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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

KYLE DEI ROSSI and MARK  
LINTHICUM, on behalf of themselves and  
those similarly situated,

Plaintiff,

v.

WHIRLPOOL CORPORATION,

Defendant.

No. 2:12-cv-00125

**ORDER**

This matter is before the Court pursuant to Defendant Whirlpool Corporation’s (“Defendant”) Motion to Dismiss Plaintiffs’ Second Amended Complaint. (ECF No. 72.) Plaintiffs Kyle Dei Rossi and Mark Linthicum (“Plaintiffs”) have filed an opposition to Defendant’s motion. (ECF No. 77.) The Court has carefully considered the arguments raised in Defendant’s motion to dismiss and their subsequent reply, as well as Plaintiffs’ opposition. For the reasons set for the below, Defendant’s motion to dismiss (ECF No. 72) is GRANTED IN PART AND DENIED IN PART.

**I. FACTUAL BACKGROUND**

Plaintiffs have brought this claim on behalf of themselves and 100 other similarly situated individuals. (Second Amended Complaint (“SAC”), ECF No. 71 at ¶ 2.) Plaintiffs

1 purchased refrigerators manufactured by Defendant that bear the Energy Star logo.<sup>1</sup> The model  
2 numbers for the purchased refrigerators were subsequently determined not to comply with Energy  
3 Star requirements and were disqualified from the Energy Star program. Plaintiffs allege that they  
4 would not have purchased the refrigerators had they known that the refrigerators did not meet the  
5 Energy Star requirements. They have brought this action alleging that Defendant's  
6 misrepresentation that the refrigerators met the Energy Star guidelines is a breach of the products'  
7 express warranty and implied warranty of merchantability. (ECF No. 71 at ¶¶ 115–122,  
8 123–132.) In addition, Plaintiffs allege that Defendant violated the following: the Magnuson-  
9 Moss Warranty Act, 15 U.S.C. §§ 2301, et seq.; California Consumer Legal Remedies Act, Civil  
10 Code §§ 1750, et seq.; California Unfair Competition Law, Business and Profession Code §§  
11 17200, et seq.; and California False Advertising Law, Business and Professions Code §§ 17500 et  
12 seq. (ECF No. 71 at ¶¶ 106–114, 133–142, 143–153, 154–161.)

13 Defendant contends that Plaintiffs' Second Amended Complaint is both factually  
14 and legally deficient and thus moves this Court to dismiss Plaintiffs' Second Amended Complaint  
15 with prejudice pursuant to Federal Rule of Civil Procedure 12(b)(6). (ECF No. 72.)

## 16 II. STANDARD OF LAW

17 Federal Rule of Civil Procedure 8(a) requires that a pleading contain "a short and  
18 plain statement of the claim showing that the pleader is entitled to relief." *See Ashcroft v. Iqbal*,  
19 556 U.S. 662, 678–79 (2009). Under notice pleading in federal court, the complaint must "give  
20 the defendant fair notice of what the claim . . . is and the grounds upon which it rests." *Bell*  
21 *Atlantic v. Twombly*, 550 U.S. 544, 555 (2007) (internal quotations omitted). "This simplified  
22 notice pleading standard relies on liberal discovery rules and summary judgment motions to  
23 define disputed facts and issues and to dispose of unmeritorious claims." *Swierkiewicz v. Sorema*  
24 *N.A.*, 534 U.S. 506, 512 (2002).

25 On a motion to dismiss, the factual allegations of the complaint must be accepted

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26 <sup>1</sup> The Energy Star program is a government-backed program intended to identify and  
27 promote energy efficient products. The program is jointly administered by the Department of  
28 Energy ("DOE") and the Environmental Protection Agency ("EPA"). *See*  
<http://www.energystar.gov/> (last visited Oct. 11, 2013).

1 as true. *Cruz v. Beto*, 405 U.S. 319, 322 (1972). A court is bound to give plaintiff the benefit of  
2 every reasonable inference to be drawn from the “well-pleaded” allegations of the complaint.  
3 *Retail Clerks Int’l Ass’n v. Schermerhorn*, 373 U.S. 746, 753 n.6 (1963). A plaintiff need not  
4 allege “‘specific facts’ beyond those necessary to state his claim and the grounds showing  
5 entitlement to relief.” *Twombly*, 550 U.S. at 570. “A claim has facial plausibility when the  
6 plaintiff pleads factual content that allows the court to draw the reasonable inference that the  
7 defendant is liable for the misconduct alleged.” *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S.  
8 544, 556 (2007)).

9           Nevertheless, a court “need not assume the truth of legal conclusions cast in the  
10 form of factual allegations.” *United States ex rel. Chunie v. Ringrose*, 788 F.2d 638, 643 n.2 (9th  
11 Cir. 1986). While Rule 8(a) does not require detailed factual allegations, “it demands more than  
12 an unadorned, the defendant-unlawfully-harmed-me accusation.” *Iqbal*, 556 U.S. at 678. A  
13 pleading is insufficient if it offers mere “labels and conclusions” or “a formulaic recitation of the  
14 elements of a cause of action.” *Twombly*, 550 U.S. at 555; *see also Iqbal*, 556 U.S. at 678  
15 (“Threadbare recitals of the elements of a cause of action, supported by mere conclusory  
16 statements, do not suffice.”). Moreover, it is inappropriate to assume that the plaintiff “can prove  
17 facts that it has not alleged or that the defendants have violated the . . . laws in ways that have not  
18 been alleged[.]” *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*,  
19 459 U.S. 519, 526 (1983).

20           Ultimately, a court may not dismiss a complaint in which the plaintiff has alleged  
21 “enough facts to state a claim to relief that is plausible on its face.” *Iqbal*, 556 U.S. at 697  
22 (quoting *Twombly*, 550 U.S. at 570). Only where a plaintiff has failed to “nudge[] [his or her]  
23 claims . . . across the line from conceivable to plausible[,]” is the complaint properly dismissed.  
24 *Id.* at 680. While the plausibility requirement is not akin to a probability requirement, it demands  
25 more than “a sheer possibility that a defendant has acted unlawfully.” *Id.* at 678. This  
26 plausibility inquiry is “a context-specific task that requires the reviewing court to draw on its  
27 judicial experience and common sense.” *Id.* at 679.

28           In ruling upon a motion to dismiss, the court may consider only the complaint, any

1 exhibits thereto, and matters which may be judicially noticed pursuant to Federal Rule of  
2 Evidence 201. *See Mir v. Little Co. of Mary Hosp.*, 844 F.2d 646, 649 (9th Cir. 1988); *Isuzu*  
3 *Motors Ltd. v. Consumers Union of United States, Inc.*, 12 F. Supp. 2d 1035, 1042 (C.D. Cal.  
4 1998).

5 If a complaint fails to state a plausible claim, “[a] district court should grant leave  
6 to amend even if no request to amend the pleading was made, unless it determines that the  
7 pleading could not possibly be cured by the allegation of other facts.” *Lopez v. Smith*, 203 F.3d  
8 1122, 1130 (9th Cir. 2000) (en banc) (quoting *Doe v. United States*, 58 F.3d 484, 497 (9th Cir.  
9 1995)); *see also Gardner v. Marino*, 563 F.3d 981, 990 (9th Cir. 2009) (finding no abuse of  
10 discretion in denying leave to amend when amendment would be futile). Although a district court  
11 should freely give leave to amend when justice so requires under Rule 15(a)(2), “the court’s  
12 discretion to deny such leave is ‘particularly broad’ where the plaintiff has previously amended  
13 its complaint[.]” *Ecological Rights Found. v. Pac. Gas & Elec. Co.*, 713 F.3d 502, 520 (9th Cir.  
14 2013) (quoting *Miller v. Yokohama Tire Corp.*, 358 F.3d 616, 622 (9th Cir. 2004)).

### 15 III. ANALYSIS

16 Plaintiffs have alleged state claims governed by California law as well as federal  
17 law. Since some of Plaintiffs’ claims are dependent on Plaintiffs’ breach of warranty claims, the  
18 Court will address the warranty claims first.

#### 19 a. Breach of Express Warranty (Count II)

20 Plaintiffs allege in their complaint that Defendant expressly warranted that the  
21 refrigerators in question met the specifications required to be Energy Star certified by adhering  
22 the Energy Star logo to the refrigerator. (ECF No. 71 at ¶ 117.) Defendant argues that Plaintiffs’  
23 claim fails because the adhesion of the Energy Star logo does not create an affirmation of fact or  
24 promise, and further that Plaintiffs have not pled the exact terms of the alleged warranty. (ECF  
25 No. 72-1 at 14–16.) For the reasons set forth below, the Court agrees with Plaintiffs.

26 An express warranty is a contractual term relating to the title, character, quality,  
27 identity or condition of the sold goods. *Blennis v. Hewlett-Packard Co.*, No. C 07-00333 JF,  
28 2008 WL 818526, at \*2 (N.D. Cal. Mar. 25, 2008) (citing *Fogo v. Cutter Labs., Inc.*, 68 Cal. App.

1 3d 744 (1977)). California Commercial Code § 2313 states that an express warranty is created as  
2 follows:

3 (1) (a) Any affirmation of fact or promise made by the seller to the  
4 buyer which relates to the goods and becomes part of the basis of  
5 the bargain creates an express warranty that the goods shall  
6 conform to the affirmation or promise.

7 (b) Any description of the goods which is made part of the basis of  
8 the bargain creates an express warranty that the goods shall  
9 conform to the description.

10 (c) Any sample or model which is made part of the basis of the  
11 bargain creates an express warranty that the whole of the goods  
12 shall conform to the sample or model.

13 (2) It is not necessary to the creation of an express warranty that the  
14 seller use formal words such as “warrant” or “guarantee” or that he  
15 have a specific intention to make a warranty, but an affirmation  
16 merely of the value of the goods or a statement purporting to be  
17 merely the seller’s opinion or commendation of the goods does not  
18 create a warranty.

19 Thus, to prove a claim based on breach of an express warranty, a plaintiff must show that the  
20 seller: “(1) made an affirmation of fact or promise or provided a description of its goods; (2) the  
21 promise or description formed part of the basis of the bargain; (3) the express warranty was  
22 breached; and (4) the breach caused injury to the plaintiff.” *Blennis*, 2008 WL 818526, at \*2  
23 (quoting *Rodarte v. Philip Morris Inc.*, No. 03-0353FMC, 2003 WL 23341208, at \*7 (C.D. Cal.  
24 June 23, 2003)). In addition, to plead a claim for breach of express warranty, “one must allege  
25 the exact terms of the warranty, plaintiff’s reasonable reliance thereon, and a breach of that  
26 warranty which proximately causes plaintiff injury.” *Blennis*, 2008 WL 818526, at \*2 (quoting  
27 *Williams v. Beechnut Nutrition Corp.*, 185 Cal. App. 3d 135, 142 (1986). The Court shall address  
28 each of the aforementioned prongs separately.

As to the first prong, Plaintiffs have pled that the Energy Star logo was in fact  
affixed to the refrigerators through an energy guide sticker, indicating that the products met the  
Energy Star requirements. (ECF No. 71 at ¶¶ 67–68, 71.) Although Defendant alleges that this  
logo does not confer a specific and express warranty, Defendant does not provide any reason for  
affixing this logo to the product other than to signify that the product meets the Energy Star

1 specifications. Simply put, the Court cannot fathom any other reason for affixing the logo in such  
2 a manner. In fact, if Defendant's intention was simply to signify that the product was energy  
3 efficient, it could have done so without affixing the Energy Star certification logo. Thus, the  
4 Court finds that affixing this logo to the product satisfies the definition of an express warranty  
5 under California Commercial Code § 2313(1)(a) and (1)(b). Specifically pursuant to (1)(a) it is  
6 an affirmation of fact that the product adheres to the Energy Star product, and pursuant to (1)(b) it  
7 sufficiently describes the product as meeting the Energy Star requirements. *Accord Avram v.*  
8 *Samsung Elecs. Am., Inc.*, No. 2:11-6973 KM, 2013 U.S. Dist. LEXIS 97341, at \*20 (D.N.J. July  
9 11, 2013).

10 Defendant contends that Plaintiffs fail to plead the exact terms of the alleged  
11 warranty. (ECF No. 72-1 at 16 (citing *Avago Techs. U.S., Inc. v. Venture Corp.*, No. C 08-03248  
12 JW, 2008 WL 5383367, at \*4-5 (N.D. Cal. Dec. 22, 2008).) However, the Court finds that  
13 Plaintiffs have satisfied this requirement. Plaintiffs allege that the Energy Star logo expressed  
14 that the product meets the Energy Star requirement which is "that the Mislabeled Refrigerators  
15 were at least 20% more efficient than models that simply meet the federal minimum standard for  
16 energy efficiency." (ECF No. 71 at ¶ 111.) The Energy Star policy illustrates that this is the  
17 exact specification requirement for such certification. As Plaintiffs have alleged in their  
18 complaint, the energystar.gov website highlights that the mandatory 20% improvement in energy  
19 efficiency is the key product criterion for refrigerators. *See* ENERGY STAR, Refrigerators &  
20 Freezers Key Product Criteria, [http://www.energystar.gov/index.cfm?c=refrig.pr\\_crit\\_](http://www.energystar.gov/index.cfm?c=refrig.pr_crit_refrigerators)  
21 [refrigerators](http://www.energystar.gov/index.cfm?c=refrig.pr_crit_refrigerators) (last visited Oct. 2, 2013) (providing that the "key product criteria" for full size and  
22 compact refrigerators is "[a]t least 20% more energy efficient than the minimum federal  
23 government standard"). Notably, the program does not require that the product meet certain  
24 hyper-technical requirements—only that the finished product yields a product that is at least 20%  
25 more energy efficient than the minimum federal government standard under the National  
26 Appliance Energy Conservation Act ("NAECA"). It would be nonsensical for this Court to  
27 impose stricter pleading requirements on Plaintiffs than is required and articulated by the Energy  
28 Star program itself.

1           Thus, this Court finds that Defendant’s adhesion of the Energy Star certification to  
2 its products falls within the statutory definition of an express warranty pursuant to California  
3 Law, and that Plaintiffs have alleged an express warranty with appropriate specificity and have  
4 met the first prong.

5           The Court is cognizant that its opinion conflicts with that expressed in the  
6 Northern District of Ohio. *See Savett v. Whirlpool*, No. 12-cv-310, WL 3780451, at \*9 (N.D.  
7 Ohio Aug. 31, 2012). In *Savett*, the court held that the

8           ENERGY STAR logo is not an “affirmation of fact or promise” as  
9 alleged in this case. As an initial matter neither the parties nor the  
10 Court uncovered any case in which a logo has ever been held to  
11 constitute an express warranty. Moreover, the logo itself contains  
12 no assertion of fact or promise. Unlike traditional express  
warranties where unambiguous promises or factual assertions are  
made, which are clearly understood on their own footing, any  
meaning conveyed by the logo requires independent knowledge.

13 2012 WL 3780451, at \*9. In making this determination, the Ohio court noted that the plaintiff  
14 failed to assert that “he saw or understood any purported meaning of the logo.” *Id.* at n.8. This  
15 Court declines to follow the reasoning in *Savett*. As the Court has previously alluded, Defendant  
16 does not provide, and the Court cannot fathom any other reason to affix an Energy Star logo to a  
17 product other than for the purpose of expressing that the product meets the Energy Star  
18 requirements. Furthermore, unlike the plaintiff in *Savett*, in the instant case Plaintiffs have  
19 alleged that they independently understood the meaning of the logo and relied on it in deciding to  
20 purchase the products. (*See* ECF No. 71 at ¶¶ 71–73 (“Mr. Dei Rossi is an energy conscious  
21 person and goes out of his way to avoid wasting energy. Like most consumers, he is very  
22 familiar with the ENERGY STAR® program and learned about it from numerous news reports  
23 that explained the program and from talking to his wife, parents and in-laws. At the time he  
24 purchased the KitchenAid KSRG25FVMT, he understood that the Energy Star® program is a  
25 government program that promotes energy efficiency and that the ENERGY STAR® logo  
26 indicates that the appliance is more energy efficient than an appliance that does not have the  
27 ENERGY STAR® label. . . [Mr. Linthicum] saw the ENERGY STAR® labels prior to and at the  
28 time of purchase, and understood them as a representation and warranty by Whirlpool that the

1 KitchenAid KSRS25RVHR met the standards of energy efficiency established by the ENERGY  
2 STAR® program, and that the refrigerator would help him maximize his energy savings while  
3 helping to protect the environment.”.)

4 In addition, the Court finds that Plaintiffs have met the second prong since the  
5 promise or description formed part of the basis of the bargain. (*See* ECF No. 71 at ¶¶ 71–73  
6 (“While shopping for a new refrigerator, Mr. Dei Rossi decided to look only at Energy Star®  
7 models. . . [Mr. Linthicum] relied on these [Energy Star] representations and warranties in  
8 deciding to purchase the refrigerator, and these representations and warranties were part of the  
9 basis of the bargain, in that he would not have purchased the KitchenAid KSRS25RVHR if he  
10 had known that it was not in fact, Energy Star qualified.”.) As the foregoing illustrates, the  
11 Plaintiffs specifically allege in the complaint that the promise or description formed the basis of  
12 the bargain.

13 The second amended complaint complies with the requisites necessary to prove the  
14 third prong. The complaint alleges that the products breached the exact terms of the warranty by  
15 not meeting the 20% Energy Star requirement and by failing to yield the energy saving  
16 advantages that an Energy Star appliance bestows upon its users, (ECF No. 71 at ¶¶ 74–93, 114).  
17 Also, the complaint specifically alleges that Plaintiffs relied on the [Energy Star] representations  
18 made by Defendant in deciding whether or not to purchase the refrigerators.

19 Further, Plaintiffs also meet the fourth prong in that they allege in the complaint  
20 that they suffered damages from the breach, i.e. paid a higher amount for the product, (ECF No.  
21 71 at ¶ 114).

22 Finally, Defendant also contends that Plaintiffs failed to plead that the breach of  
23 warranty occurred within the one-year warranty term. (ECF No. 72-1 at 16 n.3.) However,  
24 Plaintiffs allege that the product never conformed and thus violated the warranty upon sale which  
25 is necessarily within the one-year warranty term. This factual allegation sufficiently pleads that  
26 the violation occurred within the one-year warranty term. (*See* ECF No. 71 at ¶¶ 88–89, 95.)  
27 Hence, the Court finds that Plaintiffs have sufficiently pled their breach of express warranty  
28 claim.



1                   **b. Breach of Implied Warranty of Merchantability (Count III)**

2                   Plaintiffs contend that the refrigerators violate the implied warranty of  
3 merchantability because they do not conform to the promise or affirmation that they abide by the  
4 Energy Star requirements. (ECF No. 77 at 21.) Defendant argues that Plaintiffs define  
5 merchantability too narrowly and that the proper test is whether the refrigerator can serve its  
6 ordinary purpose, i.e. the product’s ability to keep food cold rather than the ability to keep food  
7 cold while using 20% less energy than the national minimum. (ECF No. 72-1 at 17.) Thus,  
8 Defendant contends that this claim must be dismissed because Plaintiffs cannot claim that the  
9 product failed to properly refrigerate. (ECF No. 72-1 at 17.)

10                   “A warranty that the goods shall be merchantable is implied in a contract for their  
11 sale if the seller is a merchant with respect to goods of that kind.” Cal. Com. Code § 2314(1)  
12 (West). For goods to be merchantable they must:

- 13                   (a) Pass without objection in the trade under the contract  
14 description; and  
15                   (b) In the case of fungible goods, are of fair average quality within  
16 the description; and  
17                   (c) Are fit for the ordinary purposes for which such goods are used;  
18 and  
19                   (d) Run, within the variations permitted by the agreement, of even  
20 kind, quality and quantity within each unit and among all units  
21 involved; and  
22                   (e) Are adequately contained, packaged, and labeled as the  
23 agreement may require; and  
24                   (f) Conform to the promises or affirmations of fact made on the  
25 container or label if any.

26 Cal. Com. Code § 2314(2). “Unlike express warranties, which are basically contractual in nature  
27 [ ], the implied warranty of merchantability arises by operation of law.” *Hauter v. Zogarts*, 14  
28 Cal. 3d 104, 117 (1975). “The implied warranty ‘provides for a minimum level of quality.’”  
*Birdsong v. Apple, Inc.*, 590 F.3d 955, 958 (9th Cir. 2009) (quoting *Am. Suzuki Motor Corp. v.*  
*Superior Court*, 37 Cal. App. 4th 1291, 1296 (1995)). “A breach of the warranty of

1 merchantability occurs if the product lacks ‘even the most basic degree of fitness for ordinary  
2 use.’” *Id.* (quoting *Mocek v. Alfa Leisure, Inc.*, 114 Cal. App. 4th 402, 406 (2003)). In order to  
3 state a claim, “a defect must be sufficiently serious so as to render the product unfit for its  
4 ordinary purpose.” *Hovsepian v. Apple, Inc.*, 08-5788 JF (PVT), 2009 WL 2591445, at \*6 (N.D.  
5 Cal. Aug. 21, 2009); *see also Am. Suzuki Motor Corp.*, 37 Cal. App. 4th at 1295. That being said  
6 a product must reasonably perform its purpose. *See Isip v. Mercedes-Benz USA, LLC*, 155 Cal.  
7 App. 4th 19, 26 (2007) (“We reject the notion that merely because a vehicle provides  
8 transportation from point A to point B, it necessarily does not violate the implied warranty of  
9 merchantability. A vehicle that smells, lurches, clanks, and emits smoke over an extended period  
10 of time is not fit for its intended purpose.”).

11           The Court agrees with Defendant and finds that that even though a product may be  
12 labeled with specific adjectives, that description does not change the ordinary purpose that it is  
13 used for. *See Am. Suzuki Motor Corp.*, 37 Cal. App. 4th at 1295 (stating that an implied warranty  
14 does not “impose a general requirement that goods precisely fulfill the expectation of the buyer.  
15 Instead, it provides for a minimum level of quality.”); *Tomek v. Apple, Inc.*, No. 2:11-cv-02700-  
16 MCE-DAD, 2012 WL 2857035, at \*7 (E.D. Cal. July 11, 2012) (dismissing implied warranty  
17 claim where the plaintiff alleged that his computer’s battery and charger failed to adequately  
18 power his computer because the plaintiff’s allegations of inconvenience were insufficient to show  
19 computer is not fit for ordinary use); *Kent v. Hewlett-Packard Co.*, No. 09-5341JF PVT, 2010  
20 WL 2681767, at \*4 (N.D. Cal. July 6, 2010) (finding that plaintiffs had to show that the defect  
21 renders the defendant’s computers unfit for their ordinary purpose, not just that the alleged defect  
22 was “inconvenient.”) Plaintiffs have had numerous opportunities to allege that the products failed  
23 to refrigerate and have not done so. As such, the Court finds that Plaintiffs cannot state a claim  
24 for breach of implied warranty.

25           **c. Magnuson-Moss Warranty Act (Count I)**

26           Defendant alleges that because Plaintiffs’ warranty claims fail, the Court must  
27 dismiss Plaintiffs’ claim that Defendant’s alleged warranty breach violates the Magnuson-Moss  
28 Warranty Act (“MMWA”). (ECF No. 72-1 at 21.) In addition, Defendant contends that

1 Plaintiffs' MMWA claim also fails because the Energy Star sticker does not qualify as a "written  
2 warranty" as defined in the MMWA. (ECF No. 72-1 at 21 n.8.) The Court has already  
3 determined that Plaintiffs' express warranty claim survives Defendant's motion, thus the Court  
4 need only address Defendant's argument that the Energy Star logo does not meet the MMWA  
5 definition of a "written warranty."

6 The MMWA creates a federal private cause of action for a warrantor's failure to  
7 comply with the terms of a written warranty: "[A] consumer who is damaged by the failure of a . .  
8 . warrantor . . . to comply with any obligation . . . under a written warranty . . . may bring suit for  
9 damages and other legal and equitable relief . . . in an appropriate district court of the United  
10 States." 15 U.S.C. § 2310(d)(1)(B). The MMWA defines the term "written warranty" as

11 (A) any written affirmation of fact or written promise made in  
12 connection with the sale of a consumer product by a supplier to a  
13 buyer which relates to the nature of the material or workmanship  
14 and affirms or promises that such material or workmanship is defect  
free or will meet a specified level of performance over a specified  
period of time, or

15 (B) any undertaking in writing in connection with the sale by a  
16 supplier of a consumer product to refund, repair, replace, or take  
other remedial action with respect to such product") (emphasis  
added);

17 15 U.S.C. § 2301(6). Thus, in contrast to the California Civil Code's definition of an express  
18 warranty, the MMWA requires (1) a "written affirmation" or "written promise," (2) that the  
19 written affirmation promises a defect free product or guarantees a level of performance, and (3) a  
20 specific time period over which the performance is guaranteed.

21 As previously discussed, a reasonable interpretation of the affixed Energy Star  
22 logo is that a product is Energy Star certified. Furthermore, the "Energy Star" certification  
23 promises that a refrigerator meets a certain "specified level of performance." *See Avram*, 2013  
24 U.S. Dist. LEXIS 97341, at \*41-42. Thus, assuming the Court found that the logo could satisfy  
25 the written fact or promise requirement and did specify a level of performance, Plaintiffs still  
26 must satisfy the specific time period requirement for the logo in question to fall within the  
27 regulation of the MMWA. *See Skelton v. GM Corp.*, 660 F.2d 311, 316 n. 7 (7th Cir. 1981) ("A  
28

1 product information disclosure without a specified time period to which the disclosure relates is ...  
2 not a written warranty.”).

3 Here, Plaintiffs cannot plead sufficient facts concerning the specified time element  
4 because the Energy Star logo does not in itself express or denote a time period. *See Kelley v.*  
5 *Microsoft Corp.*, 2007 WL 2600841, at \*3–5 (W.D. Wash. Sept. 10, 2007) (dismissing MMWA  
6 claim because “Windows Vista Capable” stickers lacked a “temporal element” as to the specified  
7 period of time required to constitute a warranty). As such, Plaintiffs do not adequately plead a  
8 violation on the MMWA, and this claim must be dismissed. *Id.*; *see also Hairston v. S. Beach*  
9 *Beverage Co., Inc.*, CV 12-1429-JFW DTBX, 2012 WL 1893818, at \*6 (C.D. Cal. May 18,  
10 2012), *appeal dismissed* (July 12, 2012) (dismissing plaintiff’s MMWA claim because the  
11 Lifewater label fails to meet the definition of “written warranty” under Section 2301(6)(A) of the  
12 MMWA because the label neither promises a defect-free product, nor guarantees a level of  
13 performance over a specific time period); *States v. BFG Electroplating & Mfg. Co., Inc.*, Civ. A.  
14 No. 87-1421, 1989 WL 222722, at \* 10 (W.D. Pa. Oct. 18, 1989) (holding that an advertisement  
15 stating “450 used 8-inch cement blocks” was not a written warranty because it specified no period  
16 of time); *Simmons v. Taylor Childre Chevrolet-Pontiac, Inc.*, 629 F. Supp. 1030, 1032 (M.D. Ga.  
17 1986) (written invoice for purchase of used car does not specify level of performance or period of  
18 time); *Schreib v. Walt Disney Co.*, 2006 WL 573008 at \*4 (Ill. App. 2006) (videos named “Gold  
19 Collection” and “Masterpiece Collection” were not written warranties that videos would last for  
20 generations).

21 **d. California’s Consumer Legal Remedies Act (Count IV)**

22 Plaintiffs allege that Whirlpool violated CLRA §§ 1170(a)(5),(7) and (9).  
23 Defendant contends that Plaintiffs have not adequately pled a violation because they cannot allege  
24 facts that prove that Defendant was aware that the refrigerator models at issue did not comply  
25 with the Energy Star guidelines. (ECF No. 72-1 at 25.)

26 The Consumer Legal Remedies Act (“CLRA”) “prohibits ‘unfair methods of  
27 competition and unfair or deceptive acts or practices undertaken by any person in a transaction  
28 intended to result or which results in the sale or lease of goods or services to any consumer.’”

1 *Wilson v. Hewlett-Packard Co.*, 668 F.3d 1136, 1140 (9th Cir. 2012) (quoting Cal. Civ. Code §  
2 1770(a)) (emphasis added). Conduct that is “likely to mislead a reasonable consumer” violates  
3 the CLRA. *Id.*; *Colgan v. Leatherman Tool Grp., Inc.*, 135 Cal. App. 4th 663, 680 (2006); *Nagel*  
4 *v. Twin Labs., Inc.*, 109 Cal. App. 4th 39, 54 (2003).

5           Claims sounding in fraud or mistake are subject to the heightened pleading  
6 requirements of Federal Rule of Civil Procedure 9(b) which requires that a plaintiff alleging fraud  
7 “must state with particularity the circumstances constituting fraud.” Fed. R. Civ. P. 9(b); *see also*  
8 *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1124 (9th Cir. 2009). The Court notes that Plaintiffs’  
9 CLRA claim as well as their Unfair Competition Law (“UCL”) claim,<sup>2</sup> are subject to the  
10 heightened pleading standard set forth in Federal Rule of Civil Procedure 9(b). *See Vess v. Ciba-*  
11 *Geigy Corp. USA*, 317 F.3d 1097, 1105 (9th Cir. 2003). “To satisfy the heightened standard  
12 under Rule 9(b), the allegations must be ‘specific enough to give defendants notice of the  
13 particular misconduct which is alleged to constitute the fraud charged so that they can defend  
14 against the charge and not just deny that they have done anything wrong.’” *Bruton v. Gerber*  
15 *Products Co.*, No. 12-CV-02412-LHK, 2013 WL 4833413, at \*4 (N.D. Cal. Sept. 6, 2013)  
16 (quoting *Semegen v. Weidner*, 780 F.2d 727, 731 (9th Cir.1985)). However, “the heightened  
17 pleading requirements of Rule 9(b) do not apply to allegations of knowledge, intent, or ‘other  
18 conditions of a person’s mind.’” *Kowalsky v. Hewlett-Packard Co.*, No. 10-CV-02176-LHK,  
19 2011 WL 3501715, at \*3 (N.D. Cal. Aug. 10, 2011) (quoting Fed. R. Civ. P. 9(b)). Rule 9(b)  
20 explicitly states that scienter may be alleged generally. *Id.* This does not mean, that conclusory  
21 allegations of knowledge or intent suffice. *Iqbal*, 556 U.S. at 686. Rather, Rule 9(b) merely  
22 excuses a party from pleading scienter under an elevated pleading standard; the “less rigid—  
23 though still operative—strictures of Rule 8” must be satisfied. *Id.*; *see also Swingless Golf Club*  
24 *v. Taylor*, 679 F. Supp. 2d 1060, 1067 (N.D. Cal. 2009) (concluding that the “non-heightened  
25 pleading standard” for knowledge is the “*Iqbal* standard”);

26           Section 1770(a) of the CLRA states that the following unfair methods of  
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28 <sup>2</sup> *See* Section III(e) below for more discussion of Plaintiffs’ UCL claim.

1 competition and unfair or deceptive acts or practices undertaken by any person in a transaction  
2 intended to result or which results in the sale or lease of goods or services to any consumer are  
3 unlawful:

4 (5) Representing that goods or services have sponsorship, approval,  
5 characteristics, ingredients, uses, benefits, or quantities which they  
6 do not have or that a person has a sponsorship, approval, status,  
7 affiliation, or connection which he or she does not have.

8 (7) Representing that goods or services are of a particular standard,  
9 quality, or grade, or that goods are of a particular style or model, if  
10 they are of another.

11 (9) Advertising goods or services with intent not to sell them as  
12 advertised.

13 California federal courts have held that under the CLRA, plaintiffs must sufficiently allege that a  
14 defendant was aware of a defect at the time of sale to survive a motion to dismiss. *See Wilson*,  
15 668 F.3d at 1145; *In re Sony Grand Wega KDF-E A10/A20 Series Rear Projection HDTV*  
16 *Television Litig.*, 758 F. Supp. 2d 1077, 1095 (S.D. Cal. 2010) (“Sony had no duty to disclose  
17 facts of which it was unaware.”); *Kent v. Hewlett-Packard Co.*, No. 09-5341 JF (PVT), 2010 WL  
18 2681767, at \*10, 2010 U.S. Dist. LEXIS 76818, at \*29 (N.D. Cal. July 6, 2010) (“Plaintiffs have  
19 not alleged with specificity any other facts that could support a claim that HP knew the computers  
20 in suit were defective at the time of sale or that HP actively concealed a defect at the time of  
21 sale.”).

22 Plaintiffs’ Second Amended Complaint alleges as follows:

23 [Whirlpool] maintains rigorous testing procedures. Whirlpool’s  
24 laboratories are certified annually by the Canadian Standards  
25 Association, and “work closely with them in rigorously  
26 demonstrating that the appropriate principles outlined by ISO/IEC  
27 17025 are within [Whirlpool’s] process for ENERGY STAR®  
28 product qualification. Moreover, Whirlpool touts that the technical  
sophistication of [its] laboratories and the highly advanced skill sets  
of [its] engineers [as] among the best in the world. [Whirlpool’s]  
lab personnel also have expansive job scopes, which include more  
responsibility than just testing product for energy performance.  
According to Whirlpool, the Whirlpool process includes rigorous  
equipment maintenance and calibration, detailed lab procedures and  
comprehensive record keeping on both equipment and test results.  
**As such, Whirlpool either (a) tested the Mislabeled  
Refrigerators before marketing them and, at all times relevant  
hereto, knew that the models were non-compliant with the  
requirements of the ENERGY STAR® program or, in the**

1           **alternative (b) affixed ENERGY STAR® labels to the**  
2           **Mislabeled Refrigerators without testing them, and thus knew**  
3           **the representation concerning their energy efficiency was**  
4           **baseless. This information is solely within Whirlpool's**  
5           **possession.**

6 (ECF No. 71 at ¶ 94 (quotations and citations omitted) (emphasis added).) The Court finds that  
7 Plaintiffs have set forth factual allegations that if proven true would support their contention that  
8 Defendant either intentionally misrepresented the energy efficiency of its product or intentionally  
9 labeled the products with information that it had not verified as accurate. In either instance, the  
10 Court finds that these allegations comport with the pleading standards required under the CLRA.

11           Finally, Defendant contends that Plaintiffs' CLRA claim fails because Plaintiffs  
12 bought their refrigerators from third-party vendors and not directly from Defendant. (ECF No.  
13 72-1 at 26.) Defendant has not cited any cases in support of its contention. In contrast, Plaintiffs  
14 have provided the Court with numerous cases supporting their contention that a direct sale is not  
15 required to allege a CLRA claim. *See Tietsworth v. Sears*, 720 F. Supp. 2d 1123, 1140 (N.D. Cal.  
16 2010); *Keilholtz v. Superior Fireplace Co.*, No. C 08-00836 CW, 2009 WL 839076, at \*3-4  
17 (N.D. Cal. Mar. 30, 2009); *Chamberlan v. Ford*, 369 F. Supp. 2d 1138, 1144 (N.D. Cal. 2005).  
18 These cases demonstrate that where a manufacturer had exclusive knowledge of a defect and the  
19 consumer relied upon that defect, the CLRA's protection extends to the manufacturer as well,  
20 regardless of whether the consumer dealt directly with the manufacturer. *See Tietsworth*, 720 F.  
21 Supp. 2d at 1140; *Keilholtz*, 2009 WL 839076, at \*3-4; *Chamberlan*, 369 F. Supp. 2d at 1144.  
22 Accordingly, the Court finds that Plaintiffs have adequately pled their CLRA claim.

23           **e. California's Unfair Competition Law (Count V)**

24           The scope of the UCL is broad and does not proscribe specific practices. Rather, it  
25 defines "unfair competition" to include "any unlawful, unfair or fraudulent business act or  
26 practice." *See Cal. Bus. & Prof. Code § 17200; Keilholtz*, 2009 WL 839076, at \*5; 13 Witkin,  
27 Summary 10th (2005) Equity, § 107, p. 411. It governs anticompetitive business practices as well  
28 as injuries to consumers, with a primary purpose of preserving fair business competition. 13  
Witkin, Summary 10th (2005) Equity, § 107, p. 411-12. The statutory language referring to "any

1 unlawful, unfair or fraudulent” practice makes clear that a practice may be deemed unfair even if  
2 not specifically proscribed by some other law. Thus, the UCL has established three types of  
3 unfair competition: (1) unlawful acts or promises; (2) unfair acts or promises; and (3) fraudulent  
4 acts or promises. Cal. Bus. & Prof. Code § 17200.

5 Plaintiffs have alleged violations under all three prongs alleging that Defendant’s  
6 conduct was unlawful, unfair and fraudulent. (ECF No. 71 at ¶¶ 146, 148–49.) Defendant argues  
7 that Plaintiffs fail to allege facts supporting any of the three prongs and thus move this Court to  
8 dismiss Plaintiffs’ UCL claim. As such, the Court shall address each prong separately.

9 1. Unlawful Acts or Promises

10 By proscribing “any unlawful” business practice, § 17200 borrows violations of  
11 other laws and treats them as unlawful practices that the unfair competition law makes  
12 independently actionable. *Berryman v. Merit Property Management, Inc.*, 152 Cal. App. 4th  
13 1544, 1554 (2007); 13 Witkin, Summary 10th (2005) Equity, § 107, p. 412. Plaintiffs contend  
14 that all manufacturers are required to confirm that a product meets the Energy Star requirements  
15 before using the logo. Thus, Plaintiffs argue that because the Department of Energy (“DOE”)  
16 found that the refrigerators did not comply with the Energy Star requirements and because there  
17 had been no modification to the specifications of these products, Defendant had either failed to  
18 test the product or knowingly misrepresented that these products were Energy Star certified in  
19 violation of “EPCA (“Energy Policy and Conservation Act), NECPA (National Energy  
20 Conservation Policy Act) [and] NAECA (National Appliance Energy Conservation Act).” (ECF  
21 No. 71 at ¶ 146.) Plaintiffs further allege that

22 [t]hese statutes give the DOE authority to establish energy  
23 efficiency standards for refrigerators, promote Energy Star  
24 compliant technologies, and the power to preserve the integrity of  
25 the Energy Star label. 42 U.S.C. § 6294a. Under applicable  
26 regulations, the DOE set detailed testing standards for refrigerators  
27 to be ENERGY STAR® certified. 10 C.F.R. § 430; 10 C.F.R. §  
28 430.23; 10 C.F.R. § 430 Appx. A to Subpart B; 10 C.F.R. § 430  
Appx. A1 to Subpart B. or knowingly made false representations  
that the product complied when they in fact knew that [the  
products] did not.

(ECF No. 71 at ¶ 146.) The Court has looked at the cited regulations and guidelines for testing



1 the energy efficiency of appliances, but fails to find within them a law governing the use of the  
2 Energy Star logo. As such, Plaintiffs cannot sustain a UCL claim under the unlawful prong of §  
3 17200.

4 2. Unfair Acts or Promises

5 “Under the UCL, ‘[a]n act or practice is unfair if the consumer injury is  
6 substantial, is not outweighed by any countervailing benefits to consumers or to competition, and  
7 is not an injury the consumers themselves could reasonably have avoided.’” *Berryman*, 152 Cal.  
8 App. 4th at 1555 (quoting *Daugherty v. American Honda Motor Co., Inc.*, 144 Cal. App. 4th 824,  
9 839 (2006)). Defendant contends that Plaintiffs have not specified the unfair practice that  
10 Defendant has engaged in. (ECF No 72-1 at 27–28.) The Court disagrees and finds that  
11 Plaintiffs’ statement that “Defendant’s conduct caused substantial consumer injury, by selling  
12 mislabeled appliances that fail to meet the rigorous energy efficiency standards ... as conveyed by  
13 the ENERGY STAR® logo” explicitly states the “unfair practice” that Plaintiffs are alleging.  
14 (ECF No. 71 at ¶ 152.) Furthermore, Plaintiffs’ allegations that “there is no countervailing  
15 benefit to Defendant’s conduct,” (ECF No. 71 at ¶ 152), and that Plaintiffs suffered injury, (ECF  
16 No. 71 at ¶ 153), comport with the UCL pleading requirements. Thus, the Court finds that  
17 Plaintiffs have stated a UCL claim under the unfair practice prong.

18 3. Fraudulent Acts or Promises

19 In arguing that Plaintiffs’ UCL claim for fraudulent acts or promises fails,  
20 Defendant again argues that Plaintiffs’ Second Amended Complaint contains “no specific facts  
21 related to misrepresentation that can be imputed to Defendant.” (ECF No. 72-1 at 28.) The Court  
22 has already discussed this argument as it pertains to Plaintiffs’ CLRA claim.<sup>3</sup> The Court  
23 determined that Plaintiffs’ allegations—that “Defendant’s laboratories are certified annually by the  
24 Canadian Standards Association,” and “[Defendant] work[s] closely with them in rigorously  
25 demonstrating that the appropriate principles outlined by ISO/IEC 17025 are within [Defendant’s]  
26 process for [its] Energy Star® product qualification”—if true, support Plaintiffs’ claim that  
27 Defendant either intentionally misrepresented the energy efficiency of its product or intentionally

28 <sup>3</sup> See Section IV(d).

1 labeled the products with information that it had not verified as accurate. (*See* ECF No. 71 at ¶  
2 94.) Thus, the Court finds that Plaintiffs have stated a UCL claim under the fraudulent acts or  
3 promises prong.

4 **f. California's False Advertising Law (Count VI)**

5 Finally, Plaintiffs have alleged that Defendant's misrepresentation about its  
6 products' Energy Star certification violates California's False Advertising Law, Business &  
7 Professions Code §§ 17500 et seq. ("FAL"). FAL provides that it is:

8 unlawful for any person to make or disseminate or cause to be made  
9 or disseminated before the public in this state . . . in any advertising  
10 device. . . or in any other manner or means whatever, including  
11 over the Internet, any statement, concerning . . . personal property  
12 or services, professional or otherwise, or performance or disposition  
thereof, which is untrue or misleading and which is known, or  
which by the exercise of reasonable care should be known, to be  
untrue or misleading.

13 Cal. Bus. & Prof. Code § 17500 (West). Defendant contends that this claim should be dismissed  
14 because it does not adhere to the heightened pleading standards required under Federal Rule of  
15 Civil Procedure 9(b). Specifically, Defendant states: "Plaintiffs failed to specify the time, place,  
16 or medium in which any allegedly false advertisement was communicated to them, nor do they  
17 offer any specific allegations concerning the content of any allegedly false advertisement that  
18 they saw or were otherwise exposed to." (ECF No. 72-1 at 28–29.)

19 Plaintiffs' second amended complaint contains numerous pages of Energy Star  
20 advertisements utilized by Defendant. (ECF No 71 at 21–33.) In addition, Plaintiffs specifically  
21 allege the following:

22 On December 8, 2008, Plaintiff Kyle Dei Rossi purchased a  
23 KitchenAid refrigerator model KSRG25FVMT at 7:21 p.m. from a  
24 Best Buy retail store in Stockton, California . . . The refrigerator he  
25 purchased was marked with the ENERGY STAR® logo on the  
26 yellow Energy Guide label affixed to the refrigerator. The  
refrigerator he purchased also included the ENERGY STAR® logo  
on the inside of the refrigerator next to the temperature gauge. The  
logo is visible whenever the door is opened. A picture of the  
ENERGY STAR® logo inside Mr. Dei Rossi's refrigerator is  
included below.

27 On December 31, 2008, Plaintiff Mark Linthicum purchased a  
28 KitchenAid refrigerator model KSRS25RVHR at a Pacific Sales

1 retail store in Los Angeles, California. . . Prior to purchasing the  
2 KitchenAid KSRS25RVHR, [Mr. Linthicum] looked at  
3 advertisements for the refrigerator on the internet. He saw the  
4 ENERGY STAR® logo in the internet advertisements. Prior to  
5 purchasing the KitchenAid KSRS25RVHR, he went to the store a  
6 couple of times to look at the refrigerators sold by Pacific Sales.  
7 He did not consider purchasing any refrigerator that did not include  
8 the ENERGY STAR® logo and only looked at the approximately  
9 20 refrigerators that included the ENERGY STAR® logo, meaning  
10 that he specifically wanted a model that had greater energy  
11 efficiency than conventional refrigerators or standard models that  
12 did not display the ENERGY STAR® logo. The KitchenAid  
13 KSRS25RVHR he purchased was prominently marked with the  
14 ENERGY STAR® logo on the door. He also saw the ENERGY  
15 STAR® logo on the yellow Energy Guide tag on the refrigerator.  
16 He also saw the ENERGY STAR® logo on the inside of the  
17 refrigerator to the right of the temperature panel. Mr. Linthicum  
18 sees the ENERGY STAR® logo every time he opens his  
19 refrigerator. A picture of the ENERGY STAR® logo inside Mr.  
20 Linthicum's refrigerator is included below.

21 (ECF No. 71 at ¶¶ 71–72.) The Court finds the above allegations state the date, place, and  
22 medium in which Plaintiffs were exposed to Defendant's Energy Star advertisements. As such,  
23 the Court finds that Plaintiffs have adequately stated a claim for FAL.

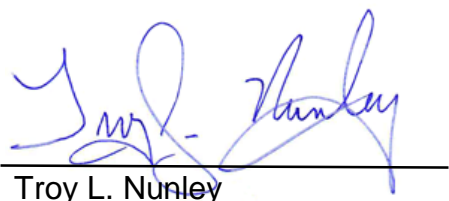
#### 24 **IV. CONCLUSION**

25 For the foregoing reasons, the Court hereby GRANTS IN PART AND DENIES  
26 IN PART Defendant's Motion to Dismiss Plaintiffs' Second Amended Complaint (ECF No. 72).  
27 The Court finds that Plaintiffs' Counts II, IV, V, and VI adequately state a claim upon which  
28 relief may be granted. Thus, Defendant's Motion to Dismiss is DENIED as to COUNTS II, IV,  
V, and VI. However, the Court finds that Plaintiffs' MMWA Claim (Count I) and Breach of  
Implied Warranty of Merchantability (Count III) fail to state a claim. As such, the Court  
GRANTS Defendant's motion as to COUNTS I and III. Furthermore, the Court finds that  
Plaintiffs have had multiple opportunities to amend their complaint and have not alleged facts  
supporting these claims. Plaintiffs have been warned previously of such deficiency and the  
unlikelihood of further opportunities to cure these deficiencies. (*See* ECF No. 67.) Thus, the  
Court finds that Plaintiffs are unable to allege facts to support these claims and that to allow  
Plaintiffs another opportunity to amend would be futile. Accordingly, the Court hereby  
DISMISSES COUNTS I and III WITHOUT LEAVE TO AMEND.

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IT IS SO ORDERED.

Dated: October 24, 2013



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Troy L. Nunley  
United States District Judge