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5 UNITED STATES DISTRICT COURT
6 EASTERN DISTRICT OF CALIFORNIA
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8 CHAD HERRON, individually, on
9 behalf of himself and all
10 others similarly situated,

11 Plaintiff,

12 v.

13 BEST BUY STORES, LP, a
14 Virginia limited partnership;
15 BESTBUY.COM, LLC, Virginia
16 limited liability company;
17 TOSHIBA AMERICA INFORMATION
18 SYSTEMS, INC., a California
19 corporation; and DOES 3-100,
20 inclusive,

21 Defendants.

No. 12-cv-02103-GEB-JFM

**ORDER DENYING TOSHIBA'S MOTION
TO DISMISS AND BEST BUY STORES
AND BESTBUY.COM'S MOTION TO
STRIKE**

22 Defendant Toshiba America Information Systems, Inc.
23 ("Toshiba") moves to dismiss Plaintiff's complaint under Federal
24 Rules of Civil Procedure ("Rules") 9(b) and 12(b)(6). Defendants
25 Best Buy Stores, LP ("Best Buy Stores") and Bestbuy.com, LLC
26 ("Bestbuy.com") separately move to strike Plaintiff's class
27 allegations under Rule 12(f). Plaintiff opposes each motion.
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I. FACTUAL ALLEGATIONS

Plaintiff alleges the following in his Second Amended
Class Action Complaint ("SAC"). On December 15, 2009, after

1 looking at the product tags for various laptops, Plaintiff
2 purchased a Toshiba Satellite L505 Laptop from a Best Buy Stores
3 retail store in Folsom, California. (SAC ¶¶ 10-12 & Ex. D.) Best
4 Buy Stores displays each of its laptops with a "'product tag,'
5 which contains the price and a brief description of the features
6 of the laptop." (SAC ¶ 43.) "One prominent feature is 'Battery.'" (Id. ¶ 43.) "Best Buy [Stores] represented Plaintiff's Laptop
7 battery life to be 'up to 3.32 hours.'" (Id. ¶ 44.) Best Buy
8 Stores did not provide "any explanation as to how the 'up to'
9 hours was calculated or determined on the product tag or
10 elsewhere" in the store, and "there was no disclaimer, qualifier,
11 or other language." (Id. ¶¶ 45, 14.)

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15 Plaintiff "decided to purchase the Toshiba Satellite
16 L505 [Laptop] based substantially on his reliance on the
17 representation that the battery life for that model was 'up to
18 3.32 hours.'" (Id. ¶ 12.) "Plaintiff . . . believed that the
19 represented battery life of 'up to 3.32 hours' was reflective of
20 how long Plaintiff could expect his Laptop to operate when being
21 powered solely by its battery." (Id. ¶ 13.) In fact, "[i]n the
22 years since Plaintiff purchased his Laptop, he has never once
23 achieved even close to the represented 3.32 hours of battery
24 life." (Id. ¶ 15.)

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26 Toshiba uses the MobileMark 2007 ("MM07") benchmark
27 test to measure the battery life of its Toshiba L505 Laptops.
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1 (Id. ¶ 37.) During the test, the computer's monitor is set to 60
2 nits, or "the brightness of 20% to 30% of [the] normal level."

3 (Id. ¶ 28.) Meanwhile, "the computer's Wi-Fi, Bluetooth, and
4 other wireless functions are disabled so the computer is not
5 drawing power from the battery to perform these functions," and
6 the computer's "main processor chip is set to 5% to 7.5% of its
7 normal capacity" so that it "is essentially running in an idle
8 state." (Id. ¶¶ 29, 30.) Three separate performance tests are
9 then administered: (1) a DVD test where "a DVD movie is played
10 until the battery dies," (2) a productivity test where the
11 computer "perform[s] common office activities" such as data
12 processing, and (3) a reading test where the computer "read[s] a
13 PDF document pausing [for] two minutes on each page." (Id. ¶
14 31(a)-(c).) "MM07 does not provide an 'overall' rating; rather,
15 the computer is given three scores, one for each category (DVD,
16 Productivity, and Reader). The laptop manufacturer or retailer
17 may choose which score to report to consumers." (Id. ¶ 32.)

18 "Toshiba conveys the results of the Laptop's MM07" test
19 to "third party retailers, such as Best Buy [Stores] . . . with
20 the intention and desire that these third party retailers will,
21 in turn, represent to consumers these results." (Id. ¶ 38.) Since
22 MM07 testing bears "no resemblance to the real-life and everyday
23 uses of laptop computers and notebooks," the Laptop's actual
24 battery life is "significantly less" than that which was
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1 represented by Defendants. (Id. ¶¶ 33, 5.)

2 On its website, Bestbuy.com describes each of its
3 laptops' specifications, including their battery lives. (Id. ¶¶
4 46–48.) “[E]ach laptop’s battery life is represented as being ‘up
5 to’ a specified number of hours.” (Id. ¶ 46.) Customers can click
6 on this battery life representation to display a pop-up box. (Id.
7 ¶ 47.) The pop-up box states:

9 Battery Life
10 Battery life tested using MobileMark 2007.
11 Battery life will vary depending on the
12 product configuration, product model,
13 applications loaded on the product, power
management setting of the product, and the
product features used by the customer. As with
all batteries, the maximum capacity of this
battery will decrease with time and usage.

14 (Id. ¶ 47.) “Other than the statement that the Laptop’s battery
15 life was tested using MobileMark 2007 . . . there is not any
16 explanation [on the Bestybuy.com website] as to how the ‘up to’
17 hours was calculated or any other information.” (Id. ¶ 48.)

18 “Plaintiff paid more for his Laptop than he would have
19 paid had . . . the material fact not been concealed or omitted
20 that the battery life for his [L]aptop was determined by testing
21 the machine pursuant to MM07 . . . with: (i) its screen set to 60
22 nits; (ii) its Wi-Fi, Bluetooth, and other wireless functions
23 disabled; and (iii) its main processor chip set to 5% to 7.5% of
24 its normal capacity.” (Id. ¶ 15.) On behalf of himself, and a
25 proposed class and subclass of California consumers, Plaintiff
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1 alleges claims against each Defendant under the California
2 Consumers Legal Remedies Act ("CLRA"), Cal. Civ. Code § 1770
3 (a) (5), (a) (7), (a) (9), and against Best Buy Stores and
4 Bestbuy.com under the California Unfair Competition Law ("UCL"),
5 Cal. Bus. & Prof. Code § 17200 et seq. (Id. ¶¶ 58-94.)

6 7 **II. LEGAL STANDARD**

8 **A. Rule 12(b) (6)**

9 Decision on a Rule 12(b) (6) dismissal motion requires
10 determination of "whether the complaint's factual allegations,
11 together with all reasonable inferences, state a plausible claim
12 for relief." United States ex rel. Cafasso v. Gen. Dynamics C4
13 Sys., Inc., 637 F.3d 1047, 1054 (9th Cir. 2011) (citing Ashcroft
14 v. Iqbal, 556 U.S. 662, 678-79 (2009)). "A claim has facial
15 plausibility when the plaintiff pleads factual content that
16 allows the court to draw the reasonable inference that the
17 defendant is liable for the misconduct alleged." Iqbal, 556 U.S.
18 at 678 (citing Bell Atlantic v. Twombly, 550 U.S. 544, 556
19 (2007)).

21 When determining the sufficiency of a claim under Rule
22 12(b) (6), "[w]e accept factual allegations in the complaint as
23 true and construe the pleadings in the light most favorable to
24 the non-moving party." Fayer v. Vaughn, 649 F.3d 1061, 1064 (9th
25 Cir. 2011) (internal quotation marks omitted). However, this
26 tenet does not apply to "legal conclusions . . . cast in the form
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1 of factual allegations.” Id. (internal quotation marks omitted).
2 “Therefore, conclusory allegations of law and unwarranted
3 inferences are insufficient to defeat a motion to dismiss.” Id.
4 (internal quotation marks omitted); see also Iqbal, 556 U.S. at
5 678 (quoting Twombly, 550 U.S. at 555) (“A pleading that offers
6 ‘labels and conclusions’ or ‘a formulaic recitation of the
7 elements of a cause of action will not do.’”).

9 **B. Rule 12(f)**

10 Rule 12(f) permits a court to “strike from a pleading
11 an insufficient defense or any redundant, immaterial,
12 impertinent, or scandalous matter.” Since interpretation of the
13 Rule begins with its plain meaning, a motion to strike will not
14 be granted unless the matter to be stricken is “(1) an
15 insufficient defense; (2) redundant; (3) immaterial; (4)
16 impertinent; or (5) scandalous.” Whittlestone, Inc. v. Handi-
17 Craft Co., 618 F.3d 970, 973-74 (9th Cir. 2010).

19 As the movants, Defendants bear the burden on their
20 motions to strike, SEC v. Sands, 902 F. Supp. 1149, 1166-67 (C.D.
21 Cal. 1995), and their motions will not be granted unless the
22 matter to be stricken could have no possible bearing on the
23 controversy. Neveu v. City of Fresno, 392 F. Supp. 2d 1159, 1170
24 (E.D. Cal. 2005); see Nat’l Res. Def. Council v. Kempthorne, 539
25 F. Supp. 2d 1155, 1162 (E.D. Cal. 2008) (noting such motions are
26 disfavored and infrequently granted). Further, when ruling on the
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1 motions to strike, the court accepts Plaintiff's allegations as
2 true and liberally construes the complaint in the light most
3 favorable to Plaintiff. Stearns v. Select Comfort Retail Corp.,
4 763 F. Supp. 2d 1128, 1140 (N.D. Cal. 2010); Multimedia Patent
5 Trust v. Microsoft Corp., 525 F. Supp. 2d 1200, 1211 (S.D. Cal.
6 2007); Lazar v. Trans Union LLC, 195 F.R.D. 665, 669 (C.D. Cal.
7 2000).

8 9 **III. DISCUSSION**

10 **A. Toshiba's Dismissal Motion**

11 Toshiba seeks dismissal of Plaintiff's CLRA claim
12 against it, arguing that Plaintiff fails to allege (1) "any CLRA
13 'transaction'" with Toshiba, (2) "exposure to or reliance on any
14 representation" directly made by Toshiba, or (3) Toshiba's
15 "participation and control" over Best Buy Stores'
16 representations. (Toshiba's Corrected Mot. to Dismiss, ECF No.
17 34, 1:11-13.)

18 19 **(1) Transactions with Toshiba**

20 Toshiba argues that Plaintiff's claim fails because
21 "there was no 'transaction' between [Toshiba] and [P]laintiff,"
22 since the "only 'transaction' alleged is [P]laintiff's purchase
23 of a [Toshiba Satellite L505 L]aptop from Best Buy [Stores]."
24 (Toshiba's Mot. to Dismiss Second Am. Compl. ("Toshiba's Mot."),
25 ECF No. 30, 4:16-17.) Plaintiff responds that "the CLRA does not
26 require contractual privity," and thus "'a cause of action under
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1 the CLRA may be established independent of any contractual
2 relationship between the parties.'" (Pl.'s Opp'n to Toshiba's
3 Mot. to Dismiss, ECF No. 41, 9:13, 9:23-24 (citing McAdams v.
4 Monier, Inc., 182 Cal. App. 4th 174, 186 (2010)).)

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6 The CLRA prohibits unfair or deceptive practices
7 arising from "a transaction *intended to result or which results*
8 *in the sale or lease of goods or services to any consumer.*" Cal.
9 Civ. Code § 1760 (emphasis added). Thus the CLRA does not limit
10 liability to "a defendant who directly engaged in a completed
11 transaction with a plaintiff." Chamberlan v. Ford Motor Co., No.
12 No. C 03-2628 CW, 2003 WL 25751413, at * (N.D. Cal. Aug. 6, 2003)
13 (rejecting defendant's argument that the CLRA applies only "in
14 the context of a transaction between the plaintiff and the
15 defendant"); Keilholtz v. Sup. Fireplace Co., No. C 08-00836 CW,
16 2009 WL 839076, at *3-4 (N.D. Cal. Mar. 30, 2009) (rejecting
17 defendants' argument that "a CLRA claim can be asserted only
18 against defendants who sell goods or services directly to
19 consumers"); see also In re NVIDIA GPU Litig., No. C 08-04312 JW,
20 2009 WL 4020104, at *10 (N.D. Cal. Nov. 19, 2009) (denying CLRA
21 dismissal motion against manufacturer who was not in contractual
22 privity with plaintiffs). Accordingly, this portion of Toshiba's
23 dismissal motion is denied.
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26 **(2) Representations by Toshiba**

27 Toshiba also argues that Plaintiff "fails to allege
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1 that [Toshiba] made any representation to [P]laintiff, as
2 required to establish direct liability [for fraudulent
3 affirmative misrepresentations] under the CLRA." (Toshiba's Mot.
4 1:11-12.) However, Toshiba failed to squarely raise this argument
5 in its initial dismissal motion, even though the argument was
6 available to Toshiba when it originally sought to dismiss
7 Plaintiff's complaint. (See Mot. to Dismiss First Am. Compl., ECF
8 No. 7, 6:15-16 (arguing principally that "[b]ecause a reasonable
9 consumer would not be deceived[by the representations], there
10 can be no liability").) Under Rule 12(g), "a party that makes a
11 motion under [Rule 12] must not make another motion under this
12 rule raising a defense or objection that was available to the
13 party but omitted from its earlier motion." Thus "a series of
14 [Rule 12(b)(6)] motions should not be permitted because that
15 results in delay and encourages dilatory tactics." Aetna Life
16 Ins. Co. v. Alla Med. Servs., Inc., 855 F.2d 1470, 1475 n.2 (9th
17 Cir. 1988); see Fed. Agr. Mortg. Corp. v. It's a Jungle Out
18 There, Inc., No. C 03-3721 VRW, 2005 WL 3325051, at *5 (N.D. Cal.
19 Dec. 7, 2005) ("[T]he weight of authority . . . holds that where
20 the complaint is amended after the defendant has filed a Rule
21 12(b) motion, the defendant may not thereafter file a second Rule
22 12(b) motion asserting objections or defenses that could have
23 been asserted in the first motion."). Accordingly, this portion
24 of Toshiba's dismissal motion is not considered.
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1 **(3) Participation and Control by Toshiba**

2 Toshiba argues that the UCL's "'participation and
3 control' standard applies to CLRA claims," and Plaintiff has not
4 met this standard. (Toshiba's Mot. 6:13-14.) To state a claim
5 under the UCL, a plaintiff must allege a defendant's "personal
6 'participation in the unlawful practices' and 'unbridled control'
7 over the practices." Emery v. Visa Int'l Serv. Ass'n, 95 Cal.
8 App.4th 952, 960 (2002) (quoting People v. Toomey, 157 Cal.App.3d
9 1, 15 (1984)). This "personal participation . . . and unbridled
10 control" standard developed in UCL cases nearly thirty years ago.
11 See Emery, 95 Cal. App. 4th at 960 (enunciating the "personal
12 participation . . . and unbridled control" standard in UCL case,
13 without CLRA claims); Toomey, 157 Cal. App. 3d at 14-15
14 (articulating these criteria for first time in UCL case, where
15 the CLRA is unmentioned). Toshiba relies on In re Jamster
16 Marketing Litigation, No. 05cvo819 JM(CAB), 2009 WL 1456632, at
17 *9 (S.D. Cal. May 22, 2009)) to argue that this UCL standard
18 should be extended to CLRA claims as well. (Toshiba's Mot. 6:15-
19 7:1.) In In re Jamster, plaintiffs' CLRA claim was dismissed
20 because "[p]laintiffs fail[ed] to identify any authority
21 permitting a CLRA claim to be maintained under a secondary
22 liability theory," without allegations of defendants'
23 participation and control. Id. at *9 (emphasis added). However,
24 "defendants," and not plaintiffs, "bear all applicable burdens on
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1 their motion[s] to dismiss. Falcocchia v. Saxon Mortg., Inc., 709
2 F. Supp. 2d 873, 886 (E.D. Cal. 2010). California state courts
3 have not extended the “personal participation . . . and unbridled
4 control” limitation on liability to claims under the CLRA, which
5 must be “liberally construed and applied,” Cal. Civ. Code § 1760,
6 and which contains “more extensive remedies” and provisions than
7 the UCL. Cruz v. PacifiCare Health Sys., Inc., 30 Cal. 4th 303,
8 316 (2003). Indeed, with the exception of In re Jamster and the
9 two cases that rely on it,¹ the “personal participation . . . and
10 unbridled control” limitation on liability has been confined to
11 UCL claims. In this case and at this stage of the litigation,
12 Toshiba has not shown that the personal participation and
13 unbridled control standard applies to Plaintiff’s CLRA claim.
14 Accordingly, this portion of Toshiba’s dismissal motion is
15 denied.

18 **B. Best Buy Stores and Bestbuy.com’s Motion to Strike**

19 Best Buy Stores and Bestbuy.com seek to strike
20 Plaintiff’s class allegations under Rule 12(f) “for a lack of
21 typicality, commonality, and predominance of individual issues.”
22 (Mot. to Strike Portions of SAC (“Mot. to Strike”), ECF No. 32,
23 4:21-22.) Plaintiff counters that Defendants’ Rule 12(f) motion
24 is premature and improper, and should therefore be denied. (Pl.’s
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27 ¹ See Yordy v. Plimus, Inc., No. C12-0229 THE, 2012 WL 2196128, at
28 *5 (N.D. Cal. June 14, 2012); In re Hydroxycut Mktg. & Sales
Practices Litig., 801 F. Supp. 2d 993, 1012-13 (S.D. Cal. 2011).

1 Opp'n to Mot. to Strike, ECF No. 43, 2:12-28.)

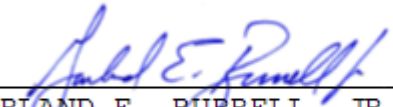
2 Material may be stricken under Rule 12(f) only when it
3 is "redundant, immaterial, impertinent or scandalous matter" or
4 "an insufficient defense." Fed. R. Civ. P. 12(f); Whittlestone,
5 Inc., 618 F.3d at 973-74. Here, Best Buy Stores and Bestbuy.com
6 have not shown that Plaintiff's class allegations satisfy any of
7 these "five categories" of material that may be stricken under
8 Rule 12(f). Whittlestone, 618 F.3d at 974. Nor may Defendants'
9 motion to *strike* be read "in a manner that allow[s them] to use
10 it as a means to *dismiss* some or all of a pleading." *Id.*
11 (emphasis added); see also Harvey v. Bank of Am., N.A., 906
12 F.Supp.2d 982, 996 (N.D. Cal. 2012) ("Rule 12(f) may not be used
13 to make an end-run around Rule 12(b)(6) standards or summary
14 judgment procedures."). Further, "the better and more advisable
15 practice for a District Court to follow is to afford the
16 litigants an opportunity to present evidence as to whether a
17 class action was maintainable." Doninger v. Pac. Nw. Bell, Inc.,
18 564 F.2d 1304, 1313 (9th Cir. 1977); accord Casida v. Sears
19 Holdings Corp., 1:11-CV-01052-AWI, 2012 WL 253217, at *3 (E.D.
20 Cal. Jan. 26, 2012) (finding "premature" defendant's motion to
21 strike class actions since "the issue would be more properly
22 resolved after [p]laintiff has had an opportunity to conduct
23 discovery"). Accordingly, since it has not been shown that Rule
24 12(f) is an "authorized" or "proper" vehicle for the relief
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sought, Yamamoto v. Omiya, 564 F.2d 1319, 1327 (9th Cir. 1977),
Best Buy Stores and Bestbuy.com's motion to strike is denied.

IV. CONCLUSION

For the stated reasons, Toshiba's dismissal motion (ECF
No. 30) and Best Buy Stores and Bestbuy.com's motion to strike
(ECF No. 32) are denied.

Dated: August 15, 2013



GARLAND E. BURRELL, JR.
Senior United States District Judge