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5 IN THE UNITED STATES DISTRICT COURT
6 FOR THE EASTERN DISTRICT OF CALIFORNIA
7

8 CHAD HERRON, individually, on)
9 behalf of himself and all others) 2:12-cv-02103-GEB-JFM
10 similarly situated,)
11 Plaintiffs,) ORDER GRANTING IN PART AND
12 v.) DENYING IN PART MOTION TO
13 BEST BUY CO. INC., a Minnesota) DISMISS FIRST AMENDED
14 corporation; TOSHIBA AMERICA) COMPLAINT
15 INFORMATION SYSTEMS, INC., a)
16 California corporation; and DOES)
17 1-100, inclusive,)
18 Defendants.)
19 _____)

20 Defendants Best Buy Co. Inc. ("Best Buy") and Toshiba America
21 Information Systems, Inc. ("Toshiba") (collectively "Defendants") move
22 to dismiss Plaintiff's complaint under Federal Rules of Civil Procedure
23 ("Rules") 9(b) and 12(b)(6). This case is a putative consumer class
24 action alleging violations of the California Consumers Legal Remedies
25 Act ("CLRA"), Cal. Civ. Code § 1770 (a)(5), (a)(7), (a)(9), and the
26 California Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code §
27 17200 et seq. Plaintiff argues that Defendants affirmatively
28 misrepresented the battery life on his Toshiba Satellite L505 laptop
(the "Laptop") as "up to 3.32 hours" even though this battery life
"could never be achieved when the [Laptop] was used in normal,
practical, and realistic circumstances," and that Defendants concealed

1 or failed to disclose that the battery life testing parameters
2 Defendants employed "bear no rational or reasonable relationship to an
3 average consumer's expected use of [the] Laptop." (Opp'n to Mot. to
4 Dismiss ("Opp'n") ECF No. 11, 1:16-17, 4:14-15.) Defendants argue that
5 Plaintiff fails to allege any fraudulent affirmative misrepresentations,
6 fraudulent omissions, unlawful or unfair conduct, or that Toshiba
7 participated in and controlled Best Buy's representations concerning the
8 Laptop. (Mot. to Dismiss ("Mot.") ECF No. 7, 4:18-14:12.) Plaintiff
9 opposes the motion.

10 I. FACTUAL ALLEGATIONS

11 Plaintiff alleges the following in his First Amended Class
12 Action Complaint ("FAC"). On December 15, 2009, after looking at the
13 product tags for various laptops, Plaintiff purchased a Toshiba
14 Satellite L505 Laptop from a Best Buy retail store in Folsom,
15 California. (FAC ¶ 9 & Ex. A.) Best Buy displays its laptops with a
16 "'product tag,' which contains the price and a brief description of the
17 features of the laptop." (FAC ¶ 43.) "One prominent feature is
18 'Battery.'" (Id. ¶ 43.) "Best Buy represented Plaintiff's Laptop battery
19 life to be 'up to 3.32 hours.'" (Id. ¶ 44.) Best Buy did not provide
20 "any explanation as to how the 'up to' hours was calculated or
21 determined on the product tag or elsewhere" in the store, and "there was
22 no disclaimer, qualifier, or other language." (Id. ¶¶ 45, 12.)

23 Plaintiff "decided to purchase the Toshiba Satellite L505
24 [Laptop] based substantially on his reliance on the representation that
25 the battery life for that model was 'up to 3.32 hours.'" (Id. ¶ 11.)
26 "Plaintiff . . . believed that the represented battery life of 'up to
27 3.32 hours' was reflective of how long Plaintiff could expect his Laptop
28 to operate when being powered solely by its battery." (Id. ¶ 12.) In

1 fact, "[i]n the years since Plaintiff purchased his Laptop, he has never
2 once achieved even close to the represented 3.32 hours of battery life."
3 (Id. ¶ 14.)

4 Toshiba uses the MobileMark 2007 ("MM07") benchmark test to
5 measure the battery life of its Toshiba L505 Laptops. (Id. ¶¶ 24, 35.)
6 During the test, the computer's monitor is set to 60 nits, or "the
7 brightness of 20% to 30% of [the] normal level." (Id. ¶ 26.) Meanwhile,
8 "the computer's Wi-Fi, Bluetooth, and other wireless functions are
9 disabled so the computer is not drawing power from the battery to
10 perform these functions," and the computer's "main processor chip is set
11 to 5% to 7.5% of its normal capacity" so that it "is essentially running
12 in an idle state." (Id. ¶¶ 27, 28.) Three separate performance tests are
13 then administered: (1) a DVD test where "a DVD movie is played until the
14 battery dies," (2) a productivity test where the computer "perform[s]
15 common office activities" such as data processing, and (3) a reading
16 test where the computer "read[s] a PDF document pausing [for] two
17 minutes on each page." (Id. ¶ 29(a)-(c).) "MM07 does not provide an
18 'overall' rating; rather, the computer is given three scores, one for
19 each category (DVD, Productivity, and Reader). The laptop manufacturer
20 or retailer may choose which score to report to consumers." (Id. ¶ 30.)

21 "Toshiba conveys the results of the Laptop's MM07" test to
22 "third party retailers, such as Best Buy . . . with the intention and
23 desire that these third party retailers will, in turn, represent to
24 consumers these results." (Id. ¶ 36.) Since MM07 testing bears "no
25 resemblance to the real-life and everyday uses of laptop computers and
26 notebooks," the Laptop's "actual battery life [i]s substantially less
27 than that which was represented by Defendants." (Id. ¶¶ 31, 3.)

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

7 Battery Life
8 Battery life tested using MobileMark 2007. Battery
9 life will vary depending on the product
10 configuration, product model, applications loaded on
11 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.

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

16 “Plaintiff paid more for his Laptop than he would have paid
17 had the material fact not been concealed or omitted that the battery
18 life for his Laptop was calculated with: (i) its screen set to 60 nits;
19 (ii) its Wi-Fi, Bluetooth, and other wireless functions disabled; and
20 (iii) its main processor chip set to 5% to 7.5% of its normal capacity.”
21 (Id. ¶ 15.)

22 II. LEGAL STANDARD

23 Decision on a Rule 12(b)(6) dismissal motion requires
24 determination of “whether the complaint’s factual allegations, together
25 with all reasonable inferences, state a plausible claim for relief.”
26 Cafasso, United States ex rel. v. Gen. Dynamics C4 Sys., Inc., 637 F.3d
27 1047, 1054 (9th Cir. 2011) (citing Ashcroft v. Iqbal, 556 U.S. 662,
28 678–79 (2009)). “A claim has facial plausibility when the plaintiff

1 pleads factual content that allows the court to draw the reasonable
2 inference that the defendant is liable for the misconduct alleged.”
3 Iqbal, 556 U.S. at 678 (citing Bell Atlantic v. Twombly, 550 U.S. 544,
4 556 (2007)).

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

17 **III. DISCUSSION**

18 **A. Toshiba’s Participation and Control Over Best Buy’s Representations**

19 **1. UCL**

20 Plaintiff alleges Defendants violated the UCL by engaging in
21 an “unlawful, unfair or fraudulent business act or practice.” Cal. Bus.
22 & Prof. Code § 17200. “Because [the UCL] is written in the disjunctive,
23 it establishes three varieties of unfair competition—acts or practices
24 which are unlawful, or unfair, or fraudulent. An act can be alleged to
25 violate any or all of the three prongs of the UCL—unlawful, unfair, or
26 fraudulent.” Berryman v. Merit Prop. Mgm’t, Inc., 152 Cal. App. 4th
27 1544, 1554 (2007); see also Klein v. Chevron U.S.A., Inc., 202 Cal.
28 App. 4th 1342, 1374 (2012). Here, although Plaintiff’s claims sound

1 primarily in fraud, Plaintiff also alleges claims under the unlawful and
2 unfair prongs of the UCL. (See FAC ¶¶ 89, 90, 94, 95.) Toshiba seeks
3 dismissal of all UCL claims against it, arguing that “[t]o impose
4 UCL . . . liability . . . [P]laintiff must allege with particularity
5 facts demonstrating [Toshiba’s] ‘personal participation in the unlawful
6 practices and unbridled control over the practices that are found to
7 violate’ the UCL.” (Mot. 13:5–7 (quoting Perfect 10, Inc. v. Visa Int’l
8 Serv. Ass’n, 494 F.3d 788, 808 (9th Cir. 2007)).) Toshiba asserts that
9 “Plaintiff has failed to plead any representations by [Toshiba], and has
10 failed to plead any facts demonstrating [its] participation and
11 unbridled control over Best Buy’s representations.” (Mot. 14:8–10.)¹

12 Plaintiff counters that it has “sufficiently establish[ed]
13 Toshiba’s participation in the creation of [Best Buy’s] product tags”
14 since the information on the product tags “was provided directly by, and
15 therefore controlled by, Toshiba.” (Opp’n 21:21–23.) Toshiba rejoins
16 this contention is insufficient since “Plaintiff does not allege that
17 [Toshiba] told Best Buy what it should or should not put on its product
18 tags or its website, nor does he allege that Best Buy was required to
19 follow such instructions had they been given,” and the “practices that
20

21 ¹ Toshiba also argues that whereas Best Buy’s product tag merely
22 lists the Laptop’s battery life as “up to 3.32 hours,” Toshiba’s website
23 provides numerous disclosures concerning the Laptop’s battery life and
24 MM07 testing. (Reply, ECF No. 13, 11:27–12:4.) Toshiba requests judicial
25 notice of the Toshiba webpage providing these disclosures and describing
26 the Toshiba Satellite L505 Laptop. (Defs.’ Req. for Judicial Not., ECF
27 No. 12, Ex. A.) However, Toshiba does not allege that the webpage
28 printout provided reflects the contents of Toshiba’s webpage during the
applicable proposed class period. Accordingly, Toshiba’s request for
judicial notice of the webpage is denied. See Bingham v. Holder, 637
F.3d 1040, 1045 n.3 (9th Cir. 2011) (stating the “content of particular
websites on a specified date . . . is not ‘capable of accurate and ready
determination by resort to sources whose accuracy cannot reasonably be
questioned’” and denying request for judicial notice of webpage on that
ground).

1 are alleged to have violated the UCL . . . here are solely Best Buy
2 practices.” (Reply 11:17–19, 11:22–23.)

3 “A defendant’s liability [under the UCL] must be based on his
4 personal ‘participation in the unlawful practices’ and ‘unbridled
5 control’ over the practices.” Emery v. Visa Int’l Serv. Ass’n, 95 Cal.
6 App. 4th 952, 960 (2002) (quoting People v. Toomey, 157 Cal. App. 3d 1,
7 15 (1984)); see also In re Firearm Cases, 126 Cal. App. 4th 959, 985,
8 983 (2005) (rejecting UCL claim where defendants “did not control the
9 wrongful acts [in question] or encourage others to engage in
10 questionable acts,” even though defendants did “have a relationship with
11 the wrongdoers”). Here, rather than “exercis[ing] control over the
12 preparation or distribution” of Best Buy’s battery life representation,
13 Emery, 95 Cal. App. 4th at 960, Toshiba merely “convey[ed to Best Buy]
14 the results of the Laptop’s MM07 test.” (FAC ¶ 36.) Given these
15 allegations, “[t]he worst that can be said is that [Toshiba] did not
16 take more aggressive corrective steps” to police Best Buy’s
17 representations concerning the Laptop’s battery test results. Emery, 95
18 Cal. App. 4th at 965. Failure to take on the role of “global policeman”
19 is insufficient to support liability under the UCL. Id. at 966.
20 Accordingly, Plaintiff’s UCL claims against Toshiba for unlawful,
21 unfair, and fraudulent practices are dismissed.

22 2. CLRA

23 Plaintiff alleges Defendants violated the following quoted
24 provisions of the CLRA: “[r]epresenting that goods or services
25 have . . . characteristics . . . which they do not have,” Cal. Civ. Code
26 § 1770(a)(5); “[r]epresenting that goods or services are of a particular
27 standard, quality , or grade, . . . if they are of another,” id. §
28 1770(a)(7); and “[a]dvertising goods or services with intent not to sell

1 them as advertised.” Id. § 1770(a)(9). These provisions of the CLRA
2 proscribe both fraudulent omissions and fraudulent affirmative
3 misrepresentations. Outboard Marine Corp. v. Superior Court, 52 Cal.
4 App. 3d 30, 36 (1975); see also Collins v. eMachines, Inc., 202 Cal.
5 App. 4th 249, 255 (2011). Plaintiff alleges claims under both theories.

6 Toshiba seeks dismissal of Plaintiff’s CLRA claims against it,
7 arguing that “[t]o impose . . . CLRA liability against [it], plaintiff
8 must [likewise] allege with particularity facts demonstrating
9 [Toshiba’s] ‘*personal participation* in the unlawful practices and
10 *unbridled control* over the practices.’” (Mot. 13:5–7 (quoting Perfect
11 10, 494 F.3d at 808).) This argument is premised on the same arguments
12 Toshiba made when challenging Plaintiff’s UCL claims. However, since
13 Toshiba has not provided sufficient authority supporting its position
14 that the UCL personal participation and unbridled control standard
15 applies to CLRA pleadings, this portion of its motion is denied.
16 See Emery, 95 Cal. App. 4th at 960 (enunciating the “personal
17 participation . . . and unbridled control” standard in UCL case, without
18 CLRA claims); Toomey, 157 Cal. App. 3d at 14–15 (articulating these
19 criteria for first time in UCL case, where the CLRA is unmentioned).

20 **B. UCL & CLRA Fraudulent Acts or Practices**

21 **1. Rule 9(b)**

22 Plaintiff’s CLRA claims and UCL fraud claim must satisfy Rule
23 9(b)’s heightened pleading standards since Plaintiff’s allegations
24 involve fraudulent conduct. It is well settled that a federal court
25 examines state claims to determine whether the elements of fraud have
26 been pled with Federal Rule of Civil Procedure 9(b)’s required
27 specificity, irrespective of whether state law is the substantive law at
28 issue. Kearns v. Ford Motor Co., 567 F.3d 1120, 1125 (9th Cir. 2009).

1 "Rule 9(b) requires a party to 'state with particularity the
2 circumstances constituting fraud or mistake,' including 'the who, what,
3 when, where, and how of the misconduct charged.'" Ebeid ex rel. United
4 States v. Lungwitz, 616 F.3d 993, 998 (9th Cir. 2010) (quoting Vess v.
5 Ciba-Geigy Corp. USA, 317 F.3d 1097, 1106 (9th Cir. 2003)). Further, the
6 Ninth Circuit has "specifically ruled that Rule 9(b)'s heightened
7 pleading standards apply to claims for violations of the CLRA and UCL."
8 Kearns, 567 F.3d at 1125.

9 Defendants argue "[P]laintiff has not satisfied the
10 requirements of Rule 8, let alone the heightened requirements of Rule
11 9(b)." (Mot. 10:13–14.) Plaintiff rejoins that the FAC "satisfies the
12 pleading requirements of [Rule] 9(b)" by recounting the who, what, when,
13 where, and how of the alleged misconduct, (Opp'n 6:13, 7:3–8:27), and
14 since the FAC's allegations are "strikingly similar" to the allegations
15 found to satisfy Rule 9(b) in Kowalsky v. Hewlett-Packard Company.
16 (Opp'n 7:1 (citing 771 F. Supp. 2d 1138, 1143 (N.D. Cal. 2010), *vacated*
17 *in part on other grounds by* 771 F. Supp. 2d 1156 (N.D. Cal. 2011)).

18 Plaintiff alleges in the FAC that Toshiba "report[ed] the
19 Laptops' battery life to third party retailers using the results from
20 the Laptops' MM07 testing with the intention and desire that these third
21 party retailers [] convey to consumers the Laptop's alleged battery
22 life, while failing to disclose that the represented battery life was
23 derived" with the Laptop's monitor set to "the brightness of 20% to 30%
24 of [the] normal level," the "Wi-Fi, Bluetooth, and other wireless
25 functions [] disabled," and the "main processor chip [] set to 5% to
26 7.5% of its normal capacity." (FAC ¶¶ 66, 26.) With respect to Best Buy,
27 Plaintiff alleges that "Best Buy represented Plaintiff's Laptop battery
28 life to be 'up to 3.32 hours'" without providing "any explanation as to

1 how the 'up to' hours was calculated or determined," and despite the
2 fact that this battery life was obtained with the Laptop's monitor set
3 to "the brightness of 20% to 30% of [the] normal level," the "Wi-Fi,
4 Bluetooth, and other wireless functions [] disabled," and the "main
5 processor chip [] set to 5% to 7.5% of its normal capacity." (FAC ¶¶ 44,
6 45, 26.) These allegations are "sufficient[ly] detail[ed] . . . to give
7 us some assurance that [Plaintiff's] theory has a basis in fact." Berson
8 v. Applied Signal Tech., Inc., 527 F.3d 982, 989–90 (9th Cir. 2008).
9 They also provide Defendants "'notice of the particular misconduct which
10 is alleged . . . so that they can defend against the charge and not just
11 deny that they have done anything wrong.'" Bly-Magee v. California, 236
12 F.3d 1014, 1019 (9th Cir. 2001) (quoting Neubronner v. Milken, 6 F.3d
13 666, 672 (9th Cir. 1993)); see also 5A Charles Alan Wright & Arthur R.
14 Miller, Federal Practice & Procedure § 1298 (3d ed. 2012) ("Perhaps the
15 most basic consideration for a federal court in making a judgment as to
16 the sufficiency of a pleading for purposes of Rule 9(b) . . . is the
17 determination of how much detail is necessary to . . . enable [an
18 adverse] party to prepare a responsive pleading."). "Rule 9(b) requires
19 no more." Berson, 527 F.3d at 990. Accordingly, this portion of
20 Defendants' motion is denied.

21 **2. Fraudulent Affirmative Misrepresentations**

22 Defendants seek dismissal of Plaintiff's affirmative
23 misrepresentation claims alleged under the UCL and CLRA. Defendants
24 argue, based on the Ninth Circuit's unpublished disposition in Maloney
25 v. Verizon Internet Services, Inc., Plaintiff could not have been
26 reasonably deceived by the Laptop's product tag, which stated the
27 Laptops have a battery life of "up to 3.32 hours." (Mot. 4:26–5:2.) In
28 Maloney, defendants "stated that a subscriber [to its Internet service]

1 would receive Internet service at a speed 'up to 3 Mbps.'" Maloney, 413
2 Fed. App'x 997, 999 (9th Cir. 2011). The defendants' Terms of Service
3 contract in Maloney also promised that defendants would provide
4 "'qualified [high-speed Internet] lines at the maximum line rate
5 available to your location,'" but that "[t]he speed of the Service will
6 vary based on network or Internet congestion, your computer
7 configuration, the condition of your telephone line and the wiring
8 inside your location, among other factors.'" Id. Maloney argued that
9 defendants violated the UCL and CLRA since her Internet service was only
10 provided at a rate of 1.792 Mbps, "the maximum line rate available at
11 [her] location." Id. The Ninth Circuit affirmed the district court's
12 dismissal of Maloney's claims, stating that "[a] reasonable consumer
13 would not have been deceived by [d]efendants' statements, which included
14 the qualifier 'up to' (meaning the same or less than) and an explanation
15 that each consumer's maximum speed would vary depending on several
16 listed customer-specific factors, including factors that applied to
17 [p]laintiff." Id. Defendants here argue that, as in Maloney, "[t]he
18 qualifier 'up to' put [P]laintiff on notice that his battery life would
19 be 'the same or less than' 3.32 hours," that Plaintiff "ignores the
20 words 'up to' as if they were not present," and that Best Buy's website
21 provided "precisely the type of disclosure that the Ninth Circuit relied
22 upon . . . in Maloney." (Mot. 5:17-19, 6:9-10.)

23 Plaintiff distinguishes Maloney, arguing that both the
24 district court and the Ninth Circuit decisions in Maloney relied not
25 only on the "up to 3.0 Mbps" representation, but also on the fact that
26 Maloney, unlike Plaintiff, "received clear notice from the Terms of
27 Service (which she admitted reading prior to purchase [and which she was
28 required to read prior to receiving service]) that . . . her

1 circumstances [including her maximum line rate could] preclude her from
2 receiving the represented maximum internet speed." (Opp'n 11:14-18.)
3 Plaintiff argues Maloney is inapplicable since the "up to" language
4 there was accompanied and "reinforced by the [Terms of Service] to which
5 a customer would have to agree before receiving internet service,"
6 Maloney, No. ED CV 08-1885-SGL(AGRx), 2009 WL 8129871, at *5 (C.D. Cal.
7 Oct. 4, 2009), whereas here, by contrast, Plaintiff "had *no notice*, with
8 the words 'up to' or otherwise, that he would *never* be able to achieve
9 the represented maximum battery duration . . . outside of the MM07
10 settings in which [the Laptop] was tested." (Opp'n 11:26-12:1.)
11 Defendants dispute Plaintiff's contention that the Maloney decisions
12 relied on the Terms of Service disclosures, inveighing that this view is
13 "simply wrong," and arguing that "[i]n any event, Best Buy made
14 virtually identical disclosures" on its website to those provided in
15 Maloney. (Reply 3:21-23, 4:3-4.)

16 Plaintiff also argues that "the California Court of Appeals []
17 rejected the very 'up to' argument Defendants advance here" in Consumer
18 Advocates v. Echostar Satellite Corporation. (Opp'n 9:26-27 (citing 113
19 Cal. App. 4th 1351 (2003)).) In Echostar, the defendants represented
20 that a consumer could view its television program schedule "'up to 7
21 days in advance'" but "the on-screen guide allowed consumers to see the
22 schedule at most only two or three days in advance." Echostar, 113 Cal.
23 App. 4th at 1353, 1357. Defendants argued that their "up to" statement
24 "only meant that the system had the *capacity* to show the schedule seven
25 days in advance." Id. at 1362. The Court of Appeals rejected this
26 argument and reversed the grant of summary judgment for defendants,
27 holding that defendants' interpretation of "up to 7 days" constitutes a
28 "possible, if technical, interpretation[] of the statement[], but we

1 cannot say that there is no triable issue on whether [it is] untrue or
2 misleading." Id. Plaintiff relies on Echostar as support for his
3 contention that "even if the Laptops have the *capacity* to reach the
4 represented maximum battery life" under the exact circumstance of the
5 MM07 test, Plaintiff "has sufficiently stated a claim under the CLRA and
6 UCL by alleging" that Defendants' representations are "based on a false
7 and deceptive standard" and are likely to deceive the ordinary consumer.
8 (Opp'n 10:9–13.) Defendants rejoin that the Court should "follow
9 Maloney—more recent, federal authority that is directly on point—[rather
10 than]. . . the intermediate state court appellate ruling in Consumer
11 Advocates." (Reply 5:16–18.)

12 Under the UCL, "[a] 'reasonable consumer' standard applies
13 when determining whether a given claim is misleading or deceptive."
14 Colgan v. Leatherman Tool Grp., 135 Cal. App. 4th 663, 682 (2006). UCL
15 liability exists not only for untrue representations, but also for a
16 "'perfectly true statement couched in such a manner that it is likely to
17 mislead or deceive the consumer.'" Morgan v. AT & T Wireless Servs.,
18 Inc., 177 Cal. App. 4th 1235, 1255 (2009) (quoting McKell v. Wash. Mut.,
19 Inc., 142 Cal. App. 4th 1457, 1471 (2006)). Thus a statement that "'may
20 be accurate on some level, but will nonetheless tend to mislead or
21 deceive'" is actionable under the UCL. Boschma v. Home Loan Ctr., Inc.,
22 198 Cal. App. 4th 230, 253 (2011) (quoting McKell, 142 Cal. App. 4th at
23 1471); Day v. AT & T Corp., 63 Cal. App. 4th 325, 332–33 (1998).
24 Further, the UCL is "intentionally broad" and "sweeping" to confer on
25 courts "broad equitable powers to remedy violations" and protect
26 consumers. In re First Alliance Mortg. Co., 471 F.3d 977, 995 (9th Cir.
27 2006); ABC Int'l Traders, Inc. V. Matsushita Elec. Corp., 14 Cal. 4th
28 1247, 1270 (1997).

1 The same reasonable consumer standards applicable to
2 Plaintiff's UCL claim apply to his CLRA claim. See Klein, 202 Cal. App.
3 4th at 1382; Echostar, 113 Cal. App. 4th at 1360. Like the UCL, the CLRA
4 is also "to be 'liberally construed and applied to promote its
5 underlying purposes'" of consumer protection. Colgan, 135 Cal. App. 4th
6 at 680 (quoting Cal. Civ. Code § 1760).

7 In this case, Plaintiff believed that the battery life listed
8 on the Laptop was stated in a manner that conveyed that it "was
9 reflective of how long Plaintiff could expect his Laptop to operate."
10 (FAC ¶ 12). Defendants counter that this belief was "unreasonable as a
11 matter of law" since a reasonable consumer would not be deceived by a
12 representation containing the phrase "up to." (Mot. 5:16–20.) However,
13 multiple courts have found that "up to" representations may materially
14 mislead reasonable consumers. See, e.g., Bruno v. Quten Research Inst.,
15 LLC, 280 F.R.D. 524, 537 (C.D. Cal. 2011) (certifying Rule 23 class
16 action under the UCL and CLRA where "the central predominating question
17 is whether Defendants' marketing statements about 'up to 6X BETTER
18 ABSORPTION' or 'effectiveness' [are] materially misleading"); Walter v.
19 Hughes Commc'ns, Inc., 682 F. Supp. 2d 1031, 1043 (N.D. Cal. 2010)
20 (denying defendants' motion to dismiss plaintiffs' UCL and CLRA claims
21 where plaintiffs allege they were "unable to experience the [peak hour]
22 speeds that [defendants] had advertised its service as reaching 'up to,'
23 even during non-peak hours"); Thompson Med. Co., Inc. v. Ciba-Geigy
24 Corp., 643 F. Supp. 1190, 1200 (S.D.N.Y. 1986) (enjoining defendant from
25 representing that "thousands of consumers have reported to us that they
26 lost up to 5 lbs. the first week" since, although this "may be literally
27 true," it leads "consumers [to] believe they will lose 5 lbs. or more"
28 making the claim "unquestionably false and misleading"); Echostar, 113

1 Cal. App. 4th at 1362 (reversing grant of summary judgment for
2 defendants since "we cannot say that there is no triable issue on
3 whether [defendants' 'up to' representation is] untrue or misleading").

4 Here, Defendants have not shown that Plaintiff's alleged
5 belief was unreasonable as a matter of law or was "predicated on a
6 strained and unjustified interpretation" of the product tag statement or
7 battery representations. O'Shea v. Epson Am., Inc., No. CV 09-8063 PSG
8 (Cwx), 2011 WL 3299936, at *9 (C.D. Cal. July 29, 2011). Unlike in
9 Maloney, where the plaintiff read and was required to read defendants'
10 disclosures, and where it was not alleged that no consumers would reach
11 the represented internet speeds, here, no disclosures accompanied Best
12 Buy's product tag and Plaintiff does allege that all of the Laptops have
13 an "actual battery life [of] substantially less than that which was
14 represented by Defendants." (FAC ¶ 3; see also id. ¶¶ 39, 50.) Thus
15 "[r]easonable minds could [] differ" as to whether the words "up to,"
16 without more, put Plaintiff on notice that his Laptop would never
17 achieve close to the represented 3.32 hours of battery life. Miletak v.
18 Allstate Ins. Co., No. C 06-03778 JW, 2010 WL 809579, at *7 (N.D. Cal.
19 Mar. 5, 2010). Accordingly, since "a reasonable interpretation of ['up
20 to'] could encompass [Plaintiff's belief], the Court concludes that a
21 fact question remains[,] as in Echostar," Silicon Image, Inc. v.
22 Analogix Semiconductor, Inc., 642 F. Supp. 2d 957, 969 (N.D. Cal. 2008),
23 and that Defendants have not shown that the allegations in the FAC fail
24 to state a plausible claim for relief. Accordingly, this portion of
25 Defendants' dismissal motion is denied.

26 **3. Fraudulent Omissions**

27 Defendants seek dismissal of Plaintiff's fraudulent omission
28 claims alleged under the UCL and CLRA, arguing that the allegedly

1 omitted information was neither material, contrary to Defendants'
2 battery life representation, nor subject to a duty to disclose. (Mot.
3 7:2–11:15.) Plaintiff does not contend that the allegedly omitted
4 information was contrary to the “up to 3.32 hours” representation, but
5 rather argues that the omitted information was material and that
6 Defendants were subject to a duty to disclose. (Opp’n 13:25–19:19.)

7 **i. Materiality**

8 Defendants dispute the materiality of the omitted battery
9 testing information, arguing that it is not material since “members of
10 the public [do not] hold expectations about the ‘nit’ levels, wireless
11 functions, processor chip capacity, or PDF read-rate used to calculate
12 a maximum potential battery life.” (Mot. 8:23–25.) Plaintiff counters
13 that the omitted information is material since “the battery life of
14 laptops and notebooks is one of the primary factors consumers consider
15 when determining which laptop to purchase,” (Opp’n 14:21–23), and
16 “Plaintiff paid more for his Laptop than he would have paid” due to
17 Defendants’ omissions. (FAC ¶ 15.)

18 In California, a misrepresentation is material “if ‘a
19 reasonable man would attach importance to its existence or nonexistence
20 in determining his choice of action.’” Kwikset Corp. v. Superior Court,
21 51 Cal. 4th 310, 332 (2011) (quoting Engalla v. Permanente Med. Grp.,
22 Inc., 15 Cal. 4th 951, 977 (1997)). “[A]s such materiality is generally
23 a question of fact unless the ‘fact misrepresented is so obviously
24 unimportant that the jury could not reasonably find that a reasonable
25 man would have been influenced by it.’” In re Tobacco II Cases, 46 Cal.
26 4th 298, 327 (2009) (quoting Engalla, 15 Cal. 4th at 977); see also
27 Stearns v. Ticketmaster Corp., 655 F.3d 1013, 1022 (9th Cir. 2011)
28 (recognizing the same); Engalla, 15 Cal. 4th at 978 (considering whether

1 defendant's representations were "'so obviously unimportant' as to
2 render them immaterial as a matter of law").

3 Plaintiff alleges that he was "induced to purchase the
4 Laptop[]" and "paid more for his Laptop than he would have paid"
5 otherwise due to Best Buy's unqualified statement that the Laptop had a
6 battery life of "up to 3.32 hours." (FAC ¶ 4, 11, 15.) Plaintiff further
7 alleges:

8 Portability is one of the key features for
9 consumers purchasing a laptop or notebook computer,
10 as consumers often take their laptops and notebooks
11 to locations without electrical outlets, such as
12 coffee shops, college classes, airplanes, commuter
13 trains, and public parks.

14 When a consumer uses a laptop computer or notebook
15 without an electrical outlet power source, the
16 computer uses the electrical power from the
17 laptop's built-in computer battery. Accordingly,
18 the battery life of laptops and notebooks is one of
19 the primary factors consumers consider when
20 determining which laptop to purchase.

21 (FAC ¶¶ 21, 22.) Given these allegations, Defendants have not shown that
22 Plaintiff did not reasonably "'attach importance to [the] existence [of
23 the battery life representations] in determining his choice of action.'" Kwikset Corp., 51 Cal. 4th at 332 (quoting Engalla, 15 Cal. 4th at 977).
24 Accordingly, this portion of Defendants' dismissal motion is denied.

25 **ii. Duty to Disclose**

26 The parties argue that "[u]nder California law, there are four
27 circumstances in which an obligation to disclose may arise: '(1) when
28 the defendant is in a fiduciary relationship with the plaintiff; (2)
when the defendant had exclusive knowledge of material facts not known
to the plaintiff; (3) when the defendant actively conceals a material
fact from the plaintiff; and (4) when the defendant makes partial
representations but also suppresses some material facts.'" Smith v. Ford

Motor Co., 749 F. Supp. 2d 980, 987 (N.D. Cal. 2010) (quoting LiMandri v. Judkins, 52 Cal. App. 4th 326, 336 (1997)); see also Mot. 8:9–13 (same); Opp’n 16:19–24 (same).² Plaintiff argues “Defendants’ [had a] duty to disclose under the last three circumstances.” (Opp’n 16:25.) The same showing is required to plead a duty to disclose under the UCL and the CLRA. Baba v. Hewlett-Packard Co., No. C 09-05946 RS, 2010 WL 2486353, at *7 (N.D. Cal. June 16, 2010).

(a) Exclusive Knowledge

Defendants argue that Plaintiff cannot successfully allege Defendants’ exclusive knowledge since Plaintiff admits in the FAC that Best Buy’s website disclosed the use of MM07 testing and that Newsweek published an article publicly criticizing the MM07 test for the same reasons raised here by Plaintiff. (Mot. 10:5–11 (citing FAC ¶¶ 31–33).) Plaintiff responds that Defendants had exclusive knowledge of the MM07 DVD, Productivity, and Reader test results since the “results of the[se] tests are [still] not available in the public domain,” and this exclusive and “superior” knowledge gave rise to Defendants’ duty to disclose. (Opp’n 17:7–8.) Defendants counter that Plaintiff cannot establish their exclusive knowledge based on a theory “that is never

² The California Courts of Appeal are split on whether these factors—which are outlined in Judkins, a fraudulent concealment case—properly apply to UCL and CLRA omission claims. Compare Collins v. eMachines, Inc., 202 Cal. App. 4th 249, 255–56 (2011) (applying the Judkins factors to find duty to disclose under CLRA), with Buller v. Sutter Health, 160 Cal. App. 4th 981, 988 n.3 (2008) (“respectfully disagree[ing]” with the application of the Judkins factors to UCL and CLRA omission claims to the extent that they compel a duty to disclose). However, since both parties adopt the Judkins factors in their briefs, the applicable standard is not decided in this ruling. See generally Donohue v. Apple, Inc., 871 F. Supp. 2d 913, 925 n.5 (N.D. Cal. 2012) (declining to consider a limitation on liability under the CLRA and UCL since “neither party has addressed [the issue] and [defendant] has not moved to dismiss on this ground”).

1 pled in the FAC." (Reply 8:3.) Specifically, Defendants argue that the
2 FAC concerns disclosure of the MM07 test *conditions*, but Plaintiff now
3 improperly attempts to establish Defendants' duty to disclose based on
4 Defendants' exclusive knowledge of the test *results*. (Reply 8:2-3.)

5 A defendant has exclusive knowledge giving rise to a duty to
6 disclose when "according to the complaint, [defendant] knew of this
7 defect while plaintiffs did not, and, given the nature of the defect, it
8 was difficult to discover." Collins v. eMachines, Inc., 202 Cal. App.
9 4th 249, 256 (2011); see also Falk v. Gen. Motors Corp., 496 F. Supp. 2d
10 1088, 1096-97 (N.D. Cal. 2007) (finding exclusive knowledge because
11 defendant had access to significant data unavailable to the public about
12 the defect, and because "customers only became aware of the problem if
13 they actually experienced it first-hand"); Warner Constr. Corp. v. City
14 of L.A., 2 Cal. 3d 285, 294 (1970). "[G]eneralized allegations with
15 respect to exclusive knowledge" are insufficient to defeat a dismissal
16 motion. Hovsepian v. Apple, Inc., No. 08-5788 JF (PVT), 2009 WL 5069144,
17 at *3 (N.D. Cal. Dec. 17, 2009).

18 Here, Plaintiff could have readily recognized any deficiencies
19 in his Laptop's battery life, and "Plaintiff[] purchased [his Laptop]
20 more than [nine months] after information [criticizing MM07] was
21 disseminated." Gray v. Toyota Motor Sales, U.S.A., No. CV-08-1690 PSG
22 (Jcx), 2012 WL 313703, at *8 (C.D. Cal. Jan. 23, 2012). Accordingly,
23 "[b]ased on Plaintiff['s] own allegations, Plaintiff[has] not alleged
24 facts that show [Defendants] had exclusive knowledge of the [omitted]
25 material facts and that Plaintiff[] could not have reasonably discovered
26 such facts." Wolph v. Acer Am. Corp., No. C 09-01314 JSW, 2009 WL
27 2969467, at *4 (N.D. Cal. Sept. 14, 2009); see also Stickrath v.
28

1 Globalstar, Inc., No. C07-1941 THE, 2008 WL 344209, at *4 (N.D. Cal.
2 Feb. 6, 2008).

3 Nor can Defendants' concealment of the DVD, Reader, and
4 Productivity test results give rise to a duty to disclose, since
5 Plaintiff does not allege that he was misled by Defendants' failure to
6 disclose these test *results*. Rather, Plaintiff consistently alleges that
7 he was misled because Defendants concealed or failed to disclose that
8 the Laptop's battery life was calculated with "(i) its screen set to 60
9 nits; (ii) its Wi-Fi, Bluetooth, and other wireless functions disabled;
10 and (iii) its main processor chip set to 5% to 7.5% of its normal
11 capacity." (FAC ¶ 15; see also id. ¶¶ 2, 13, 37, 42, 49, 53, 58, 66,
12 78.) Accordingly, this portion of the dismissal motion is granted.

13 **(b) Active Concealment**

14 Defendants argue Plaintiff's "bare assertion" that Toshiba and
15 Best Buy "actively concealed material facts from Plaintiff and the CLRA
16 Subclass" is insufficient to state an active concealment duty to
17 disclose. (Mot. 10:26.) Plaintiff responds that he "has pled sufficient
18 facts to allege active concealment" by alleging that "'the results of
19 all three tests (DVD, Productivity, and Reading)'" have not been
20 published. (Opp'n 18:5-6, 17:27-28 (quoting FAC ¶ 34).) Defendants
21 respond that Plaintiff cannot predicate a duty to disclose on
22 concealment of the test *results*, since Plaintiff "does not allege [that]
23 *in the FAC.*" (Reply 9:3.) Defendants also retort that it is "nonsense"
24 to "suggest that facts that were publicly disclosed in Newsweek and on
25 [D]efendants' websites were 'actively concealed.'" (Reply 8:25-9:1.)

26 Mere nondisclosure does not constitute active concealment.
27 See, e.g., Gray, 2012 WL 313703, at *9; Alfaro v. Cmty. Hous.
28 Improvement Sys. & Planning Ass'n, Inc., 171 Cal. App. 4th 1356, 1382

1 (2009); Lingsch v. Savage, 213 Cal. App. 2d 729, 734 (1963). Rather, to
2 state a claim for active concealment, Plaintiff must allege specific
3 "affirmative acts on the part of the [D]efendants in hiding, concealing
4 or covering up the matters complained of." Lingsch, 213 Cal. App. 2d at
5 734 (concluding complaint alleges "mere nondisclosure, rather than
6 active concealment" since it fails to allege such affirmative acts). As
7 with exclusive knowledge, "generalized allegations with respect
8 to . . . active concealment" will not do. Hovsepian, 2009 WL 5069144, at
9 *3.

10 Here, Plaintiff's only active concealment allegation is the
11 conclusory assertion that Defendants "actively concealed material facts
12 from Plaintiff and the Class." (FAC ¶¶ 41, 52.) This active concealment
13 "allegation[is] deficient [since Plaintiff] fails to allege any
14 specific facts demonstrating that . . . [Defendants] actively tried to
15 conceal the existence of the [MMM07 testing or test conditions]." Gerawan Farming, Inc. v. Rehrig Pac. Co., 1:11-CV-01273 LJO BAM, 2012 WL
16 691758, at *9 (E.D. Cal. Mar. 2, 2012). Accordingly, this portion of
17 Defendants' dismissal motion is granted.

18
19 **(c) Partial Representation**

20 Toshiba argues that "Plaintiff has not alleged particularized
21 facts supporting . . . a duty to disclose" by Toshiba based on a partial
22 representation theory. (Mot. 8:14-15.) Since Plaintiff does not allege
23 any representations made by Toshiba to Plaintiff, this portion of
24 Toshiba's dismissal motion is granted. Accordingly, since Plaintiff
25 fails to plead a duty to disclose by Toshiba under any theory,
26 Plaintiff's CLRA fraudulent omission claim against Toshiba is dismissed.

27 Best Buy also contends that Plaintiff "has not pled a partial
28 representation related to the allegedly omitted test conditions" since

1 Plaintiff "does not allege that [Best Buy] made any specific
2 representations regarding battery test conditions." (Mot. 11:10–12.)
3 Plaintiff rejoins that, given the MM07 testing conditions, "representing
4 the maximum battery life [of the Laptops as 'up to 3.32 hours'] was
5 deceitful and misleading" and gave rise to a partial representation duty
6 to disclose. (Opp'n 18:19–20.)

7 A partial representation claim may arise when "the defendant
8 makes representations but does not disclose facts which materially
9 qualify the facts disclosed, or which render his disclosure likely to
10 mislead." Warner Constr. Corp., 2 Cal. 3d at 294; Roddenberry v.
11 Roddenberry, 44 Cal. App. 4th 634, 666 (1996). Thus a defendant may not
12 "suppress or conceal any facts within his knowledge which materially
13 qualify those stated." Mktg. W., Inc. v. Sanyo Fisher (USA) Corp., 6
14 Cal. App. 4th 603, 613 (1992); see also Vega v. Jones, Day, Reavis &
15 Pogue, 121 Cal. App. 4th 282, 292 (2004).

16 Here, Best Buy's product tag listed the Laptop's battery life
17 as "up to 3.32 hours." (FAC ¶ 44.) The product tag did not provide "any
18 explanation as to how the 'up to' hours was calculated or determined,"
19 and "there was no disclaimer, qualifier, or other language." (Id. ¶¶ 45,
20 12.) Given Plaintiff's allegation that a reasonable consumer could not
21 expect to experience this battery life, (id. ¶ 58d), or "even close" to
22 this battery life, (id. ¶ 14), Plaintiff has pled a duty to disclose
23 based on partial representation. See generally In re Apple In-App
24 Purchase Litig., 855 F. Supp. 2d 1030, 1039 (N.D. Cal. 2012) (finding
25 partial representation where defendant represented its iPhone app was
26 free, made no representations about the potential for in-app purchases,
27 and permitted players to make in-app purchases for a fifteen-minute
28 period after entering a password); Goldsmith v. Allergan, Inc., No. CV

09-7088 PSG (Ex), 2011 WL 2909313, at *5 (C.D. Cal. May 25, 2011) (finding partial representation where defendant made “literal[ly]” true product representation but a reasonable consumer could not use the product in the manner represented). Accordingly, this portion of Best Buy’s dismissal motion is denied.

C. Best Buy’s Unlawful or Unfair Acts or Practices

In addition to his UCL fraud claim, Plaintiff also alleges that Best Buy violated the unlawful and unfair prongs of the UCL. (FAC ¶¶ 94, 95.) Under the UCL’s “unlawful” prong, violations of other laws are “borrowed” and made independently actionable under the UCL. Cel-Tech Commc’ns, Inc. v. L.A. Cellular Tel. Co., 20 Cal. 4th 163, 180 (1999). CLRA violations may serve as the predicate for “unlawful” business practice actions under the UCL. Collins, 202 Cal. App. 4th at 258. Since Plaintiff has pled a CLRA claim against Best Buy, see supra, Plaintiff states a claim for unlawful conduct under the UCL against Best Buy as well.

Under the UCL’s “unfair” prong, the test for liability in consumer suits is “in flux.” Lozano v. AT & T Wireless Servs., Inc., 504 F.3d 718, 735 (9th Cir. 2007). Previously, to determine whether a business practice was “unfair,” California courts applied a balancing test “weigh[ing] the utility of the defendant’s conduct against the gravity of the harm to the alleged victim.” S. Bay Chevrolet v. Gen. Motors Acceptance Corp., 72 Cal. App. 4th 861, 886 (1999). The Supreme Court of California subsequently rejected this approach in an anticompetitive practices case, where it instead held that an “unfair” business practice claim must “be tethered to some legislatively declared policy or proof of some actual or threatened impact on competition.” Cel-Tech Commc’ns, 20 Cal. 4th at 186–87. While criticizing consumer

1 cases applying the former balancing test, id. at 184–85, the Court
2 nonetheless expressly limited its holding to anticompetitive practices
3 cases, stating that “[n]othing we say relates to actions by consumers.”
4 Id. at 187 n.12. Following Cel-Tech, a split of authority developed
5 concerning the standard for consumer claims under the unfairness prong
6 of the UCL. Compare Mlejnecky v. Olympus Imaging Am. Inc., No. 2:10-CV-
7 02630 JAM-KJN, 2011 WL 1497096, at *7 (E.D. Cal. Apr. 19, 2011)
8 (adopting the balancing test), with Jackson v. Ocwen Loan Servicing,
9 LLC, No. 2:10-cv-00711-MCE-GGH, 2011 WL 587587, at *4 (E.D. Cal. Feb. 9,
10 2011) (applying the tethering test), with Chang Bee Yang v. Sun Trust
11 Mortg., Inc., No. 1:10-CV-01541 AWI SKO, 2011 WL 3875520, at *8 (E.D.
12 Cal. Aug. 31, 2011) (applying both tests); see generally Bardin v.
13 Daimlerchrysler Corp., 136 Cal. App. 4th 1255, 1273–74 (2006)
14 (discussing the split and the reasons for the split).

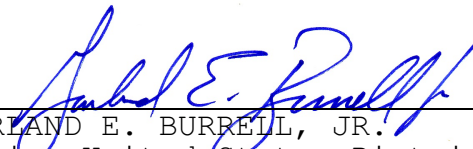
15 The applicable test need not be decided here since Plaintiff
16 fails to plead a claim under either standard. Under the South Bay
17 Chevrolet balancing test, Plaintiff has not shown that “the gravity of
18 the harm” he alleges outweighs “the utility of the [D]efendant’s
19 conduct.” 72 Cal. App. 4th at 886. Since Plaintiff refused to return his
20 Laptop for a full refund, his harm was avoidable, and likely “any harm
21 he suffered was the product of his own behavior,” rather than Best Buy’s
22 actions. Davis v. HSBC Bank Nev., N.A., 691 F.3d 1152, 1170 (9th Cir.
23 2012). “Meanwhile, any harm [to Plaintiff] is offset by Best Buy’s
24 strong justification” for relying on the MM07 test. Id. As Best Buy
25 argues, if it had “used a different benchmark, it [c]ould have impaired,
26 not improved, [Plaintiff’s] ability to make a meaningful comparison
27 between different computers” because MM07 is the industry-standard
28 benchmark for measuring battery life on all manner of laptops, leaving

1 Plaintiff less able to choose a computer than without the benchmark.
2 (Mot. 1:21-23.) In light of these concerns, under the Cel-Tech
3 Communications tethering test, Plaintiff also fails to allege that Best
4 Buy's conduct was "contrary to the 'spirit'" of the CLRA's legislatively
5 declared policy of consumer protection. Tourgeman v. Collins Fin.
6 Servs., Inc., No. 09-CV-01392-JNS-NLS, 2009 WL 6527757, at *7 (S.D. Cal.
7 Aug. 6, 2009). Accordingly, Best Buy's dismissal motion on Plaintiff's
8 unlawful UCL claim is denied, and its motion on Plaintiff's unfair UCL
9 claim is granted.

10 IV. CONCLUSION

11 For the reasons stated, Plaintiff's unlawful, unfair, and
12 fraudulent UCL claims against Toshiba and his fraudulent omission CLRA
13 claim against Toshiba are dismissed. Plaintiff's unfair UCL claim
14 against Best Buy and his fraudulent omission CLRA claim against Best Buy
15 based on Best Buy's exclusive knowledge and active concealment are
16 dismissed. The remainder of the dismissal motion is denied. Plaintiff is
17 granted fifteen (15) days leave from the date on which this Order is
18 filed to file an amended complaint amending the dismissed claims.

19 Dated: February 13, 2013

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21 
22 GARLAND E. BURRELL, JR.
23 Senior United States District Judge
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