UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No.	ED CV18-02388 JAK (SPx)	Date	May 15, 2020
Title	Valeria Mercado v. Audi of America, LLC, et al.		

Present: The Honorable	JOHN A. KRONSTADT, UNITED STATES DISTRICT JUDGE	
Cheryl Wynn		Not Reported
Deputy Clerk		Court Reporter / Recorder
Attorneys Present for Plaintiffs:		Attorneys Present for Defendants:
Not Present		Not Present

Proceedings: **(IN CHAMBERS) DEFENDANT'S PARTIAL MOTION TO DISMISS THIRD AMENDED CLASS ACTION COMPLAINT (DKT. 100)**

I. Introduction

On November 9, 2018, Valeria Mercado ("Mercado"), on behalf of herself and others similarly situated, brought this putative class action against Audi of America, LLC ("Audi LLC") and Volkswagen Group of America, Inc., d/b/a Audi of America, Inc. ("Audi") (collectively, "Defendants"). Dkt. 1. The Complaint advanced several causes of action, including: (i) violation of the Consumer Legal Remedies Act ("CLRA"), Cal Civ. Code § 1750 *et seq.*; (ii) violation of the California Unfair Competition Law ("UCL"), Cal. Bus & Prof. Code § 17200 *et seq.*; (iii) negligence; (iv) product liability -- design defect; (v) violation of the Magnuson-Moss Warranty Act ("MMWA"), 15 U.S.C. § 2301 *et seq.*; (vi) violation of the Song-Beverly Consumer Warranty Act, Cal. Civ. Code § 1790 *et seq.*; and (vii) violation of the statutes of certain other states that prohibit unfair and deceptive acts and practices. *Id.* at 2. The claims arose out of allegedly defective brake systems installed in certain vehicles, which cause a "high-pitched squealing noise" when used. *Id.* ¶¶ 2-4.

A First Amended Complaint ("FAC") was filed on February 22, 2019. Dkt. 53. It advanced the same causes of action presented in the Complaint, and added a second plaintiff, Jacob Whitehead ("Whitehead"). *Id.* at 2. On May 1, 2019, the parties stipulated to the filing of a Second Amended Complaint ("SAC"), which was approved. Dkt. 78. The SAC advanced the same causes of action, but replaced Whitehead with Andrea Kristy Anne Holmes ("Holmes") (together with Mercado, "Plaintiffs"), and named only Audi ("Defendant"). Dkt. 79 at 2.

On May 17, 2019, Defendant filed a motion to dismiss the SAC. Dkt. 81. On November 26, 2019, the motion to dismiss the SAC was granted, without prejudice, as to the following claims: (i) violations of CLRA and the UCL, insofar as they arose out of alleged fraud and were advanced by Mercado; (ii) negligence, (iii) product liability; (iv) violation of the MMWA; (v) violation of the Song-Beverly Warranty Act as advanced by Holmes; and (vi) violation of the statutes of states other than California. Order re Defendant's Motion to Dismiss Second Amended Class Action Complaint (the "November 26 Order"), Dkt. 97 at 17. It was denied as to all other claims. *Id.*

On December 17, 2019, Plaintiffs filed a Third Amended Complaint ("TAC") advancing the same causes of action except those as to the violation of the statutes of states other than California that

prohibited unfair and deceptive acts and practices. Dkt. 98 at 2. On December 31, 2019, Defendant filed a Partial Motion to Dismiss Third Amended Class Action Complaint (the "Motion"). Dkt. 100. Through the Motion, Defendant challenges the following claims: (i) violations of CLRA and the UCL, insofar as they arise out of alleged misrepresentation; (ii) violations of the CLRA and UCL as advanced by Mercado, insofar as they arise out of alleged fraud; (iii) violation of the UCL predicated on an alleged violation of the Secret Warranty Law; (iv) negligence; (v) product liability; (vi) violation of the MMWA; and (vii) violation of the Song-Beverly Warranty Act as advanced by Holmes. *Id.* at 6. Plaintiffs opposed the Motion on January 21, 2020. Dkt. 106. Defendant replied on February 4, 2020. Dkt. 109. A hearing on the Motion was held on March 2, 2020, and it was then taken under submission. Dkt. 110.

For the reasons stated in this Order, the Motion is **GRANTED IN PART** and **DENIED IN PART**.

II. Factual Background

A. The Parties

Mercado is a California citizen who resides in San Bernardino County. Dkt. 98 ¶ 9. Holmes is a California citizen who resides in Riverside County. *Id.* ¶ 10.

Defendant is a New Jersey corporation whose headquarters are located in Virginia. *Id.* ¶ 11. Defendant allegedly imports, distributes, services and sells certain motor vehicles, including the Audi Q7. *Id.*

B. Allegations in the TAC

1. In General

Plaintiffs advance this action on behalf of those who purchased or leased Audi Q7 vehicles for model years 2015-18. *Id.* ¶ 1. The TAC alleges that these vehicles had defective braking systems, which resulted in a high-pitched noise (the "Noise") when the brakes were used. It is also alleged that the Noise would distract or startle both drivers and those nearby. *Id.* ¶¶ 2-4. The Noise allegedly occurs when the brakes are used while a vehicle is travelling at range of speeds and in a variety of driving conditions. *Id.* ¶ 5.

It is alleged that Defendant has "long known" about the Noise through reports from dealerships, testing data, warranty data, complaint data and sales of replacement parts. *Id.* ¶ 76. Defendant allegedly did not disclose this "*per se*" safety defect. *Id.* ¶¶ 77, 90.

Plaintiffs allege that the Vehicles are covered by a New Vehicle Limited Warranty, which "states that Audi will cover any repairs to correct a manufacturer's defect in material or workmanship for 4 years or 50,000 miles, whichever occurs first." *Id.* ¶ 79. The relevant provision is as follows: "The warranty covers any covers any repair or replacement to correct a defect in manufacturer's material and workmanship (i.e., a mechanical defect)." *Id.* ¶ 80; *see also* Ex. A, Declaration of George Blake ("Blake Decl."), Dkt. 84-1 (USA Warranty and Maintenance booklet applicable to 2017 Audi Q7 vehicles); Dkt. 97 at 3-4 (taking judicial notice of Exhibit A, which "appears to be the 'New Vehicle Limited Warranty'").

2. Individual Allegations

a) Mercado

Mercado allegedly leased a new 2017 Audi Q7 from Audi Ontario on January 2, 2017, and decided to do so in reliance on Defendant's representations about the quality, reliability and safety of the Q7. Dkt. 98 ¶¶ 16-17. She alleges that, beginning in May 2017, the Noise occurred when she applied the brakes in her vehicle, and that this affected her driving. *Id.* ¶¶ 19-22.

Mercado allegedly informed Audi Ontario about the Noise "immediately." *Id.* ¶ 23. Audi Ontario allegedly inspected her vehicle several times between May 2017 and the present day. *Id.* ¶ 24. It is also alleged that a representative of the dealership told Mercado that the Noise was because "all 2017 Audi Q7 vehicles are too heavy for the brakes installed during manufacturing," but at other times declined to state a cause of the Noise. *Id.* ¶¶ 24, 26. The parts required to remedy the Noise were allegedly on back order due to the number of vehicles requiring them. *Id.* ¶ 28. "12 days after [Mercado] fil[ed] her lawsuit" in November 2018, Audi Ontario allegedly repaired it pursuant to a service bulletin issued in October 2015. *Id.* ¶ 29. Mercado allegedly would not have leased the vehicle, or paid as much for the lease, had she been aware of the Noise at the time she entered the lease. *Id.* ¶ 31.

b) Holmes

Holmes allegedly purchased a 2017 Audi Q7 from Audi San Diego on November 5, 2017. *Id.* ¶ 32. She allegedly did so based on Defendant's representations about the quality, reliability and safety of the Q7. *Id.* ¶ 33. She allegedly first heard the Noise while driving the vehicle in December 2017, and the Noise affected her driving. *Id.* ¶¶ 35-38.

Holmes allegedly informed Audi San Diego about the Noise "immediately." *Id.* ¶ 39. Audi San Diego allegedly told Holmes that the Noise was "normal," but later admitted that Defendant knew about the Noise and was developing a solution. *Id.* ¶ 40. In May 2018, Audi San Diego allegedly replaced the brakes in Holmes's vehicle. *Id.* ¶ 41. The Noise allegedly recurred in September 2018, while Holmes was backing up the vehicle. *Id.* ¶ 44. Audi San Diego allegedly inspected the vehicle on three subsequent occasions. *Id.* ¶¶ 46, 52, 55. As a result of one of the inspections, it replaced the brake rotors, and later stated that it could not cause the Noise to occur while operating the vehicle. *Id.* ¶¶ 52-55. It is alleged that the Noise has continued to occur whether the vehicle is going forward or backing up. *Id.* ¶ 56. As a result, Holmes is allegedly unable to use the vehicle for the intended purpose she had when she purchased it. *Id.* ¶¶ 57-59. Holmes allegedly would have chosen a different vehicle, or paid less for the one she purchased, had she been aware of the Noise issue at the time of purchase. *Id.* ¶ 60.

3. Class Allegations

Plaintiffs allege that the putative class, which includes "[a]ll persons in the United States who formerly or currently own or lease one or more of the Class Vehicles," may include "at or near" 100,000 consumers. *Id.* ¶¶ 97, 101. The putative class members allegedly make driving decisions, "consciously or unconsciously," as the result of the Noise. *Id.* ¶ 61. They have allegedly been advised to operate the brakes in an unsafe manner in order to avoid the Noise, and they have suffered a loss of money, property, or a loss in value of their vehicles as a result. *Id.* ¶¶ 62, 66. They allegedly did not know about

the Noise at the time of purchase, and would have made different purchasing decisions had they known about it. *Id.* ¶¶ 71-72.

III. Analysis

A. Legal Standards

Fed. R. Civ. P. 8(a) provides that a "pleading that states a claim for relief must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief . . . ." The complaint must state facts sufficient to show that a claim for relief is plausible on its face. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). The complaint need not include detailed factual allegations, but must provide more than a "formulaic recitation of the elements of a cause of action." *Id.* at 555. "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal citations omitted).

Pursuant to Fed. R. Civ. P. 12(b)(6), a defendant may move to dismiss a complaint for failure to state a claim. Such a motion may be granted when the complaint lacks a cognizable legal theory or sufficient facts to support one. *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008). In considering a motion to dismiss, the allegations of the challenged complaint are deemed true and must be construed in the light most favorable to the non-moving party. *See Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337-38 (9th Cir. 1996). However, a court need not "accept as true allegations that contradict matters properly subject to judicial notice or by exhibit. Nor is the court required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008) (quoting *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001)).

If a motion to dismiss is granted, the court should "freely give leave [to amend] when justice so requires." Fed. R. Civ. P. 15(a)(2). Although this policy is to be applied "with extreme liberality," *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 712 (9th Cir. 1990) (citation omitted), allowing leave to amend is inappropriate in circumstances where litigants have failed to cure previously identified deficiencies, or where an amendment would be futile. *See Foman v. Davis*, 371 U.S. 178, 182 (1962); *Allen v. City of Beverly Hills*, 911 F.2d 367, 373-74 (9th Cir. 1990).

B. Application

1. CLRA and UCL Claims

The first and second causes of action allege, respectively, violations of the Consumer Legal Remedies Act ("CLRA"), Cal. Civ. Code §§ 1750 *et seq*.; and the California Unfair Competition Law ("UCL"), Cal. Bus & Prof. Code §§ 17200 *et seq*. Conduct that is "likely to mislead a reasonable consumer violates the CLRA." *Wilson v. Hewlett Packard Co*., 668 F.3d 1136, 1140 (9th Cir. 2012) (citation omitted). This includes omissions. *See Daugherty v. American Honda Motor Co., Inc.*, 144 Cal. App. 4th 824, 835 (2006), *as modified* (Nov. 8, 2006). Such an "omission must be contrary to a representation actually made by the defendant, or an omission of a fact the defendant was obliged to disclose." *Id*.

With respect to the CLRA, the TAC alleges that Defendant violated Cal. Civ. Code § 1770(a), Dkt. 98 ¶ 114, which prohibits certain acts that are "intended to result" or result "in the sale or lease of goods or services to any consumer." The following are the specific violations of the CLRA that are alleged in the TAC:

1. Representing that the Vehicles have "approval, characteristics, and uses or benefits which they do not have (because they are defective)" (§ 1770(a)(5));
2. Representing that the Vehicles "are of a particular standard, quality, or grade, when they are of another (having a design defect of manufacturing defect or both)" (§ 1770(a)(7));
3. Advertising the Vehicles "as safe with the intent not to sell them as advertised" (§ 1770(a)(9)); and
4. Representing that the Vehicles "have been supplied in accordance with previous representations (being free of design or manufacturing defects), when they were not" (§ 1770(a)(16)).

Id. ¶ 112.

The UCL prohibits "unfair competition," which "include[s] any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising." Cal. Bus. & Prof. Code § 17200. The UCL claim in the TAC is premised on "fraudulent" practices likely to deceive a consumer, alleged violations of the CLRA, the Secret Warranty Law, Cal. Civ. Code §§ 1750 *et seq*., the Transportation Recall Enhancement, Accountability and Documentation Act ("TREAD Act"), 49 U.S.C. §§ 30101 *et seq*. and unfair practices which "violate[] the stated spirit" of those laws. Dkt. 98 ¶¶ 120-124.

a) Basis in Fraud

The CLRA claim is based on alleged fraud. *See* Dkt. 98 ¶ 116 ("Defendant's conduct is malicious, fraudulent, and wanton in that Defendant intentionally and knowingly provided misleading information to the public."). The UCL claim is also based in part on fraud. *Id.* ¶ 124 ("Defendant's actions and practices constitute 'fraudulent' business practices in violation of the UCL because, among other things, they are likely to deceive reasonable consumers.").

"Generally, the standard for deceptive practices under the fraudulent prong of the UCL applies equally to claims for misrepresentation under the CLRA." *Kowalsky v. Hewlett-Packard Co.*, 771 F. Supp. 2d 1156, 1162 (N.D. Cal. 2011) (citing *Consumer Advocates v. Echostar Satellite Corp*., 113 Cal. App. 4th 1351, 1360 (2003)). "For this reason, courts often analyze the two statutes together." *Id*.; *see also Paduano v. Am. Honda Motor Co. Inc*. 169 Cal. App. 4th 1453, 1468-73 (2009). Under California law, to allege fraud requires five elements: (i) a misrepresentation (false representation, concealment, or nondisclosure); (ii) knowledge of falsity ("scienter"); (iii) intent to defraud, *i.e*., to induce reliance; (iv) reasonable reliance; and (v) resulting damage*. Zambrano v. CarMax Auto Superstores, LLC*, 2014 WL 228435 at *4 (S.D. Cal. Jan. 21, 2014) (citing *Lazar v. Superior Court*, 12 Cal.4th 631, 638)). A plaintiff asserting fraud must establish that the defendant "intended to induce the plaintiff to act to his detriment in reliance upon the false representation" and that "plaintiff actually and justifiably relied upon defendant's misrepresentation in acting to his detriment." *Conrad v. Bank of Am.*, 45 Cal. App. 4th 133,

157 (1996).

Allegations of fraud are also subject to the heightened pleading requirements of Fed. R. Civ. P. 9(b). *Swartz v. KPMG LLP*, 476 F.3d 756, 764 (9th Cir. 2007); *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003); *see also Marolda v. Symantec Corp*., 672 F. Supp. 2d 992, 1002 (N.D. Cal. 2009) ("Claims of nondisclosure and omission, as varieties of misrepresentation, are subject to the pleading standards of Rule 9(b)." (citing *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1126-27 (9th Cir. 2009)).

Defendant contends that the TAC does not adequately allege misrepresentation, and that Mercado does not adequately allege fraud. Dkt. 100 at 10-13.

(1) False Representation

Defendant argues that Plaintiffs claims identify only "the conclusory puffery statement that Defendant's marketing campaigns emphasized 'the quality, reliability, and safety of Defendant's vehicles.'" Dkt. 100 at 10 (citing Dkt. 98 ¶¶ 17, 33).

As in the SAC, the TAC does not include any allegations that Defendant affirmatively represented that the braking systems on the Q7 were satisfactory. Nor does it allege how statements were communicated to Plaintiffs, when or by whom. Therefore, the TAC does not sufficiently allege fraud under the standards of Rule 9(b). *See Tae Hee Lee v. Toyota Motor Sales, U.S.A., Inc.*, 992 F. Supp. 2d 962, 974 (C.D. Cal. 2014) (dismissing complaint where "Plaintiffs have failed to identify any statement made . . . that misrepresents the performance of [the car's] braking feature").

(2) Concealment or Nondisclosure

Defendant next contends that Mercado has not identified any relevant omissions. Dkt. 100 at 11-13. A defendant must disclose a material fact when it had exclusive knowledge of it, *i.e.,* the plaintiff did not know it. *Mui Ho v. Toyota Motor Corp.*, 931 F. Supp. 2d 987, 996 (N.D. Cal. 2013) (citing *LiMandri v. Judkins,* 52 Cal. App. 4th 326, 336-37 (1997)). It was previously determined that the SAC made allegations that were sufficiently plausible to support the claim that Defendant knew about the alleged defect at the time Holmes purchased her vehicle, but not when Mercado did so. Dkt. 97 at 8-9. As in the SAC, the only bases for the allegation in the TAC that Defendant knew of the Noise before Mercado leased her car on January 2, 2017, are that a NHTSA complaint had been made regarding brake noise in December 2016, and that Audi had issued brake noise repair instructions on October 13, 2015. *Id.* at 8. As stated in the November 26 Order, neither the NHTSA complaint nor those instructions concerned Defendant's 2017 vehicle: The NHTSA complaint was about a 2015 vehicle, and the repair instructions were as to model years 2012-16. *Id.* Although the TAC refers to two new NHTSA complaints, they were filed in November 2017, after Mercado leased her vehicle. Dkt. 98 ¶ 88.

For the foregoing reasons, to the extent the CLRA and UCL claims sound in fraud, the Motion is **GRANTED** as to those advanced by Mercado, without prejudice.

b) Unlawful Conduct

"[UCL S]ection 17200 borrows violations of other laws and treats them as unlawful practices that the unfair competition law makes independently actionable." *Velazquez v. GMAC Mortg. Corp.*, 605 F. Supp. 2d 1049, 1068 (C.D. Cal. 2008) (citation omitted). Defendant contends that the TAC does not adequately plead a predicate violation under the Secret Warranty Act. Dkt. 100 at 13-15. Plaintiffs argue that their UCL claim is adequate under the "unlawful" prong, based on alleged violations of the CLRA, California's Secret Warranty Act and the TREAD Act. Dkt. 106 at 10.

(1) Secret Warranty Act

The Secret Warranty Act (Cal Civ. Code §§ 1795.90 *et seq*.) regulates "Adjustment Programs." These are "any program or policy that expands or extends the consumer's warranty beyond its stated limit or under which a manufacturer offers to pay for all or any part of the cost of repairing, or to reimburse consumers for all or any part of the cost of repairing, any condition that may substantially affect vehicle durability, reliability, or performance, other than service provided under a safety or emission-related recall campaign." Cal. Civ. Code § 1795.90(d). Within 90 days of adopting such an Adjustment Program, the manufacturer must notify owners and lessees of affected vehicles about its terms and conditions. *Id.* § 1795.92(a). The manufacturer must also reimburse those owners who have already paid repair costs associated with the condition. *Id.* § 1795.92(d). An "[a]djustment program does not include ad hoc adjustments made by a manufacturer on a case-by-case basis." *Id.* § 1795.90(d).

The TAC does not expressly identify the Adjustment Program on which Plaintiffs' claim is based. The November 26 Order assumed that Plaintiffs' claim was premised on six Technical Safety Bulletins ("TSBs") issued by Defendant that related to the Noise. Dkt. 97 at 8, 10. The TSBs "instruct service technicians to '[e]xplain to the Customer that a solution is forthcoming and that no repairs are necessary at this point." Dkt. 97 at 10 (citing Dkt. 79-3; Dkt. 86 at 8; Dkt. 87 at 10). That claim was dismissed because "[e]ach TSB includes either the statement that '[i]f vehicle is outside any warranty, this Technical Service Bulletin is informational only' or that 'this TSB is informational only." *Id.*

The TAC makes new allegations on this issue. They include that Defendant "engaged in a clandestine program to secretly pay for the cost of repairing the Brake Defect for only those customers who were the most vocal and persistent in their complaints." Dkt. 98 ¶ 67. The parties dispute whether this allegation is sufficient to state a claim under the Secret Warranty Act. *See* Motion, Dkt. 100 at 14-15; Opposition, Dkt. 106 at 11. A "remedial strategy designed to resolve customer complaints is not classified as an 'adjustment program' if it 'expressly requires dealers to make decisions on a "case-by-case" basis, upon consideration of the circumstances pertaining at the time the customer makes the complaint.'" *Cholakyan v. Mercedes-Benz USA, LLC*, 796 F. Supp. 2d 1220, 1239 (C.D. Cal. 2011) (quoting *Smith v. Ford Motor Co.*, 749 F. Supp. 2d 980, 987 (N.D. Cal. 2010)). In holding that an "After Warranty Assistance Program" offered by Ford did not qualify as an Adjustment Program, *Smith* emphasized that Ford instructed dealers to use discretion in making the program available to particular customers "on a case-by-case basis considering all factors, including past loyalty and the likelihood of favorably influencing the customer's satisfaction and future sales and service intentions." 749 F. Supp. 2d at 996.

Other district courts have found that allegations of more specific reimbursement plans may be sufficient to plead an Adjustment Program. *See Morris v. BMW of North America, LLC*, No. C 07-02827 WHA, 2007 WL 3342612, at *2, *6-7 (N.D. Cal. 2007) (allegation that BMW failed to disclose "plan to

reimburse purchasers of 3 series automobiles for replacement tires," rather than more general plan, sufficient to state a claim); *Ehrlich v. BMW of N. Am., LLC*, 801 F. Supp. 2d 908, 920 (C.D. Cal. 2010) (allegations sufficient that included a claimed "clandestine program" to pay for cost of repairing cracked windshields "for those customers who were the most vocal and persistent, using code names for the repairs like 'goodwill' or 'policy adjustments'"); *Marsikian v. Mercedes Benz USA, LLC*, No. CV 08-04876-AHM (JTLx), 2009 WL 8379784, at *7 (C.D. Cal. May 4, 2009) (same). Here, in contrast, Plaintiffs do not allege any facts to support the existence of a "clandestine program." Nor do they allege that this program was specific to the Noise or the Vehicles at issue, rather than a more general plan.

For these reasons, the UCL claim is not adequately pleaded to the extent that it is premised on a violation of the Secret Warranty Act. However, Defendant has provided no authority that a court may dismiss certain predicate violations where Plaintiffs adequately allege other ones as a basis for a claim of unlawful conduct. Defendant cites *Martinez v. Wells Fargo Home Mortg., Inc.*, 598 F.3d 549, 558 (9th Cir. 2010). However, it held only that plaintiffs failed to state a claim under the unlawful prong where all of the alleged predicate violations were either preempted or did not violate any law.

* * *

For the foregoing reasons, to the extent that the UCL claim is based on unlawful action, the Motion is **DENIED**. Plaintiffs have sufficiently alleged unlawful conduct; *i.e.*, a CLRA violation, as well as violation of the TREAD Act.

2. Negligence and Product Liability -- Design Defect Claims

The November 26 Order dismissed this claim because it is barred by the economic loss rule. Dkt. 97 at 12. Defendant again argues that the economic loss doctrine bars this claim, and Plaintiffs again agree. *See* Dkt. 100 at 15; Dkt. 106 at 6 n.1. Accordingly, the Motion is **GRANTED** as to the third and fourth causes of action, with prejudice.

3. Magnuson-Moss Warranty Act, 15 U.S.C. §§ 2301 *et seq.*

The MMWA prohibits, *inter alia*, the failure of a supplier to comply with a warranty made with regard to a consumer product. 15 U.S.C. § 2310(d)(1). Plaintiffs allege that the Vehicles are covered by a New Vehicle Limited Warranty. Dkt. 98 ¶ 79.

a) Subject Matter Jurisdiction

Defendant argues that there is no subject matter jurisdiction over this claim because the MMWA provides that "[n]o claim shall be cognizable" in federal court "if the action is brought as a class action, and the number of named plaintiffs is less than one hundred." Dkt. 100 at 16 (citing 15 U.S.C. § 2310(d)(3)(C)).

The relevant MMWA provisions are as follows:

> (1) Subject to subsections (a)(3) and (e) of this section, a consumer who is damaged by the failure of a supplier, warrantor, or service contractor to comply with any obligation

> under this chapter, or under a written warranty, implied warranty, or service contract, may bring suit for damages and other legal and equitable relief--
>
> > (A) in any court of competent jurisdiction in any State or the District of Columbia; or
> >
> > (B) in an appropriate district court of the United States, subject to paragraph (3) of this subsection.
>
> (3) No claim shall be cognizable in a suit brought under paragraph (1)(B) of this subsection--
>
> > (C) if the action is brought as a class action, and the number of named plaintiffs is less than one hundred.

15 U.S.C. § 2310(d).

The Class Action Fairness Act ("CAFA") provides:

> (2) The district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs, and is a class action in which--
>
> > (A) any member of a class of plaintiffs is a citizen of a State different from any defendant;
> >
> > (B) any member of a class of plaintiffs is a foreign state or a citizen or subject of a foreign state and any defendant is a citizen of a State; or
> >
> > (C) any member of a class of plaintiffs is a citizen of a State and any defendant is a foreign state or a citizen or subject of a foreign state.

28 U.S.C. § 1332(d).

There is a split of authority within this District as to whether original jurisdiction under CAFA overrides the 100-plaintiff requirement. *See Floyd v. Am. Honda Motor Co.*, No. 2:17-CV-08744-SVW (ASx), 2018 WL 6118582, at *4 (C.D. Cal. June 13, 2018) ("[N]either the Ninth Circuit, nor the Supreme Court of the United States has addressed the interplay between the jurisdictional requirements of CAFA and the pleading requirements of the MMWA."). The majority view has shifted. *See, e.g.*, *Keegan v. American Honda Motor Co., Inc.*, 838 F. Supp. 2d 929, 954-55 (C.D. Cal. 2012) ("The court follows the weight of authority and adopts the reasoning set forth in these cases. It concludes, as a result, that it has subject matter jurisdiction to hear plaintiffs' Magnuson-Moss claims despite the fact that there are not one hundred named plaintiffs." (collecting eight cases)); *Cadena v. Am. Honda Motor Co.*, No. 18-CV-04007-MWF (PJWx), 2019 WL 3059931, at *11 (C.D. Cal. May 29, 2019) ("[T]he weight of more recent authority is that the 100-plaintiff requirement cannot be supplanted by the prerequisites for exercising diversity jurisdiction under CAFA." (citing *Patterson v. RW Direct, Inc.*, No. 18-CV-00055-VC,

2018 WL 6106379, at *2 n.2 (N.D. Cal. Nov. 21, 2018); *MacDougall v. Am. Honda Motor Co.*, No. 17-CV-01079-AGD (FMx), 2017 WL 8236359, at *4 (C.D. Cal. Dec. 4, 2017)). The issue is currently pending before the Ninth Circuit. Dkt. 106 at 12 (citing *Floyd v. Am. Honda Motor Co.*, No. 18-55957 (argued Dec. 11, 2019)).[1]

In finding that CAFA did not supersede the 100-plaintiff requirement, *Floyd* stated:

> The Supreme Court has made it clear that "Congress enacted [CAFA] to lower diversity jurisdiction requirements in class actions . . . ." *Mississippi ex rel. Hood v. AU Optronics Corp.*, 571 U.S. 161, 163 (2014). CAFA is a basis for diversity jurisdiction. 28 U.S.C. § 1332. The MMWA, however, is a basis for federal question jurisdiction. The MMWA does not include a diversity requirement, but rather provides a distinct federal claim for certain warranty violations. 28 U.S.C. § 1331. Thus, the MMWA's requirement to name one hundred plaintiffs must be met independently of CAFA's jurisdictional standard.

2018 WL 6118582, at *3 (citing *Ebin v. Kangadis Food, Inc.*, No. 13 Civ. 2311, 2013 WL 3936193, at *1 (S.D.N.Y. July 26, 2013)); *see also MacDougall*, 2017 WL 8236359, at *4 ("CAFA -- a basis for federal courts to exercise jurisdiction over state law disputes between diverse parties -- doesn't fill in the gaps for missing substantive requirements of a federal law."). *Floyd* found additional support in the "age-old rule that a court may not in any case, even in the interest of justice, extend its jurisdiction where none exists." *Id.* (quoting *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 818 (1988)).

Other district courts have not adopted this position. "[W]hile the Magnuson-Moss Act provides that federal jurisdiction may be premised on allegations meeting the requirements in § 2310(d)(3), the Act alternatively permits jurisdiction 'in any court of competent jurisdiction in any State or the District of Columbia' [in 15 U.S.C. § 2310(d)(1)(A)]." *Bros. v. Hewlett-Packard Co.*, No. C-06-02254RMW, 2007 WL 485979, at *8 (N.D. Cal. Feb. 12, 2007) (citing *Chavis v. Fidelity Warranty Services, Inc.*, 415 F.2d 620, 622-624 (D.S.C. 2006)). *Chavis* explained:

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[1] The Sixth Circuit is the only one that has addressed the issue. It held that CAFA jurisdiction supersedes the 100-plaintiff requirement. *See Kuns v. Ford Motor Co.*, 543 F. App'x 572, 574 (6th Cir. 2013) ("[O]ur circuit has not yet addressed the jurisdictional interplay of the CAFA and the MMWA. Nor, apparently, have most of our sister circuits. *But see Birdsong v. Apple, Inc.*, 590 F.3d 955, 957 n. 1 (9th Cir. 2009) (finding that district court had jurisdiction pursuant to the CAFA over purported class action alleging violations of the MMWA and state law)."). In *Birdsong*, the Ninth Circuit affirmed the district court's dismissal of plaintiffs' MMWA claim where plaintiffs failed to state a claim for breach of state warranty law. 590 F.3d at 959 n.2. Although the decision did not address the 100-plaintiff requirement, in a footnote it stated:

> The parties do not dispute that the district court had subject matter jurisdiction over the class action. We agree. The district court had original jurisdiction pursuant to the Class Action Fairness Act ('CAFA'), 28 U.S.C. § 1332(d). Plaintiffs' class action satisfied CAFA's amount in controversy, numerosity and minimal diversity requirements. Additionally, section 1332(d)'s enumerated exceptions to federal jurisdiction do not apply.

Id. at 957 n.1 (internal citations omitted). Courts in this district have not applied this statement to the present issue because it "solely states that the district court had original jurisdiction pursuant to CAFA" and "the Court never addressed the interplay between the Magnuson-Moss Act's explicit named-plaintiffs requirement and CAFA." *Floyd*, 2018 WL 6118582, at *4.

> It is firmly entrenched that Congress is presumed to enact legislation with knowledge of the law. The practical effect of this canon of statutory interpretation is that absent a clear manifestation of contrary intent, a newly-enacted or revised statute is presumed to be harmonious with existing law and its judicial construction.
>
> CAFA was passed with the clear intention of expanding "federal court jurisdiction over class actions. . . ." S. Rep. No. 109-14 at 42 (2005), 2005 U.S.C.C.A.N. 3, 40. Under the established framework for statutory interpretation, it is to be assumed that Congress was aware of the Act's strict provisions for maintaining a class-action in federal court. Congress was also presumed to be aware of section 2310(d)(1)(A) of the [MMWA] and its recognition that jurisdiction is appropriate under the [MMWA] "in any court of competent jurisdiction in any State or the District of Columbia." 15 U.S.C. § 2310(d)(1)(A). Accordingly, CAFA's grant of federal jurisdiction over *any* class-action in which the matter in controversy exceeds the sum or value of $5,000,000 and where any member of a class of plaintiffs is a citizen of a state different from any defendant necessarily includes qualifying class-actions filed pursuant to the [MMWA] that fail to meet the strict provisions of 15 U.S.C. § 2310(1)(B). CAFA provides an alternate basis by which federal courts may become courts of "competent jurisdiction" under 15 U.S.C. § 2310(d)(1)(A).

Chavis, 415 F.Supp.2d at 626 (internal citations omitted); *see also Clark v. Wynn's Extended Care*, No. 06 C 2933, 2007 WL 922244, at *5 (N.D. Ill. Mar. 23, 2007) ("The Court concludes that the *Chavis* decision is persuasive, especially in light of its analysis of the Congressional intent behind CAFA, and adopts its reasoning."); *Keegan*, 838 F. Supp. 2d at 954-55 (quoting *Chavis* as cited in *Bros v. Hewlett-Packard*, 2007 WL 485979, at *8)).

The reasoning in *Chavis* is persuasive in its analysis of the language of the MMWA with the underlying purpose of CAFA. Accordingly, it is adopted, and it is determined that there is jurisdiction over the MMWA claim.

b) Express Warranty Claim

Plaintiffs' claims under the MMWA "stand or fall with [their] express and implied warranty claims under state law." *Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017, 1022 (9th Cir. 2008). The applicable New Vehicle Limited Warranty covers the cost of repairs related to defects "in manufacturer's material and workmanship." Dkt. 98 ¶ 80. The parties largely agree that a plaintiff must allege more than a design defect to state an express warranty claim. *See* Opposition, Dkt. 106 at 14-15; Motion, Dkt. 100 at 16-17.

California law distinguishes manufacturing and design defects:

> California recognizes two distinct categories of product defects: manufacturing defects and design defects. A manufacturing defect exists when an item is produced in a substandard condition. Such a defect is often demonstrated by showing the product performed differently from other ostensibly identical units of the same product line. A

> design defect, in contrast, exists when the product is built in accordance with its intended specifications, but the design itself is inherently defective.

McCabe v. Am. Honda Motor Co., 100 Cal. App. 4th 1111, 1119-20 (2002) (internal citations omitted).

"[E]xpress warranties covering defects in materials and workmanship exclude defects in design." *Troup v. Toyota Motor Corp.*, 545 Fed. App'x. 668 (9th Cir. 2013) (citing *Daugherty*, 144 Cal. App. 4th at 830). Thus, to assert an express warranty claim a plaintiff must allege a manufacturing defect. Although a design defect is itself an insufficient basis for such a claim, a complaint may be sufficient if it adequately pleads a manufacturing defect as an alternative ground. *See, e.g.*, *Horvath v. LG Electronics Mobilecomm USA*, No. 3:11-cv-01576-H-RBB, 2012 WL 2861160, at *5 (S.D. Cal. Feb. 13, 2012) ("Plaintiffs' claims are not based *solely* on alleged design defects.") (emphasis added).

The allegations in the TAC are focused on a design defect*, i.e.,* that the Noise occurs when the brakes are applied. *See* Dkt. 98 ¶¶ 3-4. Plaintiffs argue that the TAC alleges both manufacturing and design defects. Dkt. 106 at 14-15 ("Plaintiffs expressly allege that '[t]he Vehicles were unfit for their intended uses by reason of the Brake Defect *in their manufacture*, design, testing, *components*, and *constituents*, so that they would not safely serve their ordinary and intended purpose' and that 'Defendant designed and/or *manufactured* the Vehicles defectively, causing them to fail to perform as safely as an ordinary customer would expect.'" (citing Dkt. 98 ¶ 140-41)). These allegations are not sufficient to state a claim that the Vehicles were produced in a substandard condition. *See Hindsman v. Gen. Motors LLC*, No. 17-CV-05337-JSC, 2018 WL 2463113, at *7 (N.D. Cal. June 1, 2018) (boilerplate allegations that class vehicles "contain one or more design and/or manufacturing defect" were not sufficient to state a claim); *cf. Johnson v. Nissan North America, Inc.*, 272 F. Supp. 3d 1168, 1177-78 (N.D. Cal. 2017) (allegations of manufacturing defect as to panoramic sunroofs were sufficient because, in addition to allegations that sunroof glass was too thin, there were allegations that the tempering process used to produce it may have been deficient).

For the foregoing reasons, the Motion is **GRANTED** as to the fourth cause of action, without prejudice.

4. Song-Beverly Warranty Act, Cal. Civ. Code §§ 1790 *et seq*.

The Song-Beverly Consumer Warranty Act sets standards for implied and express warranties for "consumer goods." Cal. Civ. Code § 1791(a). The November 26 Order stated that "Plaintiffs concede that the Song-Beverly claim of Holmes fails because she purchased her vehicle when it was used, and as a result, the implied warranty of merchantability has only limited applicability." Dkt. 97 at 15. In light of this ruling, Plaintiffs stated that they "will not oppose dismissal of" Holmes's Song-Beverly claim. Dkt. 106 at 16. For these reasons, the Motion is **GRANTED** as to the sixth cause of action brought by Holmes, with prejudice.

IV. Conclusion

For the reasons stated in this Order, the Motion is **GRANTED IN PART**. The following claims are **DISMISSED WITH PREJUDICE**: (i) negligence; (ii) product liability; and (ii) violation of the Song-Beverly Warranty Act as advanced by Holmes. The following claims are **DISMISSED WITHOUT PREJUDICE**, *i.e.*, with leave to amend: (i) violations of CLRA and the UCL, insofar as they arise out of

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

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alleged fraud and are advanced by Mercado; and (ii) violation of the Magnuson-Moss Warranty Act.

The Motion is **DENIED IN PART** as follows: (i) violations of CLRA and UCL, insofar as they arise out of fraud and are advanced by Holmes; (ii) violations of the UCL insofar as they arise out of unlawful conduct.

Any Fourth Amended Complaint shall be filed within 14 days of the issuance of this Order.

IT IS SO ORDERED.

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Initials of Preparer cw