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PLANTRONICS, INC.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

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

Plaintiff,

v.

PLANTRONICS, INC.,

Defendant.

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

DEFENDANT PLANTRONICS, INC.'S REPLY IN SUPPORT OF MOTION TO DISMISS FIRST AMENDED COMPLAINT

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

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I. INTRODUCTION

Plaintiff must adequately allege a defect. But he has not done so. He asserts only that some Headphones' batteries (including his own) have failed or might fail at some point. This is not enough, particularly in the absence of any facts identifying the causes of the alleged failure or any testing or other facts showing that it was due to a product defect rather than the myriad of other reasons a product may fail in individual cases—or, as in plaintiff's case, may not work as he hoped years after the warranty expired. No case law supports holding that the mere potential of some individual units of a mass-produced product to fail (or the actual failure of some units) is enough to state a claim of product defect.

Plaintiff also fails to allege any facts showing that Plantronics knew of any defect. The anonymous on-line customer reviews cited in the FAC are unsubstantiated, do not reveal the cause(s) of the alleged battery failure, and are so small in number (in the context of the over 1 million Headphones Plantronics sold) as to be past the vanishing point. And nearly all of the reviews post-date plaintiff's purchase of the Headphones. Moreover, the vast majority of customer reviews are positive, and if they are to be relied upon (as plaintiff urges), establish there is no systemic defect.

Nor does plaintiff offer any valid basis to save his breach of warranty claims. Plaintiff does not dispute that he is bound by the terms of Plantronics' Limited Warranty, which provides that plaintiff's exclusive remedy is a replacement. Because he alleges that he submitted warranty requests and received replacements, his express warranty claims fail. His implied warranty claims similarly fail because the Limited Warranty supersedes any purported implied warranty.

Plaintiff's failure to meet his pleading burden, and his inability to cure the deficiencies to state a valid claim, demonstrate that this meritless litigation is attorney-manufactured and an abuse of the class-action mechanism. The FAC should be dismissed.

II. PLAINTIFF DOES NOT ALLEGE VALID BREACH OF EXPRESS WARRANTY CLAIMS.

Plaintiff alleges that Plantronics provided him with a replacement product for every warranty claim he submitted. FAC ¶¶ 41–42. And he acknowledges that Plantronics' Limited

Warranty states that his exclusive remedy for a defective product is a replacement product. Opp. 2. These facts defeat his claim. When a manufacturer acts in conformity with its warranty, a plaintiff cannot maintain breach of express warranty claims.

This is true even when a plaintiff alleges that he received defective replacement products. Courts in this district, including this Court in *Weeks v. Google LLC*, No. 18-CV-00801 NC, 2018 WL 3933398 (N.D. Cal. Aug. 16, 2018), have found that the relevant question in breach of express warranty claims is not whether the replacement is defect-free, "but rather whether the defendant responded appropriately in remedying any problems with the product." *Id.* at *6; *Kent v. Hewlett-Packard Co.*, No. 09-5341 JF PVT, 2010 WL 2681767, at *6 (N.D. Cal. July 6, 2010) ("HP is not liable for breach of express warranty merely because a product manifests recurring failures during the warranty period. Rather, the question is whether Plaintiffs sought repairs, refunds, or replacements and, if so, whether HP responded appropriately under the warranty."). Plaintiff attempts to distinguish *Weeks* by interpreting it narrowly. *See* Opp. 3. But as in *Weeks*, the question is whether Plantronics breached its Limited Warranty by allegedly providing defective replacements. And as in *Weeks*, the answer is no. So long as the defendant acts in conformance with its Limited Warranty, it does not breach the warranty. Plaintiff also argues that *Weeks* is distinguishable because the warranty there stated that it did not guarantee "the *use* of the Phone [would] be uninterrupted or error free." *Id.* (quoting *Weeks*, 2018 WL 3933398 at *1) (emphasis added). But the Court did not base its decision on that clause, and Plantronics' Limited Warranty in any event likewise provides that it does not guarantee "that the operation of [Plantronics'] software products will be uninterrupted or error free." Eister Decl. Ex. 1 [ECF No. 30-2] at 3. Plaintiff also does not allege that Plantronics promised the product would be error free.

Plaintiff is also wrong that the other cases on this issue are "inapposite." Opp. 6. In fact, those cases are right on point. *See Bros. v. Hewlett-Packard Co.*, No. C-06-02254RMW, 2007 WL 485979, at *4 (N.D. Cal. Feb. 12, 2007) (the court dismissed claims because, even though the plaintiff alleged the defendant replaced "a defective part with another defective part," the defendant acted in conformance with the Limited Warranty); *Ferranti v. Hewlett-Packard Co.*,

No. 5:13-CV-03847-EJD, 2014 WL 4647962, at *6 (N.D. Cal. Sept. 16, 2014) (finding the plaintiffs failed to allege a breach of express warranty claims because they did not allege that they requested a replacement and were denied the request and made "no[] factual allegations of when they requested a refund and were denied one"); *Frenzel v. Aliphcom*, No. 14-CV-03587-WHO, 2015 WL 4110811, at *13 (N.D. Cal. July 7, 2015) (while the court dismissed the breach of express warranty claims because the plaintiff requested a replacement outside the one-year warranty period, the court noted that the plaintiff also had not alleged that the defendant "failed to repair or replace" the devices within the warranty period).

The FAC reveals that for every warranty claim submitted, plaintiff received a replacement. He does not allege that he submitted a claim for the last replacement Headphones or that he ever submitted a refund request. Nor does he allege the dates when he submitted claims for the second, third, and fourth replacement Headphones. It is likely that he omits these dates because they would reveal that one or more of these claims were submitted outside of the warranty period. But whatever the reason, courts in this district have dismissed breach of warranty claims when the plaintiff's warranty claims fell outside of the warranty period. *See id.* Plaintiff's failure to allege facts showing that his warranty claims were timely is an additional reason why the complaint should be dismissed.

Plaintiff argues Plantronics breached the warranty because the warranty provides for a replacement that is "equivalent to your product in performance." Opp. 2 (quoting Eister Decl. Ex. 1 at 2–3). But this provision for an "equivalent" product is not a promise that the replacement will not experience any failure. Virtually any product or replacement product can malfunction for numerous reasons (including consumer mishandling). The possibility of such a malfunction is precisely why companies provide a warranty. And a replacement that malfunctions is no more a breach of that warranty than the failure of the original product. In either case, the remedy afforded by the warranty is a replacement product.

Also groundless is plaintiff's assertion that the essential purpose doctrine saves his claim. "[T]he essential purpose doctrine ***only*** *'becomes operative* when a party is deprived of its contractual remedy.'" *In re Seagate Tech. LLC Litig.*, 233 F. Supp. 3d 776, 783 (N.D. Cal. 2017)

(emphases added). That is, a plaintiff can only rely on the essential purpose doctrine when a manufacturer fails to *completely* honor its warranty and he is left with no remedy at all. *See Fiorito Bros. v. Fruehauf Corp.*, 747 F.2d 1309, 1313 (9th Cir. 1984) ("[The defendant] *failed completely to honor* its own repair or replace remedy, which represents a failure of essential purpose.") (emphases added); *Stearns v. Select Comfort Retail Corp.*, No. 08-2746 JF, 2009 WL 1635931, at *5 (N.D. Cal. June 5, 2009) ("A limited remedy fails of its essential purpose when *the circumstances existing at the time of the agreement have changed* so that *enforcement of the limited remedy would essentially leave plaintiff* with ***no remedy at all***.") (internal quotations and citation omitted; emphases added). Plaintiff does not allege that Plantronics failed to honor the remedies provided in the Limited Warranty. Nor does he allege that he was deprived of his contractual remedy under the warranty. No allegations in the FAC support his argument that the Limited Warranty fails its essential purpose.

Furthermore, the Limited Warranty states that Plantronics' maximum liability for any "failure of the product to perform" is "***the lesser of*** the [purchase] price" of the product "or the cost of repair or replacement." Eister Decl. Ex. 1 at 3 (emphases added). This express limitation of liability precludes plaintiff's claims here, which seek to impose liability beyond the replacement cost.

III. PLAINTIFF DOES NOT ALLEGE VALID BREACH OF IMPLIED WARRANTY CLAIMS.

A. Plantronics Validly Disclaimed All Implied Warranties.

Plaintiff contends that the Limited Warranty allows for implied warranties. That is not correct. The very first sentence of the disclaimer paragraph in the warranty states that Plantronics "DISCLAIMS ALL WARRANTIES AND CONDITIONS NOT STATED IN THIS LIMITED WARRANTY." Eister Decl. Ex. 1 at 3. This means any warranties not stated in the Limited Warranty (*e.g.*, plaintiff's implied warranty claims) are disclaimed. Plaintiff relies on the statement that any implied warranties of merchantability, satisfactory quality or fitness for a particular purpose are limited to the one-year warranty period. Opp. 7–8. But, read in context with the first sentence of the disclaimer paragraph, this statement can be interpreted only as

specifying a one-year period for such warranties to the extent they exist. The first sentence makes clear they do not exist for this product.

Even if the warranty is interpreted to allow for implied warranties, plaintiff's claims still fail. The Court recognized in *Weeks* that implied warranties arise by operation of law and where a contract "sets out a remedy, and the remedy is expressly agreed to be exclusive, then it is the sole remedy." 2018 WL 3933398, at *9. Thus, plaintiff's sole remedy for any implied warranties would be the same as for the express warranty—*i.e.*, replacement headphones. *See id.* (holding plaintiffs are not "entitled to any relief outside of the Limited Warranty" for their implied warranty claim). And because plaintiff's express warranties claims fail, so does his implied warranty claims.

B. Plaintiff's Implied Warranty Claims Also Fail for Lack of Privity.

Plaintiff asserts that *Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017 (9th Cir. 2008), recognizes an exception to the privity requirement for implied warranty claims and that he satisfies this exception. Opp. 8. But this exception applies only to express warranty claims, not implied warranty claims. *Tietsworth v. Sears, Roebuck & Co.*, No. 5:09-CV-00288 JFHRL, 2009 WL 3320486, at *12 (N.D. Cal. Oct. 13, 2009) (finding the exception to the privity requirement "*applies **only** in the context of **express warranties***") (emphases added). In discussing the exception, the Ninth Circuit cited to the California Supreme Court's decision in *Burr v. Sherwin Williams Co.*, 42 Cal. 2d 682 (1954). In *Burr*, the court made clear that the "possible exception to the general rule is found in a few cases where the purchaser of a product relied on representations made by the manufacturer . . . and recovery from the manufacturer was allowed on the theory of ***express warranty*** without a showing of privity." *Id.* at 696 (emphases added). Plaintiff's failure to allege this privity requirement is fatal to his implied warranty claims.

C. Plaintiff's Implied Warranty for a Particular Purpose Claim Fails because He Does not Plead a Particular Purpose.

Plaintiff either misunderstands or knowingly misstates the requirements for pleading a particular purpose. He maintains that because the Headphones were marketed "for the particular purpose of listening to audio *while exercising*" and not for the ordinary purpose of listening to

audio, he adequately pleads a particular purpose. Opp. 10 (emphases in original). But listening to audio while exercising is the ordinary purpose for which the Headphones are designed, marketed, and sold. Plaintiff has not identified a different particular purpose for which he purchased the Headphones.

Numerous courts have dismissed implied warranty claims for particular purpose when a plaintiff fails to allege a use of the product that is specific to the plaintiff. *See Barber v. Johnson & Johnson Co.*, No. 816CV1954JLSJCGX, 2017 WL 2903255, at *7–8 (C.D. Cal. Apr. 4, 2017) (dismissing claim where plaintiffs alleged "they specifically purchased Defendants' Deeply White products to remove not only surface stains, but also to remove 'deep stains' below the enamel layer of teeth. . . . However, . . . Plaintiffs also allege that this was the very purpose that Defendant[s] marketed and sold the [Deeply White products]"); *Frenzel*, 76 F. Supp. 3d at 1021 (dismissing claim finding that plaintiff's intended use of a fitness tracker as "a fitness and lifestyle tracker with a . . .10 day battery life" was the ordinary purpose for which the product was advertised and purchased); *Smith v. LG Elecs. U.S.A., Inc.*, No. C 13-4361 PJH, 2014 WL 989742, at *8 (N.D. Cal. Mar. 11, 2014) ("[P]laintiff has identified no 'particular purpose' for which she purchased the washing machine. She purchased it to wash her laundry, which is the 'ordinary' purpose of a washing machine."). Here, plaintiff alleges that he purchased the Headphones for the ordinary purpose for which the Headphones are designed, marketed and customarily purchased—to listen to audio while exercising, exposure to sweat or moisture, and for up to 8 hours of listening time.

Moreover, this claim fails because he does not dispute (nor point to any facts in the FAC) showing that Plantronics knew of plaintiff's particular purpose in purchasing the Headphones. *See Punian*, 2015 WL 4967535, at *14 (dismissing particular purpose claim because the plaintiff failed to allege that "at the time of contracting" the defendant had "reason to know of [Plaintiff's] particular purpose."); *In re Sony PS3 Other OS Litig.*, 551 F. App'x 916, 920 (9th Cir. 2014) (affirming dismissal where "[p]laintiffs fail to allege that Sony ha[d] reason to know that Plaintiffs purchased the PS3 for any particular purpose") (internal quotations omitted).

D. All of Plaintiff's Warranty Claims Fail for Failure to Give Plantronics Pre-Suit Notice.

Plaintiff recognizes that pre-suit notice is required for breach of warranty claims. Opp. 11. However, he argues that he did not need to notify Plantronics of his intention to sue because he has not dealt directly with Plantronics. He is wrong. The exception to pre-suit notice recognized in the case on which he relies, *Greenman v. Yuba Power Prod., Inc.*, 59 Cal. 2d 57 (1963), "applie[s] to personal injur[y]" cases. *Id.* at 61. This is not a personal injury case. So plaintiff is not excused from giving pre-suit notice.

Plaintiff also cites *Tasion Commc'ns, Inc. v. Ubiquiti Networks, Inc.*, No. C-13-1803 EMC, 2014 WL 1048710 (N.D. Cal. Mar. 14, 2014), for this argument. Opp. 11. But *Taison* misunderstood the exception. It relied on *Sanders v. Apple Inc.*, 672 F. Supp. 2d 978 (N.D. Cal. 2009), which in turn relied on *Greenman*. Thus, *Greenman* is the controlling case and it holds the exception applies only to personal injury cases.

Even if plaintiff were correct that injured consumers are not required to give notice to "manufacturers with whom they have not dealt," plaintiff still does not fall under the exception. The FAC reveals plaintiff contacted Plantronics multiple times to make warranty requests and obtain replacement Headphones. Plaintiff clearly dealt with Plantronics and could have provided written pre-suit notice of his intention to sue. Nor is he excused from the notice requirement merely because he submitted warranty requests and sent Plantronics a CLRA demand letter on September 12, 2018. *See* Opp. 11. The warranty requests do not constitute notice because plaintiff does not allege that he notified Plantronics of his intention to sue. Nor does the September 12 demand letter constitute ***pre-***suit notice. *See Tasion*, 2014 WL 1048710, at *4 (explaining that plaintiffs asserting warranty claims must provide "the seller with pre-suit notice *before* instituting a lawsuit" (emphasis added)). The letter was not sent until the day before plaintiff filed his complaint on September 13, 2018. Compl. ECF No. 1. And Plantronics did not receive the letter until September 18, 2018. *See* Judith Hom Decl. at ¶ 2.

As explained in Plantronics' motion, the purpose of this pre-suit notice requirement is to give the defendant an opportunity to negotiate a settlement and preserve evidence before being

sued. Allowing plaintiff to simply mail off a letter and then sue before the letter is even received would defeat this purpose entirely. The Court should thus dismiss plaintiff's breach of warranty claims with prejudice.

IV. PLAINTIFF DOES NOT ALLEGE VALID FRAUD-BASED CLAIMS.

Plaintiff fails to show that he adequately alleged Plantronics' knowledge of the purported defect. While knowledge may be alleged generally under Rule 9(b), he must still set forth facts to support an inference that Plantronics was aware of the alleged defect. *See Elias v. Hewlett-Packard Co.*, No. 12-CV-00421-LHK, 2014 WL 493034, at *6 (N.D. Cal. Feb. 5, 2014) ("[T]o successfully allege that a manufacturer was aware of a defect, Plaintiff must still present a plausible basis for the Court to infer Defendant's alleged knowledge."). There are no facts in the FAC that would support his allegation of pre-sale knowledge. Therefore, his CLRA, UCL,[1] and common law fraud claims must be dismissed.

Plaintiff's allegation that Plantronics has "exclusive knowledge" (FAC ¶ 29) about the facts that would show the Headphones defect is insufficient to defeat the motion to dismiss. *Herron v. Best Buy Co. Inc.*, 924 F. Supp. 2d 1161, 1175 (E.D. Cal. 2013) ("[G]eneralized allegations with respect to exclusive knowledge are insufficient to defeat a dismissal motion.") (citation and internal quotations omitted). He must allege some facts of how Plantronics knew of the defect *before* he purchased his Headphones. *See Stewart v. Electrolux Home Prod., Inc.*, 304 F. Supp. 3d 894, 908 (E.D. Cal. 2018) ("[T]o successfully allege a manufacturer was aware of a defect, a plaintiff is typically required to allege *how* the defendant obtained knowledge of the specific defect *prior* to the plaintiff's purchase of the defective product.") (emphases in original; citation omitted). His generic and boilerplate allegations are insufficient.

The cases plaintiff cites to argue that he has adequately pled knowledge are

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[1] Plaintiff argues his UCL claim survives irrespective of knowledge of falsity. But the Ninth Circuit stated in *Wilson v. Hewlett-Packard Co.*, 668 F.3d 1136, 1145 (9th Cir. 2012), that "[p]laintiffs' UCL claim also requires that they allege HP's knowledge of a defect." And "federal district courts [that] have considered fraudulent prong claims [under the UCL] based on representations about defective products, . . . [require the plaintiff to make] a plausible showing that the defendant knew of the alleged defect." *Kowalsky v. Hewlett-Packard Co.*, 771 F. Supp. 2d 1156, 1160 (N.D. Cal. 2011) (citing cases).

distinguishable. In those cases, the court found the plaintiff had adequately pled sufficient *facts* to show the defendant was *clearly aware* of the defect. For example, in *Falk v. Gen. Motors Corp.*, 496 F. Supp. 2d 1088 (N.D. Cal. 2007), the court found that GM had *exclusive knowledge* about the defect and that "[t]he record of complaints to GM . . . show that GM was ***clearly aware*** of a problem with its speedometers." *Id.* at 1096 (emphases added). In *Mui Ho v. Toyota Motor Corp.*, 931 F. Supp. 2d 987 (N.D. Cal. 2013), the defendant had issued "two technical service information bulletins . . . to their dealers" addressing the defect, and the court found the plaintiffs provided "sufficient detail[s]" to show the defendant's knowledge. *Id.* at 991. And in *Morgan v. Apple Inc.*, No. 17-CV-05277-RS, 2018 WL 2234537 (N.D. Cal. May 16, 2018), the plaintiffs had "identified *hundreds* of poor reviews" dated "*prior to* the relevant times of sales" "as well as an editorial that identif[ied] the alleged defect as a problem." *Id.* at *5 (emphases added). By contrast, plaintiff here has identified at most eight reviews posted before plaintiff's purchase.

As explained in the motion to dismiss, in the context of a product that sold over one million units and that can fail for reasons apart from any defect, the purported existence of even hundreds or thousands of complaints would not show that Plantronics knew of any defect. But plaintiff's allegations do not rise even to that insufficient level. He points only to eight anonymous and unverified complaints posted before plaintiff purchased his Headphones, which is not enough to support an inference of pre-sale knowledge. Plaintiff cites to *Williams v. Yamaha Motor Co.*, 851 F.3d 1015 (9th Cir. 2017) as "categorically reject[ing]" that "consumer complaints may never support an allegation of presale knowledge." Opp. 14–15 (citing *Williams*, 851 F.3d at 1027). But *Williams* only stated that "*Wilson* did not hold that consumer complaints may never support an allegation of presale knowledge." 851 F.3d at 1027. Defendants do not argue that consumer complaints may never be sufficient. Rather, the point is that, because plaintiff relies solely on few anonymous and unverified reviews, he does not sufficiently allege defendant's pre-sale knowledge of the purported defect.

The insufficiency of the cited consumer reviews to show knowledge is bolstered by the overwhelming number of positive reviews of the Headphones on Plantronics.com. Plaintiff objects to the Court considering these reviews. Opp. 19. But plaintiff cannot have it both ways.

He cannot rely on consumer reviews to support his allegation of a systemic defect, while at the same time claim that it would be improper for the Court to consider the many more positive reviews, found amongst the negative reviews, that defeat his claims. As plaintiff admits, the Court may consider "materials incorporated into the complaint by reference." *Id.* 17 (citation omitted); *see United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003) ("A court may [consider] . . . documents incorporated by reference in the complaint . . . without converting the motion to dismiss into a motion for summary judgment."). Plaintiff refers to and incorporates in the FAC consumer reviews posted on Plantronics.com. For the Court to have a complete picture of the reviews on Plantronics.com, it should take into consideration all reviews, not just the ones plaintiff cherry-picked and quoted in the FAC. This would fulfill the purpose of the incorporation by reference doctrine—which is to prevent a plaintiff from surviving a motion to dismiss by deliberately omitting documents and information that defeat his claims. *Knievel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005).

Moreover, plaintiff's conclusory allegation that there is internal testing data or warranty claim data that would show "an abnormally high failure rate" is insufficient. Opp. 12. He speculates such alleged tests and data would reveal that Plantronics knew the Headphones were defective. But no such conclusion is possible because plaintiff's allegations do not identify any facts about the actual existence of any such test results or data, what may have caused the purported negative result, and whether the alleged defect affected all Headphones allegedly tested. In the absence of such facts, plaintiff's allegations are meaningless—particularly because they are all conclusory pled based upon "information and belief." FAC ¶¶ 29, 34. To validly plead matters on "information and belief," plaintiff must provide "a statement of the facts upon which the belief is based." *MacDonald v. Ford Motor Co.*, 37 F. Supp. 3d 1087, 1095 (N.D. Cal. 2014) (internal quotations and citation omitted). He has not done so.

In short, a manufacturer cannot be held liable for failing to disclose a purported defect of which it had no knowledge. Plaintiff has failed to allege facts showing any such knowledge—which is hardly surprising given, as shown in the next section, that he has not shown the existence of any defect in the first place. It is hard to know of something that does not exist.

V. ALL OF PLAINTIFF'S CLAIMS FAIL FOR FAILURE TO ALLEGE A DEFECT.

Plaintiff alleges no facts showing the Headphones have a systemic defect. Plantronics moves to dismiss the entire complaint (not just plaintiff's fraud-based claims) based on this flaw. Plaintiff falsely asserts that "Plantronics does not dispute that the Headphones fail to live up to its pre-sale representations." Opp. 2. But to be clear, Plantronics denies the Headphones have any defects.

As explained in Plantronics' motion, the cases that have found a product defect requiring disclosure involved an actual defect—*e.g.*, a computer made with a power supply unit that did not meet the component manufacturer's requirements or a water pump part that did not meet required engineering standards. *See* Mot. at 21–22 (citing cases). In the leading case in this area from the Ninth Circuit, *Wilson*, the "complaint describe[d] the design defect in some detail." 668 F.3d at 1143. Plaintiff attempts to distinguish *Wilson* on inconsequential grounds. He argues that the reasoning in *Wilson* does not apply because the case was about a safety hazard. Opp. 22–23. But the court's discussion and reasoning focused on whether the plaintiff sufficiently alleged a defect. *See Wilson*, 668 F.3d at 1144. Plaintiff also tries to distinguish *Punian v. Gillette Co.*, No. 14-CV-05028-LHK, 2016 WL 1029607 (N.D. Cal. Mar. 15, 2016) based on the facts. Opp. 23. But *Punian* is right on point. The court in *Punian* undertook a rigorous analysis as to whether the plaintiff had sufficiently alleged a defect. And like in *Punian*, plaintiff here "has not identified any cause for [the Headphones' batteries] potential to [fail] . . . or alleged the existence of a design or manufacturing defect in [the Headphones]." 2016 WL 1029607 at *14.

Moreover, the cases plaintiff cites to support his assertion that he has sufficiently alleged a defect are distinguishable. In *Avedisian v. Mercedes-Benz USA, LLC*, No. CV 12-00936 DMG CWX, 2013 WL 2285237 (C.D. Cal. May 22, 2013), the defect was a sharp edge that cut people and the court found the plaintiff sufficiently pled the defect. *Id.* at *1, 5–6. Here, there is nothing visible or apparent about the alleged defect in the Headphones like a sharp edge. While the plaintiff in *Avedisian* pled facts to support a defect, plaintiff has not done so here. In *Ehrlich v. BMW of N. Am., LLC*, 801 F. Supp. 2d 908 (C.D. Cal. 2010), plaintiff pled facts that the defendant had issued a technical service bulletin acknowledging the windshield defect. *Id.* at 913,

919. There is no such evidence here of Plantronics acknowledging any defect. Plaintiff also relies on *In re Sony Vaio Comput. Notebook Trackpad Litig*., No. 09-cv-2109, 2010 WL 4262191 (S.D. Cal. Oct. 28, 2010), but the court did not engage in any analysis as to whether plaintiff had sufficiently alleged a defect. *See generally id.*

Plaintiff does not dispute that his product defect allegations must meet the heightened pleading standard of Rule 9(b). That rule applies because the existence of a defect is necessary to explain "why the statement or omission complained of was false or misleading." *In re GlenFed, Inc. Sec. Litig.*, 42 F.3d 1541, 1548 (9th Cir. 1994). Plaintiff therefore must "plead with particularity allegations that provide a reasonable basis to infer" that Plantronics' Headphones are in fact defective. *Ebeid ex rel. U.S. v. Lungwitz*, 616 F.3d 993, 998 (9th Cir. 2010). But he points to no facts (in the FAC or anywhere else) showing a defect. He does not identify any manner in which the Headphones were improperly designed in any engineering or technical respect. Nor does he identify any flaw in the process by which the Headphones are manufactured. He thus offers no factual basis for concluding that the Headphones contained any defect at all.

Plaintiff offers no justification for his failure to allege this fundamental prerequisite to his claims. Instead, he protests that he is a "layman with no advance skills" and therefore cannot identify the cause of the defect. Opp. 20. But his legion of counsel at four separate law firms could have easily conducted the requisite pre-suit investigation to substantiate plaintiff's claims, including by hiring an expert to analyze the Headphones to determine whether they contain any defect. Plaintiff was obligated to conduct such a pre-suit investigation to ensure that his "charge of fraud is responsible and supported, rather than defamatory and extortionate." *Morici v. Hashfast Technologies LLC*, No. 5:14-CV-00087-EJD, 2015 WL 906005, at *3 (N.D. Cal. Feb. 27, 2015) (internal quotations and citation omitted). His failure to conduct even this most basic investigation necessary to sustain his claims require that the complaint be dismissed.

Plaintiff's theory—that battery failure in some Headphones (or the possibility of such failure) means that all of the Headphones had a defect that Plantronics was required to disclose—fails because he does not contest that the Headphones batteries may fail for any number of reasons, including isolated problems in the manufacturing and shipping process or, most

commonly, consumer mishandling. The mere fact that some Headphones' batteries failed therefore says nothing about the existence of any systemic defect—any more than the fact that some automobile batteries or tires do not last for the entire period of their warranty period means that the entire product line is defective, or that some light bulbs burn out early means all the bulbs are defective. And here plaintiff does not even allege that his Headphones failed during the warranty period.

Plaintiff also does not allege any facts showing what percentage of the Headphones have failed, or that the Headphones are more likely to fail than other consumer headphones. The FAC contains allegations that the Headphones "often" take long to charge (FAC ¶ 18) and "regularly fail to hold a charge" (*id.* ¶ 4). But such vague and conclusory assertions do not satisfy Rule 9(b). And plaintiff offers no factual basis for concluding that the rate of failure is sufficiently high that it would be reasonable to infer it is the result of a defect rather than any of the other innumerable causes of battery failure.

If anything, plaintiff's allegations prove the absence of systemic defect. Out of the more than 1 million Headphones in the marketplace, plaintiff only points to his Headphones allegedly failing and a small number of unverified and anonymous complaints he or his attorneys found on the internet of customers who had issues with the Headphones from unknown causes. Even assuming that the rate of battery failure in the Headphones is equal to or greater than the number of internet reviews referenced in the FAC, plaintiff still has not come close to showing anything even remotely approaching a large enough number to show a systemic defect. The small handful of reviews alleged here do not rise even to that insufficient level.

VI. CONCLUSION

The FAC should be dismissed.

Dated: March 20, 2019.

JONES DAY

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

Counsel for Defendant
PLANTRONICS, INC.

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Attorneys for Defendant
PLANTRONICS, INC.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

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

Plaintiff,

v.

PLANTRONICS, INC.,

Defendant.

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

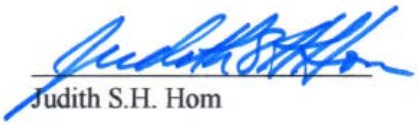
DECLARATION OF JUDITH S.H. HOM IN SUPPORT OF PLANTRONICS' REPLY

I, Judith S.H. Hom, declare as follows:

1. I am Senior Director–Associate General Counsel at Plantronics, Inc. I make this declaration in support of Plantronics' Reply in support of its Motion to Dismiss the Amended Complaint in this matter. I have personal knowledge of the facts stated in this declaration, and if called as a witness I could and would testify competently to them.

2. On September 18, 2018, five days after Plaintiff Phil Shin commenced this lawsuit, Plantronics' legal department received a certified letter from Plaintiff's counsel, Jeffrey Goldenberg, dated September 12, 2018. I personally signed the return receipt for the letter. A true and correct copy of the letter is attached hereto as Exhibit A.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Executed this 19th day of March, 2019, in San Francisco, California.



Judith S.H. Hom

Goldenberg Schneider, LPA

September 12, 2018

Via Certified Mail/Return Receipt Requested
Plantronics, Inc.
345 Encinal Street
Santa Cruz, California 95060

Re: *Gaffney v. Plantronics, Inc. – Defective Plantronics BackBeat Fit Headphones*

Dear Sir or Madam:

We represent James Gaffney, Phil Shin, and Joni Ragain ("Claimants"), individuals who purchased Plantronics BackBeat FIT wireless headphones ("Headphones") manufactured, marketed and warranted by Plantronics, Inc. ("Plantronics"). Claimants purchased the Headphones after reviewing and relying on representations on Plantronics' website, marketing materials, and product packaging that the Headphones are "sweatproof," "waterproof," and capable of providing "up to 8 hours" of wireless listening – enough to "[p]ower through a week of workouts from a single charge." Contrary to Plantronics' representations, the Headphones are not sweatproof or waterproof. Nor do they provide eight hours of listening on a single charge. This is because the Headphones contain one or more defects that cause the battery life to diminish and eventually stop retaining a charge after normal usage, especially when the Headphones are exposed to sweat or water. As a result of the defect(s), the Headphones regularly fail to hold a reasonable charge.

Please take notice that it has come to the attention of Claimants and other purchasers of the Headphones that Plantronics has engaged in deceptive, fraudulent and misleading consumer practices in connection with the marketing and sale of the Headphones in violation of the Consumers Legal Remedies Act ("CLRA"), Cal.Civ.Code § 1750 *et seq*. Specifically, consumers, including Claimants, allege that Plantronics has engaged in unfair or deceptive trade practices that violated Cal. Civ. Code § 1770(a) by, among other things, failing to disclose the defective nature of the Headphones, representing that the Headphones had characteristics and benefits that they do not have (e.g., durability, battery-life, sweatproof, waterproof, the ability to use during workouts), representing that the Headphones were of a particular standard, quality, or grade when they were of another, and advertising Headphones with the intent not to sell them as advertised. *See* Cal. Civ. Code §§ 1770(a)(5), (a)(7), (a)(9).

As a result, Claimants and consumers have incurred substantial damages. Based upon our investigation and the numerous experiences of consumers, we believe and allege that the Headphones cannot and do not perform as Plantronics claims. Claimants further believe and allege that Plantronics knew, or, at a minimum, should have known, that the Headphones are defective and incapable of performing as Plantronics claims.

One West Fourth Street
18th Floor
Cincinnati, Ohio 45202

TEL: (513) 345.8291
FAX: (513) 345.8294

In addition, on behalf of Claimants and a nationwide class of similarly-situated consumer purchasers of the Headphones, Claimants hereby notify you of your violations of the Magnuson-Moss Warranty – Federal Trade Commission Improvement Act, 15 U.S.C. § 2301, *et seq.* ("MMWA"). Numerous consumers have complained to Plantronics about the Headphones' battery defect, but Plantronics has refused to repair the Headphones or provide replacement headphones that conform to Plantronics' representations. This conduct violates the MMWA. Consumers, including Claimants, reasonably relied on Plantronics' warranties in making their purchase decisions.

This Notice is being served on behalf of Claimants and all similarly situated consumers nationwide, who hereby demand that, within 30 days of the date of this letter, you agree to provide to Claimants and similarly situated consumers replacement headphones that fully conform to your prior representations, or otherwise provide to Claimants and similarly situated consumers full refunds of their purchase price.

We have sent this letter directly to you in order to fully comply with the requirements of Cal.Civ.Code § 1782 and the MMWA. We, of course, hope that you will act immediately to rectify this situation and stand ready to discuss a reasonable resolution of this matter on the terms outlined above or on similar terms acceptable to Claimants and similarly situated consumers nationwide.

If you have any questions, require any additional information, or would like to discuss these matters, please do not hesitate to contact me.

Sincerely,

Jeffrey S. Goldenberg