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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

RANDY NUNEZ, on Behalf of Himself, and All Others Similarly Situated,

Plaintiffs,

vs.

MICROSOFT CORPORATION, a Washington corporation, and BUNGIE, L.L.C., a Delaware Limited Liability Company, .

Defendants.

CV NO. 07cv2209-L (WMC)

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS COMPLAINT UNDER RULE 12(b)(6) AND RULE 9(b)

Judge: Hon. M. James Lorenz
Location: Courtroom 14
Date: March 10, 2008
Time: 10:30 a.m.

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I. INTRODUCTION

Plaintiff alleges that he purchased a video game called *Halo 3*, which he asserts was designed and manufactured by Defendants Microsoft Corporation ("Microsoft") and Bungie, LLC ("Bungie"), that "repeatedly locked up, froze, and/or crashed" when he attempted to play it. Rather than returning the game to the retailer where he purchased it for an exchange or refund, or contacting Microsoft to obtain the same relief available to him under Microsoft's express warranty, Plaintiff chose to file this class action lawsuit seeking "restitutionary disgorgement" of all *Halo 3* revenues based on nothing more than the alleged breach of an implied warranty and supposed misrepresentations which he claims mislead consumers to believe that *Halo 3* will never malfunction in any way. On this basis, Plaintiff asserts claims for violations of (1) California's Unfair Competition Law ("Unfair Competition Law" or "UCL"), Cal. Bus. & Prof. Code §§ 17200, *et seq.*, and (2) the Song-Beverly Consumer Warranty Act ("Song-Beverly Act"), Cal. Civ. Code §§ 1790, *et seq*. Plaintiffs' claims should be dismissed because California's consumer protection laws cannot be distorted in this way.

Plaintiff's UCL claims should be dismissed because he does not allege any conduct by Microsoft or Bungie that constitutes an "unlawful, fraudulent, or unfair" business practice. California law is clear that a mere breach of an implied warranty does not amount to a violation of the UCL. Plaintiff's allegations that Defendants engaged in "fraudulent" conduct are likewise insufficient to state a claim under the UCL for two reasons. *First*, such claims are not pled with particularity as Federal Rule of Civil Procedure 9(b) requires. *Second*, the alleged misrepresentations are not actionable because, as a matter of law, they are not "likely to deceive" reasonable consumers. No reasonable consumer would construe statements on *Halo 3* packaging that it is "[o]nly on Xbox 360" and "for exclusive use on the Xbox 360," Compl. ¶ 25, as representing that *Halo 3* will never lock up, freeze, crash or otherwise malfunction in any way. Under any reasonable construction, these statements simply inform prospective purchasers that *Halo 3* can be played "only" and "exclusively" on Xbox 360 consoles and not on other video game consoles, such as Sony PlayStation or Nintendo Wii. Nor does Plaintiff's allegation that Defendants failed to disclose that *Halo 3* supposedly "freezes, locks up and/or crashes," Compl.

¶¶ 27, 65, amount to a violation of the UCL because Plaintiff does not allege facts showing that Defendants knew of the supposed defect at the time of his purchase or that this purported omission was "likely to deceive" reasonable consumers.

Plaintiff's breach of warranty claims should also be dismissed because he does not allege that he gave timely notice of the alleged breach to Defendants, as required to state a breach of warranty claim under California law. Plaintiff's claim for breach of the implied warranty of fitness for a particular purpose should be dismissed for two additional reasons. *First*, Plaintiff fails to allege that Microsoft or Bungie knew or had reason to know of any "particular purpose" for which he intended to use *Halo 3* that is different from the "ordinary purpose" for which this game is used. *Second*, Plaintiff does not allege—nor can he—that he purchased his copy of *Halo 3* directly from either defendant. The statute upon which Plaintiff bases his claim makes clear that manufacturers make the implied warranty of fitness for a particular purpose only where the product is "sold at retail in this state *by a manufacturer*." Cal. Civ. Code § 1792.1 (emphasis added). Here, Plaintiff concedes he purchased his game from someone other than Defendants.

II. SUMMARY OF ALLEGATIONS

The facts alleged in the Complaint, assumed to be true for the purpose of this motion only, are as follows:

On September 25, 2007, Microsoft released *Halo 3*, a video game designed and manufactured by Microsoft and Bungie for exclusive use on the Xbox 360 video game console. Compl. ¶ 23. Plaintiff purchased a copy of *Halo 3* "on or around the middle of October, 2007" from GameStop, a video game retail store in San Diego, California. Compl. ¶ 30. According to Plaintiff, his copy of *Halo 3* "repeatedly locked up, froze and/or crashed while being operated on [his] Xbox 360 game console." Compl. ¶ 33. Plaintiff alleges that Defendants misrepresented *Halo 3* by stating on packaging that *Halo 3* was "[o]nly on Xbox 360" and "for exclusive use on the Xbox 360," Compl. ¶¶ 1, 25, while failing to disclose that it "freezes, locks up and/or crashes" when used on the Xbox 360 console, Compl. ¶ 65. Plaintiff further alleges that Defendants "knew, recklessly disregarded, or should have known" that these representations "were untrue and/or misleading." Compl. ¶ 67.

Conspicuously absent from the Complaint are any allegations acknowledging that Microsoft offers a 90-day express warranty for *Halo 3* and that, under that warranty, Plaintiff is entitled to a repair or replacement of his video game, or a refund. Plaintiff does not allege that either GameStop or Defendants refused to repair or replace his video game. Nor does he allege that either GameStop or Defendants refused to refund his money. Instead, Plaintiff chose to file this class action lawsuit seeking "replacement and reimbursement" on November 7, 2007, only weeks after purchasing *Halo 3* and with over two months remaining on a warranty that provides the same relief. Compl. ¶¶ 55, 61, 71.

III. ARGUMENT

A. Plaintiff's UCL Claims Should Be Dismissed (Count 3).

Plaintiff alleges that Defendants violated the UCL by distributing an unmerchantable product and by misrepresenting it to the public. Plaintiff fails to state a claim based on either type of alleged misconduct. California law is clear that merely distributing an allegedly "defective" product does not amount to a UCL violation. Plaintiff's claims based on supposed misrepresentations likewise fail for two reasons. *First*, such claims are not pled with particularity as Rule 9(b) requires. *Second*, the alleged misrepresentations are not actionable under the UCL because, as a matter of law, they are not "likely to deceive" consumers.

1. Claims Based On Alleged Defects In *Halo 3* Fail Because Breach Of An Implied Warranty Does Not Violate The UCL As A Matter Of Law.

Under California law, mere breach of an implied warranty does not constitute the type of "deceptive or sharp" practice for which liability may be imposed under the UCL. In *Klein v Earth Elements, Inc* , 59 Cal. App. 4th 965 (1997), the plaintiff asserted UCL claims based on allegations that Earth Elements distributed contaminated pet food that made pets sick after eating it. The California Court of Appeal affirmed the trial court's holding that such allegations did not support claims that Earth Elements engaged in "any prohibited conduct under the [UCL]—whether unlawful, unfair, or deceptive." *Id.* at 969. The court first disposed of the plaintiff's claims under the "unlawful" prong of the UCL:

> It is Klein's theory that liability imposed under the doctrines of "strict products liability and . . . breach of the implied warranty of fitness" will support an independent action under the "unlawful" prong of section 17200. . . . While these doctrines do provide for civil liability upon proof of their elements they do not, by themselves, describe acts or practices that are illegal or otherwise forbidden by law.

Id. (emphasis added). Turning to the "unfair" prong, the court held that the unintentional distribution of an unmerchantable product "d[id] not fit the 'unfairness' bill." *Id.* at 970. "To set the standard at perfection or no mistakes is too high a price to pay for eliminating the potential harm to the dogs from the unwitting distribution of contaminated food." *Id.* Finally, the court rejected the plaintiff's claim under the "fraudulent" prong of the UCL because "[t]he public is not likely to be deceived by Earth Element's unintentional distribution of unmerchantable pet food." *Id.*

Here, as in *Klein*, Plaintiff does not allege that the supposed breach of warranty was intentional, or that Defendants refused to provide remedies to consumers who allegedly received unmerchantable copies of *Halo 3*. Indeed, Plaintiff does not allege that he even sought remedies available to him from the retailer and under Microsoft's express warranty.

Plaintiff's claim that Defendants violated the "unfair" prong of the UCL fails for the separate reason that he specifies no legislative policy that Defendants supposedly violated. To maintain a cause of action under the "unfair" prong of the UCL, a plaintiff must specify a legislative policy that the defendant allegedly violated. *See Schnall v. Hertz Corp.*, 78 Cal. App. 4th 1144, 1166 (2000) ("claims of unfairness under the UCL should be defined in connection with a legislatively declared policy. . . .") (emphasis in original); *see also Gregory v. Albertson's, Inc.*, 104 Cal. App. 4th 845, 854 (2002). Plaintiff's conclusory allegation that Defendants' conduct "offend[s] public policy" does not allege facts sufficient to state a claim for "unfair" practices under the UCL. Compl. ¶ 66.

2. Claims Based On "Fraudulent" Conduct Fail Because They Do Not Satisfy The Pleading Requirements Of Rule 9(b) And Rely On Supposed Misrepresentations That Are Not "Likely To Deceive" Reasonable Consumers As A Matter Of Law.

Plaintiff purports to state a claim under the UCL on grounds that Defendants engaged in "fraudulent" business acts or practices. Specifically, Plaintiff alleges that "Defendants' acts, omissions, misrepresentations, practices and non-disclosures, as alleged herein, also constitute 'fraudulent' business acts or practices within the meaning of" the UCL. Compl. ¶ 67. Other than the "act or practice" of unintentionally distributing an unmerchantable product, which does not violate the UCL for reasons set forth above, the only conduct alleged in the complaint is that Defendants misrepresented *Halo 3* by (1) stating on product packaging that *Halo 3* is "[o]nly on Xbox 360" and "for exclusive use on the Xbox 360 in the NTSC format," Compl. ¶ 25, and (2) failing to disclose that *Halo 3* supposedly "freezes, locks up and/or crashes when it is utilized in its intended use on Defendant Microsoft's Xbox 360 video game console," Compl. ¶ 65. Plaintiff's claims for violation of the "fraudulent" prong of the UCL fail for two reasons. *First*, they are not pled with particularity as Rule 9(b) requires. *Second*, the alleged misrepresentations are not actionable because, as a matter of law, they are not "likely to deceive" reasonable consumers

a. The Supposed "Fraudulent" Conduct Is Not Pled With Particularity As Rule 9(b) Requires.

Plaintiff's UCL claim should be dismissed to the extent it is based on allegedly fraudulent conduct because the Complaint fails to meet the heightened pleading requirements of Rule 9(b). *See Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1105 (9th Cir. 2003) ("[I]f particular averments of fraud are insufficiently pled under Rule 9(b), a district court should 'disregard' those averments, or 'strip' them from the claim.").

Rule 9(b) requires that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." This is not a mere technical requirement but one that serves important purposes:

> Rule 9(b) serves not only to give notice to defendants of the specific fraudulent conduct against which they must defend, but also "to deter the filing of complaints as a pretext for the discovery of unknown wrongs, to protect [defendants] from the harm that comes from being subject to fraud charges, and to prohibit plaintiffs from unilaterally imposing upon the court, the parties and society enormous social and economic costs absent some factual basis."

Bly-Magee v. California, 236 F.3d 1014, 1018 (9th Cir. 2001) (*quoting In re Stac Elec. Sec. Litig.*, 89 F.3d 1399, 1405 (9th Cir. 1996)).

Accordingly, the Ninth Circuit rigorously enforces the Rule 9(b) requirements, including in cases brought under the UCL. *See, e.g.*, *Vess*, 317 F.3d at 1103-06 (claims which "sound in fraud," including UCL claims, must satisfy Rule 9(b); allegation of conspiracy without "the particulars of when, where, or how the alleged conspiracy occurred" is insufficient); *Bly-Magee*, 236 F.3d at 1018 (broad allegation that defendant "concealed the fraudulent submission of false claims . . . to avoid repayment of funds" insufficient under Rule 9(b)); *In re Stac Elecs.*, 89 F.3d at 1410-11 (allegation that defendants "schemed . . . to project false reports" insufficient under Rule 9(b)).

To meet the Rule 9(b) requirements, a plaintiff must, at a minimum, specify the "time, place, and content" of the alleged fraudulent misrepresentation or omission. *In re Glenfed*, 42 F.3d 1541, 1547-48 (9th Cir. 1994) (en banc); *In re Stac*, 89 F.3d at 1404. In other words, Plaintiff must set forth "the who, what, when, where, and how" of the misconduct alleged. *Vess*, 317 F.3d at 1106 (citation omitted). Even such details are insufficient, however; Plaintiff must also "set forth an explanation as to why the statement or omission complained of was . . . false or misleading when made." *In re Stac*, 89 F.3d at 1404. Defendants are entitled to know the "precise misconduct" with which they are charged "so that they can defend against the charge and not just deny that they have done anything wrong." *Bly-Magee*, 236 F.3d at 1018-19 (*quoting Rolo v. City Investing Co. Liquidating Trust*, 155 F.3d 644, 658 (3d Cir. 1998) and *Neubronner v. Milken*, 6 F.3d 666, 672 (9th Cir. 1993)).

Here, Plaintiff's allegations of fraudulent conduct are insufficient. Rather than state the particulars of the allegedly fraudulent conduct, Plaintiff simply refers to the "Defendants' acts,

omissions, misrepresentations, practices and non-disclosures, as alleged herein," Compl. ¶ 67, and alleges that they "also constitute 'fraudulent' business acts or practices." *Id.* These allegations fall woefully short of the specificity required. *See Semegen v. Weidner*, 780 F.2d 727, 731 (9th Cir. 1985) (conclusory allegations of fraud and conspiracy with no specification of "times, dates, places or other details," insufficient under Rule 9(b)).

With respect to the alleged misrepresentations, Rule 9(b) requires that Plaintiff allege facts showing that Defendants knew of the supposed defect in *Halo 3* at the time of his purchase. *See Brothers v. Hewlett-Packard Co.*, No. C-06-02254, 2006 WL 3093685, at *6 (N.D. Cal. Oct. 31, 2006) (dismissing UCL claims based upon failure to disclose an alleged defect in laptop computers where "plaintiff allege[d] no *contemporaneous facts* that [defendant manufacturer] knew about the alleged defects when plaintiff . . . purchased [his laptop]") (emphasis added). Here, Plaintiff alleges no "contemporaneous facts" to make this showing. Instead, he makes the conclusory allegation that "Defendants either knew, recklessly disregarded, or should have known their product representations were untrue and/or misleading." Compl. ¶ 67. As in *Brothers*, this allegation is insufficient to state a claim under the UCL based on alleged misrepresentations

b. The Alleged Misrepresentations Are Not Actionable Because They Are Not "Likely To Deceive" Reasonable Consumers As A Matter Of Law.

Misrepresentation claims under the UCL require a showing that the alleged false statements or omissions upon which they are based are "likely to deceive" reasonable consumers. *See Freeman v. Time, Inc.*, 68 F.3d 285, 289 (9th Cir. 1995) (misrepresentation claims under UCL require a showing that "members of the public are likely to be deceived"); *Haskell v. Time, Inc.*, 857 F. Supp. 1392, 1399 (E. D. Cal. 1994) (same); *Comm. on Children's Television, Inc. v. Gen. Foods Corp.*, 35 Cal. 3d 197, 211 (1983) (same). Because the "reasonable consumer" inquiry is an objective standard, claims may be dismissed as a matter of law where the alleged statement "in context, is such that no reasonable consumer could be misled" in the manner claimed by the plaintiff. *Haskell*, 857 F. Supp. at 1399 (dismissing claims based on statements that the court concluded could not be construed as alleged in the complaint); *Cook, Perkiss &*

Liehe, Inc. v. N. Cal. Collection Serv., Inc., 911 F.2d 242, 245 (9th Cir. 1990) ("District Courts often resolve whether a statement is puffery when considering a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) and we can think of no sound reason why they should not do so.").

Likewise, claims based on omissions may be dismissed as a matter of law where the complaint does not allege facts showing that the alleged omission is "likely to deceive" reasonable consumers. *See Bardin v. Daimlerchrysler Corp.*, 136 Cal. App. 4th 1255, 1274-76 (2006) (dismissing UCL claims based on failure to disclose an alleged defect because the plaintiff did not allege facts showing that consumers were "likely to be deceived" by the alleged omission); *Daugherty v. Am. Honda Motor Co.*, 144 Cal. App. 4th 824, 838 (2006) (dismissing UCL claims based on failure to disclose an alleged defect where the plaintiff did not allege facts giving rise to a duty to disclose the alleged omission because "failure to disclose a fact one has no affirmative duty to disclose" cannot be deemed "'likely to deceive' anyone within the meaning of the UCL").

Plaintiff's claims based on affirmative misrepresentations should be dismissed because the alleged statements upon which they are based would not mislead reasonable consumers. Plaintiff alleges that statements on *Halo 3's* packaging that it is "[o]nly on Xbox 360" and "for exclusive use on the Xbox 360 in the NTSC format" are false and misleading because *Halo 3* supposedly "freezes, locks up and/or crashes" when played on the Xbox 360 console. Compl. ¶¶ 25, 65. These statements are not false or misleading because no reasonable consumer would construe them as representing that *Halo 3* would perform to a particular standard, let alone that it would never freeze, lock up, crash or otherwise malfunction in any way. As Plaintiff admits in the Complaint, *Halo 3* is "made and sold for *exclusive use* on Microsoft's video game console (the 'Xbox 360')." Compl. ¶ 1 (emphasis added). Likewise, other video games are made and sold for *exclusive use* on other video game consoles, such as Nintendo Wii, Sony PlayStation and Sega Dreamcast. Because some games are designed for exclusive use on particular consoles, while other games are made for use on more than one type of console, it is necessary to inform consumers which games can be played on which consoles. Statements that *Halo 3* is "[o]nly on

Xbox 360" and "for exclusive use on the Xbox 360" do exactly that, and only that. Therefore, these statements simply inform consumers of a fact that Plaintiff admits (repeatedly) is true. *See* Compl. ¶ 1 ("[Defendants] manufacture a 'first person' science fiction video game ('Halo 3') made and sold for exclusive use on Microsoft's video game console (the 'Xbox 360')"); Compl. ¶ 21 (*Halo 3* "is designed, manufactured, marketed, and sold by Defendants to be played exclusively on the Xbox 360 video game console"). Accordingly, Plaintiff's claims based on affirmative misrepresentations should be dismissed. *See Haskell*, 857 F. Supp. at 1399 (dismissing UCL claims "as a matter of law" where no reasonable consumer would construe alleged statements as the plaintiff claimed).

Plaintiff's claims based on omissions should be dismissed because the supposed omission—that *Halo 3* purportedly "freezes, locks up and/or crashes"—does not amount to a violation of the UCL for two reasons. *First*, as set forth above, Plaintiff does not allege facts showing that Defendants knew of the supposed defect at the time Plaintiff allegedly purchased his copy of *Halo 3*. Liability under the UCL cannot be predicated on the defendant's failure to disclose information it does not have. *See Brothers*, 2006 WL 3093685, at *6 (dismissing UCL claims based upon failure to disclose an alleged defect in laptop computers where "plaintiff allege[d] no contemporaneous facts that [defendant manufacturer] knew about the alleged defects when plaintiff . . . purchased [his laptop]"). *Second*, as the California Court of Appeal held in *Klein*, 59 Cal. App. 4th 965, consumers are not "likely to be deceived" because a product they purchase turns out to be defective:

> While the consumer buying "Nature's Recipe" would anticipate that the product was pet-edible, that same consumer would not be deceived when the food turned out to be contaminated. While we expect that food we buy will not be rotten or contaminated, we know that sometimes it is—this is a fact of life. As soon as a dog refused to eat or vomited, the customer would know something was wrong and, as we all have contemplated doing from time to time, might have returned the defective product to the store, contacted the manufacturer, etc.

Id. at 970. No manufacturer can guarantee that its products will never malfunction in any way. That is why they provide warranties under which they make available certain remedies to consumers who experience malfunctions. Consumers understand this and, therefore, are not

deceived when a product malfunctions—this is "a fact of life." As recognized in *Klein*, the reasonable course for a consumer to take when this occurs is to return the product to the retailer or contact the manufacturer to seek available remedies, not file a lawsuit accusing the manufacturer of "sharp and deceptive" practices. Although Plaintiff was clearly disappointed when his copy of *Halo 3* (allegedly) malfunctioned, he was not deceived. Rather than filing this lawsuit seeking "replacement and reimbursement" of the game, Plaintiff could have contacted Microsoft to obtain his remedy, which he remains free to do as of the date of this filing.

B. Plaintiff's Warranty Claims Should Be Dismissed (Counts 1 And 2).

1. Plaintiff Does Not Allege That He Gave Timely Notice Of The Alleged Breach As Required To State A Claim For Breach Of Warranty.

Plaintiff's claims for breach of the implied warranties of merchantability and fitness for a particular purpose fail because he has not alleged that he timely notified Defendants of the alleged breach, as required under section 2607(3)(A) of the California Commercial Code. The notice requirement "is based on a sound commercial rule designed to allow the defendant opportunity for repairing the defective item, reducing damages, avoiding defective products in the future, and negotiating settlements," and also "protects against stale claims." *Pollard v. Saxe & Yolles Dev. Co.*, 12 Cal. 3d 374, 380 (1974). Plaintiff could have resolved any problems he had with his allegedly defective copy of *Halo 3* simply by contacting Microsoft and requesting an exchange or refund under Microsoft's express warranty. Plaintiff's failure to allege that he even contacted Microsoft (or Bungie) when his game allegedly malfunctioned requires dismissal of his claims. *See, e.g.*, *Andrade v. Pangborn Corp.*, No. C 02-3771, 2004 WL 2480708, at *23 (N.D. Cal. Oct. 22, 2004) (noting that a plaintiff must take steps to provide the defendant with notice to have a viable breach of implied warranty claim); *Vogel v. Thrifty Drug Co.*, 43 Cal. 2d 184, 187 (1954) ("[P]laintiff overlooks an element essential to stating a cause of action for breach of the implied warranty, i.e., an allegation that plaintiff gave notice of the breach to the defendant within a reasonable time.").

2. Plaintiff's Claim For Breach Of The Implied Warranty Of Fitness For A Particular Purpose Fails Because He Does Not Allege A "Particular Purpose" For Which He Intended To Use *Halo 3*, Or That He Purchased *Halo 3* Directly From Defendants.

Plaintiff's claim for breach of the implied warranty of fitness for a particular purpose fails for two additional reasons. *First*, he does not allege any "particular purpose" for which he intended to use *Halo 3* that is different from its "ordinary use." *See* Cal. Civ. Code § 1791.1(b) "A 'particular purpose' differs from the ordinary purpose for which the goods are used in that it envisages a specific use by the buyer which is peculiar to the nature of his business whereas the ordinary purposes for which goods are used . . . go to uses which are customarily made of the goods in question." *Am. Suzuki Motor Corp. v. Superior Court*, 37 Cal. App. 4th 1291, 1295 n.2 (1995); *see also Andrade*, 2004 WL 2480708, at *25 (intervener-plaintiff did not prove breach of the implied warranty of fitness for a particular purpose where plaintiff did not offer any evidence that plaintiff-intervener intended to put machine to a specific use peculiar to the nature of its business).

Here, Plaintiff alleges that the "particular purpose" of *Halo 3* is for "being played on the Xbox 360" and "use on the Xbox 360." Compl. ¶¶ 6(b), 59. This claimed "particular purpose" is indistinct from the alleged "ordinary purpose" of *Halo 3*—"operating on the Xbox 360." Compl. ¶¶ 6(a), 52. Indeed, the fact that Plaintiff attempts to assert this claim on behalf of everyone in California who purchased the *Halo 3* video game underscores the flaw in his contention that this stated purpose is peculiar to a particular buyer. Accordingly, Plaintiff's claim for breach of the implied warranty of fitness for a particular purpose should be dismissed because it is duplicative of his claim for breach of the implied warranty of merchantability. *See Am. Suzuki Motor Corp.*, 37 Cal. App. 4th at 1295 n.2 (1995) (dismissing "fitness" claims because the plaintiffs "failed to identify any legally cognizable 'particular purpose' for which they supposedly obtained their vehicles (other than the general purpose of providing transportation)")

Second, Plaintiff does not—and cannot—allege that he purchased *Halo 3* from Defendants and, therefore, cannot show that Defendants had reason to know of any "particular purpose" for which he intended to use *Halo 3* or that he relied on their skill or judgment to select or furnish a

product to meet that purpose. Under the Song-Beverly Act, the implied warranty of fitness for a particular purpose is implied as to manufacturers only where the product is "sold at retail in this state by a manufacturer." Cal. Civ. Code § 1792.1 (emphasis added). Thus, the plain language of the Act recognizes that a claim for breach of the implied warranty of fitness for a particular purpose is predicated on some direct communication between the buyer and seller about the buyer's particular purpose. *See Gottsdanker v. Cutter Labs.*, 182 Cal. App. 2d 602, 608 (1960) ("[I]mplied warranties of fitness and of merchantability are enforceable only against a seller"). Here, Plaintiff concedes that he purchased *Halo 3* from GameStop, not Microsoft or Bungie. Compl. ¶ 30. Accordingly, he cannot state a claim for breach of the implied warranty of fitness for a particular purpose against either defendant.

IV. CONCLUSION

For the reasons stated above, Microsoft and Bungie respectfully request that the Complaint, and claims alleged therein, be dismissed.

DATED: January 10, 2008

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UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

RANDY NUNEZ, on Behalf of Himself, and All Others Similarly Situated. Plaintiff, vs. MICROSOFT CORPORATION, a Washington corporation, and BUNGIE, L.L.C., a Delaware Limited Liability Company. Defendants	CV NO. 07cv2209-L (WMC) PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS COMPLAINT UNDER RULE 12(b)(6) AND RULE 9(b) Judge: Hon. M. James Lorenz Location: Courtroom 14 Date: March 10, 2008 Time: 10:30 a.m.

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I. INTRODUCTION

Defendants' dismissal briefing suggests that Defendants – as Plaintiff alleges – do indeed defectively manufacture fictional realities. To wit, Defendants' dismissal effort centers on a bizarre, pet poisoning-based bid to remove defective products completely from the coverage of California's Unfair Competition Law, Cal. Bus. & Prof. Code §17200 ("the UCL"). At the same time, Defendants mostly ignore the statutory warranty claims at the core of Plaintiff's Complaint. Defendants' arguments as to both subjects ultimately are unavailing.

One of Defendants' omissions concerning Plaintiff's statutory warranty claims is especially telling. As to Count I of Plaintiff's Class Action Complaint (Breach of Statutory Implied Warranty of Merchantability), Defendants have nothing to say except that Plaintiff's merchantability claim should be dismissed because Plaintiff did not notify Defendants in advance of filing suit of his intention to pursue relief under California's Song-Beverly Consumer Warranty Act, Cal. Civ. Code §1790 *et seq.* (the "Song-Beverly Act"). Defendants ignore that consumers suing under the Song-Beverly Act's implied warranty provisions are not required to give pre-suit notice. The cases Defendants cite to the contrary pertain only to warranty claims under California's version of the Uniform Commercial Code ("UCC") – and not to warranty claims under the Song-Beverly Act.

As to the UCL, among other things, Defendants strikingly assert that consumers have no legal remedies under that law when their computer programs malfunction or their pets die from poisoned pet food (Defendants' metaphor of choice) because "[c]onsumers understand" that the food they buy sometimes will be rotten or contaminated and that the computer programs they buy sometimes will malfunction. According to Defendants, California

consumers know that when these things happen, they are simply "fact[s] of life" with no consequences under the UCL. (*See* Defendants' Memorandum of Points and Authorities In Support Of Motion To Dismiss at 9-10 ("Def. Mem.").) Thankfully, Defendants' macabre effort to define consumer protection deviancy down finds no support in the UCL. *See McKell v. Washington Mutual, Inc.*, 142 Cal. App. 4th 1457, 1471 (2006) ("scope of the UCL is quite broad"); *Cortez v. Purolator Air Filtration Products Co.*, 23 Cal. 4th 163, 181 (2000) (plaintiff need not show that a UCL defendant intended to injure anyone by its unlawful or unfair conduct).

In short, Plaintiff has properly alleged his claims under both the Song-Beverly Act and the UCL, and Defendants' Motion to Dismiss accordingly should be denied.

II. SUMMARY OF FACTS ALLEGED

Plaintiff purchased a product (namely, the "*Halo 3*" video game) manufactured and marketed by Defendants Microsoft Corporation and Bungie, LLC (collectively, "Microsoft" or "Defendants"). (Plaintiff's Class Action Complaint ¶ 1 (variously, the "Complaint" or "Compl.").) Plaintiff alleges in his Complaint that the container in which *Halo 3* is sold "expressly states that *Halo 3* is compatible with the Xbox 360" game console and that Defendants otherwise marketed *Halo 3* as compatible with the Xbox 360. (*Id.* ¶¶ 1, 25.) Plaintiff alleges that even though Defendants knew consumers were purchasing *Halo 3* only for use on the Xbox 360 game system, *Halo 3* nonetheless does not function with that system, and that attempted use of *Halo 3* consistently causes the Xbox 360 to "crash," "freeze" or "lock up" while the game is being played. (*Id.* ¶¶ 2, 4.) Plaintiff alleges that Defendants at the time Plaintiff filed his Complaint had not remedied *Halo 3*'s malfunctioning even though Defendants were "faced with repeated and mounting consumer complaints and inquiries

concerning this operational flaw in the *Halo 3*" game. (*Id.* ¶ 5.) And Plaintiff alleges that Defendants knew or had reason to know that *Halo 3* was being purchased by consumers for use on an Xbox 360 and that the buyers of *Halo 3* were relying on Defendants to furnish goods suitable for that purpose. (*Id.* ¶ 2.)

III. DEFENDANTS' BURDEN OF PROOF UNDER RULE 12(b)(6)

It is "axiomatic that 'the motion to dismiss for failure to state a claim is viewed with disfavor and is rarely granted.'" *Hall v. Santa Barbara*, 833 F.2d 1270, 1274 (9th Cir. 1986). Thus, "it is only the extraordinary case in which dismissal is proper." *United States v. Redwood City*, 640 F.2d 963, 966 (9th Cir. 1981). When considering a motion to dismiss, the court must accept as true the complaint's allegations and construe them in the light most favorable to plaintiff. *Cervantes v. United States*, 330 F.3d 1186, 1187 (9th Cir. 2003). A motion to dismiss must be denied "'unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *See Estate of Migliaccio v. Midland Nat'l Life Ins. Co.*, 436 F. Supp. 2d 1095, 1099 (C.D. Cal. 2006).

As discussed below, Plaintiff's Song-Beverly Act cause of action for breach of warranty and his UCL cause of action are adequately alleged and easily satisfy the above-mentioned standards.

IV. PLAINTIFF HAS PROPERLY ALLEGED HIS SONG-BEVERLY ACT CLAIMS

Defendants assert that both of Plaintiff's Song-Beverly Act claims (his statutory claim for breach of implied warranty of merchantability and his statutory claim for breach of implied warranty of fitness for a particular purpose) must be dismissed because Plaintiff did not notify Defendants before filing suit of his intent to bring his Song-Beverly Act claims. Defendants also assert that Plaintiff's Song-Beverly claim for the warranty of fitness for a particular purpose should be dismissed because Plaintiff has not adequately alleged a distinct and

actionable "particular purpose" here and has not adequately alleged that he bought the product at issue from Defendants. ***Notably, the pre-suit notice argument is Defendants' only argument for dismissal of Plaintiff's Song-Beverly Act merchantability claim.***

Defendants' Song-Beverly Act arguments are meritless. As an initial matter, the Song-Beverly Act provides that manufacturers who make any express warranty to consumers (Def. Memo. at 3:1-3) furthermore make to consumers implied, nonwaivable statutory warranties that the goods in question are merchantable and fit for their particular purpose. Cal. Civ. Code §§ 1792, 1792.1, 1790.1, 1791.1(a) & (b); *see generally, Mocek v. Alpha Leisure*, 114 Cal. App. 4th 402 (Cal. App. 4 Dist., 2003); *Gusse v. Damon Corp.*, 470 F. Supp. 2d 1110, 1116 n.9 (C.D. Cal. 2007). Statutory relief for a breach of these Song-Beverly warranties includes, at the election of the consumer, a right of ***full reimbursement.*** Cal. Civ. Code §§1794(b), 1793.2(d); *see, e.g., Gusse*, 470 F. Supp. 2d at 1117-18.

The elements of a Song-Beverly merchantability claim are straightforward:

> (1) the plaintiff bought a consumer good in California;
>
> (2) the defendant manufactured the consumer good, and
>
> (3) the consumer good was not "merchantable" within the meaning of Cal. Civ. Code §1791.1(a).

Isip v. Mercedes-Benz, USA, LLC, 155 Cal. App. 4th 19, 23 (Cal. App. 2 Dist. 2007); *Music Acceptance Corp. v. Lofing*, 32 Cal App. 4th 610, 619 (Cal. App. 3 Dist. 1995). Song-Beverly's "merchantability" standard provides a minimum level of quality, such that the product is "substantially free of defects." *Isip*, 155 Cal. App. 4th at 26-27. A nonconformity that "substantially impairs the use or value" of the product to the buyer breaches the Song-Beverly warranty of merchantability. *Music Acceptance*, 32 Cal. App. 4th at 624.

The elements of a Song-Beverly Act implied warranty of fitness claim are equally straightforward – the only difference being that the manufacturer must be shown to have had "reason to know at the time of the retail sale that the goods are required for a particular purpose and that the buyer is relying on the manufacturer's skill or judgment to select or furnish suitable goods." Cal. Civ. Code §1792.1. Plaintiff here, of course, alleges that Defendants manufacture *Halo 3* knowing that consumers will use the game for the particular purpose of operating the game on a hardware system recommended by Microsoft. (Compl. ¶¶ 3, 26.)

Finally, California consumers sold goods warrantied under Song-Beverly need not limit themselves to remedies purportedly dictated by the manufacturer. Song-Beverly Act remedies for breach of a manufacturer's statutory implied warranties include rescission and restitution, at the election of the purchaser, even if the actual seller of the goods is someone other than the manufacturer. *Music Acceptance*, 32 Cal. App. 4th 610, at 165; *Gusse*, 470 F. Supp. 2d at 1117; *accord*, Cal. Civ. Code §1794. The Song-Beverly Consumer Warranty Act is manifestly a remedial measure, intended for the protection of the consumer, which should be given a construction calculated to bring its benefits into action. *Robertson v. Fleetwood Travel Trailers of California, Inc.*, 50 Cal. Rptr. 3d 731, 144 Cal. App. 4th 785 (App. 5 Dist. 2006).

A. Pre-Suit Notice Is Not Required For Song-Beverly Act Warranty Claims

Defendants in their dismissal brief curiously make only a single argument for dismissal of Plaintiff's Song-Beverly Act merchantability claim (which also applies to Plaintiff's Song-Beverly fitness claim): that Plaintiff failed to give pre-suit notice of the

alleged warranty breach. Defendants here simply misstate applicable California law. The California Court of Appeals has squarely held that a plaintiff suing under the Song-Beverly Act need not give the defendant manufacturer(s) any particular notice of the breach or prior opportunity to repair. *Mocek*, 114 Cal. App. 4th, at 407. Defendants fail to address or even cite *Mocek* - controlling authority directly on point – even though the case is specifically referenced in the Complaint. (*See* Compl. ¶ 9.) Instead, Defendants cite three readily distinguishable cases that ***do not even involve Song-Beverly claims***. *Pollard v. Saxe & Yolles Dev. Co*, 12 Cal. 3d 374, 380 (1974) (discussing notice requirements under California's version of the UCC); *Andrade v. Pangborn Corp.*, 2004 WL 2480708, at *23 (N.D. Cal. Oct. 22, 2004) (same); *Vogel v. Thrifty Drug Co.*, 43 Cal. 2d 184, 187 (1954) (same).

In any event, to the extent that there is any conflict between the two sets of law, the Song-Beverly Act trumps California's version of the UCC. *See* Cal. Civ. Code § 1790.3.

B. Plaintiff Has Properly Alleged His Song-Beverly Claim for Breach of Warranty of Fitness for a Particular Purpose

Defendants contend that Plaintiff's Song-Beverly fitness claim should be dismissed because Plaintiff supposedly "does not allege any 'particular purpose' for which he intended to use *Halo 3* that is different from its 'ordinary use.'" (Def. Mem. 11:4-6 (citation omitted).) As with the pre-suit notice issue, Defendant cites a number of irrelevant UCC-related precedents in support of its position here. And Defendant's position here similarly is without merit. Just last summer, the California Court of Appeals affirmed a jury trial verdict for a pair of plaintiffs on Song-Beverly Act warranty claims for breaches of both the implied warranty of merchantability and the implied warranty of fitness for a particular purpose. *See Townsend v. Boat and Motor Mart*, No. Nos. A112623, A114267, 2007 WL 1252619, at *8 (Cal. Ct.

App. May 1, 2007). The case concerned the sale of a defective fishing boat, and the court left no doubt in affirming the jury's verdict that it considered the "ordinary" and "particular" purposes for which the boat was sold to the plaintiffs to be one and the same. The court stated that the jury's "findings were supported by substantial evidence. There was ample testimony that the boat was neither fit for its ordinary purpose (sports-fishing) or for Townsend's particular purpose (also sports-fishing)." *Id.*

V. PLAINTIFF HAS PROPERLY ALLEGED HIS UNFAIR COMPETITION LAW CLAIMS

A. Defendants' Alleged Violation of the Song-Beverly Act is a Sufficient Predicate for Plaintiff's "Unlawful Business Acts" UCL Claim

Plaintiff alleges that Defendants' *Halo 3*-related business acts and practices are unlawful and unfair, in violation of the UCL. (Compl. ¶¶ 63-66.) Defendants contend that these allegations should be dismissed because "merely distributing an allegedly 'defective' product [in violation of the Song-Beverly Act] does not amount to a UCL violation." (Def. Mem. At 3:11-13.) The UCL, however, affords Plaintiff an avenue for injunctive relief and restitutionary disgorgement from Defendants' violation of the Song-Beverly Act. *See Mocek*, 114 Cal. App. 4th, at 405 (Song-Beverly violations constituted basis for restitutionary relief under Section 17200); *accord*, Cal. Civ. Code §1790.4. Such restitution, notably, is available to Plaintiff under the UCL even if he did not pay Defendants directly for the product. *See*, *Shersher v. Superior Court*, 15 Cal. App. 4th 1491, 1499-1500 (Cal. App. 2 Dist. 2007)

B. Plaintiff Has Adequately Alleged that Defendants Have Committed "Unfair" and "Fraudulent" Business Acts in Violation of the UCL

Defendants' briefing improperly elides the distinction between a common law fraud action and a "fraudulent business practice" under the UCL. In order properly to allege that a practice is "fraudulent" within the meaning of the UCL, Plaintiff need not allege with

specificity the elements of the common law tort of fraud. *Bank of the West v. Superior Court*, 2 Cal. 4th 1254, 1267 (1992). Plaintiff must allege only a "fraudulent business practice . . . which is likely to deceive the public." *McKell v. Washington Mutual, Inc.*, 142 Cal. App. 4th 1457, 1471 (2006). Unlike common law fraud, the normal principles of notice pleading apply to allegations under the fraudulent prong of Business and Professions Code §17200. "The requirement that fraud be pleaded with specificity . . . does not apply to causes of action under the consumer protection statutes." *Comm. On Children's Television, Inc. v. Gen. Foods Corp.*, 35 Cal. 3d 197 at 212 n.11 (1983).

1. Defendants Improperly Apply Federal Rule of Civil Procedure 9(b) to Plaintiff's UCL Allegations

Defendants in their briefing ignore this distinction and attempt to apply Federal Rule of Civil Procedure 9(b) to the entirety of Plaintiff's UCL allegations under the statute's "fraudulent" practices prong. (Def. Mem. at 5.) At the core of Defendants' effort here is a distorted construction of *Vess v. Ciba-Geigy Corp.*, 317 F.3d 1097, 1105 (9th Cir. 2003). Defendants argue that pursuant to *Vess*, ***all*** of Plaintiff's allegations under the UCL fraudulent practices prong must meet "Fed. Rule Civ. P. 9(b)'s heightened pleading requirements." (Def. Mem. at 5.) Defendants misread *Vess*.

First, *Vess* specifically acknowledges that a UCL claim concerning allegedly fraudulent practices is something fundamentally different than a common law fraud claim. Citing *Children's Television*, *Vess* noted that "fraud is not an essential element of the California statutes [*i.e.*, the UCL and the Consumer Legal Remedies Act; California Civil Code §1750 et. seq.] on which" the plaintiff in that case relied. *Id.* at 1103. *Vess* goes on to state that when fraud is not a necessary element of a plaintiff's UCL claim, a plaintiff may nonetheless allege fraud-like conduct (acts that tend to mislead, for instance) in support of her UCL claim as well as other conduct that would, in fact, constitute common law fraud (*i.e.*, acts of actual deception such as demonstrably false statements, subsequent reliance on those

acts by an actually defrauded plaintiff, and consequent injury). If so, "***only the allegations of fraud*** are subject to Rule 9(b)'s heightened pleading requirements." *Id.* at 1104 (emphasis added). To illustrate the rule, *Vess* points to securities cases where a complaint asserting violations of the 1933 Securities Act grounded in negligence may also attempt to establish violations of the anti-fraud provisions of the Act. If so, the fraud claims need to be averred with particularity. *Vess*, 317 F.3d at 1103-04.[1]

Thus, Plaintiff here may permissibly allege facts in support of his UCL claim that are not coextensive with the elements of common law fraud. Those allegations "may be based upon representations to the public which are untrue, and also those which may be accurate on some level, but will tend to mislead or deceive" the consumer. *Id.* (citing *Massachusetts Mutual Life Ins. Co. v. Superior Court*, 97 Cal. App. 4th 1282, 1289-90 (2002)). To the extent Plaintiff has challenged Defendants' misrepresentations as flatly "false" – which is to say, potentially actionable as common law fraud if as alleged – Plaintiff submits that he has made such allegations with the specificity necessary to satisfy Rule 9(b), if that rule is indeed in play here. However, to the extent Plaintiff has merely alleged that Defendants' statements and conduct would tend to mislead consumers, Plaintiff may permissibly articulate (and has articulated) those allegations as required by the rules of notice pleading.

Similar to the case at bar, in *Brothers v. Hewlett-Packard Co.*, No. C-06-02254, 2006 WL 3093685, (N.D. Cal. Oct. 31, 2006), defendant Hewlett Packard ("HP") brought a motion to dismiss the plaintiff's UCL allegations for failing to allege with particularity that HP had falsely misrepresented the capabilities and omitted the defects of a notebook computer sold to the plaintiff. *Id.* at *1. The plaintiff in that case argued that his allegations did not sound in fraud because they did not focus on the defendant's intent. In ultimately

[1] Further, the remaining cases cited by Defendants go to the same principle. *In re Stac Elecs. Sec. Litig.*, 89 F.3d 1399, 1405 (9th Cir. 1996), simply cites the rule that if Section 11 claims are grounded in fraud they must satisfy Rule 9(b). In *Bly-Magee v. California*, 236 F. 3d 1014, 1018 (9th Cir. 2001), the court simply held that claims brought under the False Claims Act, 31 U.S.C. §3729(a), which explicitly "is an anti-fraud statute," must fulfill the requirements of Rule 9(b).

rejecting the plaintiff's argument, the Court held that only the plaintiff's "allegations of ***false*** misrepresentations constituted allegations that sounded in fraud." Id. at *6 citing *Vess v. Ciba-Geigy Corp.*, 317 F.3d 1097, 1106-1107 (9th Cir. 2003) (emphasis added). The plaintiff's fatal mistake in *Brothers* – unrepeated in the case at bar – was that his allegations in support of the fraudulent business practice claim were "based on an entire course of fraudulent conduct, namely, HP's alleged ***false*** misrepresentations and concealment of the alleged defects." Id. at *7. (emphasis added).

Here, Plaintiff's allegations are not exclusively grounded in Defendants' "false misrepresentations." Plaintiff has alleged that – their allegedly false statements aside – Defendants ***misled*** Plaintiff in representing that the *Halo 3* was compatible with the Xbox 360 video game system (Compl. ¶25), when in fact, the game "routinely, consistently, and systematically 'froze,' 'crashed', or 'locked up' – disrupting game play and rendering the game inoperable." (*Id.* ¶27). Plaintiff does not only contend that Defendants' representations concerning *Halo 3* were false. As Plaintiff alleges, "Defendants have deceived consumers who reasonably believed that the Halo 3 video game would perform reliably in its intended use and permit purchasers to play the video game without substantial interruption." (*Id.* ¶65.) Thus, Plaintiff has appropriately alleged within the constraints of notice pleading that Defendants' representations were "deceptive" and "misleading," regardless of whatever allegations he makes that Defendants' representations were "untrue" or "false." (*Id.* ¶67.)

In any event and regardless of the standard applied here, Plaintiff alleges facts concerning Defendants' conduct with enough specificity for Defendants to understand the claims asserted against them. A motion to dismiss under Rule 9(b) should be denied if the "allegations are sufficient to notify the defendants of the claim made against them, and to frame the issues for litigation." *Comm. On Children's Television, Inc. v. Gen. Foods Corp.*, 35 Cal. 3d 197 at 213 (1983). The question of whether a practice is likely to deceive is a

"question of fact, requiring consideration and weighing of the evidence from both sides before it can be resolved" – and thus by its nature is unsuited for resolution on a motion to dismiss. *McKell*, 142 Cal. App. 4th at 1472; *see also People v. McKale*, 25 Cal. 3d 626, 635 (1979) (what constitutes a UCL fraudulent business practice under any given set of circumstances is a question of fact); *Gregory v. Albertson's, Inc*., 104 Cal. App. 4th 845, 857 (2002) (same).

2. Rule 9(b) Aside, Plaintiff Has Properly Asserted His UCL Claim

"A business practice is unfair within the meaning of the UCL if it violates established public policy or if it is immoral, unethical, oppressive or unscrupulous and causes injury to consumers which outweighs its benefits." *McKell v. Washington Mutual, Inc.*, 142 Cal. App. 4th at 1473. Like the "unlawful" prong of the UCL, the "unfair" prong is "'intentionally broad, thus allowing courts maximum discretion to prohibit new schemes to defraud.'" *Schnall v. Hertz Corp.*, 78 Cal. App. 4th 1144, 1166 (2000). As the California Supreme Court has emphasized, "'[i]n permitting the restraining of all "unfair" business practices,'" the UCL "'undeniably establishes only a wide standard to guide courts of equity . . . . [G]iven the creative nature of the scheming mind, the Legislature evidently concluded that a less inclusive standard would not be adequate.'" *Cel-Tech Communications, Inc. v. Los Angeles Cellular Tel. Co.*, 20 Cal. 4th 163 at 181 (1999); accord *Barquis v. Merch. Collection Ass'n*, 7 Cal. 3d 94, 112 (1972).

Nonetheless, Defendants argue that Plaintiff's claim under the UCL's "unfair" prong should be dismissed because the alleged unfairness must be "tethered" to a specific legislative, constitutional, statutory or regulatory provision.[2] Defendants' argument fails

[2] Defendants' argument ignores that because Plaintiff has properly alleged an unlawful activity (as discussed above), the unfair prong allegations are adequately tethered to a statute.

because the majority of courts (including the Ninth Circuit) have concluded that the "tethering" standard for unfairness under the UCL (first elucidated in *Cel-Tech Communications, Inc. v. Werner Enters, Inc.* 20 Cal. 4th 163 at 186 (1999)) only applies in cases between competitors, not in actions brought by consumers. Indeed, the *Cel-Tech* court specifically narrowed its holding to competitor cases. Id. at 187 n.12. In consumer cases, the traditional balancing test for "unfairness" is used.[3] Given the facts Plaintiff has alleged, that standard is met here.

Further, as set forth above, Plaintiff has properly alleged unlawful predicate acts to a UCL claim, including violations of the Song-Beverly Consumer Warranty Act. Thus, the unfairness of Defendants' conduct can be defined in connection with the legislatively and judicially declared policies that companies should not sell products that are not fit for their ordinary use or for the particular purpose as represented by the manufacturer under the Song-Beverly Consumer Warranty Act.

In sum, Plaintiff has properly stated a claim under the unfair prong of the UCL.

V. CONCLUSION

For the reasons set forth above, Plaintiff respectfully requests that Defendants' motion be denied. In the event that the Court finds Plaintiff's allegations insufficient, Plaintiff requests leave to amend.

[3] See *Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F. 3d 979, 994 (9th Cir. 2000) ("*Cel-Tech* was limited to claims of 'unfairness to competitors'"); *McKell v. Washington Mutual Life Ins. Co.*, 142 Cal. App. 4th 1457 at 1473 (2006) (applying traditional balancing test in consumer case); *Progressive West Ins. Co. v. Superior Court*, 135 Cal. App. 4th 263, 286 (2005) (noting that *Cel-Tech* declined to extend tethering test to consumer cases and the Court has yet to do so since that decision was announced over seven years ago); *Smith v. State Farm Auto. Ins. Co.*, 93 Cal. App. 4th 700, 720 n. 23 (2001) (tethering test limited to UCL cases between competitors).

DATED: February 6, 2008

s/Todd D. Carpenter

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7. Because *Halo 3* is not fit for either its ordinary purpose or for the particular purpose for which it was sold, Defendants have breached the statutorily implied warranties of the Song-Beverly Consumer Warranty Act.

8. Nunez brings this action as a California class action on behalf of himself and all other similarly situated California consumers that have purchased the Product, for all relief authorized under Cal. Civ. Code §1791.1(d) and §1794(a), including the rights of replacement or reimbursement provided for under Cal. Civ. Code §1794(b).

9. The Song-Beverly Consumer Warranty Act is manifestly a remedial measure, intended for the protection of the consumer, which should be given a construction calculated to bring its benefits into action. *Robertson v. Fleetwood Travel Trailers of California, Inc.*, 50 Cal. Rptr. 3d 731, 144 Cal. App. 4th 785 (App. 5 Dist. 2006). The Song-Beverly Consumer Warranty Act was intended to broaden the remedies set out in the California Commercial Code. *Mocek v. Alfa Leisure, Inc.*, 7 Cal. Rptr. 3d 546, 114 Cal. App. 4th 402 (App. 4 Dist. 2003).

10. Any waiver by the buyer of consumer goods of the provisions of the Song-Beverly Consumer Warranty Act, except as expressly provided in the Act, is "deemed contrary to public policy and shall be unenforceable" pursuant to Cal. Civil Code §1790.1.

11. The remedies provided by the Song-Beverly Consumer Warranty Act are cumulative, and do not in particular supplant the provisions of the Unfair Practices Act, Business and Professions Code §17200 et seq. Cal. Civ. Code §1790.4.

12. Furthermore, Defendants' statutory violations and other acts, omissions, misrepresentations, practices and non-disclosures, as alleged herein, also constitute "unlawful," and "unfair" business acts and practices within the meaning of Cal. Bus. & Prof. Code §§17200, *et seq.*

PARTIES

13. Microsoft is incorporated under the laws of the State of Washington and maintains its principal executive offices at One Microsoft Way, Redmond, Washington. Microsoft is responsible for the manufacture and sale of *Halo 3*.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

ERIC MARTIN Individually and on behalf of his minor child, MICHAEL MARTIN,	*	01-246 JUDGE RICHARD T. HAIK, SR.
Plaintiffs,	*	MAGISTRATE JUDGE TYNES
versus	*	
NINTENDO OF AMERICA, INC.,	*	
Defendant	*	

****

FIRST AMENDED COMPLAINT FOR DAMAGES AND CLASS ACTION CERTIFICATION

NOW INTO COURT, through the undersigned counsel of record, come plaintiff Eric Martin, individually and for his minor son Michael Martin, and both Eric Martin and Michael Martin as representative plaintiffs on behalf of all other persons similarly situated, who, by this *First Amended Complaint for Damages and Class Certification,* amend *Complaint for Damages*, filed in this Court on February 6, 2001, and aver as follows:

NATURE OF CASE

1.

Through a devious course of conduct that has spanned at least 15 years, the defendant Nintendo of America, Inc. has manufactured, promoted or caused to be promoted, and sold or caused to be sold or rented unreasonably dangerous video game systems and video games to the plaintiffs and millions of other similarly situated American children and their parents, friends and relatives. It

is not disputed that the play of video games may trigger the onset of epileptic seizures or seizure-like symptoms in children who have had no prior history of epilepsy and have been otherwise normally developing children, in children with slight neurological disorders, and in children who have had prior history of epileptic seizures. Armed with the knowledge from its own funded research and from independent studies demonstrating that certain geometric patterns, and flashing lights and colors programmed throughout the sequence of its own video games trigger seizures or seizure-like symptoms in as many as ten percent of the video-game playing population from the ages of 9-19. Nintendo of America, Inc. has publically denied such wide-spread problems exist, and has concealed from its consumers the true nature and extent of the problems, all the while manufacturing and selling more and more seriously dangerous programs.

The plaintiffs seek damages for their physical injuries and emotional distress, medical treatment, economic losses, and all equitable relief to which they may be entitled, including the manufacturing of safer video game programs in line with the conclusions reached in medical research funded by the defendant. Plaintiffs seek all available remedies in law and in equity.

PARTIES

2.

Made plaintiffs and proposed as Class Representatives in this matter are Eric Martin, a person of full age of majority, domiciled in the State of Louisiana, Parish of St. Martin, on behalf of himself and his minor son, Michael Martin.

3.

Made defendant herein is Nintendo of America, Inc. (hereinafter referred to as "Nintendo"), which is a foreign (non-Louisiana) corporation doing business in Louisiana and within the jurisdiction

of this Court. Nintendo has its principal place of business in Redmond, Washington.

4.

At all times pertinent, there was and is in full force and effect policies of liability insurance coverage issued by insurance companies to and in favor of each of the defendant named herein which policies afford liability coverage for some or all of the claims asserted herein. Under the provisions of the Louisiana Direct Action Statute, LSA-R.S. 22:655, *et seq*, these policies enure to the benefit of the plaintiffs herein, thereby entitling plaintiffs to maintain this direct action against said defendant insurers, and thereby rendering each defendant insurer liable, in solido, with its corresponding defendant insured to plaintiffs for as sued for herein. After appropriate discovery, plaintiffs intend to amend the complaint to specifically name the appropriate insurers. Therefore, made defendant(s) herein, pursuant to LSA-R.S. 22:655 *et seq* is XYZ Insurance Company (Companies) in its (their) capacity as insurer(s) of Nintendo of America, Inc.

STATEMENT OF JURISDICTION AND VENUE

5.

Jurisdiction of this Court is founded on diversity of citizenship and amount under 28 U.S.C.§1332(a). The named plaintiffs and defendant are domiciled in different states, and the matter in controversy exceeds $75,000.00 because plaintiffs' respective damages each exceed this amount.

6.

Venue is proper in this district pursuant to 28 U.S.C. § 1391(a)(2). As will be further discussed herein below, the events giving rise to this action filed by named plaintiff Michael Martin occurred in St. Martinville, St. Martin Parish, Louisiana, located within the United States Western Judicial District of Louisiana, ("Western District of Louisiana"). Nintendo of America, Inc. sold these

products through distributors and/or outlets and/or retail stores located in the Western District of Louisiana.

CLASS ACTION ALLEGATIONS

7.

The named plaintiffs bring this class action on behalf of themselves and all other persons similarly situated in the United States of America, for the purpose of asserting the claims on a common basis alleged in this *First Amended Complaint for Damages and Class Action Certification* and the original *Complaint for Damages*, filed February 6, 2001, which is amended hereby.

The plaintiffs' proposed class is defined generally as all persons who have suffered damages as a result of seizures or seizure-like symptoms triggered by the play or viewing of video games. In particular, the class consists of those persons who actually suffered the seizures or seizure-like symptoms and the parents and/or siblings whose claims arise out of their child or sibling suffering seizures or seizure-like symptoms as a result of the viewing or play of video game, to wit: A) all persons who reside in the United States of America who have suffered seizures or seizure-like symptoms triggered by the viewing or play of video games; B) the parents, or siblings, or otherwise relatives of the person who has suffered seizures or seizure-like symptoms from the viewing or play of video games and who may have a for damages as a result of the seizure or seizure-like episodes.

8.

Excluded from the Class are the defendants named herein, any entity in which the defendant has a controlling interest, any offices, director, or employee or the defendant, legal representative, heir, successor, and assignee of any defendant or any minor child of any natural person included in the list named as defendant hereinabove.

9.

This action may be properly maintained as a class action pursuant to the provisions of the Federal Rules of Civil Procedure 23(a)(1)-(4) and 23(b)(2), or 23(b)(3). With regard to the general prerequisites of a class action, rule 23(a):

A. Numerosity of the Class: The large number of potential claimants presents a level of numerosity better handled through the class action procedure as opposed to a mass joinder of individual claims. Upon information and belief, the class consists of all the effected children and their parents and/or siblings in each state. Conservatively, the class size may be at least 400 claimants per state, more than 20,000 nation-wide. This number is conservative because medical statistics indicate that as many as 10% of all the children between the ages of 9 and 19 may be susceptible to suffering seizures or seizure-like symptoms as a result of viewing and/or playing video games. Considering that through 1994, Nintendo of America, Inc.'s profit exceeded $500,000,000.00 Dollars through the sale of video games and game systems, a high probability exists for a much greater number of claimants;

B. Existence and Predominance of Common Questions of Law and Fact: The common issues of law and fact exist as to all members of the Class and predominate over any questions affecting only individual members of the Class. These common legal and factual questions arise from central issues which do not vary from Class member to Class member and which may be determined without reference to the individual circumstances of any particular Class member, namely, the defendant marketed these products using a nation-wide marketing scheme with national commercials, and national publications directed at children. The product literature inserts are identical whether the product is sold in Alaska or Louisiana. The defendant's course of conduct in manufacturing, selling and distributing video systems and game cartridges in the United States was the same regardless of where the games found a home. These common legal and factual questions include, but are not limited to, the following:

1. Whether the defendant negligently designed, manufactured, tested, assembled, selected components and materials for, packaged, marketed, advertised and sold a product or products which caused plaintiff's condition;

2. Whether the defendant failed to use reasonable care in the testing, manufacturing and marketing of these products which were inherently and unreasonably dangerous;

3. Whether the defendant negligently failed to instruct or warn users of its products about the dangers associated therewith or

the safe and proper methods of using said products, and defendant also failed to adequately supplement any warnings relative to said product;

4. Whether the defendant negligently marketed said products with express and implied advertisements, promotions and representations that said product could be safely used by plaintiff;

5. Whether the defendant expressly and/or impliedly warranted that their products were safe, merchantable and fit for their intended use and whether the defendant breached express warranties, and/or breached implied warranties of merchantability;

6. Whether the defendant designed, manufactured, marketed and sold its products which were defective and unreasonably dangerous by design. These products were unreasonably dangerous and defective in design at the time the products were marketed by defendant and at the time the products reached plaintiff. Said defective and dangerous conditions and design proximately caused plaintiff's injuries while the product was used in the manner and for a purpose reasonably anticipated and foreseeable by defendant;

7. Whether the defendant knew that the video games it was manufacturing and selling to the public were dangerous;

8. Whether the defendant manufactured the video games in such a manner as to promote rather that to manufacture a safer product for the consumer;

9. Whether the product was in fact safe;

10. Whether the defendant failed to disclose information about the safety of the product;

11. Whether the defendant was aware of the risk when it introduced the product;

12. Whether the defendant was unjustly enriched;

13. Whether the defendant's course of conduct in denying that the video games triggered seizures and/or seizure like symptoms, failing to adequately warn of the dangers as provided by law, failing to provide an alternatively designed and safer product constitutes fraud, deception, intentional misrepresentation and//or concealment of material facts;

10. Whether the defendant's conduct constitutes negligence:

11. Whether the defendant is liable for intentional infliction of emotional distress;

13. Whether the defendant negligently designed the products in terms of using unreasonable dangerous qualities, such as but not limited to bright, red colors, rapidly flashing geometric patterns, success of playing the games reliant on the necessity for

prolonged play with increasing intensity at each progressive of the game;

14. Whether the defendant failed to adequately warn the Class regarding the inherent dangers of playing the video games;

15. Whether the incorporation of certain geometric patterns, flashing of lights and certain color patterns, increase in intensity and necessity of long periods of play, and the defendant's course of conduct in marketing games with these characteristics constitute a manufacturing, design, and/or marketing defect for purposes of strict liability;

16. Whether the defendants are strictly liable in tort for selling a dangerously defective product;

17. Whether the Class in entitled to compensatory damages, and it so, the nature of such damages.

18. Whether the class members have are threatened with irreparable harm and whether they are entitled to injunctive and other equitable relief, including restitution and refund for the purchase of an unreasonably dangerous products sold to them without the proper warning of its inherent danger, and an injunction on the continued production and sale of highly dangerous video games having little or no social value.

The determination of fault and the basis for assessment of damages may be made in the class action without the necessity of proof at that time as to the amount of those damages, thereby establishing the guidelines for settlement and/or subsequent trials in individual cases if necessary;

C. Typicality of Claims: The plaintiffs claims are typical of the claims of the members of the Class, all of whom have purchased Nintendo video games and/or viewed or played the games, and have suffered seizures or seizure like symptoms triggered by the play of the video games, or are the parents and/or siblings of such seizure victim. The plaintiffs and all other members of the Class have sustained and/or will continue to sustain damages and injuries arising out of the defendant's common course of conduct;

D. Adequacy of Representation: The named plaintiffs' claims are aligned with those claims of the other putative class members. Their claims are typical and for that reason are an adequate representation of the claims of the Class. The plaintiffs are represented by skilled attorneys who are experienced in the handling of mass tort Class actions and who may be expected to handle this action in an expeditious and economical manner to the best interests of all the Class;

10.

This action may be properly maintained as a Class action pursuant to Rule 23(b)(3), because, as set forth in paragraph 9.B., *supra*, the questions of law and fact common to the members of the class predominate over any questions affecting individual members. Furthermore, the class action process affords a superior vehicle for the efficient disposition of the issues and claims herein presented. It would be unduly burdensome to the courts in this country if individual litigation of the facts identical to these were to proceed. Individual litigation increases the delay and expense to all parties and the courts in resolving the complex legal and factual issues of these cases. By contrast, the class action device presents far fewer management difficulties and provides the benefits of single adjudication, economies of scale, and comprehensive supervision by a single court.

11.

In the alternative, this action is also certifiable under the provisions of FRCP 23(b)(2):

A. the prosecution of separate actions by the individual members of the class would create a risk of inconsistent or varying adjudications with respect to individual class members, thus establishing incompatible standards of conduct for the defendant;

B. The prosecution of separate actions by individual class members would create the risk of adjudications with respect to them that would, as a practical matter, be dispositive of the interests of other class members not parties to such adjudications or that would substantially impair or impede the ability of such non-party class members to protect their interests; and

C. Defendants have acted or refused to act in respects generally applicable to the Class, thereby making appropriate final injunctive relief from the manufacture of seriously dangerous video games and recall/refund of those seriously dangerous games currently on the market, with regard to the members of the class as a whole.

FACTUAL ALLEGATIONS

12.

In December, 1998, Michael Martin received as a Christmas present a Nintendo 64 video game console that included the game cartridge Super Mario Kart. This Nintendo game was not Michael's first Nintendo game, but it was his first Nintendo 64 game.

13.

In the spring of 1999, when Michael was nine years of age, he began having seizure-like symptoms while playing Mario Kart. He would twitch, shiver and became totally unresponsive to his father's efforts to get his attention during these episodes. Michael would not remember having any twitching or shivering after the episode stopped. Prior to his receiving and playing Nintendo 64 and Super Mario Kart, Michael did not have any seizures or seizure-type episodes.

14.

Michael's seizures became progressively more frequent and violent in nature. Michael started frequently suffering these seizures during the night as he slept.

15.

Eric Martin, Michael's father and plaintiff herein, contacted a family physician, without knowing that video game playing could trigger these symptoms, and the doctor advised him that the shivering was probably just an unexplainable tick. Michael continued playing the Nintendo game. He was successful playing the game, and he wanted to show his friends and family that he could play the games so well. Eric Martin even encouraged Michael to play the Nintendo game because Michael was successful with the game and that success was good for the child's esteem. After countless episodes, Michael's seizures became almost continuous, about five times every hour, and Eric Martin frantically contacted a family physician in the middle of the night for help. The physician prescribed Valium for Michael, and Eric consequently scheduled an appointment with a neurologist.

16.

With no indication of the source of the problem, and with no knowledge of the possible connection, the neurologist prescribed the drug Depakote to sedate Michael's abnormal brain activity, and Dexadrine to counteract the sedative effects of Depakote. The dosage of Depakote was overwhelming for Michael. He became lethargic to the point of being hardly responsive to everyday stimuli He lost his appetite and became very fidgety, biting his nails, scratching all over his body as if he were itching everywhere, and picking at cuts and scrapes on his body

17.

Michael has been taking Depakote for 18 months at the time of filing the initial Complaint in this matter. His seizures have subsided, however, Michael still suffers from the effects of the medication and has problems adjusting the dosages of the medications. At eleven years of age, Michael is listless and has no appetite. He has lost about 30 pounds, and his father cannot convince Michael to eat.

18.

On or after January 5, 2001, plaintiffs first learned that there may be a connection between the Nintendo video game and Michael's seizures. Specifically, prior to January 5, 2001, plaintiffs had been informed only that Michael's condition may be a tick and the cause of the problem was not known. However, on or after January 5, 2001, plaintiffs learned that defendant Nintendo actually admits that its games can trigger the seizures that have overwhelmed Michael. Plaintiffs subsequently learned that the risk of video game-induced seizures was known within the video game industry, and that there existed numerous occurrences involving children and adults similar to Michael's situation.

19.

Prior to January 5, 2001, plaintiffs at no time were aware of the fact that the Nintendo video game might be the trigger of Michael's condition. Nor were plaintiffs aware that Nintendo had sufficient knowledge of facts to inform the public that Nintendo's products were unreasonably dangerous to many individuals like Michael, and that Nintendo of America, Inc. intentionally withheld critical information from its consumers.

20.

As such, the prescriptive period for this claim did not begin to run until January 5, 2001. Plaintiffs specifically plead the legal doctrine of *contra non valentem praescriptio non currit*, because plaintiffs could not reasonably have known of their cause of action until January 5, 2001. Plaintiffs' delay in discovering their cause of action, until on or after January 5, 2001, was not unreasonable, willful, or negligent.

21.

Plaintiffs specifically aver that Michael Martin's seizure disorder was triggered by playing the Nintendo 64 game console and Mario Kart.

22.

Plaintiffs aver that this incident, causing injuries and resulting in damages, occurred as a result of the negligence of Nintendo, the particulars of which are averred non-exclusively, severally and/or in the alternative as set forth in paragraph 9.B., *supra*, and again as follows:

a. Defendant, Nintendo of America, Inc., negligently designed, manufactured, tested, assembled, selected components and materials for, packaged, marketed, advertised and sold a product or products which caused plaintiff's condition;

b. Defendant, Nintendo of America, Inc., failed to use reasonable care in the testing,

manufacturing and marketing of these products which were inherently and unreasonably dangerous;

c. Defendant, Nintendo of America, Inc., negligently failed to instruct or warn users of its products about the dangers associated therewith or the safe and proper methods of using said products, and defendant also failed to adequately supplement any warnings relative to said product;

d. Defendant, Nintendo of America, Inc., negligently marketed said products with express and implied advertisements, promotions and representations that said product could be safely used by plaintiff;

e Defendant, Nintendo of America, Inc., expressly and/or impliedly warranted that their products were safe, merchantable and fit for their intended use;

f. Defendant, Nintendo of America, Inc., designed, manufactured, marketed and sold its products which were defective and unreasonably dangerous by design. These products were unreasonably dangerous and defective in design at the time the products were marketed by defendant and at the time the products reached plaintiff. Said defective and dangerous conditions and design proximately caused plaintiff's injuries while the product was used in the manner and for a purpose reasonably anticipated and foreseeable by defendant;

g. As a direct and proximate result of the negligence, breaches of warranty and the liability in tort of the defendant, plaintiff was caused physical and psychological injuries; and

h. Such other acts and omissions as will be shown at trial.

23.

As a result of Nintendo's negligence, Michael Martin suffered the following damages for which he is entitled to recover from the defendant in amounts which will legally, justly and fairly compensate him, included but not limited to the following:

a. Damages for physical pain and suffering, past and future;

b. Damages for mental anguish and emotional distress, past and future;

c. Damages for loss of future earning capacity;

d. Impairment of present and future insurability;

e. Damages for future partial or permanent physical disability or impairments and limitations;

f. Damages for medical, hospital and rehabilitation expenses, past and future; and

g. Loss of enjoyment of life; and

h. Any and all other damages which will be shown through discovery and proven at trial.

24.

As a result of the injuries to his minor child, plaintiff Eric Martin has suffered the following damages for which he is entitled to recover from defendant in amounts which will legally, justly and fairly compensate him, including but not limited to the following:

a. Damages for mental anguish and emotional distress;

b. Damages for medical, hospital and rehabilitation expenses, past and future; and

c. Any and all other damages which will be shown through discovery and proven at trial.

WHEREFORE, the plaintiffs, on behalf of themselves and all other persons similarly situated, pray for judgment against the defendant as follows:

1. an Order certifying the Class and any appropriate subclasses under the provisions of Federal Rules of Civil Procedure, rule 23, and appointing the plaintiffs and their counsel to represent the Class;

2. For compensatory damages as alleged herein;

3. For pre-judgment interest from the date of filing of this suit;

4. for all costs of this proceeding;

5. for all general, special, and equitable relief to which the Plaintiffs and the members of the Class are entitled in law and in equity.

Respectfully submitted,

WENDELL H. GAUTHIER (Bar #5984)
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PLEASE SERVE:

By the Louisiana Long Arm Statute
Nintendo of America, Inc.
4820 150th Avenue, NE
Redmond, WA 98052

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

KEVIN RAY, Individually and on behalf of all others similarly situated, Plaintiff, v. MICROSOFT CORPORATION, a Washington Corporation, and certain unidentified Microsoft Corporation affiliates, Defendants.	**Case No.** **CLASS ACTION COMPLAINT FOR:** **1. BREACH OF CONTRACT;** **2. VIOLATION OF CONSUMER PROTECTION ACT (RCW 19.86); AND** **3. NEGLIGENCE** **JURY TRIAL DEMANDED**

SUMMARY OF CLAIMS

1. This is a class action against Microsoft and its affiliates for Breach of Contract, violation of the Washington Consumer Protection Act ("CPA") (RCW 19.86) and, alternatively, Negligence. Plaintiff brings this action on behalf of himself and all other persons who experienced hardware problems with their Microsoft Xbox 360 gaming consoles following installation of Microsoft's Fall 2006 Update for the Xbox 360.

THE PARTIES

2. Plaintiff Kevin Ray is an individual resident of California. Plaintiff is the original purchaser and current owner of an Xbox 360 gaming console. Plaintiff brings this action

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individually and as a class action under Rule 23 of the Federal Rules of Civil Procedure on behalf of the class specified herein.

3. Defendant Microsoft is a corporation organized under the laws of the State of Washington, with its principal place of business at One Microsoft Way, Redmond, WA 98052-6399. Microsoft is the manufacturer of the Xbox 360 gaming console ("Xbox 360) and also provides support for the Xbox 360 through the http://www.xbox.com website. Further, Microsoft, in conjunction with certain unknown "Microsoft Corporation affiliates" owns and operates an online gaming service for Xbox gaming machines (including the Xbox 360) known as "Xbox Live." Purchasers of the Xbox 360 and users of Xbox Live within the United States (located at http://www.xbox.com/en-US/live/) presumptively include citizens of every state in the United States.

JURISDICTION AND VENUE

4. This Court has original jurisdiction over this action pursuant to 28 U.S.C. § 1332(d)(2) in that it is a class action filed under Rule 23 of the Federal Rules of Civil Procedure, the matter in controversy, as aggregated pursuant to 28 U.S.C. §1332(d)(6), exceeds the sum of $5,000,000 exclusive of interest and costs, and a substantial number of members of the class of plaintiffs are citizens of a state different from Microsoft

5. Venue is proper in the Western District of Washington pursuant to 28 U.S.C. § 1391(a) in that (1) Microsoft is a Washington Corporation with its principal place of business in the Western District of Washington, (2) the events or omissions giving rise to the claims asserted herein occurred in the State of Washington, and (3) Microsoft is subject to personal jurisdiction in the State of Washington. In addition, the agreement between Microsoft and all members of the class provides: ". . . you consent to the exclusive jurisdiction and venue of state or federal

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courts in King County, Washington, USA for all disputes relating to this contract or the Service." King County is within the Western District of Washington.

6. With regard to certain unidentified Microsoft affiliates, venue is proper in the Western District of Washington pursuant to 28 U.S.C. § 1391(a) in that (1) the Microsoft affiliates' corporate parent is a Washington Corporation with its principal place of business in the Western District of Washington, (2) the events or omissions giving rise to the claims asserted herein occurred in the State of Washington, and (3) the Microsoft affiliates are subject to personal jurisdiction in the State of Washington.

CLASS ACTION ALLEGATIONS

7. Plaintiff brings this action as a class action pursuant to Federal Rule of Civil Procedure 23(a), (b)(2), and (b)(3) on behalf of all persons who experienced hardware problems with their Xbox 360 following installation of Microsoft's Fall 2006 Update for the Xbox 360. Excluded from the Class are Defendants, officers and directors of Defendants, members of their immediate families and each of their legal representatives, heirs, successors or assigns and any entity in which Defendants have or have had a controlling interest.

8. This action is properly maintainable as a class action because:

a. The members of the Class for whose benefit this action is brought are dispersed throughout the United States and are so numerous that joinder of all Class members is impracticable. While the exact number of Class members is unknown to Plaintiff at this time and can only be ascertained through appropriate discovery, Plaintiff believes that Class members number in at least the thousands. Members of the Class may be identified from records maintained by Defendants and may be notified of the pendency of this action by mail, using a form of notice similar to that customarily used in class actions;

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b. Plaintiff's claims are typical of those of the Class as all members of the Class are similarly affected by Defendants' actionable conduct as alleged herein;

c. Plaintiff will fairly and adequately protect the interests of the Class and has retained counsel competent and experienced in class action litigation in the U.S. District Courts. Plaintiff has no interests antagonistic to, or in conflict with, the Class that Plaintiff seeks to represent;

d. A class action is superior to other available methods for the fair and efficient adjudication of the claims asserted herein, because joinder of all members is impracticable. Furthermore, because the damages suffered by individual members of the Class may be relatively small, the expense and burden of individual litigation make it virtually impossible for Class members to redress the wrongs done to them. The likelihood of individual Class members prosecuting separate claims is remote;

e. Defendants have acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief with respect to the class a whole;

f. Plaintiff anticipates no difficulties in the management of this action as a class action; and

g. The questions of law and fact common to the members of the Class predominate over any questions affecting individual members of the Class. Among the questions of law and fact common to the Class are:

i. the pervasiveness of hardware problems in Xbox 360s caused by the Fall 2006 Update;

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ii. the existence of an agreement between Defendants and the Class

iii. the construction of the agreement between Defendants and the Class;

iv. Defendants' acts and/or omissions as alleged herein;

v. whether Defendants have breached their agreement with the Class;

vi. whether Defendants have taken adequate measures to prevent hardware problems in Xbox 360s caused by their Fall 2006 Update;

vii. whether Defendants have taken adequate measures to address the hardware problems in Xbox 360s caused by their Fall 2006 Update;

viii. whether Defendants' release of the Fall 2006 Update was an "unfair or deceptive act or practice" under Washington's CPA;

ix. whether Defendants' release of the Fall 2006 Update impacted the "public interest" under Washington's CPA;

x. if no contract exists between Defendants and the Class, whether the Defendants were negligent in releasing the Fall 2006 Update; and

xi. to what extent the members of the Class have sustained damages and the proper measure of damages.

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SUBSTANTIVE ALLEGATIONS COMMON TO ALL COUNTS

1. Microsoft's Xbox 360 Gaming Console

9. The Xbox 360 is Microsoft's latest video game console and was the first of the most advanced generation of game consoles. The Xbox 360 competes with Sony's PlayStation 3 and Nintendo's Wii. There are two different configurations of the Xbox 360, the Xbox 360 Premium Package and the Xbox 360 Core System. The suggested retail price for the Xbox 360 Premium Package is $399.99 while the suggested retail price for the Xbox 360 Core System is $299.99. According to Microsoft, as of November 2006, 10 million Xbox 360s will have been sold.

10. Xbox Live is an online multiplayer gaming and content delivery system operated and owned by Microsoft. Microsoft claims in its Xbox Live "Terms of Use" that certain "Microsoft Corporation Affiliates" may be operating the Xbox Live service depending on where the service is accessed, however, Microsoft has never identified those affiliates. In any event, both Xbox 360 configurations can make use of Xbox Live.

11. On the Xbox 360, updates to the console's internal software are delivered via Xbox Live. Whenever the Xbox 360 is powered on and is signed in to Xbox Live, the user will be prompted to download the current update if they have not already done so. On information and belief, the update process on Xbox Live does not prompt the user to agree to any additional terms and conditions prior to installing the update.

2. The Fall 2006 Update for Xbox 360

12. Beginning the morning of Tuesday, October 31, Defendants made the Fall 2006 update for the Xbox 360 available. This free update for Xbox 360 was distributed via Xbox Live

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and available to all members of the Xbox Live community regardless of their level of service or the configuration of their Xbox 360s.

13. Microsoft encouraged all Xbox 360 owners to download the Fall 2006 Update. In the press release announcing the update, Microsoft said:

> This free update will be distributed via the Xbox Live® online gaming and entertainment network to all members (Xbox Live Silver and Xbox Live Gold) with no disc or hard drive required. Gamers without an Xbox Live account can easily sign up for free by connecting their console to a broadband Internet connection. Once online, downloading the update is fast and simple, and provides instant access to features such as:
>
> **Expanded HD Display and Video Playback Options**
>
> * With 1080p resolution, gamers now have the ability to enjoy both game and video content in the best HD resolution currently available.
>
> * Expanded video playback options increase the ways gamers can enjoy video content on Xbox 360. It is now possible to stream WMV video from a Windows PC running Windows Media Player 11 or Windows Media Connect.
>
> * Gamers can now play video files from data CDs and DVDs, as well as from storage devices like USB 2.0 flash drives and Xbox 360 Memory Units.
>
> * Xbox 360 will support 50hz HDTV display modes, providing viewers greater choice in how they watch DVD and HD DVD content.
>
> **Xbox Live Arcade Enhancements**
>
> * Keeping up to date on Xbox Live Arcade games is now even more convenient with the ability to automatically download newly released Xbox Live Arcade trial games. This eliminates the need to manually search for new downloads on Xbox Live Marketplace each time a new game trial is released.
>
> * Fast Enumeration of Games. You'll see the games in your Xbox Live Arcade collection appear almost instantly. Get in and play right away.
>
> * With so many games to choose from, Xbox Live Arcade added new sorting options such as "Recently Played" and "By Category." These enhancements make managing Xbox Live Arcade collections faster and easier than ever.

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* A new expanded Friends Leaderboard within Xbox Live Arcade allows gamers to compare themselves directly against their friends and view leaderboard details of their top-10 friends.

* A new expanded Achievements View within Xbox Live Arcade lets gamers view their full Achievement details for their Arcade games including descriptions, icons, allotted Gamerscore and more, right from the Xbox Live Arcade dashboard interface.

* The "Play Now" launch feature has been streamlined. Selecting "Play Now" after downloading a game in Xbox Live Marketplace now bypasses Arcade and takes you directly to the game.

* Xbox Live Arcade now offers a "Tell a Friend" feature. Select this from the game info screen to send any friend on your friends list a message telling them about the Arcade game.

XNA Support

* Amateur game designers will be able to test and play the games they create using XNA Game Studio Express on their Xbox 360 systems when it launches later this year (separate download and subscription required).

These features are just some of the enhancements gamers and developers can expect as part of the Autumn update. For a complete list of updates, visit http://www.xbox.com/live.

Microsoft is committed to providing Xbox 360 customers with the best online experience possible and delivering added value to Xbox Live Gold subscribers. Those subscribers will enjoy exclusive early access to special Xbox Live Marketplace content, such as game demos, free game ad-ons, free community videos, and free Gamer pics and themes for up to one week in advance of their general release. Paid downloadable content remains available at the same time for both Silver and gold subscribers.

Through these regular updates, the way gamers are connected to their friends and entertainment is constantly evolving and improving. With more than 4-million Xbox Live members to date, Xbox 360 has proven itself as the premiere gaming platform of choice.

14. Thousands of Xbox 360 owners responded to Microsoft's enticement and downloaded the Fall 2006 update as soon as it became available.

15. Almost immediately, reports began to circulate on the Internet that Xbox 360 users who had installed the Fall 2006 Update were experiencing new and serious hardware

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problems. The most common and obvious problem reported after installation was that the Xbox 360 immediately rebooted and showed an error message following which, the Xbox 360 was permanently non-functional. Xbox 360 users refer to this phenomenon by the slang term "bricking" (meaning that the device is now only useful as a "brick"). As of today, a Google search of the terms "xbox 360" and "brick" or "bricking" shows over 15,000 results.

16. Other complaints have also been reported by Xbox 360 users following installation of the Fall 2006 Update, including unstable performance and system freezes.

17. On November 1, 2006, Microsoft's Xbox Live Director of Programming Larry Hryb ("Hyrb") acknowledged on his personal website http://www.majornelson.com that there were problems with the Fall 2006 update. Under his Xbox Live name of "Major Nelson," Hyrb posted that:

> It turns out that there is a very small number of people are having issues with the Fall update that we rolled out a couple of days ago. I just spoke to the Dashboard team, and they are aware of it and working on an update that we will rolling out in a matter of hours, not days. If you already have the update and you are connected to Xbox Live and playing games etc., then you can continue on with your day. If you are having problems, call your local Xbox Support number (get your local number from Xbox.com) and they'll get you taken care of. I'll update this post when the update is available, but as I said...if you are up and running now on Live...you don't have anything to worry about and this won't affect you.

18. Notwithstanding Hyrb's contention, it seems that the number of Xbox 360 users having issues with the fall update is anything but small, and there continue to be numerous complaints circulating about the Fall 2006 update.

19. Despite acknowledging the existence of the problem, Defendants have refused to make complete restitution to owners of Xbox 360s damaged by the Fall 2006 update. For those owners of Xbox 360s "bricked" by the Fall 2006 update, the machine cannot be updated via

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Xbox Live and will require either a replacement machine or for new software to be installed by Microsoft itself through a physical flash of the machine's internal memory. Microsoft is however refusing to make repairs or replacement without users paying the cost of shipping the machine to Microsoft. Microsoft is charging users up to $140 to ship an Xbox 360 back to Microsoft for repair or replacement. This cost of shipping is in excess of 35% of the suggested retail price of an Xbox 360 Premium Package and in excess of 46% of the suggested retail price of an Xbox 360 Core System.

20. Prior to November 1, 2006, Plaintiff's Xbox 360 was functioning normally. On or about November 1, 2006, Plaintiff updated his Xbox 360 with the Fall 2006 Update. Following the installation of the update, Plaintiff's Xbox 360 was "bricked" and is now completely non-functional. Microsoft has refused to repair or replace Plaintiff's Xbox 360 unless he pays for shipping back to Microsoft.

FIRST CAUSE OF ACTION

(BREACH OF CONTRACT)

21. Plaintiff realleges the preceding paragraphs as if set forth here.

22. Defendants have an Agreement with the Class known as the "Xbox Live Terms of Use" ("TOU"). The TOU provides:

> This contract covers your use of this service via an original Xbox console, an Xbox 360 console or a personal computer as applicable, and includes any other related services for which you choose to sign up (for example, specific game subscriptions), content and other media (for example, items downloaded from Xbox Live Marketplace), software, machines, support, papers, ***updates, or upgrades***.

(emphasis added).

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23. The TOU provides that, "[i]f this contract is with Microsoft Corporation, then claims for breach of this contract will be subject to the laws of the State of Washington, without reference to conflict of laws principles."

24. While the TOU also seeks to limit Defendants' liability, disclaim any warranties and limit the Class's remedies, these limitations and disclaimers are unenforceable under Washington law because they are procedurally unconscionable in that:

a. on information and belief, the TOU is never shown to the Class when they sign up for Xbox Live via the Xbox 360;

b. the limitations and disclaimers are not specifically negotiated between Defendants and each member of the Class;

25. Further, the limitations and disclaimers contained in the TOU are unenforceable under Washington law because they are substantively unconscionable in that the limited remedy provided to the Class under the TOU fails of its essential purpose because it deprives the Class of the substantive value of its bargain due to an undiscoverable defect.

26. Defendants' conduct is a breach of the implied terms of the TOU as well as Defendants' obligation of good faith and fair dealing.

27. As a direct and proximate result of Defendants' breach, Plaintiff and the Class have been damaged in an amount to be determined at trial but in excess of an aggregated amount of $5,000,000.

28. Plaintiff and the Class are also entitled to declaratory and injunctive relief requiring Defendants to repair or replace all Xbox 360s damaged by the Fall 2006 Update free of any charge including shipping.

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SECOND CAUSE OF ACTION

(VIOLATION OF WASHINGTON CONSUMER PROTECTION ACT)

(RCW 19.86)

29. Plaintiff realleges the preceding paragraphs as if set forth fully here.

30. As described above, the TOU provides that it shall be governed by Washington law. RCW 19.86.090 provides a private right of action to any person injured in his property by an "unfair or deceptive act or practice."

31. Defendants' release of the Fall 2006 Update and their failure to disclose to the Class that the update might cause damage to the Class's property violates the Washington Consumer Protection Act because: 1) it was an unfair or deceptive act or practice; 2) committed in the course of Defendants' business; 3) with a public interest impact (on information and belief Defendants' actions and inactions affected at least hundreds of thousands of consumers and has the potential to affect millions of consumers); which has caused 4) injury to plaintiff's property and the similar property of the plaintiff class.

32. Pursuant to RCW 19.86.090, plaintiff seeks damages on behalf of himself and each class member for their actual damages sustained as a result of Defendants' unfair and deceptive act in an amount to be determined at trial but not less than $5,000,000 as well as the costs of this suit and reasonable attorneys' fees.

33. Further, pursuant to RCW 19.86.090, plaintiff seeks treble damages on behalf of himself and each class member for their actual damages sustained as a result of Defendants' unfair and deceptive act in an amount to be determined at trial but not less than $15,000,000.

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THIRD CAUSE OF ACTION

(ALTERNATIVE CAUSE OF ACTION)

(NEGLIGENCE)

34. Plaintiff realleges the preceding paragraphs as if set forth fully here.

35. If Defendants contend that there is no agreement with the Class, Defendants are liable to Plaintiff and the Class for their negligence in releasing the Fall 2006 Update.

36. Defendants had a duty to refrain from releasing software that would cause damage to Xbox 360s and the release of the Fall 2006 Update violated that duty causing damage to Plaintiff and the Class in an amount to be determined at trial but not less than $5,000,000.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, individually and on behalf of all those similarly situated, prays for judgment against Defendants as follows:

Certifying this action as a class action;

ii. Declaring that Defendants' release of the Fall 2006 Update which caused damage to the Plaintiff and the Class was a breach of contract and of Defendants' implied duty of good faith and fair dealing;

iii. Awarding Plaintiff and the Class damages for Defendants' breach of contract in an amount to be determined at trial but not less than an aggregate amount in excess of $5,000,000;

iv. Declaring that Defendants' conduct violates the CPA and awarding plaintiff and the class restitution and damages for such violation;

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v. Awarding Plaintiff and the Class damages for Defendants' negligent act in an amount to be determined at trial but not less than an aggregate amount in excess of $5,000,000;

vi. Awarding counsel for Plaintiff and the Class reasonable attorneys' fees and costs; and

vii. Granting such other and further relief that this Court may deem just and proper.

DATED this 29th day of November, 2006.

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(Permissive Joinder of Parties: Separate Trials), and 42(b) (Separate Trials, generally) and the note to the latter rule.

Rule 22. Interpleader

(1) Persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability. It is not ground for objection to the joinder that the claims of the several claimants or the titles on which their claims depend do not have a common origin or are not identical but are adverse to and independent of one another, or that the plaintiff avers that the plaintiff is not liable in whole or in part to any or all of the claimants. A defendant exposed to similar liability may obtain such interpleader by way of cross-claim or counterclaim. The provisions of this rule supplement and do not in any way limit the joinder of parties permitted in Rule 20.

(2) The remedy herein provided is in addition to and in no way supersedes or limits the remedy provided by Title 28, U.S.C., §§ 1335, 1397, and 2361. Actions under those provisions shall be conducted in accordance with these rules.

(As amended Dec. 29, 1948, eff. Oct. 20, 1949; Mar. 2, 1987, eff. Aug. 1, 1987.)

ADVISORY COMMITTEE NOTES

1937 Adoption

The first paragraph provides for interpleader relief along the newer and more liberal lines of joinder in the alternative. It avoids the confusion and restrictions that developed around actions of strict interpleader and actions in the nature of interpleader. Compare *John Hancock Mutual Life Insurance Co. v. Kegan et al.*, 22 F.Supp. 326 (D.C.Md.1938). It does not change the rules on service of process, jurisdiction, and venue, as established by judicial decision.

The second paragraph allows an action to be brought under the recent interpleader statute when applicable. By this paragraph all remedies under the statute are continued, but the manner of obtaining them is in accordance with these rules. For temporary restraining orders and preliminary injunctions under this statute, see Rule 65(e).

This rule substantially continues such statutory provisions as U.S.C., Title 38, § 445 [now 784] (Actions on claims; jurisdiction; parties; procedure; limitation; witnesses; definitions) (actions upon veterans' contracts of insurance with the United States), providing for interpleader by the United States where it acknowledges indebtedness under a contract of insurance with the United States; U.S.C., Title 49, § 97 (Interpleader of conflicting claimants) (by carrier which has issued bill of lading). See Chaffee, *The Federal Interpleader Act of 1936: I and II* (1936), 45 Yale L.J. 963, 1161.

1948 Amendment

The amendment effective October 20, 1949, substituted the reference to "Title 28, U.S.C., §§ 1335, 1397, and 2361," at the end of the first sentence of paragraph (2), for the reference to "Section 24(26) of the Judicial Code, as amended, U.S.C., Title 28, § 41(26)." The amendment also substituted the words "those provisions" in the second sentence of paragraph (2) for the words "that section."

1987 Amendment

The amendment is technical. No substantive change is intended.

Rule 23. Class Actions

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determining by Order Whether to Certify a Class Action; Appointing Class Counsel; Notice and

Membership in Class; Judgment; Multiple Classes and Subclasses.

(1)(A) When a person sues or is sued as a representative of a class, the court must—at an early practicable time—determine by order whether to certify the action as a class action.

(B) An order certifying a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g).

(C) An order under Rule 23(c)(1) may be altered or amended before final judgment.

(2)(A) For any class certified under Rule 23(b)(1) or (2), the court may direct appropriate notice to the class.

(B) For any class certified under Rule 23(b)(3), the court must direct to class members the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must concisely and clearly state in plain, easily understood language:

- the nature of the action,
- the definition of the class certified,
- the class claims, issues, or defenses,
- that a class member may enter an appearance through counsel if the member so desires,
- that the court will exclude from the class any member who requests exclusion, stating when and how members may elect to be excluded, and
- the binding effect of a class judgment on class members under Rule 23(c)(3).

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the prot tion of the members of the class or otherwise for t fair conduct of the action, that notice be given in su manner as the court may direct to some or all of t members of any step in the action, or of the propos extent of the judgment, or of the opportunity members to signify whether they consider the repr sentation fair and adequate, to intervene and prese claims or defenses, or otherwise to come into tl action; (3) imposing conditions on the representati parties or on intervenors; (4) requiring that the plea ings be amended to eliminate therefrom allegations to representation of absent persons, and that tl action proceed accordingly; (5) dealing with simil procedural matters. The orders may be combine with an order under Rule 16, and may be altered amended as may be desirable from time to tim

(e) Settlement, Voluntary Dismissal, or Compr mise.

(1)(A) The court must approve any settlement voluntary dismissal, or compromise of the claims issues, or defenses of a certified class.

(B) The court must direct notice in a reasonabl manner to all class members who would be bound by a proposed settlement, voluntary dismissal, o compromise.

(C) The court may approve a settlement, volun tary dismissal, or compromise that would bind class members only after a hearing and on finding that the settlement, voluntary dismissal, or compromise is fair, reasonable, and adequate.

(2) The parties seeking approval of a settlement, voluntary dismissal, or compromise under Rule 23(e)(1) must file a statement identifying any agreement made in connection with the proposed settlement, voluntary dismissal, or compromise.

(3) In an action previously certified as a class action under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(4)(A) Any class member may object to a proposed settlement, voluntary dismissal, or compromise that requires court approval under Rule 23(e)(1)(A).

(B) An objection made under Rule 23(e)(4)(A) may be withdrawn only with the court's approval.

(f) Appeals. A court of appeals may in its discretion permit an appeal from an order of a district court granting or denying class action certification under this rule if application is made to it within ten days after entry of the order. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

(g) **Class Counsel.**

(1) Appointing Class Counsel.

(A) Unless a statute provides otherwise, a court that certifies a class must appoint class counsel.

(B) An attorney appointed to serve as class counsel must fairly and adequately represent the interests of the class.

(C) In appointing class counsel, the court

(i) must consider:

- the work counsel has done in identifying or investigating potential claims in the action,
- counsel's experience in handling class actions, other complex litigation, and claims of the type asserted in the action,
- counsel's knowledge of the applicable law, and
- the resources counsel will commit to representing the class;

(ii) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class;

(iii) may direct potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney fees and nontaxable costs; and

(iv) may make further orders in connection with the appointment.

(2) Appointment Procedure.

(A) The court may designate interim counsel to act on behalf of the putative class before determining whether to certify the action as a class action.

(B) When there is one applicant for appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Rule 23(g)(1)(B) and (C). If more than one adequate applicant seeks appointment as class counsel, the court must appoint the applicant best able to represent the interests of the class.

(C) The order appointing class counsel may include provisions about the award of attorney fees or nontaxable costs under Rule 23(h).

(h) **Attorney Fees Award.** In an action certified as a class action, the court may award reasonable attorney fees and nontaxable costs authorized by law or by agreement of the parties as follows:

(1) Motion for Award of Attorney Fees. A claim for an award of attorney fees and nontaxable costs must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision, at a time set by the court. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.

(2) Objections to Motion. A class member, or a party from whom payment is sought, may object to the motion.

(3) Hearing and Findings. The court may hold a hearing and must find the facts and state its conclusions of law on the motion under Rule 52(a).

(4) Reference to Special Master or Magistrate Judge. The court may refer issues related to the amount of the award to a special master or to a magistrate judge as provided in Rule 54(d)(2)(D).

(As amended Feb. 28, 1966, eff. July 1, 1966; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 24, 1998, eff. Dec. 1, 1998; Mar. 27, 2003, eff. Dec. 1, 2003.)

ADVISORY COMMITTEE NOTES

1937 Adoption

Note to Subdivision (a). This is a substantial restatement of [former] Equity Rule 38 (Representatives of Class) as that rule has been construed. It applies to all actions, whether formerly denominated legal or equitable. For a general analysis of class actions, effect of judgment, and requisites of jurisdiction see Moore, *Federal Rules of Civil Procedure. Some Problems Raised by the Preliminary Draft*, 25 Georgetown L.J. 551, 570 et seq. (1937); Moore and Cohn, *Federal Class Actions*, 32 Ill.L.Rev. 307 (1937); Moore and Cohn, *Federal Class Actions—Jurisdiction and Effect of Judgment*, 32 Ill.L.Rev. 555–567 (1938); Lesar, *Class Suits and the Federal Rules*, 22 Minn.L.Rev. 34 (1937); cf. Arnold and James, *Cases on Trials, Judgments and Appeals* (1936) 175; and see Blume, *Jurisdictional Amount in Representative Suits*, 15 Minn.L.Rev. 501 (1931).

The general test of [former] Equity Rule 38 (Representatives of Class) that the question should be "one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court," is a common test. For states which require the two elements of a common or general interest and numerous persons, as provided for in [former] Equity Rule 38, see Del.Ch. Rule 113; Fla.Comp.Gen.Laws Ann. (Supp., 1936) § 4918(7); Georgia Code (1933) § 37–1002, and see *English Rules Under the Judicature Act* (The Annual Practice, 1937) O. 16, r. 9. For statutory provisions providing for class actions when the question is one of common or general interest or when the parties are numerous, see Ala.Code Ann. (Michie, 1928) § 5701; 2 Ind.Stat.Ann. (Burns, 1933) § 2–220; N.Y.C.P.A. (1937) 195; Wis.Stat. (1935) § 260.12. These statutes have, however, been uniformly construed as though phrased in the conjunctive. See *Garfein v. Stiglitz*, 260 Ky. 430, 86 S.W.2d 155 (1935). The rule adopts the test of [former] Equity Rule 38, but defines what constitutes a "common or general interest". Compare with code provisions which make the action dependent upon the propriety of joinder of the parties. See Blume, *The "Common Questions" Principle in the Code Provision for Representative Suits*, 30 Mich.L.Rev. 878 (1932). For discussion of what constitutes "numerous persons" see Wheaton, *Representative Suits Involving Numerous Litigants*, 19 Corn.L.Q. 399 (1934); Note, 36 Harv.L.Rev. 89 (1922).

Clause (1), Joint, Common, or Secondary Right. This clause is illustrated in actions brought by or against representatives of an unincorporated association. See *Oster v*

CHAPTER 4
REMEDIES AND PROCEDURES

§1780. Remedies; Commencement of Action; Senior Citizens and Disabled Persons.

(a) Any consumer who suffers any damage as a result of the use or employment by any person of a method, act, or practice declared to be unlawful by Section 1770 may bring an action against that person to recover or obtain any of the following:

(1) Actual damages, but in no case shall the total award of damages in a class action be less than one thousand dollars ($1,000).

(2) An order enjoining the methods, acts, or practices.

(3) Restitution of property.

(4) Punitive damages.

(5) Any other relief that the court deems proper.

(b)(1) Any consumer who is a senior citizen or a disabled person, as defined in subdivisions (f) and (g) of Section 1761, as part of an action under subdivision (a), may seek and be awarded, in addition to the remedies specified therein, up to five thousand dollars ($5,000) where the trier of fact does all of the following:

(A) Finds that the consumer has suffered substantial physical, emotional, or economic damage resulting from the defendant's conduct.

(B) Makes an affirmative finding in regard to one or more of the factors set forth in subdivision (b) of Section 3345.

(C) Finds that an additional award is appropriate.

(2) Judgment in a class action by senior citizens or disabled persons under Section 1781 may award each class member that additional award if the trier of fact has made the foregoing findings.

(c) An action under subdivision (a) or (b) may be commenced in the county in which the person against whom it is brought resides, has his or her principal place of business, or is doing business, or in the county where the transaction or any substantial portion thereof occurred.

In any action subject to the provisions of this section, concurrently with the filing of the complaint, the plaintiff shall file an affidavit stating facts showing that the action has been commenced in a county described in this section as a proper place for the trial of the action. If a plaintiff fails to file the affidavit required by this section, the court shall, upon its own motion or upon motion of any party, dismiss the action without prejudice.

(d) The court shall award court costs and attorney's fees to a prevailing plaintiff in litigation filed pursuant to this section. Reasonable attorney's fees may be awarded to a prevailing defendant upon a finding by the court that the plaintiff's prosecution of the action was not in good faith. **Leg.H.** 1970 ch. 1550, 1988 chs. 823, 1343 §2, 1998 ch. 931, effective September 28, 1998, 2003 ch. 449 (AB 1712).

Ref.: Cal. Fms. Pl. & Pr., Ch. 14, "Advertising," Ch. 127, "Consumer Contracts and Loans," Ch. 129, "Consumer Credit Reporting," Ch. 504, "Sales: Consumers Legal Remedies Act"; MB Prac. Guide: Cal. Contract Lit., §§1.33[2]; 5.13[5]; 10.01; 10.03; 10.04[3]; 10.05[4][a]; 10.09; 10.11[1]; MB Prac. Guide: Fed. Pretrial Proc. in Cal., §20.12[2][b]; MB Prac. Guide: Cal. Unfair Comp. & Bus. Torts, §3.17; W. Cal. Pro., "Pleading" §§268, 270, 272; W. Cal. Sum., 4 "Sales" §296.

§1781. Conditions for Action on Behalf of All Consumers Damaged—Hearing to Permit Class Action—Notice to Each Member—Dismissal, Settlement, or Compromise—Judgment.

(a) Any consumer entitled to bring an action under Section 1780 may, if the unlawful method, act, or practice has caused damage to other consumers similarly situated, bring an action on behalf of himself and such other consumers to recover damages or obtain other relief as provided for in Section 1780.

(b) The court shall permit the suit to be maintained on behalf of all members of the represented class if all of the following conditions exist:

(1) It is impracticable to bring all members of the class before the court.

(2) The questions of law or fact common to the class are substantially similar and predominate over the questions affecting the individual members.

(3) The claims or defenses of the representative plaintiffs are typical of the claims or defenses of the class.

(4) The representative plaintiffs will fairly and adequately protect the interests of the class.

(c) If notice of the time and place of the hearing is served upon the other parties at least 10 days prior thereto, the court shall hold a hearing, upon motion of any party to the action which is supported by affidavit of any person or persons having knowledge of the facts, to determine if any of the following apply to the action:

(1) A class action pursuant to subdivision (b) is proper.

(2) Published notice pursuant to subdivision (d) is necessary to adjudicate the claims of the class.

(3) The action is without merit or there is no defense to the action.

A motion based upon Section 437c of the Code of Civil Procedure shall not be granted in any action commenced as a class action pursuant to subdivision (a).

(d) If the action is permitted as a class action, the court may direct either party to notify each member of the class of the action. The party required to serve notice may, with the consent of the court, if personal notification is unreasonably expensive or it appears that all members of the class cannot be notified personally, give notice as prescribed herein by publication in accordance with Section 6064 of the Government Code in a newspaper of general circulation in the county in which the transaction occurred.

(e) The notice required by subdivision (d) shall include the following: