IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
ST. JOSEPH DIVISION

RACHEL BUCHHOLZ, on behalf of herself and all others similarly situated, Plaintiff, v. GENERAL MOTORS LLC, Defendant.	))))))))))	No. 23-06004-CV-SJ-BP

ORDER DENYING MOTION TO DISMISS

Plaintiff Rachel Buchholz alleges Defendant General Motors LLC ("GM") sold certain vehicles with engines containing an oil consumption defect. (Doc. 1.)[1] Plaintiff's Complaint asserts, for herself and for a putative class, one count alleging violation of the Missouri Merchandising Practices Act (the "MMPA"), Mo. Rev. Stat. §§ 407.005-407.315. (*Id.*)

Now pending is GM's Motion to Dismiss under Federal Rules of Civil Procedure 9(b) and 12(b)(6). (Doc. 14.) Its primary argument is Plaintiff has not alleged sufficient facts to meet Rule 9(b)'s particularity standard and Rule 12(b)(6)'s plausibility standard. GM also argues Plaintiff's claim is barred by the statute of limitations. GM's Motion is fully briefed. (Docs. 14, 15, 23, 26.)

Upon review, the Court is satisfied Plaintiff's allegations are sufficient to state a plausible MMPA claim and trigger tolling of the statute of limitations. GM's Motion will be denied.

I. Background

Plaintiff's Complaint—which consists of 42 pages and 143 paragraphs—contains the following allegations, which the Court finds have sufficient factual matter to be taken as true.

[1] Citations are to the Court's CM/ECF docket system and the page numbers generated by it.

Tucker v. Gen. Motors LLC, 58 F.4th 392, 395 (8th Cir. 2023). The Court discusses only those allegations that are particularly relevant here.

GM designs, manufactures, markets, and sells automobiles and other vehicles throughout the United States and the world. (Doc. 1 ¶ 24.) In July 2015, Plaintiff purchased a new 2015 Chevrolet Equinox LT from a GM dealership in Missouri, and since then she has had her vehicle serviced at GM dealerships in Missouri. (*Id.* ¶¶ 28, 29.)

In November 2021, Plaintiff's vehicle began to malfunction. (*Id.* ¶ 30.) When she took her vehicle in for service, the GM dealership service personnel told her the vehicle was excessively burning oil, it was well known this issue affected vehicles with an engine type like hers, and GM knew about the issue but was waiting for the affected vehicles to "die off." (*Id.* ¶¶ 31, 33.) The service personnel also advised Plaintiff to check and change her vehicle's oil more frequently, supplement her vehicle's oil with additives, and consider replacing her vehicle's engine. (*Id.* ¶¶ 32, 35.) When Plaintiff contacted GM about her vehicle's issue, she was instructed to take her vehicle to a GM dealership for a series of oil consumption tests. (*Id.* ¶¶ 36-38.) Ultimately, Plaintiff's vehicle failed the oil consumption test, and she replaced her vehicle's engine. (*Id.* ¶¶ 38, 40.)

Based on these events, Plaintiff's Complaint asserts one count alleging violation of the MMPA, for both herself and a putative class. (*Id.* ¶¶ 124-25, 132-143.) Plaintiff alleges vehicles like hers—that is, 2014 through 2017 model year Chevrolet Equinox and GMC Terrain vehicles equipped with a 2.4 liter engine[2] (the "Affected Vehicles"), (*id.* ¶¶ 124-25)—excessively burn oil (the "Oil Consumption Defect"), (*id.* ¶¶ 2-12). Plaintiff alleges GM knew of the Oil Consumption Defect based on its receipt of consumer complaints, (*id.* ¶ 76), its resulting investigation and

[2] This engine type is also referred to as an "LEA" or "EcoTech 2.4L" engine. (Doc. 1 ¶ 1.)

publication of GM Techlink articles[3] and technical service bulletins, (*id.* ¶¶ 76, 79-81, 86-90, 93), its recommendation of more frequent oil changes for vehicle model years preceding the Affected Vehicles, (*id.* ¶¶ 82-85), and consumer complaints posted to the internet, (*id.* ¶ 106). Plaintiff alleges GM concealed this defect, causing her damages. (*E.g.*, *id.* ¶¶ 13-20.)

Now pending is GM's Motion to Dismiss, in which it primarily argues that Plaintiff has not stated a plausible MMPA claim as to the Affected Vehicles, because (1) she has alleged insufficient facts, and (2) her allegations do not relate precisely to the Affected Vehicles but rather to different vehicles with different engines. GM also argues Plaintiff's claim is barred by the statute of limitations. The Court resolves this Motion below.

II. Law

The law governing Federal Rules of Civil Procedure 9(b) and 12(b)(6) is well established. Rule 9(b) provides that, when "alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." This is known as Rule 9(b)'s "particularity" requirement, and courts have ruled it applies to an MMPA claim that is fraud-like in that it arises from a misrepresentation or omission. *Craggs v. Fast Lane Car Wash & Lube, L.L.C.*, 402 F. Supp. 3d 605, 611 (W.D. Mo. 2019). "To satisfy the particularity requirement of Rule 9(b), the complaint must plead such facts as the time, place, and content of the defendant's false representations, as well as the details of the defendant's fraudulent acts, including when the acts occurred, who engaged in them, and what was obtained as a result." *Id.* at 610 (citation omitted). However, "the degree of specificity that is required may depend on the nature of the fraud alleged." *Id.*

[3] "GM TechLink is a monthly periodical published by GM for its dealership technicians and service personnel that discusses, among other matters, repair procedures concerning GM vehicles." (Doc. 1 ¶ 77.)

As for Rule 12(b)(6), a defendant may move to dismiss a plaintiff's claim for "failure to state a claim upon which relief can be granted." To survive a motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Braden v. Wal–Mart Stores, Inc.*, 588 F.3d 585, 594 (8th Cir. 2009). A plausible claim contains "factual content [that] allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citation omitted). "[T]he complaint should be read as a whole, not parsed piece by piece to determine whether each allegation, in isolation, is plausible." *Id.* "Ultimately, evaluation of a complaint upon a motion to dismiss is a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* (quotation and citation omitted).

III. Analysis

Before addressing GM's specific arguments, the Court notes other federal courts have also recently presided over cases about an oil consumption defect in GM vehicles that is substantially similar to what is alleged here—including the Eighth Circuit in *Tucker v. Gen. Motors LLC*, 58 F.4th 392 (8th Cir. 2023). *Tucker* reversed a Rule 12(b)(6) dismissal, holding the plaintiffs there had alleged a plausible MMPA claim. *Id.* at 398. The *Tucker* opinion shows the Eighth Circuit considered allegations quite similar to those at issue here and found they stated a claim that survived dismissal. *Id.* at 396-98. *Tucker* did not decide precisely the same issue and arguments GM raises in its Motion—for instance, it expressly declined to consider whether the plaintiffs' allegations were adequate under Rule 9(b)—but, given the similarities in the allegations, this controlling precedent is highly instructive as the Court turns to GM's arguments.

GM's Motion argues Plaintiff has failed to allege a viable MMPA claim, with its first and primary argument being that she failed to plead sufficient facts in support of her claim. To state

an MMPA claim, Plaintiff must plausibly allege she "(1) purchased merchandise from GM; (2) for personal, family or household purposes; and (3) suffered an ascertainable loss of money or property; (4) as a result of an act declared unlawful under the MMPA." *Tucker v. Gen. Motors LLC*, 58 F.4th 392, 396-97 (8th Cir. 2023) (alteration punctuation omitted). As to the element of an unlawful act, the MMPA "declares unlawful the use of 'any deception, fraud, false pretense, false promise, misrepresentation, unfair practice or the concealment, suppression, or omission of any material fact in connection with the sale or advertisement of any merchandise[.]'" *Id.* at 396 (quoting Mo. Rev. Stat. § 407.020(1)).

GM begins by arguing Plaintiff has not alleged certain elements of an MMPA claim with the particularity required by Rule 9(b). (Doc. 15 at 9-10; Doc. 26 at 12-14.) With respect to unlawful deceptive conduct, GM argues Plaintiff has failed to allege any details of its alleged concealment of the Oil Consumption Defect. The Court disagrees that such detail is required at the pleading stage in an MMPA omission case like this one. In *Tucker*, the Eighth Circuit favorably cited two cases—*Owen*[4] and *In re Polaris*[5]—in which the courts rejected Rule 9(b) arguments challenging omission claims in circumstances much like those presented here.[6] Following that precedent, the Court is satisfied Plaintiff has alleged with sufficient particularity

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[4] *Owen v. Gen. Motors Corp.*, 2006 WL 2808632, at *8 (W.D. Mo. Sept. 28, 2006):

> It is clear from the Complaint precisely what information the Owens allege GM omitted and/or concealed. That is sufficient to satisfy the particularity requirements of Rule 9 in this case. Requiring the Owens to plead with particularity which agent of GM omitted the material information and precisely where and when the omission occurred would put the Owens in the untenable position of having to plead a negative. Such a draconian reading of Rule 9 would read the words "concealment, suppression, or omission" right out of the MMPA by making it impossible to take such a claim beyond the pleading stage.

[5] *In re Polaris Mktg., Sales Pracs., & Prod. Liab. Litig.*, 364 F. Supp. 3d 976, 988–89 (D. Minn. 2019).

[6] *See also Holman v. Ali Indus., LLC*, 2023 WL 1438752, at *4 (W.D. Mo. Feb. 1, 2023):

> Thus, Plaintiff has alleged the time and place (during and in the design, manufacturing, labeling and/or packaging), the content omitted (the expiration date), the identity of the person who omitted it ([Defendant] as a company—as this case does not involve a fraudulent misrepresentation, Plaintiff cannot be expected to be more specific at this stage in the litigation[.]

that GM concealed the Oil Consumption Defect. Additionally, the nature of Plaintiff's transaction (i.e., purchasing a vehicle from a sophisticated global manufacturer) and Plaintiff's additional allegations of consumer complaints and TechLink and technical service bulletin publication, (*e.g.*, Doc. 1 ¶ 76), distinguish Plaintiff's allegations from the cases GM cites.

GM argues too that Plaintiff's causation allegations—in the language of the MMPA, that her damages occurred "as a result of" GM's committing an act the MMPA has declared unlawful—fail Rule 9(b)'s particularity requirement, focusing on Plaintiff's failure to allege she personally encountered GM's actions or inactions. (Doc. 15 at 9-10; Doc. 26 at 12-14.) The Court is not persuaded, as it finds Plaintiff has alleged she was affected by GM's concealment of the oil consumption, in that she alleged if had she known about that defect, she either would not have purchased her vehicle or would have paid less for it, (Doc. 1 ¶¶ 15, 139); in *Tucker* the Eighth Circuit held a materially identical allegation was plausible under Rule 12(b)(6), *Tucker*, 58 F.4th at 397. The cases GM cites are either not instructive[7] or distinguishable as involving a misrepresentation rather than an omission.[8] The Court finds Plaintiff's causation allegations sufficient, particularly given the MMPA does not require traditional reliance. *Boone v. PepsiCo, Inc.*, 2023 WL 1070293, at *9 (E.D. Mo. Jan. 27, 2023).

Turning to GM's Rule 12(b)(6) arguments, it contends insufficient facts support Plaintiff's allegations that GM knew of the Oil Consumption Defect before she purchased her vehicle. (Doc. 15 at 10-16; Doc. 26 at 6-11.) GM's argument arises from what is referred to as the MMPA's scienter requirement, which "limits liability for '[o]mission of a material fact' to 'any failure by a

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[7] The cited *Wullschleger* district court decision was recently vacated by the Eighth Circuit for lack of federal subject-matter jurisdiction. *Wullschleger v. Royal Canin U.S.A., Inc.*, 2023 WL 4855186, ___ F.4th ___ (8th Cir. July 31, 2023). As for *Albin v. Resort Sales Missouri, Inc.*, 2021 WL 5106365, at *4 (W.D. Mo. Sept. 7, 2021), it was a summary judgment ruling in which the plaintiffs presented no evidence in support of their theory.

[8] *McCall v. Monro Muffler Brake Inc.*, 2013 WL 3418089, at *3 (E.D. Mo. July 8, 2013) was an MMPA misrepresentation case in which the issue was whether the plaintiffs ever saw the disputed fee disclosures.

person to disclose material facts known to him/her, or upon reasonable inquiry would be known to him/her.'" *Tucker v. Gen. Motors LLC*, 58 F.4th 392, 397 (8th Cir. 2023) (quoting 15 Mo. C.S.R. 60-9.110(3)). In connection with the MMPA's requirement that an unlawful act must occur "in connection with the sale … of any merchandise[,]" *id.* at 396 (quoting Mo. Rev. Stat. § 407.020(1)), the defendant must actually or constructively know of the concealed material fact before the sale occurs. Applied here, Plaintiff's MMPA claim is plausible if she alleges facts support that GM knew of the Oil Consumption Defect or reasonably should have inquired about it before Plaintiff bought her vehicle in July 2015.

GM argues Plaintiff can meet this standard only by specifically alleging facts showing it knew of the Oil Consumption Defect in the Affected Vehicles themselves. In other words, GM argues allegations about oil issues in "different engines, different components, and different vehicles," (Doc. 15 at 6, 7, 16), are not enough for a plausible claim.

The Court disagrees and finds Plaintiff makes specific and detailed allegations indicating GM knew or—at a minimum—was on reasonable inquiry notice of the alleged Oil Consumption Defect in the Affected Vehicles before July 2015. For instance, Plaintiff alleges that, as of July 2012, GM had received numerous complaints about oil consumption issues and published both a technical service bulletin and a TechLink article for 2010 Equinox and Terrain vehicles using an engine that was a precursor for—but nonetheless materially similar to—the 2.4-liter engine in the Affected Vehicles. (Doc. 1 ¶¶ 76 & n.2.) In February 2013, GM issued a software update for the model years preceding the Affected Vehicles that reduced their oil change interval, seeking to conceal oil consumption issues. (*Id.* ¶¶ 82-85.) GM published additional documents detailing oil consumption issues in vehicle model years preceding the Affected Vehicles, including a TechLink article in August 2013, (*id.* ¶ 86-87), and technical service bulletins in September 2013, (*id.* ¶ 88),

May 2014, (*id.* ¶ 90), and January 2015, (*id.* ¶ 93), some of which specifically concerned a 2.4-liter engine, (*id.* ¶¶ 86-87, 93). Additionally, before July 2015 numerous consumer complaints about model years preceding the Affected Vehicles were posted to at least one third-party website. (*id.* ¶ 106.)

Based on the above allegations about an oil consumption defect in the model years immediately preceding the Affected vehicles, the Court finds Plaintiff has sufficiently and plausibly GM actually or constructively knew of the Oil Consumption Defect in Affected Vehicles, particularly given the alleged material similarities between the vehicles and their engines during those years. Inferring GM's knowledge in this way is supported by language in at least one of the cases it cites. *See Gregorio v. Ford Motor Co.*, 522 F. Supp. 3d 264, 282 (E.D. Mich. 2021) ("Although a service bulletin is not necessarily an admission of a defect, it leads to other inferences. … [Technical service bulletins] advising of [] issues support a fair inference that the manufacturer relied on an 'accretion of knowledge' collated from its own internal testing and engineering reports and complaints and data received exclusively by it through its dealer channels, which prompted it to issue those repair bulletins.") (citation omitted and cleaned up). Given it is sufficient under the MMPA that a defendant would have learned of a fact if it had conducted a reasonable inquiry, *Tucker*, 58 F.4th at 397, the Court finds Plaintiff has alleged sufficient facts for a plausible MMPA claim. *See Tucker*, 58 F.4th at 397 (ruling plaintiffs had adequately alleged the MMPA's scienter requirement based in part on allegations of "many specific consumer complaints of the problem to GM"); *Dack v. Volkswagen Grp. of Am.*, 565 F. Supp. 3d 1135, 1146 (W.D. Mo. 2021) (same, where the plaintiffs' allegations relied on both complaints to governmental regulators and the defendant's internal records).

Finally, GM argues the statute of limitations bars Plaintiff's claim because she bought her vehicle in July 2015, more than five years before she filed this case. (Doc. 15 at 16-17; Doc. 26 at 17.) The MMPA takes Missouri's general five-year statute of limitations and is subject to the discovery rule, which tolls the running of the statute if the defendant takes some affirmative action to fraudulently or intentionally conceal the matter, thereby preventing the plaintiff from discovery the cause of action. *Loy v. BMW of N. Am., LLC*, 2020 WL 5095372, at *1, 3 (E.D. Mo. Aug. 28, 2020). Here, Plaintiff alleges GM concealed the Oil Consumption Defect, such that Plaintiff learned of it only in November 2021 when her vehicle began to malfunction, she took it to a GM dealership for service, and she heard from the service personnel of oil consumption problems with GM vehicles. (Doc. 1 ¶¶ 30-33, 117-123.) The Court finds these allegations sufficient to support tolling of the statute of limitations, particularly given *Tucker*.[9] Based on these allegations, Plaintiff discovered her MMPA claim in November 2021 and filed this case in January 2023, meaning the five-year limitations period does not bar her claim.

IV. Conclusion

The Court finds Plaintiff's Complaint contains sufficient facts to allege a plausible MMPA claim and may proceed. GM's Motion to Dismiss is **DENIED**.

IT IS SO ORDERED.

/s/ Beth Phillips
BETH PHILLIPS, JUDGE
UNITED STATES DISTRICT COURT

DATE: August 18, 2023

[9] "[T]he alleged oil consumption defect concerned the inner workings of a complex machine that the average consumer would be unlikely to know or be able to research[.]" *Tucker v. Gen. Motors LLC*, 58 F.4th 392, 398 (8th Cir. 2023).