JS-6

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

ROGER LARSEN, **Plaintiff,** **v.** **VIZIO, INC.,** **Defendant.**	**Case No.: SACV 14-01865-CJC(JCGx)** **ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

I. INTRODUCTION

Plaintiff Dr. Roger Larsen filed this putative class action against Defendant Vizio, Inc., claiming Vizio misrepresented to him and other consumers the refresh rate of certain of its televisions. (*See generally* Dkt. 1; *see also* Dkt. 27 [First Amended Complaint, hereinafter "FAC"].) He alleges the following causes of action: (1) violation of the

Maine Unfair Trade Practices Act ("Maine UTPA"), Maine Revised Statutes Title 5 §§ 205-A *et seq.*, (FAC ¶¶ 45–57); (2) common law fraud, (*id.* ¶¶ 58–67); (3) negligent misrepresentation, (*id.* ¶¶ 68–75); (4) unjust enrichment, (*id.* ¶¶ 76–80); and (5) breach of express warranty, (*id.* ¶¶ 81–86).[1] Before the Court is Vizio's motion for summary judgment. (Dkt. 64 [Notice of Motion]; Dkt. 65 [Memorandum of Points and Authorities in support of Motion, hereinafter "Mot."].) Vizio contends that all of Dr. Larsen's claims fail because he cannot demonstrate that he was misled by Vizio's representations regarding the refresh rate of the Vizio television that he purchased. The Court agrees with Vizio and GRANTS Vizio's motion.[2]

II. BACKGROUND

Vizio is a California company and a seller of consumer electronics, including liquid-crystal display ("LCD") televisions that purport to have a refresh rate of 120Hz. (FAC ¶¶ 6, 17–18, 33.) Refresh rate refers to the number of times per second an image is displayed on a television screen. (*Id.* ¶ 1.) Refresh rate is expressed in Hertz ("Hz"), defined by the International System of Units as cycles per second, meaning that a television with a refresh rate of 60Hz displays 60 images per second on its screen. (*Id.*)

Currently, video is not recorded at any more than 60 images per second. (*Id.* ¶ 22.) If too few images are displayed per second, viewers can see what is referred to as "motion blur," or "the apparent streaking of rapidly moving objects." (*Id.* ¶ 23.) "Motion blur can be evident in fast moving sports such as basketball or football." (*Id.*) However, through technology known as "motion interpolation," a television processor

[1] On April 27, 2017, the Court denied Dr. Larsen's motion for class certification. (Dkt. 125.)

[2] Dr. Larsen's claim for unjust enrichment fails on the additional ground that he has an adequate remedy at law, which precludes him from obtaining equitable relief.

can create new, additional images to insert in between the recorded images to increase the number of images displayed per second, and thus, the refresh rate. (*Id.* ¶¶ 26–28.)

On October 27, 2014, Dr. Larsen, who resides in Maine, bought a 50-inch Vizio E500i-B1 television from Amazon.com with a purported refresh rate of 120Hz. (*Id.* ¶¶ 12–14; Dkt. 115 [Statement of Undisputed Facts, hereinafter "SUF"] ¶¶ 1, 7.) Roughly one month after his purchase, Dr. Larsen filed this lawsuit, alleging that he relied on Vizio's representation that his television was 120Hz, but the television actually had a refresh rate of 60Hz. (*See generally* Dkt. 1.) Dr. Larsen also asserted his claims on behalf of a class of Maine residents who had bought Vizio's television models E420i-A1, E550i-A0, E400i-B2, E400i-B0, E500i-B1, E600i-B3, E700i-B3, M401i-A3, E550VA, P502ui-B1, P702ui-B3, P602ui-B3, P552ui-B2, and XVT3D474SV, claiming that Vizio has been systematically "overstating, falsifying and obfuscating" the actual refresh rates of these televisions for years to improve sales. (FAC ¶ 2.)

Specifically, Dr. Larsen alleges that Vizio "uses inferior, less expensive, backend technology to create more *non-unique* images, or simply misstates the refresh rate altogether." (*Id.* ¶ 30 (emphasis in original).) Vizio apparently uses a "scanning blacklight," which flashes an "unperceivable instant of black" between two identical images displayed in succession, thus "doubling" the number of images displayed per second. (*Id.* ¶¶ 31–32.) In this way, Dr. Larsen alleges that "Vizio is claiming to provide a 120Hz display, but is really providing nothing more than a 60Hz display displayed twice." (*Id.* ¶ 33.) Vizio does not deny that it uses backlight scanning, but contends that its practices are not misleading because its use of refresh rate expressed in Hz refers only to images per second, not to *unique* images per second, and because its promotional materials usually refer to the refresh rate as "120Hz *effective* refresh rate" or state that the refresh rate is "enhanced with backlight scanning." (Dkt. 94 at 1, 5, 8.) It further

contends that Dr. Larsen "offers no evidence of any industry standard requiring a 120Hz TV to show 120 'unique' images." (*Id.* at 5.)

Before buying his television, Dr. Larsen visited a Walmart and saw the television he purchased. (SUF ¶ 2.) He did an "apples-to-apples" comparison of his model and other models in the store, and was happy with the picture quality of the model he eventually purchased. (*Id.* ¶¶ 2–3.) Dr. Larsen also conducted online research about the television he purchased. (*Id.* ¶ 4.) He then visited Amazon.com in October 2014 and carefully reviewed the information on the webpage concerning his television, including the refresh rate information and the section of the webpage comparing his model to other models. (*Id.* ¶ 5.)

At Dr. Larsen's deposition, when asked if he remembered the wording on the Amazon.com webpage he observed in October 2014 describing his television's refresh rate, he testified that he did not think the description explained that the refresh rate was "enhanced with backlight scanning." (SUF ¶ 7; Dkt. 66 [Declaration of Nicholas Gregory, hereinafter "Gregory Decl."] Ex. 2 at 76:14–19.) He stated that if the Amazon.com webpage had used the term "effective" refresh rate, he "would have looked [it] up and found out what that meant." (Gregory Decl. Ex. 2 at 33:8–16.) When he was asked "assuming that the website said 120Hz effective refresh rate enhanced with backlight scanning, would you believe that that promotion is misleading?" Dr. Larsen replied "No." (Gregory Decl. Ex. 2 at 76:20–24.) Vizio's counsel then asked, "And if you saw that text on Amazon's website and you purchased the TV, then it follows that you wouldn't be harmed; is that correct?" to which Dr. Larsen responded "Yes." (*Id.* at 77:1–5.)

Dr. Larsen stated that he made a copy of the Amazon.com webpage for the television he purchased, but lost that webpage prior to the deposition. (SUF ¶ 6.) On

February 18, 2016, Dr. Larsen printed another copy of an Amazon.com webpage for the television and produced that webpage shortly before his deposition. (Gregory Decl. Ex. 4.) That webpage contradicted his recollection, as it advertised the television as having an *effective* refresh rate of 120Hz, not simply a 120Hz refresh rate. (*Id.*)

Dr. Larsen also admitted that he did not know the technical definition of Hertz and had not "really" heard of motion interpolation. (Gregory Decl. Ex. 2 at 34:4–5, 43:2–9; SUF ¶ 15.) He also mistakenly used the term 180Hz instead of 120Hz for the first forty-five minutes or so of his deposition, (*see, e.g.*, Gregory Decl. Ex. 2 at 23:2–3, 26:2–3, 28:9–10, 30:7, 32:22, 32:25, 33:4–5, 37:11; SUF ¶ 17), until his attorney alerted him to the error, (*id.* at 37:13–22). However, Dr. Larsen testified that he had looked up the meaning of 180Hz (meaning 120Hz) refresh rate and learned that it meant that "you got two unique images per second or per frame." (*Id.* at 33:17–21.) He was seeking a television that would be best for watching sports, (*id.* at 21:21–22), and his research indicated that 180Hz (again, meaning 120Hz) provided a "better picture as far as fast action, which is sports," (*id.* at 32:17–34:3). Dr. Larsen explained that if he had known his television used backlight scanning, he would not have purchased it because "backlighting is a copy of the initial image, and it's not the next image, so it's not unique." (Dkt. 109-1 [Declaration of Deborah Dixon, hereinafter "Dixon Decl."] Ex. A at 38:14–40:2.)

Finally, Dr. Larsen testified that he still uses his television, and when asked if he has any complaints regarding its performance, he stated "I like the TV, but you know, I just feel that, you know, it was misrepresented and sometimes there is a slight blurring in fast action." (Gregory Decl. Ex. 2 at 59:17–21.) Dr. Larsen estimated that he has noticed motion blur in fast action on his television around fifty times since he purchased it. (Dixon Decl. Ex. A at 59:23–60:6.)

III. LEGAL STANDARD

The Court may grant summary judgment on "each claim or defense—or the part of each claim or defense—on which summary judgment is sought." Fed. R. Civ. P. 56(a). Summary judgment is proper where the pleadings, the discovery and disclosure materials on file, and any affidavits show that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Id.*; *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The party seeking summary judgment bears the initial burden of demonstrating the absence of a genuine issue of material fact. *Celotex Corp.*, 477 U.S. at 325. A factual issue is "genuine" when there is sufficient evidence such that a reasonable trier of fact could resolve the issue in the nonmovant's favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A fact is "material" when its resolution might affect the outcome of the suit under the governing law, and is determined by looking to the substantive law. *Id.* "Factual disputes that are irrelevant or unnecessary will not be counted." *Id.*

Where the movant will bear the burden of proof on an issue at trial, the movant "must affirmatively demonstrate that no reasonable trier of fact could find other than for the moving party." *Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th Cir. 2007). In contrast, where the nonmovant will have the burden of proof on an issue at trial, the moving party may discharge its burden of production by either (1) negating an essential element of the opposing party's claim or defense, *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158–60 (1970), or (2) showing that there is an absence of evidence to support the nonmoving party's case, *Celotex Corp.*, 477 U.S. at 325. Once this burden is met, the party resisting the motion must set forth, by affidavit, or as otherwise provided under Rule 56, "specific facts showing that there is a genuine issue for trial." *Anderson*, 477 U.S. at 256. A party opposing summary judgment must support its assertion that a material fact is genuinely disputed by (i) citing to materials in the record, (ii) showing the

moving party's materials are inadequate to establish an absence of genuine dispute, or (iii) showing that the moving party lacks admissible evidence to support its factual position. Fed. R. Civ. P. 56(c)(1)(A)–(B). The opposing party may also object to the material cited by the movant on the basis that it "cannot be presented in a form that would be admissible in evidence." Fed. R. Civ. P. 56(c)(2). But the opposing party must show more than the "mere existence of a scintilla of evidence"; rather, "there must be evidence on which the jury could reasonably find for the [opposing party]." *Anderson*, 477 U.S. at 252.

In considering a motion for summary judgment, the court must examine all the evidence in the light most favorable to the non-moving party, and draw all justifiable inferences in its favor. *Id.*; *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962); *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630–31 (9th Cir. 1987). The court does not make credibility determinations, nor does it weigh conflicting evidence. *See Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 456 (1992). But conclusory and speculative testimony in affidavits and moving papers is insufficient to raise triable issues of fact and defeat summary judgment. *Thornhill Pub. Co., Inc. v. GTE Corp.*, 594 F.2d 730, 738 (9th Cir. 1979). The evidence the parties present must be admissible. Fed. R. Civ. P. 56(c). "If the court does not grant all the relief requested by the motion, it may enter an order stating any material fact—including an item of damages or other relief—that is not genuinely in dispute and treating the fact as established in the case." Fed. R. Civ. P. 56(g).

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IV. DISCUSSION

A. Maine UTPA, Fraud, Negligent Misrepresentation, and Breach of Express Warranty

Vizio contends that it is entitled to summary judgment on Dr. Larsen's claims for violation of the Maine UTPA,[3] fraud, negligent misrepresentation, and breach of express warranty because he cannot show that he was misled by Vizio's representations regarding the refresh rate of the television that he purchased. (Mot. at 9–16.) The Court agrees.

Individual reliance is an element of the Maine UTPA, fraud, negligent misrepresentation, and breach of express warranty. *Sanford v. Nat'l Ass'n for the Self-Employed, Inc.*, 264 F.R.D. 11, 16 (D. Me. 2010) (Maine UTPA); *Letellier v. Small*, 400 A.2d 371, 376 (Me. 1979) (fraud); *Binette v. Dyer Library Ass'n*, 688 A.2d 898, 903 (Me. 1996) (negligent misrepresentation); *Sullivan v. Young Bros. & Co.*, 91 F.3d 242, 249 (1st Cir. 1996) (breach of express warranty, applying Maine law). Dr. Larsen conceded at his deposition that, although he did *not* believe the Amazon.com webpage for his television had used qualifiers like "120Hz effective refresh rate enhanced with backlight scanning," if it *had* such qualifiers, he would not have found the representation of the refresh rate misleading. (Mot. at 9–10; Gregory Decl. Ex. 2 at 76:20–24.) This concession is fatal to Dr. Larsen's claims.

The Amazon.com webpage did not state what Dr. Larsen thought it did. Although neither party has a copy of the Amazon.com webpage from October 27, 2014, the actual

[3] The Maine UTPA prohibits "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." Me. Rev. Stat. Tit. 5 § 207. "To justify a finding of unfairness, the act or practice: (1) must cause, or be likely to cause, substantial injury to consumers; (2) that is not reasonably avoidable by consumers; and (3) that is not outweighed by any countervailing benefits to consumers or competition." *State v. Weinschenk*, 2005 ME 28, ¶ 16 (2009).

day Dr. Larsen purchased his television, Vizio has provided copies of webpage as it existed on October 1, 7, 11, 14, 23, and 29, 2014. (Gregory Decl. Exs. 7–12; *see also id.* Exs. 5–6 (affidavits authenticating webpages); *id.* Ex. 13 (webpage showing dates captured by the Internet Archive Wayback Machine).) On all those dates, the Amazon.com webpage described Dr. Larsen's television as having a "120Hz effective refresh rate enhanced with backlight scanning." (Gregory Decl. Exs. 7–12.) The webpage also contained a comparison chart listing the regular refresh rate of Dr. Larsen's television as 60Hz (i.e., the refresh rate without the use of backlight scanning) and the "product description" section of that webpage stated that the television has a "120Hz *effective* refresh rate." (*Id.* (emphasis added).) Plaintiff testified that he carefully reviewed these very portions of the webpage. (SUF ¶ 5.) Thus, Dr. Larsen's recollection of the contents of the Amazon.com webpage as it existed in October 2014 was incorrect. And because Dr. Larsen has conceded that 120Hz in conjunction with the qualifier "120Hz effective refresh rate enhanced with backlight scanning" is not misleading to him, and he must have seen such a qualifier on the Amazon.com webpage, Dr. Larsen could not have been misled.

Dr. Larsen objects to the admissibility of the damning copies of the webpage from October 2014, asserting that they (1) are "not relevant for the purposes offered because the exhibits clearly represent the Television to be '120Hz' on the first page," (2) lack foundation, and (3) are hearsay. (Dkt. 105-7.) Dr. Larsen's objections are without merit.

First, the content of the webpage is clearly relevant, since it goes directly to the question of whether Dr. Larsen was misled by Vizio's representations—he admitted that if the webpage had used the qualifying language "120Hz effective refresh rate enhanced with backlight scanning," he would not have been misled. (Gregory Decl. Ex. 2 at 76:20–24.) It is hard to conceive of more relevant evidence than the webpage he viewed when he bought his television.

Second, Vizio has laid the necessary foundation for the copies of the webpage. Vizio obtained copies of the webpage as it existed in October 2014 using the Internet Archive, a website that "provides access to a digital library of Internet sites and other cultural artifacts in digital form." (Gregory Decl. Ex. 5 ¶ 2.) The Internet Archive has a service called the "Wayback Machine," which "makes it possible to surf more than 450 billion pages stored in the Internet Archive's web archive" so visitors of the site can review how a webpage looked on certain dates. (*Id.* ¶ 3.) To authenticate the copies of the webpage, Vizio has submitted declarations from Christopher Butler, the office manager of the Internet Archive, and Nicholas Gregory, Vizio's attorney who retrieved the copies of the webpage. (Gregory Decl.; *id.* Ex. 5 [hereinafter "Butler Decl. I"]; Gregory Decl. Ex. 6 [hereinafter "Butler Decl. II"].) Mr. Butler explains that to use the Wayback Machine, a visitor can search for a specific URL and if archived records for that URL are available, the visitor is then presented with a list of available dates for that URL. (Butler Decl. I ¶ 3; Butler Decl. II ¶ 3.) "The visitor may select one of those dates, and then begin surfing on an archived version of the Web. The links on the archived files, when served by the Wayback Machine, point to other archived files (whether HTML pages or images). If a visitor clicks on a link on an archived page, the Wayback Machine will serve the archived file with the closest available date to the page upon which the link appeared and was clicked." (*Id.*) This data is compiled using software programs known as "crawlers," which "surf the Web and automatically store copies of web files, preserving these files as they exist at the points of time of capture." (Butler Decl. I ¶ 4; Butler Decl. II ¶ 4.) Mr. Butler attests that the printouts of the Amazon.com webpage obtained by Mr. Gregory "are true and accurate copies of printouts of the Internet Archive's records of the HTML files for the URLs and the dates specified." (Butler Decl. I ¶ 6; Butler Decl. II ¶ 6.)

Mr. Gregory's declaration, in turn, explains that on November 4, 2016, he visited the Wayback Machine platform located at https://archive.org/web/ and searched for the

following URL in order to obtain copies of the Amazon.com webpage in question: https://www.amazon.com/VIZIO-E500i-B1-50-Inch-1080pSmart/dp/B00GKKI4IE. (Gregory Decl. ¶ 13.) The declaration attaches a document Mr. Gregory obtained on November 4, 2016, using the Wayback Machine, showing the dates on which the Wayback Machine captured and archived that URL. (*Id.*; *id.* Ex. 13.) The dates and URL provided in that document match those of the webpages Vizio obtained through the Wayback Machine. Mr. Gregory attests that the webpages are true and correct copies of the Amazon.com webpages as they existed in October 2014. (Gregory Decl. ¶¶ 7–12.) Contrary to Dr. Larsen's assertion, there is no foundation problem with the copies of the Amazon.com webpage from October 2014.

Third, the copies of the webpage are not hearsay. Vizio is not offering the copies of the webpage for the truth of the matters asserted in them. Rather, Vizio is offering the copies of the webpage to show what specific statements the webpage contained. More specifically, the October 2014 copies of the webpage stated in various places that Dr. Larsen's television had a "120Hz effective refresh rate enhanced with backlight scanning" or a "120Hz effective refresh rate," as well as a regular refresh rate of 60Hz. These statements are being offered to show what Dr. Larsen actually viewed on the webpage in October 2014. They are not being offered to show that Dr. Larsen's television actually has a 120Hz effective refresh rate, that it has a 60Hz regular refresh rate, or that it is in fact enhanced with backlight scanning. Since the copies of the webpage are not being offered for their truth, there is no hearsay problem.

In his opposition, Dr. Larsen, perhaps realizing he cannot establish his own reliance, insists that his reliance can be presumed if a jury decides Vizio's representations were *material*. (Dkt. 109 [Opposition, hereinafter "Opp."] at 3 (citing *Stearns v. Ticketmaster Corp.*, 655 F.3d 1013, 1022 (9th Cir. 2011)).) Dr. Larsen relies on California law for the proposition that "[i]f materiality is found, then individual reliance

is presumed" in a class action. (*Id.* at 4 (citing *Makaeff v. Trump Univ., LLC*, 2014 WL 688164, at *13 (S.D. Cal. Feb. 21, 2014); *id.* at 9 (citing, *inter alia*, *Steroid Hormone Product Cases*, 181 Cal. App. 4th 145, 157 (2010) and *In re Tobacco II Cases*, 46 Cal. 4th 298, 328 (2009)).)

Dr. Larsen's argument is unavailing. As an initial matter, Dr. Larsen cites only California authority for the proposition that materiality confers an inference of reliance, while all his claims are brought under Maine law, and all those claims under that state's law require individual reliance. (*See* Opp. at 9–11.) In any event, such an *inference* of reliance always can be rebutted and Vizio has clearly done so here. *Baghdasarian v. Amazon.com, Inc.*, No. CV 05-8060 AG (CTX), 2009 WL 4823368, at *6 (C.D. Cal. Dec. 9, 2009), *aff'd*, 458 F. App'x 622 (9th Cir. 2011) ("Plaintiff here cannot take advantage of a presumption or inference of reliance. In this case, Plaintiff's own deposition testimony undermines his own claims, showing that he did not actually rely on Defendant's statements."); *Engalla v. Permanente Med. Grp., Inc.*, 15 Cal. 4th 951, 977 (1997), *as modified* (July 30, 1997) ("[T]he Engallas need only make a showing that the misrepresentations were material, and that therefore a reasonable trier of fact could infer reliance from such misrepresentations, in order to survive this summary-judgment-like proceeding, *absent evidence conclusively rebutting reliance*.") (emphasis added).

B. Unjust Enrichment

Dr. Larsen's remaining claim is for unjust enrichment. Since Dr. Larsen was not misled by Vizio's representations regarding the refresh rate of the television that he purchased, Vizio did not receive an unjust benefit from Dr. Larsen's purchase. *See In re Light Cigarettes Mktg. Sales Practices Litig.*, 271 F.R.D. 402, 407 (D. Me. 2010) ("Under Maine law, a claim for unjust enrichment has three elements: [1] a benefit conferred upon the defendant by the plaintiff; [2] an appreciation or knowledge by the

defendant of the benefit; and [3] the acceptance or retention by the defendant of the benefit under such circumstances as to make it inequitable for the defendant to retain the benefit without payment of its value."). But there is an additional ground for summary judgment in Vizio's favor on Dr. Larsen's claim for unjust enrichment—Dr. Larsen cannot show that he is entitled to equitable relief. (Mot. at 14.) "[T]o pursue unjust enrichment in equity, the plaintiff must lack an adequate remedy at law." *Wahlcometroflex, Inc. v. Baldwin*, 2010 ME 26, ¶ 22 (2010). Dr. Larsen's central theory is that he wrongfully paid a higher price premium for a television that he believed was 120Hz when it was really 60Hz. Dr. Larsen's only alleged injury appears to be that he paid too much for his television, especially since he still likes and uses it. (*See* Gregory Decl. Ex. 2 at 59:15–19.) Thus, if he could have prevailed on the merits of his other claims, money damages would have made him whole by compensating him for any inflated price premium. As Dr. Larsen does have an adequate remedy at law, he has no equitable claim for unjust enrichment.

V. CONCLUSION

For the foregoing reasons, Defendant's motion for summary judgment is GRANTED.

DATED: June 26, 2017

CORMAC J. CARNEY
UNITED STATES DISTRICT JUDGE