UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

YUN-FEI LOU, et al.,

Plaintiffs,

v.

AMERICAN HONDA MOTOR COMPANY, INC.,

Defendant.

Case No. 16-cv-04384-JST

ORDER GRANTING IN PART AND DENYING IN PART MOTION FOR JUDGMENT ON THE PLEADINGS

Re: ECF No. 365

Before the Court is Defendant American Honda Motor Company, Inc.'s motion for judgment on the pleadings. ECF No. 365. The Court will grant the motion in part and deny it in part.

I. BACKGROUND

In this consumer class action, Plaintiffs allege the hands-free calling feature in their Acura cars causes parasitic drain on their car batteries. By failing to "reliably switch[] off" even "if not in use and even after the car's ignition switch is turned off," the hands-free technology leads "to drained and dead batteries, recurring battery replacement, and premature failure of other essential electric components such as alternators." ECF No. 148 ¶ 3. That defect leads to "cars that will not start after a short period of non-use and electrical systems prone to fail even when the car is in operation." *Id.* As a consequence, Plaintiffs "find themselves with cars that are less valuable than comparable cars with properly functioning 'hands-free' systems." *Id.*

Plaintiffs allege that Honda has known about this defect since at least 2005, notifying dealers about the defect but concealing it from consumers. The operative complaint brings claims

for numerous classes and individually.[1] For the California class, John Kelly brings the following claims: (1) equitable claims for violation of California's Consumer Legal Remedies Act ("CLRA"), Cal. Civ. Code § 1750 *et seq.*; (2) violation of California's Unfair Business Practices Act ("UCL"), Cal. Bus. & Prof. Code § 17200 *et seq.*; (3) fraud by concealment; (4) a California Commercial Code Implied Warranty of Merchantability, Cal. Com. Code § 2314 *et seq.*, breach claim; and (5) a Magnuson Moss Warranty Act ("MMWA"), 15 U.S.C. § 2301 *et seq.*, claim for his implied warranty claim. Also for the California class, Lindsay and Jeff Aberin bring a fraud-by-concealment claim. For the New York class, Joy Matza brings the following claims: (1) violation of the New York General Business Law § 349, (2) breach of implied warranty of merchantability, (3) violation of the MMWA (for the implied warranty claim), and (4) fraud by concealment under New York law. For the Washington class, Charles Burgess brings claims for (1) violations of the Washington Consumer Protection Act – Unfair Business Practices, Wash. Rev. Code § 19.86.010 *et seq.*; (2) violations of the Washington Consumer Protection Act – Deceptive Business Practices, Wash. Rev. Code § 19.86.010; and (3) fraudulent concealment under Washington law. For the Kansas class, Don Awtrey brings the following claims: (1) violation of the Kansas Consumer Protection Act, Kan. Stat. Ann. § 50-624, (2) breach of implied warranty, Kan. Stat. Ann. § 84-2-314, and (3) violations of the MMWA (for the implied warranty claim). And finally, Yun-Fei Lou brings individual claims for (1) violations of the Delaware Consumer Fraud Act, Del. Code Ann. tit. 6, § 2511 *et seq.*; (2) fraudulent concealment under Delaware law; (3) breach of the implied warranty of merchantability; (4) violation of the MMWA (for the implied warranty claim).

Honda moves for judgment on the pleadings against Kelly, the Aberins, Awtrey, and Matza. First, Honda contends that the Ninth Circuit's decision in *Sonner v. Premier Nutrition Corp.*, 971 F.3d 834 (9th Cir. 2020), bars Kelly's CLRA and UCL claims for equitable relief because he has not pleaded an inadequate remedy at law. Second, Honda contends that because Kelly bought his car from a private seller, his CLRA and UCL claims fail. Third, Honda contends

[1] As the Court notes below, Plaintiffs have since abandoned some claims.

that Kelly's and the Aberins' fraud-by-concealment claims fail: Kelly's because he bought his car from a private seller, which means he fails to allege the required "transactional" relationship with Honda, and both Kelly's and the Aberins' because the economic loss rule bars fraud-by-concealment contract-related claims alleging purely economic loss. Fourth and finally, Honda contends that Kelly's, Awtrey's, and Matza's MMWA claims should be dismissed because under *Floyd v. Am. Honda Motor Co., Inc.*, 966 F.3d 1027, 1034 (9th Cir. 2020), they have not met the MMWA's jurisdictional requirement that a class action in federal court have "at least one hundred named plaintiffs."

II. JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1332(d) because the amount in controversy exceeds $5 million and at least one member in the proposed class of over 100 members is a citizen of a state different from Honda.

III. LEGAL STANDARD

A motion for judgment on the pleadings under Rule 12(c) of the Federal Rules of Civil Procedure is proper "when the moving party clearly establishes on the face of the pleadings that no material issue of fact remains to be resolved and that it is entitled to judgment as a matter of law." *Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1550 (9th Cir. 1989) As with a motion to dismiss for failure to state a claim under Rule 12(b)(6), "a court must determine whether the facts alleged in the complaint, taken as true, entitle the plaintiff to a legal remedy." *Chavez v. United States*, 683 F.3d 1102, 1108 (9th Cir. 2012) (citation omitted). "A dismissal on the pleadings for failure to state a claim is proper only if 'the movant clearly establishes that no material issue of fact remains to be resolved[.]'" *McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 810 (9th Cir. 1988) (quoting *Doleman v. Meiji Mut. Life Ins. Co.*, 727 F.2d 1480, 1482 (9th Cir. 1984)). A court "must presume all factual allegations of the complaint to be true and draw all reasonable inferences in favor of the nonmoving party." *Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987).

IV. DISCUSSION

A. Kelly's CLRA and UCL Claims

1. Equitable Relief

Honda contends that the Ninth Circuit's decision in *Sonner v. Premier Nutrition Corp.*, 971 F.3d 834 (9th Cir. 2020), prevents Kelly from pursuing equitable relief under the CLRA and UCL. First, Honda contends that *Sonner* requires pleading an inadequate remedy at law, which Kelly has not done. Second, Honda contends that, even if *Sonner* is read to apply only to claims seeking equitable restitution, it nonetheless bars Kelly's CLRA and UCL claims because that is the only remedy he seeks.

Kelly does not address whether he properly pleaded an inadequate legal remedy in the third amended complaint. Instead, he argues that "this Court previously rejected this line of argument" and asks the Court to retain its earlier holding that Plaintiffs may plead alternative remedies at the pleadings stage "because *Sonner* has not materially changed the issue before this Court." ECF No. 370 at 9. In addition, Kelly argues that *Sonner* is distinguishable because, unlike the plaintiffs in *Sonner*, he is not dismissing his damages claim to seek restitution on the eve of trial.

The Court finds that Honda is entitled to judgment as a matter of law on Kelly's CLRA and UCL claims. *Sonner* requires that a plaintiff plead an inadequate remedy at law to pursue equitable restitution under the CLRA and UCL. *Sharma v. Volkswagen AG*, 524 F. Supp. 3d 891, 907 (N.D. Cal. 2021) (stating that under *Sonner* plaintiffs "'must establish that they lack an adequate remedy at law before securing equitable restitution for past harm' under their UCL, CLRA, and unjust enrichment claims'") (cleaned up). And yet Kelly offers no response to Honda's argument that he failed to plead an inadequate remedy at law.[2] As a result, he concedes that argument. *See Ardente, Inc. v. Shanley*, No. 07-cv-4479-MHP, 2010 WL 546485, at *6 (N.D. Cal. Feb. 10, 2010) ("Plaintiff fails to respond to this argument and therefore concedes it through silence."). Honda is therefore entitled to judgment as a matter of law against Kelly on his

[2] In fact, Kelly appears to concede he has not alleged an inadequate remedy at law and argue instead that he need not. *See* ECF No. 370 at 9 ("Kelly's CLRA and UCL Claims Should Not Be Dismissed for Failure to Allege an Adequate Remedy at Law").

CLRA and UCL claims.[3]

B. Fraud-by-Concealment

1. Kelly's Lack of Transactional Relationship with Honda

Under California law, fraud-by-concealment requires that the defendant "[(1)] have concealed or suppressed a material fact, (2) the defendant must have been under a duty to disclose the fact to the plaintiff, (3) the defendant must have intentionally concealed or suppressed the fact with the intent to defraud the plaintiff, (4) the plaintiff must have been unaware of the fact and would not have acted as he did if he had known of the concealed or suppressed fact, and (5) as a result of the concealment or suppression of the fact, the plaintiff must have sustained damage." *Bigler-Engler v. Breg, Inc.*, 7 Cal. App. 5th 276, 310-311 (2017) (citation omitted).

Honda argues that Kelly cannot pursue a fraud-by-concealment claim because he fails to allege a "transactional" relationship with Honda. Put another way, Honda argues that it owed Kelly no duty to disclose because he bought his car used not from Honda or from an authorized dealer, but from a private party. Honda argues that under California law, "duty to disclose does not exist between a manufacturer and the public at large, but rather arises from direct dealings between the parties." ECF No. 365 at 22 (citing *Bigler-Engler*, 7 Cal. App. 5th at 311).

The Court rejects Honda's argument. As other courts have noted, "[t]he state of the law on the duty to disclose under California law is in some disarray." *In re Apple Inc. Device Performance Litig.*, 347 F. Supp. 3d 434, 458 (N.D. Cal. 2018), *reconsidered in part*, 386 F. Supp. 3d 1155 (N.D. Cal. 2019). Amidst that landscape, the Court finds persuasive the reasoning of other courts in this district that have "conclude[d] that under California law, a manufacturer has

[3] Kelly's other arguments do not alter this conclusion. First, Kelly is wrong to think that this Court's earlier decision denying Honda's motion to dismiss Kelly's equitable restitution claim requires rejecting Honda's argument. The Court's earlier decision not only predated *Sonner* but addressed a different question: whether a plaintiff may pursue both legal and equitable remedies in the alternative. *See* ECF No. 139 at 14. Honda did not argue that Kelly failed to plead an inadequate remedy at law, so that order did not address that question. Second, however *Sonner*'s unique facts may limit the breadth of its holding, its holding still requires that plaintiffs pursuing equitable restitution under the CLRA and UCL plead an inadequate remedy at law. *See* Order, *Ablaza v. Sanofi-Aventis U.S. LLC*, Case No. 21-cv-01942-JST, (N.D. Cal. 2022), ECF No. 66 at 5 (adopting the view that, in general, "if a plaintiff pleads that she lacks an adequate legal remedy" that is all that *Sonner* requires at the pleading stage) (citation omitted); *Sharma*, 524 F. Supp. 3d at 907 (reading *Sonner* to require the pleading of an inadequate remedy at law).

a duty to disclose a defect that poses an unreasonable safety risk even if that manufacturer did not have a transactional relationship with the vehicle owner." *Hamm v. Mercedes-Benz USA, LLC*, No. 16-cv-3370-EJD, 2019 WL 4751911, at *4 (N.D. Cal. Sept. 30, 2019); *In re JUUL Labs, Inc., Mktg., Sales Pracs., & Prod. Liab. Litig.*, 497 F. Supp. 3d 552, 628 (N.D. Cal. 2020) (agreeing with the reasoning in *Hamm*); *but see Carrillo v. BMW of N. Am., LLC*, No. 19-cv-8702-DSF (GJSx), 2020 WL 12028895, at *7 (C.D. Cal. Mar. 25, 2020) ("BMW NA's failure to publicly disclose the engine defect does not grant Plaintiff – who purchased his Vehicle second-hand, FAC ¶ 25 – grounds to sue for a fraudulent omission."). The Court therefore denies Honda's motion for judgment as to Kelly's fraudulent concealment claim on the grounds that it owed him no duty to disclose the alleged defect.

2. Economic Loss Rule

"The economic loss rule requires a purchaser to recover in contract for purely economic loss due to disappointed expectations, unless he can demonstrate harm above and beyond a broken contractual promise." *Robinson Helicopter Co., Inc. v. Dana Corp.*, 34 Cal. 4th 979, 988 (2004). "Economic losses include damages for inadequate value, the costs of repair or replacement, and any consequent lost profits. The rule bars a plaintiff's tort recovery of economic damages unless such damages are accompanied by some form of physical harm (i.e., personal injury or property damage)." *Avila v. Ford Motor Co.*, No. EDCV 22-00395 JGB (SHKx), 2022 WL 2283310, at *2 (C.D. Cal. May 27, 2022) (cleaned up). One exception to the economic loss doctrine is "where the contract was fraudulently induced" due to an affirmative misrepresentation. *Robinson*, 34 Cal. 4th at 989-991 (citation omitted); *Rattagan v. Uber Techs, Inc.*, 19 F.4th 1188, 1191 (9th Cir. 2021) ("In *Robinson*, the California Supreme Court held that the economic loss rule does not bar fraud claims premised on affirmative misrepresentations."). But "[w]hether California's economic loss rule bars fraudulent *omissions* claims based on purely economic injury is unsettled." *Anderson v. Apple Inc.*, 500 F. Supp. 3d 993, 1019 (N.D. Cal. 2020) (emphasis added).

Honda contends that the economic loss rule bars Kelly's and the Aberins' concealment claims because the economic loss rule generally bars contract-related claims that allege solely economic loss. And though the California Supreme Court has recognized that purely economic

claims based on affirmative misrepresentations are an exception to that general rule, Honda argues that exception does not apply here because Kelly and the Aberins claim Honda committed fraud by omission, not affirmative misrepresentation.

The Court rejects Honda's argument. The California Supreme Court has not yet decided whether the economic loss rule exception for affirmative misrepresentations extends to fraudulent concealment claims, but the Ninth Circuit recently certified that question to that court and it has agreed to take up that question. *See Rattagan v. Uber Techs., Inc.*, 19 F.4th 1188, 1192-93 (9th Cir. 2021); *Rattagan v. Uber Techs., Inc.*, No. 20-16796, ECF No. 43 (Feb. 14, 2022). Until the California Supreme Court issues a decision, however, this Court agrees with other courts in this district that have explained that the rationale that excepts affirmative misrepresentations from the economic loss rule applies with equal force to intentional omissions. *Anderson*, 500 F. Supp. 3d at 1019; *see also NLRB v. Calkins*, 187 F.3d 1080, 1089 (9th Cir. 1999) (until a state's highest court issues a decision, federal courts "must predict how [it] would decide the issue").

In *Robinson*, 34 Cal. 4th at 988, the California Supreme Court held that the economic loss rule poses no bar to purely economic claims based on affirmative misrepresentations. To reach that conclusion, the court surveyed its past cases, synthesizing them to conclude that the economic loss doctrine generally does not apply "when (1) the breach is accompanied by a traditional common law tort, such as fraud or conversion; (2) the means used to breach the contract are tortious, involving deceit or undue coercion; or (3) one party intentionally breaches the contract intending or knowing that such a breach will cause severe, unmitigable harm in the form of mental anguish, personal hardship, or substantial consequential damages." *Robinson*, 34 Cal. 4th at 990 (quoting *Erlich v.* Menezes, 21 Cal. 4th 543, 553-54 (1999)). The court then held that the economic loss rule poses no bar to purely economic losses based on a contract induced through affirmative misrepresentations because affirmative misrepresentations reflect "tortious conduct [] separate from the breach itself." *Id.* at 991.

As the court explained in *Anderson*, a leading case from this district:

> All of the reasons that supported *Robinson*'s holding about affirmative misrepresentation support finding that fraudulent omissions . . . are not barred by the economic loss doctrine. A

> fraudulent omission, no less than an affirmative misrepresentation, falls into several categories to which the court held the rule should generally not apply: Where 'breach is accompanied by a traditional common law tort, such as fraud' and 'the means used to breach the contract are tortious, involving deceit.'" [*Robinson*, 34 Cal. 4th] at 990. . . .
>
> A fraudulent omission, additionally, is just as intentional as an affirmatively misleading misrepresentation. Focusing on the touchstone of "intentional conduct," *Robinson* teaches, "gives substance to the proposition that a breach of contract is tortious only when some independent duty arising from tort law is violated." [*Id.*] A mere negligent omission is not, by definition, fraudulent. Indeed, *Robinson* highlights that the classic elements of "fraud" include "a misrepresentation'—which it defined as including "false representation[s], concealment[s], or nondisclosure[s]"—as well as scienter and intent to defraud. *Id.* The [*Robinson*] court explained that, where there is fraud, "a party to a contract cannot rationally calculate the possibility that the other party will deliberately misrepresent terms critical to that contract." [*Id.* at 993.] That reality is no less true if the deliberate misrepresentation is by omission or affirmative representation.

500 F. Supp. 3d at 1021. For these reasons, the economic loss rule does not bar Kelly's and the Aberins' concealment claims.

C. MMWA Claims

Finally, Honda argues that it is entitled to judgment as a matter of law on Awtrey's and Matza's MMWA claims because the Ninth Circuit held in *Floyd v. Am. Honda Motor Co., Inc.*, 966 F.3d 1027, 1034 (9th Cir. 2020), that an MMWA class action in federal court requires "at least one hundred named plaintiffs," which this action lacks. ECF No. 365 at 27.[4] Awtrey and Matza do not dispute that *Floyd* requires that number of plaintiffs to maintain an MMWA *class action*, but contend that *Floyd* does not control because they are bringing *individual* MMWA claims. ECF No. 370 at 22. In other words, they concede that their MMWA class claims fail but

[4] Honda also moves for judgment on Kelly's MMWA claim. But because Kelly has dropped his implied warranty claim, *see* ECF No. 367 at 19 n.21, his derivative MMWA claim necessarily fails. *See In re Ford Tailgate Litig.*, No. 11-cv-2953-RS, 2014 WL 1007066, at *5 (N.D. Cal. Mar. 12, 2014), *order corrected on denial of reconsideration*, No. 11-cv-2953-RS, 2014 WL 12649204 (N.D. Cal. Apr. 15, 2014) (dismissing MMWA warranty claims when state warranty claims were dismissed); *see also Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017, 1022 (9th Cir. 2008) ("The district court held – and Clemens does not dispute – that the claims under the Magnuson-Moss Act stand or fall with his express and implied warranty claims under state law. Therefore, this court's disposition of the state law warranty claims determines the disposition of the Magnuson-Moss Act claims."). The Court therefore need not address Kelly's MMWA claim.

argue that their individual claims survive.

The Court finds that Honda is entitled to judgment as a matter of law on the MMWA claims. First, there is no dispute that there are fewer than 100 named plaintiffs in this case. The MMWA class claims thus fail. Second, Awtrey and Matza's effort to proceed on their MMWA claims individually fails because the statute states that the amount in controversy for "all claims" must exceed $50,000 for federal courts to exercise jurisdiction. *See* 15 U.S.C. § 2310(d)(3)(B) (stating that an MMWA claim is not cognizable if "the amount in controversy is less than the sum or value of $50,000 (exclusive of interests and costs) computed on the basis of all claims to be determined in this suit"). Courts interpreting that language have concluded that – read in context and in view of the legislative history – "all claims" means "the sum of all of the individual MMWA claims," not all claims in the lawsuit as a whole. *Critney v. Nat'l City Ford, Inc.*, 255 F. Supp. 2d 1146, 1147-49 (S.D. Cal. 2003); *Landeis v. Future Ford*, No. 04-cv-2733-MCE-PAN, 2006 WL 1652659, at *6 (E.D. Cal. June 14, 2006) ("It is clear that in calculating the jurisdictional amount [in the MMWA], the Court may not consider pendent state law claims."); *see also Shoner v. Carrier Corp.*, 30 F.4th 1144, 1149 (9th Cir. 2022) (noting that "the MMWA's jurisdictional hurdles were meant to restrict access to federal courts" (quotation omitted)).

This Court agrees with that interpretation. Because Awtrey and Matza do not allege that their MMWA claims are collectively worth more than $50,000, this Court lacks jurisdiction and Honda is entitled to judgment on those claims.

D. Leave to Amend

Plaintiffs ask "that any dismissal be without prejudice and that they be granted leave to amend." ECF No. 370 at 23. They contend that leave to amend is warranted because "[m]any of Honda's belated arguments are being raised for the first time, the Court has not previously ruled on them (except as indicated above), and Plaintiffs have not had previous opportunities to cure any of the purported defects." *Id.* At this morning's case management conference, Plaintiffs clarified that they seek leave to amend only their CLRA and UCL claims, and not their MMWA claims.

Once the Court issues a pretrial scheduling order and the deadline for amending a pleading has passed, a party's motion to amend is governed by Rule 16 of the Federal Rules of Civil

Procedure. *See Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 607-08 (9th Cir. 1992). Under Rule 16, a party must show "good cause" for an amendment to justify modifying the case schedule. Fed. R. Civ. P. 16(b)(4) ("A schedule may be modified only for good cause and with the judge's consent."); *see also Johnson*, 975 F.2d at 608. "Rule 16(b)'s 'good cause' standard primarily considers the diligence of the party seeking the amendment." *Johnson*, 975 F.2d at 609. Good cause exists when the deadline in the scheduling order "cannot reasonably be met despite the diligence of the party seeking the extension." *Id.* (quotation omitted). "Although the existence or degree of prejudice to the party opposing the modification might supply additional reasons to deny a motion, the focus of the inquiry is upon the moving party's reasons for seeking modification. If that party was not diligent, the inquiry should end." *Id.* "Ultimately, 'what constitutes good cause necessarily varies with the circumstances of each case.'" *Doe v. Trump*, 329 F.R.D. 262, 272 (W.D. Wash. 2018) (quoting 6A Charles A. Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure: Civil* § 1522.2 (2d ed. 1990)) (cleaned up). This Court previously set the deadline for amending the pleadings as April 27, 2018, ECF No. 146, and then extended the deadline to November 2, 2021, ECF No. 325.

The Court will grant leave. First, the Court concludes that Plaintiffs have been diligent. "In order to demonstrate diligence, plaintiff must show whether he collaborated with the court in setting a schedule; whether matters that were not, and could not have been, foreseeable at the time of the scheduling conference caused the need for amendment; and whether the movant was diligent in seeking amendment once the need to amend became apparent." *Fernandez v. Cal. Dep't of Corr. & Rehab.*, No. 11-cv-1125 MCE KJN, 2014 WL 1389759, at *3 (E.D. Cal. Apr. 9, 2014) (citing *Johnson*, 975 F.2d at 608), *report and recommendation adopted*, No. 11-cv-1125 MCE KJN, 2014 WL 3362362 (E.D. Cal. July 9, 2014). In this instance, Plaintiffs were not aware of the defect in their UCL and CLRA claims until the Court's ruling. Plaintiffs were not required to accept Defendant's argument, apparently made during a meet and confer in January, that their claims were defective; they were entitled to have the Court decide that issue. The Court need not decide whether Defendant should have moved to dismiss these claims earlier; it is sufficient to say there was no need for Plaintiffs to amend until Defendant actually did so.

Nor would there be any prejudice to Defendant. Defendant argues that "any amendment would be on the eve of trial . . . , requiring the reopening of discovery and causing undue delay and prejudice." ECF No. 380 at 19. But the one or two sentences Plaintiffs will add to their complaint will not change their theories of relief or add any factual allegations.

Plaintiffs' request for leave to amend their UCL and CLRA claims to add the allegation that they lack an adequate remedy at law is granted.

CONCLUSION

For the reasons stated above, the Court grants Honda's motion for judgment on the pleadings as to Kelly's CLRA and UCL claims and Awtrey's and Matza's MMWA claims. The Court denies Honda's motion for judgment on the pleadings on Kelly's and the Aberins' fraud-by-concealment claims. The Court grants Plaintiffs' request for leave to amend for the sole purpose of adding the allegation that they lack an adequate remedy at law. An amended complaint is due within 14 days of this order.

IT IS SO ORDERED.

Dated: August 26, 2022

JON S. TIGAR
United States District Judge