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3
4 UNITED STATES DISTRICT COURT
5 EASTERN DISTRICT OF CALIFORNIA
6

7 CHAD HERRON, individually, on
8 behalf of himself and all
9 others similarly situated,

10 Plaintiff,

11 v.

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

20 Defendants.

No. 12-cv-02103-GEB-JFM

**ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANTS
BESTBUY.COM, LLC AND BEST BUY
STORES, L.P.'S MOTION TO DISMISS
CLAIMS IN PLAINTIFF'S SECOND
AMENDED COMPLAINT**

21 Defendants BestBuy.com, LLC ("BB.com") and Buy Stores,
22 L.P. ("BBS") move in this putative class action for dismissal of
23 claims alleged in Plaintiff's Second Amended Complaint ("SAC").
24 Defendants seek dismissal of Plaintiff's claims alleged under
25 California's Consumers Legal Remedy Act ("CLRA") and Unfair
26 Competition Law ("UCL"). Dismissal is sought under Federal Rules
27 of Civil Procedure ("Rules") 9(b), 12(b)(1), and 12(b)(6).
28 Plaintiff opposes the motion. Diversity jurisdiction is the
alleged basis of subject-matter jurisdiction.

I. FACTUAL ALLEGATIONS

The following allegations in Plaintiff's SAC concern

1 the motion. "In or about January 2010," after looking at the
2 product tags for various laptops, Plaintiff purchased a Toshiba
3 Satellite L505 laptop from a Best Buy retail store in Folsom,
4 California. (Not. of Removal, Second Amend. Compl. ("SAC") ¶¶ 10-
5 12, ECF No. 1-2.) "In Best Buy's retail stores, each [l]aptop
6 computer . . . has a Best Buy 'product tag'" that "lists the
7 [l]aptop's battery life as being 'up to' a specified number of
8 hours." (Id. ¶¶ 43-44.) "Best Buy represented Plaintiff's
9 [l]aptop battery life to be 'up to 3.32 hours.'" (Id. ¶ 44.)
10 "There is not an explanation as to how the 'up to' hours was
11 derived on the product tag or elsewhere," and "there was no
12 disclaimer, qualifier, or any other language on the product tag."
13 (Id. ¶¶ 45, 14.)

14 Plaintiff "decided to purchase the Toshiba Satellite
15 L505 [laptop] based substantially on his reliance on the
16 representation." (Id. ¶ 12.) "In the years since Plaintiff
17 purchased his laptop, he has never once achieved even close to
18 the represented 3.32 hours of battery life." (Id. ¶ 15.)

19 "The 'up to' battery life representations on Best Buy's
20 product tags . . . are not limited to [l]aptops manufactured by
21 Toshiba; rather such representations are common and identical
22 regardless of the manufacturer of the [l]aptop." (Id. ¶ 49.) Best
23 Buy's "up to" battery life claims are the result of tests
24 conducted under the MobileMark 2007 ("MM07") benchmark. (Id.)
25 During an MM07 test, the laptop's monitor is set to a "brightness
26 of 20% to 30% of [the] normal level," "Wi-Fi, Bluetooth, and
27 other wireless functions are disabled," and "the main processor
28 chip is set to 5% to 7.5% of its normal capacity." (Id. ¶¶ 28-

1 30.) "Best Buy's use of the results from MM07 . . . grossly
2 overstate[s] the battery life a consumer can expect to
3 experience." (Id. ¶ 50.)

4 II. DISCUSSION

5 A. Defendant BestBuy.com, LLC

6 BB.com argues Plaintiff has not sufficiently alleged
7 an Article III standing injury, which is required for him to
8 maintain a lawsuit against BB.com. Specifically, BB.com argues
9 Plaintiff "has not [alleged he] suffered any injury which is
10 fairly traceable" to BB.com either by "purchas[ing] anything from
11 [BB.com]" or "rel[ying] upon any representation made by
12 [BB.com]." (Defs.' Mot. 11:3-5.) Plaintiff rejoins with the
13 conclusory argument that the misrepresentation he suffered "was
14 the result of a uniform policy and practice implemented by
15 Defendants in the California brick-and-mortar stores and the
16 website." (Pl.'s Opp'n 11:21-22, ECF No. 31.)

17 To satisfy Article III standing, a
18 plaintiff must show (1) he has suffered an
19 "injury in fact" that is concrete and
20 particularized and actual or imminent, not
21 conjectural or hypothetical; (2) the injury
22 is fairly traceable to the challenged action
23 of the defendant; and (3) it is likely, as
24 opposed to merely speculative, that the
injury will be redressed by a favorable
decision. The plaintiff bears the burden of
establishing these elements. . . . A suit
brought by a plaintiff without Article III
standing is not a "case or controversy," and
an Article III federal court therefore lacks
subject matter jurisdiction over the suit.

25 Braunstein v. Ariz. Dept. of Transp., 683 F.3d 1177, 1184 (9th
26 Cir. 2012) (citations omitted). In addition, "named plaintiffs
27 who represent a class 'must allege and show that they personally
28 have been injured, not that injury has been suffered by other,

1 unidentified members of the class to which they belong and which
2 they purport to represent.'" Simon v. E. Ky. Welfare Rights Org.,
3 426 U.S. 26, 40 n.20 (1976) (quoting Warth v. Seldin, 422 U.S.
4 490, 502 (1975)).

5 "[T]o establish Article III standing in a class action,
6 at least one named plaintiff must have standing in his own right
7 to assert a claim against each named defendant before he may
8 purport to represent a class claim against that defendant." Henry
9 v. Circus Circus Casinos, Inc., 223 F.R.D. 541, 544 (D. Nev.
10 2004); see also Cady v. Anthem Blue Cross Life & Health Ins. Co.,
11 583 F. Supp. 2d 1102, 1106 (N.D. Cal. 2008) (holding that a named
12 plaintiff in a putative class action "may not assert claims
13 against those [d]efendants that played no part in" his injury);
14 Siemers v. Wells Fargo & Co., No. 05-cv-04518 WHA, 2006 WL
15 3041090, *5-7, (N.D. Cal. Oct. 24, 2006) (dismissing a defendant
16 from a putative class action since the complaint did not allege
17 the defendant "made a misrepresentation to [the named] plaintiff,
18 that [the named] plaintiff bought or sold" a product "in reliance
19 on that misrepresentation, or that [the named] plaintiff suffered
20 a cognizable harm as a result" of the defendant's actions).

21 Plaintiff does not allege he viewed a representation on
22 BB.com's website or purchased any product from BB.com. Therefore,
23 Plaintiff has not alleged an "injury [that] is fairly traceable
24 to" BB.com. Braunstein, 683 F.3d at 1184. Since Plaintiff has not
25 sustained his burden of alleging this element of Article III
26 standing, there is no federal subject-matter jurisdiction over
27 this portion of the suit, and this portion of "the suit should be
28 dismissed under Rule 12(b)(1)." Cetacean Cmty. v. Bush, 386 F.3d

1 1169, 1174 (9th Cir. 2004). Therefore, BB.com's motion to be
2 dismissed as a party in this action is granted.

3 **B. Defendant Best Buy Stores, L.P.**

4 **1. CLRA Statute of Limitations**

5 BBS argues Plaintiff's CLRA claim is barred by the
6 applicable statute of limitations. The applicable limitations
7 period is prescribed as follows in California Civil Code § 1783:
8 "Any action brought under the [CLRA] shall be commenced not more
9 than three years from the date of the commission of such method,
10 act, or practice." This limitations period expired in January
11 2013, since Plaintiff alleges he purchased his laptop "[i]n or
12 about January 2010." (SAC ¶ 10.) Plaintiff added BBS as a
13 defendant in his SAC, on March 1, 2013, which is after expiration
14 of the statute of limitations period. However, Plaintiff argues
15 he preserved the ability to add BBS as a defendant at that time,
16 since he sued fictitious Doe defendants in his first amended
17 complaint ("FAC"), in lieu of BBS.¹

18 In a diversity case, California's fictitious name rule,
19 in Code of Civil Procedure § 474, allows claims against certain
20 later-added defendants to relate back to the filing date of an
21 earlier complaint. Lindley v. Gen. Elec. Co., 780 F.2d 797, 802
22 (9th Cir. 1985). The statute prescribes:

23 When the plaintiff is ignorant of the name of
24 a defendant, he must state that fact in the
25 complaint . . . and such defendant may be
designated in any pleading or proceeding by

26 ¹ Plaintiff also contends he sued fictitious defendants in lieu of BBS in
27 his initial complaint filed in state court. However, Plaintiff's FAC is the
28 only complaint attached to the notice of removal filed in this action. (See
ECF No. 1-2.) Since Plaintiff's initial complaint has not been filed in
federal court, relation back to the initial complaint is not addressed in this
order.

1 any name, and when his true name is
2 discovered, the pleading or proceeding must
3 be amended accordingly

4 Cal. Civ. Proc. Code § 474. Plaintiff alleged as follows, in his
5 FAC, which was filed on June 28, 2012, within the statute of
6 limitations period: "Plaintiff is unaware of the true names,
7 capacities or basis for liability of Defendants Does 1 through
8 100, inclusive" (See Not. of Removal Ex. B, FAC ¶ 18, ECF
9 No. 1-2.)

10 BBS challenges the credibility of Plaintiff's Doe
11 allegations, arguing, "Plaintiff's counsel indisputably knew that
12 [BBS] was the operator of the Best Buy retail stores long before
13 the expiration of the statute of limitations." (Defs.' Mot.
14 20:24-25.) BBS argues this knowledge is evinced by a FAC
15 Plaintiff's counsel filed in another topically different lawsuit
16 on behalf of a different plaintiff on April 29, 2011, before
17 counsel commenced action in the instant case. In the other
18 lawsuit, captioned Wood v. Best Buy Stores, L.P., that plaintiff
19 alleged: "Defendant [BBS] . . . operates retail stores under the
20 name Best Buy, throughout California." (Req. Judicial Not. 10,
21 FAC, No. 11-cv-01877-LB, 3:18-19 (N.D. Cal. Apr. 29, 2011), ECF
22 No. 31-3.)² BBS contends Plaintiff's counsel's knowledge of
23 [BBS]'s identity "is imputed to [P]laintiff," and therefore
24 "[P]laintiff had knowledge of the identity of [BBS]," and "the
25 addition of [BBS] as a defendant in the [SAC] . . . does not

26 ² Defendants have requested that judicial notice be taken of the FAC filed
27 in Wood. This request is granted. However, the remainder of Defendants'
28 judicial notice request is denied since Defendants have not shown that the
 other documents should be considered in the decision of this dismissal
 motion.

1 relate back" to any earlier-filed complaint. (Defs.' Mot. 22:6-7,
2 22:9-11.)

3 Plaintiff rejoins that while the FAC in Wood
4 prove[s] that Plaintiff's counsel knew of the
5 identity of [BBS] at the time of filing the
6 initial complaint and the FAC [in this case],
7 Plaintiff's counsel was unaware of any facts
8 that would connect [BBS] with Plaintiff's
injuries; mainly, that [BBS] created the
product tags that resulted in Plaintiff's
injury in this action.

9 (Pl.'s Opp'n 20:19-22.) Plaintiff argues BBS, therefore, has not
10 sustained its burden of proving Plaintiff was not "ignorant" of
11 BBS within the meaning of the California fictitious name rule.
12 Cal. Civ. Proc. Code § 474. (Pl.'s Opp'n 20:23-26.)

13 This rule "has been liberally construed by the courts.
14 The words 'ignorant of the name of a defendant' are construed
15 broadly to include other kinds of ignorance which explain the
16 failure to name a person as a defendant until sometime later."
17 Miller v. Thomas, 121 Cal. App. 3d 440, 444 (1981); accord
18 Lindley, 780 F.2d at 801 ("California's policy in favor of
19 litigating cases on their merits requires that the fictitious
20 name statute be liberally construed."). "[I]t is now well
21 established that even though the plaintiff knows of the existence
22 of the defendant sued by a fictitious name . . ., the plaintiff
23 is 'ignorant' within the meaning of the statute if he lacks
24 knowledge of that person's connection with the case or with his
25 injuries." Gen. Motors Corp. v. Sup. Ct., 48 Cal. App. 4th 580,
26 593-94 (1996). "[T]he relevant inquiry . . . is *what facts the*
27 *plaintiff actually knew* at the time the [earlier] complaint was
28 filed." Id. at 588.

1 BBS has not shown that when Plaintiff filed his FAC, he
2 had knowledge of BBS's connection to Plaintiff's CLRA claim.
3 Therefore, this portion of the motion is denied.

4 **2. CLRA Notice Requirement**

5 BBS also argues the damages portion of Plaintiff's CLRA
6 claim should be dismissed with prejudice, since Plaintiff failed
7 to provide BBS with the CLRA's mandated pre-suit notice before
8 Plaintiff added BBS as a party in the SAC. It is undisputed that
9 before filing his initial complaint, Plaintiff sent the CLRA's
10 mandated pre-suit notice to BBS's parent company, Best Buy Co.,
11 Inc. Plaintiff argues he satisfied the CLRA notice provision
12 since BBS is a Best Buy Co., Inc. subsidiary and hence cannot
13 "claim [it] did not receive Plaintiff's notice" since it was sent
14 to "[BBS]'s principal place of business." (Pl.'s Opp'n 14:25-27.)
15 Plaintiff also argues BBS "waived any . . . notice deficiencies
16 when [parent company Best Buy Co., Inc.] treated Plaintiff's
17 letter as a notice and demand under the CLRA," (id. 15:26-27), by
18 responding with a settlement offer that made "no reference to
19 which entity was responding to Plaintiff's CLRA demand letter and
20 did not disclose that Best Buy Co., Inc. was not a proper party
21 to the case." (Id. 14:16-18.)

22 Concerning the referenced notice, the CLRA prescribes:

23 Thirty days or more prior to the commencement
24 of an action for damages pursuant to this
title, the consumer shall do the following:

25 (1) Notify the person alleged to have
26 employed or committed methods, acts, or
27 practices declared unlawful by [the CLRA] of
the particular alleged violations of [the
CLRA].

28 (2) Demand that the person correct, repair,

1 replace, or otherwise rectify the goods or
2 services alleged to be in violation of [the
3 CLRA].

4 Cal. Civ. Code § 1782(a) (emphasis added).

5 "The CLRA's notice requirement is not jurisdictional,
6 but compliance with the requirement is necessary to state a
7 claim" for damages. Keilholtz v. Superior Fireplace Co., No. 08-
8 cv-836 CW, 2009 WL 839076, at *2 (N.D. Cal. Mar. 30, 2009)
9 (citing Outboard Marine Corp. v. Sup. Ct., 52 Cal. App. 3d 30,
10 40-41 (1975)). "The purpose of the notice requirement . . . is to
11 give the manufacturer or vendor sufficient notice of alleged
12 defects to permit appropriate corrections or replacements," and
13 this "purpose may only be accomplished by a literal application
14 of the notice provisions." Outboard Marine, 52 Cal. App. 3d at
15 40-41.

16 Plaintiff has not shown that BBS, as a separate
17 corporate entity, should not have been provided a separate CLRA
18 pre-suit notice before it was added as a Defendant in the SAC.
19 Therefore, when Plaintiff filed the SAC without sending a pre-
20 suit notice to BBS, Plaintiff did not satisfy the requirement of
21 the CLRA notice provisions.

22 Plaintiff argues BBS waived the CLRA notice requirement
23 when an entity identifying itself only as "Best Buy" responded to
24 Plaintiff's original pre-suit notice with a settlement offer.
25 (SAC Ex. D.) However, Plaintiff has not satisfied his burden of
26 showing that BBS, as a separate corporate entity, waived the
27 notice provisions of the CLRA. Therefore, the damages component
28 of Plaintiff's CLRA claim against BBS is dismissed for failure to
29 give notice required by the CLRA.

1 Defendants argue this dismissal should be with
2 prejudice since "strict compliance with the [CLRA notice
3 provisions] is required." (Defs.' Mot. 12:14-15.) Whether
4 dismissal with prejudice is required in these circumstances is an
5 issue of California law.

6 "When interpreting state law, federal courts are bound
7 by decisions of the state's highest court. In the absence of such
8 a decision . . . a federal court is obligated to follow the
9 decisions of the state's intermediate appellate courts" as long
10 as "there is no convincing evidence that the state supreme court
11 would decide differently." Vestar Dev. II, LLC v. Gen. Dynamics
12 Corp., 249 F.3d 958, 960 (9th Cir. 2001) (quoting Lewis v. Tel.
13 Employees Credit Union, 87 F.3d 1537, 1545 (9th Cir. 1996)). The
14 California Supreme Court has not decided whether dismissal with
15 prejudice is required for failure to comply with the CLRA's
16 notice provision. However, a California appellate court squarely
17 addressed the issue in Morgan v. AT&T Wireless, Inc., by
18 explaining that the notice "requirement exists in order to allow
19 a defendant to avoid liability for damages if the defendant
20 corrects the alleged wrongs" and "[a] dismissal *with prejudice* of
21 a damages claim filed without the requisite notice is not
22 required to satisfy this purpose." 177 Cal. App. 4th 1235, 1261
23 (2009).

24 Defendants argue the California appellate court
25 decision in Outboard Marine and three federal district court
26 cases, Cattie v. Wal-Mart Stores, Inc., 504 F. Supp. 2d 939, 950
27 (S.D. Cal. 2007), Laster v. T-Mobile USA, Inc., 407 F. Supp. 2d
28 1181, 1196 (S.D. Cal. 2005), Von Grabe v. Sprint, 312 F. Supp. 2d

1 1285, 1304 (S.D. Cal. 2003), which Plaintiff describes as the
2 “progeny” of Outboard Marine, demand dismissal with prejudice for
3 a CLRA notice failure. (Defs.’ Mot. 14:13-15.) Outboard Marine,
4 however, contains no such demand. In fact, Outboard Marine did
5 not require dismissal; rather, the court found the defendant
6 waived CLRA notice. 52 Cal. App. 3d at 41. Further, the other
7 judicial decisions Defendants cite are unpersuasive, were
8 rendered before Morgan squarely addressed the issue, and do not
9 offer “convincing evidence that the [California] [S]upreme
10 [C]ourt would decide [the dismissal with prejudice issue]
11 differently” from Morgan. Vestar, 249 F.3d at 960. Therefore, the
12 Morgan decision is followed on this issue. See Wehlage v. EmpRes
13 Healthcare, Inc., No. 10-cv-5839 CW, 2012 WL 380364, at *8 (N.D.
14 Cal. Feb. 6, 2012) (dismissing with leave to amend for failure to
15 comply with the CLRA notice requirement based on the reasoning in
16 Morgan). Accordingly, Defendants’ request for dismissal with
17 prejudice is denied.

18 3. CLRA and UCLA Claims as to Laptops Plaintiff Did Not 19 Purchase

20 a. Statutory Standing

21 BBS argues the CLRA and UCL do not confer on Plaintiff
22 “standing to bring a claim” on behalf of other class members
23 “relating to representations about any laptop computer other than
24 the Toshiba Satellite L505” he purchased. (Defs.’ Mot. 22:17-18.)
25 Plaintiff counters that “there is no rule prohibiting a plaintiff
26 from bringing claims against a defendant for products not
27 purchased when the same misrepresentations are alleged.” (Pl.’s
28 Opp’n 22:26-27.)

1 Plaintiff alleges in the SAC that BBS engaged in a
2 uniform practice of misrepresenting laptop computer battery life
3 on product tags on multiple models. Concerning this issue, the
4 SAC includes the following allegations: "The 'up to' battery life
5 representations on Best Buy's product tags . . . are not limited
6 to [l]aptops manufactured by Toshiba; rather, such
7 representations are common and identical regardless of the
8 manufacturer of the [l]aptop" since they were "tested under MM07"
9 testing parameters. (SAC ¶ 49.)

10 A plaintiff has statutory standing to assert a claim
11 under the CLRA if he or she "suffers any damages as a result of
12 the use or employment by any person of a method, act, or practice
13 declared to be unlawful by [the CLRA]." Cal. Civ. Code § 1780(a).
14 A plaintiff has statutory standing to assert a claim under the
15 UCL if he or she "has suffered injury in fact and has lost money
16 or property as a result of the unfair competition." Cal. Bus. &
17 Prof. Code § 17204.

18 "Courts in this circuit have diverged on the question
19 of whether a named plaintiff has standing" under the CLRA and UCL
20 "to sue on behalf of purchasers of a product that he or she did
21 not purchase." Donohue v. Apple, Inc., 871 F. Supp. 2d 913, 921-
22 22 (N.D. Cal. 2012) (collecting cases). However, several district
23 courts have found "that a plaintiff may have standing to assert
24 claims for unnamed class members based on products he or she did
25 not purchase so long as the products and alleged
26 misrepresentations are substantially similar." Brown v. Hain
27 Celestial Grp., Inc., 913 F. Supp. 2d 881, 890 (N.D. Cal. 2012).
28 For example, Cardenas v. NBTY, Inc., 870 F. Supp. 2d 984, 992

1 (E.D. Cal. 2012), held that the named plaintiff's purchase of one
2 dietary supplement gave her standing to assert class CLRA and UCL
3 claims on a variety of dietary supplements, "which ostensibly
4 share[d] many similarities in ingredients" and representations.
5 The reasoning in Brown and Cardenas is persuasive and followed.

6 Here, Plaintiff has standing to bring claims on behalf
7 of purchasers of other laptops since he alleged BBS engaged in a
8 common practice of misrepresentation on "the same kind of . . .
9 products" (laptops) with the "same basic mislabeling practice"
10 (utilizing the MM07 testing parameters). Astiana v. Dreyer's
11 Grand Ice Cream, Inc., No. 11-cv-2910 EMC, 11-cv-3164 EMC, 2012
12 WL 2990766, at *13 (N.D. Cal. July 20, 2012). Therefore, this
13 portion of the motion is denied.

14 **b. Rule 9(b) Pleading Standard**

15 BBS argues Plaintiff has not satisfied "the
16 heightened requirements of Rule 9(b) [applicable] to his claims
17 regarding any computer other than the Toshiba Satellite L505
18 laptop he purchased [since] the SAC references other
19 manufacturers' laptops . . . but plaintiff does not allege any
20 representations about any of these other laptops, on which he
21 relied in deciding to purchase any of them." (Defs. Mot. 25:13-
22 18.) Plaintiff rejoins that the SAC "expressly alleges that [BBS]
23 carried out the same common course of fraudulent conduct with
24 respect to each [l]aptop." (Pl.'s Opp'n 29:6-7.)

25 Plaintiff's CLRA and UCL claims must satisfy Rule
26 9(b)'s heightened pleading standards since Plaintiff alleges
27 fraudulent conduct in these claims. "Rule 9(b)'s heightened
28 pleading standards apply to claims for violations of the CLRA and

1 UCL.” Kearns v. Ford Motor Co., 567 F. 3d 1120, 1125 (9th Cir.
2 2009) (citing Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1102-
3 05 (9th Cir. 2003)). “Rule 9(b) requires a party to ‘state with
4 particularity the circumstances constituting fraud or mistake,’
5 including ‘the who, what when, where, and how of the misconduct
6 charged.’” Ebeid ex rel. United States v. Lungwitz, 616 F.3d 993,
7 998 (9th Cir. 2010) (quoting Vess, 317 F.3d at 1106).

8 Plaintiff alleges in the SAC that BBS “represented the
9 battery life of the [l]aptops on its product tags . . . while
10 failing to disclose that the represented battery life was
11 derived,” (SAC ¶ 81), with the monitor set to a “brightness of
12 20% to 30% of [the] normal level,” the “Wi-Fi, Bluetooth, and
13 other wireless functions [] disabled,” and the “main processor
14 chip [] set to 5% to 7.5% of its normal capacity.” (Id. ¶¶ 28-
15 30.) Plaintiff alleges these representations “grossly overstate
16 the battery life the customer can expect to experience insofar as
17 the represented maximum battery life could never be achieved when
18 the [l]aptop was used in normal, practical, and realistic
19 circumstances.” (Id. ¶ 50.) Plaintiff alleges Defendant made
20 “common and identical” battery life representations, based on the
21 same measurement standard, “regardless of the manufacturer of the
22 laptop.” (SAC ¶ 49.)

23 These allegations are “sufficient[ly] detail[ed] . . .
24 to give us some assurance that [Plaintiff’s] theory has a basis
25 in fact.” Berson v. Applied Signal Tech., Inc., 527 F.3d 982,
26 989-90 (9th Cir. 2008). They also “give [BBS] notice of the
27 particular misconduct which is alleged . . . so that [it] can
28 defend against the charge and not just deny that [it] ha[s] not

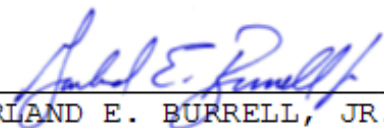
1 done anything wrong." Bly-Magee v. California, 236 F.3d 1014,
2 1019 (9th Cir. 2001) (quoting Neubronner v. Milken, 6 F.3d 666,
3 672 (9th Cir. 1993)). Therefore, this portion of BBS's motion is
4 denied.

5 **III. CONCLUSION**

6 For the stated reasons, the motion is GRANTED IN PART
7 AND DENIED IN PART. BB.com is DISMISSED from this action. The
8 damages component of Plaintiff's CLRA claim is DISMISSED. The
9 remainder of the motion is DENIED.

10 Plaintiff is granted thirty-five (35) days from the
11 date on which this order is filed to file an amended complaint
12 addressing the deficiencies in the dismissed damages component of
13 the CLRA claim and the dismissal of BB.com. Plaintiff is notified
14 that failure to file an amended complaint within the prescribed
15 time period could result in dismissal with prejudice under Rule
16 41(b).

17 Dated: February 3, 2014

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20 _____
21 GARIAND E. BURRELL, JR.
22 Senior United States District Judge
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