

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF
CALIFORNIA

American Ice Machine Company v. Modern Ice Equipment
Company, Inc.

American Ice Machine · No. 3:24-cv-02083 · Decided June 2, 2025

SUMMARY

The United States District Court for the Southern District of California granted Nvenia, LLC’s Rule 12(b)(6) motion to dismiss American Ice Machine Company’s first amended complaint. The court held that the claims, including negligent misrepresentation, warranty, contract, rescission, false advertising, and unfair competition claims, were inadequately pleaded and that the complaint did not establish a sufficient direct relationship between American Ice and Nvenia. The court dismissed Nvenia with prejudice, finding that further amendment would be futile.

CASE DETAILS

COURT	United States District Court for the Southern District of California
JURISDICTION	United States District Court for the Southern District of California
DECIDED	June 2, 2025
DOCKET	3:24-cv-02083
DISPOSITION	other
PROCEDURAL POSTURE	Defendant Nvenia, LLC moved under Federal Rule of Civil Procedure 12(b)(6) to dismiss the first amended complaint for failure to state a claim. The district court granted the motion and dismissed Nvenia from the action with prejudice.
STANDARD OF REVIEW	On a Rule 12(b)(6) motion, the court tests the legal sufficiency of the pleadings, accepts factual allegations as true, and construes them in the plaintiff's favor. The complaint must contain enough facts to state a facially plausible claim. The court may consider exhibits attached to the complaint and need not accept allegations contradicted by those exhibits.
PRECEDENTIAL VALUE	unpublished district court order; precedential status unknown

TOPICS

- motions to dismiss
- pleadings
- civil procedure
- commercial litigation
- breach of contract

PRACTICE AREAS

civil procedure

commercial litigation

contracts

consumer protection

torts

QUESTIONS PRESENTED

1. Whether the first amended complaint plausibly stated a negligent misrepresentation or fraudulent-concealment claim against Nvenia.
2. Whether the first amended complaint plausibly stated claims for breach of express warranty, implied warranty of merchantability, or implied warranty of fitness for a particular purpose against Nvenia.
3. Whether the first amended complaint plausibly stated claims for breach of oral contract or rescission against Nvenia.
4. Whether the claims under California's Unfair Competition Law and False Advertising Law were adequately pleaded.
5. Whether Plaintiff should receive leave to amend after failing to cure deficiencies identified in the prior dismissal order.

HOLDINGS

1. A manufacturer-distributor relationship, without more, does not establish an agency relationship sufficient to impute the distributor's interactions with the plaintiff to the manufacturer. A plaintiff proceeding on an agency theory must allege facts showing conduct by each party manifesting acceptance of a relationship in which one performs work for the other under the other's direction.
2. The negligent-misrepresentation claim failed because Plaintiff did not plead with particularity the specific statements made by Nvenia, what was false or misleading about them, and how Plaintiff relied on them.
3. The fraudulent-concealment theory failed because Plaintiff did not allege facts establishing that Nvenia owed Plaintiff a duty to disclose.
4. The breach-of-express-warranty claim failed because Plaintiff did not plausibly allege that Nvenia made the alleged one-year warranty representation.
5. The implied-warranty-of-merchantability claim failed because Plaintiff lacked vertical contractual privity with Nvenia and did not establish an applicable advertising-based exception.
6. The claims for breach of the implied warranty of fitness for a particular purpose, breach of oral contract, and rescission failed because the amended complaint did not cure the deficiencies identified in the prior dismissal order, including the absence of allegations showing a direct relationship or transaction with Nvenia.
7. The UCL and False Advertising Law claims failed because they were based on the same deficient misrepresentation and concealment theories that did not state an underlying claim.
8. Leave to amend was properly denied because Plaintiff failed a second time, despite guidance from the court, to allege basic facts supporting its claims against Nvenia, making further amendment futile.

KEY QUOTATIONS

“A complaint will survive a Rule 12(b)(6) motion to dismiss if it contains “enough facts to state a claim to relief that is plausible on its face.”” (at 3)

“But a manufacturer-distributor relationship is not, by itself, sufficient to establish agency.” (at 5)

“The Court, then, cannot take it as true that Nvenia advertised the statements as alleged.” (at 7)

“The Court therefore denies Plaintiff leave to amend.” (at 12)

FACTUAL BACKGROUND

American Ice Machine, a California corporation, purchased a Hamer 540E ice-bagging machine from Modern Ice for \$110,000 after its principal viewed information about the machine on Nvenia's website and discussed the purchase with Modern Ice employees. The machine was delivered in April 2023, stored without operation, and initiated in March 2024; Plaintiff then alleged defects and sought to have a one-year warranty run from initiation rather than shipment. Plaintiff's claims against Nvenia relied largely on representations allegedly made by Modern Ice or appearing on Nvenia's website, but the amended complaint did not allege a direct transaction or sufficient agency relationship between Plaintiff and Nvenia, and the attached website screenshots contradicted several alleged representations.

PROCEDURAL HISTORY

American Ice Machine filed the action in the Superior Court of California, County of San Diego, against Modern Ice Equipment Company, Inc. and Nvenia, LLC. Modern Ice removed the action to the Southern District of California. The court previously granted Nvenia's motion to dismiss the original complaint without prejudice and allowed amendment. After Plaintiff filed a first amended complaint, Nvenia again moved to dismiss. The court granted the motion without leave to amend and dismissed Nvenia with prejudice.

DISPOSITION

other

CASES CITED

- *Conservation Force v. Salazar*, 646 F.3d 1240, 1242 (9th Cir. 2011)
- *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001)
- *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 570 (2007)
- *Conley v. Gibson*, 355 U.S. 41, 47 (1957)
- *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)
- *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008)
- *Los Angeles Lakers, Inc. v. Fed. Ins. Co.*, 869 F.3d 795, 800 (9th Cir. 2017)
- *AE ex rel. Hernandez v. Cty. of Tulare*, 666 F.3d 631, 636 (9th Cir. 2012)
- *Doe v. United States*, 58 F.3d 494, 497 (9th Cir. 1995)

- Telesaurus VPC, LLC v. Power, 623 F.3d 998, 1003 (9th Cir. 2010)
- Schreiber Distrib. Co. v. Serv-Well Furniture Co., 806 F.2d 1393, 1401 (9th Cir. 1986)
- Acevedo v. Sunnova Energy Corp., 738 F. Supp. 3d 1268, 1277 (C.D. Cal. 2024)
- Murphy v. DirecTV, Inc.
- Aton Ctr., Inc. v. United Healthcare Ins. Co., 311 Cal. Rptr. 3d 564, 593 (Cal. Ct. App. 2022)
- Apollo Cap. Fund, LLC v. Roth Cap. Partners, LLC, 70 Cal. Rptr. 3d 199 (2007)
- Kearns v. Ford Motor Corp., 567 F.3d 1120, 1124, 1126 (9th Cir. 2009)
- Monreal v. GMAC Mortg., LLC, 948 F. Supp. 2d 1069, 1077–78 (S.D. Cal. 2013)
- In re iPhone 4S Consumer Litig., No. 12-cv-1127, 2014 WL 589388, at *5 (N.D. Cal. Feb. 14, 2024)
- Daniels-Hall v. Nat'l Educ. Ass'n, 629 F.3d 992, 998 (9th Cir. 2011)
- In re Ford Motor Co. DPS6 Powershift Transmission Prod. Liab. Litig., No. 18-ml-02814, 2019 WL 3000646, at *5 (C.D. Cal. May 22, 2019)
- Smith v. Ford Motor Co., 749 F. Supp. 2d 980, 987 (N.D. Cal. 2010)
- Falk v. Gen. Motors Corp., 496 F. Supp. 2d 1088, 1095 (N.D. Cal. 2007)
- Bigler-Engler v. Breg, Inc., 213 Cal. Rptr. 3d 82, 113–14 (Cal. Ct. App. 2017)
- Viggiano v. Hansen Nat. Corp., 944 F. Supp. 2d 877, 893 (C.D. Cal. May 13, 2013)
- Williams v. Beechnut Nutrition Corp., 185 Cal. App. 3d 135, 142 (Cal. Ct. App. 1986)
- Birdsong v. Apple, Inc., 590 F.3d 955, 958 (9th Cir. 2009)
- Clemens v. DaimlerChrysler Corp., 534 F.3d 1017, 1023 (9th Cir. 2008)
- Burr v. Sherwin Williams Co., 268 P.2d 1041, 1049 (Cal. 1954)
- Keith v. Buchanan, 173 Cal. App. 3d 13, 25 (Cal. Ct. App. 1985)
- In re Cloudera Sec. Litig., 121 F.4th 1180, 1190–91 (9th Cir. 2024)
- Lathus v. City of Huntington Beach, 56 F.4th 1238, 1243 (9th Cir. 2023)

OPINION

1 2 3 4 5 6 7 UNITED STATES DISTRICT COURT 8 SOUTHERN DISTRICT OF
 CALIFORNIA 9 10 AMERICAN ICE MACHINE Case No.: 24-cv-02083-H-BJC 11 COMPANY,
 a California corporation, 12 ORDER GRANTING MOTION TO Plaintiff, DISMISS
 DEFENDANT NVENIA, 13 v. LLC WITH PREJUDICE 14 MODERN ICE EQUIPMENT 15
 COMPANY, INC. et al., [Doc. No. 31.] 16 Defendants. 17 On March 12, 2025, Defendant Nvenia,
 LLC (“Nvenia”) filed a motion to dismiss 18 Plaintiff American Ice Machine Company’s first
 amended complaint for failure to state a 19 claim against it.

(Doc. No. 31.) On April 7, 2025, Plaintiff filed its response in opposition 20 to Nvenia’s motion.
 (Doc. No. 34.) On April 21, 2025, Nvenia filed its reply. (Doc. No. 21 39.) On May 5, 2025, the
 Court took the matter under submission. (Doc. No. 40.)

For the 22 reasons below, the Court grants Nvenia’s motion to dismiss without leave to amend. 23
 Background 24 The following background is taken from the allegations in Plaintiff’s first amended

25 complaint. Modern Ice is an Ohio corporation that sells and distributes ice-bagging 26 machines to its customers. (FAC ¶ 1, 8.) Defendant Nvenia, LLC (“Nvenia”) is a 27 Delaware corporation that manufactures certain models of ice-bagging machines that 28 1 Modern Ice distributes.

(Id. ¶ 1, 7.) Plaintiff is a California corporation that is in the 2 business of packaged-ice retail sales and distribution. (Id. ¶ 6.) 3 In December 2022, Plaintiff’s founder and principal, Mr. Hani Toma, viewed 4 information concerning a Hamer 540E ice-bagging machine on Nvenia’s website. (Id. 5 ¶¶ 11–12.) Shortly thereafter, Mr. Toma contacted Modern Ice and spoke with two of 6 Modern Ice’s employees about purchasing a Hamer 540E.

(Id. ¶ 15.) Mr. Toma told 7 Modern Ice’s employees that he wished to purchase a Hamer 540E to use in Plaintiff’s 8 production facility beginning in March of 2024. (Id.) During this discussion, Modern Ice’s 9 employees represented to Mr. Toma that (1) the manufacturer’s warranty on the Hamer 10 540E would be for one year beginning on the date when the machine was first operated at 11 Plaintiff’s production facility and (2) the labor charge for setup of the Hamer 540E would 12 be between \$3,000 and \$5,000.

(Id. ¶ 16.) On December 16, 2022, Plaintiff executed an 13 invoice with Modern Ice for the purchase of a Hamer 540E for \$110,000. (Id. ¶¶ 1, 17, 14 Ex. B.) 15 In April 2023, Modern Ice informed Plaintiff that the Hamer 540E Plaintiff had 16 purchased had been manufactured and was ready for delivery. (Id. ¶ 18.) Plaintiff 17 objected, stating it could not accept delivery until March of 2024.

(Id.) Modern Ice 18 responded that Plaintiff needed to accept delivery immediately or be in breach of contract. 19 (Id.) In April 2023, Modern Ice delivered the Hamer 540E to Plaintiff. (Id. ¶ 19.) Plaintiff 20 accepted delivery and stored the Hamer 540E, without setting up or initiating it, in its 21 production facility. (Id. ¶¶ 18–19.)

On March 20, 2024, about a year after accepting 22 delivery, Plaintiff hired one of Modern Ice’s technicians to set up and initiate the Hamer 23 540E. (Id. ¶ 20.) The technician did so shortly afterward. (Id. ¶ 21.) Modern Ice invoiced 24 Plaintiff for \$9,500 for the technician’s labor. (Id.)

After the machine was initiated, 25 Plaintiff noticed several deficiencies with the machine, including that bags produced by the 26 machine leak, that several parts needed frequent replacement, and that the machine 27 repeatedly shut down due to malfunction. (Id. ¶ 14.) 28 1 On April 16, 2024, Plaintiff contacted Modern Ice and Nvenia and demanded that 2 the Hamer 540E’s one-year warranty period commence from the date of first initiation in 3 March 2024.

(Id. ¶ 22.) Modern Ice and Nvenia informed Plaintiff that the manufacturer’s 4 warranty period began when the Hamer 540E was first shipped from Nvenia’s 5 manufacturing plant and, thus, had already expired. (Id.) Plaintiff claims that it would not 6 have accepted delivery or initiation of the

Hamer 540E at its production facility but for the 7 representation by Modern Ice’s employees that the manufacturer’s warranty would begin 8 on the date the machine was first operated, not on the date the machine was shipped from 9 Nvenia’s plant.

(Id. ¶ 23–25.) 10 On September 6, 2024, Plaintiff filed a complaint in the Superior Court of California, 11 County of San Diego against Defendants Modern Ice and Nvenia. (Doc. No. 1, Compl.) 12 On November 6, 2024, Modern Ice, with Nvenia’s consent, removed Plaintiff’s complaint 13 to the United States District Court for the Southern District of California.

(Doc. No. 1, 14 Notice of Removal ¶ 14.) On December 5, 2024, Nvenia filed a motion to dismiss 15 Plaintiff’s complaint against it for failure to state a claim. (Doc. No. 12.) On January 27, 16 2025, the Court granted Nvenia’s motion to dismiss and dismissed Nvenia from the action 17 without prejudice. (Doc. No. 22.) 18 On February 26, 2025, Plaintiff filed its first amended complaint against Modern Ice 19 and Nvenia, alleging causes of action for: (1) negligent misrepresentation; (2) breach of 20 implied warranty of merchantability; (3) breach of implied warranty of fitness for a 21 particular purpose; (4) breach of contract; (5) breach of express warranty; (6) rescission; 22 (7) violation of California’s False Advertising Law, California Business & Professional 23 Code §§ 17500, et seq.; and (8) violation of California’s Unfair Competition Law (“UCL”), 24 California Business & Professional Code §§ 17200, 17500 et seq.

(Compl. ¶¶ 26–77.) 25 Nvenia moves pursuant to Federal Rule of Civil Procedure 12(b)(6) to dismiss Plaintiff’s 26 claims against it in their entirety for failure to state a claim. 27 \ 28 \ 1 Discussion 2 I. Legal Standard 3 A motion to dismiss under Federal Rule of Civil Procedure 12(b) (6) tests the legal 4 sufficiency of the pleadings and allows a court to dismiss a complaint if the plaintiff has 5 failed to state a claim upon which relief can be granted.

See *Conservation Force v. Salazar*, 646 F.3d 1240, 1242 (9th Cir. 2011) (citing *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 7 2001)). Federal Rule of Civil Procedure 8(a)(2) requires that a pleading contain “a short 8 and plain statement of the claim showing that the pleader is entitled to relief.” The function 9 of this pleading requirement is to give the defendant fair notice of the claim and its grounds.

10 *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). 12 A complaint will survive a Rule 12(b)(6) motion to dismiss if it contains “enough 13 facts to state a claim to relief that is plausible on its face.” *Id.* at 570. “A claim has facial 14 plausibility when the plaintiff pleads factual content that allows the court to draw the 15 reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

Dismissal for failure to state a claim is proper where the 17 claim “lacks a cognizable legal theory or sufficient facts to support a cognizable legal 18 theory.” *Mendondo v. Centinela Hosp. Med.*

Ctr., 521 F.3d 1097, 1104 (9th Cir. 2008); 19 see *Los Angeles Lakers, Inc. v. Fed. Ins. Co.*, 869 F.3d 795, 800 (9th Cir. 2017). 20 In reviewing a Rule 12(b)(6) motion to dismiss, a district court must “accept the 21 factual allegations of the complaint as true and construe them in the light most favorable 22 to the plaintiff.” *Los Angeles Lakers*, 869 F.3d at 800 (quoting *AE ex rel.*

Hernandez v. 23 *Cty. of Tulare*, 666 F.3d 631, 636 (9th Cir. 2012)). If the court dismisses a complaint for 24 failure to state a claim, it must then determine whether to grant leave to amend. See *Doe 25 v. United States*, 58 F.3d 494, 497 (9th Cir. 1995); *Telesaurus VPC, LLC v. Power*, 623 F.3d 998, 1003 (9th Cir. 2010). Courts may deny leave to amend where the “allegation of 27 other facts consistent with the challenged pleading could not possibly cure the deficiency.” 28 *Telesaurus*, 623 F.3d at 1003 (quoting *Schreiber Distrib.*

Co. v. Serv-Well Furniture Co., 1 806 F.2d 1393, 1401 (9th Cir. 1986)). 2 II. Analysis 3 A. New Allegations 4 At the outset, as the Court explained in its previous order and again explains below, 5 many of Plaintiffs claims against Nvenia require that it allege some sort of direct 6 interaction, relationship, or transaction have existed between Plaintiff and Nvenia.

The 7 Court provided Plaintiff with leave to amend its complaint to add the necessary allegations, 8 but it has failed to do so. Plaintiff’s first amended complaint contains the following new 9 allegations: (1) that Plaintiff viewed information about the Hamer 540E on Nvenia’s 10 website prior to purchasing a Hamer 540E from Modern Ice, and (2) a list of several issues 11 with the Hamer 540E that Plaintiff experienced after the machine was initiated in March 12 2024.

(FAC ¶¶ 11–14.) These allegations do not address many of the deficiencies the 13 Court identified in its previous order. (See Doc. No. 22 at 5–8.) 14 Plaintiff asserts that Modern Ice’s interactions with Plaintiff can be imputed to 15 Nvenia under an agency theory. (Doc. No. 34-1 at 18, 21.) Plaintiff’s first amended 16 complaint, however, has provided no allegations regarding Modern Ice and Nvenia’s 17 relationship beyond conclusory statements.

(See FAC ¶ 10.) In order for Plaintiff to 18 proceed against Nvenia under an agency theory, it must allege facts that would allow the 19 Court to reasonably infer that Modern Ice “represent[e]d” Nvenia “in dealings with third 20 persons.” Cal. Civ. Code § 2295. Such allegations, at a minimum, must describe “conduct 21 by each party manifesting acceptance of a relationship whereby one of them is to perform 22 work for the other under the latter’s direction.” *Acevedo v. Sunnova Energy Corp.*, 738 F. 23 Supp. 3d 1268, 1277 (C.D.

Cal. 2024). Plaintiff has not even attempted to allege such 24 facts.¹ With that, the Court will proceed to address why each count in Plaintiff’s FAC fails 25 26 1 Plaintiff alleges that Nvenia manufactures the Hamer 540E and that Modern Ice is a 27 distributor of the Hamer 540E. (FAC ¶¶ 1, 7–8.) But a manufacturer-distributor relationship is not, by itself, sufficient to establish agency.

See *Murphy v. DirecTV, Inc.*, 28 F.3d 1120, 1124 (9th Cir. 2009). 2 B. Count I 3 In Count I of the FAC, Plaintiff brings a claim against Nvenia for negligent 4 misrepresentation. (FAC ¶¶ 26–31.) Plaintiff alleges that Nvenia made misrepresentations 5 on its website regarding the Hamer 540E’s functionality and applicable one-year warranty. 6 (See *id.* ¶ 12.)

Plaintiff alleges its principal, Mr. Toma, viewed Nvenia’s website and relied 7 on those misrepresentations in subsequently purchasing the Hamer 540E from Modern Ice. 8 (See *id.* ¶¶ 11–13, 15.) Nvenia argues that Count I should be dismissed because Plaintiff 9 has failed to plead with particularity what misrepresentation Nvenia made. (Doc. No. 31 10 at 13–15.)

The Court notes that although the claim in Count I is brought as a negligent 11 misrepresentation claim, Plaintiff explains the underlying theory of this claim by stating 12 that Nvenia “failed to disclose” and “actively concealed” information from Plaintiff. (FAC 13 ¶¶ 28–29.)

In its briefing, Plaintiff also shifts between the legal standards for 14 misrepresentation and fraudulent concealment throughout its argument. (See Doc. No. 34- 15 1 at 12–17.) For the sake of completeness, the Court will address both negligent 16 misrepresentation and fraudulent concealment. 17 i. Negligent Misrepresentation 18 Under California law, “[t]he elements of negligent misrepresentation are: ‘(1) the 19 misrepresentation of a past or existing material fact, (2) without reasonable ground for 20 believing it to be true, (3) with intent to induce another’s reliance on the fact 21 misrepresented, (4) justifiable reliance on the misrepresentation, and (5) resulting 22 damage.’” *Aton Ctr., Inc. v. United Healthcare Ins.*

Co., 311 Cal. Rptr. 3d 564, 593 (Cal. 23 Ct. App. 2023) (quoting *Apollo Cap. Fund, LLC v. Roth Cap. Partners, LLC*, 70 Cal. Rptr. 2d 3d 199 (2007)). Negligent misrepresentation sounds in fraud, so a plaintiff must describe 25 “the who, what, when, where, and how” of the alleged misconduct to satisfy Federal Rule 26 of Civil Procedure 9(b) and avoid dismissal.

Kearns v. Ford Motor Corp., 567 F.3d 1120, 1124, 1126 (9th Cir. 2009); *Monreal v. GMAC Mortg., LLC*, 948 F. Supp. 2d 1069, 1077– 28 78 (S.D. Cal. 2013). Specifically, a plaintiff must aver “the statements they relied upon in 1 making their purchases, what is false or misleading about the statements, and why those 2 statements turned out to be false.” *In re iPhone 4S Consumer Litig.*, No. 12-cv-1127, 2014 3 WL 589388, at *5 (N.D.

Cal. Feb. 14, 2024). 4 Here, Plaintiff’s complaint alleges that it relied statements Nvenia made on its 5 website that the Hamer 540E would “form pouches with product and seal them under sterile 6 conditions,” “would remain free from defects,” and would “be repaired at no cost... for a 7 period of twelve (12) months from the date of installation and setup at Plaintiff’s facilities.” 8 (FAC ¶¶ 11–12.)

Plaintiff attached several screenshots of Nvenia’s website as Exhibit A 9 to its FAC in support of these allegations. (See FAC Ex. A.) However, the screenshots of 10 Nvenia’s website clearly do

not contain many of the representations that Plaintiff attributes 11 to it.

After reviewing the screenshots submitted as Exhibit A to the FAC, the Court did not 12 find any mention that the Hamer 540E would remain free of defects or that there would be 13 no-cost repair offered. (See *id.*) More troublingly, Exhibit A contradicts Plaintiff's 14 allegation that Mr. Toma viewed this information on Nvenia's website in 2022, because 15 the screenshots are dated February 26, 2025 along the footer.

(*Id.*) The Court, then, cannot 16 take it as true that Nvenia advertised the statements as alleged. See *Daniels-Hall v. Nat'l 17 Educ. Ass'n*, 629 F.3d 992, 998 (9th Cir. 2010) (holding that courts are not "required to 18 accept as true allegations that contradict exhibits attached to" a complaint). 19 To be fair, the screenshot of Nvenia's website does represent that the Hamer 540E 20 "enables forming, filling and sealing of all popular bag sizes [of ice]," but the FAC does 21 not explain what about this statement is false.

(*Id.*) Indeed, Plaintiff alleges that the Hamer 22 540E does bag ice up to ten pounds. (See FAC ¶ 14.) Plaintiff has failed to allege specific 23 statements from Nvenia it relied upon and what about the statements are misleading. 24 Plaintiff therefore fails to state a claim for negligent misrepresentation against Nvenia. 25 ii. Fraudulent Concealment 26 "A claim for fraud based on concealment or omission requires that: (1) the defendant 27 must have concealed or suppressed a material fact; (2) the defendant must have been under 28 a duty to disclose the fact to the plaintiff; (3) the defendant must have intentionally 1 concealed or suppressed the fact with intent to defraud the plaintiff; (4) the plaintiff must 2 have been unaware of the fact and would have acted otherwise if he had known of the 3 concealed or suppressed fact; and (5) as a result of the concealment or suppression of the 4 fact, the plaintiff sustained damage." *In re Ford Motor Co. DPS6 Powershift Transmission 5 Prod.*

Liab. Litig., No. 18-ml-02814, 2019 WL 3000646, at *5 (C.D. Cal. May 22, 2019). 6 Allegations of fraud must set forth "the who, what, when, where, and how of the 7 misconduct charged." *Kearns*, 567 F.3d at 1124. 8 Nvenia asserts that Plaintiff fails to plead a claim for fraudulent concealment because 9 Plaintiff does not allege facts to support that Nvenia owed a duty of disclosure to Plaintiff.

10 (Doc. No. 39 at 9.) "Under California law, there are four circumstances in which an 11 obligation to disclose may arise." *Smith v. Ford Motor Co.*, 749 F. Supp. 2d 980, 987 12 (N.D. Cal. 2010). These include "(1) when the defendant is in a fiduciary relationship with 13 the plaintiff; (2) when the defendant had exclusive knowledge of material facts not known 14 to the plaintiff; (3) when the defendant actively conceals a material fact from the plaintiff; 15 and (4) when the defendant makes partial representations but also suppresses some material 16 fact." *Falk v. Gen.*

Motors Corp., 496 F. Supp. 2d 1088, 1095 (N.D. Cal. 2007). 17 Plaintiff argues that Nvenia owed it a duty to disclose under the partial representation 18 theory because Nvenia made a “misleading affirmative statement” or “half-truth” regarding 19 the functionality of the Hamer 540E. (Doc. No. 34-1 at 14, 16.) But “a duty to disclose 20 arises in this context only where there is already a sufficient relationship or transaction 21 between the parties.” Bigler-Engler v. Breg, Inc., 213 Cal. Rptr.

3d 82, 114 (Cal. Ct. App. 22 2017). As explained above, Plaintiff’s first amended complaint contains no allegations that 23 allow the Court to infer that there was a direct relationship or transaction between Plaintiff 24 and Nvenia. See supra Section II.A. Instead, Plaintiff’s allegations concern its direct 25 interactions and transaction with Modern Ice.

The allegation that Plaintiff viewed Nvenia’s 26 website and marketing materials prior to its purchase are of no help, because the necessary 27 relationship “cannot arise between the defendant and the public at large.” Bigler-Engler, 28 1 213 Cal. Rptr. 3d at 113. Plaintiff, therefore, fails to state a claim for fraudulent 2 concealment against Nvenia. 3 C. Counts II, III, and V 4 Plaintiff’s first amended complaint bring claims against Nvenia for breach of express 5 warranty, breach of the implied warranty of merchantability, and breach of the implied 6 warranty of fitness for a particular purpose.

(FAC ¶¶ 32–45; 52–55.) The Court will 7 address each claim in turn. 8 i. Express Warranty 9 To prevail on a motion to dismiss a breach of express warranty claim, a plaintiff 10 must adequately allege that the seller “(1) made an affirmation of fact or promise or 11 provided a description of its goods; (2) the promise or description formed part of the basis 12 of the bargain; (3) the express warranty was breached; and (4) the breach caused injury to 13 the plaintiff.” Viggiano v. Hansen Nat.

Corp., 944 F. Supp. 2d 877, 893 (C.D. Cal. May 14 13, 2013). Furthermore, a plaintiff “must allege the exact terms of the warranty” and 15 “plaintiff’s reasonable reliance thereon.” Williams v. Beechnut Nutrition Corp., 185 Cal. 16 App. 3d 135, 142 (Cal. Ct. App. 1986). 17 Nvenia argues that the breach of warranty claim against it should be dismissed 18 because Plaintiff has again failed to plead the terms of the alleged warranty.

(Doc. No. 39 19 at 10–11.) Plaintiff’s FAC alleges that Nvenia’s website and marketing materials 20 advertised that the Hamer 540E would remain free of defects, be “effective, proper, and 21 safe for its intended use,” and be repaired at no cost for a twelve-month period after the 22 date it was first initiated. (FAC ¶¶ 53, 12.)

In short, Plaintiff’s alleges that Nvenia publicly 23 advertised that the Hamer 540E “would come with a warranty period of one year from the 24 date of its initial operation.” (FAC ¶ 53; see Doc.

No. 34-1 at 21.) Plaintiff's allegations 25 and argument are directly contradicted by the screenshots of Nvenia's website and 26 marketing materials that are attached to the FAC.

(See FAC Ex. A.) Nowhere in these 27 materials does Nvenia advertise a one-year warranty for the Hamer 540E. The Court 28 cannot reasonably infer, then, that Nvenia made an affirmation of fact, promise, or 1 description regarding a one-year warranty to Plaintiff. See Daniels-Hall, 629 F.3d at 998. 2 Plaintiff fails to state a claim for breach of express warranty.

3 ii. Implied Warranty of Merchantability 4 To state a claim for breach of the implied warranty of merchantability, a consumer 5 must demonstrate that the good is not "fit for the ordinary purposes for which such goods 6 are used." Cal. Com. Code § 2314(2)(c); see Birdsong v. Apple, Inc., 590 F.3d 955, 958 7 (9th Cir. 2009).

The plaintiff also "must stand in vertical contractual privity with the 8 defendant." Clemens v. DaimlerChrysler Corp., 534 F.3d 1017, 1023 (9th Cir. 2008). An 9 "end consumer... who buys from a retailer is not in privity with a manufacturer." (Id.) 10 Nvenia argues Plaintiff is barred from bringing this claim because vertical privity 11 does not exist between Plaintiff and Nvenia.

(See Doc. No. 31 at 17.) Plaintiff responds 12 that an exception to the privity requirement is applicable here because it relied on 13 representations made on Nvenia's website regarding the Hamer 540E. (See Doc. No. 34- 14 1 at 26.) A party's reliance on the written labels or advertisements of a manufacturer is an 15 established exception to the privity requirement, however, it only applies when the labels 16 or advertisements relied upon establish an express warranty between the manufacturer and 17 end-consumer.

See Clemens, 534 F.3d at 1023; Burr v. Sherwin Williams Co., 268 P.2d 18 1041, 1049 (Cal. 1954). As the Court explains above, Plaintiff has not adequately pled 19 what statements Nvenia made that constitute an express warranty, so this exception is not 20 applicable. See supra Section II.C.i.

Accordingly, Plaintiff fails to state a claim for breach 21 of the implied warranty of merchantability. 22 iii. Implied Warranty of Fitness for a Particular Purpose 23 Plaintiff has failed to add any allegations to its first amended complaint that address 24 the deficiencies that the Court previously identified in Plaintiff's original complaint for this 25 claim.

Specifically, Plaintiff has not alleged that it had any direct contact with Nvenia that 26 would allow the Court to infer that Nvenia, "at the time of contracting ha[d] reason to know 27 of [Plaintiff's] particular purpose" for the Hamer 540E. Keith v. Buchanan, 173 Cal. App. 28 3d 13, 25 (Cal. Ct. App. 1985); see supra Section II.A.

For the same reasons identified in 1 the Court's previous order, Plaintiff fails to state a claim for breach of the implied warranty 2 of fitness for a particular purpose. (See Doc. No. 22 at 6.) 3 D.

Counts IV and VI 4 Counts IV and VI of Plaintiff's first amended complaint set out claims for breach of 5 oral contract and rescission against Nvenia. (FAC ¶¶ 46–51; 56–61.)

As explained above, 6 Plaintiff has failed to add any allegations to its first amended complaint that address the 7 deficiencies that the Court previously identified in Plaintiff's original complaint for these 8 claims. See *supra* Section II.A.

Therefore, for the same reasons explained in the Court's 9 previous order, Plaintiff fails to state a claim against Nvenia for breach of oral contract and 10 rescission. (See Doc. No. 22 at 7–8.) 11 E. Counts VII and VIII 12 Counts VII and VIII of Plaintiff's FAC bring claims against Nvenia for violations of 13 the UCL and California's False Advertising Law.

(FAC ¶¶ 62–77.) Nvenia moves to 14 dismiss these claims, and Plaintiff does not address Nvenia's arguments regarding these 15 claims in its opposition. (See Doc. No. 39 at 14.) These claims appear to be based on the 16 same allegations and theories that underly the claim in Count I and are properly dismissed 17 on the basis that the underlying theories fail to state a claim.

(FAC ¶¶ 64, 71–72); see *supra* 18 Section II.B; *Monreal*, 948 F. Supp. 2d at 1076–77 (dismissing UCL claim brought under 19 unfair, unlawful, and fraudulent prongs where UCL claim was based on same allegations 20 used to support deficiently pled concealment and misrepresentation claims). 21 F. Leave to Amend 22 Finally, Plaintiff requests that this Court grant it leave to amend.

(Doc. No. 34-1 at 23 27.) “Although leave to amend should be given freely, denying leave is not an abuse of 24 discretion if it is clear that granting leave to amend would have been futile.” In re *Cloudera* 25 Sec. Litig., 121 F.4th 1180, 1190 (9th Cir. 2024) (quoting *Lathus v. City of Huntington* 26 Beach, 56 F.4th 1238, 1243 (9th Cir. 2023)).

Because Plaintiff has failed for a second time, 27 despite guidance from the Court, to put forward basic allegations to sustain its claims 28 against Nvenia, the Court determines Plaintiff is unable to do so and so amendment is futile. 1 *id.* at 1190–91 (affirming denial of leave to amend where one amendment had been 2 allowed and plaintiff made no effort to correct deficiencies previously identified).

The 3 || Court therefore denies Plaintiff leave to amend. 4 Conclusion 5 For the reasons above, the Court grants Nvenia's motion to dismiss and dismisses 6 || Nvenia from this action with prejudice. 7 IT IS SO ORDERED. 8 || DATED: June 2, 2025 10 UNITED STATES DISTRICT COURT 1] 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28