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APPLE INC.

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN FRANCISCO

JOHN KEELEY, individually and on behalf of all others similarly situated,

Plaintiff,

v.

APPLE INC.,

Defendant.

Case No. CGC-21-589534

DEFENDANT APPLE INC.'S NOTICE OF DEMURRER AND DEMURRER TO PLAINTIFF'S FIRST AMENDED COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES

Hearing Date: June 24, 2021
Time: 9:30 a.m.
Department: 302

First Amended Complaint Filed:
April 7, 2021

NOTICE OF DEMURRER

PLEASE TAKE NOTICE that on June 24, 2021, at 9:30 am, or as soon thereafter as the matter may be heard in Department 302 of the above-captioned Court, before the Hon. Ethan P. Schulman, located at 400 McAllister Street, San Francisco, California 94102, Defendant Apple Inc. ("Apple") will and hereby does demur to Plaintiff John Keeley's First Amended Complaint ("FAC"). The Demurrer is made pursuant to Code of Civil Procedure sections 430.10(e) and 430.30(a), based on this Notice of Demurrer and Demurrer, Memorandum of Points and Authorities, all papers and records on file in this action, arguments of counsel, and such other matters as may be presented to the Court.

DEMURRER

Pursuant to sections 430.10(e) and 430.30(a) of the California Code of Civil Procedure, Apple demurs to the alleged causes of action in Plaintiff's FAC.

DEMURRER TO FIRST CAUSE OF ACTION: CONSUMERS LEGAL REMEDIES ACT ("CLRA") CAL. CIVIL CODE § 1750

1. Plaintiff's first cause of action for violation of the CLRA fails to allege facts sufficient to constitute a cause of action. Specifically, Plaintiff has failed to plausibly plead facts to establish that Apple had knowledge of the alleged defect at the time Plaintiff purchased his AirPods Max headphones, or that Apple committed any fraudulent misrepresentation or omission.

DEMURRER TO SECOND CAUSE OF ACTION: UNFAIR COMPETITION LAW ("UCL") CAL. BUS. & PROF. CODE § 17200

2. Plaintiff's second cause of action for violation of the UCL fails to allege facts sufficient to constitute a cause of action. Specifically, Plaintiff has failed to plausibly allege facts to establish that Apple had knowledge of the alleged defect at the time Plaintiff purchased his AirPods Max headphones, or that Apple committed any fraudulent misrepresentation or omission. Additionally, Plaintiff has not alleged any predicate unlawful conduct to state a claim under the "unlawful" prong of the UCL or any unfair conduct to state a claim under the "unfair" prong of the UCL.

DEMURRER TO THIRD CAUSE OF ACTION:
BREACH OF IMPLIED WARRANTY PURSUANT TO SONG-BEVERLY CONSUMER WARRANTY ACT, CAL. CIVIL CODE §§ 1791.1 AND 1792

3. Plaintiff's third cause of action for breach of the implied warranty of merchantability under the Song-Beverly Consumer Warranty Act ("Song-Beverly") fails to allege facts sufficient to constitute a cause of action. Specifically, Plaintiff has failed to plead facts showing that the AirPods Max he bought were unmerchantable, i.e., unfit for their ordinary use, as is required to state a claim.

DEMURRER TO FOURTH CAUSE OF ACTION:
BREACH OF EXPRESS WARRANTY
CAL. COMMERCIAL CODE § 2313

4. Plaintiff's fourth cause of action for breach of express warranty under California Commercial Code § 2313 fails to allege facts sufficient to constitute a cause of action. Specifically, as pled, the alleged "defect" at issue is design defect that, under California law, is not covered by Apple's one-year Limited Warranty for "defects in materials and workmanship."

DEMURRER TO FIFTH CAUSE OF ACTION:
COMMON LAW FRAUD/FRAUDULENT CONCEALMENT

5. Plaintiff's fifth cause of action for common law fraud or fraudulent concealment fails to allege facts sufficient to constitute a cause of action. Specifically, Plaintiff has failed to plausibly allege facts to establish that Apple had knowledge of the alleged defect at the time Plaintiff purchased his AirPods Max headphones, or that Apple committed any fraudulent misrepresentation or omission. Additionally, Plaintiff has failed to plead facts establishing that Apple "concealed" the alleged defect.

DEMURRER TO SIXTH CAUSE OF ACTION:
UNJUST ENRICHMENT

6. Plaintiff's sixth cause of action for unjust enrichment fails to allege facts sufficient to constitute a cause of action. Specifically, unjust enrichment is not an independent cause of action in California, and, regardless, unjust enrichment is not available where, as here, an express contract (Apple's Limited Warranty) governs Plaintiff's purchase.

Dated: April 16, 2021

O'MELVENY & MYERS LLP

By: /s/ Matthew D. Powers
Matthew D. Powers

Attorneys for Defendant
APPLE INC.

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I. INTRODUCTION

Although Apple *repeatedly* tells customers that its new high-end, studio-quality AirPods Max headphones "aren't waterproof or water resistant" and "not to get moisture in any openings," Plaintiff John Keeley nevertheless contends Apple committed "fraud" because his AirPods Max suffered water damage. Specifically, Plaintiff alleges that his AirPods Max have a "latent and material defect" that can, in rare circumstances, cause "condensation" to "accumulate inside the ear cups," resulting in what he describes as "occasional" performance issues. FAC ¶¶ 4, 15. But as pled, the "condensation" Plaintiff alleges may simply be sweat from exercise or prolonged use. *E.g.*, *id*. ¶ 13 ("taking a walk" outside), ¶ 33 (going "from place to place for 6 hours or so"). Regardless of the sources of the "condensation" at issue, Plaintiff's claims all fail as a matter of law because he has not pled key facts that are necessary for each of his claims.

First, Plaintiff's fraud claims all fail for a simple reason: Plaintiff has not plausibly shown that Apple actually *knew* about the alleged "condensation" defect at the time Plaintiff bought his AirPods Max. *E.g.*, *Wilson v. HP*, 668 F.3d 1136, 1145-46 & n.5 (9th Cir. 2012) ("Plaintiffs must allege HP's knowledge of a defect to succeed on their claims of deceptive practices and fraud."). Here, Plaintiff's allegations of "knowledge" are based largely on purported customer complaints and repair records. FAC ¶¶ 40-41. But Plaintiff *preordered* his AirPods Max, before they were available to the public. The complaints and repair records that he cites as proof of Apple's "knowledge" thus *postdate* his purchase and show nothing about Apple's "knowledge" at the time of sale. *Wilson*, 668 F.3d at 1147-48 (complaints *after* plaintiffs bought laptops "do not support an inference that HP was aware of the defect" at the time of sale).

Second, to the extent Plaintiff's fraud claims are based on purported "omissions"—i.e., an alleged failure to disclose the effects of water or moisture on the AirPods Max—those claims fail because Apple explicitly and repeatedly cautioned users "not to get moisture in any openings" since AirPods Max "aren't waterproof or water resistant." *E.g.*, FAC ¶ 32. Although Plaintiff appears to contend that those explicit disclosures were inadequate, he never explains what else he believes Apple should have disclosed, let alone how those additional disclosures (whatever they

may have been) would have affected his own purchase decision—since Plaintiff admits he did not see *any* Apple statements about the headphones before his purchase, further disclosures in Apple materials would not have impacted his decision to buy AirPods Max.

Third, to the extent Plaintiff's fraud claims are based on "affirmative misrepresentations," those claims fail because Plaintiff has not identified, let alone pled his personal reliance on, any actionable false statement. The statements cited in Plaintiff's complaint—e.g., that AirPods Max are "innovative" and "a perfect balance of exhilarating high-fidelity audio and the effortless magic of AirPods," FAC ¶¶ 3, 28—are the types of non-actionable statements about product superiority that courts routinely reject as a basis for fraud. *E.g.*, *Oestreicher v. Alienware*, 544 F. Supp. 2d 964, 973 (N.D. Cal. 2008). And, in any event, Plaintiff does not allege he even saw, much less relied on, these (or any other) Apple statements when he bought his AirPods Max—instead, he says "before purchasing his AirPods Max" he relied only on "his previous experience with Apple products." FAC ¶ 12. Without a plausible allegation that Plaintiff saw and relied on a false representation, his fraud claims must be dismissed. *E.g.*, *In re Tobacco II*, 46 Cal. 4th 298, 306 (2009) ("plaintiff must plead and prove actual reliance").

Fourth, Plaintiff's express warranty claim fails because, as multiple courts have held, written warranties like Apple's that cover "defects in materials and workmanship" do *not* cover an alleged defect in "design" at issue here. FAC ¶ 38 ("Apple's own design Defect" causes moisture); *Anderson v. Apple Inc.*, 2020 WL 6710101, at *19 (N.D. Cal. Nov. 16, 2020); *Troup v. Toyota*, 545 F. App'x 668, 669 (9th Cir. 2013) ("In California, express warranties covering defects in materials and workmanship exclude defects in design.") (citing *Daugherty v. Am. Honda*, 144 Cal. App. 4th 824, 830 (2006)). And for an implied warranty claim, Plaintiff must show his AirPods Max are essentially worthless and cannot be reasonably used as headphones—i.e., that they lack "even the most basic degree of fitness for ordinary use." *E.g.*, *Kacsuta v. Lenovo*, 2013 WL 12126775, at *3 (C.D. Cal. July 16, 2013). But here, the alleged defect causes only "occasional" issues (FAC ¶ 15), and Plaintiff admits he still uses the product. *Kacsuta*, 2013 WL 12126775, at *3 (plaintiff "fails to allege that he discontinued his use of the laptop"); *Minkler v. Apple Inc.*, 65 F. Supp. 3d 810, 819 (N.D. Cal. 2014) (plaintiff did not allege "Apple Maps

failed to work at all or even that it failed to work a majority of the time").

Fifth, Plaintiff's claim for "unjust enrichment" fails, as "California does not recognize a separate cause of action for unjust enrichment." *E.g.*, *Brodsky v. Apple Inc.*, 445 F. Supp. 3d 110, 132 (N.D. Cal. 2020). And such a claim could not survive at any rate because an express contract (here, Apple's Limited Warranty) governs Plaintiff's purchase. *Id*.

In short, Plaintiff does not (and likely cannot) plead critical facts that are necessary to support his claims in this case. His complaint should be dismissed.

II. FACTUAL BACKGROUND

Plaintiff's claims here all revolve around what he contends is a "latent defect" in Apple's premier, studio-quality AirPods Max headphones. FAC ¶ 4.[1] Specifically, he alleges his AirPods Max (and all AirPods Max) have a "design defect" that can sometimes cause "condensation" to "accumulate inside the ear cups." *Id*. ¶¶ 4, 7, 38.[2] He says that this "defect" affects "the overall experience and value of the AirPods Max" and causes some devices to experience "occasional" performance and connectivity issues "such as degraded or no sound in one or both of the ear cups, failure to detect the user's ear and the active noise cancellation ('ANC') function, and/or battery charging issues." *Id*. ¶¶ 4, 15.

Although Plaintiff says the "condensation" can occur after "normal use" (*id*. ¶ 4), he does ***not*** claim that the issue is widespread, and his own allegations suggest that the issue typically occurs when users exercise outdoors with or wear their AirPods Max for hours at a time. For example, Plaintiff himself noticed moisture in his AirPods Max ear cups while "taking a walk" outside. *Id.* ¶¶ 13, 15 (Plaintiff "no longer uses the AirPods Max when he is outside"). And while he omits details about that "walk" (declining to say, e.g., whether it was an arduous hike up the hills of San Francisco to Twin Peaks), the excerpts of online forum comments that Plaintiff cites show that users who claim to have experienced water damage often were exercising with or

[1] Plaintiff filed his original complaint on February 1, 2021 and his FAC on April 7, 2021. The only substantive change in the FAC is to the CLRA claim, to add a request for damages after the 30-day statutory notice period had elapsed. *See* FAC ¶¶ 69-71; Cal. Civ. Code § 1782(d).

[2] Unlike other over-ear headphones, Apple's AirPods Max ear cups are magnetic and removable, making any moisture retained from body heat around the ear (or "condensation") more noticeable to users when they remove the ear cups. *Cf.* FAC ¶ 33(g), (i).

wearing their headphones for prolonged periods. *Id*. ¶ 33 ("working out" with AirPods Max; walking from "place to place for about 6 hours or so"; "prolonged usage").

As Plaintiff acknowledges in his complaint, Apple explicitly informs users that AirPods Max headphones "aren't waterproof or water resistant" and that users should avoid activities that could "get moisture in any openings." *Id.* ¶ 32 ("[A]void getting moisture in any openings"; "[M]ake sure not to get any liquid in the openings"). Despite these clear disclosures, Plaintiff claims that Apple made some sort of "omission" by "failing to disclose" information about the "defect" (or the effects of moisture on AirPods Max) and made "misrepresentations" about the product. But he neither explains how any additional disclosures would have affected his purchase decision nor pleads *facts* to show that Apple was even aware of this alleged "condensation" issue at the time Plaintiff bought his AirPods Max. According to Plaintiff, he preordered his AirPods Max on December 8, 2020, before they were available for shipment to the public on December 15, 2020. *Id.* ¶¶ 11, 21. And while Plaintiff includes a generic allegation (on "information and belief") that Apple "knew or should have known" about this issue, the only *facts* that he pleads to show Apple's "knowledge" are online complaints and customer repair and warranty records that, by definition, are from *after* Plaintiff preordered his AirPods Max. *Id.* ¶¶ 40-41.

In his complaint, Plaintiff also contends Apple made false or misleading statements about the headphones. For example, Plaintiff says Apple "boasts" that AirPods Max are "innovative" and deliver "unparalleled wireless audio" for a "theater-like experience"—a "perfect balance of exhilarating high-fidelity audio and the effortless magic of AirPods." *Id.* ¶¶ 3, 28-31. But he never explains why these statements are false—his claim is not that the AirPods Max are "not innovative" or fail to provide a "theater-like experience," his claim is that the headphones can become damaged if exposed to moisture. In any event, Plaintiff does not plead he personally saw or relied on any of the images or statements cited in his complaint. Instead, he admits he bought his headphones based entirely on his "previous experience" with Apple and did not personally see any of the images or statements he now claims are "misleading." *Id.* ¶ 12.

Based on these allegations, Plaintiff asserts claims on behalf of "all California citizens who purchased Apple AirPods Max headphones" for: (1) violation of the CLRA, Cal. Civ. Code

§ 1750 *et seq*., (2) violation of the UCL, Cal. Bus. & Prof. Code § 17200 *et seq*., (3) breach of the implied warranty of merchantability under the Song-Beverly Act, Cal. Civ. Code §§ 1791.1 and 1792, (4) breach of express warranty, Cal. Comm. Code § 2313, (5) common law fraud/fraudulent concealment, and (6) unjust enrichment. FAC ¶ 48, Claims I-VI.

III. LEGAL STANDARD

A demurrer should be sustained "where the complaint 'does not state facts sufficient to constitute a cause of action.'" *Osornio v. Weingarten*, 124 Cal. App. 4th 304, 315 (2004); Cal. Civ. Proc. Code § 430.10(e). On demurrer, courts must assume the truth of well-pled facts, but need not accept "contentions, deductions, or conclusions of fact or law." *Cedar Fair, L.P. v. City of Santa Clara*, 194 Cal. App. 4th 1150, 1159 (2011). For a complaint to state a cause of action, it must contain a statement of facts that, without the aid of other conjectured facts not stated, shows a complete cause of action. *Garcia v. Super. Ct.*, 50 Cal. 3d 728, 737 (1990); *Baldwin v. AAA N. Cal., Nev. & Utah Ins.*, 1 Cal. App. 5th 545, 551 (2016).

IV. PLAINTIFF'S FRAUD CLAIMS FAIL AS A MATTER OF LAW

Plaintiff's fraud claims under the CLRA, UCL, and common law fail for multiple reasons. ***First***, Plaintiff has not pled facts to show Apple's "knowledge" of the alleged defect at the time he bought his AirPods Max, as is required under California law. ***Second***, to the extent Plaintiff is trying to plead fraud claims based on an alleged "omission," those claims fail because Apple explicitly told users not to get moisture in the headphones and Plaintiff does not say what else Apple supposedly should have or was required to disclose. And, ***third***, to the extent Plaintiff is claiming Apple made affirmative misrepresentations, those claims likewise fail as Plaintiff has pled no actionable misrepresentation or personal reliance on any such "misrepresentation."

A. Plaintiff Fails to Establish Apple's Pre-Sale Knowledge of the Alleged Defect

Plaintiff's fraud claims all fail—whether based on alleged affirmative misrepresentations or omissions—because Plaintiff has not pled that Apple actually knew about the alleged defect at the time he bought his AirPods Max. Obviously, a manufacturer cannot fraudulently "fail to disclose" or "misrepresent" information it does not possess, which is why the UCL, CLRA, and California common law all require a showing of "knowledge of a defect" at the time of sale. *E.g.*,

Wilson, 668 F.3d at 1145-46 & n.5 ("Plaintiffs must allege HP's knowledge of a defect to succeed on their claims of deceptive practices and fraud."); *Grodzitsky v. Am. Honda Motor*, 2013 WL 690822, at *6 (C.D. Cal. Feb. 19, 2013) ("plaintiffs must sufficiently allege that a defendant was aware of a defect ***at the time of sale*** to survive a motion to dismiss"); *Coleman-Anacleto v. Samsung Elec.*, 2017 WL 86033, at *7-8 (N.D. Cal. Jan. 10, 2017) (knowledge required for affirmative misrepresentation and omission claims); *Deras v. Volkswagen*, 2018 WL 2267448, at *4 (N.D. Cal. May 17, 2018) ("UCL, CLRA, and fraud by omission claims require [plaintiff] to allege that VW had knowledge of the alleged defect at the time of sale or lease."); *Hauck v. AMD*, 2019 WL 1493356, at *11 (N.D. Cal. Apr. 4, 2019) ("Under California law, a manufacturer must have known of the defect at the time of sale."), *aff'd*, 816 F. App'x 39 (9th Cir. 2020).

Here, Plaintiff's assertion (on "information and belief") that Apple was "well aware" of the alleged defect depends on *post-sale* customer complaints, repair records, and warranty service that—by definition—occurred (if at all) *after* Plaintiff's purchase. FAC ¶¶ 40-41 ("through (a) [Apple's] own records of customers' complaints, (b) Apple Store repair records, (c) warranty and post-warranty claims, and (d) complaints online, on its own community boards, in news articles, and on third-party websites"). *Id.* ¶ 41; *see also id.* ¶ 40 ("Apple knew or should have known" of the defect from "its own internal records, and from complaints on Apple's website and third-party forums" and "directly to Apple representatives").[3] But Plaintiff *preordered* his AirPods Max on December 8, 2020—*before* the product had been shipped to any customers. *Id*. ¶ 11 (Plaintiff preordered his AirPods Max on December 8, 2020); ¶ 21 ("Apple introduced the AirPods Max for pre-order on December 8, 2020, with availability beginning on December 15, 2020."). Thus, *all* customer complaints, repair records, and warranty service necessarily postdate his purchase and could not as a matter of law prove Apple's pre-sale "knowledge." *Wilson*, 668 F.3d at 1147-48 (complaints *after* plaintiffs bought laptops "do not support an inference that HP was aware of the defect" at the time of sale); *Grodzitsky*, 2013 WL 690822, at *7 ("Nor can Plaintiffs establish a plausible inference of knowledge based on their allegation that Defendant received customer

[3] Alleging a manufacturer "knew or should have known" of a defect is insufficient for fraud. *See Morris v. BMW*, 2007 WL 3342612, at *6 (N.D. Cal. Nov. 7, 2007) (that "BMW 'knew or should have known' of the defects … may be enough to sustain a negligence action, but not fraud").

complaints *after* the sales of the vehicles in question."); *In re Sony Grand*, 758 F. Supp. 2d 1077, 1095 (S.D. Cal. 2010) ("no duty to disclose facts of which it was unaware").[4]

To be sure, Plaintiff does include a generic assertion that Apple was "aware" of the "condensation" issue because of "pre-release research, development, and testing." FAC ¶ 41. But as multiple courts have held, a "generalized assertion" that a manufacturer "knew" of an issue because of "unspecified pre-release testing" is insufficient under California law. *E.g.*, *Grodzitsky*, 2013 WL 690822, at *6 ("Plaintiff's generalized assertion that unspecified 'pre-release testing data' and 'aggregate data from Honda dealers' fails to suggest how this information could have informed Defendant of the alleged defect at the time of sale."); *Herremans v. BMW*, 2015 WL 12712082, at *10 (C.D. Cal. Feb. 19, 2015) (rejecting "conclusory" references to "'pre-release testing data, warranty data, customer complaint data, and replacement part sales data' as 'other internal sources of aggregate information about the problem'"). And here, the only specific "pre-release testing" Plaintiff cites has nothing to do with water resistance or "condensation." FAC ¶ 42 ("battery life"), ¶ 43 (product "fit" and "skin sensitivities"). In short, Plaintiff has failed to plead facts that could establish Apple's pre-sale "knowledge" of the alleged "defect." *Wilson*, 668 F.3d at 1147; *Herremans*, 2015 WL 12712082, at *10; *Grodzitsky*, 2013 WL 690822, at *6; *Burdt v. Whirlpool*, 2015 WL 4647929, at *4-5 (N.D. Cal. Aug. 5, 2015).

B. Plaintiff's "Omission" and "Concealment" Claims Fail

Next, to the extent Plaintiff is claiming that Apple "omitted" or "concealed" information, those claims fail for several additional reasons. First, and most fundamentally, Apple told users—

[4] Courts have also "expressed doubt" that "customer complaints in and of themselves" can show knowledge of a defect, as such complaints "merely establish the fact that some consumers were complaining" but are "insufficient to show that [the manufacturer] had knowledge [of the defect]." *Wilson*, 668 F.3d at 1147; *Baba v. HP*, 2011 WL 317650, at *3 (N.D. Cal. Jan. 28, 2011) ("Awareness of a few customer complaints … does not establish knowledge of an alleged defect."); *Berenblat v. Apple*, 2010 WL 1460297, at *9 (N.D. Cal. Apr. 9, 2010); *Grodzitsky*, 2013 WL 690822, at *7. That is particularly true here—as the few customer complaints Plaintiff cites either postdate his purchase or are undated. FAC ¶¶ 33-37; *Oestreicher*, 544 F. Supp. 2d at 974 n.9 ("Random anecdotal examples of disgruntled customers posting their views on websites at an unknown time is not enough to impute knowledge upon defendants."); *Baba*, 2011 WL 317650, at *3 ("anecdotal complaints without dates or any other information are insufficient to allege that HP possessed knowledge of the putative defect"); *Wilson*, 668 F.3d at 1148 ("undated customer complaints … provide no indication whether the manufacturer was aware of the defect *at the time of sale*").

explicitly and repeatedly—that AirPods Max "aren't waterproof or water resistant" and thus that moisture could cause issues. *See* FAC ¶ 32 ("Avoid getting moisture in any openings"; "Make sure not to get any liquid in the openings"). Under these circumstances, Apple had no further obligation to disclose that using non-waterproof or water-resistant headphones in ways that could result in sweat or other moisture might in rare instances lead to performance issues. *E.g.*, *Marcus v. Apple Inc.*, 2015 WL 1743381, at *2-3 (N.D. Cal. Apr. 16, 2015) (no omission claim where overheating disclosed in user guide). This is particularly true given that California courts have long "rejected a broad obligation to disclose," instead limiting a manufacturer's duty to its "warranty obligations absent either an affirmative misrepresentation or a safety issue." *Wilson*, 668 F.3d at 1141-42 (requiring manufacturers to disclose every conceivable way a product might malfunction would make "product defect litigation … as widespread as manufacturing itself"); *Daugherty*, 144 Cal. App. 4th at 835 ("We cannot agree that a failure to disclose a fact one has no affirmative duty to disclose is 'likely to deceive[.]'"). Because Plaintiff did not—and could not—plead any affirmative misrepresentation (*infra*, Section IV.C) or safety issue, he is unable to show Apple had any additional disclosure obligation as a matter of law. *Id.*[5]

Nor does Plaintiff even attempt to explain what else Apple should have disclosed or how those additional disclosures (whatever they may have been) would have influenced his purchase decision. For an omission claim, Plaintiff must show Apple knowingly failed to disclose some specific information, leading Plaintiff to rely on a mistaken "expectation or assumption" about the AirPods Max at the time of his purchase. *E.g.*, *Daugherty*, 144 Cal. App. 4th at 838; *In re Tobacco II*, 46 Cal. 4th at 320; *Wilson*, 668 F.3d at 1145. But here, again, the only statements Apple made about the effect of moisture on the AirPods Max very clearly communicated ***not*** to get "moisture" or "liquid in any openings" of the headphones. *E.g.*, FAC ¶ 32. Plaintiff does not explain how additional information would have—or even *could* have—affected his expectations

[5] Plaintiff appears to contend that Apple had a "duty to disclose the Defect" based on factors discussed in *LiMandri v. Judkins*, 60 Cal. App. 4th 326 (1997), including "exclusive knowledge" of a defect and "partial" misrepresentations. FAC ¶¶ 114-15. But putting aside whether *LiMandri* even applies here, Plaintiff fails to allege a duty based on those factors—as discussed above, Plaintiff's allegations fail to show Apple had *any* knowledge of the alleged defect at the time he bought his AirPods Max and thus certainly did not have "exclusive" knowledge; and Plaintiff has not pled any actionable misrepresentation, partial or otherwise. *Infra* Section IV.C.

or purchase decision, particularly since Plaintiff admits he did not see *any* Apple statement(s) about the AirPods Max until after he bought the product. *See id*. ¶ 12 ("[b]efore purchasing his AirPods Max," Plaintiff relied only on "his previous experience with Apple products"); *see also Daugherty*, 144 Cal. App. 4th at 838; *In re Tobacco II*, 46 Cal. 4th at 320.[6]

C. Plaintiff's Misrepresentation Claims Fail

To the extent Plaintiff is claiming that Apple made affirmative misrepresentations, those claims likewise fail because Plaintiff has neither identified—nor pled personal reliance on—any actionable false statement. In his complaint, Plaintiff says that:

- Apple "touts" the AirPods Max for "delivering unparalleled wireless audio" and being "innovative wireless headphones that bring the magic of AirPods to an over-ear design with high fidelity sound" to deliver a "breakthrough listening experience." ¶ 3.
- Apple's "landing page" for the AirPods Max shows certain product features and states that the headphones are "a perfect balance of exhilarating high-fidelity audio and the effortless magic of AirPods. The ultimate personal listening experience is here." ¶ 28.
- Apple displays the product's listening modes (e.g., "Active Noise Cancellation" and "Transparency mode," *id.* ¶ 29), and states that AirPods Max give users "a theater-like experience," and offer "20 hours of listening, movie watching, or talk time," with "a quick 5-minute charge" to deliver "1.5 hours of listening." ¶¶ 30-31.
- Apple informs users repeatedly that the AirPods Max "aren't waterproof or water resistant, so be careful not to get moisture in any openings," and to "[m]ake sure not to get any liquid in the openings." ¶ 32.

But, ***first***, Plaintiff does not allege that he personally saw—much less relied on—any of those statements. In California, fraud claims require that a plaintiff allege "actual reliance" on a misrepresentation—i.e., that the false statement was "an immediate cause" of his alleged harm.

[6] Plaintiff also comes nowhere near pleading "concealment." Under California law, "mere non-disclosure" is not enough for concealment. *Czuchaj v. Conair Corp.*, 2014 WL 1664235, at 6 (S.D. Cal. Apr. 18, 2014). Instead, Plaintiff must show Apple took "affirmative acts … in hiding, concealing, or covering up" a defect. *Id.* (citing *Lingsch v. Savage*, 213 Cal. App. 2d 729, 734 (1963)). And "conclusory allegation[s] that a defendant 'actively concealed facts' is insufficient." *Id.*; *Herron v. Best Buy*, 924 F. Supp. 2d 1161, 1176 (E.D. Cal. 2013) (no concealment claim as "Plaintiff's only active concealment allegation is the conclusory assertion that Defendants 'actively concealed material facts from Plaintiff and the Class.'"). Here, as in *Herron*, Plaintiff alleges only a conclusory assertion that "Defendant intentionally suppressed and concealed material facts about the performance and quality of the AirPods Max." *E.g.*, FAC ¶¶ 111-12; *Herron*, 924 F. Supp. 2d at 1176. He does not support that generic allegation with *facts* even remotely suggesting that Apple took "affirmative acts" to hide any defect—nor could he, as he has not shown that Apple *knew* about the alleged "condensation" issue at the time he bought his AirPods Max and thus obviously could not have hidden it. *See supra*, Section IV.A.

E.g., *In re Tobacco II*, 46 Cal. 4th at 306 (UCL "plaintiff must plead and prove actual reliance"); *Kwikset Corp. v. Super. Ct.*, 51 Cal. 4th 310, 326-27 (2011) ("reliance is the causal mechanism of fraud"); *Durell v. Sharp Healthcare*, 183 Cal. App. 4th 1350, 1362-67 (2010); *Phillips v. Apple*, 2016 WL 1579693, at *7 (N.D. Cal. Apr. 19, 2016) (no claim where plaintiffs failed to allege that they saw misrepresentations about Wi-Fi Assist); *Ferrari v. Mercedes-Benz*, 2019 WL 2103438, at *4 (N.D. Cal. May 14, 2019). Here, Plaintiff did not see or rely on any Apple statement before buying his headphones—instead, he relied only "on his previous experience with Apple products and trusted that they were high-quality, high-performance, durable products." FAC ¶ 12.

Second, even if Plaintiff had seen the Apple statements referenced in his complaint, those statements are not actionable under California law. To be actionable, a statement must make a "specific and measurable claim, capable of being proved false or of being reasonably interpreted as a statement of objective fact." *E.g.*, *Rasmussen v. Apple*, 27 F. Supp. 3d 1027, 1039-43 (N.D. Cal. 2014); *Ahern v. Apple*, 411 F. Supp. 3d 541, 554-56 (N.D. Cal. 2019); *Oestreicher*, 544 F. Supp. 2d at 973 ("Generalized, vague, and unspecified assertions constitute 'mere puffery' upon which a reasonable consumer could not rely, and hence are not actionable."); *Vitt v. Apple*, 469 F. App'x 605, 607 (9th Cir. 2012) ("'mere puffing' cannot support liability under California consumer protection laws"); *Elias v. HP*, 903 F. Supp. 2d 843, 855 (N.D. Cal. 2012) ("computer is 'ultra-reliable' or 'packed with power' say nothing about the specific characteristics or components of the computer"). And a representation that "merely states in general terms that one product is superior is not actionable." *Rasmussen*, 27 F. Supp. 3d at 1039. Here, the statements that Plaintiff cites—"innovative," "unparalleled," "theater-like," and "exhilarating high-fidelity" audio—are precisely the types of generalized, non-actionable statements about product superiority that courts regularly reject on the pleadings. *E.g.*, *Oestreicher*, 544 F. Supp. 2d at 973 ("uncompromising quality," "faster, more powerful," "more innovative," "higher performance" not actionable); *Elias*, 903 F. Supp. 2d at 855 ("ultra-reliable" and "packed with power" not actionable); *Brothers v. Hewlett Packard*, 2006 WL 3093685, at *5 (N.D. Cal. Oct. 31, 2006) ("high performance," "top of the line," functioning like "an in-home digital entertainment and

photo studio," with "the most cinematic graphics and special effects" not actionable).[7]

Third, Plaintiff fails to allege any Apple statement was false *when made*. *E.g.*, *Sateriale v. RJ Reynolds*, 697 F.3d 777, 794 (9th Cir. 2012) ("The plaintiffs do not assert … that those representations were false or deceptive when made."); *Muse Brands, LLC v. Gentil*, 2015 WL 4572975, at *4-5 (N.D. Cal. July 25, 2015) (to "qualify as a misrepresentation, the complaint must allege facts sufficient to plausibly establish that the statement was false when made"); *In re Sony Grand*, 758 F. Supp. 2d at 1094 ("Plaintiffs have not sufficiently shown that the statements were false or misleading when made."); *Ahern*, 411 F. Supp. 3d at 559. Here, Plaintiff does not deny, for example, that AirPods Max are "innovative," or that they can deliver "unparalleled" wireless audio and offer "20 hours of listening, movie watching, or talk time." FAC ¶¶ 3, 28-32. These statements are indisputably true when the products are sold, and multiple courts have rejected attempts by other plaintiffs to transform true statements about product features into promises that those features will work indefinitely without issue. *E.g.*, *In re MyFord Touch*, 46 F. Supp. 3d 936, 954 (N.D. Cal. May 30, 2014) (plaintiffs did not allege that the "system [did] not have the features described," since "their beef is that the features … did not work"); *In re iPhone 4S*, 2014 WL 589388, at *7 (N.D. Cal. Feb. 14, 2014) ("Absent a representation that a product feature would perform at a certain level, a reasonable consumer is unlikely to be deceived by advertising that merely demonstrates the product has such a feature."); *Ahern*, 411 F. Supp. 3d at 559 (citing, e.g., *Deburro v. Apple Inc.*, 2013 WL 5917665, at *4 (W.D. Tex. Oct. 31, 2013) ("Plaintiffs have not identified a single *false* representation.… It would be false to represent the MacBook has USB ports when it does not have USB Ports. It is not false to represent the MacBook has USB ports when it in fact has them, even if those ports may cease to function.")).

[7] The only Apple statements that conceivably could be viewed as grounded in objective fact are the alleged statements about "20 hours" of battery life, a "quick 5-minute charge delivers 1.5 hours of listening," and Apple's disclosure that the AirPods Max "aren't waterproof or water resistant." FAC ¶¶ 31-32. But as discussed above, Plaintiff does not allege he saw or relied on these statements, nor does he explain how any of the statements were false. And because the last statement—that AirPods Max "aren't waterproof or water resistant"—is true, it undermines Plaintiff's contention that Apple "failed to disclose" information about the effects of water and moisture on the product. *See supra*, Section IV.B.

V. PLAINTIFF HAS NO UCL "UNLAWFUL" OR "UNFAIR" CLAIM

As set out above, Plaintiff's claims under the "fraud" prong of the UCL fail for numerous reasons. To the extent Plaintiff is also trying to plead claims under the UCL's "unlawful" and "unfair" prongs, he does not (and cannot) do so.

No UCL "Unlawful" Claim. Plaintiff's UCL "unlawful" claim fails because he has pled no predicate violation. A UCL claim under the "unlawful" prong "borrows violations of other laws and treats these violations … as unlawful practices." *Farmers v. Super. Ct.*, 2 Cal. 4th 377, 383 (1992); *Hadley v. Kellogg*, 243 F. Supp. 3d 1074, 1094 (N.D. Cal. 2017). Here, Plaintiff's UCL "unlawful" claim is predicated on his CLRA, Song-Beverly Act, and express warranty claims. FAC ¶ 82. But because those claims fail, as discussed in Sections IV and VI, his UCL "unlawful" claim based on those claims fails too. *Ingels v. Westwood One*, 129 Cal. App. 4th 1050, 1060 (2005) ("defendant cannot be liable under § 17200 for committing 'unlawful business practices' without having violated another law"); *Hadley*, 243 F. Supp. 3d at 1094.

No UCL "Unfair" Claim. Plaintiff's UCL "unfair" claim likewise fails. That is because Plaintiff's complaint does not articulate any theory of unfair conduct, instead merely repeating the conclusory assertion that Apple has engaged in "unfair, deceptive, and/or fraudulent business practices." FAC ¶¶ 9, 60, 83-85. But conclusory assertions unsupported by facts cannot as a matter of law state a claim. *Cedar*, 194 Cal. App. 4th at 1159 (court may not accept "contentions, deductions, or conclusions of fact or law"). And to the extent Plaintiff contends Apple's alleged misrepresentations or omissions constitute "unfair" conduct, that similarly should be rejected—courts have repeatedly held that where alleged "unfair" conduct overlaps with the conduct alleged to constitute fraud, as here, then the UCL "unfair" claim fails if the fraud claims fail. *E.g.*, *Hadley*, 243 F. Supp. 3d at 1104-05; *Hoai Dang v. Samsung*, 2018 WL 6308738, at *10 (N.D. Cal. Dec. 3, 2018); *supra* Section IV. Moreover, California law is clear that Plaintiff's failure to plead Apple's pre-sale knowledge of the purported defect (*supra* Section IV.A) "is fatal to [his] claim of 'unfairness' as well." *In re Samsung Galaxy Smartphone Mktg. & Sales Prac. Litig.*, 2020 WL 7664461, at *11 (N.D. Cal. Dec. 24, 2020); *Wilson*, 668 F.3d at 1145 n.5 ("failure to disclose a fact that the manufacturer does not have a duty to disclose, *i.e.*, a defect of which it is

not aware, does not constitute an unfair or fraudulent practice," citing *Daugherty*, 144 Cal. App. 4th at 838-39).

VI. PLAINTIFF'S WARRANTY CLAIMS FAIL AS A MATTER OF LAW

A. Plaintiff's Express Warranty Claim Must Be Dismissed

Next, Plaintiff's express warranty claim (based on Apple's one-year Limited Warranty) should be dismissed. *E.g.*, FAC ¶¶ 102-05. Here, the alleged defect is explicitly pled as a defect in the "design" of the headphones. *Id.* ¶¶ 7, 38 ("Apple's own design Defect" causes the moisture). But Apple's Limited Warranty covers only "defects in materials and workmanship"—and in California, "express warranties covering defects in materials and workmanship exclude defects in design." *E.g.*, *Troup*, 545 F. App'x at 669 (citing *Daugherty*, 144 Cal. App. 4th at 830); *Anderson*, 2020 WL 6710101, at *19 (Apple's Limited Warranty does not cover "design" defects); *Woo v. Am. Honda*, 462 F. Supp. 3d 1009, 1016-17 (N.D. Cal. 2020) ("Under California law, a warranty that provides protection against 'defects in materials or workmanship' does not cover design defects."). Because alleged design defects are not covered by Apple's Limited Warranty, Plaintiff's claim based on that Limited Warranty must be dismissed.[8]

B. Plaintiff's Song-Beverly Implied Warranty Claim Must Be Dismissed

Plaintiff's implied warranty of merchantability claim similarly fails. Cal. Civ. Code §§ 1791.1, 1792. To be "merchantable," a product must be "fit for the ordinary purposes" for which it is used. *Id.*; *Kacsuta*, 2013 WL 12126775, at *3. That means the product need not be defect-free, or even "precisely fulfill the expectation of the buyer," so long as the product "provides for a minimum level of quality." *Kacsuta*, 2013 WL 12126775, at *3 (quoting *Am. Suzuki Motor Corp. v. Super. Ct.*, 37 Cal. App. 4th 1291, 1296 (1995); *Baltazar v. Apple*, 2011 WL 3795013, at *3-4 (N.D. Cal. Aug. 26, 2011). That is, merely alleging that a product had a "defect" or was "inconvenient" to use, without showing that it "failed to work at all or even that it failed to work a majority of the time," is not enough for an implied warranty claim. *Baltazar*,

[8] As some courts have noted, that Plaintiff seeks to represent a class of "all" California purchasers of Apple's AirPods Max reinforces that Plaintiff himself views the alleged defect as one related to the design of the product. *Anderson*, 2020 WL 6710101, at *21 n.11 ("Apple's point that 'the fact that Plaintiffs seek to represent a class of all purchasers of an iPhone XR for all their other claims further shows that they allege a design choice in all iPhone XRs' is well taken.").

2011 WL 3795013, at *3; *Minkler*, 65 F. Supp. 3d at 819 (plaintiff "has not alleged that Apple Maps failed to work at all or even that it failed to work a majority of the time"); *Hauck*, 2019 WL 1493356, at *17 (no implied warranty claim for CPU slowdown by up to 30% due to security issue, as "the AMD processors are certainly still operable … though [they] may be a little less efficient"). Simply put, Plaintiff's burden is high: he must establish that the purported "defect" is so serious and pervasive that his AirPods Max lacked "even the most basic degree of fitness for ordinary use." *Hauck*, 2019 WL 1493356, at *16; *Mocek v. Alfa Leisure, Inc.*, 114 Cal. App. 4th 402, 406 (2003).

Here, Plaintiff cannot do so. That is because Plaintiff does not contend the alleged defect caused anything other than "occasional" performance and connectivity issues—a far cry from the product "fail[ing] to work at all or even … a majority of the time." FAC ¶ 15; *Minkler*, 65 F. Supp. 3d at 819.[9] Perhaps "most telling," *Kacsuta*, 2013 WL 12126775, at *3, is that Plaintiff still uses his AirPods Max—although Plaintiff says he stopped using his AirPods Max "when he is outside" due to the potential effect of "outside temperatures or conditions," he does not claim (or even suggest) that his use of the product indoors or in other circumstances was hindered at all. FAC ¶ 15; *Kacsuta*, 2013 WL 12126775, at *3 (plaintiff "fails to allege that he discontinued his use of the laptop"); *Kent v. HP*, 2010 WL 2681767, at *4 (N.D. Cal. July 6, 2010) (plaintiffs "do not allege that they have been forced to abandon the use of their computers completely"); *Baltazar*, 2011 WL 3795013, at *4 (that iPad overheated when used outdoors or in warm conditions did not render it unfit for its ordinary purpose); *Hauck*, 2019 WL 1493356, at *17 ("[E]ven though [plaintiff] 'no longer uses the processor,' [he] does not allege that his processor is unusable—only that it is somewhat less efficient, and that he chose to stop using the processor. That is insufficient to state a claim for breach of the implied warranty of merchantability."). In short, because the alleged defect, even taken at face value, caused only "occasional" issues and Plaintiff allegedly did not stop using the product, he has not pled that his headphones were so

[9] To be sure, Plaintiff does allege that, in time, his AirPods Max "generated condensation in the ear cups every time he used them, after approximately one hour of use." FAC ¶ 15. But he does ***not*** contend that the condensation caused performance or connectivity issues "every time"—to the contrary, he concedes that the issues arose only "occasionally." *Id.*

"umerchantable" that they lacked "even the most basic degree of fitness for ordinary use." *See Kacsuta*, 2013 WL 12126775, at *3.[10]

VII. PLAINTIFF'S CLAIM FOR UNJUST ENRICHMENT MUST BE DISMISSED

In California, "[u]njust enrichment is not a cause of action," but rather a "general principle underlying various doctrines and remedies, including quasi-contract." *Havilland v. FX*, 21 Cal. App. 5th 845, 870 (2018); *Jogani v. Super. Ct.*, 165 Cal. App. 4th 901, 911 (2008); *Melchior v. New Line*, 106 Cal. App. 4th 779, 793 (2003); *Brodsky*, 445 F. Supp. 3d at 132 ("[C]ourts have consistently dismissed stand-alone claims for unjust enrichment."). Although some courts have "construed purported claims for unjust enrichment as quasi-contract claims seeking restitution," a court may *not* do so "where there exists between the parties a valid express contract." *Brodsky*, 445 F. Supp. 3d at 133; *accord Klein v. Chevron*, 202 Cal. App. 4th 1342, 1388 (2012). Here, as Plaintiff admits, his purchase of AirPods Max was governed by an express contract (Apple's Limited Warranty), and thus his claim for "unjust enrichment" fails. FAC ¶¶ 102-04; *Marcus v. Apple Inc.*, 2015 WL 151489, at *10 (N.D. Cal. Jan. 8, 2015) ("The existence of Apple's express Limited Warranty therefore precludes unjust enrichment as a cause of action.").

VIII. CONCLUSION

For the reasons set out above, Apple requests that the Court sustain its demurrer.

Dated: April 16, 2021

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APPLE INC.

[10] Although Plaintiff cites excerpts of online forums about users who claim to have experienced "condensation" in the ear cups, hundreds of other online posts from customers and independent analysts give the AirPods Max glowing reviews. *E.g.*, https://www.bestbuy.com/site/reviews/apple-airpods-max-space-gray/6373460 (238 reviews of AirPods Max, with a 4.4/5 rating on average and nearly 80% of reviewers saying they "would recommend to a friend"; reviews include "BEST ANC Headphones: THE BEST. Simply stated."; "Absolutely Blown away"; "Best over the ear headphones"); https://www.wired.com/review/apple-airpods-max/ ("Review: AirPods Max … they're the best wireless headphones I've ever heard.").