UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.: 2:20-cv-01421-SB-PLA	Date: 11/23/2020

Title: *Linda Drake v. Toyota Motor Corp. et al*

Present: The Honorable	**STANLEY BLUMENFELD, JR., U.S. District Judge**
Victor Cruz Deputy Clerk	N/A Court Reporter
Attorney(s) Present for Plaintiff(s): None Appearing	Attorney(s) Present for Defendant(s): None Appearing

Proceedings: **[In Chambers] ORDER GRANTING DEFENDANTS' MOTION TO DISMISS (DKT. NO. 19)**

This case involves a putative nationwide class action based on an alleged steering defect in Toyota Highlanders. Before the Court is Defendants Toyota Motor Corporation; Toyota Motor North America, Inc.; and Toyota Motor Sales, U.S.A., Inc.'s (collectively Defendants) motion to dismiss Plaintiffs Linda Drake and Mike Heslop's (collectively Plaintiffs) first amended class action complaint. Dkt. Nos. 19, 19-1 (Mot.). Plaintiffs filed an opposition, Dkt. No. 20 (Opp.), and Defendants filed a reply, Dkt. No. 21 (Reply).

I. RELEVANT BACKGROUND

On February 12, 2020, Plaintiff Drake filed a class action complaint against Defendants. Dkt. No. 1. The parties stipulated to permit Plaintiffs to amend the complaint. Dkt. No. 16. On June 5, 2020, Plaintiffs Drake and Heslop filed the First Amended Complaint against Defendants. Dkt. No. 18 (Compl.). Drake is a citizen of California and Heslop is a citizen of Illinois. Compl. ¶¶ 14, 29.

Plaintiffs bring a class action lawsuit on behalf of themselves and a putative class of current and former owners and lessees of 2008-2013 Toyota Highlander vehicles. *Id.* ¶ 1. Defendants are three entities within the Toyota corporate family who allegedly "designed, manufactured, distributed, marketed, sold and warranted" this class of vehicles. *Id.* ¶ 2.

Plaintiffs allege that 2008-2013 Toyota Highlanders contain one or more defects in the intermediate steering shaft, a vehicle part that helps convert "the rotational motion of the steering wheel into the linear motion needed to turn the wheels." *Id.* ¶¶ 2-3. According to the complaint, the shaft creates a "plunk, pop, or knock-type noise when turning the steering wheel left or right." *Id.* ¶ 2. Plaintiffs state "as the intermediate shaft fails, the vehicle becomes harder to turn and power steering features falter, making vehicles more difficult to drive and placing drivers, occupants and other motorists at a substantial and unreasonable risk of physical injury." *Id.* ¶ 3.

In support of these claims, Plaintiffs highlight several consumers' alleged problems with their Toyota Highlanders' intermediate steering shaft. Drake alleges that she experienced continuous "harsh noises and gear-shifting issues" despite multiple trips to her local Toyota dealer for repairs. *Id.* ¶¶ 18-24. In July 2017, the Toyota dealer allegedly informed Drake "her intermediate steering shaft required immediate attention and needed to be replaced." *Id.* ¶ 24. Likewise, Heslop allegedly "noticed a harsh noise when turning the steering wheel" and ultimately had to replace his intermediate steering shaft. *Id.* ¶¶ 32-35. Plaintiffs also compile similar complaints from other consumers. *Id.* at 18-24.

Defendants allegedly issue an express warranty to any consumer who purchases a Toyota Highlander. *Id.* ¶ 109. Under the warranty, Defendants allegedly promise "to repair vehicle component failures reported within the earlier of thirty-six . . . months or 36,000 miles, so long as the vehicle owner tenders the vehicle to a Toyota authorized dealer for repair." *Id.*

In response to this alleged defect, the complaint alleged eight counts. Count 1 is for breach of express warranty under various states' laws; Count 2 is for breach of written warranty under the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301; Count 3 is for violations of California's Unfair Competition Law, Cal. Bus. & Prof. Code § 17200; Count 4 is for violations of California's Consumers Legal Remedies Act, Cal. Civ. Code § 1750; Count 5 is for violations of the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/1; Count 6 is for violations of the Illinois Uniform Deceptive Trade Practices Act, 815 ILCS

510/1; Count 7 is for fraudulent concealment under various states' laws; and Count 8 is for unjust enrichment under various states' laws. Compl. 1.

Plaintiffs bring these claims in their individual capacities but also seek to represent a nationwide class, defined as follows:

> All persons or entities in the United States who are current or former owners and/or lessees of a 2008-2013 Toyota Highlander vehicles.

Id. ¶ 114. In the alternative, Plaintiffs seek to represent essentially identical classes of California and Illinois consumers, in the event this Court declines to certify the nationwide class. *Id.*

On June 29, 2020, Defendants filed this motion to dismiss the first amended class complaint. Dkt. No. 19.

On July 24, 2020, Plaintiffs filed an opposition. Dkt. No. 20. And on August 7, 2020, Defendants filed a reply. Dkt. No. 21. Both Plaintiffs and Defendants later filed notices to alert the Court as to recently issued authority. Dkt. Nos. 23, 26, 27.

II. LEGAL STANDARD

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." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation and internal quotations omitted). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

"Generally, a court may not consider material beyond the complaint" when ruling on a motion to dismiss. *Intri-Plex Technologies, Inc. v. Crest Group, Inc.*, 499 F.3d 1048, 1052 (9th Cir. 2007). The Court may consider "only allegations contained in the pleadings, exhibits attached to the complaint, and matters properly subject to judicial notice." *Akhtar v. Mesa*, 698 F.3d 1202, 1212 (9th Cir. 2012) (citation omitted). But the Court "must accept as true all of the factual allegations contained in the complaint." *Erickson v. Pardus*, 551 U.S. 89, 94 (2007).

Allegations of fraud must comply with Fed. R. Civ. P. 9(b), which requires parties to "state with particularity the circumstances constituting fraud or mistake." The Ninth Circuit has explained that Rule 9(b) requires a specific account of the

"time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentations." *Swartz v. KPMG LLP*, 476 F.3d 756, 764 (9th Cir. 2007) (citation omitted). In other words, "[a]verments of fraud must be accompanied by 'the who, what, when, where, and how' of the misconduct charged" in order to give defendants notice of the "particular misconduct . . . so that they can defend against the charge and not just deny that they have done anything wrong." *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003) (citation omitted).

III. PUTATIVE NATIONWIDE CLASS CLAIMS

Plaintiffs bring this action on behalf of a putative nationwide class for the breach of express warranty, breach of written warranty under the federal Magnuson-Moss Warranty Act, fraudulent concealment, and unjust enrichment causes of action. Compl. 30-42. Defendants contend that the Court should dismiss these nationwide-class allegations because (1) Plaintiffs lack standing to assert claims under another state's law, and (2) asserting a nationwide class raises choice-of-law concerns that will inevitably preclude class certification. Mot. 13-15.[1]

The Court agrees that Plaintiffs lack standing to bring claims based on other states' laws.

Courts in this circuit have overwhelmingly ruled that plaintiffs "do not have standing to assert claims from states in which they do not reside" and that it is "appropriate . . . to address standing in advance of class certification." *In re Carrier IQ, Inc.*, 78 F. Supp. 3d 1051, 1075 (N.D. Cal. 2015*); see, e.g., Villanueva v. Am. Honda Motor Co.*, No. CV 19-1390-MWF (MAAx), 2019 WL 8112467, at *14 (C.D. Cal. Oct. 10, 2019) (recognizing "the majority of courts . . . have concluded that when 'a representative plaintiff is lacking for a particular state, all claims based on that state's laws are subject to dismissal"); *Corcoran v. CVS Health Corp.*, 169 F. Supp. 3d 970, 990 (N.D. Cal. 2016) ("Courts routinely dismiss claims where no plaintiff is alleged to reside in a state whose laws the class seeks to enforce.").

Here, Plaintiffs are two individuals who live in California and Illinois. Compl. ¶¶ 14, 29. They concede that they "do not allege that a single state's law

[1] Plaintiffs plead California- and Illinois-based classes in the alternative to the nationwide classes. *See, e.g.*, Compl. ¶ 14. Defendants do not challenge those classes at this point.

governs the claims of the nationwide class" but rather that they are asserting claims on behalf of the nationwide class "under the laws of the jurisdiction[s] in which the transaction[s] took place." Opp. 4 (citation omitted). Because parties generally "lack standing to bring claims under the laws of states other than the ones they reside in," Plaintiffs here only have standing to bring claims based on California and Illinois law. *See Villanueva*, 2019 WL 8112467, at *15. Thus, Plaintiffs cannot assert claims on behalf of the putative nationwide class rooted in the warranty, fraud, and unjust enrichment laws of other states.

Plaintiffs' argument to the contrary is not persuasive. Plaintiffs emphasize that they "clearly have standing to pursue their individual claims" and that is enough for their nationwide-class allegations to at least survive a motion to dismiss. Opp. 4. They quote *Melendres v. Arpaio* for the proposition that whether named plaintiffs "may be allowed to present claims on behalf of others who have similar, but not identical, interests depends not on standing, but on an assessment of typicality and adequacy of representation." *Id.* (quoting 784 F.3d 1254, 1262 (9th Cir. 2015)). As one court noted earlier this year, however, *Melendres* did not involve the application of multiple states' laws and thus has little bearing in this context. *Goldstein v. Gen. Motors LLC*, 445 F. Supp. 3d 1000, 1021 (S.D. Cal. 2020). When named plaintiffs plainly "do not have standing to bring claims under the laws of states where they have alleged no injury, residence, or other pertinent connection . . . . *Melendres* does not . . . stand for the proposition that [the] Court must delay its consideration of standing." *Id.*

To be sure, "once the named plaintiff demonstrates her individual standing to bring a claim, the standing inquiry is concluded, and the court proceeds to consider whether the Rule 23(a) prerequisites for class certification have been met." *B.K. by next friend Tinsley v. Snyder*, 922 F.3d 957, 967 (9th Cir. 2019). But a plaintiff still must have "standing to bring the . . . claims asserted on behalf of the [g]eneral [c]lass." *Id.*

Understandably, a "named plaintiff whose injuries have no causal relation to, or cannot be redressed by, the legal basis for a claim does not have standing to assert that claim." *In re Wellbutrin XL Antitrust Litig.*, 260 F.R.D. 143, 152 (E.D. Pa. 2009). Thus, there is no doubt that Plaintiffs lack standing to sue under other states' laws when they have "no injuries in relation to the laws of [those] states" and could not seek redress in those states' courts. *Id.* at 153-55. Defendants need not wait until the certification stage to address this deficiency.

Plaintiffs also do not have standing to assert claims arising under the Manguson-Moss Warranty Act (MMWA) on behalf on the nationwide class. Though the MMWA is a federal law available nationwide, "claims under the [act] stand or fall with [the plaintiff's] express and implied warranty claims under state law." *Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017, 1022 (9th Cir. 2008). The MMWA claims here "hinge on the state law warranty claims" that Plaintiffs lack standing to bring and are likewise dismissed. *See id.* at 1022 n.3.

Thus, the Court **GRANTS WITHOUT PREJUDICE** Defendants' motion to dismiss as related to Plaintiffs' nationwide class allegations.

IV. DRAKE'S ALLEGATIONS OF A STEERING DEFECT

Underlying all of Plaintiffs' causes of action is the alleged "Steering Shaft Defect" in Toyota Highlanders sold 2008 to 2013. Compl. 12-14. Defendants contend that each of Drake's (the individual California named plaintiff) claims fails because she has alleged a defect in shifting not steering. Mot. 15-16. Alternatively, Defendants argue that, even if Drake alleges a steering defect, her claims based on that defect are untimely. Mot. 16-17.

A. DRAKE'S SUFFICIENTLY ALLEGES A DEFECT

The threshold question before the Court is whether Drake sufficiently alleges a defect to her Toyota Highlander's intermediate steering shaft.

In her individual allegations, Drake states that, starting in 2015, she heard "harsh noises" and experienced "gear-shifting issues" in her vehicle. Compl. ¶ 20. Sometimes "her vehicle fail[ed] to shift entirely" or there were "harsh shift[s] between 2nd and 3rd gear." *Id.* ¶¶ 19, 23. She brought the vehicle to the dealer on three separate occasions in 2015. *Id.* ¶¶ 19-23. Even so, "the harsh noises and gear trouble persisted." *Id.* ¶ 23. She returned to the dealer in 2017 after the warranty period ended and the dealer allegedly "acknowledged and informed [Drake] that her intermediate steering shaft required immediate attention and needed to be replaced." *Id.* ¶ 24.

"The Ninth Circuit has not squarely addressed the level of detail necessary" to allege a defect to a product under Fed. R. Civ. P. 8(a)(2). *DeCoteau v. FCA US LLC*, No. 2:15-cv-00020-MCE-EFB, 2015 WL 6951296, at *3 (E.D. Cal. Nov. 10, 2015). But, as is always true under Rule 8(a)(2), a complaint must "contain sufficient allegations of underlying facts to give fair notice and to enable the

opposing party to defend itself effectively," and those allegations "must plausibly suggest an entitlement to relief" *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011).

Applying that rule to the product-defect context, district courts in this circuit have said plaintiffs are not "required to plead the mechanical details of an alleged defect in order to state a claim." *Cholakyan v. Mercedes-Benz USA, LLC*, 796 F. Supp. 2d 1220, 1237 n.60 (C.D. Cal. 2011). Rather, a complaint provides fair notice of defect-based claims by (1) identifying the particular part or system affected by the defect, and (2) describing the problems allegedly caused by the defect. *See, e.g.*, *Zuehlsdorf v. FCA US LLC*, No. EDCV 18-1877 JGB (KKx), 2019 WL 2098352, at *6 (C.D. Cal. Apr. 30, 2019) (finding plaintiff's "identification of the particular [vehicle transmission] affected . . . and description of the problems allegedly caused by the defect are sufficient to provide fair notice and allow Defendant to mount a defense"); *Hardt v. Chrysler Grp. LLC*, No. SACV 14-01375 SJO (VBKx), 2015 WL 12683965, at *5 (C.D. Cal. June 15, 2015) (finding that an "allegation that 'the Manual Transmission contains one or more design and/or manufacturing defects,' combined with a description of the symptoms of the alleged defect . . . provides Chrysler sufficient notice of the defect at issue"). But the complaint need "not indicate how the alleged defect *caused* the reported symptoms." *Zuehlsdorf*, 2019 WL 2098352, at *6 (emphasis added).

Here, Drake's allegations satisfy those requirements. First, Drake identifies a specific defective part, the intermediate steering shaft, and alleges it was "defective," "susceptible to breaking down," and "unable to withstand the wear and tear caused by normal and foreseeable use." Compl. ¶ 17. Second, Drake describes the specific symptoms of the alleged defect: "a harsh noise when shifting gears," "fail[ure] to shift entirely," and "harsh shift[s] between 2nd and 3rd gears." *Id.* ¶¶ 18, 23. These allegations are enough to provide notice of Drake's claims to Defendants, who can later challenge their factual truth or show that the defect and the symptoms are not linked.

Defendants argue that Drake's claims should still fail at the 12(b)(6) stage because the identified defective part could not plausibly result in the alleged symptoms. Mot. 15-16 (contending the "intermediate steering shaft" has "nothing to do with shifting gears"). In support of this argument, Defendants point to Toyota's "warranties and technical service bulletins" attached as exhibits to show "the steering intermediate shaft is part of the steering system, which is separate from the drive and transmission systems." Mot. 12 n.2; *see* Reply 4. Defendants also cite *Ashcroft v. Iqbal* for the proposition that the Court should "draw on its

judicial experience and common sense" to recognize steering-system defects would not impact a vehicle's shifting. Reply 3-4 (citing 556 U.S. 662, 679 (2009)).

The Court is not persuaded. To begin, Defendants cite only generally to Toyota's warranties and technical bulletins and make no effort to explain how or where they prove the shifting and steering systems are entirely unrelated. Mot. 12 n.2 (citing Compl. Exs. C, E). Blanket references to technical documents are insufficient to satisfy "the burden . . . on the moving party to prove that no legally cognizable claim for relief exists" at the 12(b)(6) stage. *See* 5B Charles A. Wright & Arthur R. Miller, Fed. Prac. & Proc. Civ. § 1357 (3d ed.). Even so, nothing in the documents seems to identify the various systems and subsystems of the Toyota Highlander or delineate how they do or not impact one another. *See* Compl. Exs. C, E.

Moreover, Defendants' appeal to the Court's "common sense" rings hollow given the technical subject matter. As Defendants note, modern vehicles involve "complex automated vehicle systems" and "subsystems." Reply 4. Perhaps there could be some defect that is so plainly unrelated to the described symptoms that it renders the claim implausible (e.g., allegations that a defective cupholder caused an engine to erupt in flames). But here, at the pleading stage and without further evidence, the Court cannot conclude that a vehicle's intermediate steering shaft has no impact on its "drive and transmission systems" and shifting mechanisms. *See* Mot. 12 n.2.

Thus, the Court finds that Drake has sufficiently alleged a defect to her Toyota Highlander's intermediate steering shaft such that Defendants are provided notice of the nature of her claims.

B. DRAKE'S CLAIMS ARE NOT TIMELY BECAUSE SHE HAS NOT ALLEGED REASONABLE DILIGENCE.

Defendants also argue that, even assuming Drake has adequately alleged a defect, her claims based on that defect are time-barred. Mot. 16-18.

Here, there is no dispute that all Drake's claims have statutes of limitations ranging from three to four years. Mot. 16-17. Typically, for both warranty and fraud claims based on the sale of a vehicle, the limitations period begins to run from the date of delivery of the vehicle. *Vanella v. Ford Motor Co.*, No. 3:19-CV-07956-WHO, 2020 WL 887975, at *3 (N.D. Cal. Feb. 24, 2020). In this case, Drake purchased and received delivery of her Toyota Highland "[o]n or around

March 20, 2012"—7 years and 10 months before the complaint. Compl. ¶ 15. Thus, Drake's claims are time barred unless she can plausibly plead that a tolling or delayed accrual doctrine applies.

Drake argues that the "delayed discovery" rule tolled the statutes of limitations on her claims. Opp. 8-9. Specifically, Drake contends that since she "could not have discovered Toyota's alleged fraud in concealing the Defect until Toyota diagnosed it in her vehicle on July 3, 2017—less than three years before she commenced this action—her claims are timely." *Id.* at 8.

"In California, the discovery rule postpones accrual of a claim until 'the plaintiff discovers, or has reason to discover, the cause of action.'" *Clemens*, 534 F.3d at 1024. To rely on this rule, a plaintiff "must specifically plead facts to show (1) the time and manner of discovery and (2) the inability to have made earlier discovery despite reasonable diligence." *Zimmerman v. Ford Motor Co.*, No. 5:18-CV-02149-JLS-SP, 2019 WL 6481695, at *2 (C.D. Cal. Sept. 20, 2019). The discovery rule only delays accrual "until the plaintiff has, or should have, inquiry notice of the cause of action." *Fox v. Ethicon Endo-Surgery, Inc.*, 35 Cal. 4th 797, 807 (2005). Put another way, plaintiffs are (1) "required to conduct a reasonable investigation after becoming aware of an injury," and (2) "charged with knowledge of the information that would have been revealed by such an investigation." *Id.* at 808.

The "threshold question" is by what date Drake was "charged with inquiry notice that the problems with [her] vehicle might be the result of wrongdoing." *Zimmerman*, 2019 WL 6481695, at *3.

Drake points to July 3, 2017, when Toyota told her that "that her intermediate steering shaft required immediate attention and needed to be replaced." Compl. ¶ 24; *see* Opp. 8-9. But the problems with Drake's Toyota Highlander started over two years earlier. Beginning in March 2015, Drake "noticed a harsh noise when shifting gears, and in some cases, her vehicle failing to shift entirely." Compl. ¶ 18. This resulted in three separate trips to her local Toyota dealer for repairs, but none of the visits proved fruitful in fixing her Highlander's problems. *Id.* ¶¶ 19-23.

As several recent decisions in this circuit note, repeated and unsuccessful repairs put a reasonable consumer on inquiry notice. *See, e.g., Yetter v. Ford Motor Co.*, 428 F. Supp. 3d 210, 223 (N.D. Cal. 2019) ("Plaintiff should have been aware of a problem . . . after his engine had already had multiple unsuccessful repairs.");

Finney v. Ford Motor Co., No. 17-CV-06183-JST, 2018 WL 2552266, at *4 (N.D. Cal. June 4, 2018) (ruling the plaintiff had inquiry notice when she "received several repairs seemingly related to the defect"). Here, Drake's repeated need to take her Toyota Highlander to the dealer for similar shifting problems should have at least triggered a suspicion that the problems resulted from a defect.

Drake emphasizes that she promptly sought repairs multiple times and that "in each instance a Toyota service technician . . . resolve[d] the issue" or told her there was no identifiable problem. Opp. 8-9. To be sure, the fact that Drake "was allegedly told that the repair had fixed the problem" could have caused "an unsophisticated consumer not to suspect a defect and therefore not to investigate whether there was a defect." *Herremans v. BMW of N. Am., LLC*, No. CV 14-02363 MMM (PJWx), 2015 WL 12712082, at *5 (C.D. Cal. Feb. 19, 2015). But Drake's complaint makes plain that she recognized that Toyota never resolved her continued problems with her vehicle's shifting.

After her first visit (when the dealer said the problem would go away), "Drake again experienced the same harsh noises and gear-shifting issues." Compl. ¶ 20. After her second visit (despite the dealer's claims that it had fixed the problem), "Drake found that the hash noises and gear trouble persisted." *Id.* ¶ 22. These "post-repair problems should have ultimately triggered a suspicion in Plaintiff that the problems stemmed from a defect or similar issue that could not be repaired, despite Defendant's representations to the contrary." *Zimmerman*, 2019 WL 6481695, at *3. Most notably, during her third visit on December 5, 2015, the dealer did not purport to fix the problem at all. Quite the contrary, the dealer admittedly "was unable to verify the condition" that was causing the problem. Compl. ¶ 22.

Therefore, the Court concludes that Drake was on inquiry notice after the third failed repair on December 5, 2015, when her repeated need for repairs and the Toyota dealer's admitted failure to diagnose her ongoing problem was enough for even an unsophisticated consumer to recognize that she should inquire whether her vehicle had a defect.

Once on inquiry notice, a plaintiff must "must specifically plead facts to show . . . the inability to have made earlier discovery despite reasonable diligence." *Fox*, 35 Cal. 4th at 808. Here, the complaint is silent about what occurred between December 5, 2015 (Drake's third trip to the dealer) and July 3, 2017 (when the dealer diagnosed her broken intermediate steering shaft). Compl. ¶¶ 23-24. Absent some legally adequate allegation as to what happened between those dates, Drake

"has not met [her] burden of pleading sufficient facts demonstrating that [she] undertook a reasonable investigation once on inquiry notice that another's wrongdoing could be the source of [her] vehicle's troubles." *Zimmerman*, 2019 WL 6481695, at *5.

In sum, because Drake fails to plausibly allege that she exercised reasonable diligence once she was put on inquiry notice after her third unsuccessful trip to the Toyota dealer, she is not entitled to invoke the discovery rule to delay the accrual of her claims. *See Yetter*, 2019 WL 3254249, at *7 (ruling that "because Plaintiff has not plausibly alleged reasonable diligence, Plaintiff is not entitled to invoke the discovery rule"); *Finney*, 2018 WL 2552266, at *4 (same).

Though it is not clear whether Plaintiffs can cure this deficiency, the policy favoring amendment is to be applied with "extreme liberality." *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1051 (9th Cir. 2003) (citation omitted). If Plaintiffs file an amended complaint, they must allege facts demonstrating why, despite reasonable investigative efforts, Drake could not discover her vehicle's defect until July 3, 2017. *Zimmerman*, 2019 WL 6481695, at *3 (explaining "a plaintiff must plead facts sufficient to convince the trial judge that delayed discovery was justified" (citation omitted)).

Thus, the Court **GRANTS WITHOUT PREJUDICE** Defendants' motion to dismiss as to each of Plaintiff Linda Drake's individual claims.

V. ALLEGATIONS OF EXPRESS-WARRANTY CLAIMS

Plaintiffs assert express-warranty claims arising under state law and the federal MMWA on behalf of themselves as individuals and the putative class. Compl. 30-32. Specifically, Plaintiffs allege that Defendants provided all purchasers and lessees of Toyota Highlanders with an express warranty, which Defendants breached by selling the vehicle with a defect. Compl. ¶¶ 124-26. Toyota's express warranty allegedly covers "all repairs required as a result of defects in material or workmanship for three-years or 36,000 miles (whichever comes first)." Compl. ¶ 78.

Defendants contend, however, that this Court should dismiss the state and federal express-warranty claims of both individual plaintiffs Drake and Heslop because the complaint shows that the defect manifested in both of their vehicles *after* their express warranties had expired. Mot. 18.

Under both California and Illinois law, an express warranty "does not cover repairs made after the applicable time or mileage periods have elapsed." *Daugherty v. Am. Honda Motor Co.*, 51 Cal. Rptr. 3d 118, 122 (2006); *see Mydlach v. DaimlerChrysler Corp.*, 875 N.E.2d 1047, 1060-61 (Ill. 2007) ("Because the promise to repair or replace defective parts is only good during the warranty period, the latest a breach of warranty can occur is at the very end of that period."). Here, the complaint makes plain that both individual plaintiffs required repairs after their express warranties expired. Drake alleges her shifting problems began in March 2015, when her 2009 Toyota Highlander was six-to-seven years old and had 92,258 miles. Compl. ¶ 18. Likewise, Heslop's 2012 Toyota Highlander allegedly did not have problems until 2017, when the vehicle was four-to-five years old and had 55,582 miles. Compl. ¶¶ 30-32.

Thus, it appears that neither Drake nor Heslop has a valid express-warranty claim because no problems occurred while the warranty was effective.

Plaintiffs' sole reply is to argue that the whole transaction was allegedly "tainted by Toyota's concealment" of the defect and, thus, any time or mileage limitations on the express warranty is "unconscionable." Opp. 11.[2] Citing three unpublished decisions from the District of New Jersey, Plaintiffs argue that when a complaint alleges an express warranty's limitations are unconscionable, it is inappropriate "at the pleadings stage" to bar a warranty claim. *Id.*

But the Court knows of no California, Illinois, or Ninth Circuit authority establishing a similar "unconscionability exception" for express-warranty claims. To the contrary, courts in this circuit have concluded a warranty's durational terms are not substantively unconscionable, even when there are allegations that the defendant concealed the defects. *Goldstein v. Gen. Motors LLC*, 445 F. Supp. 3d 1000, 1015 (S.D. Cal. 2020) (rejecting argument "that given [defendant's] concealment of the defect, the durational limits of the warranty [were] unconscionable"); *Seifi v. Mercedes-Benz USA*, LLC, No. C12-5493 TEH, 2013 WL 2285339, at *4 (N.D. Cal. May 23, 2013) (rejecting argument "that the time/mileage limit in [defendant's] warranty is unconscionable when invoked to

[2] The complaint also alleges that Drake "purchased an extended 100,000-mile warranty plan for her Class Vehicle for an additional $1,500." Compl. ¶ 16. Defendants note that the complaint is silent about whether Defendants were a party to the extended warranty, or if it was sold by a dealer or other third party. Mot. 19. Plaintiffs do not refer to or rely on the extended warranty in arguing against dismissal.

deny a claim based on the latent defect in the engine gears," which plaintiffs alleged "was known" the defendant "at the time their vehicles were sold and delivered"). Indeed, the Ninth Circuit has said no express-warranty claim exists when "the item fails after the warranty period expires," even if the complaint alleges the defendant "had knowledge of the defect at the time of sale." *Clemens*, 534 F.3d at 1022-23 (9th Cir. 2008).[3]

Though Drake and Heslop have alleged serious issues with the function of their purchased vehicles, all the issues arose outside of the warranty period. If Defendants knew of this defect at the time of sale, there may be a claim "sound[ing] in fraud and implied warranty." *Id.* But there simply cannot be a claim for breach of express warranty. Plaintiffs have pointed to no binding law indicating otherwise.

Thus, the Court **DISMISSES WITH PREJUDICE** Drake and Heslop's individual state and federal claims for breach of express warranty. This ruling has no bearing on any valid express-warranty claims from the putative class members.

VI. ALLEGATIONS OF MAGNUSON-MOSS WARRANTY ACT CLAIMS

Plaintiffs also allege claims on behalf of themselves and the California and Illinois classes under the Magnuson-Moss Warranty Act. Compl. 31. They allege that Defendants "breached . . .written warranties" and that the breach "has deprived the Plaintiffs and the other Class members of the benefit of their bargain," in violation of the MMWA. Compl. ¶¶ 140-41.

The MMWA "allows a consumer to bring a suit where he claims to be damaged by the failure of a supplier, warrantor, or service contractor to comply with any obligation under [the MMWA] or under a written warranty, implied warranty, or service contract." *In re Apple iPhone 3G Prod. Liab. Litig.*, 859 F. Supp. 2d 1084, 1089 (N.D. Cal. 2012) (citation omitted). In other words, the MMWA permits "consumers to enforce written and implied warranties in federal court, borrowing state law causes of action." *Schimmer v. Jaguar Cars, Inc.*, 384 F.3d 402, 405 (7th Cir. 2004).

[3] Nor is the Court persuaded that a successful defense to a contract on unconscionability grounds, rendering it partially or wholly unenforceable, would result in a remedy that extends the duration of the express warranty.

Separate and apart from challenging the state-law warranty claims that underly the MMWA claims, Defendants contend Plaintiffs have not satisfied the MMWA's provision stating "no claim shall be cognizable" if "the action is brought as a class action, and the number of named plaintiffs is less than one hundred." Mot. 20; *see* 15 U.S.C. § 2310(d)(3)(C). Since Drake and Heslop are the only named plaintiffs, the complaint falls short of this requirement.

Plaintiffs respond that the MMWA's numerical requirement is set aside where there is an alternative basis for federal jurisdiction, such as the Class Action Fairness Act (CAFA). Opp. 12. They argue that because Plaintiffs have satisfied CAFA lesser requirements, there is subject matter jurisdiction over the MMWA claims. To be sure, there has been a longstanding split of authority over whether CAFA can supersede the MMWA's 100-named-plaintiff requirement. And both sides cited extensive case law representing the side of the split favorable to them. Mot. 20 (collecting cases); Opp. 12 (same).

But amid the parties' briefing, the Ninth Circuit issued *Floyd v. American Honda Motor Co.*, 966 F.3d 1027 (9th Cir. 2020), which settled the question for this circuit. According to *Floyd*, "[c]onstruing CAFA to provide jurisdiction over MMWA claims despite Plaintiffs' failure to satisfy the plain-language requirement of at least one hundred named plaintiffs would have the effect of overriding a part of the MMWA." *Id.* at 1035. Because CAFA contains no clear and manifest intent to repeal part of the MMWA, it "may not be used to evade . . . the MMWA's specific numerosity requirement." *Id.* That clear direction makes this an easy case. Here, there are only two named plaintiffs in this class action and so there is no cognizable MMWA claim.

Thus, the Court **GRANTS WITHOUT PREJUDICE** Defendants' motion to dismiss as to the California and Illinois putative classes' respective MMWA claims. Any future MMWA class must consist of at least 100 named plaintiffs.

VII. ALLEGATIONS OF FRAUD-BASED CLAIMS

Plaintiffs' third (California Unfair Competition Law), fourth (California Consumers Legal Remedies Act), fifth (Illinois Consumer Fraud and Deceptive Business Practices Act), sixth (Illinois Uniform Deceptive Trade Practices Act),

seventh (fraudulent concealment), and eighth (unjust enrichment)[4] claims all sound in fraud. Compl. ¶¶ 146-225.

Defendants argue these fraud-based claims should be dismissed for several reasons: (1) the complaint fails to distinguish the different corporate actors with particularity, (2) Plaintiffs have not alleged that Defendants breached a duty to disclose, and (3) the economic loss rule bars any fraud-based common law claims. Mot. 21-32.

A. PLAINTIFFS FAIL TO PLEAD FRAUD WITH PARTICULARITY.

Defendants first argue that Plaintiffs fail to distinguish between the three individual corporate defendants when alleging their fraud-based claims.

The Ninth Circuit has instructed that, when applying Rule 9(b) to claims against multiple defendants involving a singular fraudulent scheme, a complaint cannot "merely lump multiple defendants together" but rather must "differentiate the[] allegations when suing more than one defendant . . . and inform each defendant separately of the allegations surrounding his alleged participation in the fraud." *Swartz v. KPMG LLP*, 476 F.3d 756, 764-65 (9th Cir. 2007). Put another way, the plaintiff must "at a minimum" identify the "role of [each] defendant" in the fraudulent scheme. *Id.* at 765.

Generally, an allegation of multi-defendant fraud fails when the "complaint is shot through with general allegations that the 'defendants' engaged in fraudulent conduct." *Id.* For example, in *Corson v. Toyota Motor Sales, U.S.A., Inc.*, a complaint against some of these same Defendants was dismissed where the allegations were made collectively against "Toyota." No. CV 12-08499 JGB, 2013 WL 1802709, at *4 (C.D. Cal. Apr. 24, 2013). The court reasoned that "by stating the allegations against Defendants collectively, Plaintiffs have failed to provide each Defendant with sufficient notice of the particular allegations against them." *Id.* Specifically, even though there was a relationship between Defendants such

[4] When an unjust enrichment claim is rooted in the same misrepresentations as other fraud-based claims, it "also sounds in fraud and is subject to Rule 9(b)'s heightened pleading requirements." *In re Arris Cable Modem Consumer Litig.*, No. 17-CV-01834-LHK, 2018 WL 288085, at *10 (N.D. Cal. Jan. 4, 2018). Here, Plaintiffs concede their "Unjust Enrichment claims are subject to the [Rule 9(b)] standard." Opp. 14 n.10.

that one defendant's "decisions could implicate the knowledge and approval" of the other, "sweeping allegations" that Defendants were acting in concert were insufficient "to meet the heightened standard of Rule 9(b)." *Id.* Even if both individual defendants were "liable for the actions alleged, Plaintiffs [were] required to specify the actions alleged against each." *Id.*

Corson is directly on point. Here, Plaintiffs almost exclusively refer to Defendants collectively as "Toyota." *See* Compl. ¶ 43 ("TMC, TMNA and TMS are collectively referred to herein as 'Defendants' or 'Toyota' unless identified separately."). For each of the six causes of action that sound in fraud, there is no delineation between the actions of individual defendants but, instead, all allegations are made against the generic collective entity "Toyota" or "Defendants." *See* Compl. ¶¶ 146-225. Thus, the allegations within each cause of action fails to notify each Defendant of the particular allegations against them or specify what impermissible acts they have been accused of.

Further, in describing the Defendants' relationship with one another, the complaint alleges there is a "unity of ownership" between the individual entities "such that any individuality or separateness between them has ceased." Compl. ¶ 44. It also alleges the individual defendants "communicate" with each other "concerning virtually all aspects of the Toyota products" and that decisions about disclosing defects, covering repairs, and designing window stickers are made "jointly." *Id.* ¶¶ 45-47. But, like *Corson*, these sweeping and conclusory allegations of a conspiracy—or a "unity of ownership" or a lack of "individuality or separateness"—fail to meet Rule 9(b)'s heightened pleading requirement. 2013 WL 1802709, at *4; *see also Swartz*, 476 F.3d at 765 (noting "[c]onclusory allegations" that the defendants "knew" of each other's wrongdoing and "were acting in concert" and "as agents" without "any stated factual basis" failed to meet Rule 9(b)'s standard "as a matter of law").

Plaintiffs attempt to distinguish *Corson* by noting they have "allege[d] in detail the different roles" the individual defendants "played in the design, production, marketing, warranting and distribution of Class Vehicles." Opp. 16. And indeed the complaint does identify the various functions performed by the individual defendants within Toyota's corporate ecosystem:

- "TMC, through its various subsidiaries and affiliates, designs, manufactures, markets, distributes and warrants Toyota automobiles through the fifty States." Compl. ¶ 40.

- "TMNA oversees government and regulatory affairs, energy, economic research, philanthropy, corporate advertising, and corporate communications for all of TMC's North American operations." *Id.* ¶ 41.

- "TMS is TMC and TMNA's U.S. sales and marketing division, which oversees sales and other operations across the United States. TMS distributes Toyota parts and vehicles, which are then sold through Defendants' network of dealers." *Id.* ¶ 42.

- "TMS also oversees Toyota's National Warranty Operations (NWO), which, among other things, reviews and analyzes warranty data submitted by Toyota's dealerships and authorized technicians in order to identify structural failure trends in vehicles." *Id.* ¶ 46.

Rule 9(b), however, requires more than detailed descriptions of a defendant's general business activities; it requires particular allegations of "the circumstances constituting fraud." Fed. R. Civ. P. 9(b). Though the Plaintiffs no doubt "describe with sufficiently particularized detail the operations and the role of each Defendant" within Toyota, Opp. 16-17, Plaintiffs fail to provide "detailed allegations of . . . the various roles *played in the alleged conspiracy*." *Swartz*, 476 F.3d at 765. In sum, there are no particularized allegations of misconduct underlying the six fraud-based claims that allow Defendants to "defend against" the claims "and not just deny that they have done anything wrong." *Vess*, 317 F.3d at 1106.

Thus, Defendants' motion to dismiss is **GRANTED WITHOUT PREJUDICE** as to Plaintiffs' fraud-based claims.[5]

[5] Defendants also argue that dismissal is warranted because "Plaintiffs have not alleged Toyota breached a duty to disclose" or that "Toyota had superior knowledge of material facts at the time of sale." Mot. 24-31. But the resolution of those issues necessarily turns on *who* had knowledge, *who* had a duty, and *who* acted in violation of that duty. The complaint's generalized references to "Toyota" renders that analysis impracticable. Thus, the Court declines to resolve those questions at this time.

B. THE ECONOMIC LOSS RULE BARS THE CALIFORNIA FRAUDULENT CONCEALMENT CLAIMS.

Defendants also contend that the economic loss rule bars Plaintiffs' seventh cause of action (fraudulent concealment) and eighth cause of action (unjust enrichment). Mot. 31-32; Reply 15. As to the fraudulent concealment claims, Plaintiffs allege Defendants "concealed and suppressed material facts" about the existence of the steering defect and that if the defect "had been disclosed, Plaintiffs and the Class would not have bought, leased, or retained their vehicles." Compl. ¶¶ 216, 221. As to the unjust enrichment claims, Plaintiffs allege that, due to the concealed defect, Plaintiffs wrongly conferred a benefit to Defendants by overpaying for their vehicle and paying for repairs. *Id.* ¶¶ 228-29.

The economic loss rule "is designed to maintain a distinction between damage remedies for breach of contract and for tort" and "provides that certain economic losses are properly remediable only in contract." *Giles v. Gen. Motors Acceptance Corp.*, 494 F.3d 865, 873 (9th Cir. 2007). As applied, the rule prevents a recovery in tort for "damages that are solely monetary, as opposed to damages involving physical harm to person or property." *Id.*

A modest exception to the economic loss doctrine exists where "one party has lied to the other." *Hannibal Pictures, Inc. v. Sonja Prods. LLC*, 432 F. App'x 700, 701 (9th Cir. 2011). Consequently, under both California and Illinois law, the rule does not bar claims for fraudulent inducement. *E.g.*, *Arena Rest. & Lounge LLC v. S. Glazer's Wine & Spirits, LLC*, No. 17-CV-03805-LHK, 2018 WL 1805516, at *6 (N.D. Cal. Apr. 16, 2018) ("[F]raudulent inducement is a well-recognized exception to the economic loss rule."); *Catalan v. GMAC Mortg. Corp.*, 629 F.3d 676, 693 (7th Cir. 2011) (noting exception applies "where the plaintiff's damages are proximately caused by a defendant's intentional, false representation").

But, as Defendants identify, there is a split of authority within this circuit as to whether California law's exception to the economic loss rule extends to fraudulent concealment claims, i.e., fraud claims based on an omission rather than an affirmative representation. Mot. 31-32. A handful of district court cases indicate that the exception covers omission-based fraud claims. *See, e.g.*, *Finney v. Ford Motor Co.*, No. 17-CV-06183-JST, 2018 WL 2552266, at *9 (N.D. Cal. June 4, 2018). Yet "the weight of authority within the Ninth Circuit" indicates that the exception only applies to where a party has made *affirmative* representations such that the economic loss rule bars "fraudulent omission claims under California law."

Sloan v. Gen. Motors LLC, No. 16-CV-07244-EMC, 2020 WL 1955643, at *24 (N.D. Cal. Apr. 23, 2020).

Plaintiffs do not present any argument for why the Court should follow the minority view. *See* Opp. 21-22. On the other hand, the majority view seems to better comport with the California Supreme Court's direction that the fraud exception to the economic loss rule is "narrow in scope and limited to a defendant's affirmative misrepresentations." *Robinson Helicopter Co. v. Dana Corp.*, 34 Cal. 4th 979, 993 (2004). Thus, because the fraudulent concealment claims raised by Drake and the putative California class are admittedly "not premised on affirmative misrepresentations," Opp. 14, they are barred by the economic loss rule.

This Court does not, however, conclude that the economic loss rule bars fraudulent concealment claims arising from *Illinois* law. There is minimal case law directly on point. Plaintiffs note that *Stein v. D'Amico* applied the fraud exception to a case in which plaintiffs "alleged intentional misrepresentation in the form of fraudulent concealment." Opp. 22 (citing No. 86 C 9099, 1987 WL 4934, at *3 (N.D. Ill. June 5, 1987)). The Seventh Circuit cited *Stein* as standing for that proposition in *Wigod v. Wells Fargo Bank, N.A.*, 673 F.3d 547, 569 (7th Cir. 2012).

Defendants neglect to address *Stein*. Instead, they claim that the Illinois Supreme Court "recently confirmed" the economic loss rule bars claims for fraudulent concealment, pointing to *Lewis v. Lead Industries Association*, _ N.E.3d _, 2020 WL 2562929 (Ill. 2020). Reply 16. There, a claim for civil conspiracy was exempted from the economic loss rule because it was "grounded on a theory of intentional misrepresentation or fraud." 2020 WL 2562929, at *5. But *Lewis* did not address the exception's applicability to fraudulent concealment. In the portion quoted by Defendants, the Supreme Court attempted to parse out some seemingly ambiguous claims in a complaint:

> [A]lthough count III of plaintiffs' second amended complaint appear[s] to be a claim for fraudulent concealment, some of the allegations set forth in counts I and II, which were incorporated in count III, might be considered as allegations of fraudulent misrepresentation. . . . [C]ount VI, the civil conspiracy count, incorporated all of the allegations in the prior five counts.

Id. As a matter of pleading, the Supreme Court noted that the plaintiff's concealment claim fell "squarely" within the fraud exception to the economic loss rule because the claim incorporated allegations of intentional misrepresentation. *Id*. But the *Lewis* court did not address, much less rule on, the scope of the economic loss rule as applied to a fraudulent concealment claim. There was no need to do so, for the court ultimately affirmed "dismiss[al] [of the claim] for various pleading deficiencies." *Id.* Consequently, Defendants fail to cite any authority supporting their position, and *Stein* appears to undercut it.

To be clear, the Court does not rule that the complaint adequately states a claim for fraudulent concealment. Any amended complaint must cure the pleading deficiencies addressed above and otherwise properly allege a claim, which requires a duty to disclose (among other things). *See, e.g.*, *Miller v. William Chevrolet/GEO, Inc.*, 762 N.E.2d 1, 13 (Ill. 2001) (finding that a car dealership had a statutory but not a common-law duty). Defendants are also not foreclosed from raising similar economic loss arguments in any future challenge to an amended complaint. Their request for supplemental briefing at the hearing is therefore denied.

Finally, the Court will not apply the rule to the claims for unjust enrichment under both California and Illinois law. The rule implicates tort claims to "prevent[] the law of contract and the law of tort from dissolving one into the other." *Robinson Helicopter*, 34 Cal. 4th at 988. But "[u]njust enrichment . . . is an equitable claim, not a tort. Thus, the economic loss rule doesn't apply." *In re Wells Fargo Ins. Mktg. & Sales Practices Litig.*, No. SAML 17-02797 AG (KESx), 2018 WL 9536803, at *5 (C.D. Cal. Dec. 14, 2018).

Thus, the Court **GRANTS** Defendants' motion to dismiss the California fraudulent concealment claims **WITH PREJUDICE** and grants the motion to dismiss the Illinois fraudulent concealment claims and the California and Illinois unjust enrichment claims **WITHOUT PREJUDICE** (on Rule 9(b) grounds, as discussed *supra*).

VIII. ALLEGATIONS FOR EQUITABLE RELIEF

Finally, Defendants argue that Plaintiffs have insufficiently alleged a basis for their equitable claims—the California UCL, the California CLRA, the Illinois UTDPA, and unjust enrichment claims—and the other requested equitable relief. Mot. 32; *see* Compl. 44-45 (requesting, among other things, "appropriate injunctive and/or declaratory relief, including . . . an order that requires Defendants to repair, recall, and/or replace the Class Vehicles and to extend the applicable warranties to a reasonable period of time").

"It is a basic doctrine of equity jurisprudence that courts of equity should not act . . . when the moving party has an adequate remedy at law." *Mort v. United States*, 86 F.3d 890, 892 (9th Cir. 1996). Indeed, "equitable relief is not appropriate where an adequate remedy exists at law." *Schroeder v. United States*, 569 F.3d 956, 963 (9th Cir. 2009). Here, as Defendants note, the complaint is devoid of substantive allegations showing Plaintiffs' legal claims would not provide them an adequate remedy. Mot. 32; *see* Compl. ¶¶ 146-54,

That alone is grounds to dismiss the equitable claims, at least without prejudice. *See, e.g.*, *Philips v. Ford Motor Co.*, 726 F. App'x 608, 609 (9th Cir. 2018) (affirming dismissal of UCL and CLRA claims for failing "to plead the inadequacy of their legal remedies"); *Strumlauf v. Starbucks Corp.*, 192 F. Supp. 3d 1025, 1033 (N.D. Cal. 2016) (dismissing unjust enrichment because legal remedies were adequate); *see also Sonner v. Premier Nutrition Corp.*, 962 F.3d 1072, 1082 (9th Cir. 2020) (explaining that federal courts sitting in diversity apply "federal equitable principles," including the requirement that there be no adequate legal remedy, regardless of state law).

Plaintiffs emphasize that, at the pleadings stage, they are "entitled to plead legal and equitable remedies in the alternative." Opp. 22. That is no doubt true. *In re Ford Tailgate Litig.*, No. 11-CV-2953-RS, 2014 WL 1007066, at *5 (N.D. Cal. Mar. 12, 2014) (noting "Plaintiffs are, of course, entitled to plead alternative claims" under Fed. R. Civ. P. 8(a)). Even so, a party does not avoid federal equitable principles merely because the equitable claim is pled in the alternative. *Loo v. Toyota Motor Sales, USA, Inc.*, No. 8:19-cv-00750-VAP (ADSx), 2020 WL 4187918, at *8 (C.D. Cal. Apr. 10, 2020) ("The Court agrees that Plaintiffs may seek alternative forms of relief . . . however, in order to avail themselves of . . . equitable remedies, Plaintiffs must allege that their legal remedies are inadequate."). To proceed with their equitable claims and to pursue equitable relief, Plaintiffs must plead a lack of an adequate remedy at law.

Thus, for this independent reason, the Court **GRANTS WITHOUT PREJUDICE** Defendants' motion to dismiss as to Plaintiffs' third (California UCL), fourth (California CLRA), sixth (Illinois UDTPA), and eighth (Unjust Enrichment) causes of action.

IX. CONCLUSION

For the foregoing reasons, the Court:

- **DISMISSES WITHOUT PREJUDICE** the putative nationwide class's claims as to all Counts;

- **DISMISSES WITHOUT PREJUDICE** all individual and the California and Illinois putative classes' claims as to Counts 3 (California Unfair Competition Law), 4 (California Consumers Legal Remedies Act), 5 (Illinois Consumer Fraud and Deceptive Business Practices Act), 6 (Illinois Uniform Deceptive Trade Practices Act), and 8 (unjust enrichment); and Plaintiff Mike Heslop's and the Illinois putative class's claims as to Count 7 (fraudulent concealment);

- **DISMISSES WITH PREJUDICE** Plaintiff Linda Drake's and the California putative class's claims as to Count 7 (fraudulent concealment);

- **DISMISSES WITH PREJUDICE** Plaintiff Linda Drake's and Plaintiff Mike Heslop's individual claims as to Counts 1 (state breach of express warranty) and 2 (federal breach of written warranty); and

- **DISMISSES WITHOUT PREJUDICE** the California and Illinois putative classes' claims as to Count 2 (federal breach of written warranty).

If Plaintiffs wish to file a Second Amended Class Complaint, they must do so within 14 days of the issuance of this Order. Since the Court has dismissed some of Drake and Heslop's individual claims with prejudice, Plaintiffs are granted leave to add or substitute new class representatives.

IT IS SO ORDERED.