

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

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MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

LOUIS LONG and TERRY SIMIEN, on
behalf of themselves and all others
similarly situated,

Plaintiffs - Appellants,

v.

HEWLETT-PACKARD COMPANY,

Defendant - Appellee.

No. 07-16440

D.C. No. CV-06-02816-JW

MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
James Ware, District Judge, Presiding

Argued and Submitted February 12, 2009
San Francisco, California

Before: D.W. NELSON, W. FLETCHER and TALLMAN, Circuit Judges.

Plaintiffs Lewis Long (“Long”) and Terry Simien (“Simien,” and collectively, “Plaintiffs”) appeal the district court’s rulings in favor of Appellee Hewlett-Packard (“HP”). The district court dismissed with prejudice Plaintiffs’

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

various state law class action claims for breach of express warranty and fraudulent concealment in violation of the California Unfair Competition Law (“UCL”) and California Consumers Legal Remedies Act (“CLRA”). We affirm the dismissal of Plaintiffs’ claims.

Under California law, time limits in express warranties are effective at limiting the coverage of the warranty to defects that manifest themselves during the specified time period. *Daugherty v. Am. Honda Motor Co.*, 51 Cal. Rptr. 3d 118, 122–24 (Ct. App. 2006). Although there may be an exception to this general rule for products that are truly “substantially likely to fail” during their useful lives, *Hicks v. Kaufman and Broad Home Corp.*, 107 Cal. Rptr. 2d 761, 773 (Ct. App. 2001), Plaintiffs do not allege facts that *all* HP Pavilion inverters of the models covered by this class were substantially likely to fail. Instead, they allege that, in general, HP laptops failed at higher rates than HP expected or than HP considered acceptable, and that, specifically, their own laptops, which did in fact fail, were “substantially likely to fail.” Therefore, Plaintiffs have failed to state a claim for breach of express warranty.

Plaintiffs failed to state a claim for breach of express warranty by description as well. When HP described the Pavilions as “laptops” or as “portable,” it may have been warranting that the computers sold to Plaintiffs were

indeed portable when sold and as designed, and could indeed be described as laptops, which they were. It was not warranting that the computers would function as designed for any period of time beyond that specified in HP's Limited Warranty. The cases to which Plaintiffs cite involve products that were never as described and are therefore inapposite. *See, e.g., Keith v. Buchanan*, 220 Cal. Rptr. 392, 398 (Ct. App. 1985) (involving a vessel marketed as "seaworthy" but upon delivery turned out not to be); *Metowski v. Traid Corp.*, 104 Cal. Rptr. 599, 600–01 (Ct. App. 1972) (involving cameras that were described as being "electronic color" cameras but were not); *Lane v. C.A. Swanson & Sons*, 278 P.2d 723, 726 (Cal. Ct. App. 1955) (involving chicken that was supposed to be boneless but was sold with bones).

Plaintiffs also failed to state a claim under either the UCL or the CLRA. HP owed Plaintiffs no independent duty to disclose information about the elevated failure rate of the laptops, absent a special relationship or affirmative misrepresentations. *Buller v. Sutter Health*, 74 Cal. Rptr. 3d 47, 51–52 (Ct. App. 2008); *Daugherty*, 51 Cal. Rptr. 3d at 126, 129; *Bardin v. DaimlerChrysler Corp.*, 39 Cal. Rptr. 3d 634, 647–49 (Ct. App. 2006). Plaintiffs have alleged no special relationship here. HP's affirmative representations that the Pavilions were "laptops" or that they were "portable" only imposed on HP a duty to disclose facts

that were contrary to the representations that were actually made. *Daugherty*, 51 Cal. Rptr. 3d at 126. The computers were in fact portable laptops, and the fact that the Pavilions may have failed at a slightly higher rate than HP considered acceptable is not contrary to that representation.

Finally, Plaintiffs do not allege facts that show an unfair course of conduct nor that HP acted unlawfully under the UCL.

AFFIRMED.