UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. 8:19-cv-01298-JLS-KES Date: July 29, 2021
Title: Terry Sonneveldt et al v. Mazda Motor of America, Inc., et al

Present: **Honorable JOSEPHINE L. STATON, UNITED STATES DISTRICT JUDGE**

Melissa Kunig	N/A
Deputy Clerk	Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFF:	ATTORNEYS PRESENT FOR DEFENDANTS:
Not Present	Not Present

PROCEEDINGS: (IN CHAMBERS) ORDER (1) GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS (Doc. 201) AND (2) DENYING DEFENDANTS' MOTION TO STRIKE (Doc. 200)

Before the Court is a Motion to Dismiss Plaintiffs' Second Amended Complaint (Mot., Doc. 201; Mem., Doc. 201-1) and Motion to Strike (MTS, Doc. 200) filed by Defendants Mazda Motor of America, Inc. d/b/a Mazda North American Operations ("MNAO") and Mazda Motor Corporation ("MC") (collectively, "Mazda"). Plaintiffs opposed both motions (Opp., Doc. 240; MTS Opp., Doc. 239), and Defendants replied (Reply, Doc. 253; MTS Reply, Doc. 254). Having considered the parties' briefs and held oral argument, the Court (1) GRANTS IN PART AND DENIES IN PART Defendants'

Motion to Dismiss and (2) DENIES Defendants' Motion to Strike for the reasons stated below.

I. BACKGROUND[1]

The Court set forth the facts of this case in detail in its January 4 Order granting in part and denying in part Defendants' motion to dismiss Plaintiffs' First Amended Complaint ("FAC") and will not repeat them here. (*See* MTD Order, Doc. 175.) In brief, this is a putative class action involving an allegedly defective water pump installed in Mazda vehicles equipped with the Mazda Cyclone engine.

On January 4, 2021, the Court dismissed all but one of the sixty-four counts alleged in Plaintiffs' FAC and granted Plaintiffs leave to amend their pleading. (*Id.* at 33–34.) Plaintiffs timely filed a Second Amended Complaint ("SAC"), now alleging thirty-one counts under twelve states' laws for fraudulent concealment or omission, breach of implied warranty, violation of the Song-Beverly Consumer Warranty Act, Cal. Civ. Code § 1791, *et seq*, and violations of the consumer protection laws of California, Florida, Illinois, Louisiana, Massachusetts, Michigan, Missouri, North Carolina, Ohio, Pennsylvania, Texas, and Virginia.[2] (SAC, Doc. 197.) Defendants now move to dismiss the complaint in its entirety for failure to state a claim under Rule 12(b)(6), and also move to strike certain allegations in the SAC under Rule 12(f).

[1] For the purposes of this motion to dismiss, the Court accepts as true the well-pleaded allegations of Plaintiffs' SAC.

[2] Plaintiffs no longer pursue claims for breach of express warranty, negligent misrepresentation, or violation of the Magnuson-Moss Warranty Act.

II. MOTION TO DISMISS

A. Legal Standard

When evaluating a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), the Court must accept as true all allegations of material facts that are in the complaint and must construe all inferences in the light most favorable to the non-moving party. *Moyo v. Gomez*, 40 F.3d 982, 984 (9th Cir. 1994). Dismissal of a complaint for failure to state a claim is not proper where a plaintiff has alleged "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 complaint must (1) "contain sufficient allegations of underlying facts to give fair notice and to enable the opposing party to defend itself effectively," and (2) "plausibly suggest an entitlement to relief, such that it is not unfair to require the opposing party to be subjected to the expense of discovery and continued litigation." *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011). "Although for the purposes of a motion to dismiss [the Court] must take all of the factual allegations in the complaint as true, [it] '[is] not bound to accept as true a legal conclusion couched as a factual allegation.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 555).

Claims sounding in fraud must also pass muster under Rule 9(b) of the Federal Rules of Civil Procedure, which requires that allegations of fraud be made "with particularity." *See* Fed. R. Civ. P. 9(b). To satisfy Rule 9(b)'s higher pleading standard, plaintiffs bringing claims sounding in fraud must sufficiently allege "'the who, what, when, where, and how' of the misconduct charged[.]" *Brenner v. Procter & Gamble Co.*, No. SACV 16-1093-JLS-JCG, 2016 WL 8192946, at *5 n.5 (C.D. Cal. Oct. 20, 2016) (citing *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003)). However, "[w]hile the factual circumstances of the fraud itself must be alleged with particularity, the state of mind—or scienter—of the defendants may be alleged generally." *Odom v.*

Microsoft Corp., 486 F.3d 541, 554 (9th Cir. 2007) (citing *In re GlenFed, Inc. Sec. Litig.*, 42 F.3d 1541, 1547 (9th Cir.1994)); Fed. R. Civ. P. 9(b).

Finally, the Court may not dismiss a complaint without leave to amend unless "it is absolutely clear that the deficiencies of the complaint could not be cured by amendment." *Karim-Panahi v. Los Angeles Police Dep't*, 839 F.2d 621, 623 (9th Cir. 1988) (internal quotation marks omitted).

B. Discussion

Mazda argues that Plaintiffs' SAC must be dismissed because: (1) Plaintiffs' fraud-based claims are deficiently pleaded; (2) certain consumer protection claims are deficiently pleaded or time-barred; (3) Plaintiffs' implied warranty claims are deficiently pleaded and most are time-barred; (4) Plaintiffs fail to state a claim under the Song-Beverly Act; and (5) all claims for injunctive and equitable relief fail for lack of Article III or statutory standing. The Court addresses each argument in turn.

1. Fraud-Based Claims

In its January 4 Order on Mazda's first motion to dismiss, the Court dismissed Plaintiffs' fraud-based claims because Plaintiffs failed to allege (1) an actionable misrepresentation based on Mazda's maintenance schedules; (2) pre-sale knowledge of the defect; and (3) a duty to disclose. (MTD Order at 6–14.) Mazda contends that Plaintiffs have failed to cure these pleading deficiencies.

Mazda first argues that Plaintiffs have failed to plead any affirmative representation from Mazda that the water pumps in their vehicles would last at least 120,000 miles without repair or replacement. (Mot. at 3–6.) Plaintiffs, however, make clear that they are no longer pursuing fraud claims based on any affirmative misrepresentation. (Opp. at 10.) The Court therefore addresses Mazda's arguments as to whether Plaintiffs have adequately pleaded claims for fraudulent concealment or

omission—specifically, whether Plaintiffs have adequately alleged pre-sale knowledge and a duty to disclose. (*See* Mot. at 7–15.)

a. **Pre-Sale Knowledge**

The Court previously concluded that Plaintiffs had failed to plead pre-sale knowledge based on "pre-production testing and analysis; 'numerous complaints' filed by consumers with the National Highway Traffic Safety Administration ('NHTSA'); complaints on internet forums; complaints directly from consumers; and replacement part orders and warranty claims submitted to Mazda dealerships." (MTD Order at 10, internal citations omitted.) Plaintiffs now allege that, in addition to these complaints, Mazda had pre-sale knowledge of the Water Pump Defect based on (1) at least 58 warranty claims for water pump failures received by the end of 2009, with warranty claims continuing to increase from there (SAC ¶¶ 4, 96); and (2) various notifications received from dealerships regarding water pump leaks through an "internal communications network" between Mazda and authorized dealerships (SAC ¶¶ 97–101).

Defendants contend that these new allegations regarding warranty claims and service technician inquiries ("Hotline" inquiries) do not plausibly support pre-sale knowledge of the alleged defect. First, Defendants argue that "58 warranty repairs under a 5-year/60,000-mile [Powertrain Limited Warranty] is unremarkable." (Mem. at 10.) Defendants also argue that "the customer's and dealer's contentions respecting the 58 warranty repairs do not mention Engine Oil Mixing with Coolant or the root cause of failure"—a conclusion Defendants reached by analyzing whether the claims included the words "mix," "milk," "mud," and "froth." (*Id.*) Defendants also analyzed Mazda's warranty data for the time period from 2008 to 2019, arguing that the data reflects just "89 warranty repairs (out of a total of 1,943 warranty claims paid [related to water pumps]) that mention Engine Oil Mixing with Coolant." (*Id.*) Even "assuming every one of the 1,943 warranty claims related to Plaintiffs' defect theory, the total claims

experience is one-half of one percent (0.5%) [1,943 / 384,114] over the 13-14 years the putative class vehicles have been on the road." (*Id.* at 11.)

Defendants make a similar argument regarding the Hotline inquiries from authorized dealerships. (Mot. at 12, citing SAC ¶¶ 97–102.) Defendants argue that, based on their own analysis of the Hotline data, "there was a statistically insignificant number of inquiries to Hotline that mention Engine Oil Mixing with Coolant." (*Id.*) Again limiting the search terms to "milk," "mud," "froth," and "mix" as proxy words for the Water Pump Defect, Defendants contend that there are only 294 Hotline inquiries related to the defect over the relevant time period (2007 to 2020), with the majority of inquiries occurring in the second half of the time period.) (*Id.*)

According to Defendants, Plaintiffs' complaint omits this "critical analysis," particularly when the Hotline inquiries are placed in the context of purchase dates. (*Id.* at 12–13.) Plaintiffs respond that Defendants' "incomplete and inaccurate factual challenge" to the SAC's allegations is "wholly inappropriate on a motion to dismiss." (Opp. at 6.) Plaintiffs further argue that Mazda's narrow set of "unilaterally-determined" keywords "hides nearly two thousand warranty repairs[.]" (*Id.* at 6.)

The Court concludes that, for pleading purposes, Plaintiffs have plausibly alleged pre-sale knowledge through the additional warranty claims and Hotline inquiries alleged in the SAC. "[A]s a general matter, '[w]hile circumstances constituting fraud must be alleged with particularity, knowledge may be alleged generally.'" *McCarthy v. Toyota Motor Corp.*, No. 8:18-CV-00201-JLS-KES, 2019 WL 3220579, at *4 (C.D. Cal. Apr. 9, 2019) (quoting *Parenteau v. Gen. Motors, LLC*, No. CV 14-04961-RGK MANX, 2015 WL 1020499). Even accepting at face value Defendants' factual analysis of the data, the fact that 294 Hotline inquiries contained the narrow search terms "mix," "milk," "mud," and "froth" suggests to the Court that there are likely many more claims concerning the alleged defect that do not mention these exact words. It also suggests that Mazda was aware of a very specific problem with its water pumps.

Defendants argue that the Court need not make such an inference, since the warranty data and Hotline inquiries are referenced in the complaint and so the Court may

take judicial notice of the data and analyze it itself. (*See* Request for Judicial Notice (RJN), Doc. 244; Reply at 4.)[3] Such factual analysis of the warranty data is better suited for the summary judgment stage. For pleading purposes, the Court need only determine whether, assuming the allegations in the SAC to be true, there is a "plausible inference that [Mazda] knew of the [water pump defect] at the time of the sale." *See McCarthy*, 2019 WL 3220579, at *5. Because the Court concludes that Plaintiffs have met the plausibility standard, Defendants' motion to dismiss Plaintiffs' fraud-based claims based on the failure to allege pre-sale knowledge is DENIED.

b. **Duty to Disclose**

Mazda also argues that, even if the Court concludes that Plaintiffs have adequately alleged pre-sale knowledge of the defect, the fraud-by-omission claims under California, Illinois, Ohio, Pennsylvania, and Virginia must also be dismissed based on the failure to allege a duty to disclose. (Mem. at 7; Reply at 8.) Plaintiffs respond that (1) California, Ohio, Pennsylvania, and Virginia all recognize a duty to disclose material information, and (2) Illinois recognizes a duty to disclose safety hazards. (Opp. at 11.) Because the

[3] The Court had previously denied Defendants' request to email Excel spreadsheets containing its entire warranty database, but allowed them to make another request for judicial notice of PDFs containing only the relevant data. (Order Denying App. to Seal, Doc. 237.) Because the Court declines to conduct a factual analysis of the warranty data at the pleading stage—and the parties plainly dispute which claims and inquiries actually concern the alleged defect—Defendants' RJN is DENIED. *See Neylon v. Cty. of Inyo, No. 1:16-CV-0712 AWI JLT, 2016 U.S. Dist. LEXIS 161326,* 2016 WL 6834097, at *4 (E.D. Cal. Nov. 21, 2016) (citing *Adriana Intern. Corp. v. Thoeren,* 913 F.2d 1406, 1410 n. 2 (9th Cir. 1990)) ("[I]f an exhibit is irrelevant or unnecessary to deciding the matters at issue, a request for judicial notice may be denied").

parties dispute the relevant law in each state, the Court addresses each in turn.

i. California law

"Under California law, there are four circumstances in which an obligation to disclose may arise: (1) when the defendant is in a fiduciary relationship with the plaintiff; (2) when the defendant had exclusive knowledge of material facts not known to the plaintiff; (3) when the defendant actively conceals a material fact from the plaintiff; and (4) when the defendant makes partial representations but also suppresses some material facts." *Smith v. Ford Motor Co.*, 749 F. Supp. 2d 980, 987 (N.D. Cal. 2010), *aff'd,* 462 F. App'x 660 (9th Cir. 2011) (citing *LiMandri v. Judkins,* 52 Cal. App. 4th 326, 337, 60 Cal. Rptr. 2d 539 (1997)). A duty to disclose may also arise "when there is a known defect in a consumer product and there are safety concerns associated with the product's use." *In re MyFord Touch Consumer Litig.*, 46 F. Supp. 3d 936, 958 (N.D. Cal. 2014).

Here, Plaintiffs adequately allege that Mazda had "exclusive knowledge of material facts not known to the plaintiff" under the second *Judkin* factor, and also that the Water Pump Defect posed safety concerns. Plaintiffs allege that "the Water Pump Defect presents a significant safety risk for Plaintiffs and members of the Classes because when the water pump suddenly and unexpectedly fails and causes catastrophic engine failure, Class Vehicles lose engine power, including the ability to accelerate, maintain speed, readily control steering and/or fully engage the brakes." (SAC ¶ 17.) Plaintiffs also detail several customer complaints expressing "serious safety concerns" related to the Water Pump Defect, including accounts of customers who experienced sudden engine failure while driving at high speeds on the freeway. (*Id.* ¶ 19.) Plaintiffs also allege that the Water Pump Defect is material because, "as a result of the internal location of the water pump in the engine, the cost to repair or replace the defective water pump is significant even in situations where the entire engine is not destroyed." (*Id.* ¶ 12.) Had Plaintiffs known the "significant costs consumers must incur to inspect, service, or

maintain the water pump within the normal expected useful life of the Class Vehicles in order to avoid catastrophic engine failure," they would not have purchased or leased the Class Vehicles or would have paid less for them. (*Id.* ¶ 16.) Further, as described above, Plaintiffs have alleged facts plausibly supporting the inference that Mazda had exclusive knowledge of the defect based on its internal warranty data and Hotline inquiries, along with various consumer complaints.

The Court concludes that these allegations are sufficient to support a duty to disclose under California law. *See Falk v. Gen. Motors Corp.*, 496 F. Supp. 2d 1088, 1096 (N.D. Cal. 2007) (concluding that a duty to disclose arose where General Motors had exclusive access to "aggregate data from its dealers," "access to pre-release testing data," and "access to the numerous complaints from its customers" concerning its allegedly defective speedometers).[4] The Court therefore DENIES Defendants' motion to dismiss Plaintiffs' fraud-based claims under California law on the failure to allege a duty to disclose.

ii. Ohio law

Plaintiffs argue that Ohio law recognizes a duty to disclose material information. (Opp. at 11 n.9, citing *Miles v. Perpetual Sav. & Loan Co.*, 58 Ohio St. 2d 97, 99, 388 N.E.2d 1367, 1369 (1979).) In *Miles,* the Ohio Supreme Court stated, "It is well established that an action for fraud and deceit is maintainable not only as a result of affirmative misrepresentations, but also for negative ones, such as the failure of a party to a transaction to fully disclose facts of a material nature where there exists a duty to

[4] The Court is unpersuaded by Defendants' attempt to distinguish *Falk.* (See Reply at 10.) Although the court in *Falk* also concluded that the plaintiffs had adequately pleaded active concealment of a defect under the third *Judkin* factor, the court concluded that a duty to disclose also arose under the second *Judkin* factor based on allegations plausibly supporting that General Motors "had exclusive knowledge of the alleged defect in their speedometers." *Falk*, 496 F. Supp. 2d. at 1096–97.

speak." *Miles*, 58 Ohio St. 2d at 99. "[A] party is under a duty to speak, and therefore liable for non-disclosure, if the party fails to exercise reasonable care to disclose a material fact which may justifiably induce another party to act or refrain from acting, and the non-disclosing party knows that the failure to disclose such information to the other party will render a prior statement or representation untrue or misleading." *Id.*

Defendants argue that Ohio law "does not broadly require the disclosure of any facts a purchaser may claim is 'material.'" (Opp. at 11.) It may be true that a purchaser cannot simply declare facts to be "material" to trigger a duty to disclose, but that is not the case here; as described above, Plaintiffs have adequately alleged the Water Pump Defect was material because it created a safety risk that the engine may suddenly seize or become inoperable while driving, and also imposed unexpected and significant costs to repair or replace. The cases cited by Defendants do not support an alternative conclusion. In *Bellinger v. Hewlett Packard Co.*, an unpublished case, the plaintiff alleged that the defendant unlawfully concealed that its printer ink cartridges contained less than a "full" amount of ink. *Bellinger v. Hewlett Packard Co.*, 2002 WL 533403, at *1–2 (Ohio Ct. App. Apr. 10, 2002). The court held that the plaintiff failed to allege a duty to disclose because the defendant's advertising contained only accurate statements about the ink cartridges and the plaintiff "does not allege, *for example*, that any special or fiduciary relationship existed between HP and herself or other consumers that would give rise to a duty to disclose." *Id.* at 5 (emphasis added.) This case does not stand for the proposition that a plaintiff *must* allege a special or fiduciary relationship to trigger a duty to disclose under Ohio law. The same is true of the other unpublished case cited by Defendants. *See Kosik v. Banc One Ins. Agency, Inc.*, No. 4:07 CV 2788, 2008 WL 5705572, at *3 (N.D. Ohio Apr. 28, 2008) (briefly concluding that a fraud claim was "patently defective" because the complaint "does not identify any representation (let alone misrepresentation) made to Plaintiff" or "allege the existence of any contacts between Plaintiff and [Defendant] that potentially could give rise to a duty to disclose").

The Court therefore DENIES Defendants' motion to dismiss Plaintiffs' fraud-based claims under Ohio law based on the failure to allege a duty to disclose.

iii. Pennsylvania law

"Pennsylvania . . . recognize[s] a duty to disclose where a defendant has exclusive and superior knowledge." *Persad v. Ford Motor Co.*, No. 17-12599, 2018 WL 3428690, at *3 (E.D. Mich. July 16, 2018) (citing *In re MyFord Touch Consumer Litig.*, 46 F. Supp. 3d 936, 960 (N.D. Cal. 2014) (finding manufacturer had duty to disclose based on exclusive knowledge of a defect under, inter alia, Pennsylvania common law and consumer protection statutes)). Defendants argue that "whether a duty to disclose may exist is transaction-specific," but fail to explain or analyze why the specific facts alleged by Plaintiffs here would fail to support a duty to disclose under Pennsylvania law. (*See* Opp. at 11, citing *Gaines v. Krawczyk*, 354 F. Supp. 2d 573, 588 (W.D. Pa. 2004).)

The Court therefore DENIES Defendants' motion to dismiss Plaintiffs' fraud-based claims under Pennsylvania law on this basis.

iv. Virginia law

Under Virginia law, a duty to disclose "'may arise . . . if the fact is material and the one concealing has superior knowledge and knows the other is acting upon the assumption that the fact does not exist.'" *In re Chrysler-Dodge-Jeep Ecodiesel Mktg., Sales Pracs., & Prod. Liab. Litig.*, 295 F. Supp. 3d 927, 1012 (N.D. Cal. 2018) (quoting *White v. Potocska*, 589 F. Supp. 2d 631, 642 (E.D. Va. 2008)). Defendants argue that Virginia law requires a "knowing and a deliberate decision not to disclose a material fact" and Plaintiffs do not plead any active or deliberate concealment. (Reply at 11–12, citing *Cars Unlimited II, Inc. v. Nat'l Motor Co.*, No. CIV A 206CV305, 2007 WL 2344990, at *9 (E.D. Va. Aug. 15, 2007)). In *Cars Unlimited*, however, the court explained that

"concealment 'always involves *deliberate nondisclosure* designed to prevent another from learning the truth," and went on to recognize that "a duty to disclose may arise if 'the fact is material and the one concealing has superior knowledge and knows the other is acting upon the assumption that the fact does not exist.'" *Cars Unlimited*, 2007 WL 2344990, at *9 (quoting *Bank of Montreal v. Signet Bank,* 193 F.3d 818, 829 (4th Cir.1999)). The fact that the court there concluded after a bench trial that the plaintiff failed to show such deliberate nondisclosure does not assist Defendants at the pleading stage. Here, the Court concludes that Plaintiffs have plausibly alleged that Mazda had "superior knowledge" of a material fact to support a duty to disclose at the pleadings stage.

The Court therefore DENIES Defendants' motion to dismiss Plaintiffs' fraud-based claims under Virginia law on this basis.

v. Illinois law

Finally, Plaintiffs argue that Illinois recognizes a duty to disclose safety hazards. (Opp. at 11, citing *In re Gen. Motors LLC Ignition Switch Litig. ("In re GM")*, 257 F. Supp. 3d 372, 414 (S.D.N.Y. 2017), *modified on reconsideration*, No. 14-MC-2543 (JMF), 2017 WL 3443623 (S.D.N.Y. Aug. 9, 2017).) In *In re GM*, the district court stated that "at least two courts have held in circumstances similar to those presented here that a manufacturer of cars (or car parts) owed a duty to consumers under Illinois law to disclose 'safety defects.'" *In re GM*, 257 F. Supp. 3d at 414.

Defendants argue that the *In re GM* opinion is inconsistent with two Illinois opinions establishing that "Illinois law also requires a confidential, special, or fiduciary relationship to support a fraudulent concealment claim." (Opp. at 10, citing *Connick v. Suzuki Motor Co.*, 174 Ill. 2d 482, 500, 675 N.E.2d 584, 593 (1996); *Weidner v. Karlin*, 402 Ill. App. 3d 1084, 1087, 932 N.E.2d 602, 605 (2010).)

In *Connick*, the Illinois Supreme Court dismissed a claim for fraudulent concealment under Illinois law, holding that, although the plaintiff had alleged that a vehicle manufacturer had exclusive knowledge of a safety risk in certain of its vehicles, plaintiffs failed to "allege that they were in a confidential or fiduciary relationship with Suzuki or that Suzuki was in a position of superiority over them." *Connick*, 174 Ill. 2d at 482; *see also Drake v. Toyota Motor Corp.*, No. 2:20-CV-01421-SB-PLA, 2021 WL 2024860, at *6 (C.D. Cal. May 17, 2021) (applying *Connick* to dismiss fraudulent concealment claim under Illinois law, concluding that "[d]espite Plaintiffs' contention that there was a known safety risk, there is no allegation of a fiduciary or trust relationship between Plaintiffs and Toyota").

Because Plaintiffs do not point the Court to allegations of a special or fiduciary relationship that would support a duty to disclose under Illinois law, Plaintiffs cannot state a claim for fraudulent concealment under Illinois law (count 9). Although the parties previously briefed the issue of whether Plaintiffs had adequately alleged a duty to disclose in the first motion to dismiss, the Court did not address the contours of this issue in its prior Order because Plaintiffs had failed to plausibly allege pre-sale knowledge. (*See* Order at 12–13.) Plaintiffs, however, have now had two chances to adequately allege their fraud-based claims. Moreover, the Court is not persuaded that Plaintiffs will be able to allege such a relationship even if granted leave to amend for a second time. The "'special relationship threshold is a high one,' and it is not enough that 'plaintiffs purchased a [vehicle] from an authorized [Mazda] dealer, and that [Mazda] manufactured and distributed the [vehicle]." *Drake*, 2021 WL 2024860, at *6 (quoting *Wigod v. Wells Fargo Bank, N.A.*, 673 F.3d 547, 572 (7th Cir. 2012) and *Connick*, 174 Ill. 2d at 482) (dismissing fraudulent concealment claim under Illinois law with prejudice).

The Court therefore GRANTS Defendants' motion as to the Illinois fraudulent concealment claim (count 9) and DISMISSES that claim WITH PREJUDICE. *See Nguyen v. Endologix, Inc.*, 962 F.3d 405, 420 (9th Cir. 2020) ("[W]here the plaintiff has previously been granted leave to amend and has subsequently failed to add the requisite

particularity to its claims, the district court's discretion to deny leave to amend is particularly broad.")

c. **Economic Loss Doctrine**

Defendants also argue that Sonneveldt's fraud claim under Michigan law (count 16) and Pickerd's fraud claim under Pennsylvania law (count 26) should be dismissed pursuant to the economic loss doctrine, which bars tort liability for purely economic loss. Plaintiffs do not address Sonneveldt's Michigan fraud claim in their opposition (*see* Opp. at 15; Reply at 9 n.9), and at oral argument counsel confirmed that Plaintiffs were no longer pursuing this claim.

Regarding Pickerd's claim under Pennsylvania law, Defendants cite to *Simchon v. Highgate Hotels, LP* for the proposition that the economic loss doctrine bars claims for common law fraud and under the Pennsylvania Unfair Trade Practices and Consumer Protection Law (UTPCPL). *Simchon v. Highgate Hotels, LP*, No. 3:15-CV-01434, 2016 WL 6595918, at *1 (M.D. Pa. Nov. 7, 2016). The court in *Simchon* cited to *Werwinski v. Ford Motor Co.*, 286 F.3d 661 (3d Cir. 2002) for this holding, but *Werwinski* has now been expressly overruled. *See Earl v. NVR, Inc.*, 990 F.3d 310, 312 (3d Cir. 2021) ("[I]t is now appropriate to set aside our holding in *Werwinski* with respect to the economic loss doctrine's application to UTPCPL claims.")

Defendants argue that the holding in *Earl* expressly extends only to UTPCPL claims, but as Defendants acknowledge, at least three federal courts have held that fraud claims are no longer barred by the economic loss doctrine after *Earl*. (Reply at 13–14.) Defendants point the Court to no case applying the economic loss doctrine to fraud claims under Pennsylvania law after *Earl*. (*Id.*)

Accordingly, Defendants' motion is GRANTED as to the fraud claim under Michigan law (count 16) and DENIED as to the fraud claim under Pennsylvania law

(count 26.) Because Plaintiffs agreed to dismiss the Michigan fraud claim at oral argument, that claim is DISMISSED WITH PREJUDICE.

2. Consumer Protection Claims[5]

a. Whether Certain Consumer Protection Claims are Time-Barred

In its January 4 Order, the Court dismissed Bibbo's Florida Deceptive and Unfair Trade Practices Act (FDUTPA) claim and Dennis's Ohio Consumer Sales Practices Act (CSPA) claim as time-barred, but gave Plaintiffs the opportunity to re-plead facts to support tolling under a fraudulent concealment theory. (Order at 21.) To invoke fraudulent concealment tolling under Florida law, Plaintiffs must plead facts establishing that Defendants "'deliberately and actively concealed the material facts for the purpose of inducing [Plaintiffs] to delay filing this action.'" *Padilla v. Porsche Cars N. Am., Inc.*, 391 F. Supp. 3d 1108, 1113 (S.D. Fla. 2019) (quoting *Speier-Roche v. Volksw Agen Grp. of Am. Inc.*, No. 14-20107-CIV, 2014 WL 1745050, at *7 (S.D. Fla. Apr. 30, 2014)). "[M]ere 'nondisclosure' . . . is legally insufficient to toll the statute of limitations" under Florida law. *Speier-Roche*, 2014 WL 1745050, at *7 (dismissing FDUTPA claim where

[5] In their opening brief, Defendants contend that "Plaintiffs' consumer protection claims under California (counts 4 and 5), Florida (count 7), Illinois (count 10), Louisiana (count 12), Massachusetts (count 14), Michigan (count 17), Missouri (count 19), North Carolina (count 21), Ohio (count 24), Texas (count 28), and Virginia (count 30) law also fail." (Mot. at 6–7.) This statement is then followed by a full-page string citation to ten different cases, with parentheticals of varying degrees of specificity. The Court will not attempt to parse this string cite to determine the basis for dismissal of each of these claims. To the extent Defendants expanded on these arguments in their Reply, the Court addresses them in this section. But ultimately, this is Defendants' motion, and the Court will not dismiss a claim unless the basis for dismissal is adequately briefed and supported by the papers.

the plaintiff "fail[ed] to allege any elements of active fraudulent concealment on the part of Defendant, much less that any such acts delayed Plaintiff's filing beyond the statute of limitations"). Similarly, to invoke fraudulent concealment tolling under Ohio law, "plaintiffs must 'establish that subsequent and specific actions by defendants somehow kept them from timely bringing suit.'" *Thornton v. State Farm Mut. Auto Ins. Co.*, No. 1:06-CV-00018, 2006 WL 3359448, at *6 (N.D. Ohio Nov. 17, 2006).

Plaintiffs argue that "Plaintiffs have pled sufficient facts to show that Defendants had pre-sale knowledge of the Defect and deliberately and actively concealed it." (Opp. at 16, citing SAC ¶¶ 4-5, 12, 14, 70, 77-82, 85-87, 103, 134), but none of the cited allegations contain facts establishing specific, affirmative actions taken by Defendants to conceal the defect for the purpose of delaying Plaintiffs' filing of this lawsuit.
The Court therefore GRANTS Defendants' motion to dismiss the FDUTPA claim (count 7) and the CSPA claim (count 24). Because Plaintiffs have now had two opportunities to adequately allege these claims and have failed to do so, the claims are DISMISSED WITH PREJUDICE.

b. **Illinois Consumer Fraud Act claim**

Defendants also argue that Plaintiffs cannot maintain an Illinois Consumer Fraud Act ("ICFA") claim because the Illinois Plaintiffs do not allege that they received any communications from Mazda. (Reply at 12–13.) Plaintiffs contend that the ICFA "covers omissions even absent affirmative misrepresentations, and regardless of a common law duty to disclose, where, as here, 'defendants have prior knowledge of the information that they are alleged to have suppressed.'" (Opp. at 13, *Miller v. William Chevrolet/GEO, Inc.*, 326 Ill. App. 3d 642, 658, 762 N.E.2d 1, 14 (2001).)

Plaintiffs are correct that omissions are actionable under the ICFA, and "it is unnecessary to plead a common law duty to disclose in order to state a valid claim of consumer fraud based on an omission or concealment." *Connick*, 174 Ill. 2d at 505.

Although the ICFA covers omissions, however, "[a] consumer cannot maintain an action under the Illinois Consumer Fraud Act when the plaintiff does not receive, directly or indirectly, communication or advertising from the defendant." *De Bouse v. Bayer*, 235 Ill. 2d 544, 555, 922 N.E.2d 309, 316 (2009); *see also Darne v. Ford Motor Co.*, No. 13 C 03594, 2015 WL 9259455, at *9 (N.D. Ill. Dec. 18, 2015) ("An 'omission' under the ICFA is an omission from a communication, not a general failure to disclose. . . . To the extent that language in *Connick* can be read to suggest that a general failure to disclose is a sufficient omission, that dicta does not reflect the prevailing view of the Illinois Supreme Court and is no longer consistent with the state's treatment of claims under the ICFA.").

Plaintiffs do not point the Court to any allegations in the SAC that the Illinois Plaintiffs received specific communications from Mazda, either directly or indirectly, from which the material information was omitted (particularly in the case of Plaintiff Meshberg, who purchased a used vehicle.) *Cf. Connick*, 174 Ill. 2d at 504 (finding that plaintiffs sufficiently pleaded claim for consumer fraud where "plaintiff[s] alleged that Suzuki represented to Car & Driver that the [vehicle] had special safety features to protect passengers involved in a rollover accident and that this information was false since the [vehicle] had improper side-door strength and roof-crush resistance.")

The Court therefore GRANTS Defendants' motion to dismiss the ICFA claim (count 10). Because this is now Plaintiffs' second attempt to adequately plead this claim, the claim is DISMISSED WITH PREJUDICE.

c. Virginia Consumer Protection Act claim

Defendants also argue that Plaintiffs' Virginia Consumer Protection Act (VCPA) claim fails because the Virginia Plaintiffs "have not pleaded a knowing and deliberate decision not to disclose the fact." (Reply at 13.) Defendants cite to *Allen v. FCA US LLC*, No. 6:17-CV-00007, 2017 WL 1957068, at *4 (W.D. Va. May 10, 2017) for the

argument that dismissal of a VCPA claim is appropriate on this basis. (*Id.*) In *Allen*, however, the court concluded that the plaintiffs had failed to allege that any statements or omissions were "intentionally and knowingly" false at the relevant time because—in contrast to Plaintiffs here—the plaintiffs in that case had failed to adequately allege pre-sale knowledge. *Allen*, 2017 WL 1957068, at *3–4. The Court therefore DENIES Defendants' motion to dismiss Plaintiffs' VCPA claim (count 30) on this basis.

3. Implied Warranty Claims

In its January 4 Order, the Court dismissed Plaintiffs' claims for breach of implied warranty, concluding that, although Plaintiffs had adequately pleaded that their vehicles were unmerchantable, any implied warranty of merchantability was limited to the Powertrain Limited Warranty (PLW) terms of 60,000 miles or 5 years, and Plaintiffs had failed to plead that the PLW's time and mileage limits were unconscionable. (MTD Order at 26–28.) Under most state laws at issue, unconscionability requires a showing of both "substantive" and "procedural" unconscionability. *See, e.g.*, *Perez v. DirecTV Grp. Holdings, LLC*, 251 F. Supp. 3d 1328, 1343 (C.D. Cal. 2017), *aff'd sub nom. Perez v. DirecTV, LLC*, 740 F. App'x 560 (9th Cir. 2018).

Plaintiffs argue that "[t]he SAC sufficiently alleges that the express warranty limitations are both substantively and procedurally unconscionable, as Mazda had pre-sale knowledge about the Defect but did not alert customers such that they could make a meaningful decision as to whether the PLW was sufficient." (Opp. at 17.) Even though the Court has determined that Plaintiffs' SAC now plausibly alleges pre-sale knowledge, this does not save Plaintiffs' implied warranty claims. As the Court stated in its prior Order, even if Mazda knew of the allege Defect, including that the Defect would manifest after the PLW expired, "such knowledge does not render the PLW substantively unconscionable." (MTD Order at 24, citing *Abraham v. Volkswagen of America, Inc.*, 795 F.2d 238, 250 (2d Cir.1985)) ("A rule that would make failure of a part actionable

based on such 'knowledge' would render meaningless time/mileage limitations in warranty coverage.").)

The Court therefore GRANTS Defendants' motion to dismiss Plaintiffs' implied warranty and redhibition claims (counts 1, 6, 8, 11, 13, 15, 18, 20, 22, 25, 27, and 29). Because Plaintiffs have now twice failed to adequately allege breach of implied warranty, these claims are DISMISSED WITH PREJUDICE. *See Nguyen v. Endologix, Inc.*, 962 F.3d 405, 420 (9th Cir. 2020) ("[W]here the plaintiff has previously been granted leave to amend and has subsequently failed to add the requisite particularity to its claims, the district court's discretion to deny leave to amend is particularly broad.")[6]

4. Song-Beverly Act

In its January 4 Order, the Court did not dismiss the Wright-Schneider's and the Bohanas' claims under the Song-Beverly Act because Defendants did not brief the dismissal of this claim in their first motion to dismiss.[7] (Order re: Clarification, Doc. 183.) Defendants now argue that Plaintiffs' claim for breach of implied warranty under the Song-Beverly Act (count 2) must be dismissed because (1) the Song-Beverly claim fails based on the PLW limits pursuant to Cal. Civ. Code § 1791.1(c) and (2) the Song-Beverly claim is time-barred. (Mem. at 22–23.)

Plaintiff Wright Schneider alleges that she leased a new 2011 Mazda vehicle on October 3, 2011, eventually purchasing the vehicle three years later. (SAC ¶ 27.) On May 13, 2018, while Wright Schneider was driving on the freeway, the vehicle had a

[6] Because the Court dismisses these claims with prejudice, it does not address Defendants' alternative arguments that certain implied warranty claims must be dismissed based on lack of privity or because they are time-barred. (*See* Mot. at 19–21.)

[7] Defendants contend that they intended to move to dismiss this claim and that the Court's conclusion to the contrary was "a miscommunication between Mazda's briefing and the Court's reading for which Mazda accepts responsibility." (Mem. at 22). In any case, the Court permits Mazda to raise these arguments in the instant Motion.

sudden and catastrophic engine failure without any prior warning that there was a problem with the vehicle's engine. (*Id.*) The engine failure was diagnosed as the result of a failed water pump and occurred around 114,000 miles. Plaintiffs Lawrence and Monika Bohana purchased a new 2010 Mazda vehicle on April 6, 2010. (*Id.* ¶ 28.) Around August 2019, the Bohanas' vehicle similarly suffered sudden engine failure while it was being driven, with no prior warning. (*Id.*) The failure was diagnosed as a result of a failed water pump and occurred when the vehicle had around 72,000 miles. (*Id.*)

a. **Durational Limit of Section 1791.1(c)**

Defendants first argue that, because Plaintiffs' water pump failures occurred after the expiration of the PLW's durational limits, their Song-Beverly claim must fail. Cal. Civ. Code § 1791.1(c) provides, "The duration of the implied warranty of merchantability . . . shall be coextensive in duration with an express warranty which accompanies the consumer goods, provided the duration of the express warranty is reasonable; but in no event shall such implied warranty have a duration of less than 60 days nor more than one year following the sale of new consumer goods to a retail buyer." Cal. Civ. Code § 1791.1(c). As above, the Wright-Schneider's vehicle experienced a water pump failure over six years after purchase when the vehicle had 114,000 miles (SAC ¶ 27), and the Bohanas' vehicle experienced a water pump failure over nine years after purchase (SAC ¶ 28).

In *Mexia*, the California Court of Appeals addressed the durational limits of Section 1791.1(c). *Mexia v. Rinker Boat Co.*, 174 Cal. App. 4th 1297, 1310, 95 Cal. Rptr. 3d 285, 295 (2009). First, it explained that "[t]he duration provision provides, in essence, that the duration of the implied warranty of merchantability shall be the same as the duration of any reasonable express warranty that accompanies the product, but in no event shorter than 60 days or longer than one year." *Id.* Because Mazda's express warranty extends longer than one year, "the maximum duration of one year applies

under section 1791.1." *Ehrlich v. BMW of N. Am., LLC*, 801 F. Supp. 2d 908, 922 (C.D. Cal. 2010). Second, the *Mexia* court held, "[i]n the case of a latent defect, a product is rendered unmerchantable, and the warranty of merchantability is breached, *by the existence of the unseen defect*, not by its subsequent discovery." *Mexia*, 174 Cal. App. 4th at 1305 (emphasis added). The court further held, "There is nothing that suggests a requirement that the purchaser discover and report to the seller a latent defect within [the one-year] time period." *Id.* at 1310.

Here, Plaintiffs argue that, because they have alleged a latent defect existing at the time of sale of their vehicles, the provisional limits of Section 1791.1(c) do not bar their claims. (Opp. at 22.) Specifically, Plaintiffs allege that "the Water Pump Defect was present at the time of sale or lease of the Class Vehicles and concealed from Plaintiffs and members of the Classes." (SAC ¶ 21.) Plaintiffs also allege that the "Class Vehicles contain an inherent defect—the Water Pump Defect—(at the time of sale or lease and thereafter) and present an undisclosed safety risk to drivers and occupants[.]" (*Id.* ¶ 177.) The Court concludes that these allegations are sufficient, at the pleadings stage, to plausibly allege a latent defect. "Although the evidence produced at later stages of the case could show that the [water pump failure] was due to improper maintenance, it is also possible that [Plaintiffs] can present evidence that the [water pump failure] was due to a defect that existed at the time of sale but remained latent and undiscoverable" until Plaintiffs experienced sudden engine failure while driving. *Mexia*, 174 Cal. App. 4th at 1305.

Defendants' attempts to distinguish *Mexia* are unconvincing. They first argue that their "argument is not directed to the one-year durational period" set forth in Section 1791(c), contending that the PLW extends the one-year statutory maximum. (Reply at 21–22). But this argument is supported neither by case law (Defendants cite to no case interpreting Section 1791(c) in this manner) nor by the plain language of the statute, which expressly states that the duration of the implied warranty of merchantability shall be the same as the duration of any reasonable express warranty that accompanies the

product, "*but in no event* . . . longer than one year." Cal. Civ. Code § 1791.1(c) (emphasis added). It is the one-year statutory maximum, not the PLW's durational limit, that governs this claim; *Mexia's* discussion of whether a claim under the Song-Beverly Act may be brought after the expiration of the durational limit of the statute is therefore squarely applicable here. Defendants also argue that *Mexia* is factually inapposite, pointing out that, in *Mexia*, the plaintiff alleged a defect resulting in destructive corrosion two years after the sale of a boat. (*Id.*) The court's reasoning, however, that the length of time between the purchase of the boat and the subsequent repairs "does not necessarily mean that the defect did not exist at the time of sale" applies with equal force to the alleged defect here, and courts have extended this reasoning to the automotive defect context. *See, e.g.*, *Ehrlich v. BMW of N. Am., LLC*, 801 F. Supp. 2d 908, 924 (C.D. Cal. 2010) (concluding, based on *Mexia*, that a plaintiff could pursue Song-Beverly Act claim for alleged windshield defect that manifested over three years after his vehicle purchase).

Moreover, courts have relied on *Mexia* to deny motions to dismiss Song-Beverly Act claims where a latent defect has been alleged. *See Ehrlich v. BMW of N. Am., LLC*, 801 F. Supp. 2d 908, 924 (C.D. Cal. 2010) ("*Mexia* directly addressed and rejected the precise argument BMW makes here, holding that, so long as a latent defect existed within the one-year period, its subsequent discovery beyond that time did not defeat an implied warranty claim."); *Beshwate v. BMW of N. Am., LLC*, No. 1:17-CV-00417-SAB, 2017 WL 6344451, at *8 (E.D. Cal. Dec. 12, 2017) ("The implied warranty of merchantability may be breached by a latent defect undiscoverable at the time of sale.") Defendants do not convincingly distinguish these cases or otherwise argue that Plaintiffs have failed to allege the existence of a latent defect at the time of sale.

The Court notes that, at oral argument, it expressed concern over the scope of *Mexia*'s holding, observing that the case provides no outer limit to an implied warranty claim based on an allegedly latent defect. Other district courts have raised similar concerns. *See, e.g.*, *Valencia v. Volkswagen Grp. of Am. Inc*, 119 F. Supp. 3d 1130, 1140 (N.D. Cal. 2015) (internal citations omitted) ("*Mexia's* broader holding 'renders

meaningless any durational limits on implied warranties[,]' as '[e]very defect that arises could conceivably be tied to an imperfection existing during the implied warranty period.' Under such a reading of *Mexia*, even 'defects' that manifest twenty or thirty years after the date of purchase would fall within Song-Beverly's one-year limitations period."); *Marchante v. Sony Corp. of Am.*, 801 F. Supp. 2d 1013, 1022 (S.D. Cal. 2011) ("*Mexia* enjoys the limelight as a case 'contrary to established California case law with respect to the duration of the implied warranty of merchantability.'").

Nonetheless, "[w]e 'must follow the decision of the intermediate appellate courts of the state unless there is convincing evidence that the highest court of the state would decide differently.'" *Daniel v. Ford Motor Co.*, 806 F.3d 1217, 1222 (9th Cir. 2015) (citing In re Schwarzkopf, 626 F.3d 1032, 1038 (9th Cir. 2010)). Here, "there is not convincing evidence that the California Supreme Court would decide the latent defect discovery issue that was presented in *Mexia* differently." *Id.* "While California federal district courts have given *Mexia* mixed treatment . . . we must adhere to state court decisions—not federal court decisions—as the authoritative interpretation of state law." *Id.* (citing *W. v.* Am. Tel. & Tel. Co., 311 U.S. 223, 237–38 (1940)).

In light of the foregoing, the Court declines to dismiss Plaintiffs' Song-Beverly claim as barred by the statute's durational limit.

b. **Statute of Limitations**

Defendants also argue that the Song-Beverly claim is barred by the statute of limitations. (Mot. at 23.)

"The Song-Beverly Act does not include its own statute of limitations." *Mexia*, 174 Cal. App. 4th at 1305. "California courts have held that the statute of limitations for an action for breach of warranty under the Song–Beverly Act is governed by . . . section 2725 of the Uniform Commercial Code." *Id.* Under Section 2725, "[a]n action for

breach of any contract for sale must be commenced within four years after the cause of action has accrued." Cal. Com. Code § 2725.

Although the California Plaintiffs brought their claims more than four years after the date of purchase of their respective vehicles, Plaintiffs argue that (1) their claims did not accrue until they were on notice of the Defect, which was May 2018 for Plaintiff Wright Schneider (SAC ¶ 27) and August 2019 for the Bohanas (SAC ¶ 28), and (2) any applicable statute of limitations has been tolled by Mazda's fraudulent concealment. (Opp. at 23.)

Defendants argue that "there is no tolling for implied warranty claims" (Mot. at 23), citing to Section 2752(2), which states:

> A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered.

Cal. Com. Code § 2725(2). This "future performance" or "delayed discovery" exception, however, has been applied "almost exclusively in the express warranty context." *Philips v. Ford Motor Co*., No. 14-CV-02989-LHK, 2016 WL 1745948, at *12 (N.D. Cal. May 3, 2016) (citing *Cardinal Health 301, Inc. v. Tyco Elecs. Corp.*, 87 Cal. Rptr. 3d 5, 16–18 (2008)); *see also Cardinal Health*, 87 Cal. Rptr. 3d at 19–20 ("Because an implied warranty is one that arises by operation of law rather than by an express agreement of the parties, courts have consistently held it is not a warranty that "explicitly extends to future performance of the goods.") Plaintiffs thus may not rely on this exception to toll the statute of limitations.[8]

[8] Plaintiffs rely on *Kwon Yi v. BMW of N. Am., LLC*, 805 F. App'x 459, 461 (9th Cir. 2020), in which the Ninth Circuit affirmed a grant of summary judgment on the plaintiff's Song-Beverly

Plaintiffs may, however, invoke the doctrine of fraudulent concealment to toll their Song-Beverly claims. Section 2725(4) states, "This section does not alter the law on tolling of the statute of limitations." Cal. Com. Code § 2725(4). Courts have therefore determined that, "when properly pleaded, fraudulent concealment tolls the statute of limitations for claims brought under the Song-Beverly Act." *Philips v. Ford Motor Co.*, 2016 WL 1745948, at *14 (N.D. Cal. May 3, 2016) (collecting cases).

"The doctrine of fraudulent concealment tolls the statute of limitations where a defendant, through deceptive conduct, has caused a claim to grow stale." *Allen v. Similasan Corp.*, 96 F. Supp. 3d 1063, 1071 (S.D. Cal. 2015) (citing Aryeh v. Canon Bus. Solutions, Inc., 55 Cal.4th 1185, 1192 (Cal. 2013)). "This doctrine requires the plaintiff (1) plead with particularity the facts giving rise to the fraudulent concealment claim and (2) demonstrate that the he or she used due diligence in an attempt to uncover the facts." *Allen v. Similasan Corp.*, 96 F. Supp. 3d 1063, 1071 (S.D. Cal. 2015) (citing Hunter v. Gates, 68 Fed.Appx. 69, 71 (9th Cir. 2003)).

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claims because there was no genuine dispute of fact that the plaintiff was aware of the issues with his car more than four years before filing his complaint. In that case, the court stated, "A breach of warranty claim accrues when the plaintiff reasonably knows or should know that breach has occurred—that is, that the defendant either will not or cannot repair an existing defect." *Yi*, 805 F. App'x at 461. The court cited to *Krieger v. Nick Alexander Imps., Inc.*, 234 Cal. App. 3d 205, 215–19 (1991), but *Krieger* dealt with a written warranty that all defects would be repaired for a period of 36 months/36,000 miles. *Krieger*, 234 Cal. App. 3d at 217. The *Krieger* court held that there was an issue of material fact as to whether the discovery rule codified in Section 2725(2) applied, because "[a] promise to repair defects that occur during a future period is the very definition of express warranty of future performance." *Krieger*, 234 Cal. App. 3d at 217. However, "since *Krieger*, the California Court of Appeal has squarely held that an express warranty does not toll the statute of limitations on an implied warranty claim." *Covarrubias v. Ford Motor Co.*, No. 19-CV-01832-EMC, 2019 WL 2866046, at *4 (N.D. Cal. July 3, 2019) (citing *Cardinal Health*, 87 Cal. Rptr. 3d at 19–20).

For reasons explained in Section III.B., *supra*, Plaintiffs have adequately pleaded their claims for fraudulent concealment. Additionally, the California Plaintiffs allege that both of their vehicles suffered sudden, catastrophic engine failure with no prior warning. (SAC ¶¶ 27–28.) The Court therefore concludes that Plaintiffs have sufficiently pleaded tolling of the statute of limitations based on a theory of fraudulent concealment. *See Philips*, 2016 WL 1745948, at *14 (denying motion to dismiss Song-Beverly Act claim based on fraudulent concealment tolling where the plaintiffs had adequately pleaded a claim for fraudulent concealment claim and the plaintiffs had alleged that they took their vehicle in for service when it first experienced issues).

Accordingly, the Court DENIES Defendants' motion to dismiss Plaintiffs' Song-Beverly claim (count 2).

5. Injunctive and Equitable Relief

Finally, Defendants argue that all claims for injunctive and equitable relief fail for lack of Article III or statutory standing. (Mem. at 24.)

In its January 4 Order, the Court dismissed claims for injunctive and equitable relief because (1) Plaintiffs had failed to adequately allege a threat of future injury to establish Article III standing, and (2) Plaintiffs had failed to allege an inadequate remedy at law to establish statutory standing under the UCL and CLRA. (MTD Order at 31.) As to threat of future injury, Plaintiffs had failed to address how their argument that all Class Members faced the continued safety risk of a water pump failure applied to Plaintiffs "who allege they no longer possess or have use of their vehicles." (*Id.*)

Here, the SAC alleges that "the Bohanas, Bibbo, the Levasseurs, Aslan, the Pickerds, and Halwas no longer possess their vehicles." (Mem. at 24 n. 17.) The SAC is unclear, however, as to whether the remaining Plaintiffs continue to possess their vehicles. Defendants argue that "based on discovery responses served in March 2020, it appears they may have also disposed of their vehicles." (*Id.*) But as Plaintiffs correctly

point out, Defendants may not rely on discovery responses outside of the pleadings at the motion to dismiss stage. (Opp. at 24.) Any argument as to possession of Class Vehicles based on discovery responses is properly raised at the summary judgment stage. Additionally, in a class action, "only one named Plaintiff must meet the standing requirements." *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 979 (9th Cir. 2011).

Because Defendants have not pointed the Court to any allegations in the SAC supporting the argument that *all* named Plaintiffs have disposed of their vehicles, the Court concludes that, at least as to Plaintiffs who may still possess their Class vehicles, Plaintiffs have plausibly alleged a threat of future injury based on the ongoing safety risk posed by the Water Pump Defect. *See Pascal v. Nissan*, Case No. 8:20-cv-00492-JLS-JDE, Doc. 62 at 10–11 (C.D. Cal. July 8, 2021). Further, "Plaintiffs seek injunctive relief to remedy an ongoing safety defect in their vehicles that poses a risk of continuing harm," and "Defendant has not explained how monetary damages would adequately remedy this harm in a manner equivalent to an injunction." (*Id.*) The Court therefore also determines that Plaintiffs have plausibly alleged an inadequate remedy at law.

Accordingly, Defendants' motion to dismiss Plaintiffs' claims for injunctive and equitable relief is DENIED.

III. MOTION TO STRIKE

Defendants additionally move to strike the various allegations in the SAC pertaining to a fatal accident attributed to a water pump failure. (MTS at 3.)

A. Legal Standard

The Court may strike from a pleading any matter that is "redundant, immaterial, impertinent, or scandalous." Fed. R. Civ. P. 12(f). "Matters are 'immaterial' if they have 'no essential or important relationship to the claim for relief or the defenses being

pleaded' and 'impertinent' if they 'do not pertain, and are not necessary, to the issues in question.'" *Marcus v. ABC Signature Studios, Inc.*, 279 F. Supp. 3d 1056, 1062 (C.D. Cal. 2017) (citations omitted). "Matters are 'scandalous' if they 'cast a cruelly derogatory light on a party or other person.'" *Id.* "As a general rule, motions to strike are disfavored." *Barber v. Johnson & Johnson Co.*, 2017 WL 2903255, at *3 (C.D. Cal. Apr. 4, 2017) (*citing Wein v. Kaiser*, 647 F.2d 200, 201 (D.C. Cir. 1981)). "In reviewing a motion to strike, the court must view the pleadings under attack in the light most favorable to the pleader." *Juno Therapeutics, Inc. v. Kite Pharma*, No. CV:17-07639-SJOR (AOx), 2018 WL 1470594, at *3 (C.D. Cal. Mar. 8, 2018). Ultimately, "[s]uch a motion 'should not be granted unless it is clear that the matter to be stricken could have no possible bearing on the subject matter of the litigation.'" *Barber*, 2017 WL 2903255, at *3 (*citing Liley v. Charren*, 936 F. Supp. 708, 713 (N.D. Cal. 1996)).

B. Discussion

Defendants move to strike the following allegations in the SAC:

- ". . . the cause of at least one fatal accident has been attributed to the Water Pump Defect" and "deadly accidents like this one are always a possibility." SAC ¶ 6.
- "This dangerous condition has resulted in at least one death." SAC ¶ 18.
- ". . . many of which detailed gravely serious safety concerns and at least one reported death." SAC ¶ 19.
- "The failure caused an accident that resulted in one death to a surrounding party." SAC, at p. 7.
- ". . . or even death . . ." SAC ¶ 84.
- ". . . deadly failures . . ." SAC ¶ 90.
- "Mazda's internal records reflect that at least one death was caused by an accident attributed to the Water Pump Defect." SAC ¶ 106.

(MTS at 3.)

Defendants first argue that these allegations are "immaterial and impertinent because, as the Court held [in its January 4 Order], information about a purported safety hazard does not give rise to an independent duty to disclose unless, at a minimum, there are allegations from which the Court could plausibly conclude Mazda had pre-sale knowledge of the alleged safety hazard." (*Id.* at 6.) As explained in Section II.B., however, Plaintiffs now adequately allege pre-sale knowledge and these allegations support Plaintiffs' assertion that Mazda had a duty to disclose the Defect based on its materiality and that it posed a potential safety hazard.

Defendants next argue that the allegations are "scandalous" because there is no indication that the "water pump failure" was actually caused by the specific Water Pump Defect alleged here, and "there is no basis for plaintiffs to conclude the water pump caused a fatality because the he or she was not physically involved in the reported accident." (*Id.*) A motion to strike, however, may not be granted merely because "they portray [Defendant] in an unfavorable light." *Kaiser Found. Hosps. v. California Nurses Ass'n*, No. 11-5588 SC, 2012 WL 440634, at *4 (N.D. Cal. Feb. 10, 2012) (reasoning that the defendant would "have an opportunity to challenge these allegations as the case proceeds"). Further, such a motion "'should not be granted unless it is clear that the matter to be stricken could have no possible bearing on the subject matter of the litigation.'" *Barber*, 2017 WL 2903255, at *3 (*citing Liley v. Charren*, 936 F. Supp. 708, 713 (N.D. Cal. 1996)). As explained above, these allegations are directly relevant to whether the Water Pump Defect poses a safety hazard to Class Members.

Accordingly, Defendants' Motion to Strike is DENIED.

IV. CONCLUSION

For the above reasons, (1) Defendants' Motion to Dismiss is GRANTED IN PART AND DENIED IN PART and (2) Defendants' Motion to Strike is DENIED in its entirety. Defendants' Motion to Dismiss is GRANTED as to the following claims, which are DISMISSED WITH PREJUDICE:

- Fraud claim under Illinois law (count 9) and Michigan law (count 16);
- Consumer protection claims under Florida law (count 7); Illinois law (count 10); and Ohio law (count 24).
- Plaintiffs' implied warranty and rehibition claims (counts 1, 6, 8, 11, 13, 15, 18, 20, 22, 25, 27, and 29).

Defendants' Motion to Dismiss is denied in all other respects.

Initials of Deputy Clerk: mku