terms of [the defendant’s] warranty.”); *Bros. v. Hewlett-Packard Co.*, No. C-06-02254RMW,
26 2007 WL 485979, at *4 (N.D. Cal. Feb. 12, 2007) (finding that, even if a defective part was
27 replaced with another defective part, providing a replacement “is exactly what the [defendant’s]
28 Limited Warranty provides” and thus the defendant “could not have breached the Limited

1 Warranty by acting in conformance with it.”); *Ferranti v. Hewlett-Packard Co.*, No. 5:13-CV-
2 03847-EJD, 2014 WL 4647962, at *6 (N.D. Cal. Sept. 16, 2014) (dismissing breach of express
3 warranty claim because “[t]he fact that Plaintiffs did receive replacement printers and were able
4 to get assistance from Tech Support indicates that HP did comply with its warranty”).

5 Similarly, here, plaintiff’s breach of express warranty claims must be dismissed. His sole
6 remedy for any alleged product failure is obtaining replacement Headphones under the Limited
7 Warranty. He does not allege that Plantronics failed to replace his Headphones. Nor does he
8 allege that Plantronics failed to honor the warranty for any other consumer who submitted a valid
9 claim. He has accordingly failed to state a valid warranty claim. *See Stearns v. Select Comfort*
10 *Retail Corp.*, No. 08-2746 JF, 2009 WL 1635931, at *5 (N.D. Cal. June 5, 2009) (dismissing
11 breach of express warranty claims because the defendant’s warranty was the plaintiffs’ exclusive
12 remedy); *Frenzel v. Aliphcom*, No. 14-CV-03587-WHO, 2015 WL 4110811, at *13 (N.D. Cal.
13 July 7, 2015) (finding that the only available remedy for alleged defects with Jawbone’s fitness
14 tracker was Jawbone’s limited warranty, and because the plaintiff “had not alleged that Jawbone
15 failed to repair or replace [the device,] . . . he could not maintain claims for . . . breach of express
16 warranty”).

17 **B. Plaintiff’s Breach of Implied Warranty Claims (II, IV & V) Fail Because**
18 **Plantronics Validly Disclaimed any Implied Warranty.**

19 Plaintiff’s breach of implied warranty claims fail because the Limited Warranty precludes
20 all implied warranties. It is well established that “[a] company may disclaim the implied
21 warranty of merchantability so long as the disclaimer ‘mentions[s] merchantability’ and is
22 ‘conspicuous.’” *Minkler v. Apple, Inc.*, 65 F. Supp. 3d 810, 819 (N.D. Cal. 2014) (quoting Cal.
23 Comm. Code § 2316(2)). A company may also “disclaim the implied warranty of fitness as long
24 as the disclaimer is in writing and ‘conspicuous.’” *Id.* (quoting Cal. Comm. Code § 2316(2)).
25 And “where a remedy ‘is expressly agreed to be exclusive, . . . it is the sole remedy.’” *Frenzel v.*
26 *AliphCom*, 76 F. Supp. 3d 999, 1020 (N.D. Cal. 2014) (quoting Cal. Com. Code § 2719)).

27 Courts in this district have held that a disclaimer of all implied warranties is enforceable
28 and precludes any breach of implied warranty claims. *See, e.g., Davidson v. Apple, Inc.*, No. 16-

1 CV-04942-LHK, 2017 WL 976048, at *15 (N.D. Cal. Mar. 14, 2017) (“[T]he implied warranty
2 disclaimer contained within Defendant’s Limited Warranty is enforceable, and the Court thus
3 GRANTS Defendant’s motion to dismiss Plaintiffs’ breach of implied warranty claim.”); *In re*
4 *Google Phone Litig.*, No. 10-CV-01177-EJD, 2012 WL 3155571, at *7–8 (N.D. Cal. Aug. 2,
5 2012) (dismissing breach of implied warranty claim finding the defendant’s disclaimer
6 conspicuous); *Inter-Mark USA, Inc. v. Intuit, Inc.*, No. C-07-04178 JCS, 2008 WL 552482, at *8
7 (N.D. Cal. Feb. 27, 2008) (holding that a disclaimer in all caps was conspicuous and thus
8 foreclosed the plaintiff’s claim for breach of implied warranty of merchantability).

9 This Court similarly held in *Weeks* that the plaintiffs were not “entitled to any relief
10 outside the Limited Warranty” and consequently dismissed the breach of implied warranty
11 claims. 2018 WL 3933398, at *8–9. The Court found the Limited Warranty superseded any
12 implied warranty and thus the plaintiff’s “sole remedy . . . was to have their phones repaired,
13 replaced, or to be refunded.” *Id.* at *9. The same reasoning applies here. Plantronics disclaimed
14 “all implied warranties or conditions, including any implied warranties of merchantability and
15 fitness for a particular purpose.” Eister Decl. Ex. 1 at 3. This disclaimer was in writing and
16 conspicuous; it was in all capital letters and easily distinguishable from the surrounding text. *Id.*

17 Because the disclaimer applies, the Court should dismiss all the implied warranty claims
18 as plaintiff does not allege that Plantronics refused to issue him a replacement. *See, e.g., Frenzel*,
19 76 F. Supp. 3d at 1020 (dismissing breach of implied warranty claims because Jawbone’s limited
20 warranty was the plaintiff’s exclusive remedy and the plaintiff had “not alleged that Jawbone’s
21 refusal to issue an additional replacement device occurred during the applicable warranty
22 period”). Indeed, plaintiff admits he requested replacements under the Limited Warranty and
23 Plantronics sent him replacement Headphones. *See* FAC ¶¶ 41–42. Plaintiff’s claims are
24 accordingly precluded.

25 **C. Even if the Court Were to Find the Limited Warranty is Not Applicable, the**
26 **Breach of Implied Warranty Claims Still Fail.**

27 Plaintiff’s breach of implied warranty claims fail for two additional reasons.

28 First, plaintiff bought his Headphones from a retailer, Amazon.com, and thus lacks the

1 requisite vertical privity with Plantronics. *See id.* ¶ 36. The Ninth Circuit explained in *Clemens*
2 *v. DaimlerChrysler Corp.*, 534 F.3d 1017 (9th Cir. 2008), that, under California Commercial
3 Code section 2314, “a plaintiff asserting a breach of warranty claim[] must stand in vertical
4 privity with the defendant.” *Id.* at 1023. A consumer “who buys from a retailer is not in privity
5 with a manufacturer.” *Id.* And “[a] lack of vertical privity requires the dismissal of [a plaintiff’s]
6 implied warranty claims.” *Id.* at 1024.

7 Second, plaintiff’s breach of implied warranty for a particular purpose claim fails because
8 he does not allege facts showing he had any particular purpose in using the Headphones different
9 from the ordinary purpose for which consumers use the Headphones. Nor does he allege that
10 Plantronics knew of any such purpose or that plaintiff was relying on Plantronics to furnish goods
11 for his particular purpose. “An implied warranty of fitness for a particular purpose arises only
12 where (1) the purchaser at the time of contracting intends to use the goods for a particular
13 purpose, (2) the seller at the time of contracting has reason to know of this particular purpose, (3)
14 the buyer relies on the seller’s skill or judgment to select or furnish goods suitable for the
15 particular purpose, and (4) the seller at the time of contracting has reason to know that the buyer
16 is relying on such skill and judgment.” *Keith v. Buchanan*, 173 Cal. App. 3d 13, 25 (1985). “A
17 particular purpose differs from the ordinary purpose for which the goods are used in that it
18 envisages *a specific use by the buyer* which is peculiar to the nature of his business whereas the
19 ordinary purposes for which goods are used are those envisaged in the concept of merchantability
20 and go to uses which are customarily made of the goods in question.” *Am. Suzuki Motor Corp. v.*
21 *Superior Court*, 37 Cal. App. 4th 1291, 1295 n.2 (1995) (emphases added) (internal quotation
22 marks omitted). Plaintiff alleges none of this. To the contrary, he says only that he purchased the
23 Headphones “to listen to music while exercising.” FAC ¶ 38. Because plaintiff’s intended use
24 was not any different from the ordinary purposes for which the Headphones are used, his
25 warranty claim fails. *See Punian v. Gillette Co.*, No. 14-CV-05028-LHK, 2016 WL 1029607, at
26 *18 (N.D. Cal. Mar. 15, 2016) (dismissing implied warranty claim “because Plaintiff failed to
27 identify any particular purpose for her use of Duralock Batteries, and failed to explain how that
28 particular purpose differed from the ordinary purpose for Duralock Batteries”).

1 **D. The Breach of Warranty Claims (I–V) also Fail because Plaintiff Failed to**
2 **Give Plantronics the Requisite Pre-Suit Notice.**

3 Plaintiff does not allege that he gave Plantronics written pre-suit notice of the alleged
4 defect. To the contrary, plaintiff maintains he was not required to give Plantronics notice. FAC
5 ¶¶ 73, 91, 123. Plaintiff is wrong. “To recover on a breach of warranty claim, [a plaintiff] must,
6 within a reasonable time after he or she discovers . . . any breach, notify the [defendant] of any
7 breach or be barred from any remedy.” *Adkins v. Apple Inc.*, 147 F. Supp. 3d 913, 920 (N.D. Cal.
8 2014) (quoting *Cardinal Health 301, Inc. v. Tyco Electronics Corp.*, 169 Cal. App. 4th 116, 135
9 (2008)); *see also T & M Solar & Air Conditioning, Inc. v. Lennox Int’l Inc.*, 83 F. Supp. 3d 855,
10 875 (N.D. Cal. 2015) (“[T]he Plaintiff must allege that he has given pre-suit notice to the
11 defendant of the alleged breach of warranty to allow the defendant an opportunity to cure
12 the defect outside of court.”).

13 “Courts have interpreted [California Commercial Code section 2607] as requiring a
14 plaintiff asserting warranty claims to have provided the seller with pre-suit notice before
15 instituting a lawsuit.” *Tasion Commc’ns, Inc. v. Ubiquiti Networks, Inc.*, No. C-13-1803 EMC,
16 2014 WL 1048710, at *4 (N.D. Cal. Mar. 14, 2014). The purpose of requiring a plaintiff to give
17 pre-suit notice is to give the defendant an opportunity to negotiate a settlement and preserve
18 evidence before being sued. *See Adkins*, 147 F. Supp. 3d at 920 (“This notice requirement is
19 designed to allow the seller the opportunity to repair the defective item, reduce damages, avoid
20 defective products in the future, and negotiate settlements.” (internal quotation marks and citation
21 omitted)); *Alvarez v. Chevron Corp.*, 656 F.3d 925, 932 (9th Cir. 2011) (“[P]re-suit notice
22 requirement best satisfies the statutory objectives of § 2607(3)(A) by allowing sellers to repair or
23 remedy the problem by providing the opportunity to negotiate a settlement, and by affording time
24 to prepare for litigation by preserving relevant evidence.” (internal quotation marks and citation
25 omitted)).

26 Here, plaintiff did not give Plantronics any such opportunity because he never told
27 Plantronics of his intention to sue. In circumstances such as this, courts have dismissed breach of
28 warranty claims. *See id.* (finding the “district court properly dismissed” the breach of warranty

1 claims because the plaintiff failed to give the defendant pre-suit notice); *Adkins*, 147 F. Supp. 3d
 2 at 920–21 (dismissing the plaintiffs’ breach of warranty claim with prejudice “because the
 3 plaintiffs did not provide Apple pre-suit notice of the alleged breach of warranty.”); *Eckler v.*
 4 *Wal-Mart Stores, Inc.*, No. 12-CV-727-LAB-MDD, 2012 WL 5382218, at *8 (S.D. Cal. Nov. 1,
 5 2012) (dismissing breach of warranty claim because the plaintiff failed to give pre-suit notice to
 6 the defendant).

7 Because plaintiff concedes he did not give Plantronics notice before bringing this lawsuit,
 8 the breach of warranty claims, both under California law and the federal Magnuson-Moss
 9 Warranty Act, should be dismissed with prejudice. *See 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
 11 claims under state law. Therefore, this court’s disposition of the state law warranty claims
 12 determines the disposition of the Magnuson–Moss Act claims.”); *Donohue*, 871 F. Supp. 2d at
 13 930 (“Because the court dismisses plaintiff’s state warranty claims, his MMWA claim is
 14 dismissed as well.”).

15 **III. PLAINTIFF’S FRAUD-BASED CLAIMS (VI-VIII) MUST BE DISMISSED**
 16 **BECAUSE PLAINTIFF FAILS TO ADEQUATELY ALLEGE PLANTRONICS’**
 17 **KNOWLEDGE OF ANY DEFECT.**

18 The linchpin of plaintiffs’ fraud-based claims is that Plantronics knew that the
 19 Headphones had “one or more defects” that would cause them to fail prematurely. FAC ¶¶ 4–5.
 20 Plaintiff asserts that Plantronics thus had a duty to disclose the defect and that it falsely
 21 represented the Headphones’ expected useful life. These fraud-based allegations fail because
 22 plaintiff does not allege facts showing either knowledge or the existence of any defect, let alone
 23 allege facts on these points that satisfy the heightened standard of Federal Rule of Civil Procedure
 24 9(b).²

25 _____
 26 ² Because the UCL, FAL, and CLRA claims alleging false advertising overlap in both scope
 27 and elements, courts often consolidate the analysis of motions to dismiss these claims. *See, e.g.,*
 28 *Kowalsky v. Hewlett-Packard Co.*, 771 F. Supp. 2d 1156, 1162-63 (N.D. Cal. 2011) (“[C]ourts
 often analyze the [UCL and CLRA] together”); *Chacanaca v. Quaker Oats Co.*, 752 F.
 Supp. 2d 1111, 1124-27 (N.D. Cal. 2010) (analyzing UCL, FAL, and CLRA claims together);

1 To maintain his fraud-based claims, plaintiff must establish Plantronics knew the
2 statements were false at the time he purchased his Headphones. *See, e.g., Coleman-Anacleto v.*
3 *Samsung Electronics America, Inc.*, No. 16-CV-02941-LHK, 2016 WL 4729302, at *11 (N.D.
4 Cal., Sept. 12, 2016) (when a plaintiff alleges a manufacturer fraudulently failed to disclose a
5 fact, “the plaintiff must sufficiently allege that [the] defendant was aware of [the] defect at the
6 time of sale to survive a motion to dismiss” (quoting *Wilson v. Hewlett-Packard Co.*, 668 F.3d
7 1136, 1145 (9th Cir. 2012) (internal quotations omitted)); *Henryhand v. Dorel Juvenile Grp., Inc.*,
8 No. CV1700180SJOAGR, 2017 WL 7806590, at *1 (C.D. Cal. Oct. 5, 2017) (holding that even
9 if the plaintiffs had pointed “to an actionable affirmative misrepresentation,” they must
10 sufficiently allege that the defendant “*was aware of a defect at the time of sale*, which is required
11 for claims sounding in fraud to survive dismissal” (emphases added)). Plantronics has “no duty
12 to disclose facts of which it was unaware.” *In re Sony Grand Wega KDF-E A10/A20 Series Rear*
13 *Projection HDTV Television Litig.*, 758 F. Supp. 2d 1077, 1095 (S.D. Cal. 2010).

14 Plaintiff does not and cannot sufficiently allege Plantronics was aware of any defects.
15 Plaintiff attempts to substantiate his claim by citing to consumer reviews posted on Plantronics’
16 and Amazon.com’s website. FAC ¶¶ 25–34. Most of these reviews could not possibly have
17 given Plantronics’ pre-sale knowledge of any purported defect because they were not posted until
18 after plaintiff bought his Headphones in early 2015. Only nine of the cited reviews were posted
19 before plaintiff’s purchase. And plaintiff is incorrect regarding the publication date for at least
20 one of the reviews he alleges was posted before he purchased his Headphones. In paragraph 31
21 of the FAC, plaintiff alleges that comment “a” was published in 2014. FAC ¶ 31(a). However,
22 this comment was actually posted on April 18, 2015, after plaintiff purchased his Headphones.
23 Sanchez Decl. ¶ 5. Moreover, this consumer requested and received replacement Headphones
24 and posted a follow-up review after receiving the replacement, stating: “My replacement was
25 successful and fairly quick. So far the battery life of my headphones have been exceeding my
26 expectations. . . .” (5 Star Review posted on Plantronics’ website on May 4, 2015). *Id.* This is

27
28

Neu v. Terminix Int’l, Inc., No. 07-cv-6472, 2008 WL 2951390, at *3-4 (N.D. Cal. July 24, 2008)
(same).

1 just one example of why reliance on consumer reviews is unreliable and does not prove any
2 alleged battery defect with the Headphones.

3 But even taking all of plaintiff's allegations at face value and disregarding when the
4 reviews were posted, they still do not support a claim. It is axiomatic that anonymous postings on
5 the internet are not a reliable source of information, and plaintiff alleges no facts indicating that
6 he has any basis for concluding that the postings are legitimate or accurate. And even accepting
7 the truthfulness of the unsubstantiated postings, they establish neither the existence of a defect nor
8 Plantronics' knowledge of any defect. *See Henryhand v. Dorel Juvenile Grp., Inc.*, No.
9 CV1700180SJOAGR, 2017 WL 7806590, at *6 (C.D. Cal. Oct. 5, 2017) (finding the consumer
10 reviews the plaintiff relied on "do not plausibly establish [the defendant's] pre-sale knowledge of
11 the alleged defect"); *Oestreicher v. Alienware Corp.*, 544 F. Supp. 2d 964, 974 n.9 (N.D. Cal.
12 2008) ("Random anecdotal examples of disgruntled customers posting their views on websites at
13 an unknown time is not enough to impute knowledge upon defendants."); *Baba v. Hewlett-*
14 *Packard Co.*, No. CV 09-05946 RS, 2011 WL 317650, at *3 (N.D. Cal. Jan. 28, 2011)
15 ("Awareness of a few customer complaints . . . does not establish knowledge of an alleged
16 defect."). In the context of the more than one million Headphones sold during the relevant
17 period, a small number of unverified instances of alleged defects from unknown causes does not
18 come close to showing either a defect or Plantronics' knowledge. To the contrary, it only
19 confirms the absence of any defect that could require disclosure.

20 In *Berenblat v. Apple, Inc.*, No. 08-4969 JF (PVT), 2010 WL 1460297 (N.D. Cal. Apr. 9,
21 2010), the plaintiffs relied on customer complaints as evidence that Apple knew of a defect. *See*
22 *id.* at *9. The plaintiff alleged that there were over 350 complaints to Apple by the time plaintiff
23 acquired his computer, far more than the number of complaints plaintiff has identified here. *See*
24 *id.* at *8. But the court nonetheless dismissed the case on the ground that a customer complaint
25 and knowledge of a defect were not the same: "[T]he complaints posted on Apple's consumer
26 website [only] *establish the fact that some consumers were complaining*. By themselves they are
27 insufficient to show that Apple had knowledge that the memory slot *in fact was defective* and
28 sought to conceal that knowledge from consumers." *Id.* at *9 (emphases added). The same is

1 true here. Plaintiff’s allegation that there is some unknown number of consumer complaints does
2 not show Plantronics knew of a defect.³

3 If the Court were to place any weight on consumer reviews as evidence of the existence or
4 non-existence of a defect, there are many more positive four- and five-star reviews from
5 consumers praising the Headphones than there are negative reviews. Sanchez Decl. ¶ 6. Many of
6 these reviews demonstrate that consumers were satisfied with the Headphone’s battery life and
7 moisture resistance:⁴

8 (1) “Perfect for the gym, running, cycling. Comfortable, good sound, **good battery life** and
9 easy to use.” (emphases added) (5 Star Review, Plantronics.com).

10 (2) “I bought the blue one for my wife and the green one for myself. **I found it to be [as] sweat
11 proof as they say.** The Sound is great and it didn't bounce up and down behind my head.”
(emphases added) (5 Star Review, Plantronics.com).

12 (3) “Before I bought Plantronics, I [was] using Jabra for about 6 months . I went through 3
13 headsets in the period. They would keep malfunctioning for a multitude of reasons. So I
14 tried Plantronics and immediately I noticed a difference. The blue tooth connection was
15 faster, the quality of the sound is more crisp and **the battery lasts twice as long** . It's
definitely worth the extra money .” (emphases added) (5 Star Review, Plantronics.com).

16 ³ See also *Punian v. Gillette Co.*, No. 14-CV-05028-LHK, 2015 WL 4967535, at *11 (N.D.
17 Cal. Aug. 20, 2015) (finding the plaintiff failed to “allege that Defendants had knowledge of any
18 product defect either at the time of sale, or when any allegedly false representations were made”
when the plaintiff’s “sole allegation regarding Defendant’s knowledge of a defect” were
19 “numerous complaints”); *Herremans v. BMW of N. Am., LLC*, No. CV 14-02363 MMM PJWX,
20 2014 WL 5017843, at *10 (C.D. Cal. Oct. 3, 2014) (finding insufficient to establish knowledge an
allegation that defendant received “numerous . . . complaints” from consumers about the alleged
21 defect); *Grodzitsky v. Am. Honda Motor Co.*, No. 2:12-CV-1142-SVW-PLA, 2013 WL 690822,
22 at *6 (C.D. Cal. Feb. 19, 2013) (rejecting “knowledge” and “duty to disclose” allegations
premiered on claim that Honda knew of a defect based on “pre-release testing data, early consumer
23 complaints to Honda and dealers, testing done in response to complaints, replacement part sales
data, aggregate data from Honda dealers, and other internal sources.”); *Rice v. Sunbeam*, No. CV
24 12-7923-CAS-(AJWx), 2013 WL 146270, at *7-8 (C.D. Cal. Jan. 7, 2013) (finding allegations
that defendant had previously demanded consumers return their defective products, had received
25 unspecified customer service/warranty service call center records for returns and/or complaints,
and “numerous individual letters and communications sent by members of the Class” insufficient
to allege knowledge under the CLRA).

26 ⁴ The Court may consider these consumer reviews for purposes of the motion to dismiss because
27 plaintiff references consumer reviews in the FAC. Although plaintiff does not reference these
28 five star reviews in the FAC, it would be appropriate for the court to consider them in order to
prevent plaintiff from selectively quoting only a few consumer reviews while omitting the many
consumer reviews that defeat his claim.

- 1 (4) "Light weight. Comfy fit. Good looking. **Looooong [sic] lasting battery**. They fit so flush
2 to my ears that you can[']t even tell I'm wearing headphones when you look at me head on.
3 I'm happily buying an extra pair as a backup. Keep up the good work, favorite headphones
4 ever." (emphases added) (5 Star Review, Plantronics.com).
- 5 (5) "I've been using the BackBeat FIT for about 8 months now and believe it is one of the few
6 truly excellent products I've come across lately. It simply works, is lightweight, and has
7 great audio while allowing in ambient noise (for safety). The **battery life is terrific too, I
8 charge it once or maybe twice a week but it still gets me through all my workouts and
9 long runs** -- and that's only because I charge when it tells me the battery level is "medium."
10 I just ran my first marathon, and the BackBeat FIT stayed comfortable and functional the
11 entire time." (emphases added) (5 Star Review, Plantronics.com).
- 12 (6) "Love these headphones. Sleek and comfortable. You can do any activity with them and
13 forget you're wearing them. Great sound quality, awesome wireless range and **long battery
14 life**." (emphases added) (5 Star Review, Plantronics.com).
- 15 (7) "Comfortables [sic], Easy, Nice sound, **Battery up to 8 hours** and fast at charging. Just
16 nice!" (emphases added) (5 Star Review, Plantronics.com).
- 17 (8) "I mean, this was the best choice of earphones in my entire life. Wireless for a good big
18 distance even through walls. I do hovering with them, I dance with them. Can't imagine life
19 without them. No cable, nothing is destroyed in teo [sic] months, so even[though] they are
20 more expensive, but their lifespan is quite long :) And **I am more than satisfied with its
21 battery**." (emphases added) (5 Star Review, Plantronics.com).
- 22 (9) "The best sports headphones I have ever used. They stay in place while running, don't
23 interfere with my bike helmet, with **long battery life**." (emphases added) (5 Star Review,
24 Plantronics.com).
- 25 (10) "I've had mine 1 year. The fit is excellent and they stay in my ear. **The battery lasts a
26 very long time. I only charge them once a week on average**. I love that they do not
27 cancel out sound. This is great when I'm running on the road. I did have to send mine back
28 after 8 months because they stopped working but they were exchanged without hesitation as
long as I had proof of purchase." (emphases added) (5 Star Review, Plantronics.com).
- (11) "I am a runner logging about 30-40 miles per week. I have been through almost every
headset out there. I have used the BackBeat FiT for several runs now **and I am very
impressed with the quality of the sound and length of battery time. I typically get
around 8 hours of run time before I recharge them**. The headset is lightweight and the
earbuds fit securely in my ears. I have not had any issues with them falling out of my ears or
bouncing when I run. The earbuds rotate to give a more custom and comfortable fit. I barely
realize I am wearing them. The controls are easy to learn and simple to use while running. I
am able to take phone calls, listen to my music and use Siri completely hands free while I
run with no annoying cord hanging down. **The headset has a flexible rubber casing that
is sweatproof and folds up easily to throw in my gym bag**. My previous headset had a
rechargeable battery that was large and obvious behind my head. I can't tell you where the
battery is in the BackBeat FIT, it has a thin sporty profile. Love it!" (emphases added) (5
Star Review, Plantronics.com).

1 (12) “[V]ery impressed with this product so far! Stays in your ears and has AWESOME sound
2 quality. Also, **through tons of sweat, rain, and grime, they never quit!**” (emphases
added) (5 Star Review, Plantronics.com).

3 (13) “This [sic] headphones are great for me and sound awesome. I[’]ve been using them for
4 about two months now. I bought them from Amazon. They have great sound quality and a
5 **good battery life. I normally have to charge them about once a week on Sunday and
I[’]m running three days a week.** All of my firmware upgrades have been easy. So far I
6 have nothing but good things to say about these headphones.” (emphases added) (5 Star
Review, Plantronics.com).

7
8 *Id.* ¶ 4.

9 Moreover, for some of the negative reviews plaintiff cites, there were follow-up reviews
10 posted after the consumer received a replacement demonstrating that consumers were satisfied
11 with their replacement. For example, plaintiff relies on an Amazon.com review from December
12 25, 2015. *See* FAC ¶ 33(e). But he omits that in that same review the consumer wrote that he
13 received a replacement and was satisfied with the battery life of the replacement: “Original
14 review from late December is below. I’m happy to say Verizon made it an easy exchange and the
15 replacement set has been great. . . . Battery life is as expected and comparable to my old Motorola
16 SD-10.” (December 25, 2014 Amazon.com review). Sanchez Decl. ¶ 3. Thus, if the Court were
17 to place any weight on consumer reviews, it would have to take into consideration all reviews,
18 and the many more positive reviews demonstrate customer satisfaction with the Headphone’s
19 battery life and moisture resistance and negates plaintiff’s theory of a systematic defect.

20 Plaintiff’s other conclusory allegation, that “upon information and belief” Plantronics
21 “continuously received broken headphones,” and “should have known” of the alleged defect from
22 “multiple sources” is equally deficient. FAC ¶¶ 5, 34, 158. Plaintiff alleges no facts regarding
23 the number of Headphones returned to Plantronics. Nor does he allege when Plantronics received
24 the alleged broken Headphones or the reason the Headphones broke. Similarly, plaintiff does not
25 identify any data or facts regarding the alleged “testing” that would show a systematic defect. *See*
26 *id.* ¶ 5. All he offers is that Plantronics has received some unknown number of Headphones that
27 are “broken” for some unknown reason, and that there is allegedly some “testing data” that would
28 show a systematic defect. All these allegations are conclusory and insufficient to satisfy the

1 heightened pleading standard of Rule 9(b). *See In re Nexus 6P Prod. Liab. Litig.*, 293 F. Supp.
2 3d 888, 908 (N.D. Cal. 2018) (finding that the plaintiff’s allegation that the “[d]efendant knew (or
3 exercising due diligence should have known) that the Phones were defective at the time of sale”
4 was conclusory, and the complaint did “not contain sufficient factual matter to make that
5 inference plausible”).

6 In short, plaintiff has not satisfied the heightened pleading requirement under Federal Rule
7 of Civil Procedure 9(b) to maintain his claims based in fraud. Plaintiff has not alleged facts
8 sufficient to show Plantronics knew of any alleged defect, nor stated with particularity the alleged
9 defects in the Headphones. Accordingly, he fails to state a valid claim under the CLRA, UCL,
10 and common law fraud.

11 **IV. THE COMPLAINT SHOULD BE DISMISSED FOR FAILURE TO ALLEGE A**
12 **DEFECT.**

13 The foregoing assumes that plaintiff adequately alleged that the Plantronics Headphones
14 were defective. In fact, however, none of the facts in the complaint show that the Headphones
15 contain any defect that could give rise to a duty to disclose. This is an additional reason to
16 dismiss the complaint.

17 As explained above, plaintiff alleges no facts about the design of the product or its
18 manufacturing process. Instead, plaintiff speculates “upon information and belief” that either the
19 alleged “flimsy plastics used to protect the Headphones’ batteries from moisture were
20 insufficient” or “the inadequate acquisition, installation, construction and manufacture of the
21 rechargeable batteries” caused the alleged systematic battery failure. FAC ¶ 29. This conclusory
22 speculation is not sufficient. *See Wilson*, 668 F.3d at 1144 (affirming the district court’s
23 dismissal of the complaint finding the plaintiffs did not allege sufficient facts to support
24 allegation of design defect even though the plaintiffs described in “detail” how the “component
25 that connects the power jack to the motherboard” was “fragile” resulting in the laptop overheating
26 and catching fire). Nor does plaintiff allege any facts showing a causal connection between the
27 Headphones being exposed to sweat or water and the battery failing. Without this information (or
28 other facts showing the existence of a defect), no basis exists for concluding that the Headphones

1 have any defect that must be disclosed. *See Comwest, Inc. v. Am. Operator Servs., Inc.*, 765 F.
2 Supp. 1467, 1471 (C.D. Cal. 1991) (“It is well settled that fraud [a]llegations based on
3 information and belief do not satisfy the particularity requirement of Rule 9(b) unless the
4 complaint sets forth the facts on which the belief is founded.” (internal quotations and citation
5 omitted)).

6 Plaintiff cannot evade his burden to allege the required facts simply by stating that testing
7 data “is unavailable to Plaintiff without discovery.” FAC ¶ 29. If the Headphones really were
8 defective, nothing prevented plaintiff from alleging facts showing as much. He does not need any
9 discovery to do so. The Headphones can easily be purchased, and he and his counsel easily could
10 have conducted whatever pre-filing investigation he needed (including obtaining an expert
11 analysis) to verify that the Headphones are in fact defective and identify the nature of the defect.
12 He needed nothing from Plantronics to do any of this. Before filing suit, he was obligated to
13 conduct that investigation. The law does not—and should not—permit a plaintiff to file a lawsuit
14 and impose on the courts and the defendant the enormous burden and expense of refuting even a
15 meritless claim when the plaintiff has not done even the most basic spadework necessary to
16 establish the claim. *Bly–Magee v. California*, 236 F.3d 1014, 1018 (9th Cir. 2001) (requirements
17 of Rule 9(b) serve “to deter the filing of complaints as a pretext for the discovery of unknown
18 wrongs . . . and to prohibit plaintiffs from unilaterally imposing upon the court, the parties and
19 society enormous social and economic costs absent some factual basis”); *Morici v. Hashfast*
20 *Technologies LLC*, No. 5:14-CV-24 00087-EJD, 2015 WL 906005, at *3 (N.D. Cal. Feb. 27,
21 2015) (heightened pleading “requires the plaintiff to conduct a precomplaint investigation in
22 sufficient depth to assure that the charge of fraud is responsible and supported, rather than
23 defamatory and extortionate”); *see also In re Nexus 6P*, 293 F. Supp. 3d at 909–10 (finding the
24 plaintiffs did “not adequately allege[] that [the defendants] had knowledge of the defects at the
25 time that [the plaintiff] purchased their phones” because the plaintiffs must allege “facts in
26 support of knowledge” and “[c]ontrary to [the plaintiffs’] suggestion, the allegation that
27 ‘Defendants had superior knowledge and access to the relevant facts,’ . . . does not equate to an
28 allegation that straightforward testing would have revealed the defects”).

1 The need for adequate pre-suit investigation and factually supported allegations of a
2 defect is especially acute in cases like this because some individual units of a mass-produced
3 product, such as headphones, inevitably will fail for any number of causes other than a product
4 defect. The possibility of such events occurring is why product manufacturers provide
5 warranties. Under plaintiff’s theory, however, all warranties are pointless (or at least easily
6 evaded) because consumers could disregard the warranty and bring a class action fraud suit for a
7 refund. Indeed, if plaintiff’s theory were accepted, consumers could sue without their product
8 ever having failed or even if the failure was caused by their own misuse. All they would have to
9 do is allege that there is a possibility of failure (and perhaps that the product purchased by other
10 consumers failed) and be entitled to damages on the theory that the price for all consumers would
11 have been lower.

12 Finding a duty to disclose based on the allegations here would open the door to a new
13 wave of lawsuits. A plaintiff could allege with respect to almost any mass-produced product that
14 it may fail “after normal usage” (FAC ¶ 4) or that one or more individual units of that product in
15 fact failed prematurely. But no case of which defendant is aware has found that fact, by itself, is
16 enough to create a duty to disclose. Reflecting that essentially all products will experience some
17 rate of premature failure (or failure from misuse), the cases that have found a duty to disclose
18 have involved an actual defect in the design of the product, not merely the potential inherent in
19 any product that particular units may wear out prematurely or otherwise not function as intended.
20 *See Punian*, 2016 WL 1029607, at *14 (“[T]he Court is aware of no[] [cases] . . . where a court
21 has found that such an unspecified potential to fail suffices to allege a material product defect.
22 Rather, as Defendants point out, cases finding that a company has a duty to disclose a product
23 defect have identified a particular design or manufacturing defect and described the connection
24 between the defect and the harm to the plaintiff.”). In *Elias v. Hewlett-Packard Co.*, No. 12-CV-
25 00421-LHK, 2014 WL 493034 (N.D. Cal. Feb. 5, 2014), for example, the plaintiff alleged that
26 Hewlett-Packard had installed a 220-watt power supply unit in one of its computer models, when
27 the component parts in that model needed at least 300 watts to operate properly, *id.* at *1.
28 According to the plaintiff, because of this identified design defect, the power supply unit was

1 “incapable of providing adequate power.” *Id.* at *4. In *Herremans*, the plaintiff likewise alleged
2 the existence of an actual, identified design defect—*i.e.*, the sealed ball bearing system in the
3 automobile’s water pump was defective because the stress placed on it exceeded engineering
4 limitations. 2014 WL 5017843, at *1; *see also Wilson v. Hewlett-Packard Co.*, 668 F.3d 1136,
5 1143 (9th Cir. 2012) (noting that the “complaint describes the design defect in some detail,”
6 including “that the component that connects the power jack to the motherboard ‘was designed in a
7 manner that is exceedingly fragile,’ as the connection is supported only by a few pins affixed with
8 solder”); *Donohue v. Apple, Inc.*, 871 F. Supp. 2d 913, 917 (N.D. Cal. 2012) (defendant admitted
9 that the formula it used to calculate and display signal strength on cell phones was “totally
10 wrong”); *Kowalsky v. Hewlett-Packard Co.*, No. 10-CV-02176-LHK, 2011 WL 3501715, at *4
11 (N.D. Cal. Aug. 10, 2011) (alleged defect in printer feed “was present ‘out of the box’ in every
12 8500 Printer ‘and manifested on a regular basis when using the ADF regardless of conditions”).

13 Here, unlike these cases, plaintiff has not identified any defect, but only that some
14 unidentified fraction of the more than one million Headphones sold allegedly failed to maintain a
15 charge for unknown reasons allegedly connected to being exposed to some unknown amount of
16 “sweat and/or water.” FAC ¶¶ 6, 39. For all the complaint reveals, the alleged instances of
17 battery issues could have been due entirely to consumer misuse, to mishandling during shipping,
18 or any other numerous causes. None of that could possibly give rise to any duty to disclose.
19 Without an actual, identified defect in the Headphones supported by facts, plaintiff has no basis
20 for any claim. *See Punian*, 2016 WL 1029607, at *15 (dismissing complaint with prejudice
21 finding that the plaintiff had not alleged “the cause of any defect,” the “impact” of the alleged the
22 defect, the “likelihood” of the defect, or consumer expectations about the “potential to fail”).

23 Plantronics is not aware of any case in which a court has ruled that alleging only a
24 potential to fail, or some instances of failure, is enough to state a valid claim. *See id.* at *13
25 (because the plaintiff had not alleged the defect was the result “of any systematic design,
26 technical, manufacturing, or other flaw present in all [the products]” his claims failed). Because
27 that is all plaintiff has done here, his complaint must be dismissed.

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CONCLUSION

For the foregoing reasons, plaintiff's FAC should be dismissed.

Dated: February 13, 2019.

JONES DAY

By: /s/ Darren K. Cottriel
Darren K. Cottriel

Counsel for Defendant
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PLANTRONICS, INC.

14
15 UNITED STATES DISTRICT COURT
16 NORTHERN DISTRICT OF CALIFORNIA
17 SAN JOSE DIVISION
18

19 PHIL SHIN on behalf of himself and
all others similarly situated,

20 Plaintiff,

21 v.

22 PLANTRONICS, INC.,

23 Defendant.
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Case No. 5:18-cv-05626-NMC

**DECLARATION OF DAYME
SANCHEZ IN SUPPORT OF
DEFENDANT PLANTRONICS,
INC.'S MOTION TO DISMISS FIRST
AMENDED COMPLAINT**

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1 I, Dayme Sanchez, declare as follows:

2 1. I am a licensed attorney in the State of California and an associate in the law firm
3 of Jones Day, counsel for defendant Plantronics, Inc. in this case. Except where otherwise stated,
4 I have personal knowledge of the facts stated herein and, if called upon to do so, could and would
5 competently testify to them.


6 2. I make this Declaration in Support of Plantronics' Motion to Dismiss Plaintiff's
7 First Amended Complaint in this action.

8 3. On February 12, 2019, I visited the following hyperlink cited in paragraph 33(e) of
9 plaintiff's First Amended Complaint ("FAC"):

10 [https://www.amazon.com/Plantronics-BackBeat-Fit-Wireless-Headphones/product-](https://www.amazon.com/Plantronics-BackBeat-Fit-Wireless-Headphones/product-reviews/B00KJLMBSO/ref=cm_cr_getr_d_paging_btm_217?ie=UTF8&reviewerType=all_reviews&sortBy=recent&pageNumber=217)
11 [reviews/B00KJLMBSO/ref=cm_cr_getr_d_paging_btm_217?ie=UTF8&reviewerType=al](https://www.amazon.com/Plantronics-BackBeat-Fit-Wireless-Headphones/product-reviews/B00KJLMBSO/ref=cm_cr_getr_d_paging_btm_217?ie=UTF8&reviewerType=all_reviews&sortBy=recent&pageNumber=217)
12 [l_reviews&sortBy=recent&pageNumber=217](https://www.amazon.com/Plantronics-BackBeat-Fit-Wireless-Headphones/product-reviews/B00KJLMBSO/ref=cm_cr_getr_d_paging_btm_217?ie=UTF8&reviewerType=all_reviews&sortBy=recent&pageNumber=217)

13 The hyperlink directs one to reviews of Plantronics' BackBeat FIT wireless headphones posted on
14 Amazon.com. Below is a screen shot of the review cited by plaintiff in paragraph 33(e) of the
15 FAC. This is the full consumer review—including the follow-up review that plaintiff omits from
16 his citation of the review in the FAC.

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1  Brian Beins

2 ★★★★★ **Dead on arrival - revived by Verizon**

3 December 25, 2014

4 Original review from late December is below. I'm happy to say Verizon made it an easy exchange and the
5 replacement set has been great. Support suggests making sure they device is turned off prior to plugging it in
6 to charge. The controls are rather basic, but quick to learn. Battery life is as expected and comparable to my
7 old Motorola SD-10. A voice notifies you of high, medium, or low battery upon startup and also during use as
8 the battery level drops. Sound quality and volume is also about the same as my Motorola (good). They are
9 great for running or outdoor activity as they don't totally seal off the ears so you can still hear traffic or people
10 around you.

11 (first review below)

12 Dead on arrival for me. I'll get a second pair and write a second review, but feel I have to note this experience
13 due to some of the other concerning reviews. I just received this pair as a holiday gift, new, unopened from a
14 Verizon store. Based on the product's instructions, they should have enough power to start up and connect to
15 my phone, but they did not. I used the included cord to plug them into my laptop's usb and the devices light
16 turns red. After four hours of charging, still just a red light. I then held down the start button to get a blue
17 light for a couple seconds and that is all, no sound, no nothing. If I continue holding the start button, it will
18 cycle between a couple seconds of blue light then several seconds of darkness, no sync mode, no sounds from
19 the device. I run with a Motorola SD-10 headset for 3 years with no issues and was looking forward to these
20 similar shaped headphones with a more flexible design. Now, I am hoping Verizon will give me a hassle free
21 exchange to try a second set.

22 One person found this helpful

23 | [Comment](#) | [Report abuse](#)

24 4. Also on February 12, 2019, I visited Plantronics.com and viewed the reviews of
25 the BackBeat FIT. The 13 reviews cited in pages 16 through 18 of Plantronics' Motion to
26 Dismiss appear at <https://www.plantronics.com/us/en/product/backbeat-fit>. Below are screen
27 shots taken from Plantronics.com of these 13 reviews.

28 (1)

★★★☆☆ Samo DJ · 4 years ago

Works Great !

Perfect for the gym, running, cycling. Comfortable, good sound, good battery life and easy to use.

✓ **Yes**, I recommend this product.

Quality of Product

Value of Product

Helpful?

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(2)

★★★★★ tiggerlove · 4 years ago

Love It!!!

I bought the blue one for my wife and the green one for myself. I found it to be sweat proof as they say. The Sound is great and it didn't bounce up and down behind my head.

✓ **Yes**, I recommend this product.

Helpful? Yes - 0 No - 0 Report

Quality of Product



Value of Product



(3)

★★★★★ Rusk · 4 years ago

Excellent connectivity

Before I bought Plantronics, I using Jabra for about 6 months . I went through 3 headsets in the period . They would keep malfunctioning for a multitude of reasons . So I tried Plantronics and immediately I noticed a difference . The blue tooth connection was faster , the quality of the sound is more crisp and the battery lasts twice as long . It's definitely worth the extra money .

✓ **Yes**, I recommend this product.

Helpful? Yes - 0 No - 0 Report

Quality of Product



Value of Product



Response from Plantronics, Inc.:

Anonymous · Plantronics representative · 4 years ago

Plantronics appreciates your candid testimony and business!

(4)

★★★★★ Anonymous · 4 years ago

Love them, love everything about them.

Light weight. Comfy fit. Good looking. Looooong lasting battery. They fit so flush to my ears that you cant even tell I'm wearing headphones when you look at me head on. I'm happily buying an extra pair as a backup. Keep up the good work, favorite headphones ever.

✓ **Yes**, I recommend this product.

Helpful? Yes - 0 No - 0 Report

Quality of Product



Value of Product



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(5)

★★★★★ srunner372 · 4 years ago

Phenomenal Product

I've been using the BackBeat FIT for about 8 months now and believe it is one of the few truly excellent products I've come across lately. It simply works, is lightweight, and has great audio while allowing in ambient noise (for safety). The battery life is terrific too, I charge it once or maybe twice a week but it still gets me through all my workouts and long runs -- and that's only because I charge when it tells me the battery level is "medium." I just ran my first marathon, and the BackBeat FIT stayed comfortable and functional the entire time.

Without headphones of this caliber and so well tailored for training, the entire experience of training would have been much worse.

Thank you Plantronics for this really great product. I'm shocked you haven't expanded the color choices, as I think this is the kind of product that could really become ubiquitous if there was a touch more personalization available in picking your headphone. As it is, I see it on more and more people as I go for my runs -- well done.

✓ Yes, I recommend this product.

Helpful? Yes · 0 No · 0 Report

Quality of Product

Value of Product

(6)

★★★★★ Nick_cali · 4 years ago

Best headphones ever!

Love these headphones. Sleek and comfortable. You can do any activity with them and forget you're wearing them. Great sound quality, awesome wireless range and long battery life.

✓ Yes, I recommend this product.

Helpful? Yes · 0 No · 0 Report

Quality of Product

Value of Product

(7)

★★★★★ JA_MX · 4 years ago

Just perfect!

Comfortable, Easy, Nice sound, Battery up to 8 hours and fast at charging. Just nice!

✓ Yes, I recommend this product.

Helpful? Yes · 0 No · 0 Report

(8)

★★★★★ Peterko · 2 years ago

Can't live without them

I mean, this was the best choice of earphones in my entire life. Wireless for a good big distance even through walls. I do hovering with them, I dance with them. Can't imagine life without them. No cable, nothing is destroyed in two months, so even they are more expensive, but their lifespan is quite long :) And I am more than satisfied with its battery.

Thumbs up for this product!

A sweepstakes entry was received in exchange for this review No
Received free product No

✓ Yes, I recommend this product.

Helpful? Yes · 0 No · 0 Report

Quality of Product

Value of Product

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(9)

★★★★★ **senorshaggo** · 2 years ago

My Favorite Sport Headphones

The best sports headphones I have ever used. They stay in place while running, don't interfere with my bike helmet, with long battery life. Be aware, these sit outside the ear canal and direct sound inside, allowing you to hear what's going on around you. These work very well with my iPhone 6s Plus, Siri, dictation, and making calls. I use the Ticker X heart rate monitor at the same time without any conflicts. If you are wanting a sport headphone that isolates outside noise, delivers full dynamic range with good bass look at the BackBeat Go which I own and recommend also.

Quality of Product

Value of Product

A sweepstakes entry was received in exchange for this review No

Received free product No

✓ **Yes**, I recommend this product.

Helpful? Yes - 0 No - 0 Report

(10)

★★★★★ **Dwightme** · 2 years ago

Perfect for my long runs

I've had mine 1 year. The fit is excellent and they stay in my ear. The battery lasts a very long time. I only charge them once a week on average. I love that they do not cancel out sound. This is great when I'm running on the road. I did have to send mine back after 8 months because they stopped working but they were exchanged without hesitation as long as I had proof of purchase.

Quality of Product

Value of Product

A sweepstakes entry was received in exchange for this review No

✓ **Yes**, I recommend this product.

Helpful? Yes - 0 No - 0 Report

(11)

★★★★★ **Texas Runner** · 3 years ago

My Favorite Bluetooth headset so far!

I am a runner logging about 30-40 miles per week. I have been through almost every headset out there. I have used the BackBeat FIT for several runs now and I am very impressed with the quality of the sound and length of battery time. I typically get around 8 hours of run time before I recharge them. The headset is lightweight and the earbuds fit securely in my ears. I have not had any issues with them falling out of my ears or bouncing when I run. The earbuds rotate to give a more custom and comfortable fit. I barely realize I am wearing them. The controls are easy to learn and simple to use while running. I am able to take phone calls, listen to my music and use Siri completely hands free while I run with no annoying cord hanging down. The headset has a flexible rubber casing that is sweatproof and folds up easily to throw in my gym bag. My previous headset had a rechargeable battery that was large and obvious behind my head. I can't tell you where the battery is in the BackBeat FIT, it has a thin sporty profile. Love it!

Quality of Product

Value of Product

Received free product No

✓ **Yes**, I recommend this product.

Helpful? Yes - 0 No - 0 Report

(12)

★★★★★ **Anonymous** · 4 years ago

These things are awesome!

very impressed with this product so far! Stays in your ears and has AWESOME sound quality. Also, through tons of sweat, rain, and grime, they never quit!

Quality of Product

Value of Product

✓ **Yes**, I recommend this product.

Helpful? Yes - 0 No - 0 Report

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(13)

★★★★★ SuperNupe1911 · 2 years ago

Awesome

This headphones are great for me and sound awesome. Ive been using them for about two months now. I bought them from Amazon. They have great sound quality and a good battery life. I normally have to charge them about once a week on Sunday and im running three days a week. All of my firmware upgrades have been easy. So far I have nothing but good things to say about these headphones.

Quality of Product



Value of Product



A sweepstakes entry was received in exchange for this review Yes

✓ **Yes**, I recommend this product.

Helpful? Yes - 0 No - 0 Report

5. Moreover, there are two consumer reviews cited on page 14 of Plantronics’ Motion to Dismiss, which were posted on April 18, 2015 and May 4, 2015, respectively, by the same user, as confirmed by Plantronics. These two reviews can also be found at <https://www.plantronics.com/us/en/product/backbeat-fit>. Below are screen shots of those two reviews.

★☆☆☆☆ abufisher · 4 years ago

I think I got a Defect! - Thats why it gets 1 star

I have the Motorola S11 HD Flex (5+ hours of continuous music or broken up, charged once a week, microphone is alright if its not too loud, mainly use it for music when working out). I met this guy at the gym and he had the BackBeat FIT. He let me try them on and they fit. I did some research to make sure this is what I wanted even though the Motorola I had met my expectations. I decided to order some for myself. Since they fit me so well, when the volume is up it feels like they are noise cancelling. The noise isolation is fantastic! When the volume is down you can make casual conversation. Less than a week of having them I find out the battery is defected and only a little less than 2hrs from full charge to empty. The headphones should last up to 6-8hrs of music according to the description. I sent them to Plantronics for a replacement and waiting on them right now. The customer service so far seems to be okay. Once everything is complete I will post a final conclusion to everything.

Quality of Product



Value of Product



✓ **Yes**, I recommend this product.

Helpful? Yes - 1 No - 2 Report

★★★★★ Anonymous · 4 years ago

part 2 comment after replacement!

My replacement was successful and fairly quick. So far the battery life of my headphones have been exceeding my expectations. I used them on the airplane to listen to music, watch Netflix, and phone conversations. - ALL sound quality is great and the phone mic is great for receiving party! Everything is great, easy to lay my head down and watch movies or do bench presses. I have not ran with them but I have tried the shake test and I say it passes with flying colors! The only CON about this product is the ear piece doesn't fit snug 100% but I will make do for the convenience of travel and light weight. The reason why they don't fall out of your ear is because of the wings, and its over your ear. So I am not complaining. bluetooth FTW!!!!!! Thanks Plantronics!

Quality of Product



Value of Product



✓ **Yes**, I recommend this product.

Helpful? Yes - 0 No - 0 Report

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6. I also reviewed the total number of consumer reviews for the BackBeat FIT on Plantronics.com. On February 12, 2019 there were 1,089 reviews of which 716 were four- and five-star reviews.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Executed this 13th day of February, 2019, in Miami, Florida.



Dayme Sanchez