UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

THOMAS SZEP, *individually and on behalf of all others similarly situated*,	)	Case No.: 1:19 CV 2858
Plaintiff	)	JUDGE SOLOMON OLIVER, JR.
v.	)	
GENERAL MOTORS LLC,	)	
Defendant	)	ORDER

Currently pending before the court in the above-captioned case is Defendant General Motors LLC's ("Defendant" or "GM") Motion to Dismiss Class Action Complaint ("Motion")(ECF No. 7) wherein Defendant asserts that Plaintiff's claims fail on multiple grounds. Specifically, Defendant contends that the Complaint should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(1) because: (1) Plaintiff lacks standing on all claims because he does not allege a concrete injury; (2) Plaintiff lacks standing to seek injunctive relief under the Ohio Consumer Sales Practices Act ("OCSPA") ("Count Two"); (3) Plaintiff lacks standing to assert a claim under the Magnuson-Moss Warranty Act ("MMWA") ("Count One") on behalf of a nationwide class.

In addition, Defendant argues that Plaintiff's MMWA (Count One), OCSPA (Count Two), breach of express warranty ("Count Three"), breach of implied warranty ("Count Four"), fraudulent omission ("Count Five"), and unjust enrichment ("Count Six") claims should be dismissed for

failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6)("Rule 12"). Finally, Defendant also assert that Plaintiff's fraudulent omission (Count Five) claim should be dismissed pursuant to Federal Rule of Civil Procedure (9)(b) ("Rule 9"). For the reasons that follow, the court grants Defendant's Motion.

I. BACKGROUND

A. Factual Background

Plaintiff Thomas Szep ("Plaintiff" or "Szep") is a resident of Ohio, and the owner of a 2011 Chevrolet Silverado, which is equipped with a Generation IV 5.3 Liter V8 Vortec 5300 Engine ("Gen IV Engine"). (Compl. ¶¶ 24–25, ECF No. 1.) Plaintiff alleges that GM designed the Gen IV Engine that is installed in his vehicle and other model year 2010 through 2014 General Motors Corporation ("GMC") and Chevrolet vehicles. (*Id.* ¶¶ 2, 4.) The court collectively refers to these vehicles as the "Class Vehicles."

Plaintiff alleges that Gen IV Engines consume an "abnormally and improperly high" quantity of oil (the "oil consumption defect"), which far exceeds industry standards for reasonable oil consumption. (*Id.* ¶ 5.) This excessive oil consumption results in low oil levels, insufficient lubricity levels, and corresponding internal engine component damage. (*Id.*) According to Plaintiff, the primary cause of the oil consumption defect is that the piston rings that GM installed within the Gen IV Engines do not maintain sufficient tension to keep the oil in the crankcase. (*Id.* ¶ 8.) He also contends that the Gen IV Engines' Active Fuel Management ("AFM") Systems, Positive Crankcase Ventilation ("PCV") Systems, and Oil Life Monitoring Systems contribute to and/or exacerbate the oil consumption defect. (*Id.* ¶¶ 9–13.) Plaintiff maintains that the oil consumption defect results in engine failure and engine damage. (*Id.* ¶¶ 18–19.) However, Szep does not allege that his vehicle

actually experienced any excessive oil consumption problems. He also does not allege that his vehicle experienced any damage due to excessive oil consumption.

Further, Plaintiff alleges that GM was aware of the oil consumption defect in the Gen IV Engines and failed to disclose it to consumers prior to the purchase or lease of their Class Vehicles. (Compl. ¶¶ 15–18.) In support of his allegation that GM knew about the oil consumption defect, Plaintiff highlights the following facts: (1) GM abandoned the Gen IV Engines and replaced them with its redesigned Generation V Vortec 5300 Engine ("Gen V Engine"); (2) many consumers complained about excessive oil consumption to the National Highway Traffic Safety Administration ("NHTSA") and on online websites such as carcomplaints.com; and (3) GM issued multiple Technical Service Bulletins ("TSBs") addressing oil loss in vehicles with Gen IV Engines. (*Id.* ¶¶ 16–17, 70–102.) The TSBs stated that oil loss issues in vehicles with Gen IV Engines "could be caused by two conditions: (a) oil pulled through the PCV [S]ystem; or (b) oil spray that is discharged from the AFM [S]ystem's pressure relief valve within the crankcase." (*Id.* ¶ 75.) The TSBs also suggested fixes for these issues, but noted that the ultimate fix would require replacement of the piston assemblies. (*Id.*)

Despite this alleged knowledge, Szep maintains that GM never disclosed the oil consumption defect to consumers. (Compl. ¶ 19.) Instead, GM "extensively advertised the performance benefits" of the Gen IV Engines and told consumers that the Class Vehicles "were dependable, long-lasting, and of the highest quality." (*Id.* ¶¶ 103–04.) As a result, Plaintiff contends that he and the putative class members suffered "damages in that they paid more for their [c]lass [v]ehicles than they would have paid had they known about the [oil consumption] defect that GM failed to disclose, or they would not have purchased or leased their [c]lass [v]ehicles at all." (*Id.* ¶ 20.)

B. Procedural History

On December 10, 2019, Plaintiff filed a Class Action Complaint in this court seeking damages and equitable relief individually and on behalf of all others who purchased or leased model year 2010 through 2013 GM vehicles equipped with a Gen IV Engine. (Compl. ¶ 1, ECF No. 1.) Pursuant to Rule 23 of the Federal Rules of Civil Procedure, Plaintiff seeks to represent a nationwide class consisting of current and former owners or lessees of a Class Vehicle that was purchased or leased in the United States, and a statewide class consisting of current and former owners or lessees of a Class Vehicle that was purchased or leased in Ohio. (*Id.* ¶¶ 138–40.) Plaintiff brings the following claims: violation of the Magnuson-Moss Warranty Act, 15 U.S.C. §§ 2301, *et seq.* (Count One); violation of the Ohio Consumer Sales Practices Act, Ohio Rev. Code §§ 1345.01, *et seq.* (Count Two); breach of express warranty, Ohio Rev. Code §§ 1302.26 and 1310.17 (Count Three); breach of implied warranty in tort (Count Four); fraudulent omission (Count Five); and unjust enrichment (Count Six). (Compl. ¶¶ 148–210, ECF No. 1.)

Thereafter, on February 10, 2020, GM filed the Motion considered herein, requesting the court dismiss Szep's Class Action Complaint. (ECF No. 7.) On June 15, 2020, Plaintiff filed his Opposition. (ECF No. 16.) On July 29, 2020, GM filed its Reply. (ECF No. 27.)

II. LEGAL STANDARD

A. Federal Rule of Civil Procedure 12(b)(1) and Standing

A defendant may challenge the court's subject matter jurisdiction with a motion to dismiss pursuant for lack of standing. Article III "standing is a question of subject matter jurisdiction properly decided under Rule 12(b)(1). *Am. BioCare Inc. v. Howard Attorneys PLLC*, 702 F. App'x

416, 419 (6th Cir. 2017). To establish standing, the plaintiff must allege that: (1) he has suffered an injury in fact that is concrete and particularized and actual or imminent, not conjectural or hypothetical; (2) his injury is fairly traceable to the challenged action; and (3) it is likely as opposed to merely speculative, that the injury will be redressed by a favorable decision. *McGlone v. Bell*, 681 F.3d 718, 729 (6th Cir. 2012) (internal citations and quotation marks omitted). The party seeking federal court jurisdiction bears the burden of establishing standing. *Rosen v. Tenn. Comm'r of Fin. & Admin.*, 288 F.3d 918, 927 (6th Cir. 2002) (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561–62 (1992)). The court will grant a Rule 12(b)(1) motion to dismiss "only if, taking as true all facts alleged by the plaintiff, the court is without subject matter jurisdiction to hear the claim." *84 Video/Newsstand, Inc. v. Sartini*, No. 1:07-CV-3190, 2008 WL 11287170, at *5 (N.D. Ohio May 13, 2008) (quotation omitted).

B. Federal Rule of Civil Procedure 12(b)(6)

The court examines the legal sufficiency of a plaintiff's claims under Rule 12(b)(6). The United States Supreme Court clarified the law regarding what a plaintiff must plead in order to survive a motion made pursuant to Rule 12(b)(6) in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). When determining whether the plaintiff has stated a claim upon which relief can be granted, the court must construe the complaint in the light most favorable to the plaintiff, accept all factual allegations as true, and determine whether the complaint contains "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570. The plaintiff's obligation "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* at 555. Even though a complaint need not contain "detailed" factual allegations, its "[f]actual allegations must be enough to raise a right to

relief above the speculative level on the assumption that all the allegations in the Complaint are true." *Id.* A court is "not bound to accept as true a legal conclusion couched as a factual allegation." *Papasan v. Allain*, 478 U.S. 265, 286 (1986).

The Court, in *Iqbal*, further explained the "plausibility" requirement, stating that "[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." 556 U.S. at 678. Furthermore, "[t]he plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* This determination is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* at 679.

C. Federal Rule of Civil Procedure 9(b)

Under Rule 9(b), claims sounding in fraud or mistake are subject to heightened pleading requirements. Fed. R. Civ. P. 9(b) (explaining that a plaintiff alleging fraud "must state with particularity the circumstances constituting fraud"). To satisfy this heightened standard, the "plaintiff, at minimum, must allege the time, place, and content of the alleged misrepresentation on which he or she relied; the fraudulent scheme; the fraudulent intent of the defendants; and the injury resulting from the fraud." *United States ex rel. Bledsoe v. Cmty. Health Sys.*, 501 F.3d 493, 504 (6th Cir. 2007) (internal citation and quotation marks omitted); *see also Heinrich v. Waiting Angels Adoption Servs.*, 668 F.3d 393, 404 (6th Cir. 2012) ("[I]n order to satisfy the heightened pleading requirements of Rule 9(b), a plaintiff must '(1) specify the statements that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent.'").

III. LAW AND ANALYSIS

A. Standing

Defendant asserts that Plaintiff lacks Article III standing for three reasons: (1) Plaintiff does not allege a concrete injury; (2) Plaintiff cannot establish a likelihood of suffering future harm; and (3) Plaintiff lacks standing to represent a nationwide class. The court will address each of Defendant's arguments in turn.

1. Concrete Injury

First, GM asserts that Plaintiff lacks standing on all claims because he does not allege a concrete injury in the Complaint. (Mot. at PageID #171, ECF No. 7.) In response, Plaintiff counters that his allegation that "he overpaid for his vehicle [because it was defective]" is sufficient to confer standing under Article III. (Opp'n at PageID #270–71, ECF No. 16.)

The Sixth Circuit has recognized that claims of overpayment are cognizable injuries in fact. *See Wuliger v. Manufacturers Life Ins. Co.*, 567 F.3d 787, 794–95 (6th Cir. 2009). And district courts have reached the same conclusion. *See, e.g.*, *Fenner v. GM, LLC (In re Duramax Diesel Litig.)*, 298 F.Supp.3d 1037, 1052 (E.D. Mich. 2018) (finding the plaintiffs' "overpayment theory suffices to provide standing to sue the defendant"); *see also Sloan v. Gen. Motors LLC*, No. 16-CV-07244, 2017 WL 3283998, at *4 (N.D. Cal. Aug. 1, 2017) (examining this exact same issue and holding "[p]laintiffs' claims of overpayment for a defective product due to GM's fraudulent omissions constitute an injury in fact"). Consequently, accepting Plaintiff's allegations as true, the court finds that Plaintiff's claim that he overpaid for his vehicle due to GM's failure to disclose the oil consumption defect constitutes an injury-in-fact. Therefore, the court denies GM's Motion to Dismiss Plaintiff's Complaint on the basis that Plaintiff has not alleged an injury-in-fact.

2. Ohio Consumer Sales Protection Act

Next, GM argues that Plaintiff lacks standing to obtain injunctive relief under the OCSPA (Count Two) because he cannot establish a likelihood of future or continuing harm. (Mot. at PageID #172, ECF No. 7; Reply at PageID #340, ECF No. 27.) Conversely, Szep maintains that he can obtain injunctive relief under the OCSPA so long as he shows that GM violated the OCSPA. (Opp'n at PageID #273, ECF No. 16.) Further, Plaintiff argues that "he presented a justiciable case or controversy by asking this court to decide whether GM deprived him of the benefit of his bargain when it sold him a Silverado with a defective engine." (*Id.* at PageID #274.)

Section 1345.09(D) of the OCSPA specifically allows consumers to seek "declaratory judgment, an injunction, or other appropriate relief" for violations of the statute. Ohio Rev. Code § 1345.09(D). In interpreting this provision, courts have held that Ohio law does not require a consumer to establish the threat of future injury as a pre-condition to enjoining conduct violative of the OCSPA. *See Midland Funding LLC v. Brent*, No. 308-CV-1434, 2009 WL 3086560, at *2–3 (N.D. Ohio Sept. 23, 2009). However, the Ninth Circuit has held that "a plaintiff whose cause of action is perfectly viable in state court under state law may nonetheless be foreclosed from litigating the same cause of action in federal court, if he cannot demonstrate the requisite injury." *Lee v. Am. Nat'l Ins. Co.*, 260 F.3d 997, 1001–02 (9th Cir.2001). But the Ninth Circuit's holding in *Lee* does not resolve the issue of whether a plaintiff has Article III standing to seek an injunction under the OCSPA. *See Aarti Hosp., LLC v. City of Grove City*, Ohio, 350 F. App'x 1, 7 (6th Cir. 2009) (discussing *Lee*, and explaining that the Sixth Circuit has never addressed this issue and noting that one day "we might be called upon to determine whether Article III forecloses suit in federal court despite the plaintiff's ability to satisfy Ohio's standing requirements, thereby confronting *Lee* head-on

and deciding whether it is the law of this circuit").

While the Sixth Circuit has not directly addressed this issue, district courts in this circuit have relied on *Lee*—since the Sixth Circuit's decision in *Aarti*—for the proposition that a plaintiff must satisfy the requirements of Article III, despite the existence of a state law which is less onerous. *See Range v. Cincinnati Life Ins. Co.*, No. 1:11-CV-1367, 2012 WL 1035728, at *2 (N.D. Ohio Mar. 27, 2012) (citing *Lee* and concluding that the plaintiff asserted a "future injury too speculative to satisfy federal Article III's standing requirements"); *Shumake v. Deutsche Bank Nat. Tr. Co.*, No. 1:11-CV-353, 2012 WL 366923, at *2 (W.D. Mich. Feb. 2, 2012) (citing *Lee* and holding that the plaintiff's claim should be dismissed for lack of standing even though the plaintiff may have had standing under Michigan law). Consequently, the court finds *Lee* persuasive and will address Plaintiff's standing under Article III.

To satisfy Article III's standing requirement, the plaintiff must allege and show that he is likely to suffer future harm as a result of the conduct challenged by him. *City of Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983). Thus, Szep must allege that he is likely to suffer future harm as a result of GM's alleged selling and leasing of the Class Vehicles with the defective Gen IV Engines. Szep has made no such allegations. Indeed, Szep neither alleges nor argues that he is likely to purchase or lease another GM vehicle that has a Gen IV Engine or that he is likely to suffer future harm as a result of GM's conduct. Therefore, the court concludes that Szep lacks Article III standing to seek injunctive relief under the OCSPA. As a result, the court dismisses Plaintiff's OCSPA claim to the extent it seeks injunctive relief. However, this dismissal does not impact Plaintiff's claim for damages under the OCSPA. The court will address that claim below.

3. Nationwide Class under the Magnuson-Moss Warranty Act

In its final attack on Plaintiff's standing, GM argues that Plaintiff's nationwide class allegation in Count One "must be dismissed for lack of standing because there is no named plaintiff from forty-nine states, and a plaintiff cannot represent putative class members from other states." (Mot. at PageID #172, ECF No. 7; Reply at PageID #340–41, ECF No. 27.) Plaintiff counters that the issue of whether a plaintiff can represent a nationwide class , and whether he can assert this class on behalf of a nationwide class is a matter that the court should later determine when deciding class certification. (Opp'n at PageID #274–75, ECF No. 16.)

The "class-certification analysis may precede [the] standing analysis when the class certification issue [is] 'logically antecedent' to the standing issue." *McKee v. GM LLC*, 376 F. Supp. 3d 751, 755 (E.D. Mich. 2019) (internal citations and quotation marks omitted). Further, the "'logical[ly] antecedent' language should be construed in a manner that permits consideration of the standing issue . . . prior to class certification." *Smith v. Lawyers Title Ins. Corp.*, No. 07-12124, 2009 WL 514210, at *3 (E.D. Mich. Mar. 2, 2009); *see also Johnson v. Nissan N. Am., Inc.*, 272 F. Supp. 3d 1168, 1175 (N.D. Cal. 2017) ("[D]istrict courts 'ha[ve] the discretion to defer questions of standing until after class certification,' but may nonetheless 'opt[], as a matter of case management,' to address standing in advance of class certification.").

It is well-settled that "named plaintiffs lack standing to assert claims under the laws of the states in which they do not reside or in which they suffered no injury." *Siriano v. Goodman Mfg. Co.*, No. 2:14-CV-1131, 2015 WL 12748033, at *2 (S.D. Ohio Aug. 18, 2015) (quoting *In re Packaged Ice Antitrust Litig.*, 779 F. Supp.2d 642, 657 (E.D. Mich. 2011)). In this case, Szep is a resident of Ohio, and he is seeking to bring claims under the laws of Ohio. (Compl. ¶¶ 24, 139, ECF No. 1.) He also seeks to bring nationwide claims on behalf of current and former owners or lessees of a Class

Vehicle that was purchased in the United States. (*Id.* ¶ 138.) However, Plaintiff does not assert that he suffered injury in any other state. As a result, the court finds that Szep does not have standing to maintain his nationwide class allegation under Count One. *See McKee*, 376 F. Supp. 3d at 755 (dismissing claims under laws of 26 states because no named plaintiff resided or purchased the relevant product in those states); *Johnson*, 272 F. Supp. 3d at1175 (dismissing the plaintiffs' nationwide MMWA claim for lack of standing). Consequently, the court dismisses Plaintiff's nationwide allegation in Count One.

B. Breach of Express Warranty Claim

Defendant argues that Plaintiff fails to state a claim for breach of express warranty (Count Three) because the alleged oil consumption defect is a design defect that is not covered by GM's limited warranty. (Mot. at PageID #174, ECF No. 7; Reply at PageID #341–42, ECF No. 27.) According to GM, the alleged oil consumption defect is a design defect because the Complaint states that it is "an inherent defect" in each of the Class Vehicles. (Mot. at PageID #173, ECF No. 7 (citing *Gertz v. Toyota Motor Corp.*, No. 2:10-CV-01089, 2011 WL 3681647, at *3 (C.D. Cal. Aug. 22, 2011) (finding that an alleged defect in all vehicles concerns a defect in design)).) GM also highlights the fact that the Complaint alleges: (1) that "design flaws caus[e] excessive oil consumption in the Class Vehicles," (2) that the "defective" Gen IV Engines "are *designed* so as to prematurely consume an abnormally large amount of oil," and (3) that GM failed to "disclose the defective design" of the Gen IV Engines. (Reply at PageID #342, ECF No. 27 (citing Compl. ¶¶ 70, 158–59, ECF No. 1).) Plaintiff counters that there is nothing in the Complaint to compel the conclusion that the oil consumption defect does not implicate defects in materials or workmanship. (Opp'n at PageID #275, ECF No. 16.)

GM's limited warranty covers "repairs to correct any vehicle defect . . . related to materials or workmanship occurring during the warranty period." (Compl. ¶ 179, ECF No. 1.) Several courts, including courts within this circuit, have held that this warranty language does not cover design defects. *See*, *e.g.*, *Matanky v. GM LLC*, 370 F.Supp.3d 772, 788 (E.D. Mich. 2019) (dismissing the plaintiffs' MMWA claim, which was based on alleged design defects that breached GM's "express warranties" because GM's warranty only covered defects in material or workmanship); *see Harris v. Gen. Motors LLC*, No. C20-257 TSZ, 2020 WL 5231198, at *3 (W.D. Wash. Sept. 2, 2020) (examining this exact issue and holding that "GM's limited warranty does not cover the alleged design defect"); *Sloan*, 2017 WL 3283998, at *8 (N.D. Cal. Aug. 1, 2017) ("[T]he overwhelming weight of state law authority holds that design defects are not covered under similar warranties.").

Here, the court finds these authorities persuasive, and follows their conclusion that GM's limited warranty does not cover design defects. In the Complaint, Plaintiff does not allege facts indicating that the oil consumption defect is related to a flaw in materials or workmanship. To the contrary, the Complaint states that the oil consumption defect is an inherent defect in each of the Class Vehicles and that the design of the Gen IV Engines caused excessive oil consumption. Notably, these types of allegations concern a defect in design. As a result, the court finds that Plaintiff's breach of express warranty claim fails. *See Schechner v. Whirlpool Corp.*, 237 F. Supp. 3d 601, 613 (E.D. Mich. 2017) ("A MMWA claim fails as a matter of law if it alleges a design defect, but is brought under an express written warranty covering materials and workmanship." (internal quotation marks and citations omitted)). Because the court has determined that GM's limited warranty does not cover the oil consumption defect and that Plaintiff's breach of express warranty claim fails, the court need not address the parties' other argument concerning this claim.

Consequently, the court grants GM's request to dismiss Plaintiff's breach of express warranty claim.

C. Breach of Implied Warranty in Tort Claim

Next, GM argues that Plaintiff fails to state a breach of implied warranty in tort claim (Count Four) because Plaintiff has owned his vehicle for more than eight years and does not allege that he experienced any problems that interfered with his ability to drive his vehicle. (Mot. at PageID #175, ECF No. 7; Reply at PageID #343, ECF No. 27.) In response, Plaintiff maintains that the Complaint states a plausible breach of implied warranty in tort claim because he alleges that the oil consumption defect puts occupants' safety at risk. (Opp'n at PageID #278, ECF No. 16 (citing Compl. ¶¶ 65–69, ECF No. 1).)

To maintain a breach of implied warranty in tort claim, the plaintiff "must allege that (1) a defect existed in a defendant's product that made it unfit for its ordinary, intended use; (2) the defect existed at the time the product left the defendant's possession; and (3) the defect was the proximate cause of the plaintiff's injuries." *Mooradian v. FCA US, LLC*, No. 1:17-CV-1132, 2017 WL 4869060, at *7 (N.D. Ohio Oct. 27, 2017). With respect to consumer vehicles, plaintiffs "must adequately allege that their vehicles are 'not fit for safe driving and reliable transportation.'" *Id.*

Here, although Plaintiff alleges that the oil consumption defect poses a safety risk to occupants, he does not allege that his vehicle suffered any excessive oil consumption issues or otherwise required repairs for excessive oil consumption during the eight years that he has owned his vehicle. Similarly, he does not allege that his vehicle experienced any serious engine problems as a result of the oil consumption defect. *See Sloan*, 2017 WL 3283998, at *9 (dismissing the plaintiffs' implied warranty claims with leave to amend because the plaintiffs did not allege that they experienced engine problems or any excessive oil consumption); *see also Matanky*, 370 F.Supp.3d

at 785 (denying the defendant's request to dismiss the plaintiffs' implied warranty claims where some plaintiffs alleged that their cars overheated, lost engine power, and/or went into Limp Mode on public highways as a result of a defective cooling system). Moreover, Plaintiff does not allege that the oil consumption defect causes sudden engine damage or engine failure. *See In re Porsche Cars N. Am., Inc.*, 880 F.Supp.2d 801, 827–28, 867 (S.D. Ohio 2012) (finding the plaintiff plausibly stated a claim for breach of implied warranty in tort where the plaintiff alleged that the defective coolant tubes could cause sudden engine failure while traveling at high speeds). Thus, the court grants GM's request to dismiss Plaintiff's breach of implied warranty in tort claim because Plaintiff does not allege that his vehicle suffered any excessive oil consumption issues.

D. Magnuson-Moss Warranty Act Claim

Having granted GM's request to dismiss Plaintiff's express and implied warranty claims, the court finds that Plaintiff's MMWA claim (Count One) must also be dismissed. *See Clemens v. DaimlerChrysler Corp.,* 534 F.3d 1017, 1022 (9th Cir. 2008) ("[C]laims under the Magnuson–Moss Act stand or fall with his express and implied warranty claims under state law."); *Mooradian*, 2017 WL 4869060, at *7 (dismissing the plaintiffs' MMWA because "[r]ecovery under the MMWA requires an underlying state law breach of warranty" and the court already dismissed the plaintiff's express and implied breach of warranty claims). Consequently, the court need not address the parties' arguments regarding whether it is appropriate to strike a nationwide class action claim under the MMWA at the motion to dismiss stage.

E. Fraudulent Omission Claim

GM asserts that Plaintiff's fraudulent omission claim (Count Five) must be dismissed for four reasons: (1) the Complaint does not meet the particularity requirements of Rule 9(b); (2) Plaintiff

does not allege that GM had knowledge of the oil consumption defect at the time he purchased his vehicle; (3) Plaintiff does not allege that GM had a duty to disclose; and (4) Plaintiff does not allege injury. (Mot. at PageID #176–81, ECF No. 7.) In response, Plaintiff counters that dismissal is not appropriate because: (1) his fraudulent omission claim is plead with particularity, (2) he sufficiently alleges that GM had knowledge of the oil consumption defect; (3) he alleges that GM had a duty to disclose the oil consumption defect; and (4) he alleges injury under Ohio law. (Opp'n at PageID #279–84, ECF No. 16.)

1. Rule 9(b)

Claims sounding in fraud, including fraudulent omission claims, must meet Rule 9(b)'s heightened pleading standard. *Wozniak v. Ford Motor Co.*, No. 2:17-CV-12794, 2019 WL 108845, at *3 (E.D. Mich. Jan. 4, 2019). Indeed, Plaintiffs must plead those claims with particularity and identify "the who, what, when, where, and how" of the allegedly fraudulent conduct. *Id.*; *see also* Fed. R. Civ. P. 9(b). To state a claim for fraudulent omission, the plaintiff must allege "(1) precisely what was omitted; (2) who should have made a representation; (3) the content of the alleged omission and the manner in which the omission was misleading; and (4) what [the defendant] obtained as a consequence of the alleged fraud." *Republic Bank & Tr. Co. v. Bear Stearns & Co.*, 683 F.3d 239, 256 (6th Cir. 2012). A complaint may satisfy this standard if it alleges "that a manufacturer knew of a defect before sale, the various venues the manufacturer used to sell the product failed to disclose the defect, and that the plaintiffs would not have purchased the product or would have paid less for it had they known of the defect." *Wozniak*, 2019 WL 108845, at *3.

Having reviewed the Complaint, the court finds that Plaintiff has not sufficiently alleged facts to satisfy Rule 9(b)'s heightened particularity requirement. Specifically, Plaintiff has failed to plead

precisely "what" GM knew of the alleged oil consumption defect. *See*, *e.g.*, *Wozniak*, 2019 WL 108845, at *3. First, Plaintiff alleges that GM knew of the oil consumption defect because it abandoned the Gen IV Engines and replaced them with the redesigned Gen V Engines. (Compl. ¶ 70, ECF No. 1.) However, the fact that GM abandoned the Gen IV Engines does not establish GM's knowledge of the alleged oil consumption defect. Indeed, GM could have chosen to redesign the Gen V Engines for a number of reasons. *See Sloan*, 2017 WL 3283998, at *6; *see also Trans-Spec Truck Serv., Inc. v. Caterpillar, Inc.*, No. CIV.A. 04-CV-11836-R, 2007 WL 776428, at *5 (D. Mass. Mar. 15, 2007), *aff'd*, 524 F.3d 315 (1st Cir. 2008) (concluding the defendant's "efforts to improve on a piece of equipment can not be viewed as evidence that unimproved equipment was negligently designed or manufactured"). Thus, the court finds that the mere fact that Defendant abandoned the Gen IV Engines and replaced it with its redesigned Gen V Engines does not support Plaintiff's allegation that GM had knowledge of the oil consumption defect.

Second, Plaintiff points to negative complaints on third party websites and complaints filed with the NHTSA for the proposition that GM knew of the oil consumption defect. (Compl. ¶¶ 77–101, ECF No. 1.) However, allegations of complaints to the NHTSA are insufficient to allege knowledge. *See Beck v. FCA US LLC*, 273 F. Supp.3d 735, 753 (E.D. Mich. 2017) (concluding that complaints to the NHTSA are insufficient to allege that the manufacturer had knowledge of the defect even though the plaintiff alleged that the defendant regularly monitored NHTSA complaints); *see also Berenblat v. Apple, Inc.*, No. 5:08-CV-04969, 2010 WL 1460297, at *9 (N.D. Cal. Apr. 9, 2010) (explaining that "complaints posted on [the defendant's own] website merely establish the fact that some consumers were complaining. By themselves they are insufficient to show that [the defendant] had knowledge [of the defect] and sought to conceal that knowledge from consumers").

Further, the case that Plaintiff points to in support of his contention that complaints on third party websites and to the NHTSA establish that GM had knowledge of the oil consumption defect is distinguishable. (Opp'n at PageID #281, ECF No. 16 (citing *Williams v. Yamaha Motor Co.*, 851 F.3d 1015, 1027–28 (9th Cir. 2017)). In *Williams*, the Ninth Circuit recognized that an unusually high volume of online complaints regarding a dry exhaust defect supported a claim that the manufacturer had presale knowledge. *Williams*, 851 F.3d at 1027–28. But in reaching that conclusion the Court relied on the fact that, in the complaint, the plaintiffs (1) listed and described an "unusually high" number of consumer complaints; and (2) explained in detail how those complaints were lodged, how the defendant responded to the complaints, and the mechanism through which the complaints traveled from the consumers to the defendant. *Id.* at 1027.

In the instant case, however, although the Complaint lists numerous customer complaints regarding oil loss problems in the Class Vehicles and generally alleges that the number of complaints are "unusual," there are no allegations indicating that GM actually received, tracked, or was otherwise made aware of the complaints. *See Wilson v. Hewlett-Packard Co.*, 668 F.3d 1136, 1148 (9th Cir. 2012) (concluding that absent some facts or evidence indicating that the defendant actually received customer complaints regarding the alleged defect, it would be speculative to find that the defendant knew of the defect). Consequently, Plaintiff's general allegations pertaining to GM's knowledge without any specific facts indicating that Defendant was aware of the complaints do not rise above mere speculation. *See Twombly*, 550 U.S. at 545. As a result, the court finds that the customer complaints are insufficient to support Plaintiff's allegation that GM had knowledge of the oil consumption defect.

Finally, Plaintiff alleges that GM had knowledge of the oil consumption defect because it

issued TSBs addressing oil loss issues in vehicles with Gen IV Engines. (Compl. ¶¶ 74–75, ECF No. 1.) However, the TSBs do not suggest the GM knew that all vehicles with Gen IV Engines were inherently defective. *See Sloan*, 2017 WL 3283998, at *7. Further, the cases on which Plaintiff relies in support of his position that the TSBs establish GM's knowledge of the defect are easily distinguished from this case. *See*, *e.g.*, *MacDonald v. Ford Motor Co.*, 37 F.Supp.3d 1087, 1094 (N.D. Cal. 2014) (finding that the defendant's subsequent TSB regarding a coolant pump defect undercut its prior statement, which indicated that problems related to the coolant pump defect were fully resolved in 2006, and thus together the defendant's statement and TSB plausibly alleged that the defendant had knowledge of the defect); *Holland v. FCA US LLC*, No. 1:15-CV-121, 2015 WL 7196197, at *4 (N.D. Ohio Nov. 16, 2015), *aff'd*, 656 F. App'x 232 (6th Cir. 2016) (finding the defendant's TSBs could serve as evidence that the defendant had knowledge of an alleged defect where the defendant issued a TSB explaining the defect and shortly thereafter issued letters to owners of the affected vehicles extending warranty coverage for the defect).

Notably, all of the cases discussed above had other factual allegations, aside from the TSBs, which alone supported a reasonable inference of the defendants' knowledge of the alleged defects. In the instant case, however, there are no other independent allegations that would support an inference that GM had knowledge of the oil consumption defect. Consequently, because "[l]iability cannot attach for a fraudulent omission [claim] . . . without a properly pleaded 'what' of the alleged omission," Szep's fraudulent omission claim must be dismissed. *Wozniak*, 2019 WL 108845, at *3.

2. Elements of a Fraudulent Omission Claim

Because the court has determined that Plaintiff's fraudulent omission claim is not properly pleaded under Rule 9(b), the court need not address the parties' other arguments in regard to this

claim. Nevertheless, the court notes that Plaintiff has failed to sufficiently allege that GM had a duty to disclose the oil consumption defect to Plaintiff.

Under Ohio law, in order to establish a fraudulent omission claim, the plaintiff must show "(1) a false representation concerning a fact or, in the face of a duty to disclose, concealment of a fact, material to the transaction; (2) knowledge of the falsity of the representation or utter disregard for its truthfulness; (3) intent to induce reliance on the representation; (4) justifiable reliance upon the representation under circumstances manifesting a right to rely; and (5) injury proximately caused by the reliance." *Micrel, Inc. v. TRW, Inc.*, 486 F.3d 866, 874 (6th Cir. 2007). Here, the parties dispute whether Plaintiff adequately pleaded that GM had a duty to disclose the oil consumption defect. (*See* Mot. at PageID #180–81, ECF No. 7; Opp'n at PageID #283–84, ECF No. 16.) In addition, the parties also dispute whether the Complaint sufficiently alleges injury. (*See* Mot. at PageID #181; Opp'n at PageID #284.)

In the absence of a duty to disclose a concealed fact to the plaintiff, concealment of the fact does not constitute fraud. *Federated Mgmt. Co. v. Coopers & Lybrand*, 738 N.E.2d 842, 854–55 (Ohio Ct. App. 2000). Further, the Ohio Supreme Court has held that a duty to disclose arises when:

> a party to a business transaction in a fiduciary relationship with another is bound to make a full disclosure of material facts known to him but not to the other. Such a duty may also arise out of an informal relationship where both parties to a transaction understand that a special trust or confidence has been reposed. *Full disclosure may also be required of a party to a business transaction where such disclosure is necessary to dispel misleading impressions that are or might have been created by partial revelation of the facts*.

Blon v. Bank One, Akron, N.A., 519 N.E.2d 363, 367 (Ohio 1988) (internal citations and quotation marks omitted) (emphasis added). This latter method is relevant here.

Plaintiff asserts that GM had a duty to disclose the oil consumption defect to him in order to dispel the misleading impressions that GM made indicating that the Class Vehicles were safe and dependable and equipped with high performance engines. (Opp'n at PageID #283, ECF No. 16.)

In deciding whether Defendant had a duty to disclose, "the [c]ourt must determine, first, whether the parties were engaged in a business transaction, and second, whether full disclosure was necessary to dispel misleading impressions that were or might have been created by partial revelation of facts." *ATM Exch., Inc. v. Visa Int'l Serv. Ass'n*, No. 1:05-CV-00732, 2008 WL 3843530, at *13 (S.D. Ohio Aug. 14, 2008) (citing *Blon*, 519 N.E.2d at 367–68). Here, as explained above, the Complaint lacks sufficient allegations to establish that GM had knowledge of the oil consumption defect. Consequently, Plaintiff's fraudulent omission claim is not properly pled and must be dismissed because the GM cannot be expected to disclose facts that it may not have had at the time of the sale. *See MV Circuit Design, Inc. v. Omnicell, Inc.*, No. 1:14-CV-2028, 2015 WL 1321743, at *8 (N.D. Ohio Mar. 24, 2015) (dismissing the plaintiff's fraudulent concealment claim against a defendant because the complaint did not allege any facts from which the court could infer that the plaintiff and the defendant were parties to a business transaction). Therefore, the court grants Defendant's request to dismiss Plaintiff's fraudulent omission claim.

F. Ohio Consumer Sales Protection Act Claim

Defendant contends that Plaintiff's OCSPA claim (Count Two) must be dismissed because: (1) Plaintiff fails to identify a deceptive or unconscionable practice by GM; (2) Plaintiff cannot satisfy the previous violation requirement for maintaining an action under the OCSPA; (3) Plaintiff's OCSPA claim is time-barred; and (4) Plaintiff does not allege injury. (Mot. at PageID #182–84, ECF No. 7.) Plaintiff counters that dismissal is not appropriate because: (1) he properly alleges GM's

deceptive and unconscionable conduct; (2) he satisfies the previous violation requirement for class actions under the OCSPA; (3) his claim is not time-barred; and (4) he alleges injury. (Opp'n at PageID #284–86, ECF No. 16.)

1. Deceptive or Unconscionable Conduct

The OCSPA prohibits suppliers from committing either unfair or deceptive consumer sales practices or unconscionable acts or practices. Ohio Rev. Code §§ 1345.02 and 1345.03. Under the OCSPA, "'unfair or deceptive consumer sales practices' [are defined] as those that mislead consumers about the nature of the product they are receiving, while 'unconscionable acts or practices' relate to a supplier manipulating a consumer's understanding of the nature of the transaction at issue." *McKinney v. Bayer Corp.*, 744 F.Supp.2d 733, 743 (N.D. Ohio 2010) (internal citations omitted).

In order to make out a prima facie claim under the OCSPA, the plaintiff "must 'show a material misrepresentation, deceptive act or omission' that impacted his decision to purchase the item at issue." *Temple v. Fleetwood Enters.*, 133 F. App'x 254, 265 (6th Cir. 2005); *see also Richards v. Beechmont Volvo*, 711 N.E.2d 1088, 1090 (Ohio 1998) ("In order to be deceptive, and therefore actionable, a seller's act must not only be at variance with the truth but must also concern a matter that is or is likely to be material to a consumer's decision to purchase the product or service involved."). However, "[m]ere non-disclosure of a defect, without more, does not fall within the purview of deceptive or unconscionable practices prohibited by the [OCSPA]." *Radford v. Daimler Chrysler Corp.*, 168 F. Supp. 2d 751, 754 (N.D. Ohio 2001) (quoting *Bierlein v. Bernie's Motor Sales, Inc.*, No. 9590, 1986 WL 6757, at *7 (Ohio Ct. App. June 12, 1986)).

In the instant case, Plaintiff's OCSPA claim is based on GM's alleged failure to disclose the

oil consumption defect to consumers that purchased or leased Class Vehicles, and GM's alleged active concealment of the defect. (Compl.¶¶ 163–71, ECF No. 1.) As explained above, however, the Complaint lacks sufficient allegations to support an inference that GM had knowledge of the oil consumption defect. As a result, Plaintiff's OCSPA claim fails. *See Bierlein*, 1986 WL 6757, at *6 (explaining that Ohio's Consumer Sales Practices Act requires a defendant to have actual awareness (knowledge) of a defect). Thus, the court grants Defendant's request to dismiss Plaintiff's OCSPA claim.

2. Statute of Limitations

Having already decided that Plaintiff's OCSPA claim must be dismissed, the court need not address the parties' remaining arguments with respect to this claim. Nevertheless, as explained more fully below, the court notes that Plaintiff's OCSPA claim also fails because it is time-barred.

The OCSPA has a two-year statute of limitations. Ohio Rev. Code § 1345.10(C). This two-year limitation is "absolute" when a party seeks damages. *Siriano*, 2015 WL 12748033, at *16–17. Further, "[w]hen a plaintiff brings an OCSPA claim based on alleged misrepresentations about the 'standard, quality, or grade' of a purchased consumer good, the statute of limitations begins to run from the time of purchase." *Mooradian*, 2017 WL 4869060, at *8.

In the instant case, Plaintiff purchased his vehicle in 2011. (Compl. ¶ 25, ECF No. 1.) As such, the statute of limitations for his OCSPA claim ran out in 2013. Nevertheless, Plaintiff filed his Complaint in 2019 bringing an OCSPA claim. (ECF No. 1.) The statute of limitations therefore bars his claim unless it is tolled. In this regard, Plaintiff alleges that tolling is appropriate based on the class action tolling doctrine and fraudulent concealment. (Opp'n at PageID #286, ECF No. 16.) But neither of these tolling methods save Plaintiff's OCSPA claim.

First, in interpreting class action tolling, the Ohio Supreme Court has held:

> The filing of a class action, whether in Ohio or the federal court system, tolls the statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action.

Vaccariello v. Smith & Nephew Richards, Inc., 763 N.E.2d 160, 382–83 (Ohio 2002). Plaintiff maintains that his claims are tolled by *Sloan*, 2017 WL 3283998, which was filed in 2016 and makes identical allegations against the same defendant. (Opp'n at PageID #286.) However, Plaintiff cannot benefit from tolling through *Sloan* because, as explained above, the statute of limitations for his OCSPA claim ran out in 2013.

Plaintiff asserts that his claim was tolled up to the filing of *Sloan* based on the doctrine of fraudulent concealment tolling. (*Id.* (citing *Thornton v. State Farm Mut. Auto Ins. Co., Inc.*, No. 1:06-CV-00018, 2006 WL 3359448, at *6–7 (N.D. Ohio Nov. 17, 2006)).) Ohio law recognizes that concealment of a cause of action can toll the statute of limitations under some limited circumstances, such as fraudulent concealment. *Thornton*, 2006 WL 3359448, at *6. However, the plaintiff must allege "some affirmative act by the defendant designed to prevent discovery of the cause of action." *Id.* Indeed, as the Ohio Supreme Court has explained, plaintiffs must "establish that subsequent and specific actions by defendants somehow kept them from timely bringing suit." *Id.* (quoting *Doe v. Archdiocese of Cincinnati*, 849 N.E.2d 268, 279 (Ohio 2006)).

Here, in the Complaint, Plaintiff alleges that GM concealed the oil consumption defect even though it could have disclosed it to consumers "through individual correspondence, media release, or by other means." (Compl. ¶ 130, ECF No. 1.) But, "[c]oncealment by mere silence is not enough. There must be some trick or contrivance intended to exclude suspicion and prevent inquiry."

Thornton, 2006 WL 3359448, at *6. Plaintiff also asserts that GM "affirmatively and actively" concealed the oil consumption defect when GM issued TSBs instructing dealers to offer repairs for oil loss problems in the Class Vehicles when it knew the repairs would not cure the oil consumption defect. (Compl. ¶ 131.) But as explained above, GM's issuance of the TSBs alone does not support a finding that GM knew that all of the Class Vehicles were inherently defective. As such, GM's issuance of the TSBs does not support Plaintiff's affirmative concealment allegations. Therefore, fraudulent concealment tolling does not save Plaintiff's time-barred OCSPA claim.

G. Unjust Enrichment Claim

GM asserts that Plaintiff's unjust enrichment claim (Count Six) must be dismissed for two reasons: (1) Ohio law prohibits unjust enrichment claims when there is an express contract and (2) Plaintiff has adequate legal remedies available through his consumer protection, fraudulent omission, and warranty claims. (Mot. at PageID #184, ECF No. 7.) In response, Plaintiff counters that his unjust enrichment claim is not barred by an express contract because he has alleged fraud, and because alternative pleading is permissible. (Opp'n at PageID #287, ECF No. 16.)

The Ohio Supreme Court has held that "unjust enrichment . . . occurs when [a person] has and retains money or benefits which in justice and equity belong to another." *Hummel v. Hummel*, 14 N.E.2d 923, 927 (Ohio 1938). To make out a claim of unjust enrichment, the plaintiff must allege: "(1) a benefit conferred by a plaintiff upon a defendant; (2) knowledge by the defendant of the benefit; and (3) retention of the benefit by the defendant under circumstances where it would be unjust to do so without payment." *Hoffer v. Cooper Wiring Devices, Inc.*, No. 106CV763, 2007 WL 1725317, at *4 (N.D. Ohio June 13, 2007). With these principles in mind, the court turns to the parties' arguments.

First, the court rejects Defendant's argument that Plaintiff's unjust enrichment claim must be dismissed because the Complaint alleges that the GM warranty, an enforceable contract, covers his vehicle. *See Cristino v. Bur. of Workers' Comp.*, 977 N.E.2d 742, 753 (Ohio Ct. App. 2012) (holding "[t]he existence of an express contract precludes an unjust-enrichment claim only *in the absence of bad faith, fraud, or some other illegality*" (emphasis in original)). Indeed, because the Complaint alleges fraud, Plaintiff's unjust enrichment claim is not subject to dismissal based on the argument advanced by Defendant.

Second, however, the court finds that dismissal of Plaintiff's unjust enrichment claim is nevertheless warranted. In the Complaint, Plaintiff asserts that GM benefitted from selling and leasing the Class Vehicles while concealing the oil consumption defect. (Compl. ¶¶ 203–10, ECF No. 1.) However, as explained above, Plaintiff does not plausibly allege that GM had knowledge of the defect. Consequently, Plaintiff's unjust enrichment claim fails because Plaintiff's general allegations as it relates to GM's knowledge of the defect are insufficient to establish that GM had knowledge of the alleged benefit. Therefore, the court grants Defendant's request to dismiss Plaintiff's unjust enrichment claim.

IV. CONCLUSION

For the foregoing reasons, the court grants Defendant's Motion to Dismiss (ECF No. 7). Specifically, the court grants Defendant's Motion pursuant to Rule 12(b)(1) on the grounds that Plaintiff lacks standing to seek injunctive relief under the OCSPA (Count Two), and Plaintiff lacks standing to assert a claim under the MMWA (Count One) on behalf of a nationwide class. In addition, the court grants Defendant's Motion pursuant to Rule 12(b)(6) on the grounds that Plaintiff has failed to state a claim on all Counts. Finally, the Court grants Defendants Motion pursuant to

Rule 9(b) on the grounds that Plaintiff's fraudulent omission (Count Five) claim does not meet the heightened particularity requirements of Rule 9.

IT IS SO ORDERED.

/s/ SOLOMON OLIVER, JR.
UNITED STATES DISTRICT JUDGE

September 30, 2020