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SONY CORPORATION

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

IN RE SONY GRAND WEGA KDF-E A10/A20 SERIES REAR PROJECTION HDTV TELEVISION LITIGATION

This Document Relates To: All Actions

Master File No. 08-CV-2276-IEG-WVG

SONY CORPORATION OF AMERICA, SONY ELECTRONICS INC., AND SONY CORPORATION'S NOTICE OF MOTION AND MOTION TO DISMISS FIRST AMENDED CONSOLIDATED COMPLAINT PURSUANT TO FEDERAL RULES OF CIVIL PROCEDURE 12(b)(1), 12(b)(6), AND 9(b)

Date: October 25, 2010
Time: 10:30 a.m.
Judge: Hon. Irma E. Gonzalez
Courtroom: 1

TO ALL PARTIES AND ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that defendants Sony Corporation of America, Sony Electronics Inc., and Sony Corporation (collectively, "Sony") respectfully move the above-captioned Court for an order dismissing with prejudice plaintiff's first amended consolidated complaint and each claim asserted therein pursuant to Federal Rules of Civil Procedure 12(b)(6), 12(b)(1), and 9(b).

This motion will be heard on October 25, 2010, at 10:30 a.m., or as soon thereafter as determined by the Court, located at 940 Front Street, San Diego, CA 92101, before the Honorable Irma E. Gonzalez, courtroom 1.

This motion is based on this Notice of Motion and Motion, the Memorandum of Points and Authorities, the Declaration of Rosemarie Pleschken, the Declaration of Leo P. Norton, and the Request for Judicial Notice, all filed concurrently herewith, all records and papers on file in this action, any oral argument, and any other evidence that the Court may consider in hearing this motion.

Dated: September 20, 2010

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Master File No. 08-CV-2276-IEG-WVG

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF SONY CORPORATION OF AMERICA, SONY ELECTRONICS INC., AND SONY CORPORATION'S MOTION TO DISMISS FIRST AMENDED CONSOLIDATED COMPLAINT PURSUANT TO FEDERAL RULES OF CIVIL PROCEDURE 12(b)(1), 12(b)(6), AND 9(b)

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I. INTRODUCTION

Plaintiffs purport to represent a nationwide class of consumers supposedly victimized by alleged "anomalies" on the screen of a certain line of Sony televisions. Plaintiffs, however, admit that the "anomalies" did not manifest until after more than one year of use. This admission bars plaintiffs' claims under settled California and federal authority. Accordingly, defendants Sony Corporation of America ("SCA"), Sony Electronics Inc. ("SEL"), and Sony Corporation (collectively "Sony") again seek dismissal of each of plaintiffs' claims without leave to amend.

The first amended consolidated complaint (the "FACC") is plaintiffs' fourth complaint in this action. It asserts the same eight claims for relief that plaintiffs asserted in their prior complaints. On August 6, 2010, Judge Whelan dismissed all but one of plaintiffs' claims with leave to amend. Plaintiffs chose to amend, superseding the consolidated complaint, and triggering a new round of pleadings. But the FACC, like the complaints before it, is replete with fatal defects. Indeed, the FACC is virtually identical to the consolidated complaint, except that it adds two named plaintiffs and allegations about certain Sony patents. These differences do not overcome the deficiencies that led to the court's prior dismissal of plaintiffs' claims. Each of plaintiffs' claims should be dismissed without leave to amend, including plaintiffs' breach of express warranty claim, which survived Sony's last motion to dismiss. Plaintiffs' breach of express warranty claim should be dismissed based on additional judicially noticeable facts, authority, and argument presented in this motion.

As an initial matter, plaintiffs continue to demand injunctive relief, but expressly admit in their "Preliminary Statement" that Sony discontinued manufacturing, marketing, and sales of the television models at issue. FACC, ¶ 4. Accordingly, plaintiffs lack standing to obtain injunctive relief under the Unfair Competition Law ("UCL"), False Advertising Law ("FAL"), and Consumer Legal Remedies Act ("CLRA"). Such injunctive relief claims should be dismissed.

Plaintiffs' UCL, FAL, CLRA, and alternative state law claims should be dismissed on several independent grounds. Because plaintiffs concede that the alleged defect did not cause their televisions to malfunction, if at all, until after the one-year warranty period had expired, *see* FACC, ¶¶ 3, 66, it is well-settled that they cannot maintain their UCL, FAL, and CLRA claims

based on Sony's purported failure to disclose the alleged defect. Also, plaintiffs fail to plead their UCL, FAL, CLRA, and alternative state law claims with particularity as required under Rule 9(b). Plaintiffs utterly fail to plead: (1) Sony's knowledge of the alleged defect prior to or contemporaneous with distributing plaintiffs' televisions; (2) the specific representations allegedly made by Sony; (3) any of the specific advertisements that supposedly victimized the plaintiffs; (4) any specifics about when or where they supposedly saw or heard such representations; and (5) reliance on such representations. Further, each of those claims fails because what little plaintiffs have pled about the alleged misrepresentations shows that they are at best non-actionable puffery. The FAL claim also fails because plaintiffs do not identify the advertisements at issue. Their CLRA claim should also be dismissed because all plaintiffs but one failed to file the statutorily required affidavits. And plaintiffs' overreaching claim under the laws of other states should be dismissed because plaintiffs assert it on behalf of putative class members.

Plaintiffs' four warranty claims fare no better. Although Judge Whelan denied Sony's prior motion to dismiss as to their breach of express warranty claim, he did so relying in part on plaintiffs' out-of-context characterization of a single sentence from Sony's "Operating Instructions" for the televisions. The instructions were not before the Court on Sony's last motion to dismiss, but Sony requests judicial notice of them here. Taking the statement in context and considering additional authority, plaintiffs' breach of express warranty claim cannot survive this motion. The express, implied, and Song-Beverly Act warranty claims also fail because the alleged defect arose after the one-year express warranty expired. The implied warranty claim should also be dismissed on the independent ground that plaintiffs lack vertical privity – they did not buy the televisions directly from Sony. Plaintiffs' Song-Beverly Act warranty claim is also defective because the statute only applies to goods sold at retail in California, but with the potential exception of two plaintiffs out of 47, none of the plaintiffs bought their televisions at retail in California. Because plaintiffs cannot state a state-law warranty claim and they again have fewer than 100 named plaintiffs, their Magnuson-Moss Act claim also necessarily falls.

Last, plaintiffs' claims against SCA and Sony Corporation should be dismissed not only for each of the reasons set forth above, but also because plaintiffs fail to allege any specific conduct by either entity. It is undisputed that the three entities are distinct corporations. Although SEL is admittedly their target and plaintiffs' counsel did not name SCA and Sony's Corp. in the nearly identical state court action, plaintiffs improperly lump together all three Sony entities here in clear violation of Rule 9(b)'s requirement that each defendant be apprised of its specific role in the alleged misrepresentations.

For the Court's ease of reference, Sony attaches as Appendix I to this brief a table summarizing each claim asserted by plaintiffs and the grounds for its dismissal. Because each claim suffers from a defect that cannot be cured by amendment and plaintiffs have already had *four* opportunities to plead their claims, each claim should be dismissed with prejudice.

II. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs purport to represent a nationwide class of people who purchased Sony Grand WEGA KDF-E A10 and A20 Series LCD Rear Projection HDTV Televisions (the "Televisions"). FACC, ¶ 3. Plaintiffs contend that the Televisions have an "inherent defect" in the Optical Block (referred to in the FACC as the "Defect"). *Id.* Plaintiffs allege that the purported defect manifests itself more than one year after normal use, and when it manifests, it "produce[s] noticeable video and color anomalies on the screens of the Televisions." *Id.* Plaintiffs' claims fall into two categories: (1) claims based on Sony's purported advertising and marketing of the Televisions; and (2) Sony's purported breach of warranty obligations.

A. Advertising and Marketing Claims.

Plaintiffs assert claims under the UCL (first cause of action), FAL (second cause of action), CLRA (third cause of action), and an alternative claim encompassing various consumer protection statutes of other states (fourth cause of action), based on Sony's purported advertising and marketing of the Televisions. FACC, ¶¶ 88-159. Plaintiffs do not specify the "promotional efforts," "advertisements," or "misrepresentations" that form the basis for these claims. Instead, plaintiffs generally aver that Sony marketed the Televisions as "offering superior picture quality" or providing "excellent video quality." FACC, ¶¶ 57, 70, 74. Plaintiffs' advertising and

marketing claims are also premised on Sony's purported failure to disclose that the Televisions contained an alleged defect. *See, e.g., id*. at ¶ 92.

B. Warranty Claims.

Plaintiffs assert the following claims based on Sony's purported breach of its warranty obligations: breach of the Song-Beverly Consumer Warranty Act (fifth cause of action); breach of the Magnuson-Moss Act (sixth cause of action); breach of express warranty (seventh cause of action); and breach of implied warranty (eighth cause of action). FACC, ¶¶ 160-188.

C. SEL's Express Limited Warranty.

Plaintiffs allege that the Televisions have a one-year written warranty. FACC, ¶¶ 66, 69, 73. Plaintiffs do not attach or quote from the warranty, notwithstanding its importance to plaintiffs' claims, and the repeated references to it in the FACC. The Televisions have a written 1-year labor / 1-year parts Limited Warranty (the "Limited Warranty").[1] The Limited Warranty provides in relevant part:

> Sony Electronics Inc. ("Sony") warrants this Product (including any accessories) against defects in material or workmanship as follows:
>
> 1. LABOR: For a period of one (1) year from the date of purchase, if this Product is determined to be defective, Sony will repair or replace the Product, at its option, at no charge, or pay the labor charges to any Sony authorized service facility. After the Warranty Period, you must pay for all labor charges.
>
> 2. PARTS: In addition, Sony will supply, at no charge, new or rebuilt replacements in exchange for defective parts for a period of one (1) year . . . . After the warranty period, you must pay for all parts costs.
>
> []
>
> To obtain warranty service, you must take the Product, or deliver the Product freight prepaid, in either its original packaging or

[1] The Limited Warranty is attached to Sony's Request for Judicial Notice filed concurrently herewith ("Sony RJN") as Exhibit A. *See also* Declaration of Rosemarie Peschken ("Peschken Decl."), ¶ 2 (authenticating Limited Warranty). The court may consider the Limited Warranty in deciding Sony's motion under the doctrine of "incorporation by reference" because plaintiffs repeatedly reference the Limited Warranty in the FACC. *See, e.g.*, FACC, ¶¶ 66, 69, 73, 177-179. *Van Buskirk v. Cable News Network, Inc.*, 284 F.3d 977, 980 (9th Cir. 2002); s*ee also Hoey v. Sony Elecs., Inc.*, 515 F. Supp. 2d 1099, 1103 (N.D. Cal. 2007) (appeal filed August 1, 2008, Ninth Circuit Docket No. 08-16780).

> packaging affording an equal degree of protection, to any authorized Sony service facility.

Sony RJN, Ex. A.

D. Discontinuance of the Televisions.

The Televisions have been discontinued, and Sony no longer manufactures, markets, or sells them in the United States. FACC, ¶ 4; Peschken Decl., ¶ 4. Sony has no plans to resume doing so because they have been succeeded by newer models. Peschken Decl., ¶¶ 4-6.

E. Plaintiffs' Experiences With the Televisions.

The FACC is notable for what is missing despite this being plaintiffs' *fourth* complaint. Plaintiffs again do not allege any facts regarding their respective purchases (or in one case gift) including: (1) the dates that they purchased the Televisions; (2) where they purchased them; (3) the dates the Televisions purportedly experienced the defect; (4) the dates they respectively demanded a warranty repair; (5) the dates they respectively gave Sony notice of the defect; (6) the dates Sony purportedly refused to repair the Televisions; (7) the price they paid; and (8) whether they have had the Televisions repaired and the cost of any such repair. FACC, ¶¶ 5-51.

Plaintiffs do, however, concede that the alleged defect did not cause the Televisions to malfunction until after the expiration of the one-year Limited Warranty. FACC, ¶ 3 (defect manifests after over one year of normal use); *id*. at ¶¶ 5-51 (plaintiffs' respective Televisions were outside one-year express warranty period when alleged defect caused purported anomalies and plaintiffs demanded warranty repair).

F. Procedural History.

Plaintiffs filed the original complaint on December 8, 2008. In response, Sony filed a motion to dismiss raising numerous fatal defects. Docket No. 4. Instead of opposing Sony's motion, plaintiffs agreed to amend their complaint. Docket No. 7. Plaintiffs filed their first amended complaint ("FAC") on February 18, 2009. Docket No. 8. Plaintiffs' FAC failed to address the fatal defects Sony raised in its original motion to dismiss. Accordingly, Sony filed a second motion to dismiss on March 20, 2009, which was set to be heard on May 4, 2009. Docket No. 12. In the interim, plaintiffs' counsel filed two other related actions in this court: (1) *Bolton,*

et al. v. Sony Corp. of America, Inc., et al., Case No. 09-CV-0620 on March 25, 2009 ("*Bolton*") and (2) *Bashore, et al. v. Sony Corp. of America, Inc., et al.*, Case No. 09-CV-0736 on April 10, 2009 ("*Bashore*"). Shortly thereafter, plaintiffs moved to consolidate all three actions. Docket No. 17. The court granted the motion July 30, 2009, and ordered plaintiffs to file a consolidated complaint and denied Sony's then pending second motion to dismiss as moot. Docket No. 25.

Plaintiffs filed their consolidated complaint on August 14, 2009 (Docket No. 26), and Sony filed another motion to dismiss on September 3, 2009 (Docket No. 27). After the court lifted the brief stay it ordered pending the outcome of a referral to the Judicial Panel on Multidistrict Litigation (Docket Nos. 32, 37), plaintiffs filed a motion to consolidate the *Smart*, *Bolton*, and *Bashore* actions with another related action filed in this court, *Mayer, et al. v. Sony Corp. of America, Inc., et al.*, Case No. 09-CV-2703 W (WVG), and to appoint interim counsel. Docket No. 38.

In a misguided attempt to satisfy Rule 9(b)'s requirement that plaintiffs allege knowledge of the defect with particularly, plaintiffs' consolidated complaint contained allegations from purported "confidential sources." But such allegations proved to be false, and plaintiffs subsequently withdrew them in this case (Docket Nos. 40-41). Remarkably, plaintiffs' counsel asserted the same "confidential sources" allegations in an effort to allege knowledge in a separate action involving different television models pending against Sony in the Southern District of New York. Plaintiffs' counsel were sanctioned under Rule 11 by the Court in the Southern District of New York for doing so.[2]

On August 6, 2010, the court granted-in-part and denied-in-part Sony's motion to dismiss, and granted plaintiffs' motion to consolidate and appoint interim counsel. In the order, Judge Whelan dismissed all but one of plaintiffs' claims with leave to amend. Docket No. 48. Notably,

[2] *See* Docket No. 27-1 [Sony's Motion to Dismiss Consolidated Complaint], at 13:15-19; Docket No. 27-7 [Second Amended Complaint in *Meserole v. Sony Corporation of America, Inc., et al.*, United States District Court, Southern District of New York, Case No. 08-CV-8987 ("Meserole")]; Docket No. 42-1, Exh. 3 thereto [order to show cause in *Meserole* why statements by plaintiffs' counsel in pleadings and to the court based on "confidential sources" allegations did not constitute violations of Rule 11]; Docket No. 46-1, Exh. 5 thereto [Order in *Meserole* publicly reprimanding plaintiffs' counsel under Rule 11].

the order found that plaintiffs' allegations regarding what Sony purportedly knew about the alleged defect prior to selling the Televisions should be more specific. Nonetheless, on August 30, 2010, plaintiffs filed the FACC, which is virtually identical to the consolidated complaint. Although two named plaintiffs were added, the only substantive changes in the FACC are allegations regarding certain patent filings. Consol. Compl., ¶¶ 5-49; FACC, ¶¶ 5-51, 60-64, 70. This addition does nothing to show what Sony purportedly knew about the alleged defect. As a matter of law, any purported statements in the patent filings cannot show knowledge of any purported defect because patent filings speak generally to the state of the art (i.e., LCD technology), not a specific Sony product. Further, plaintiffs again point to alleged defects in different television models that pre-date the Televisions to argue Sony's knowledge with respect to the Televisions at issue in this case. But pointing to an alleged defect in different television models cannot establish knowledge as a matter of law. Plaintiffs' FACC should be dismissed without leave to amend.

III. PLAINTIFFS' CLAIMS FOR INJUNCTIVE RELIEF SHOULD BE DISMISSED PURSUANT TO RULE 12(b)(1) BECAUSE PLAINTIFFS LACK STANDING

Plaintiffs seek injunctive relief under their UCL, FAL, and CLRA claims. FACC, ¶¶ 83(k), 87, 95 99, 108. To have standing to do so, a plaintiff must show a likelihood of *future injury* based on the alleged misconduct. Here, Sony no longer manufactures, markets, or sells the Televisions in the United States, and has no plans to do so in the future. Peschken Decl., ¶¶ 4-6. Plaintiffs concede this. FACC, ¶ 4. As such, Sony's alleged past conduct presents no threat of future harm. Plaintiffs' injunctive relief claims should therefore be dismissed.

A. Legal Standard for Motion To Dismiss Under Rule 12(b)(1).

A Rule 12(b)(1) motion attacks the complaint for lack of subject matter jurisdiction. FED. R. CIV. P. 12(b)(1). "Standing pertains to a federal court's subject-matter jurisdiction under Article III, and thus, is properly raised in a motion to dismiss under Federal Rule of Civil Procedure 12(b)(1)." *In re Ditropan XL Antitrust Litig*., No. M:06-CV-01761-JSW, 2007 WL 2978329, *1 (N.D. Cal. Oct. 11, 2007) (citing *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000)). Although Sony is the moving party, plaintiffs bear the burden of proving jurisdiction. *Stock West,*

Inc. v. Confederated Tribes of the Colville Reservation, 873 F.2d 1221, 1225 (9th Cir. 1989). Moreover, the court presumes a lack of jurisdiction until plaintiffs prove otherwise. *Id*.

Sony is entitled to submit evidence in support of its Rule 12(b)(1) motion. *Cattie v. Wal-Mart Stores, Inc.*, 504 F. Supp. 2d 939, 943 (S.D. Cal. 2007) (holding Rule 12(b)(1) motion can be either facial or factual). As this motion is factual, plaintiffs must "furnish evidence necessary to satisfy its burden of establishing subject matter jurisdiction." *Id*. (citing *Savage v. Glendale Union High Sch., Dist. No. 205, Maricopa County*, 343 F.3d 1036, 1040 n.2 (9th Cir. 2003)).

B. Plaintiffs Lack Standing to Seek Injunctive Relief Against Sony Because They Cannot Show a Threat of Future Harm.

Plaintiffs must show "'a likelihood of future injury'" to survive Sony's motion. *Meinhold v. Sprint Spectrum, L.P.*, No. Civ. S-07-00456 FCD EFB, 2007 WL 1456141, at *5 (E.D. Cal. May 16, 2007) (quoting *White*, 227 F.3d at 1242). Plaintiffs cannot do so because the allegations and evidence establish that any alleged injury occurred in the past and relates to a product that Sony no longer makes, sells, or markets. FACC, ¶ 4 ("Sony has now discontinued its manufacturing, marketing, and sales of these defective devices …."); Peschken Decl., ¶¶ 4-6.[3] Accordingly, plaintiffs' injunctive relief claims under the UCL, FAL, and CLRA should be dismissed without leave to amend. *See, e.g., Meinhold*, 2007 WL 1456141, at *5 (dismissing UCL, FAL, and CLRA claims because of insufficient evidence that defendant was likely to engage in conduct in the future).[4]

[3] To the extent plaintiffs seek to enjoin "Sony from withholding information regarding the Defect" (FACC, ¶ 95), such a request should be rejected. Disclosure about the alleged defect is unnecessary because plaintiffs, by bringing this action, already know about the alleged defect. Also, for the reasons set forth in Section IV.B.1. below, Sony is not obligated to disclose an alleged defect that manifests after the expiration of the Limited Warranty period.

[4] *See also, Stickrath v. Globalstar, Inc.*, 527 F. Supp. 2d 992, 997 (N.D. Cal. 2007) (dismissing injunctive relief claims under the UCL and CLRA for lack of standing where "any injury allegedly suffered []appears to lie solely in the past"); *Janda v. T-Mobile, USA, Inc.*, No. C 05-03729 JSW, 2008 WL 4847116, at *4 (N.D. Cal. Nov. 7, 2008) (same as to UCL, FAL, and CLRA claims).

IV. THE FACC SHOULD BE DISMISSED PURSUANT TO RULE 12(b)(6) AND RULE 9(b) BECAUSE PLAINTIFFS FAIL TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

As was the case with the consolidated complaint, plaintiffs' eight claims all fail to state a claim upon which relief can be granted, and should therefore be dismissed with prejudice.

A. Legal Standard for Motion To Dismiss Under Rule 12(b)(6) and Rule 9(b).

"[A] complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955 (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." *Id.* (citing *Twombly*, 550 U.S. at 556). This standard "asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief.'" *Id.* (quoting *Twombly*, 550 U.S. at 557). "Determining whether a complaint states a plausible claim for relief . . . requires the reviewing court to draw on its judicial experience and common sense." *Id.* at 1950.

On a Rule 12(b) motion to dismiss, courts assume the truth of all factual allegations, but do not accept conclusions, allegations contradicted by judicially noticed facts, or unwarranted inferences as true. *Epstein v. Wash. Energy Co.*, 83 F.3d 1136, 1140 (9th Cir. 1996). Under the doctrine of "incorporation by reference," courts may consider documents referenced or relied on extensively in a complaint. *Van Buskirk*, 284 F.3d at 980. "[T]he non-conclusory 'factual content,' and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief." *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009).

Rule 9(b) mandates that "the circumstances constituting fraud or mistake shall be stated with particularity." FED. R. CIV. P. 9(b). It applies to both federal and state law claims, including state law claims for alleged violations of the UCL, FAL, and CLRA where such claims are based on fraudulent conduct. *Mat-Van, Inc. v. Sheldon Good & Co. Auctions*, No. 07-CV-912 IEG (BLM), 2007 WL 3047093, at *6 (S.D. Cal. Oct. 16, 2007) ("It is well established that Rule

9(b)'s requirement[s] . . . appl[y] to state-law causes of action before a federal court.").[5] The purposes of Rule 9(b) include: (1) providing defendants with sufficient notice of the serious charge of fraud; (2) protecting the reputation of those charged with fraud; and (3) prohibiting plaintiffs from unilaterally imposing the enormous social and economic costs associated with fraud claims absent a factual basis for doing so. *Kearns*, 567 F.3d at 1125.

To satisfy Rule 9(b)'s requirements, a plaintiff must explicitly aver the "who, what, when, where, and how" of the alleged fraudulent conduct. *Vess*, 317 F.3d at 1103-04. A plaintiff must include allegations about the time, place, and content of the statement or omissions, the identities of the parties to them, as well as an explanation as to why the statement or omission complained of is false or misleading. *Janda v. T-Mobile, USA, Inc.*, No. C 05-03729 JSW, 2008 WL 4847116, at *4 (N.D. Cal. Nov. 7, 2009); *Swartz v. KPMG LLP*, 476 F.3d 756, 764 (9th Cir. 2007); *In re Actimmune Mktg.*, 2009 WL 3740648, at *6. A plaintiff must allege reliance on the alleged fraudulent conduct with particularity. *See Kearns*, 567 F.3d at 1126.

B. Plaintiffs' UCL, FAL, CLRA, and Alternative State Law Claims Should Be Dismissed.

Plaintiffs' UCL, FAL, CLRA, and alternative state law claims should be dismissed on several independent grounds. First, they fail because plaintiffs allege that the purported defect did not cause the Televisions to function improperly until *after the one-year express warranty expired*, and therefore the claim fails under *Daugherty v. Am. Honda Motor Co.*, 144 Cal. App. 4th 824 (2006), and its progeny. Second, even though Sony's knowledge of the alleged defect is not a consideration under *Daugherty* and its progeny, plaintiffs also fail to plead their fraud-based UCL, FAL, CLRA, and alternative state law claims with particularity as required under Rule 9(b). The claims also fail because plaintiffs' vague and general allegations regarding representations about product quality at best constitute non-actionable puffery. The FAL claim should also be

[5] *See also In re Actimmune Mktg.*, No. C 08-02376 MHP, 2009 WL 3740648, at *6 (N.D. Cal. Nov. 6, 2009) (applying Rule 9(b) to UCL, FAL and CLRA claims); *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1125 (9th Cir. 2009) (applying Rule 9(b) to CLRA and UCL claims); *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1103-04 (9th Cir. 2003) (applying Rule 9(b) to UCL and FAL claims).

dismissed because plaintiffs do not specify the alleged advertisements at issue. Their CLRA claim should also be dismissed because plaintiffs failed to file the statutorily required affidavits. Finally, plaintiffs' alternative state law cause of action should be dismissed because plaintiffs only assert these claims on behalf of putative class members and because it fails to meet even the most liberal pleading standards.

1. Plaintiffs cannot hold Sony liable under the UCL, FAL, and CLRA for Sony's alleged failure to disclose a purported defect in the Televisions that did not manifest itself until after the warranty period expired.

The crux of plaintiffs' UCL, FAL, and CLRA claims is that Sony allegedly failed to disclose the existence of a purportedly known defect with the Optical Block component in the Televisions. FACC, ¶¶ 3, 92, 98, 102. Plaintiffs' claims, however, fail as a matter of law because plaintiffs admit that the alleged defect did not cause malfunctions with the Televisions until after expiration of the one-year Limited Warranty period. *Id*. at ¶¶ 3, 5-51, 66.

It is black-letter California law that a manufacturer cannot be held liable under the UCL, FAL, or CLRA for failure to disclose a known defect that manifests itself after expiration of the warranty period unless the defect is a safety defect or the manufacturer makes specific representations about the product's useful life. *Daugherty*, 144 Cal. App. 4th at 833-39 (affirming trial court's dismissal of UCL and CLRA claims based on a failure to disclose an alleged defect in an automobile engine); *see also Oestreicher v. Alienware Corp.*, 544 F. Supp. 2d 964, 969-74 (N.D. Cal. 2008), *aff'd*, No. 08-16290, 2009 U.S. App. LEXIS 7259 (9th Cir. Apr. 2, 2009) (dismissing UCL, FAL, and CLRA claims based on failure to disclose alleged defect in computers that manifested after warranty expired); *Long v. Hewlett-Packard Co.*, No. C 06-02816 JW, 2007 WL 2994812, at *8 (N.D. Cal. July 27, 2007) (dismissing CLRA and UCL claims based on failure to disclose a defect where computers functioned normally during one-year warranty period); *Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017, 1025-27 (9th Cir. 2008) (affirming trial court's grant of summary judgment as to UCL claim because failure to disclose defect resulting in post-warranty failure is not actionable).

The seminal case is *Daugherty*. In that case, the plaintiffs owned Honda cars containing an allegedly defective engine. *Id*. at 827. The plaintiffs brought claims under the UCL and

sections (a)(5) and (a)(7) of the CLRA[6] for Honda's "conceal[ment] and fail[ure] to disclose" that the car's engines "contain[ed] a defect," and for "continuing to market and sell defective cars notwithstanding knowledge of the defect." *Id*. at 833. The court affirmed the trial court's dismissal of the plaintiff's claims, holding that a manufacturer cannot be found liable under the UCL and CLRA as a matter of law for failing to disclose a defect in a product that does not manifest itself until after expiration of warranty expired. *Id*. at 836-40. Although the court acknowledged that a claim under the CLRA could be stated in terms of a "fraudulent omission," it determined that "to be actionable the omission must be contrary to a representation actually made by the defendant, or an omission of a fact the defendant was obliged to disclose." *Id*. at 835. The court held that Honda's only affirmative representations at the time of sale were its express warranties, as to which no breach occurred, and that Honda had no duty to disclose defects that did not carry an unreasonable risk of physical injury or threat to safety. *Id*. at 836-37.

In *Long*, the court followed *Daugherty* and dismissed UCL and CLRA claims based on failure to disclose a defect in computers without leave to amend where the computers at issue did not malfunction until after the one-year limited warranty. *Long*, 2007 WL 2994812, at *8. Specifically, as to the UCL and CLRA claims, it held: "In this case, HP is not alleged to have made any representation as to the life of [the defective component], or even as to the useful life of its [computers]. As such, a consumer's only reasonable expectation was that the [computers] would function properly for the duration of HP's limited one-year warranty. HP fulfilled this expectation. Accordingly, HP's alleged failure to disclose the inverter defect is not actionable under either the CLRA or the UCL." *Id*.

Here, *Daugherty* and its progeny are directly on point. Plaintiffs concede that the alleged defect did not manifest or otherwise affect the performance of the Televisions until after the expiration of the one-year Limited Warranty. FACC, ¶¶ 3, 5-51, 66. Moreover, plaintiffs do not allege any representations by Sony about the Optical Block or the useful life of the Televisions. *See, e.g.*, *Daugherty*, 144 Cal. App. 4th at 836-37 (finding plaintiffs "did not allege a single

[6] Plaintiffs' CLRA claims are premised on purported violations of these same sections. FACC, ¶ 102.

affirmative representation by Honda regarding the [allegedly defective] engine") (citation omitted). Nor do plaintiffs allege that the defect involves an unreasonable risk of physical injury or threat of safety. Accordingly, plaintiffs' UCL, FAL, and CLRA claims should be dismissed. *See, e.g.*, *Oestreicher*, 544 F. Supp. 2d at 970 ("[S]ince any defects in question manifested themselves after expiration of the warranty period, plaintiff's CLRA claim must be barred under *Daugherty*, . . . , and *Long*.").

2. Plaintiffs' consumer statute claims fail to satisfy Rule 9(b)'s heightened pleading requirements.

Plaintiffs' UCL, FAL, CLRA, and alternative state law claims are subject to Rule 9(b)'s particularity requirements because plaintiffs allege that Sony engaged in a unified course of fraudulent conduct.[7] *See Kearns*, 567 F.3d at 1125-26. Plaintiffs do not meet Rule 9(b)'s exacting requirements. The crux of plaintiffs' consumer protection statute claims is that: (1) plaintiffs purchased the Televisions at some unspecified time; (2) the Televisions purportedly manifested the alleged defect at some unspecified time after the one-year limited warranty expired; (3) Sony marketed the Televisions as "offering superior picture quality"; and (4) Sony allegedly had knowledge that the Televisions contained the alleged defect based on patent filings and Sony's experience with different predecessor television models. FACC, ¶¶ 3, 5-51, 57, 60-64, 66. Such bare bones allegations are not enough under Rule 9(b).

First, plaintiffs have not put forth any particularized factual allegations showing that Sony knew or should have known about the alleged defect several years ago at the time plaintiffs purchased the Televisions or that Sony had a duty to disclose. Although Sony's knowledge of the alleged defect is irrelevant under *Daugherty* because the alleged defect did not manifest until after the Limited Warranty period and was not a safety defect, plaintiffs must still plead Sony's knowledge with particularity under Rule 9(b). *Meserole*, 2009 WL 1403933, at *4-*5, *8

[7] The FACC is replete with allegations of fraud by misrepresentation or omission. *See, e.g.* FACC, ¶¶ 3-4, 57, 68, 90, 111, 112-158. Plaintiffs also allege that Sony has engaged in a uniform course of fraudulent conduct through a "deceptive marketing campaign," "misleading marketing," and "promotional efforts." *Id*. at, ¶¶ 3, 83(e), 90, 92. Each of plaintiffs' consumer statute claims are premised on this conduct. *See, e.g.*, *Id*. at, ¶¶ 90-94 (UCL claim); *id*. at ¶ 98 (FAL claim); *id*. at ¶ 102 (CLRA claim); *id*. at ¶ 111 (alternative state law cause of action).

(dismissing plaintiffs' UCL, FAL, and CLRA claims because "[p]laintiffs have not put forth any particularized allegations evincing that Sony knew about the alleged [optical block] defect prior to distributing the products to [p]laintiffs."); *see Maniscalco v. Brother Int'l Corp.*, Civil Action No.: 06-CV-4907(FLW), 2008 U.S. Dist. LEXIS 50122, at *35 (D.N.J. June 26, 2008) (plaintiffs' conclusory allegation that defendant knew about the defect prior to purchase was insufficient to defeat motion to dismiss; "Court will not infer an essential element" of the action).

Plaintiffs' attempt to plead knowledge by referring to patent filings also fails. The patent filings do not and cannot show Sony's knowledge. Any purported statements regarding potential "disadvantages" with LCD technology in the patents speak generally to the state of the art (i.e., LCD technology), not a specific Sony product. *See* Sony RJN, Exhs. B, C, D, E.[8] Moreover, some of the patents pre-date the sale of the Televisions by many years, undercutting plaintiffs' assumed link to the Televisions. *See id*., at Exh. D (originally filed October 11, 1996); Exh. B (originally filed September 11, 1998); Exh. C (PCT filed December 4, 2001); c*f. Allison v. Brooktree Corp.*, 999 F. Supp. 1342, 1354 (S.D. Cal. 1998) (allegations of problems encountered bringing a product to market were insufficient to alleging scienter). Also, if anything, the patent filings demonstrate that Sony *did not* have knowledge of any potential defect in the Televisions. This is because the patent filings disclose Sony inventions to improve upon and overcome any potential issues or "disadvantages" identified in the patents with the then state of LCD technology. *See* Sony RJN, Exhs. B, C, D, E. Inventions that improve LCD technology and continual product improvement are the opposite of distributing a knowingly defective product.

Plaintiffs' allegations regarding alleged defects in different television models that pre-date the Televisions are similarly unavailing. *See Meserole*, 2009 WL 1403933, at *4, *8 (finding allegations regarding predecessor models of televisions insufficient to establish plausible basis for inferring that Sony was aware of the defect prior to plaintiffs purchasing the televisions at issue); *Clayton v. Ford Motor Co.*, 214 P.3d 865, 874-875 (Utah Ct. App. 2009) (affirming exclusion of

[8] The court may consider the patent filings in deciding Sony's motion under the doctrine of "incorporation by reference" because plaintiffs repeatedly reference these patent filings in the FACC. *See, e.g.*, FACC, ¶¶ 61, 61, 64, 70. *See also Van Buskirk*, 284 F.3d at 980.

evidence of a different defect in a different vehicle model). Also, plaintiffs admit – albeit through artful pleading – that the optical blocks in the predecessor models were not *identical* to the Televisions, but rather purportedly based on the same "core-technology." FACC, ¶ 64.

Second, plaintiffs do not specifically identify a single piece of marketing material or advertisement that they claim is deceptive or misleading. *See Meserole*, 2009 WL 1403933, at *4. Nor do plaintiffs identify when or where they purportedly saw these materials, explain how these materials are purportedly deceptive or misleading, or establish how they relied on them in deciding to purchase their television. *Id*. at *4 *5. Instead, plaintiffs make only a few vague allegations that Sony purportedly represented the Televisions as being of "high," "excellent," or "superior" quality. FACC, ¶¶ 57, 70, 74, 102(e)-(f). But these purported representations do not state anything about the alleged defect at issue here (degradation of the optical block). *See Meserole*, 2009 WL 1403933, at *4 (noting alleged optical block defect "bears little connectivity to alleged advertisements" regarding picture quality); *Bardin v. DaimlerChrysler Corp.*, 136 Cal. App. 4th 1255, 1276 (2006) (holding no affirmative misrepresentation about alleged defect). Plaintiffs do not allege a single affirmative representation by Sony regarding the optical block.

3. Plaintiffs' UCL, FAL, CLRA, and alternative state law claims should be dismissed because the alleged statements are non-actionable puffery, were true during the warranty period, and do not relate to the alleged defect.

Plaintiffs' vague and generalized allegations that Sony marketed the Televisions as providing "superior picture quality," "excellent video quality," or "high quality" video playback and display are insufficient to support plaintiffs' consumer statute claims based on purported "misrepresentations." FACC, ¶¶ 57, 70, 74, 102(e)-(f). First, the phrases "superior quality," "excellent quality," and "high quality" are "non-actionable puffery" that cannot support a UCL, FAL, CLRA, or alternative state law claim. *Oestreicher*, 544 F. Supp. 2d at 973-74 (dismissing UCL and FAL claims based on "generalized and vague statements of product superiority"); *see also Anunziato v. eMachines, Inc.*, 402 F. Supp. 2d 1133, 1139-40 (C.D. Cal. 2005) ("Generalized, vague, and unspecified assertions constitute mere puffery upon which a reasonable consumer could not rely, and hence are not actionable.") (quotation marks and citation omitted).

Second, plaintiffs admit that there were no issues with picture or video "quality" until after the one-year Limited Warranty expired. FACC, ¶ 3. Third, the alleged misstatements do not even relate to the alleged defect. *Tietsworth v. Sears, Roebuck & Co.*, No. C 09-00288 JF (HRL), 2009 U.S. Dist. LEXIS 40872, at *27 (N.D. Cal. May 14, 2009) (no misrepresentations where statements are "mere puffery" and do not relate to alleged defect).

4. The FAL claim should be dismissed for failure to identify the advertisements at issue.

Plaintiffs' FAL claim should be dismissed for failure to apprise Sony of the alleged wrongful conduct, where plaintiffs merely allege that Sony "caused" certain, unspecified "advertisements" to be placed in the public. FACC, ¶ 98; *see, e.g., Inter-Mark USA, Inc. v. Intuit, Inc.*, No. C-07-04178 JCS, 2008 WL 552482, at *10 (N.D. Cal. Feb. 27, 2008) (dismissing FAL claim for failure to meet Rule 8's requirements because plaintiff did "not provide adequate notice to Defendant of the alleged wrongful conduct" where "[i]n the claim, Plaintiff refers only to unspecified 'commercial advertisements' and a 'variety of promotional materials'").

5. The CLRA claim should be dismissed because plaintiffs' failed to file the required affidavits.

California Civil Code section 1780(d) states that if a plaintiff seeking relief under the CLRA fails to file an affidavit stating facts showing that the action has been commenced in the appropriate county, the complaint shall be dismissed. Cal. Civ. Code, § 1780(d). Here, only plaintiff Julio Real filed the required affidavit, and therefore, the CLRA claim should be dismissed as to the other plaintiffs.

6. Plaintiffs' alternative state law cause of action based on the laws where "class members" reside should be dismissed.

Plaintiffs also bring an alternative cause of action under the consumer protection laws of the states where putative "class members" reside. Plaintiffs themselves contend that California law applies and invoke California law in pleading their claims. FACC, ¶¶ 88-108, 110, 160-165, 171-188. By its own terms, plaintiffs' alternative cause of action is asserted on behalf of

unnamed putative class members if, and only if, the court determines that California law does not apply to them. *Id.*, at ¶ 110. Plaintiffs' alternative state law claim should be dismissed.

First, plaintiffs assert the claim only on behalf of unnamed class members, not individually. Plaintiffs put the proverbial cart before the horse. Prior to class certification, there is no class, and plaintiffs' claims must rise and fall on their own. Hypothetical allegations or claims of the class are not considered on a motion to dismiss. *See, e.g., Denny v. Barber*, 576 F.2d 465, 468-69 (2nd Cir. 1978); *Speyer v. Avis Rent a Car Sys., Inc.*, 415 F. Supp. 2d 1090, 1094 (S.D. Cal. 2005). Further, a substantial choice of law analysis is premature at this stage of the action. *In re Conagra Peanut Butter Prods. Liab. Litig.*, No. 1:07-MD-1845-TWT, 2008 U.S. Dist. LEXIS 40753, at *34-35 (N.D. Ga. May 21, 2008) (premature to conduct a rigorous choice of law analysis on motion to dismiss and more appropriate at class certification stage).

Second, as discussed above, the alternative state law cause of action should also be dismissed for failure to satisfy Rule 9(b)'s requirement that allegations of fraud be pled with particularity, which "applies to state-law causes of action before a federal court" sounding in fraud. *Mat-Van, Inc.*, 2007 WL 3047093, at *6. Rule 9(b) has been held to apply the alternative consumer statutes that plaintiffs allege in their alternative state law cause of action.[9]

Third, plaintiffs' method of pleading this alternative state law cause of action fails to satisfy the United States Supreme Court's *Twombly* and *Ashcroft* standards because plaintiffs' alternative claim is nothing more than a formulaic recitation of over forty statutes and subsections. Plaintiffs do not make any allegations identifying the subsections at issue, nor do plaintiffs apply the statutes to their allegations or apprise Sony of how it allegedly violated over forty statutes. *See Twombly*, 127 S. Ct. at 1964-65; *Ashcroft*, 129 S. Ct. at 1949 (same).

Fourth, assuming *arguendo* that the consumer protection laws of other states apply, plaintiffs each fail to state a claim under their home states' laws because: (1) the alleged

[9] *See, e.g., Patel v. Holiday Hospitality Franchising, Inc.*, 172 F. Supp. 2d 821, 825 (N.D. Tex. 2001) (finding claims under Texas Deceptive Trade Practice Act were insufficient under Rule 9(b)); *Williams v. Scottrade, Inc.*, No. 06-10677, 2006 WL 2077588, at *7-8 (E.D. Mich. July 24, 2006) (dismissing claim under Michigan Consumer Protection Act under Rule 9(b)).

representations amount to non-actionable puffery;[10] (2) the states are either in accord with *Daugherty* or should follow *Daugherty* if they have not yet addressed the issue;[11] or (3) plaintiffs failed to satisfy other statutory requirements.[12]

C. Plaintiffs' Warranty Claims Should Each Be Dismissed Because Sony Has Not Breached Any Warranty Obligation.

1. Plaintiffs' claim for breach of express warranty should be dismissed because the Televisions allegedly malfunctioned outside the warranty period.

Plaintiffs admit that the alleged defect did not manifest itself until after the one-year Limited Warranty expired and that they did not give Sony notice of the defect until after the Limited Warranty expired. *See, e.g.*, FACC, ¶ 3 (defect manifests after more than one year of normal use); *id*. at ¶¶ 5-51 (plaintiffs' respective Televisions were outside express warranty when they demanded warranty repair from Sony). Plaintiffs therefore cannot state a claim for breach of express warranty.

"The general rule is that an express warranty 'does not cover repairs made after the applicable time … periods have elapsed.'" *Daugherty*, 144 Cal. App. 4th at 830 (dismissing express warranty claim where the plaintiff failed to submit a claim within the warranty period) (quoting *Abraham v. Volkswagen of Am., Inc.*, 795 F.2d 238, 250 (2d Cir. 1986)).[13] Because

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[10] *Viches v. MLT, Inc.*, 124 F. Supp. 2d 1092, 1098 (E.D. Mich. 2000); *Fields v. Melrose Ltd. P'ship*, 439 S.E.2d 283, 285 (S.C. Ct. App. 1993); *Sw. Bell Media, Inc. v. Spencer*, No. 72,702, 1990 Okla. Civ. App. LEXIS 60, *5-7 (Okla. Ct. App. 1990); *Bay Colony v. Trendmaker, Inc.*, 121 F.3d 998, 1004 (5th Cir. 1997); *Rockland Trust Co. v. Computer Assocs. Int'l., Inc.*, No. 95-11683-DPW, 2007 WL 2746804, *12-14 (D. Mass. 2007).

[11] *See Canal Elec. Co. v. Westinghouse Elec. Co.*, 973 F.2d 988, 993 (1st Cir. 1992); *Theos & Sons, Inc. v. Mack Trucks, Inc.*, 729 N.E.2d 1113, 1118 n. 10 (Mass. 2000); *Cline v. DaimlerChrysler Co.*, 114 P.3d 468, 473 (Okla. Civ. App. 2005); *In re Ford Motor Co. Speed Control Deactivation Switch Prods. Liab. Litig.*, MDL Docket No. 1718, 2007 U.S. Dist. LEXIS 62483, at *19-20 (E.D. Mich. Aug. 24, 2007).

[12] *See* Tex. Bus. & Com. Code Ann. § 17.505(a) (60 day notice requirement); *Miller v. Kossey*, 802 S.W.2d 873, 877 (Tex. App. Amarillo 1991, writ denied) (holding failure to give notice mandated dismissal); Mass Gen. Laws ch. 93A, § 9(3) (30 day notice requirement); *Entrialgo v. Twin City Dodge, Inc.*, 333 N.E.2d 202, 204 (Mass. 1975) (stating notice is prerequisite to suit).

[13] *See also Anunziato*, 402 F. Supp. 2d at 1141 (dismissing breach of express warranty claim finding that plaintiff's express warranty had expired and therefore the plaintiff's "claims based on breach of the express warranty fails as a matter of law"); *Tokio Marine & Fire Ins. Co. v.*

plaintiffs admit that their televisions did not malfunction within the one-year Limited Warranty period, their breach of express warranty claim fails.

In light of Judge Whelan's prior ruling on plaintiffs' breach of express warranty claim, Sony anticipates that plaintiffs will again rely on (i) their allegation in paragraph 70 that the operating instructions state that the Televisions can be used for "years" and (ii) the cases *Hicks v. Kaufman & Broad Home Corp.*, 89 Cal. App. 4th 908 (2001) and *Long v. Hewlett-Packard Co.*, 316 Fed. App'x 585 (9th Cir. 2009) ("*Long II*") to argue that they can plead a breach of express warranty claim by alleging that all of the Televisions were "substantially certain to result in malfunction during the useful life." *Id*. at 918. Neither saves plaintiffs' express warranty claim from dismissal.

First, plaintiffs quote the statement from Sony's Operating Instructions for the Televisions out of context and mischaracterize it. FACC, ¶ 70. Read in context, the statement relates to the importance of performing periodic maintenance, and appears in a section detailing specific maintenance instructions. Sony RJN, Ex. F at p. 11 of A10 Series Operating Instructions, p. 10 of A20 Series Operating Instructions; Peschken Decl., ¶ 3. The statement does not alter the one-year Limited Warranty period, nor does it specify the "useful life" of the Televisions. Indeed, the Operating Instructions expressly refer the customer to the Limited Warranty. *See* Sony RJN, Ex. F at p. 3 of A10 Series Operating Instructions and p. 1 of A20 Series Operating Instructions (cautioning that certain imprints are not covered by "your warranty"), p. 95 of A10 Series Operating Instructions (listing the "Warranty Card" among the supplied accessories).[14]

Second, *Hicks* is distinguishable. *See Tietsworth v. Sears, Roebuck & Co.*, No. 5:09-CV-00288 JF (HRL), 2010 WL 1268093, at *13 (N.D. Cal. Mar. 31, 2010) (distinguishing *Hicks* and finding that if *Hicks* were applied over *Daugherty*, it would "'eviscerate any limitations put in place by an express warranty'" (citation omitted)). *Hicks* addressed the procedural question of

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McDonnell Douglas Corp., 617 F.2d 936, 941 (2d Cir. 1980) (applying California law and rejecting claim of breach of express warranty to "repair or replace" defective product because the warrantor "was never asked to do so" within the warranty period).

[14] Plaintiffs do not allege that they followed any of the maintenance instructions in the Operating Instructions. FACC, ¶¶ 5-51. Also, Sony's alleged representation that the Televisions could be enjoyed "for years to come" is non-actionable puffery. *See* Section IV.B.2, *supra*.

class certification, not a motion to dismiss or demurrer as in *Daugherty*. Underscoring that point, other than Judge Whelan's prior ruling, Sony is not aware of any California federal district court or Ninth Circuit opinion that has followed *Hicks* in the context of a motion to dismiss a breach of express warranty claim. On the other hand, numerous California district court and Ninth Circuit opinions have held that a breach of express warranty claim should be dismissed where the alleged defect manifests outside the time limits of an express warranty, which is in accord with *Daugherty*.[15] Also, *Hicks* pre-dates *Daugherty* by five years, and the same appellate court decided both cases. Additionally, *Hicks* involved a home's foundation, which has an indefinite useful life. The court in *Hicks* specifically distinguished a home's foundation from cases involving consumer products like the Televisions here. *Hicks*, 89 Cal. App. 4th at 922-23. Last, assuming *arguendo* that *Hicks* applies over *Daugherty* and its progeny, plaintiffs have not alleged facts demonstrating that all of the Televisions were "substantially certain to result in malfunction during the useful life." *Hicks*, 89 Cal. App. 4th at 918. The FACC does not allege the Televisions' useful life, much less that all of the "hundreds of thousands" of Televisions sold failed in that time period. FACC, ¶¶ 4, 81.[16]

Third, *Long II* is inapposite. *Long II* stated in dicta that *Hicks* ***may*** be an exception to the *Daugherty* rule, but it did not decide the issue. *Long II*, 316 Fed. App'x at 586. Further, *Long II* affirmed the dismissal of the breach of express warranty claim where the defect manifested after the warranty period. *Id*. If anything, the case supports Sony's position.

Apparently recognizing that Sony did not breach its express warranty, plaintiffs appear to seek to expand the express warranty period by alleging that it is unconscionable, insufficient, or

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[15] *See Clemens*, 534 F.3d at 1023; *Tietsworth*, 2010 WL 1268093, at *13; *Cirulli v. Hyundai Motor Co.*, No. SACV 08-0854 AG (MLGx), 2009 WL 5788762, at *5 (C.D. Cal. June 12, 2009); *Tietsworth*, 2009 WL 3320486, at *11; *Mauro v. Gen. Motors Corp.*, No. CIV. S-07892 FCD GGH, 2008 WL 2775004, at *9 (E.D. Cal. July 15, 2008).

[16] Any reliance on *Hewlett-Packard Co. v. Super. Ct.*, 167 Cal. App. 4th 87 (2008) is similarly misplaced. *Hewlett-Packard Co. v. Super. Ct.* addressed the procedural question of class certification, not the substantive issue of the merits of the claim, and expressly recognized that *Daugherty* may bar some of the class members' claims. *Hewlett-Packard*, 167 Cal. App. 4th at 95. Also, in that case, the named plaintiff's claims were based on an alleged malfunction *during* the warranty period. *Id*. at 89.

inadequate because of the one-year time limitation. FACC, ¶ 73. Any such argument is without merit. *See, e.g., Ball v. Sony Elecs., Inc.*, No. 05-C-307-S, 2005 WL 2406145, at *6 (W.D. Wis. Sept. 28, 2005) (rejecting this same argument and explaining that "[Sony's] offer to repair or replace the product under the circumstances enhanced rather than limited plaintiffs' contractual rights and is therefore not unconscionable"); *Clemens*, 534 F.3d at 1023 (recognizing manufacturer may warrant product for period of time less than a product's useful life); *Daugherty*, 144 Cal. App. 4th at 830 (same); *Tietsworth*, 2009 U.S. Dist. LEXIS 40872, at *7-8 (no unconscionability where no showing of lack of alternatives or surprise by warranty period).

To the extent plaintiffs contend that their failure to seek coverage during the warranty period is excused because Sony allegedly knew about the defect (FACC, ¶ 73, 178), their contention should be rejected. *Daugherty*, 144 Cal. App. 4th at 830. *Daugherty* dismissed this argument, noting that "[s]everal courts have expressly rejected the proposition that a latent defect, discovered outside the limits of the written warranty, may form the basis for a valid express warranty claim [even] if the warrantor knew of the defect at the time of sale." *Id*. Relying on *Daugherty*, the Ninth Circuit also held that such a contention was without merit:

> Every manufactured item is defective at the time of sale in the sense that it will not last forever; the flip-side of this original sin is the product's useful life. If a manufacturer determines that useful life and warrants the product for a lesser period of time, we can hardly say that the warranty is implicated when the item fails after the warranty period expires. The product has performed as expressly warranted.

Clemens, 534 F.3d at 1023.[17]

2. Plaintiffs' breach of implied warranty claim should also be dismissed for lack of privity and failure to seek warranty coverage during the one-year warranty period.

First, under California law, a plaintiff bringing an implied breach of warranty claim must stand in vertical privity with the defendant – meaning the plaintiff must have bought the product

[17] Any attempt by plaintiffs to claim that Sony's Limited Warranty guaranteed that the Televisions were defect-free (*see* FACC, ¶ 173) must be rejected. *Ball*, 2005 WL 2406145, at *3 (rejecting argument that written warranty was "a representation that the [product] was free of defects," instead recognizing that "a written warranty . . . is an express acknowledgment that the product may be defective"); *Hoey*, 515 F. Supp. 2d, at 1104; *Long*, 2007 WL 2994812, at *7-8. The Limited Warranty here guarantees no such thing.

directly from the defendant. *See Arabian v. Sony Elecs., Inc.*, No. 05-CV-1741 WQH (NLS), 2007 WL 627977, at *10 (S.D. Cal. Feb. 22, 2007) (recognizing that "California has a vertical privity requirement" for "implied warranty claims"); *Anunziato*, 402 F. Supp. 2d at 1141 (dismissing breach of implied warranty claim for lack of vertical privity with manufacturer where the plaintiff purchased the computer at issue from a retailer). None of the plaintiffs alleges that he or she bought his or her television directly from Sony. FACC, ¶¶ 5-51. Plaintiffs vaguely allege that potentially some putative class members purchased Televisions from SEL's Sonystyle.com website. FACC, ¶ 76. But, as discussed above, allegations pertaining to unnamed class members can not be considered on a motion to dismiss. Because plaintiffs do not allege that they purchased their televisions directly from Sony, their breach of implied warranty claim fails.

Second, plaintiffs' failure to allege that they sought warranty coverage during the one-year Limited Warranty period also defeats their breach of implied warranty claims. In California, "[t]he duration of the implied warranty of merchantability and where present the implied warranty of fitness shall be coextensive in duration with an express warranty which accompanies the consumer goods, provided the duration of the express warranty is reasonable; but in no event shall such implied warranty have a duration of less than 60 days nor more than one year following the sale of new consumer goods to a retail buyer." Cal. Civ. Code § 1791.1(c); *Tietsworth*, 2009 U.S. Dist. LEXIS 40872, at *7-8 (dismissing implied warranty claim and stating that "duration of the implied warranty of merchantability is coextensive with an express warranty, but in no case is shorter than sixty days or longer than one year following sale of the goods"). Here, the Limited Warranty for the Televisions is one year (Sony RJN, Exh. A), which is also the maximum duration for an implied warranty under California law. Plaintiffs do not allege that they sought warranty service within one year of their purchases. Their claim should be dismissed.[18]

[18] Sony anticipates that plaintiffs will rely on *Mexia v. Rinker Boat Co.*, 174 Cal. App. 4th 1297 (2009) in opposition to Sony's motion to dismiss. Plaintiffs' implied warranty claim should be dismissed notwithstanding *Mexia*. First, the case is contrary to established California law on the duration of the implied warranty. California courts have repeatedly confirmed that the duration of the implied warranty is one year. *See, e.g., Atkinson v. Elk Corp. of Tex.*, 142 Cal. App. 4th 212, 230 (2006) ("[T]he duration of the implied warranty of merchantability under California law is limited to one year.") Indeed, a separate appellate panel affirmed this established rule two weeks

3. Plaintiffs' Song-Beverly Act claim should be dismissed.

Plaintiffs contend that Sony violated Section 1793.2(a)(3) and (b) of the Song-Beverly Consumer Warranty Act by allegedly failing to "provide the effective repair or replacement of the defective Televisions within 30 days." FACC, ¶ 164. This claim fails for two reasons.

First, plaintiffs did not satisfy their duty to deliver the product to Sony for repair or to notify it of the defect *within the express warranty period.* CAL. CIV. CODE, § 1793.02(c); *Robertson v. Fleetwood Travel Trailers of Cal., Inc.*, 144 Cal. App. 4th 785, 807-08 (2006) (stating "duty squarely on the consumer to deliver the product to the authorized facility for service and repairs"); *Jiagbogu v. Mercedes-Benz USA*, 118 Cal. App. 4th 1235, 1244 (2004) (same). Plaintiffs admit that the alleged defect occurred after the express warranty period expired. By the statute's plain terms, plaintiffs' Song-Beverly Act claim should be dismissed.

Second, the Song-Beverly Act only applies to California retail transactions. *Anunziato*, 402 F. Supp. 2d at 1142 (dismissing Song-Beverly Act claim for failure to plead in-California purchase) (citing CAL. CIV. CODE, § 1792); *Morgan v. Harmonix Music Sys., Inc.*, No. C08-5211 BZ, 2009 WL 2031765, at *2 (N.D. Cal. July 7, 2009) (dismissing Song-Beverly Act claim because of plaintiffs' failure to identify where and from whom they purchased disputed goods). Here, plaintiffs do not allege that they purchased the Televisions at retail in California. Only two plaintiffs allege that they even reside in California (FACC, ¶¶ 43, 50), but they do not allege where they purchased their televisions.

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after *Mexia*. *See Hovsepian v. Apple, Inc.*, Nos. 08-5788 JF (PVT), 09-1064 JF (PVT), 2009 WL 2591445 *8, n.6, n.7 (N.D. Cal. Aug. 21, 2009). Second, because it is contrary to established California law, district courts have questioned its validity. *See, e.g., Tietsworth*, 2009 WL 3320486, at *12 n.6 (noting that "*Mexia* appears to be something of an outlier"); *Butler v. Sears, Roebuck & Co.*, Nos. 06 C 7023, 07 C 412, 08 C 1832, 2009 WL 3713687, at *3 n.4 (N.D. Ill. Nov. 4, 2009) (noting that *Mexia's* holding contradicts "[t]he majority position"). Third, *Mexia* limited its analysis to alleged defects that render a product unmerchantable from the outset. *Mexia*, 174 Cal. App. 4th at 1304-05. But plaintiffs admit that their televisions worked without issue for several years. FACC, ¶¶ 3, 5-51, 66. Fourth, even if the implied warranty is breached by the existence of a latent defect at the time of the sale, plaintiffs are still bound by the terms of Sony's Limited Warranty. *See Berenblat v. Apple, Inc.*, Nos. 08-4969 JF (PVT), 09-1649 JF (PVT), 2010 WL 1460297, at *3 n.2 (N.D. Cal. Apr. 9, 2010). The Limited Warranty provides that Sony will repair or replace a defective television for a period of one year from the purchase date.

4. The Magnuson-Moss Act claim should be dismissed.

First, plaintiffs' Magnuson-Moss Act claim necessarily fails because it is dependant on plaintiffs pleading a valid state law warranty claim. *Daugherty*, 144 Cal. App. 4th at 832-833.

Second, the Magnuson-Moss Act states: "No claim shall be cognizable . . . if the action is brought as a class action, and the number of named plaintiffs is less than one hundred." 15 U.S.C. § 2310(d)(3)(C); *see also Churchill Vill., L.L.C. v. Gen. Elec.*, 361 F.3d 566, 574 n.5 (9th Cir. 2004) (stating that "[plaintiffs'] claims do not appear viable in light of the requirement of 100 named plaintiffs to maintain a federal class action based on the [Magnuson-Moss] Act"). Here, plaintiffs have 47 named plaintiffs, far short of 100. FACC, ¶¶ 5-51. Accordingly, plaintiffs' Magnuson-Moss Act claim should be dismissed.

D. The Claims Against SCA And Sony Corporation Should Be Dismissed Because Plaintiffs Lack Any Basis To Sue Them.

Plaintiffs' claims against SCA and Sony Corporation should also be dismissed because plaintiffs admit that SCA and Sony Corporation did not participate in the alleged conduct underlying plaintiffs' claims. Plaintiffs' primary target in this action is SEL, the entity that is purportedly responsible for the alleged "wrongful acts and practices," and that provided the express warranty. FACC, ¶¶ 2, 110; Sony RJN, Exh. A. Plaintiffs seek to hold SCA and Sony Corporation liable based on the entities' parent-subsidiary relationship with SEL. *Id*., at ¶¶ 52-55.[19] However, parent-subsidiary and agency allegations are insufficient to overcome the presumption of corporate separateness. *Neilson v. Union Bank of Cal., N.A.*, 290 F. Supp. 2d 1101, 1116-18 (C.D. Cal. 2003) (recognizing presumption and dismissing claims against parent company). Also, their tactic of lumping together three distinct Sony entities violates Rule 9(b). *See, e.g., Swartz v. KPMG LLP*, 476 F.3d 756, 764-65 (9th Cir. 2007) (per curiam) ("Rule 9(b) does not allow a complaint to merely lump multiple defendants together") (quotation marks and

[19] Plaintiffs generally allege that Sony Corporation "designed, manufacture, and marketed the Televisions." FACC, ¶ 54. But plaintiffs' admissions that SEL is responsible for the alleged "wrongful acts and practices" and issued the express warranty directly contradict this allegation. FACC, ¶¶ 2, 110; Sony RJN, Exh. A. It should therefore be disregarded. *See Cimino v. Yale Univ.*, 638 F. Supp. 952, 959 (D. Conn. 1986) ("Allegations of a conclusory nature do not suffice to establish a claim in opposition to specific contradicting allegations.").

citation omitted).[20] Accordingly, all plaintiffs' UCL, FAL, and CLRA claims against SCA and Sony Corporation should be dismissed for this additional reason.[21]

V. THE FACC SHOULD BE DISMISSED WITHOUT LEAVE TO AMEND.

The FACC is plaintiffs' *fourth* complaint in this action. *See*, Docket Nos. 1, 8, 26, 51. Yet plaintiffs' FACC suffers from the same defects as the prior complaints, and no amendment will change the fact that plaintiffs Televisions did not exhibit any defect until after the one-year Limited Warranty expired, which defeats each of plaintiffs' claims. Accordingly, the FACC should be dismissed without leave to amend. *Zucco Partners, LLC v. Digimarc Corp.*, 552 F.3d 981, 1007 (9th Cir. 2009) (affirming dismissal of third complaint with prejudice); *Leadsinger, Inc. v. BMG Music Publ'g*, 512 F.3d 522, 532-33 (9th Cir. 2008) (affirming dismissal without leave to amend where "any amendment would be futile").

VI. CONCLUSION

For each of the reasons stated above, Sony respectfully requests that the court grant its motion to dismiss and without leave to amend.

Dated: September 20, 2010

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LEO P. NORTON (216282)

/s/ Michael A. Attanasio
Michael A. Attanasio (151529)

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[20] Tellingly, plaintiffs sued SCA and Sony Corporation despite their counsel having not done so in the related state court action. *See* Sony RJN, Ex. G.

[21] Additionally, UCL, FAL, and CLRA do not apply to claims asserted by non-California plaintiffs against non-California entities for harm allegedly occurring outside of California. *Norwest Mortgage, Inc. v. Super. Ct.*, 72 Cal. App. 4th 214, 224-25 (1999); *Arabian*, 2007 WL 627977, at *9; *see also Cattie*, 504 F. Supp. 2d at 949. Here, all but two of the plaintiffs (Julio Real and Napoleon Valeriano) are non-California residents, and neither SCA nor Sony Corporation is incorporated in or has its principal place of business in California. FACC, ¶¶ 5-54. Any purported conduct that SCA or Sony Corporation engaged in would have occurred outside California. As such, purported UCL, FAL, and CLRA claims against SCA or Sony Corporation by the 45 non-California plaintiffs should be dismissed on this additional ground.

APPENDIX I

SUMMARY OF CLAIMS AND GROUNDS FOR DISMISSAL

Cause(s) of Action	Claim	Ground(s) For Dismissal
First, Second, and Third	Injunctive Relief	No standing to pursue injunctive relief
First, Second, and Third	UCL, FAL, and CLRA	No liability for failure to disclose alleged Defect manifesting itself after expiration of the warranty
First, Second, Third and Fourth	UCL, FAL, CLRA, and Alternative State Law	Purported "misrepresentations" regarding the Televisions are non-actionable "puffery"
First, Second, Third, and Fourth	UCL, FAL, CLRA, and Alternative State Law	Failure to meet Rule 9(b)'s requirements
Second	FAL	Failure to identify the advertisements at issue
Third	CLRA	Failure to file affidavits
Fourth	Alternative State Law Cause of Action	(1) No basis to consider hypothetical claims of unnamed class members; and (2) failure to plead non-speculative factual allegations (*Twombly*)
Fifth	Song-Beverly Consumer Warranty Act	(1) plaintiffs do not allege that they delivered the Televisions to Sony for repair or notified Sony of the alleged "Defect" within the warranty period; and (2) Act only applies to goods sold in California
Sixth	Magnuson-Moss Act	(1) plaintiffs fail to state breach of warranty claims under California law; and (2) FACC does not have 100 named plaintiffs per statute
Seventh	Breach of Express Warranty	Plaintiffs do not allege that they sought warranty coverage during the warranty period.
Eighth	Breach of Implied Warranty	(1) plaintiffs do not allege that they sought warranty coverage during the warranty period; and (2) plaintiffs lack vertical privity with Sony
All claims against SCA and Sony Corporation (First through Eighth)	All	(1) SEL marketed, sold, and warranted the Televisions, not these entities; (2) no specific allegations against these entities in violation of Rule 9(b); (3) statutes do not apply to claims asserted by non-California plaintiffs against non-California entities

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

IN RE SONY GRAND WEGA KDF-E A10/A20 SERIES REAR PROJECTION HDTV TELEVISION LITIGATION

This Document Relates To: All Actions

Master File No. 08-CV-2276-IEG-WVG

DECLARATION OF LEO P. NORTON IN SUPPORT OF SONY CORPORATION OF AMERICA, SONY ELECTRONICS INC., AND SONY CORPORATION'S MOTION TO DISMISS FIRST AMENDED CONSOLIDATED COMPLAINT PURSUANT TO FEDERAL RULES OF CIVIL PROCEDURE 12(b)(1), 12(b)(6), AND 9(b)

Date: October 25, 2010
Time: 10:30 a.m.
Judge: Hon. Irma E. Gonzalez
Courtroom: 1

I, Leo P. Norton, declare as follows:

1. I am an attorney licensed to practice law in the State of California, and I am admitted to practice before this Court. I am an associate with the law firm of Cooley LLP, attorneys for defendants Sony Corporation of America, Sony Electronics Inc., and Sony Corporation (collectively "Sony") in this action. I make this declaration in support of Sony's Motion to Dismiss First Amended Consolidated Complaint Pursuant to Federal Rules of Civil Procedure 12(b)(1), 12(b)(6), and 9(b) and Request for Judicial Notice in support thereof. As an attorney for Sony, I have personal knowledge of the facts set forth in this Declaration, and if called upon to testify, I could and would testify competently thereto.

2. Attached as Exhibit B to Sony's Request for Judicial Notice is a true and correct copy of United States Patent Number 6,132,049, "Picture display apparatus and cooling apparatus for optical apparatus," filed September 11, 1998, and issued October 17, 2000, which is a publicly available through the United States Patent and Trademark Office.

3. Attached as Exhibit C to Sony's Request for Judicial Notice is a true and correct copy of United States Patent Number 7,123,33 B2, "Liquid Crystal Display Device and Liquid Crystal Projector Device," filed December 4, 2001, and issued October 17, 2006, which is publicly available through the United States Patent and Trademark Office.

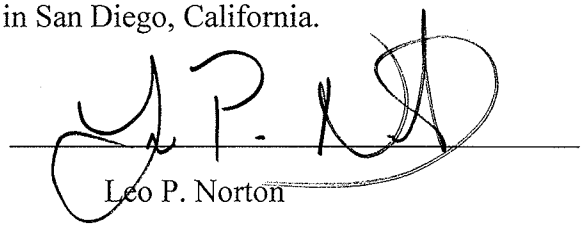
4. Attached as Exhibit D to Sony's Request for Judicial Notice is a true and correct copy of United States Patent Number 5,757,443, "Transmission-Type Display Device With a Heat-Dissipating Glass Plate External To At Least One Liquid Crystal Substrate," filed October 11, 1996, and issued May 26, 1998, which is publicly available through the United States Patent and Trademark Office.

5. Attached as Exhibit E to Sony's Request for Judicial Notice is a true and correct copy of United States Patent Number 7,535,543 B2, "Liquid Crystal Display Apparatus and Cooling Device," filed November 29, 2005, and issued May 19, 2009, which is publicly available through the United States Patent and Trademark Office.

6. Attached as Exhibit G to Sony's Request for Judicial Notice is a true and correct copy of the complaint in the action entitled *Omerod, et al. v. Sony Electronics Inc., et al.*,

Superior Court of California, County of San Diego, Case No. 37-2009-00085333-CU-BT-CTL, which is publicly available through the San Diego County Superior Court.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Executed on September 20, 2010, in San Diego, California.



Leo P. Norton

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

IN RE SONY GRAND WEGA KDF-E A10/A20 SERIES REAR PROJECTION HDTV TELEVISION LITIGATION

This Document Relates To: All Actions

Master File No. 08-CV-2276-IEG-WVG

DECLARATION OF ROSEMARIE PESCHKEN IN SUPPORT OF SONY CORPORATION OF AMERICA, SONY ELECTRONICS INC., AND SONY CORPORATION'S MOTION TO DISMISS FIRST AMENDED CONSOLIDATED COMPLAINT PURSUANT TO FEDERAL RULES OF CIVIL PROCEDURE 12(b)(1), 12(b)(6), AND 9(b)

Date: October 25, 2010
Time: 10:30 a.m.
Judge: Hon. Irma E. Gonzalez
Courtroom: 1

I, Rosemarie Peschken, declare:

1. I am Vice President of Finance for Sony Electronics Inc. ("SEL"). I have personal knowledge of the facts set forth in this Declaration, and if called upon to testify, I could and would testify competently thereto.

2. SEL sold the Sony Grand WEGA KDF-E A10 and A20 Series LCD Rear Projection HDTV Televisions (the "Televisions") with a written 1-year labor/1-year parts Limited

Warranty. A true and correct copy of the Limited Warranty for both of these Televisions is attached as Exhibit A to Sony's Request for Judicial Notice, filed concurrently herewith.

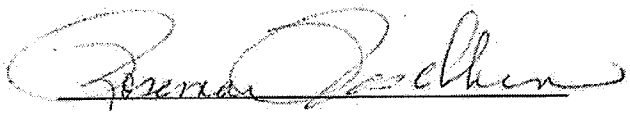
3. SEL also sold the Televisions with written Operating Instructions. A true and correct copy of the Operating Instructions for the Televisions is attached as Exhibit F to Sony's Request for Judicial Notice, filed concurrently herewith.

4. The Televisions have been discontinued and have not been manufactured by SEL since 2006. There are no plans to begin manufacturing the Televisions again as they have been succeeded by next models, all of which incorporate newer technology. It is my understanding that these successor models are not at issue in this lawsuit.

5. SEL does not currently sell the Televisions through any of its sales channels, namely, its own direct online store or retail locations. SEL has no plans to resume selling the Televisions.

6. Accordingly, SEL no longer manufactures, markets, or sells the Televisions to consumers in the United States and will not do so in the future. SEL does not produce or distribute marketing or promotional materials for the Televisions and does not advertise the Televisions in print, radio, television, Internet, or any other media. Similar to other discontinued models, SEL does maintain a small inventory of the Televisions (approximately 7 as of January 12, 2009), but these will not be resold to the public.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Executed on September 20, 2010, at San Diego, California.



Rosemarie Peschken

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

In re Sony Grand WEGA KDF-E A10/A20 Series Rear Projection HDTV Television Litigation	Case No. 08 CV 2276 IEG (WVG) **CERTIFICATE OF SERVICE** Judge: Hon. Irma E. Gonzalez Courtroom: 1

I hereby certify that on September 20, 2010, I filed the foregoing document(s) in compliance with Local Rule CV-5(a):

- **SONY CORPORATION OF AMERICA, SONY ELECTRONICS INC., AND SONY CORPORATION'S NOTICE OF MOTION AND MOTION TO DISMISS FIRST AMENDED CONSOLIDATED COMPLAINT PURSUANT TO FEDERAL RULES OF CIVIL PROCEDURE 12(B)(1), 12(B)(6), AND 9(B);**
- **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF SONY CORPORATION OF AMERICA, SONY ELECTRONICS INC., AND SONY CORPORATION'S MOTION TO DISMISS FIRST AMENDED CONSOLIDATED COMPLAINT PURSUANT TO FEDERAL RULES OF CIVIL PROCEDURE 12(B)(1), 12(B)(6), AND 9(B);**
- **REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF SONY CORPORATION OF AMERICA, SONY ELECTRONICS INC., AND SONY CORPORATION'S MOTION TO DISMISS FIRST AMENDED CONSOLIDATED COMPLAINT PURSUANT TO FEDERAL RULES OF CIVIL PROCEDURE 12(B)(1), 12(B)(6), AND 9(B);**
- **DECLARATION OF LEO P. NORTON IN SUPPORT OF SONY CORPORATION OF AMERICA, SONY ELECTRONICS INC., AND SONY CORPORATION'S MOTION TO DISMISS FIRST AMENDED CONSOLIDATED COMPLAINT PURSUANT TO FEDERAL RULES OF CIVIL PROCEDURE 12(B)(1), 12(B)(6), AND 9(B);**
- **DECLARATION OF ROSEMARIE PESCHKEN IN SUPPORT OF SONY CORPORATION OF AMERICA, SONY ELECTRONICS INC., AND SONY CORPORATION'S MOTION TO DISMISS FIRST AMENDED CONSOLIDATED COMPLAINT PURSUANT TO FEDERAL RULES OF CIVIL PROCEDURE 12(B)(1), 12(B)(6), AND 9(B);**

with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the following attorney(s) of record at the following listed email addresse(s):

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This document was served on all counsel who are deemed to have consented to electronic service. Local Rule CV-5(a)(3)(A). Pursuant to Federal Rule of Civil Procedure 5, all other counsel of record not deemed to have consented to electronic service were served with a true and correct copy of this document via U.S. First Class Mail.

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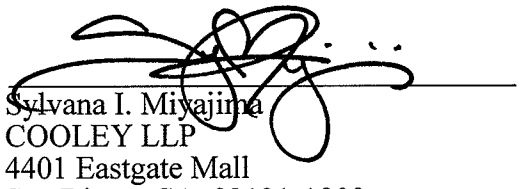

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