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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

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

Plaintiff,

vs.

PLANTRONICS, INC.,

Defendant.

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

PLAINTIFF PHIL SHIN'S MEMORANDUM IN OPPOSITION TO DEFENDANT PLANTRONICS, INC.'S MOTION TO DISMISS FIRST AMENDED COMPLAINT

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I. INTRODUCTION

Plaintiff Shin and the consumers he seeks to represent all purchased expensive BackBeat FIT wireless headphones ("Headphones") manufactured by Defendant Plantronics, Inc. ("Plantronics" or "Defendant") based on Plantronics's representations that they are "sweatproof" and "waterproof" and offer "up to 8 hours" of battery life. These representations can be found on Plantronics's packaging, website, and advertisements, all of which emphasize the Headphones supposed special suitability for exercise. But the Headphones do not live up to these representations and are defective. Plaintiff and many consumers like him have experienced the same defect causing rapidly diminishing battery life and eventual failure to retain a charge. Plaintiff alleges that the battery defect affects all Headphones and is exacerbated when the headphones are exposed to sweat or moisture. Despite receiving an avalanche of complaints, Plantronics refuses to acknowledge the problem let alone fix it. Instead, when consumers return defective Headphones under the one-year warranty, Plantronics sends replacement Headphones that contain the exact same defect, leaving consumers caught in a cycle of use, malfunction, and replacement. When the warranty expires, consumers are left with broken Headphones.

Plantronics has moved to dismiss Plaintiff's First Amended Complaint (Dkt. # 35) ("FAC"). For the reasons discussed below, Plantronics's motion should be denied in its entirety.

II. STANDARD OF REVIEW

In considering whether to dismiss a complaint, the court must accept the allegations as true, *Erickson v. Pardus*, 551 U.S. 89, 93-94 (2007), construe the pleading in the light most favorable to the pleading party, and resolve all doubts in the pleader's favor. *Berg v. Popham*, 412 F.3d 1122, 1125 (9th Cir. 2005). A motion to dismiss should only be granted if plaintiff fails to proffer "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that

allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

III. PLAINTIFF ADEQUATELY PLEADS WARRANTY CLAIMS

a. Providing Equally Defective Headphones Breaches the Limited Warranty.

Plaintiff purchased the Headphones based on Plantronics's representations that the Headphones were (1) sweatproof and waterproof, and (2) offered up to 8 hours of wireless listening on a single charge. FAC, ¶¶ 61-81. Those representations constituted written warranties. *See Nygren v. Hewlett-Packard Co.*, No. 07-cv-5793-JW, 2008 WL 11399759 at * 3 (N.D. Cal. Oct. 24, 2008) (an "express warranty may arise from any description, affirmation of fact, or promise, relating to the product sold"). Plantronics breached those warranties because the Headphones are neither sweatproof nor waterproof, and do not offer 8 hours of battery-life.

Plantronics does not dispute that the Headphones fail to live up to its pre-sale representations. Instead, Plantronics argues that Plaintiffs' warranty claims are precluded because Plaintiff received four sets of defective replacement Headphones, the "exclusive remedy" under the Limited Warranty. Motion to Dismiss (Dkt. # 40) ("Br.") at 6-9. Actually, the Limited Warranty provides that "[i]n the unlikely event your product has recurring failures or Plantronics is unable to repair or replace the product, Plantronics will provide you with a ***replacement product … that is the same or equivalent to your product in performance***." Br. at 6-9. (quoting Eister Decl. Ex. 1 (Dkt. No. 30-2) at 2-3 (emphasis added)). Plaintiff's original set of Headphones "fail[ed]" because they were not actually sweatproof and waterproof and did not offer 8 hours of battery life. Since these were "recurring failures," Plantronics, pursuant to its own Limited Warranty language, was required to provide Plaintiff a "replacement product" offering "equivalent … performance" to the headphones Plaintiff was supposed to receive (*i.e.*, headphones that are sweatproof/waterproof and play for 8 hours on a single charge). But Plantronics failed to do so. Instead, Plantronics replaced

"failed," non-conforming Headphones with other "failed," non-conforming Headphones. This constituted a breach of the express terms of the Limited Warranty.

b. Plantronics's Limited Warranty Fails of Its Essential Purpose.

Even if Plantronics were correct in asserting that Plantronics's only obligation under the Limited Warranty were to replace defective, non-conforming Headphones with identical defective, non-conforming Headphones, Plantronics would still not be entitled to dismissal of Plaintiff's warranty claims because the Limited Warranty as construed by Plantronics fails of its essential purpose.

Plantronics relies primarily on this Court's recent decision in *Weeks v. Google LLC*, No. 18-cv-00801-NC, 2018 WL 3933398 (N.D. Cal. Aug. 16, 2018). Br. at 8. But *Weeks* is easily distinguishable. First, the limited warranty in *Weeks* expressly provided that the "Limited Warranty does not guarantee that use of the Phone will be uninterrupted or error free." *Weeks*, 2018 WL 3933398, at *1. The Limited Warranty at issue here contains no such caveat or disclaimer. In fact, Plaintiff's claims flow directly from Plantronics' representations that the Headphones are sweat and waterproof and will play for 8-hours between charges. Second, in *Weeks*, the Court's analysis focused on (a) whether the alleged defect itself was a breach of the express warranty, and (b) whether Google's replacement of defective phones with other defective phones satisfied the limited warranty. *Id*. at *6-7. Here, the questions are entirely different: (a) whether Plantronics expressly warranted that the Headphones are sweat-proof and hold an 8-hour battery charge and breached those warranties by providing products that do not comply with those represented performance standards, and (b) whether Plantronics may fulfill its obligations under a Limited Warranty by not repairing the defect but instead replacing the defective product with another that also does not meet the performance standards promised in the express warranties.

However, *Weeks* is instructive in one respect since this Court recognized the "outrage" caused by Google replacing defective phones with equally defective phones: "It beggars reason and would appear to make hash of the spirit of the warranty." *Id.* at *5. Critically, however, the Court noted that it could not consider whether such a practice renders the protections of the Limited Warranty illusory, because plaintiffs only raised it in passing and it was not properly before the Court. *Id.* at *5 n.4. Plaintiff now places the argument squarely before the Court.

The replacement limitation contained in Plantronics' Limited Warranty is invalid because it fails of its essential purpose. "A limited repair [or replace] remedy serves two main purposes. First, it serves to shield the seller from liability during her attempt to make the goods conform. Second, it ensures that the buyer will receive goods conforming to the contract specifications within a reasonable period of time." *Milgard Tempering, Inc. v. Selas Corp. of Am*., 902 F.2d 703, 707 (9th Cir. 1990).[1] Limited remedies that fail of their essential purpose are unenforceable. *Fiorito Bros., Inc. v. Freuhauf Corp*., 747 F.2d 1309, 1312 (9th Cir. 1984) (affirming lower court's decision that the defendant failed to honor its repair or replace remedy, thereby depriving the remedy—a warranty—of its essential purpose).

Most cases addressing this issue involve inadequate "repairs," and hold that a repair or replace remedy fails of its essential purpose if repeated repair attempts are unsuccessful within a reasonable time. *See, e.g., Philippine Nat'l Oil Co. v. Garrett Corp*., 724 F.2d 803, 808 (9th Cir. 1984); *Consol. Data Terminals v. Applied Dig. Data Sys*., 708 F.2d 385, 392 (9th Cir. 1983) ("Where warranted goods fail to perform according to specifications as warranted despite the seller's efforts to repair, a limited 'repair' remedy fails of its essential purpose."). But the same logic applies to a replace warranty remedy that continually provides products that fail to conform to the seller's express warranties, like the Headphones. *See, e.g., Johnsen v. Honeywell Int'l Inc*., No.

[1] *See also Clark v. Int'l Harvester Co*., 581 P.2d 784, 798 (Idaho 1978) (same); *Arabian Agric. Servs. Co. v. Chief Indus., Inc*., 309 F.3d 479, 485-86 (8th Cir. 2002) (same).

4:14-cv-594-RLW, 2015 WL 631361, at *4-5, 7 (E.D. Mo. Feb. 12, 2015) (refusing to dismiss breach of express warranty claim where plaintiff alleged humidifiers were defective and nonconforming to the 5-year defect-free guarantee, and defendant simply replaced faulty humidifiers with same faulty humidifiers); *RRX Indus., Inc. v. Lab-Con, Inc.*, 772 F.2d 543, 547 (9th Cir. 1985) (limited warranty failed essential purpose when manufacturer could not fix software bugs or replace the product with one that worked as represented).

Plantronics's admitted uniform practice of replacing faulty, non-confirming products with equally faulty, non-conforming products under its Limited Warranty fails this "essential purpose" test. *See In re MyFord Touch Consumer Litig.*, 46 F.Supp.3d 936, 970 (N.D. Cal. 2014) ("If the remedy promised by the seller is so hollow or ineffectual as to be meaningless, then the warranty fails of its essential purpose and the customer is not bound by limitations of remedy contained therein.") (citation omitted); *Sharp Structural, Inc. v. Franklin Mfg., Inc.*, No. 03-cv-344-TUC, 2006 WL 8441181, at *2 (D. Ariz. July 19, 2016) ("A warranty will fail for its essential purpose when the product is so deficient it cannot be fixed or [the] warrantor fails to replace or repair the part. Failure to conform the good to the contract may be the result of careless negligence or willful noncompliance, but it may also be the result of a seller's mere inability to cure the nonconformity.") (internal quotations omitted).[2]

The cases Plantronics cites support Plaintiff's position. In *Seagate*, plaintiffs brought an express warranty claim against a manufacturer of allegedly defective hard drives. *In re Seagate Tech. LLC Litig.*, 233 F. Supp. 3d 776 (N.D. Cal. 2017). The Court noted that "the essential purpose

[2] Plantronics's suggestion that it can make "sweatproof," "waterproof," and "8-hour battery" representations about its Headphones, and then disclaim any such claims with its Limited Warranty, fails as a matter of California law. *See Fundin v. Chicago Pneumatic Tool Co.*, 152 Cal. App. 3d 951, 957-58 (Cal. Ct. App. 1984) ("Strict construction against the person who has both warranted a particular fact to be true and then attempted to disclaim the warranty is especially appropriate in light of the fact that a disclaimer of an express warranty is essentially contradictory." (internal quotes omitted)).

of Seagate's limited warranty is to ensure that customers are not deprived of functional drives during the warranty period—a purpose that can be fulfilled either by drives continuing to function as intended, or by Seagate *replacing defective drives with functional drives*." *Id.* at 783-84 (emphasis added). The Court further noted that there would be "some point" at which "repeated failures of replacement drives would deprive consumers of the essential purpose of the warranty," but held plaintiffs had not "plausibly alleged" such repeated failures. *Id.* at 784. Plaintiff Shin does so here—alleging *four consecutive* non-complying products. FAC, ¶¶ 41-42. In *Stearns*, the Court held that the full refund of the purchase price prevented a limited repair or replace remedy from failing of its essential purpose. *Stearns v. Select Comfort Retail Corp.*, No. 08-cv-2746-JF, 2009 WL 1635931, at *5–6 (N.D. Cal. June 5, 2009). No such refund was offered here. *See also Nygren*, 2008 WL 11399759 at *5 (replacement of defective wireless card with defective wireless card within warranty period sufficient to state claim for breach of express warranty).

Other cases cited by Plantronics are inapposite. *See Bros. v. Hewlett-Packard Co.*, No. C-06-cv-2254-RMW, 2007 WL 485979, at *4 (N.D. Cal. Feb. 12, 2007) (replacement product *performed* during the warranty period, and subsequent out-of-warranty failure was not pleaded as the same defect or breach); *Ferranti v. Hewlett-Packard Co.*, No. 5:13-cv-03847-EJH, 2014 WL 4647962, at *6 (N.D. Cal. Sept. 16, 2014) (plaintiffs' arguments were inconsistent and did not clearly allege how defendant breached its one-year warranty); *Frenzel v. Aliphcom*, No. 14-cv-03587-WHO, 2015 WL 4110811, at *13 (N.D. Cal. July 7, 2015) (warranty claim dismissed with leave to amend on issue of whether claim was within warranty period).

For these reasons, the Court should deny Plantronics's Motion to Dismiss Plaintiff's express warranty claims.

c. Plantronics Does Not Disclaim Plaintiff's Implied Warranty Claims.

Plantronics contends that Plaintiff's implied warranty claims (Counts II, IV, and V) fail because the Limited Warranty includes a "conspicuous" disclaimer providing that "PLANTRONICS DISCLAIMS ALL IMPLIED WARRANTIES …, INCLUDING ANY IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE." Br. at 6, 9-10. Putting aside the question whether a post-sale disclaimer buried in fine print on website can be fairly deemed "conspicuous" – a dubious proposition in itself – Plantronics's argument fails because it contravenes the plain text of the Limited Warranty.

According to Plantronics, the Limited Warranty "in relevant part" provides:

> PLANTRONICS MAKES NO OTHER EXPRESS WARRANTY WHETHER WRITTEN OR ORAL AND PLANTRONICS EXPRESSLY DISCLAIMS ALL WARRANTIES AND CONDITIONS NOT STATED IN THIS LIMITED WARRANTY. . . . PLANTRONICS DISCLAIMS ALL IMPLIED WARRANTIES OR CONDITIONS, INCLUDING ANY IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE.

Br. at 6 (citing Eister Decl. Ex. 1 (Dkt. No. 30-2) at 2-3). But when the portion of the warranty language that Plantronics replaced with ellipses is actually included, the flaw in Plantronics's argument becomes immediately apparent. The full warranty reads:

> PLANTRONICS MAKES NO OTHER EXPRESS WARRANTY WHETHER WRITTEN OR ORAL AND PLANTRONICS EXPRESSLY DISCLAIMS ALL WARRANTIES AND CONDITIONS NOT STATED IN THIS LIMITED WARRANTY. ***TO THE EXTENT ALLOWED BY THE LOCAL LAW OF JURISDICTIONS OUTSIDE THE UNITED STATES,*** PLANTRONICS DISCLAIMS ALL IMPLIED WARRANTIES OR CONDITIONS, INCLUDING ANY IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE. ***FOR ALL TRANSACTIONS OCCURING IN THE UNITED STATES, ANY IMPLIED WARRANTY OR CONDITION OF MERCHANTABILITY, SATSIFACTORY QUALITY, OR FITNESS FOR A PARTICULAR PURPOSE IS LIMITED TO THE WARRANTY PERIOD AS PROVIDED BY PLANTRONICS IN THE MATERIALS RECEIVED AT THE TIME OF***

PURCHASE.

Eister Decl. Ex. 1 (Dkt. # 30-2) at 3 (emphasis added). In other words, Plantronics misleadingly quotes language disclaiming implied warranties for products sold *outside* of the United States, and uses ellipses to cast aside warranty language applicable to products sold *within* the United States that specifically acknowledges implied warranties during the warranty period. For this reason, Plantronics's argument is unsupported by the plain language of its own Limited Warranty, and should be summarily rejected.

d. Plaintiff's Implied Warranty Claims Do Not Fail For Lack of Privity.

Plantronics next argues that because Plaintiff purchased the Headphones from Amazon.com—a retailer—he lacks vertical privity with Plantronics. Br. at 10-11. According to Plantronics, under *Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017, 1023 (9th Cir. 2008), a plaintiff bringing an action based on warranty under California Commercial Code § 2314 must satisfy vertical privity, and a consumer "who buys from a retailer is not in privity with a manufacturer." But Plantronics ignores the very next paragraph in *Clemens*, which states: "Some particularized exceptions to this rule exist. The first arises when the plaintiff relies on written labels or advertisements of the manufacturer." *Id.* Plaintiff satisfies this exception by pleading that he "reviewed marketing information from Plantronics" that "described the Headphones as suitable for exercise, as waterproof and sweatproof, and as providing up to eight hours of listening time on a single charge." FAC, ¶ 37 ("Mr. Shin relied on these representations in deciding to purchase the headphones."). Accordingly, Plantronics' argument fails.

e. Plaintiff Adequately Pleads a "Particular Purpose."

The Court should also deny as meritless Plantronics's argument that Plaintiff has not alleged facts showing "he had any particular purpose in using the Headphones different from the ordinary purpose for which consumers use the Headphones," and that "Plantronics knew of any such purpose

or that plaintiff was relying on Plantronics to furnish goods for his particular purpose." Br. at 11. Although Plantronics posits that Plaintiff "says only that he purchased the Headphones 'to listen to music while exercising,'" *id*. (quoting FAC, ¶ 38), Plantronics mischaracterizes Plaintiff's allegations. For instance, Plaintiff alleges:

> Under "From the manufacturer," Amazon.com described the Headphones as suitable for exercise, as waterproof and sweatproof, and as providing up to eight hours of listening time on a single charge. Mr. Shin relied on these representations in deciding to purchase the headphones.
>
> Mr. Shin is an avid runner who purchased the Headphones to listen to music while exercising. When he purchased the Headphones, Mr. Shin reasonably relied upon Plantronics' representation that the Headphones could withstand being used during exercise after seeing Plantronics' "sweatproof" and "waterproof" representations. Mr. Shin also reasonably relied upon Plantronics' representation that the Headphones' batteries could play for eight hours on a single charge.
>
> Mr. Shin used the [H]eadphones during runs and exposed the headphones to sweat and/or water.

FAC, ¶¶ 37-39.

"The major question in determining the existence of an implied warranty of fitness for a particular purpose is the reliance by the buyer upon the skill and judgment of the seller to select an article suitable for his needs." *Keith v. Buchanan*, 173 Cal. App. 3d 13, 25 (Cal. Ct. App. 1985). Here, Plaintiff has specifically alleged that he relied on the "sweatproof," "waterproof," and "eight hours of listening" representations in purchasing the Headphones for use during exercising. FAC, ¶37. He made this decision—trusting Plantronics's judgment, as sellers of a variety of headphones—based on Plantronics's representations that these were not ordinary headphones, but headphones specifically designed for exercising:

> Plantronics markets the Headphones as "sport headphones," and represents on its website, marketing materials, and product packaging that the Headphones are "sweatproof and "waterproof." Plantronics uses images and videos of sweat-drenched athletes wearing the Headphones while exercising in its promotional materials. According to Plantronics' website, the Headphones allow consumers to "train harder and run longer."

> Plantronics further represents on its website, marketing materials, and product packaging that the Headphones offer "up to 8 hours" of wireless listening—enough according to Plantronics to "[p]ower through a week of workouts from a single charge." Plantronics' website uses the tagline: "You never quit. Neither should your headphones." Plantronics describes the Headphones as "UNSTOPPABLEWARE."

FAC, ¶¶ 2-3. It is irrefutable that Plantronics markets its own specific judgment and skill to sell headphones intended for buyers looking to obtain headphones with the particular characteristics of "sweatproof," "waterproof," and "long-lasting batteries."

The law is clear that "[a] 'particular purpose' differs from the 'ordinary purpose for which the goods are used' in that it 'envisages a specific use by the buyer which is peculiar to the nature of his business, whereas the ordinary purposes for which goods are used are those envisaged in the concept of merchantability." *Morris v. Mott's LLP*, No. 18-cv-01799-AG, 2019 WL 948750, at *6 (C.D. Cal. Feb. 26, 2019) (internal citations omitted) ("The ordinary purpose of the snack products is general food consumption. This is distinct from the natural-food purpose Plaintiffs allege."). The *Morris* court found that the plaintiffs satisfactorily alleged they were "seeking products of particular qualities—ones that were flavored only with natural ingredients claimed on the label and which did not contain artificial flavoring," and denied the defendants' motion to dismiss for failure to state a claim for breach of implied warranty of fitness for a particular purpose. *Id.*[3]

Because Plaintiff satisfactorily alleges that the Headphones were marketed by Plantronics, and were purchased by him, not for the ordinary purpose of headphones (*i.e.*, to listen to audio) but rather for the particular purpose of listening to audio *while exercising*, the Court should deny

[3] *See also Beckman v. Wal-Mart Stores, Inc.*, No. 17-cv-2249-BAS, 2018 WL 2717659, at *5-6 (S.D. Cal. June 5, 2018) ("Plaintiff alleges that Defendants knew that consumers, like Plaintiff, would rely on their specific compatibility statements and seek to use the Carafe Filter in the Keurig 2.0 coffee machines because the Carafe Filter's packaging, and Brew & Save's website, expressly advertised that product for the specific purpose of using it in these specific machines."); *Thornton v. Micro-Star Int'l Co., Ltd.*, No. 2:17-cv-3231-CAS, 2018 WL 5291925, at *9 (C.D. Cal. Oct. 23, 2018) ("The court previously denied defendants' motion to dismiss plaintiffs' claims for breach of the implied warranty of fitness for a particular purpose after finding that plaintiffs adequately alleged that the particular, represented purpose of the laptops was their upgradeability.").

Plantronics' motion to dismiss this claim.

f. Plantronics is Not Entitled to Dismissal for Lack of Pre-Suit Notice.

Plantronics next argues that Plaintiff did not provide Plantronics sufficient notice under California Commercial Code § 2607. Br. at 12 (citing *Tasion Commc'ns, Inc. v. Ubiquiti Networks, Inc.*, No. 13-cv-1803-EMC, 2014 WL 1048710 (N.D. Cal. Mar. 14, 2014)). But Plantronics's own authority recognizes that the notice requirement does not apply "'in actions by injured consumers against manufacturers with whom they have not dealt.'" *Tasion*, 2014 WL 1048710, at *5 (quoting *Greenman v. Yoba Power Prods., Inc*., 59 Cal.2d 57, 61 (Cal. 1963)). Indeed, the *Tasion* court acknowledged that "federal district courts in California have routinely held that plaintiffs are not required to provide pre-suit notice to a remote seller/manufacturer with whom they have not dealt." *Tasion*, 2014 WL 1048710, at *5 (citing, *e.g.*, *Sanders v. Apple Inc.*, 672 F. Supp. 2d 978, 989 (N.D. Cal. 2009)).

In any event, even if the pre-suit notice requirement applied here, Plaintiff satisfied his obligation by providing Plantronics ample opportunity to cure the Headphones' defects. FAC, ¶¶ 41-42, 73, 91. Nothing more was required.[4]

IV. PLAINTIFF ADEQUATELY PLEADS FRAUD-BASED CLAIMS

Plantronics next argues that Count VI (Consumers Legal Remedies Act ("CLRA"), Count VII (Unfair Competition Law ("UCL")), and Count VIII (Common Law Fraud) should be dismissed because "plaintiff has not satisfied the heightened pleading requirement under Federal Rule of Civil Procedure 9(b)." Br. at 19. More specifically, Plantronics contends that "Plaintiff has not alleged facts sufficient to show Plantronics knew of any alleged defect, nor stated with particularity the alleged defects in the headphones." Br. at 19. Neither argument is persuasive.

[4] In addition, Plaintiff issued a pre-suit notice letter to Defendant on September 12, 2018. FAC, Ex. A.

a. Plaintiff Alleges Plantronics Knew of the Battery Defect.

Plaintiff alleges that Plantronics has long known of the Headphones' battery defect from numerous sources, including (1) hundreds of consumer complaints made directly to Plantronics; (2) numerous complaints posted on retailers' websites (which Plantronics monitors); (3) pre-release design, manufacturing, and testing data; and (4) warranty claims data reflecting an abnormally high failure rate for the Headphones. *See generally* FAC, ¶¶ 5, 28-35. These are precisely the sorts of allegations that courts routinely find support a plausible inference of knowledge. *See, e.g.*, *Ho v. Toyota Motor Corp*., 931 F. Supp. 2d 987, 998 (N.D. Cal. 2013) (knowledge adequately pleaded based on "prerelease testing data," "early consumer complaints," "dealership repair orders," "testing conducted in response to those complaints," and "other internal sources"); *Falk v. Gen. Motors Corp*., 496 F. Supp. 2d 1088, 1096 (N.D. Cal. 2007) (knowledge adequately pleaded based on "numerous complaints from its customers," "pre-release testing data," and "aggregate data from its dealers").[5]

In fact, Judge Seeborg recently found substantially similar allegations sufficient in a case involving defective wireless sports headphones. *See Morgan v. Apple Inc*., No. 17-cv-05277-RS, 2018 WL 2234537, at *5 (N.D. Cal. May 16, 2018). There, like here, the plaintiffs alleged that headphones' batteries were defective and did not provide the represented battery-life. *Id*. at *1-2. There, like here, the plaintiffs alleged that the batteries were not actually sweat- and water-resistant. *Id*. There, like here, the plaintiffs alleged that the manufacturer received a large number of complaints through its website. *Id*. at *5. There, like here, the plaintiffs' complaint quoted a sampling of those negative reviews. *Id*. And there, like here, the plaintiffs averred that the

[5] *See also Ehrlich v. BMW of N.A., LLC*, 801 F. Supp. 2d 908, 918-19 (C.D. Cal. 2010) (knowledge adequately pleaded based on "early consumer complaints," "pre-release testing data," "replacement part sales data, and "other internal sources"); *Price v. Kawasaki Motors Corp*., No. 10-cv-1074, 2011 WL 10948588, at *5 (C.D. Cal. Jan. 24, 2011) (knowledge adequately pleaded based on "receipt of consumer complaints," "internal research," "dealership repair orders," and "knowledge of lawsuits").

complaints supported their allegations that Apple "continuously received broken headphones from consumers, often several times from individual consumers," and that based on this "constant stream of returned [headphones]," "Apple knew or should reasonably have known, of the defect…." *Id*. Judge Seeborg concluded the plaintiffs' factual averments were "sufficient to raise a question of fact regarding Apple's knowledge…." *Id*. The same result applies here.

Plantronics nevertheless moves to dismiss Plaintiffs' CLRA, UCL,[6] and common law fraud claims for inadequately pleading knowledge. Br. at 13-19. In doing so, Plantronics conspicuously ignores *Morgan* and exaggerates Plaintiff's modest burden at the pleading stage. For instance, Plantronics incorrectly asserts that Plaintiff must "establish" knowledge to survive a motion to dismiss. *See* Br. at 14 ("To maintain his fraud-based claims, plaintiff must establish Plantronics knew…."). Actually, a plaintiff need only allege a "plausible basis for the Court to infer Defendant's alleged knowledge." *Elias v. Hewlett-Packard Co*., No. 12-CV-00421-LHK, 2014 WL 493034, at *6 (N.D. Cal. Feb. 5, 2014) (citing *Wilson v. Hewlett-Packard*, 668 F.3d 1136, 1146 (9th Cir. 2012)). When reviewing a motion to dismiss, the Court must accept as true all reasonable inferences which can be drawn from the facts alleged. *Broam v. Bogan*, 320 F.3d 1023, 1028 (9th Cir. 2003). If allegations support a reasonable inference of knowledge, Plaintiff can conduct discovery. *See Morgan*, 2018 WL 2234537, at *5 ("Given that documents and materials speaking to Apple's knowledge would likely be in the exclusive control of Apple at this stage, these factual averments are sufficient to survive dismissal and entitle them to proceed to discovery.").

Plantronics also repeatedly asserts incorrectly that Rule 9(b)'s heightened pleading standard applies to Plaintiffs' allegations of knowledge. *See* Br. at 13 ("These fraud-based allegations fail because plaintiff does not allege facts showing … knowledge … of any defect, let alone facts …

[6] Plantronics incorrectly asserts that Plaintiff must establish knowledge to succeed on a UCL claim. "[K]nowledge is not required under the UCL's fraudulent prong." *Beyer v. Symantec Corp.*, 333 F. Supp .3d 966, 981 (N.D. Cal. 2018). Plaintiff's "UCL claim therefore survives irrespective of knowledge of falsity." *Id*.

that satisfy the heightened standard of [Rule] 9(b)").[7] However, Fed. R. Civ. P. 9(b) clearly provides that "knowledge, and other conditions of a person's mind may be alleged generally." *Id*. Plantronics's own authorities recognize as much. *See Kowalsky v. Hewlett-Packard Co*., No. 10-cv-02176, 2011 WL 3501715, at *3 (N.D. Cal. Aug. 10, 2011) ("the circumstances of the alleged fraudulent conduct, such as the alleged misrepresentations … are subject to the heightened scrutiny of Rule 9(b), but HP's alleged knowledge of the defect is not"); *Elias*, 2014 WL 493034, at *7 ("Plaintiff need not plead the 'who, what, when, where, and how' … because these allegations go to HP's knowledge of the defect … and therefore need only be alleged generally.").

Here, Plaintiff alleges that Plantronics has long known of the Headphones' battery problems based on a "virtually unending stream of consumer complaints posted online." FAC, ¶ 25. In support of this allegation, the FAC quotes from no fewer than 89 complaints – 72 posted to Plantronics's website and 17 posted to Amazon.com. *Id*. ¶¶ 25-35.[8] These complaints reflect manifestation of the defect in 118 different pairs of Headphones. *Id*. Although only Plantronics has access to the full universe of complaints it received, Plaintiff alleges upon information and belief that Plantronics received similar consumer complaints via telephone and mail. *Id*. ¶ 32.

Plantronics argues that it is "axiomatic that anonymous postings on the internet are not a reliable source of information," and cites a handful of district court decisions for the proposition that "unsubstantiated" internet complaints cannot support an inference of knowledge. Br. at 15-16. However, the Ninth Circuit has categorically rejected that "consumer complaints may never support

[7] *See also* Br. at 18-19 ("All of these [knowledge] allegations are conclusory and insufficient to satisfy the heightened pleading standard of Rule 9(b)").

[8] Although the FAC includes 90 consumer complaints, one consumer complaint was inadvertently included twice. *See* FAC, ¶ 31(a) and ¶ 31(b). Plantronics correctly notes that the duplicative post is dated inaccurately. *See* Br. 14 ("In paragraph 31 of the FAC, plaintiff alleges that comment 'a' was published in 2014 FAC ¶ 31(a) However, this comment was actually posted on April 18, 2015…. Sanchez Decl. ¶ 5."). Although Plaintiff acknowledges the typographical error, he strongly disputes that a party may properly challenge a factual allegation on a motion to dismiss with a declaration (*i.e*., evidence).

an allegation of presale knowledge." *Williams v. Yamaha Motor Co. Ltd*., 851 F.3d 1015, 1027 (9th Cir. 2017) (citing with approval *Cirulli v. Hyundai Motor Co.*, No. 08-cv-854, 2009 WL 5788762, at *4 (C.D. Cal. June 12, 2009) (knowledge adequately pleaded where plaintiff alleged manufacturer knew of "unusually high levels of sub-frame deterioration, steering control arm separation, steering loss, and highway accidents" because it "constantly tracked" complaints posted in National Highway Traffic Safety Administration ("NHTSA") database)). Instead, the Ninth Circuit has described Plantronics's authorities as merely "express[ing] doubt that customer complaints *in and of themselves* adequately support an inference that a manufacturer was aware of a defect." *Wilson*, 668 F.3d at 1148 (emphasis added).

But Plaintiff relies on more than just consumer complaints to support a reasonable inference of knowledge. For instance, Plaintiff alleges that Plantronics tracks warranty claims in its normal course of business and therefore would have been aware of the Headphones' battery problems from the large number of warranty claims received. FAC, ¶ 25. Plaintiff further alleges the replacement Headphones suffered from the same battery problems and that consumers often experience battery failure with multiple sets of Headphones. FAC, ¶ 34 ("I'm now on my 4th different head set"). Plaintiff alleges that based on this "constant stream" of returned Headphones, Plantronics knew or reasonably should have known of the defect shortly after it began selling the Headphones. FAC, ¶ 35. *See also Doyle v. Chrysler Gr. LLC*, No. 13-cv-620, 2014 WL 1910628, at *6 (C.D. Cal. Jan. 29, 2014) ("Given the extensive history (as alleged in the [complaint]) of the repeated failure of window regulators, and the allegation that the 'repair' of a failed original or replacement window regulator consisted of replacing the defective part with a substantially similar, equally defective part that is prone to the same type of failure, Plaintiffs have sufficiently alleged Chrysler's knowledge.").

Plaintiff further alleges that Plantronics would have known of the defect based on its pre-release design, manufacturing, and testing data. FAC, ¶¶ 5, 29. Plantronics must have conducted extensive pre-release testing of the Headphones to support its claim that they are "waterproof" and provide "up to 8 hours" of wireless listening on a single charge. It is therefore reasonable to infer that such testing would have revealed the Headphones' battery problems. *See, e.g., Kowalsky*, 2011 WL 3501715, at * 4 (fact that manufacturer made specific claims regarding the speed and capabilities of copier supported inference that it would have learned of defect in automatic document feeder). These allegations, added to the hundreds of consumer complaints made to Plantronics, are more than sufficient to support a reasonable inference of knowledge.

Plantronics's authorities are readily distinguishable. For instance, Plantronics mischaracterizes *Berenblat v. Apple, Inc*., No. 08-cv-4969, 2010 WL 1460297, at *9 (N.D. Cal. Apr. 9, 2010) as holding that "over 350 complaints…, far more than the number of complaints plaintiff has identified here," were insufficient to support an inference of knowledge. Br. at 15. Actually, the plaintiffs in *Berenblat* merely alleged there were "postings from affected consumers memorializ[ing] conversations between consumers and [the defendant's] personnel," and that one of them "accuse[d the defendant] of removing a thread of 350+ complaints about the [defective product] from its website." *Id.* at *8. The existence of the "350+" complaints was itself only an allegation. No other details about the postings were provided. The court concluded that "[*b*]*y themselves*, [the allegation of postings] are insufficient to show … knowledge." *Id.* at *9. *See Wilson v. Volkswagen Grp. of Am., Inc*., No. 17-cv-23033, 2018 WL 4623539, at *9 (S.D. Fla. Sept. 26, 2018) (distinguishing *Berenblat* as "a far cry from the numerous, detailed complaints, of which the Plaintiffs allege [the defendant] was fully aware, set forth by the Plaintiffs in this case").

Similarly, in *Baba v. Hewlett-Packard Co*., No. 09-cv-05946, 2011 WL 317650, at *3 (N.D. Cal. Jan. 28, 2011), Judge Seeborg found that three pre-sale complaints posted on the defendant's

website were insufficient *by themselves* to suggest defendant's knowledge. Of course, the result was different in the more recent and factually analogous case, where Judge Seeborg found knowledge was adequately pleaded based on allegations strikingly similar to Plaintiff's in this case. *See Morgan*, 2018 WL 2234537, at *5.

Most of Plantronics's authorities merely stand for the unremarkable propositions that a plaintiff must do more than generically allege that the defendant "knew" of the defect based on unspecified "complaints," and that *undated* and *post-sale* complaints are usually insufficient to support an allegation of *pre-sale* knowledge. *See, e.g., Wilson*, 668 F.3d at 1146-48 (knowledge inadequately pleaded where plaintiff vaguely alleged that the defendant "became familiar with" a defect based on twelve undated complaints and two post-sale complaints, but failed to identify "where or how the complaints were made").[9] But the FAC specifically identifies 89 dated complaints, and Plantronics admits that at least 8 pre-date Plaintiff's transaction. Br. at 14.

These allegations sufficiently raise a reasonable inference that Plantronics knew of the defect before Plaintiff purchased his Headphones. *See, e.g., Borkman v. BMW of N. Am., LLC*, No. 16-cv-2225-FMO, 2017 WL 4082420, at *5 (C.D. Cal. Aug. 28, 2017) (knowledge adequately

[9] *See also Herremans v. BMW of N.A., LLC*, No. 14—cv-02363, 2014 WL 5017843, at *16-17 (C.D. Cal. Oct. 3, 2014) (generic allegation that consumers made "numerous … complaints" insufficient where the plaintiff "provides no detail concerning the customer complaints, when they were submitted, what they said, or how many came directly to BMW and how many went to NHTSA"); *Rice v. Sunbeam Prods, Inc.*, No. 12-cv-7923, 2013 WL 146270, at *7-8 (C.D. Cal. Jan 7, 2013) (generic allegations that defendant had knowledge based on "unspecified customer service/warranty service call center records for returns and/or complaints" and "unspecified numerous individual letters and communications" inadequate); *Oestreicher v. Alienware Corp.*, 544 F. Supp. 2d 964, 974 n.9 (N.D. Cal. 2008) ("Random anecdotal examples of disgruntled customer posting their views on websites at an *unknown time* is not enough to impute knowledge upon defendants. There are no allegations that [defendant] knew of the customer complaints at the time plaintiff bought her computer.") (emphasis added); *In re Nexus 6P Prod. Liab. Litig.*, 293 F. Supp. 3d 888. 908-09 (N.D. Cal. 2018) (knowledge inadequately pleaded where complaint contained mostly undated online consumer complaints, the plaintiffs did not allege that the defendant ever saw those complaints, and the few complaints that contained dates all post-dated the plaintiffs' transactions); *Punian v. Gillette Co.*, No. 14-cv-05028, 2015 WL 4967535, at *10 (N.D. Cal. Aug. 20, 2015) (knowledge inadequately pleaded where Plaintiff's "sole allegation regarding Defendants' knowledge of a defect is that consumers filed 'numerous complaints' with Defendants").

pleaded where plaintiff cited over 20 complaints, 3 pre-dating plaintiff's purchase, because the plaintiff also alleged that the manufacturer knew through other sources including dealership repair orders, and other internal sources of aggregate information); *Myers v. BMW of N.A., LLC*, No. 16-cv-00412-WHO, 2016 WL 5897740, at *4 (N.D. Cal. Oct. 11, 2016) (knowledge adequately pleaded where plaintiff cited "several" complaints posted on NHTSA website, two of which predated plaintiff's purchase, because the plaintiff also alleged that the manufacturer knew of the defect through "dealerships, pre-release data, and training manuals, among other internal sources"); *Avedisian v. Mercedes-Benz USA, LLC*, No. 12-cv-00936, 2013 WL 2285237, at *7 (C.D. Cal. May 22, 2013) (knowledge adequately pleaded where the plaintiff alleged the vehicle manufacturer learned of defect "through pre-release testing data, consumer complaints, dealer complaints, further testing, warranty data, goodwill data, repair data, and parts purchase information" where the "earliest of the consumer complaints predates [plaintiff's transaction]"); *Long v. Graco Children's Prods. Inc*., No. 13-cv-01257-WHO, 2013 WL 4655763, at *7 (N.D. Cal. Aug. 26, 2013) (knowledge adequately pleaded where plaintiff cited 9 complaints pre-dating plaintiff's first purchase (5 on NHTSA website and 4 Amazon.com)).[10]

Plantronics next asks the Court to look beyond the pleadings and "weigh[]" 13 positive reviews supposedly posted on its website against the numerous complaints alleged in the FAC. Br. 16-17. This request is wildly improper. A motion to dismiss tests the legal sufficiency of the *pleadings*. *Huang v. Cty. of Alameda*, No. 11-cv-01984-TEH, 2011 WL 5024641, at *2 (N.D. Cal.

[10] *Compare Grodzitsky v. American Honda Motor Co*., No. 2:12-cv-1142, 2013 WL 690822, at *2 (C.D. Cal. Feb. 19, 2013) (generic allegation upon information and belief that vehicle manufacturer received "numerous consumer complaints," coupled with 10 excerpts from complaints posted on third-party website, insufficient where plaintiff failed to allege that the defendant monitored the third-party website and most of complaints post-dated the plaintiffs' purchases) *with Grodzitsky v. Am. Honda Motor Co*., No. 2:12-cv-1142, 2013 WL 2631326, at *6 (C.D. Cal. June 12, 2013) (knowledge adequately pleaded where plaintiff alleged that vehicle manufacturer actively monitored NHSTA databases and the complaint quoted a sampling of complaints made to the NHTSA including "several" made before plaintiffs' purchases).

Oct. 20, 2011). Accordingly, the Court may only consider "the complaint, materials incorporated into the complaint by reference, and matters of which the court may take judicial notice." *Id.* Plantronics admits that the positive reviews are not incorporated by reference into the FAC, but asserts (without any authority) that the Court should consider them. Br. at 16 n.4.

Plaintiff respectfully urges the Court to decline Plantronics's request because complaints posted on a defendant's website are not properly subject to judicial notice. *See Punian*, 2015 WL 4967535, at *5 (refusing to take judicial notice of complaints posted on defendant's website); *see also Gerritsen v. Warner Bros. Entm't Inc.*, 112 F. Supp. 3d 1011, 1027-35 (C.D. Cal. Jan2015) (collecting cases). At most, the positive reviews cited by Plantronics raise "competing inferences" which do not support dismissal of Plaintiff's claim. *See Hardt v. Chrysler Gr. LLC*, No. 14-cv-1375, 2015 WL 12683963, at *5 (C.D. Cal. Mar. 16, 2015). Because Plaintiff adequately alleged facts sufficient to support a reasonable inference of Plantronics's pre-sale knowledge, the Court should deny Plantronics's motion to dismiss.

b. Plaintiff Adequately Pleads the Existence of a Defect.

The FAC alleges three types of fraud-based claims: (1) Plantronics made affirmative misrepresentations about the Headphones' battery-life (FAC, ¶¶ 145, 146, 163-168); (2) Plantronics made affirmative misrepresentations about the Headphones being sweatproof and waterproof (FAC, ¶¶ 157, 146, 163-168); and (3) Plantronics had a duty to disclose a material defect but failed to do so (FAC, ¶¶ 139-144, 158, 163-168). Plantronics challenges Plaintiff's third, omission-based fraud claim, arguing that the FAC fails to adequately allege the existence of "any defect that could give rise to a duty to disclose." Br. at 19 (citing *Wilson*, 668 F.3d at 1144). Plantronics is wrong.

To be actionable, an omission must be "[1] contrary to a representation actually made by the defendant, or [2] an omission of a fact the defendant was obliged to disclose." *Hodsdon v. Mars, Inc.*, 891 F.3d 857, 861 (9th Cir. 2018) (quoting *Daugherty v. Am. Honda Motor Co.*, 144

Cal.App.4th 824, 835 (Cal. Ct. App. 2006)). A duty to disclose arises: "(1) when the defendant is in a fiduciary relationship with the plaintiff; (2) when the defendant had exclusive knowledge of material facts not known to the plaintiff; (3) when the defendant actively conceals a material fact from the plaintiff; [or] (4) when the defendant makes partial representations but also suppresses some material fact." *Falk*, 496 F. Supp. 2d at 1094-95. A material defect is one that would cause a reasonable consumer to behave differently. *Id.* A defect that causes the product to malfunction or to become inoperable (like the battery defect) is clearly material. Plantronics makes no argument to the contrary.

Here, Plaintiff alleges that Plantronics represents that the Headphones provide "up to 8 hours" of wireless listening and are sweatproof and waterproof. Plaintiff also alleges that the defective batteries do not last anything close to 8 hours and rapidly diminish – especially after exposure to sweat – until they no longer maintain any charge at all. FAC, ¶¶ 3-4. Plantronics had a duty to disclose the material battery defect based on its partial representations about the Headphones' battery life and sweat-proof qualities. Alternatively, Plantronics had a duty to disclose the defect because it had exclusive knowledge and actively concealed material facts not known to Plaintiff.

Plantronics nevertheless argues that Plaintiff – a layman with no advanced skills in battery science or engineering – failed to conduct "whatever pre-filing investigation he needed (including obtaining an expert analysis)" to identify with technical precision the exact cause of the repeated battery failures. Br. at 20. According to Plantronics, "the need for adequate pre-suit investigation and factually supported allegations of a defect is especially acute in cases like this because some individual units of mass-produced product, such as headphones inevitably fail for any number of reasons." Br. at 21. Plantronics bemoans that to "find[] a duty to disclose based on the allegations here would open the door to a new wave of lawsuits." Br. at 21.

Although long on rhetoric, Plantronics' argument is decidedly short on authority. At best, Plantronics offers a few cases discussing the general purposes of Rule 9's heightened pleading requirement for fraud claims.[11] Notably, the Ninth Circuit interprets Rule 9(b) to demand that the allegations must be "sufficient[ly] detail[ed] ... to give us some assurance that [plaintiff's] theory has a basis in fact." *Berson v. Applied Signal Tech., Inc.*, 527 F.3d 982, 989–90 (9th Cir. 2008) ("Rule 9(b) requires no more."). And "a fraud by omission or fraud by concealment claim 'can succeed without the same level of specificity required by a normal fraud claim.'" *In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices, & Products Liab. Litig.*, 754 F. Supp. 2d 1145, 1189 (C.D. Cal. 2010).

Courts do not require plaintiffs to allege with technical precision the mechanical cause of a product's failure when filing a complaint. *See, e.g., Myers*, 2016 WL 5897740, at *5 (defect adequately pleaded where plaintiff alleged vehicle spontaneously locks itself even though plaintiff "does not allege the mechanical method by which this happens"); *Avedisian*, 2013 WL 2285237, at *1 (denying motion to dismiss where plaintiff simply alleged "Chrome Defect" causing vehicle's interior trim pieces to "flake[], crack[], and peel[]"); *Cirulli*, 2009 WL 5788762, at *1 (denying motion to dismiss where plaintiff simply alleged front sub-frame defect causing "excessive corrosion"); *Hardt*, 2015 WL 12683963, at *1 (denying motion to dismiss where plaintiff simply alleged "Transmission Defect" causing "clutch pedal to go soft" and "stalling"); *Ehrlich v. BMW of N.A., LLC*, 801 F. Supp. 2d 908, 912 (C.D. Cal. 2010) (denying motion to dismiss where plaintiff simply alleged "windshield defect" causing vehicles to have "high propensity to crack or chip under

[11] *See, e.g., Bly-Magee v. California*, 236 F.3d 1014, 1018 (9th Cir. 2001) ("Rule 9(b) serves not only to give notice to defendants of the specific fraudulent conduct against which they must defend, but also to deter the filing of complaints as a pretext for the discovery of unknown wrongs….") (internal quotations omitted); *Morici v. Hashfast Techs. LLC*, No. 5:14-cv-00087-EJD, 2015 WL 906005, at *3 (N.D. Cal. Feb. 27, 2015) ("Rule 9(b)'s heightened pleading requirement also acts as a barrier to weak or unfounded—and potentially costly—claims of fraudulent conduct.").

circumstances that would not cause non-defective windshields to similarly fail"); *Price v. Kawasaki Motors Corp.*, No. 10-cv-1074, 2011 WL 10948588, at *1 (C.D. Cal. Jan. 24, 2011) (denying motion to dismiss where plaintiff simply alleged "Oil Consumption Defect" causing motorcycles to "burn off … unacceptably high (and undisclosed) amounts of engine oil"); *In re Sony Vaio Comput. Notebook Trackpad Litig.*, No. 09-cv-2109, 2010 WL 4262191, at *1 (S.D. Cal. Oct. 28, 2010) (denying motion to dismiss where plaintiff simply alleged "defective trackpads" that "cause the onscreen cursor" to "track in reverse," "freeze," or "engage in erratic behavior").

Moreover, Plantronics offers no authority requiring defrauded consumers to hire an expert before filing a defect action. While Plantronics identifies a handful of cases where the plaintiff was able to allege more details about the mechanism of failure than Plaintiff,[12] none of those cases held that such detailed allegations were a prerequisite to survive a motion to dismiss.

For instance, Plantronics's reliance on the 9th Circuit case *Wilson* is misplaced. Plantronics describes that case as "finding the plaintiffs did not allege sufficient facts to support allegation of design defect even though the plaintiffs described in 'detail' how the 'component that connects the power jack to the motherboard' was 'fragile' resulting in laptop overheating." Br. at 19. Actually, the plaintiff in *Wilson* alleged that the laptop manufacturer had a duty to disclose the defect because it constituted a safety hazard,[13] but failed to allege any connection between the alleged defect (i.e., loss of the connection between the power jack and the motherboard) and the alleged safety hazard (i.e., laptops bursting into flames). *See Wilson*, 668 F.3d at 1144 ("[I]t is difficult to conceive (and the complaint does not explain) how the Laptops could ignite if they are 'unable to receive an

[12] *See, e.g.*, *Elias*, 2014 WL 493034, at *1 (computer defective because its 220 watt power supply unit was insufficient to adequately power upgraded graphics card); *Herremans v. BMW of N.A., LLC*, 2014 WL 5017843, at *1 (stress placed on sealed ball bearing system exceeded engineering limitations and caused water pump and engine failure).

[13] Some courts have required defects manifesting after expiration of a product's warranty period to pose a safety concern before finding a duty to disclose. *See, e.g.*, *Punian v. Gillette Co.*, No. 14-CV-05028-LHK, 2016 WL 1029607, at *9 n.3 (N.D. Cal. Mar. 15, 2016). *But see Hodsdon v. Mars*, 291 F.3d 857, 863 (9th Cir. 2018) (calling safety hazard requirement into question).

electrical charge.'"). *Wilson* is obviously distinguishable because Plaintiff does not allege that Defendant's duty to disclose arose from a safety hazard, so there is no need to provide such a causal connection.

Plantronics's reliance on *Punian* fares no better. In that case, the plaintiff alleged that certain sizes of Duracell "Duralock" batteries were defective because they had the potential to leak within a ten-year period, but the plaintiff did not allege that any of the Duralock batteries she owned ever leaked. *Punian*, 2016 WL 1029607, at*11. Nor did the plaintiff allege a particular likelihood of leakage – "for example, that Duralock Batteries regularly, often, or usually leak" – or even that leakage renders Duralock Batteries inoperable. *Id*. The court found that the plaintiff failed to adequately allege materiality (i.e., that a reasonable consumer would have behaved differently if the defect was disclosed). *Id*. at *15. In contrast, Plaintiff alleges a material defect that drastically reduces battery life, making the Headphones inoperable within weeks or months.

Lastly, Plantronics argues that Plaintiff only alleges that "some unidentified fraction" of Headphones have suffered battery failure, and "Plantronics is not aware of any case in which a court has ruled that alleging only a potential to fail, or some instances of failure, is enough…." Br. at 22. Actually, Plaintiff alleges that all Headphones suffer from the defect, even if the defect has not manifested in every pair yet. Plantronics's own authority recognizes the viability of similar allegations. *See Kowalsky*, 2011 WL 3501715, at *4 (denying motion to dismiss where plaintiff "allege[d], *upon information and belief*, that the alleged defect was present 'out of the box' in every 8500 Printer and manifested on a regular basis when using the ADF regardless of conditions" (emphasis added)). Plantronics cites no authority requiring a plaintiff to allege that a defect has manifested in every single product in order to survive a motion to dismiss. *See Chamberlan v. Ford Motor Co.*, No. 03-cv-2628-CW, 2003 WL 25751413, at *4 (N.D. Cal. Aug. 6, 2003) (rejecting argument that plaintiffs failed to adequately allege intake manifold defect because they "have not

specified when failure of intake manifolds is so premature and so frequent that Defendant has an obligation to disclose it" where plaintiffs alleged intake manifolds failed at a "much higher rate" than a reasonable consumer would expect).

Because Plantronics has identified no basis to dismiss Plaintiff's fraud-based claims, its motion should be denied.

V. CONCLUSION

Wherefore, Plaintiff requests that the Court deny Plantronics' motion in its entirety. And, to the extent the Court dismisses any of Plaintiff's claims, Plaintiff respectfully requests leave to amend.

Dated: March 6, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing was filed electronically via the Court's ECF system, on March 6, 2019. Notice of electronic filing will be sent to all parties by operation of the Court's electronic filing system.

DATED: March 6, 2019

GOLDENBERG SCHNEIDER, L.P.A.

/s/Jeffrey S. Goldenberg
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