Case No. 14-16141

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KATHLEEN HASKINS, On Behalf of Herself and all Others Similarly Situated,

Plaintiff – Appellant,

v.

SYMANTEC CORPORATION,

Defendant – Appellee.

Appeal from the United States District Court
for the Northern District of California, San Francisco
No. 3:13-cv-01834-JST
The Honorable Jon S. Tigar

APPELLANT'S OPENING BRIEF

BLOOD HURST & O'REARDON LLP
TIMOTHY G. BLOOD (149343)
THOMAS J. O'REARDON II (247952)
PAULA M. ROACH (254142)
701 B Street, Suite 1700
San Diego, CA 92101
Telephone: 619/338-1100
619/338-1101 (fax)
tblood@bholaw.com
toreardon@bholaw.com
proach@bholaw.com

Attorneys for Plaintiff-Appellant

[Additional counsel appear on signature page.]

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes and Rules

I. JURISDICTION

This appeal arises from dismissal on the pleadings of a case filed by plaintiff Kathleen Haskins ("Haskins"). The Third Amended Class Action Complaint ("TAC") includes claims for violations of: (1) California's Unfair Competition law ("UCL"), California Business & Professions Code § 17200 *et seq.*; (2) California Consumers Legal Remedies Act ("CLRA"), California Civil Code § 1750 *et seq.*; (3) breach of implied contract; and (4) money had and received/assumpsit. The defendant is Symantec Corporation ("Symantec"). The district court had jurisdiction under 28 U.S.C. § 1332(d)(2) because the case is filed as a class action in which the matter in controversy exceeds the sum or value of $5,000,000, and greater than two-thirds of the class members are citizens of states other than the state in which the defendant is a citizen.

On June 2, 2014, the district court granted Symantec's motion to dismiss the TAC under Rules 9(b) and 12(b)(6) of the Federal Rules of Civil Procedure, holding that Haskins could not state claims under the UCL or CLRA because she did not allege she relied on a specific representation or long-term advertising campaign, or Symantec's representations were false. ER 003. The district court also found Haskins could not state a claim for breach of implied contract because she did not allege the source of the terms of the contract and how the parties became legally bound by the alleged terms. ER 006. Finally, the district court found that Haskins did not state a claim for money had and received/assumpsit because a binding agreement exists between the parties. ER 007. The district court denied Haskins leave to amend. ER 008. Judgment was entered in favor of Symantec on June 16, 2014. ER 001.

On June 12, 2014, Haskins filed a timely notice of appeal. ER 010-16. Under 28 U.S.C. § 1291, this Court has jurisdiction to review the final order of dismissal.

II. ISSUES PRESENTED

1. Whether Haskins sufficiently pleads reliance where she alleges that she bought the Product for its intended purpose, relied on specific advertisements that she read and caused her to purchase the Product, and relied on Symantec's successful branding of the Product as the leader in antivirus software protection.

2. Whether, as a matter of law, *In re Tobacco II Cases*, 46 Cal. 4th 298 (2009) precludes a plaintiff from relying on an advertising campaign that was false or misleading when plaintiff relied on it, but was not false or misleading for "decades."

3. Whether Haskins alleged the source of the terms of the implied contract and how the parties were bound by them.

4. Whether Haskins' claim for money had or received/assumpsit can be pled in the alternative to her breach of implied contract claim.

III. STANDARD OF REVIEW

This Court "review[s] *de novo* the district court's decision to grant defendant's motion[ ] to dismiss under Federal Rule of Civil Procedure 12(b)(6)." *Fayer v. Vaughn*, 649 F.3d 1061, 1063 (9th Cir. 2011). Such review is generally limited to the face of the complaint, materials incorporated into the complaint by reference, and matters of judicial notice. *N.M. State Inv. Council v. Ernst & Young LLP*, 641 F.3d 1089, 1094 (9th Cir. 2011). In undertaking this review, a court must "accept the plaintiffs' allegations as true and construe them in the light most favorable to plaintiffs." *Gompper v. VISX, Inc.*, 298 F.3d 893, 895 (9th Cir. 2002).

A motion to dismiss can properly be granted only if the complaint fails to allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the

reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not taken to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted).

IV. STATEMENT OF THE CASE

A. Symantec Successfully Branded Itself and Its Antivirus Software Products as Synonymous with Computer and Data Security

Symantec has sold computer antivirus software under the Norton brand since the early 1990s. Not surprisingly, the reason one buys Symantec's Norton-branded antivirus software is for antivirus protection. This is the reason Haskins bought her Norton AntiVirus software from Symantec. ER 184-85 (¶9);[1] ER 202-03 (¶¶68, 69).

By the time Haskins first purchased the Norton AntiVirus, Symantec and its Norton-branded software products had become synonymous with antivirus protection. This is not by accident. Symantec spent years, significant manpower, and significant capital branding itself and its products as leaders in global computer security through aggressive and effective multi-media marketing and advertising campaigns. ER 187-89 (¶¶17, 18, 20). It very effectively advertises its antivirus software products as providing antivirus protection. As Symantec explained: "Our world-renowned expertise in protecting data, identities and interactions gives our customers confidence in a connected world." ER 186 (¶14 n.4). The Symantec antivirus products at issue are Norton AntiVirus, Norton SystemWorks (Norton Utilities and Norton GoBack), Norton Antivirus Corporate Edition, and Norton Internet Security (collectively, the "Products"). ER 181 (¶1).

[1] All "ER" cites are to Appellant's Excerpts of Record filed concurrently herewith.

To achieve global recognition as the leading provider of computer and data security via the Products, several years before Haskins first bought her Norton AntiVirus software, Symantec devoted thousands of employees and billions of dollars to marketing and advertising. ER 187 (¶16). In 2006, in celebration of selling 200 million Norton products worldwide, Symantec stated: "Symantec and the Norton brand have been synonymous with comprehensive Internet security protection for more than 20 years and our goal from day one has been to give people peace of mind with the kind of reliable Internet protection that only Symantec can deliver…." ER 188 (¶19). According to Symantec's 2012 Norton marketing guidelines, Symantec "worked diligently to create tremendous brand equity. Today, the Symantec brand is our most valuable asset and, combined with the Norton and VeriSign names, provides the ultimate confidence needed to perform online transactions and other activities for consumers all over the world." ER 187 (¶16).

Symantec explained in a 2006 press release that the Norton "products give users the security of knowing that they have the most complete virus protection possible" and "provide automatic protection against viruses and other malicious code at all entry points, including e-mail attachments and Internet downloads." ER 190 (¶23). In another press release from 1996, Symantec represented that the Norton Products are backed by the Symantec AntiVirus Research Center (SARC), described as the industry's definitive antivirus research facility comprised of dedicated team of employees "whose sole mission is to provide swift, global responses to computer virus threats, proactively research and develop technologies that eliminate such threats and educate the public on safe computing practices." *Id*. (¶24).

Symantec's branding strategy also included the SARC News Bureau, formed by Symantec in February 1997 as "an information center for the media only" where editors and producers can "contact the SARC News Bureau … on topical issues such as computer virus threats, virus alerts, education and awareness, anti-virus protection, research on new platforms and vulnerabilities, technology and easy anti-virus protection through Norton AntiVirus products" for the purpose of "assist[ing] the media in disseminating information to the public" and "spread[ing] the word and help[ing] educate and protect the public." ER 191 (¶25).

Integral to Symantec's branding is the "Symantec Yellow" packaging on all of its Norton-branded products that is immediately identifiable to consumers looking for computer security software. ER 186 (¶13). "Symantec Yellow" is a specially formulated and proprietary color that is unique to Symantec. *Id.* This identifiable product packaging, together with Symantec's advertising message described below, has made Symantec and its Norton products synonymous with computer and data security. *Id.* Symantec notes that "[c]onsistent use of color contributes a great deal to the successful impression of the Symantec and Norton brands on the public mind." ER 191 (¶26). In its 2000 "Brand Guidelines," Symantec explained that its goal was for "Symantec Yellow and Symantec Black [to] appear across all communications as the primary colors to represent the Symantec brand." *Id.* Symantec recognizes the effectiveness of its branding and touts itself as a leader in "product brand recognition." ER 186 (¶14).

In fact, the Norton brand and Symantec Yellow are so strongly associated with computer and data security that Symantec cross-branded the Norton brand by integrating it into other of its products and services, such as the "Norton Secured Seal," which is a combination of "the VeriSign checkmark and the industry-leading Norton brand." ER 186-87 (¶15). According to Symantec, the "Norton Secured Seal is the most recognized trust mark on the Internet," being "displayed

more than half a billion times per day in 170 countries on websites and in search results on enabled browsers." *Id.*

Since at least 1996, in connection with its recognizable Symantec Yellow packaging, Symantec has consistently advertised the Products as providing antivirus protection, including protecting computers and data from malware, viruses, spyware, and hackers. ER 192 (¶28). Symantec made (and continues to make) these representations through a variety of media, including Internet, point-of-sale displays, and the Products' packaging and labeling. *Id*. (¶29).

In 2008, when Haskins first purchased Norton AntiVirus directly from Symantec's website, Symantec advertised the product on its website as having the following computer and data security attributes: "Advanced antivirus software with spyware protection" with the following benefits for consumers: "Stay protected with the world's most trusted antivirus software"; "Key Technologies" are "Antivirus," "Antispyware," "Internet Worm Protection" and "Rootkit Detection"; "Detects and removes spyware and viruses"; "Blocks spyware and worms automatically"; "Antivirus protection for email and instant messaging"; "Prevents virus-infected emails from spreading"; and "Rootkit detection finds and removes hidden threats." ER 193 (¶33); ER 251 (Ex. A at 30). Consistent with this messaging, the Norton AntiVirus webpages prior to 2008 demonstrate that the focus of the marketing and advertising for the product was primarily, if not solely, centered on providing computer and data security. ER 193 (¶32); ER 294-408 (Ex. E). Symantec made the same computer and data security messaging in press releases, on product packaging, and in print, electronic, and televised media. ER 193-94 (¶34); ER 222 (Ex. A at 1); ER 234 (Ex. A at 13); ER 251 (Ex. A at 30); ER 261 (Ex. A at 40); ER 273 (Ex. A at 52); ER 279 (Ex. A at 58).

Moreover, in a 1998 Norton AntiVirus press release, Symantec described the product as:

> [A] multi-tier strategy that integrates products at the desktop, server, GroupWare server, Internet gateway and firewall levels to provide users with the most comprehensive virus detection and repair. The products provide users the security of knowing they have the most complete protection available…Norton AntiVirus provides users with 100 percent detection and repair of in-the-wild viruses…In addition, Norton AntiVirus users receive cutting-edge protection against unknown file, boot and macro viruses….

ER 192-93 (¶31); ER 409-559 (Ex. F).

Similarly, from 2006 through 2012, Symantec's webpages consistently represented that the Norton SystemWorks has the following computer and data security product attributes: "Protects against viruses, spyware, and other threats"; "Defend and enhance the performance of your PC"; "Detects and removes viruses and spyware"; "Blocks spyware and worms automatically"; "Prevents virus-infected emails from spreading"; "Finds and removes hidden threats"; "Provides fast, light, and continuous protection against viruses, spyware, worms, bots, and other threats"; "Deliver[s] up-to-the-minute protection against new threats"; and "Provides multilayered protection working in concert to stop threats before they impact you." ER 194-95 (¶37); ER 228 (Ex. A at 7); ER 235 (Ex. A at 14); ER 237 (Ex. A at 16); ER 249 (Ex. A at 28); ER 258 (Ex. A at 37).

Symantec's advertising for the Norton AntiVirus Corporate Edition was the same. From 2006 through 2012, Symantec's webpages for Norton AntiVirus Corporate Edition represent that the product has the following computer and data security attributes: "Symantec AntiVirus combines industry-leading, real-time malware protection for desktops and servers"; "Advanced, enterprise-wide virus protection and monitoring from a single management code"; "Effective protection from spyware and adware"; "guards against unauthorized antivirus access and

attacks, protecting users from viruses that attempt to disable security measures"; "Detects and prevents spyware from spreading throughout the company infrastructure"; and "Guards product from unauthorized access and attacks through integrated tamper protection." ER 195-96 (¶39); ER 226 (Ex. A at 5); ER 232 (Ex. A at 11); ER 242 (Ex. A at 21); ER 249 (Ex. A at 28).

Symantec advertised Norton Internet Security the same way. From 2006 through 2012, Symantec represented on its website that Norton Internet Security had the following computer and data security product attributes: "Protect your computer from viruses, hackers, spyware, and spam with comprehensive security"; "Stay protected from online threats"; "Protection for up to 3 PCs"; "Blocks online identity theft"; "Detects and eliminates spyware"; "Removes viruses and Internet worms"; and "Protects against hackers." ER 196-97 (¶41); ER 224 (Ex. A at 3); ER 239 (Ex. A at 18); ER 247 (Ex. A at 26); ER 254 (Ex. A at 33); ER 264 (Ex. A at 43); ER 268 (Ex. A at 47); ER 281 (Ex. A at 60).

As discussed further below, Symantec knowingly and intentionally failed to live up to its computer and data security protection representations because beginning in 2006, the Products sold by Symantec contained compromised source code that left the Products incapable of providing the advertised computer and data security, and made Haskins' computer and data and other purchasers' computers and data more vulnerable to attack by hackers and other criminals. ER 197 (¶43). As such, Haskins and other consumers who purchased the Products did not receive what they paid for.

B. Haskins Read and Relied on Symantec's Computer and Data Security Advertising

In February 2008, Haskins purchased Symantec's Norton AntiVirus software online for $39.99, and subsequently renewed the product annually each year through 2011. ER 184-85 (¶9); ER 202 (¶¶66-67). Not surprisingly,

Haskins purchased the Norton AntiVirus software because she wanted antivirus protection. ER 184-85 (¶9); ER 202-03 (¶68). When Haskins purchased Norton AntiVirus on Symantec's website, and each time she renewed her license, she read specific representations on Symantec's website "that Norton AntiVirus provides computer, data and email security by, *inter alia*, blocking viruses and spyware" and she relied on those statements in making her purchases. ER 184-85 (¶9); ER 203-04 (¶70); *see also* TAC, Ex. A (Symantec's website printout from 2008). Indeed, the only reason anyone reasonably would buy the Norton AntiVirus software is for antivirus protection. As described above, Haskins specifically alleges that when she initially purchased the product in 2008, Symantec represented on its website that Norton AntiVirus was "[a]dvanced antivirus software with spyware protection" and had several product attributes all relating to computer and data security. ER 193 (¶33).

When making her purchases, Haskins also saw and recognized the Symantec Yellow packaging for the Norton AntiVirus software on Symantec's website. ER 202-03 (¶68). As a result of repeated exposure to Symantec's branding, including the ubiquitous Symantec Yellow packaging, Haskins came to believe, just as Symantec intended, that the Norton-branded antivirus product would provide the comprehensive computer and data security advertised. ER 203 (¶69). Consistent with Symantec's advertising campaign, Haskins became aware of the Norton brand and Symantec Yellow packaging in the mid-2000s through a combination of direct advertising, print advertising, email advertising, Internet advertising and display advertising to the point that "Norton" and "Symantec Yellow" became synonymous with computer and data security. *Id.*

For example, Haskins subscribed to People Magazine until 2011 where she saw and read numerous Norton AntiVirus print advertisements containing the "Symantec Yellow" color scheme. *Id.* Since 2008, she also has regularly read

other magazines including Newsweek, Women's Day, Redbook, Good Housekeeping, and Family Circle that all consistently advertised Norton AntiVirus with the Symantec Yellow as providing computer and data security. *Id.* Haskins also received periodic Symantec and Norton AntiVirus marketing emails and was regularly exposed to Symantec's advertisements on websites and Internet search engine pop-up ads. *Id.* All of the advertisements Haskins viewed uniformly displayed the "Symantec Yellow" box and color scheme and conveyed the same message: Norton AntiVirus would protect her computer and data from viruses, spyware, and malware and thus make her computer and data more secure. *Id.*

Haskins, in fact, expressly alleged that:

> Prior to purchasing Norton AntiVirus in February 2008, and prior to annually renewing her Norton AntiVirus license, Plaintiff was repeatedly exposed to, read and relied on Symantec's advertisements for Norton AntiVirus in various magazines, including People, Newsweek, and Good Housekeeping. She was also exposed to, read and relied on Symantec's advertisements for Norton AntiVirus on various websites and search engines as pop-up ads and click through ads, on Symantec's website each time she renewed her Norton AntiVirus license annually online, and in displays at retail stores, such as Best Buy. All of these advertisements uniformly displayed the ubiquitous "Symantec Yellow" box and "Symantec Yellow" color scheme, and conveyed the message that Norton AntiVirus would protect her computer and data from viruses, spyware and malware.

ER 194 (¶35).

C. Symantec's Computer and Data Security Advertising Was Deceptive

Symantec's computer and data security advertising message conveyed to Haskins and other purchasers that Symantec's Products provide comprehensive computer and data security. ER 184-85 (¶9); ER 192 (¶28); ER 203-04 (¶70). Beginning in 2006, however, these representations were false because the source code for the Products was stolen from Symantec, leaving the Products

compromised and computers and data owned by Haskins and other Product purchasers accessible to hackers, data thieves, and the public worldwide – thereby, rendering the Products incapable of providing the advertised comprehensive computer and data security. ER 197 (¶¶42-43); ER 198 (¶45).

The stolen and compromised source code at the heart of the Products is software code written by programmers in a high-level computer language (Java, C/C++ or Pearl). ER 198 (¶47). Source code is referred to as the "source" of a software program and contains information that tells the software program how to function. *Id.* Source code also often contains comments that explain sections of the code so that other programmers understand what the source code does without requiring hours to decipher it. ER 198-99 (¶48). Software development companies like Symantec closely guard their source code because it is considered the "crown jewels" of the software and if in the wrong hands could be used to reverse engineer the product. ER 199 (¶¶49, 50). Indeed, the stolen and compromised source code at issue in this case is the "crown jewels" of the Products. ER 199 (¶49).

In 2006, hackers accessed Symantec's networks and stole the source code for the 2006 versions of the Products. ER 200 (¶56). The stolen source code included instructions and comments made by Symantec engineers to explain the design of the software. ER 198-99 (¶48). Despite the theft, Symantec continued to use elements of the 2006 stolen source code in subsequent versions of the Products, including the Norton AntiVirus software purchased and renewed by Haskins. ER 200 (¶57). With the source code for the Products in the hackers' possession, the Products could no longer perform the comprehensive advertised computer and data security. ER 198 (¶45). In fact, use of the Products made purchasers' computers and data more vulnerable to attack by viruses. ER 200 (¶57); ER 204 (¶71).

It was not until January 5, 2012, after Symantec unsuccessfully attempted to purchase the hackers' silence and the hackers published portions of the stolen source code and a description of an application programing interface (API) for the Products on the Internet, that Symantec publically acknowledged the 2006 source code theft. ER 199-200 (¶¶51-54). Symantec admitted that the hackers had stolen the source code for two of its enterprise security products (Symantec Endpoint Protection 11.0 and Symantec Antivirus 10.2). *Id*. (¶54). Although Symantec initially denied its internal network had been hacked, it subsequently confirmed the Products' source code was stolen as part of the 2006 breach. ER 200 (¶¶55, 56). Symantec also admitted it knew as early as 2006 that its systems had been breached but did not perform a thorough investigation of the breach to determine precisely what had been stolen. *Id*. (¶56).

Symantec failed to warn Haskins and other Product purchasers that the source code had been stolen and compromised and their computer and data security software was not secure, yet continued to sell the Products as advertised. Symantec warned only purchasers of pcAnywhere of "a slightly increased security risk." *Id*. (¶58). Symantec advised it was "in the process of … provid[ing] remediation steps to maintain the protection of their devices and information." *Id.* No efforts were made to inform or warn other Product purchasers, including Haskins.

However, in a 15-page Technical White Paper issued on January 23, 2012, titled "Symantec pcAnywhere Security Recommendations," Symantec reversed course and admitted that "[m]alicious users with access to the source code have an increased ability to identify vulnerabilities and build new exploits," and pcAnywhere customers "not following general security best practices are susceptible to man-in-the-middle attacks which can reveal authentication and session information." ER 200-01 (¶59). Symantec's suggested fix for users

involved "disabling the product until Symantec release[d] a final set of software updates that resolve currently known vulnerability risks." *Id.* Symantec also admitted in the White Paper:

> If the malicious user obtains the cryptographic key they have the capability to launch unauthorized remote control sessions. This in turn allows them access to systems and sensitive data. If the cryptographic key itself is using Active Directory credentials, it is also possible for them to perpetrate other malicious activities on the network.

ER 201 (¶60).

Instead of properly informing Haskins and other Product purchasers of the source code breach, however, Symantec continued to cover it up. *Id*. (¶61). In fact, Symantec engaged in private negotiations with the hackers for a payout in exchange for destroying the stolen source code and not publishing any more of it on the Internet. *Id.* Incredibly, as part of the negotiations, Symantec requested the hackers lie by issuing a false public statement that the hackers "lied about the hack." *Id.* The negotiations ultimately broke down, the complete stolen and compromised source code was published on the Internet, and the truth Symantec worked so hard to suppress came out. ER 202 (¶62). On March 9, 2012 and September 25, 2012, Symantec confirmed the stolen source code posted on the Internet was "authentic". *Id*. (¶64).

D. Haskins' Claims

Haskins alleges Symantec's conduct violates the UCL and CLRA, breaches an implied contract, and results in money had and received/assumpsit.

"[T]he primary purpose of the unfair competition law … is to protect the public from unscrupulous business practices." *Consumers Union of U.S., Inc. v. Alta-Dena Certified Dairy*, 4 Cal. App. 4th 963, 975 (1992). Because the statute is framed in the disjunctive, a business practice need only meet one of the three

criteria ("unlawful," "unfair," or "fraudulent") to violate the UCL. *Elder v. Pacific Bell Telephone Co.*, 205 Cal. App. 4th 841, 856 (2012).

Haskins' UCL claim is brought under each of the UCL's three prongs. ER 211-14 (¶¶97-116). Haskins alleges Symantec violated the fraudulent prong by misrepresenting through its advertising campaign that the Products would provide comprehensive antivirus protection and computer and data protection when, in fact, the Products made her computer and data less secure and could not provide the antivirus protection advertised. ER 211-13 (¶¶100-04); ER 214 (¶111). Haskins similarly alleges violation of the unlawful prong based on Symantec's violation of the CLRA, California's fraud and deceit statutes, and California's False Advertising Law, Cal. Bus. & Prof. Code § 17500, *et seq*. ER 211 (¶98). Haskins' unfair prong claim is that Symantec sold antivirus software that could not provide antivirus protection and protect her computer and data as advertised. ER 214 (¶¶112, 113).

Similar to Haskins' UCL fraudulent prong claim, Haskins also alleges Symantec violated the CLRA by representing that the Products have characteristics, uses and/or benefits and are of a certain quality (*i.e.*, that they provide antivirus protection) when the Products do not, and advertising the Products with the intent not to sell them as advertised. ER 208 (¶86). Haskins alleges that in addition to making affirmative representations regarding the Products' antivirus protection and computer and data security capabilities, Symantec also violated the CLRA by failing to disclose to Haskins that the Products' source code was compromised and thus, the antivirus software actually made Haskins' computer and data less secure. ER 209 (¶87).

Haskins also alleges the parties entered into an implied contract for the sale of antivirus software. ER 215 (¶120). Haskins alleges Symantec sold her antivirus software that would provide comprehensive antivirus protection and

computer and data security in exchange for the money Haskins paid Symantec. ER 215-16 (¶121). Haskins further alleges Symantec breached this implied contract by failing to provide Haskins with antivirus software that could provide the antivirus protection and computer and data security promised. ER 216 (¶123).

Finally, Haskins alleges in the alternative to her breach of contract claim, a claim for money had and received/assumpsit. ER 217 (¶126). Haskins alleges Symantec took Haskins' money and wrongfully kept it when Symantec sold Haskins the Norton AntiVirus software containing the stolen and compromised source code that could not provide the advertised antivirus protection. *Id*. (¶127).

E. The Court's Previous Orders

Haskins filed her initial complaint in April 2013 and then filed a First Amended Complaint ("FAC") in May 2013. ER 597. Symantec moved to dismiss the FAC arguing, among other things that Haskins lacked Article III standing. ER 598. Misreading the complaint, the district court granted Symantec's motion on the narrow ground that Haskins failed to allege the Symantec product she purchased is one of the Products at issue. *Id.* Haskins amended her allegations accordingly and filed her Second Amended Complaint ("SAC"). *Id.* Symantec then moved to dismiss the SAC on the grounds that Haskins did not plead her claims with sufficient particularity under Rule 9(b) and could not state a claim upon which relief could be granted. *Id.*

The district court granted Symantec's motion to dismiss the SAC with leave to amend. ER 613. As is relevant here, with respect to Haskins' CLRA and UCL claims, the district court held that Haskins failed to plead "the specific advertisement or representation on which she viewed, and on which she relied, in making her purchase" as the court found was required by *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1126 (9th Cir. 2009). The district court recognized that after this Court decided *Kearns*, the California Supreme Court held in *Tobacco II* that

"plaintiffs can state a UCL claim for a fraudulent advertising campaign *without* demonstrating that they actually viewed any specific advertisement." ER 602 (citing *Tobacco II*, 46 Cal. 4th at 327). However, the district court found this Court's ruling in *Kearns* and the subsequent ruling by the California Supreme Court in *Tobacco* could not be reconciled because "[i]f Plaintiff can prevail at trial without demonstrating that she saw any specific advertisement, it would make little sense to interpret Rule 9(b) to require dismissal of her claim at the pleading stage for failing to include a specific allegation that she saw a specific advertisement." ER 602.

The district court concluded that *Tobacco II* was an "exception" to the general rule under Rule 9(b) that a plaintiff must plead reliance on a specific representation and this "exception" only applies if Haskins can allege her claim "is the type of claim encompassed by the Tobacco II case, and also that the long-term advertising campaign to which she was exposed affected her decision to purchase the product." ER 604. The district court also found the SAC fails to allege how the computer and data security representations were rendered misleading. ER 605.

With regard to Haskins' breach of contract claim, the district court misinterpreted the claim as one for breach of express contract and found that Haskins failed to attach the alleged contract to the SAC or allege the terms verbatim. ER 611. The district court found that to the extent Haskins intended to allege a breach of implied contract claim, the SAC fails to allege "the substance of the relevant terms of Plaintiff's alleged contract with Symantec…." ER 612.

Finally, with respect to Haskins' claim for money had and received/assumpsit, the district court found that Haskins could not state a claim because there was a binding contract and Haskins was not clear she pled this claim in the alternative. ER 612-13.

F. The District Court's Current Dismissal Order

Haskins amended her complaint to further allege she bought the Norton AntiVirus software for the purpose of providing her computer and data with antivirus protection – the very reason for Symantec's Products. She further explained, in detail, Symantec's extensive and successful advertising efforts to brand itself and the Products as synonymous with computer and data security, Haskins' reliance on Symantec's advertising message and the falsity of it, the terms of the implied contract, and that her money had and received/assumpsit claim was pled as an alternative claim. ER 180-220. Symantec moved to dismiss the TAC, again arguing that Haskins could not state claims for relief. The district court granted Symantec's motion without leave to amend. ER 008.

The district court again found that Haskins did not state CLRA and UCL fraud claims because she failed to allege she relied on a specific representation in making her purchase. The district court specifically found the TAC "lacks any allegations that Plaintiff actually viewed any representation" and instead merely "alleges conclusorily that she 'relied' on a very long list of representations, and that she was 'exposed to' those representations." ER 003. The district court concluded that "[i]t is plain from the numerous iterations of the complaint in this action that Plaintiff cannot allege that she saw any specific representation." *Id.*

In ruling this way, the district court relied on its opinion in a different case, finding that because Haskins could not allege she relied on a specific representation, six "factors" should be evaluated to determine whether "the Tobacco II exception" applies:

> (1) "[A] plaintiff must allege that she actually saw or heard the defendant's advertising campaign," (2) "the advertising campaign at issue should be sufficiently lengthy in duration, and widespread in dissemination, that it would be unrealistic to require the plaintiff to plead each misrepresentation she saw and relied upon," (3) "a plaintiff seeking to take advantage of the exception should describe in the

> complaint, and preferably attach to it, a 'representative sample' of the advertisements at issue," (4) "the degree to which the alleged misrepresentations contained within the advertising campaign are similar to each other, or even identical, is also an important factor," (5) "a complaint subject to Rule 9(b)'s requirements should plead with particularity, and separately, when and how each named plaintiff was exposed to the advertising campaign," and (6) "the court must be able to determine when a plaintiff made her purchase or otherwise relied in relation to a defendant's advertising campaign, so as to determine which portion of that campaign is relevant."

ER 004 (quoting *Opperman v. Path, Inc.*, No. 13-CV-00453-JST, 2014 U.S. Dist. LEXIS 67225, *58-*67 (N.D. Cal. May 14, 2014)). The district court found that although "[s]ome of the most basic factors" enumerated by the district court "such as the first and the third, weigh in Plaintiff's favor," Haskins did not allege an advertising campaign of a duration like that alleged in *Tobacco II*. ER 004. The court held:

> Plaintiff alleges that Defendant's advertising became misleading about the time of the alleged 2006 source code theft, and she purchased the product in 2007 or 2008. This falls well short of the "decades-long" campaign in Tobacco II, the length of which made it "unreasonable" to demand that the plaintiff identify a specific representation she actually viewed.

Id.

The district court also found that "[t]he only representations" Haskins was exposed to were those made in "popular media such as magazines and websites" and Haskins failed to allege "what about these representations was rendered misleading by the 2006 source code theft." ER 005. For similar reasons, the district court found that Haskins did not satisfy Rule 9(b) because although "Plaintiff emphasize[d] representations such as '[s]tay protected,' 'detects and removes spyware,' and 'blocks spyware and worms automatically,'" Haskins "has not pled facts from which it is plausible to infer that these statements are actionably false statements of fact…." *Id.*

As to Haskins' breach of implied contract claim, the district court found that Haskins failed to allege how the contract arose and how its terms "became part of the parties' legal agreement." ER 006. Thus, the district court concluded, Symantec is not "reasonably on notice of how Plaintiff will contend the parties became bound by this contract." *Id.*

Finally, with regard to money had and received/assumpsit, the district court found, despite its prior ruling that Haskins could state such a claim if she pled it in the alternative, that a claim for money had and received/assumpsit could not exist where it was based on facts that give rise to a contract claim. ER 007. The district court found that because "the parties *do* have a binding legal agreement with regard to the software Plaintiff purchased," Haskins could not plead money had and received/assumpsit based on the same facts. ER 007-08.

The district court dismissed the entire TAC without leave to amend. ER 0008.

The district court erred with regard to each of these findings.

V. SUMMARY OF THE ARGUMENT

The district court's ruling that Haskins does not allege reliance on Symantec's advertising message because she did not identify a specific statement on which she relied is erroneous. Haskins alleges she purchased Symantec's antivirus software for the purpose of providing the antivirus protection advertised. ER 184-85 (¶9); ER 203-04 (¶¶69-70). Nothing more is needed, since she bought the product for the very reason the product was advertised and sold.

Moreover, although Haskins did so, she nonetheless is not required to point to a specific statement on which she relied to satisfy the "as a result of" causation element under the CLRA and the fraud prong of the UCL. This would place an unrealistic burden on many consumers and ignores how advertising works. Rather, Haskins need only allege "the misrepresentation was an immediate cause

of the injury-producing conduct…." *Tobacco II*, 46 Cal. 4th at 326. This does not require Haskins to allege "individualized reliance on specific misrepresentations...." *Id.*. at 328. Nonetheless, Haskins specifically alleges that prior to purchasing the Product, she saw and relied on representations on Symantec's website regarding the antivirus protection features of the Product, and on Symantec's branding of itself and its Products as leaders in antivirus protection. ER 184-85 (¶9); ER 203-04 (¶¶69- 70).

The district court's opinion that this Court's holding in *Kearns* requires reliance on a specific representation, and *Kearns* is thus inconsistent with *Tobacco II*, is erroneous. *Kearns* simply holds that when a plaintiff fails to allege the substance of a defendant's advertising campaign that lead to the plaintiff's expectations regarding a product, the plaintiff fails to sufficiently plead reliance under Rule 9(b). This is consistent with *Tobacco II*, which requires a plaintiff to plead reliance, but also holds a plaintiff may rely on the generalized message conveyed by a defendant's consistent advertising campaign.

The district court also erred in holding that *Tobacco II* requires a plaintiff to allege that the advertising campaign on which she relied was false for "decades-long." This is not what *Tobacco II* requires. As explained by several California Courts of Appeal, the key to the court's holding in *Tobacco II* is that a plaintiff's stated reason or reasons for purchasing a product are consistent with an advertising campaign to which she was exposed. Haskins alleges she was exposed to Symantec's consistent and thorough advertising campaign regarding comprehensive antivirus protection, including its branding of the Norton antivirus Products as providing antivirus protection, and that she relied on this message.

The district court's third error is its finding that Haskins does not allege Symantec's advertising message was false or actionable under Rule 9(b). The district court improperly focused on individual statements in Symantec's

advertisements and ignored Haskins' allegations that the compromised source code precluded Symantec's Products from being able to provide the advertised antivirus protection and computer and data security. Plaintiff need only allege these statements (even if true in isolation) contributed to Symantec's overall false and misleading advertising message that the Products would provide comprehensive antivirus, computer and data protection when they did not. Haskins also is not required to allege the statements are false. Under the UCL and CLRA, a representation need only have a tendency or likelihood to deceive to be actionable.

The district court's final errors are its findings that Haskins fails to allege the "source" of the implied contract terms, and cannot plead a money had or received/assumpsit claim in the alternative. Haskins alleges the implied contract was created by Symantec's promise to sell the Products for antivirus, computer and data protection, and Haskins' payment of money for the Products based on Symantec's promise. Additionally, Haskins is permitted to plead a claim of money had and received as an alternative claim to breach of contract.

VI. ARGUMENT

A. Haskins Sufficiently Alleges Reliance on Symantec's Computer and Data Security Representations Regarding the Products

Under the UCL and CLRA, a plaintiff must allege she "suffered injury in fact and has lost money or property as a result of" the alleged violation of the UCL for purposes of the UCL, and "suffer[ed] any damage as a result of the use or employment by any person of a method, act, or practice declared to be unlawful" under Civil Code § 1770(a) of the CLRA for purposes of the CLRA. Bus. & Prof. Code § 17204; Civ. Code § 1780(a). "To satisfy these requirements at the pleading stage a plaintiff must allege facts showing that he or she suffered an economic injury *caused by* the alleged violation." *Chapman v. Skype, Inc.*, 220 Cal. App. 4th 217, 228 (2013).

Although reliance is not an element of the UCL, "[b]ecause 'reliance is the causal mechanism of fraud', this requires pleading facts showing actual reliance [under the fraudulent prong], that is, that the plaintiff suffered economic injury as a result of his or her reliance on the truth and accuracy of the defendant's representations." *Id.*. (quoting *Tobacco II*, 46 Cal. 4th at 326). However, even a claim under the fraudulent prong of the UCL is not the same as a claim for common law fraud. "A [common law] fraudulent deception must be actually false, known to be false by the perpetrator and reasonably relied upon by a victim who incurs damages. None of these elements are required to state a claim … under the UCL." *Tobacco II*, 46 Cal. 4th at 312 (internal quotes and citations omitted).

Haskins' UCL claim under the "unfair" prong, that Symantec sold antivirus software that could not provide antivirus protection, does not require proof of reliance. *See* ER 204 (¶114); *Tobacco II*, 46 Cal. 4th at 325 n.17. Similarly, under the language of the CLRA, reliance is not a stated requirement. It merely requires "any damage as a result of" a prohibited act. *See* Cal. Civ. Code § 1780(a). One could be harmed by a violation of the CLRA that is not reliance based. For example, if a retailer was able to raise the price it charged for a product as a result of making a false claim about the product that violates the CLRA, then a plaintiff who paid the inflated price could recover because he or she paid more than he or she would have "as a result of the use or employment by any person of a method, act, or practice declared to be unlawful" by the CLRA, even though he or she did not rely on the false claim. *Id*. Nonetheless, like Haskins does here, a plaintiff may plead reliance as the form of causation satisfying the CLRA. *See, e.g., Stearns v. Ticketmaster Co.*, 655 F.3d 1013, 1020, 1022 (9th Cir. 2011).

The district court found that Haskins could not allege CLRA or UCL fraud prong claims under Rule 9(b) because Haskins does not allege she relied either on a specific representation or a long-term advertising campaign that was false for a sufficient duration. ER 002-04. The district court erred by overlooking Haskins' allegations that she bought the Norton AntiVirus software to obtain the antivirus protection advertised and which is the very purpose of the product, she saw and relied on specific representations in Symantec's advertising, Symantec branded itself and its Norton software products as the preeminent antivirus software so successfully that the color "Symantec Yellow" was synonymous with antivirus protection, and Symantec used that color on its packaging and in its print and website advertising campaigns. Haskins' allegations far exceed the Rule 9(b) requirements.

1. Although Reliance on an Individual Statement Is Not Required, Haskins Nonetheless Alleges One

The district court erroneously found that Haskins does not sufficiently plead reliance under Rule 9(b) because she "cannot allege that she saw any specific representation." ER 003. The district court erred as a matter of law and ignored the facts pled in the TAC. The UCL and CLRA do not require reliance on a specific representation, and Rule 9(b) does not change the elements of the UCL or CLRA. Nonetheless, Haskins alleged reliance on specific representations she saw before her purchases.

The district court's legal error began in its dismissal of Haskins' SAC where it found Haskins failed to satisfy Rule 9(b) because she did not "identify any specific representation she actually viewed." ER 002. The district court reasoned that reliance on an advertising campaign as permitted in *Tobacco II* is an "exception" to the general rule stated in *Kearns* that Rule 9(b) requires a plaintiff plead the specific representation on which she relied. ER 601-02. But that is not

what *Kearns* or Rule 9(b) requires. *Kearns* is not inconsistent with *Tobacco II* and *Tobacco II* is not an exception.

In *Kearns*, the plaintiff alleged that Ford Motor Company and its dealerships violated the CLRA and UCL by representing that certain late model used vehicles, known as CPO vehicles, were put through a rigorous inspection process to certify that their safety, reliability, and road-worthiness were superior to other non-certified used vehicles. 567 F.3d at 1122. Specifically, the plaintiff alleged that "Ford's marketing materials and representations led him to believe that CPO vehicles were inspected by specifically trained technicians and that the CPO inspections were more rigorous and therefore more safe." *Id.* at 1125. The advertisements did not actually state that the CPO vehicles were more reliable or that the inspections were more rigorous. Instead, these were conclusions the plaintiff drew from the advertisements. But the content of those advertisements from which plaintiff drew these conclusions were not alleged.

On appeal from the district court's grant of dismissal under Rule 9(b), this Court noted that when determining whether Rule 9(b) is satisfied, where it is applicable, "'a federal court will examine state law to determine whether the elements of [that fraud-based claim] have been pled sufficiently to state a cause of action….'" *Id.* (quoting *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1103 (9th Cir. 2003)). In examining the plaintiffs' allegations, the *Kearns* court held that the plaintiff failed to plead the elements of his fraud-based UCL and CLRA claims with specificity to satisfy Rule 9(b) because he did not allege which advertisements he was exposed to or what the television advertisements or other sales material specifically stated that led him to believe that the CPO vehicles were inspected and safer. *Id.* at 1126. As a result, Ford did not have enough information to "respond to the alleged misconduct." *Id.*

Thus, although the plaintiff in *Kearns* alleged the source of the misconduct (the television advertisements and sales materials) and the expectations he developed from those sources (CPO vehicles were inspected and were safer), he failed to allege what it was about the advertisements that led him to have those expectations.

The holding in *Kearns* is not at odds with *Tobacco II* and does not create inconsistencies with the requirements of Rule 9(b). *See* ER 602 ("It is very difficult to reconcile Kearns with Tobacco II."). Since federal courts look to substantive state law to determine if the elements of a state fraud-based claim satisfy Rule 9(b), *Tobacco II* simply further informs federal courts on what must be pled with specificity to state a UCL fraud prong. *Kearns*, 567 F.3d at 1125; *Vess*, 317 F.3d at 1103. The district court was not to look to *Tobacco II* as some sort of "exception" to Rule 9(b), but rather, for the elements Haskins is required to plead to state a claim.

The *Tobacco II* court holds that although in a misrepresentation case under the UCL fraud prong, a plaintiff must prove reliance to satisfy the "as a result of" elements of these claims, a plaintiff need only demonstrate that "the misrepresentation was an immediate cause of the injury-producing conduct…." 46 Cal. 4th at 326. This is consistent with *Kearns*, which held the plaintiff did not allege what the advertisements said that led him to his assumptions regarding the CPO vehicles, and thus, he did not allege the misrepresentation was a cause of his purchase (the injury-producing conduct). *See Kearns*, 567 F.3d at 1126.

The *Tobacco II* court recognized, however, that proof of reliance does not require a plaintiff to "demonstrate individualized reliance on specific misrepresentations…." 46 Cal. 4th at 327. In arriving at this holding, the *Tobacco II* court explained that "[t]his principle is illustrated in a pair of tobacco case decisions that upheld verdicts for the plaintiffs against substantial evidence

challenges, specifically focusing on the sufficiency of the evidence supporting reliance." *Id.*

In both cases, *Boeken v. Philip Morris, Inc.*, 127 Cal. App. 4th 1640 (2005) and *Whiteley v. Philip Morris, Inc.*, 117 Cal. App. 4th 635 (2004), plaintiffs admitted evidence concerning defendant's extensive campaigns "to conceal the health risks of its product while minimizing the growing consensus regarding the link between cigarette smoking and lung cancer and, simultaneously, engaging in 'saturation advertising targeting adolescents, the age group from which new smokers must come.'" *Tobacco II*, 64 Cal. 4th at 327 (quoting *Whiteley*, 117 Cal. App. 4th at 647). Plaintiffs then "testified that their decision to begin smoking was influenced and reinforced by cigarette advertising, though neither could point to specific advertisements," and that "despite awareness of the controversy surrounding smoking, he or she believed the tobacco industry's assurances…." *Id.* Based on these records, the courts in both *Boeken* and *Whiteley* concluded that there was "substantial evidence" of reliance on defendants' misrepresentations. *Id.* at 327-28. Specifically, the *Boeken* court found "that there was substantial evidence that [plaintiff] began to smoke '***for reasons that track Philip Morris's advertising of the time***.'" *Id.* at 327 (quoting *Boeken*, 127 Cal. App. 4th at 1663) (emphasis added).

The *Boeken* and *Whiteley* courts were able to find reliance because plaintiffs' expectations regarding the cigarettes (that the cigarettes were safe) were consistent with defendant's advertising message at the time plaintiffs were exposed to them. By contrast, the plaintiff in *Kearns* did not allege any misrepresentations that tracked his expectations of the CPO vehicles.

The rule that reliance merely requires a plaintiff to allege an expectation that tracks representations a defendant made in the advertisements to which the plaintiff was exposed is further explained in *Hale v. Sharp Healthcare*, 183 Cal. App. 4th

1373, 1385-86 (2010). There, plaintiff alleged defendant misrepresented in its hospital admission agreement that it would charge "its regular rates" when in fact it charged plaintiff higher rates. Plaintiff did not specifically allege she "relied" on any representations in the admission agreement. However, plaintiff did allege that "at the time of signing the contract, she was *expecting* to be charged 'regular rates,' and certainly not the grossly excessive rates that she was subsequently billed." *Id.* at 1385. The court found reliance could be inferred from this allegation since there was no question that plaintiff was exposed to the contract, "the difference between 'expecting' to be charged regular rates and 'relying' on being charged regular rates is a distinction without a difference." *Id.* at 1386; *see also Bardin v. DaimlerChrysler Corp.*, 136 Cal. App. 4th 1255, 1275 (2006) ("In order to be deceived, members of the public must have had an expectation or an assumption about" the product based on the defendant's conduct.). Thus, her reliance was properly inferred because her expectations regarding the rates were consistent with defendant's representations to which she was exposed.

Accordingly, under the substantive law of the UCL fraud prong and the CLRA, Haskins is only required to allege she had expectations regarding Symantec's Products that tracked Symantec's advertising message or representations regarding the Products. This requirement is readily met where, as here, a product is purchased for its intended purpose. The district court's finding that Haskins is required to point to a specific misrepresentation on which she relied is erroneous.

The district court also erroneously ignored the allegations in the TAC. Haskins alleges she purchased Symantec's antivirus software for antivirus protection – Symantec's intended purpose of the product. ER 184-85 (¶9); ER 202-03 (¶68).

Haskins not only alleges she developed particular expectations of the Symantec Products consistent with Symantec's computer and data security advertising message to which she was exposed (and thus relied on that message), she identifies specific statements on which she relied. Haskins alleges that "[i]n deciding to purchase the product, Plaintiff relied on Symantec's claim on its retail website that Norton AntiVirus provides computer, data, and email security by, *inter alia*, blocking viruses and spyware." ER 184-85 (¶9); ER 203-04 (¶70).

Attached to the TAC is an exemplar printout of Symantec's website where Haskins made her purchases. ER 221-282 (Ex. A). The website printout from 2008, the year Haskins made her initial purchase, contains several statements regarding computer and data security including that the Norton AntiVirus software "[d]etects and removes spyware and viruses"; "[b]locks spyware and worms automatically"; has "[a]ntivirus protection for email and instant messaging"; and the "[r]ootkit detection finds and removes hidden threats." ER 241 (Ex. A at 22). Haskins alleged she "purchased the Norton Antivirus software for the reasons advertised…." ER 184-185 (¶9). Haskins alleges she "never would have purchased Norton AntiVirus for her Dell desktop computer and/or renewed it on an annual basis had she known the source code was stolen and compromised years ago, and her computer and data were vulnerable to hackers, viruses, spyware and/or other malware." ER 204 (¶71).

Thus, Haskins alleged she had an expectation about the Norton AntiVirus software (that it would provide the complete advertised antivirus protection and not make her computer and data less secure), which was consistent with the Product's intended purpose and Symantec's corresponding advertising message and branding to which Haskins was exposed. Haskins, therefore, sufficiently alleges reliance. The district court erred in finding otherwise.

2. *Tobacco II* Does Not Prevent, as a Matter of Law, Reliance on an Advertising Message that Is False or Misleading for Less than Decades

After finding Haskins does not allege reliance on a specific representation, the district court then held that *Tobacco II* does not apply to Haskins' claims because, according to the district court, *Tobacco II* only applies when a defendant's advertising campaign is false for decades. ER 004. The district court held that despite Symantec's decades-long Norton AntiVirus advertising campaign, the two year period between the time Symantec's representations regarding its computer and data security became false (2006) and when Haskins made her purchase (2008) fell "well short of the 'decades-long' campaign" in *In re Tobacco II*. *Id.* Under the district court's holding, a short advertising campaign, no matter how devious, could justify escaping liability because the duration of the fraud was short. That is not and cannot be the law. The district court erred as a matter of law.

The question is whether the advertising message that was conveyed was deceptive at the time the plaintiff relied on it. This aspect of *Tobacco II* merely recognizes that a long term advertising campaign that consists of many different and varied components over time can effectively convey a specific advertising message, which a plaintiff may rely on. The message does not have to be false for the entirety of the advertising campaign nor for any specific amount of time prior to plaintiff's reliance on it as long as it was false at the time of plaintiff's reliance. Nothing in *Tobacco II* precludes an action where the message becomes false because of changed circumstances prior to plaintiff's reliance, as alleged here.

The court's holding in *Tobacco II*, that a plaintiff need not "demonstrate individualized reliance on specific misrepresentations" to state a claim under the CLRA and the fraudulent prong of the UCL, is not premised in any way on how

long the advertising message was false, or even the duration of the advertising campaign at issue. 46 Cal. 4th at 327. Rather, the question is what was the marketing message plaintiff received from the advertising campaign and whether that message was deceptive at the time plaintiff acted.

This issue was squarely decided by the California Court of Appeal, Second District, in *Morgan v. AT&T Wireless Servs., Inc.*, 177 Cal. App. 4th 1235 (2009), but the district court here ignored it. *See* ER 054-55 (discussing *Morgan*). In *Morgan*, plaintiffs alleged AT&T misrepresented advanced features of its networks for the T68i telephones. 177 Cal. App. 4th at 1257-58. The plaintiffs alleged that before buying their telephones, "they encountered AT&T advertisements and press releases explaining the advanced features of the T68i and the improvements AT&T was making and was going to make to its GSM/GPRS network." *Id.* at 1257. The plaintiffs, however, did not allege a specific advertisement on which they relied.

On appeal from the trial court's grant of AT&T's demurrer, AT&T argued that plaintiffs' allegations of reliance were insufficient under the UCL because they were required "to plead the specific advertisements or representations they relied upon in making their decisions to purchase the T68i." *Id.* at 1258. The Court of Appeal rejected this argument, holding that "[a]lthough the advertising campaign alleged…was not as long-term a campaign as the tobacco companies' campaign discussed in *Tobacco II*, it is alleged to have taken place over many months, in several different media, in which AT&T consistently promoted its GSM/GPRS network as reliable, improving, and expanding." *Id.* Thus, the plaintiffs' stated expectations regarding the telephones (*i.e.*, that the network had advanced features) was consistent with AT&T's representations about the network, which were advertised so consistently that it could be inferred plaintiffs were exposed to the advertising and, thus, relied on it.

The court in *Pfizer Inc. v. Superior Court* similarly addressed the issue. There, the court held that "*Tobacco II* does not stand for the proposition that a consumer who was never exposed to an alleged false or misleading advertising or promotional campaign is entitled to [UCL relief]." *Pfizer*, 182 Cal. App 4th 622, 632 (2010). The *Pfizer* court explained:

> [I]t is one thing to say that restitution can be awarded to purchasers of cigarettes where the cigarettes were marketed as part of a massive, sustained, decades-long fraudulent advertising campaign on the grounds the tobacco industry defendants 'may have … acquired' (§17203) the purchase price as a result of such pervasive fraudulent campaign. It is entirely another to say that restitution can be awarded to all purchasers of Listerine in California over a six-month period where the undisputed evidence shows many, if not most, class members were not exposed to the 'as effective as floss' campaign and therefore did not purchase Listerine because of it.

Id.

The reverse is true here. Haskins alleges she was repeatedly exposed to Symantec's representations and advertising campaign on its website, on the Internet, and in print media, regarding the computer and data security provided by the Norton AntiVirus software before she first purchased it and thereafter prior to her license renewals. ER 184-85 (¶9); ER 202-03 (¶68). Indeed, there is no purpose for Haskins to have purchased and renewed the Norton AntiVirus software for any reason other than antivirus protection and the protection of her computer and data.

Haskins alleges Symantec engaged in an advertising campaign to consistently brand, market and communicate to purchasers of antivirus protection software that Symantec and its Products are synonymous with computer and data security. ER 188-97 (¶¶18-41); ER 204 (¶71). Haskins alleges she was repeatedly exposed to these advertising campaigns. ER 184-85 (¶9); ER 202-04 (¶¶68-70). Haskins further alleges she repeatedly saw the Norton AntiVirus

"Symantec Yellow" product packaging that had become recognized as synonymous with computer and data security. ER 184-85 (¶9); ER 202-03 (¶¶68, 69). Haskins also alleges that as a result of Symantec's branding, marketing, and advertising campaigns, including the representations on its website where she purchased the Product, Haskins purchased the Norton AntiVirus software expecting it to provide computer and data security and make her computer and data secure. ER 184-85 (¶9); ER 204 (¶71). Thus, Haskins' expectations regarding the Norton AntiVirus software she purchased were consistent with Symantec's Product branding, marketing, and advertising to which she was exposed. Haskins sufficiently alleges reliance.

In erroneously dismissing Haskins' claim, the district court relied on a single unpublished district court case that, consistent with *Morgan* and *Pfizer*, simply found that the plaintiffs were not exposed to the advertising campaign at issue. ER 004 (citing *In re Actimmune Mktg. Litig.*, No. 08-cv-02376-MHP, 2009 U.S. Dist. LEXIS 103408, *39-*40 (N.D. Cal. Nov. 6, 2009) *aff'd* 464 F. App'x 651 (9th Cir. 2011)). In *Actimmune*, the court found that plaintiffs could not allege reliance because only one plaintiff was "ever actually exposed to any representations made by defendants" and that plaintiff did not allege the representations were false. 2009 U.S. Dist. LEXIS 103408, at *39-*40. The court found that plaintiffs' allegations that "it was 'likely' that prescribing doctors were exposed to defendants' representations … [was] insufficient under *Tobacco II*." *Id.* at *40. That is certainly not the case here. As discussed above, Haskins sufficiently alleges that she was repeatedly exposed to Symantec's advertising and marketing campaign.

The *Actimmune* court's additional finding that "defendants' seven year effort to market Actimmune to approximately 7,000 pulmonologists and 200,000 individuals suffering from IPF pales in comparison to the decades-long, national,

ubiquitous advertising campaign" in *Tobacco II*, merely noted that the advertising campaign was not pervasive and consistent enough to presume that plaintiffs were exposed to it. This observation, however, must be read in light of the fact that unlike Haskins, the plaintiffs in *Actimmune* did not allege they were exposed to the campaign. The *Actimmune* court's observation also cannot be read, as the district court did, that one cannot recover for false advertising unless others also have been exposed to the false advertisements.

By contrast here, Haskins alleges she was repeatedly exposed to Symantec's extensive and successful branding and advertising campaign, and her expectations regarding the Norton AntiVirus software Product she purchased were consistent with Symantec's advertising campaign and the intended purpose of the software. Haskins sufficiently alleges reliance.

B. Haskins Alleges that Symantec's Advertising Was Deceptive

The district court found that the only representations Haskins was exposed to were in "popular media such as magazines and websites" and Haskins fails to allege "what about these representations was rendered misleading by the 2006 source code theft." ER 005. The district court reasoned that this situation was unlike *Tobacco II* because there, "defendants made demonstrably false statements about the health and safety of cigarettes in their advertising." *Id.* The district court erred for at least two reasons.

First, Haskins was exposed to Symantec's advertising in more than just "popular media such as magazine and websites." *Id.* Haskins alleges she also was exposed to Symantec's repeated advertising in Symantec's marketing emails, in in-store advertisement displays and printed materials, and on Symantec's own website when she originally purchased the Norton AntiVirus product from Symantec and each time she renewed it annually. ER 184-85 (¶9); ER 203 (¶69).

Second, Haskins is not required to allege that the advertising was false. Under both the CLRA and the "fraudulent" prong of the UCL, an advertising message can either be false or "although true, is either actually misleading or which has the capacity, likelihood or tendency to deceive or confuse the public." *Kasky v. Nike, Inc.*, 27 Cal. 4th 939, 951 (2002). In *Williams v. Gerber Prods. Co.*, 552 F.3d 934, 939 n.3 (9th Cir. 2008), this Court recognized that when an advertising statement is viewed in isolation it may not be deceptive, but when viewed in the context of defendant's advertising message as a whole, it may be actionable because it contributes to the overall deceptive message. *See also Day v. AT&T Corp.*, 63 Cal. App. 4th 325, 332 (1998) (holding that the UCL covers "not only those advertisements which have deceived or misled because they are untrue, but also those which may be accurate on some level, but will nonetheless tend to mislead or deceive").

Haskins alleges Symantec's advertising that the Norton AntiVirus software would provide comprehensive computer and data security was false and misleading because the source code had been stolen and compromised, thereby making her computer and data and other Product purchasers' computers and data less secure and more prone to computer viruses. ER 197-98 (¶¶42-45); ER 204 (¶71). Thus, the computer and data security representations on Symantec's website, the very purpose of the Norton AntiVirus and the other Products, including that the Products would "[b]lock spyware and worms automatically," "[d]etect and remove spyware and viruses," provide "continuous protection against viruses, spyware, worms, bots, and other threats," were false and misleading. ER 193 (¶33); ER 194-95 (¶37); ER 195-96 (¶39); ER 196-97 (¶41). Symantec admitted the Products were compromised because of the source code theft and, as a result, purchasers' computers and data were less secure. ER 200-01 (¶¶56-60);

ER 202 (¶64). Haskins alleges that had she known this, she would not have purchased the Product. ER 184-85 (¶9); ER 204 (¶71).

Haskins' allegations that Symantec's representations regarding the Products were false or misleading are more than sufficient.

C. Haskins Alleges Actionable Statements that Comply with Rule 9(b)

The district court again missed the point of Haskins' allegations regarding Symantec's advertising campaign by ruling she fails to allege Symantec's statements were "actionably false statements" under Rule 9(b). ER 005. In doing so, the district court focused on individual statements, such as "detects and removes spyware" and "blocks spyware and worms automatically," and found Haskins "has not pled facts from which it is plausible to infer that these statements are actionably false statements of fact…." *Id.* The district court erred.

Rule 9(b) requires a plaintiff to plead the "'who, what, when, where, and how'" of the alleged misconduct. *Vess*, 317 F.3d at 1106. In a false advertising case, a plaintiff must "'set forth what is false or misleading about a statement, and why it is false.'" *Id.* As discussed above, a representation that may not be actionable in isolation may be actionable when read in the context of defendant's advertising as a whole. *See Williams*, 552 F.3d at 939 n.3; *Day*, 63 Cal. App. 4th at 332.

Haskins alleges Symantec sold the Products for the purpose of providing comprehensive antivirus protection, but the Products did not provide the protection advertised because the source code was compromised and the Products made computers and data less secure. ER 197-98 (¶¶42-45). Haskins alleges Symantec represented through specific statements on its website and in electronic and print media in its successful branding and advertising of itself and the Products that the Products provide antivirus protection, and protect her computer and data. ER 186-

97 (¶¶13-41). She alleges Symantec's representations were false because the source code for the Products, including the Norton Antivirus software, was stolen and compromised in 2006, leaving the Products incapable of protecting her computer and data as promised, and instead, exposing her to unexpected security risks. ER 197-98 (¶¶42-45); ER 204 (¶71).

The district court erred in holding that Haskins fails to allege Symantec's specific representations about the Products are false.

D. Haskins Properly Alleges a Breach of Implied Contract

The district court recognized that Haskins "sketches out what Plaintiff contends are the breached terms of this alleged implied contract," but dismissed the claim because, according to the district court, Haskins fails to allege "'the source of those claimed terms, and explain how those terms' became part of the parties' legal agreement." ER 006 (quoting SAC Order). The district court concluded that Haskins "failed to put Defendant reasonably on notice of how Plaintiff will contend the parties became bound by this contract." *Id.* The district court, however, overlooked the allegations in the TAC.

"A cause of action for beach of implied contract has the same elements as does a cause of action for breach of contract, except that the promise is not expressed in words but is implied from the promisor's conduct." *Yari v. Producers Guild of America, Inc.*, 161 Cal. App. 4th 172, 182 (2008). "'[T]he modern trend of the law favors carrying out the parties' intentions through the enforcement of contracts and disfavors holding them unenforceable because of uncertainty.'" *Amaral v. Cintas Corp. No. 2*, 163 Cal. App. 4th 1157, 1192 (2008).

Haskins alleges an implied contract existed between the parties when Symantec sold the Norton AntiVirus software to Haskins for the purpose of providing antivirus protection in exchange for money paid by Haskins to

Symantec. ER 184-85 (¶9); ER 215-16 (¶¶121, 122). Although Haskins fulfilled her obligations under the contract by paying for the Product, Symantec breached its obligations under the contract by failing to deliver what it promised – *i.e.*, an uncompromised software product fully capable of protecting Haskins' computer and data. ER 216 (¶123). Haskins, therefore, properly alleges the source of the terms of the implied contract – *i.e.*, Symantec's sale of the Products for the purpose of providing antivirus protection, including the representations it made on its website and in its electronic and print advertisements, in exchange for Haskins' money.

E. Haskins Properly Alleges an Alternative Claim for Money Had and Received/Assumpsit

The district court also erroneously dismissed Haskins' alternative claim for money had and received/assumpsit, finding that because "a binding legal agreement" exists between the parties, Haskins cannot plead around her failure to plead a breach of contract claim. ER 007-08. The district court erred, however, because money had and received/assumpsit may be pled in the alternative to a breach of contract claim. *See, e.g.*, *Steiner v. Rowley*, 35 Cal. 2d 713, 720 (1950) (a plaintiff can plead inconsistent counts).

The court's holding in *Supervalu, Inc. v. Wexford Underwriting Managers, Inc.*, 175 Cal. App. 4th 64 (2009), does not create an inapplicable "exception" to the general rule that a claim for money had and received cannot be pled at the same time as a breach of contract. *See* ER 007. Rather, in *Supervalu*, the court recognized a claim for money had and received can exist even when a contract exists where the claim is based on allegations, for example, that defendant obtained the money based not on the contract, but on a false representation. 175 Cal. App. 4th at 78-79. Here, Haskins alleges Symantec obtained her money by misrepresenting that the Products would provide comprehensive antivirus,

computer and data protection. To the extent Haskins does not state a claim for breach of contract – which she does – she states a claim for money had and received/assumpsit.

"In an action for money had and received it is generally necessary for the plaintiff to prove only his right to the money and the defendant's possession; and any facts, circumstances or dealings from which it appears that the defendant has in his hands money of the plaintiff which he ought in justice and conscience pay over to him…." *County of San Bernardino v. Sapp*, 156 Cal. App. 2d 550, 556 (1958). Haskins properly alleges she is entitled to recover the price she paid for the Norton AntiVirus software and thus, her alternative claim for money had and received/assumpsit should stand.

VII. CONCLUSION

For the reasons set forth herein, the judgment should be reversed.

Respectfully Submitted,

Dated: October 22, 2014

BLOOD HURST & O'REARDON, LLP
TIMOTHY G. BLOOD (149343)
THOMAS J. O'REARDON II (247952)
PAULA M. ROACH (254142)

By: *s/ Timothy G. Blood*
TIMOTHY G. BLOOD

701 B Street, Suite 1700
San Diego, CA 92101
Telephone: 619/338-1100
619/338-1101 (fax)
tblood@bholaw.com
toreardon@bholaw.com
proach@bholaw.com

THE COFFMAN LAW FIRM
RICHARD L. COFFMAN (4497460)
First City Building
505 Orleans Street, Suite 505
Beaumont, TX 77701
Telephone: 409/833-7700
866/835-8250 (fax)
rcoffman@coffmanlawfirm.com

BARNOW AND ASSOCIATES, PC
BEN BARNOW (0118265)
One N. LaSalle Street, Suite 4600
Chicago, IL 60602
Telephone: 312/621-2000
312/641-5504 (fax)
b.barnow@barnowlaw.com

Attorneys for Plaintiff-Appellant

CERTIFICATE OF COMPLIANCE TO FED. R. APP. 32(A)(7)(C) AND CIRCUIT RULE 32-1

Pursuant to Fed R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, I certify that the attached brief is proportionately spaced in 14-point Times New Roman, and contains 11,359 words.

Dated: October 22, 2014

By: *s/ Timothy G. Blood*
TIMOTHY G. BLOOD

STATEMENT OF RELATED CASES

Appellant Kathleen Haskins is not aware of any related cases pending in this Court.

Dated: October 22, 2014

By: *s/ Timothy G. Blood*
TIMOTHY G. BLOOD

CERTIFICATE OF SERVICE

I hereby certify that on October 22, 2014, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses denoted on the Electronic Mail Notice List.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on October 22, 2014.

s/ Timothy G. Blood
TIMOTHY G. BLOOD

BLOOD HURST & O'REARDON, LLP
701 B Street, Suite 1700
San Diego, CA 92101
Telephone: 619/338-1100
619/338-1101 (fax)
tblood@bholaw.com