2 of 2 DOCUMENTS

MICHELLE RESNICK ET AL. v. HYUNDAI MOTOR AMERICA, INC. ET AL.

CV 16-00593-BRO (PJWx)

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

2016 U.S. Dist. LEXIS 160179

November 14, 2016, Decided
November 14, 2016, Filed

SUBSEQUENT HISTORY: Dismissed by, in part, Dismissed without prejudice by, in part, Request granted *Resnick v. Hyundai Motor Am., 2017 U.S. Dist. LEXIS 67525 (C.D. Cal., Apr. 13, 2017)*

COUNSEL: [*1] Attorneys for Plaintiffs: Not Present.

Attorneys for Defendants: Not Present.

JUDGES: BEVERLY REID O'CONNELL, United States District Judge.

OPINION BY: BEVERLY REID O'CONNELL

OPINION

CIVIL MINUTES - GENERAL

Proceedings: (IN CHAMBERS)

ORDER RE DEFENDANTS' MOTION TO DISMISS CASE AND MOTION TO STRIKE NATIONWIDE CLASS ALLEGATIONS IN PLAINTIFFS' CORRECTED FIRST AMENDED CLASS ACTION COMPLAINT [40, 43]

I. INTRODUCTION

Pending before the Court are Defendants Hyundai Motor America, Inc., Hyundai Motor Co., Ltd., Hyundai Motor Manufacturing Alabama, LLC, and Kia Motors Manufacturing Georgia, Inc.'s (collectively, "Defendants") Motion to Dismiss and Motion to Strike Nationwide Class Allegations in Plaintiffs' Corrected First Amended Class Action Complaint. (Dkt. Nos. 40-1 (hereinafter, "MTD"), 43-1 (hereinafter, "Mot. to Strike").)[1] After considering the papers filed in support of and in opposition the instant Motion, the Court finds this matter appropriate for resolution without oral argument of counsel. *See Fed. R. Civ. P. 78*; *C.D. Cal. L.R. 7-15*. For the reasons set forth below, the Court **GRANTS** Defendants' Motion to Dismiss and **DENIES as moot** Defendants' Motion to Strike the Nationwide Class Allegations.

1 Defendants filed another Motion to Strike the Nationwide [*2] Class Allegations, (*see* Dkt. No. 42), but later the same day, they filed the instant Corrected Motion to Strike, (*see* Mot. to Strike). Therefore, Defendants' original Motion to Strike is **DENIED as moot**.

II. BACKGROUND

A. The Parties

Plaintiffs in this action are fourteen individuals from throughout the country who bring his action on behalf of themselves and all others similarly situated.[2] (*See* Dkt. No. 35 (hereinafter, "FAC") at 1.) Plaintiffs are current owners of 2006-2016 Hyundai Santa Fe, Sonata, and Elantra automobiles manufactured within the United States (the "Class Vehicles") that allegedly have "an identical and inherent defect in the vehicle's paint." (FAC ¶ 1.) Plaintiffs allege that this defect in the paint manifests itself over time and causes the paint to bubble, peel, and "flake off" of the vehicle, leading to rusting and corrosion. (*Id.*) Plaintiffs claim that Hyundai fraudulently concealed this defect when Plaintiffs purchased their

vehicles and has refused to offer Plaintiffs and the proposed class members any relief. (*Id.*)

> 2 Plaintiffs are: (1) Michelle Resnick, a Maryland resident; (2) Shelby Cramer, a Louisiana resident; (3) Paul Sandlin, a Texas resident; (4) Patricia [*3] Reynolds, a South Carolina resident; (5) Lauren Freed, a Georgia resident; (6) Christopher Baker, a North Carolina resident; (7) Tara Mulrey, a Florida resident; (8) Lorraine Strand, a Florida resident; (9) William Geers, a Florida resident; (10) Krista Verstraete, an Illinois resident; (11) Scott Schieber, a Georgia resident; (12) Leida Thomas, a California resident; (13) Elizabeth Vargo, a Florida resident; and, (14) Daniella Tirone, a Massachusetts resident. (FAC ¶¶ 8-21.) The Court will refer to all the plaintiffs collectively as "Plaintiffs."

Defendant Hyundai Motor America, Inc. is a California corporation with its principal place of business in Fountain Valley, California. (FAC ¶ 22.) Hyundai Motor America, Inc. is in the business of "designing, manufacturing, marketing, distributing and selling Hyundai automobiles" throughout the United States. (*Id.*) Defendant Hyundai Motor Manufacturing Alabama LLC is a Delaware limited liability company with its principal place of business in Montgomery, Alabama. (FAC ¶ 23.) Defendant Hyundai Motor Co., Ltd. is a corporation organized under the laws of the Republic of Korea with its principal place of business in Seoul, South Korea.[3] (FAC ¶ [*4] 24.) Plaintiffs allege that the Hyundai Santa Fe models at issue in this action have been produced at the Kia Motors Manufacturing Georgia facility in West Point, Georgia, and the Hyundai Sonata and Elantra models have been produced at the Hyundai Motor Manufacturing Alabama facility in Montgomery, Alabama, but that all Defendants collaborate for the "design, manufacturing, production, marketing, and advertising" of the Class Vehicles within the United States. (FAC ¶¶ 29-30.)

> 3 Defendants Hyundai Motor America, Inc. and Hyundai Motor Manufacturing Alabama LLC are subsidiaries of Defendant Hyundai Motor Co., Ltd. (FAC ¶ 25.) In addition, another entity, Kia Motors Corporation was initially named as a defendant, but has since been terminated as a party. (*See* Dkt. No. 18.)

B. Factual Allegations

Plaintiffs aver that Hyundai has more than 800 dealerships within the United States and has sold over six million vehicles in the United States since it began selling vehicles here in 1986. (FAC ¶ 36.) According to Plaintiffs, Hyundai advertises itself as "an automobile manufacturer conscious of quality, technology and innovation, and design." (FAC ¶ 38.) Further, Plaintiffs claim that the Class Vehicles [*5] are advertised "as being backed by 'America's best warranty.'" (*Id.*) Specifically, Hyundai provides a ten-year/100,000 mile powertrain warranty, but provides only a five-year/60,000 mile warranty for new vehicles, and limits its paint warrant to a three-year/30,000 mile warranty. (FAC ¶ 39.) Plaintiffs allege that Hyundai makes specific representations regarding its use of "state-of-the-art paint" and express warranties about the quality of its painting process, including a commercial in which Hyundai claimed that its paint quality is better than that of a Mercedes CLS550. (FAC ¶¶ 40-41.) According to Plaintiffs, since February 5, 2012, Hyundai has provided information on its website regarding the quality of and process for painting its vehicles. (FAC ¶¶ 42-43.) Plaintiffs claim that this information expressly represents to consumers that the paint on Hyundai's vehicles with "protect against corrosion, rust and scratches," and will maintain high residual values due to the quality of the paint. (FAC ¶¶ 45-46.) Plaintiffs allege that, despite receiving "numerous" customer complaints, Hyundai promoted its paint process as a selling point for its vehicles until at least May 2016. (FAC [*6] ¶ 51.)

Plaintiffs claim that "self-healing clear coats," such as the "Scratch Recovery Clear" product that Hyundai uses on the Class Vehicles, rely upon ultraviolet light to cause the polymer in it to enter a "molten" state that fills in scratches. (FAC ¶ 52.) However, since these products were developed, Plaintiffs claim that there has been concern that long-term exposure to ultraviolet light (such as through sun exposure) causes the paint to peel. (FAC ¶ 53.) Plaintiffs also claim that the "self-healing" repair process does not work on scratches deeper than surface scratches, and that, in fact, deeper scratches or chips may trigger the technology to work in reverse. (FAC ¶¶ 54-55.) According to Plaintiffs, Nissan used this technology beginning in approximately 2005, but shortly thereafter discontinued the practice as customers complained of peeling paint. (FAC ¶ 56.) Plaintiffs aver that Hyundai never informed its customers of the history of problems associated with self-healing paints and coatings and have, since May 2016, diminished its representations regarding its paint. (FAC ¶¶ 57-58.)

According to Plaintiffs, defects in the paint constitute a latent defect that a reasonable purchaser [*7] would not be aware of before buying a vehicle. (FAC ¶ 60.) Thus, Plaintiffs claim that Hyundai had a duty to inform Plaintiffs of the existence of this latent defect, but failed to do so. (*Id.*) Plaintiffs aver that Hyundai was aware of the paint defects due to: (1) customer complaint records; (2) dealership repair records; (3) warranty and

post-warranty claims; (4) internal testing; and, (5) "various other sources." (FAC ¶ 68; *see also* FAC ¶¶ 62-66.) Further, on November 13, 2013, Hyundai began using the third-party review website SureCritic to "publicly feature owner-generated ratings and reviews" for Hyundai vehicles. (FAC ¶ 70.) Plaintiffs claim that the SureCritic website contains various complaints and reviews regarding the peeling paint on the Class Vehicles. (FAC ¶ 71.) According to Plaintiffs, Hyundai admits to monitoring the SureCritic website, which should have placed it on notice of the paint defect; yet, Hyundai failed to disclose this information to consumers. (FAC ¶ 72.)

C. The Specific Facts of Plaintiffs' Cases

Plaintiff Michelle Resnick is the original owner of a 2009 Hyundai Santa Fe purchased from a Hyundai dealership in Annapolis, Maryland. (FAC ¶ 74.) In Spring 2015, [*8] paint began peeling from Ms. Resnick's Santa Fe. (FAC ¶¶ 75, 77.) After informing Hyundai of the peeling paint, Hyundai informed her that it would provide no remedy, because the vehicle was outside of the paint's warranty period. (FAC ¶ 76.)

Plaintiff Shelby Cramer purchased a pre-owned 2008 Hyundai Santa Fe in 2011. (FAC ¶ 81.) In October 2015, the Santa Fe's paint began peeling in "chunks" during a rainstorm. (FAC ¶ 82.) She took her vehicle to two different Hyundai dealerships, but both declined to provide any repairs due to the warranty period having expired. (*Id.*)

Plaintiff Paul Sandlin is the original owners of both a 2011 and 2013 Hyundai Sonata. (FAC ¶ 87.) The paint on the 2011 Sonata began peeling once the vehicle had 50,000 miles on it; accordingly, Hyundai informed him there was nothing it could do as the warranty had expired. (*Id.*) In late 2015, the 2013 Sonata's paint began peeling as well. (FAC ¶ 88.) At the time, the 2013 Sonata also had approximately 50,000 miles on it. (*Id.*) After taking the vehicle to two dealerships, Hyundai's customer service advised him that the condition was just "normal wear and tear." (FAC ¶ 89.)

Plaintiff Patricia Reynolds is the owner of a 2007 [*9] Hyundai Sonata SE. (FAC ¶ 94.) In 2015, she noticed a blister near her rear license plate. (FAC ¶ 95.) Ms. Reynolds paid $475 to have two areas on the car repainted. (*Id.*) After performing these repairs, she noticed two additional paint blisters that began to peel. (FAC ¶ 96.) She communicated her concerns to Hyundai but Hyundai provided no assistance due to the warranty period having expired. (FAC ¶ 97.)

Plaintiff Lauren Freed purchased a used 2010 Hyundai Santa Fe in November 2011. (FAC ¶ 101.) In late December 2015, the paint on her hood began peeling off. (FAC ¶ 102.) Ms. Freed called local Hyundai dealerships in Atlanta, Georgia, but was informed that, because the warranty had expired, any repair would be at her expense. (FAC ¶ 103.)

Plaintiff Christopher Baker purchased a used 2011 Hyundai Sonata in 2012 in Charlotte, North Carolina. (FAC ¶ 107.) In approximately November 2015, Mr. Baker noticed the paint on his car had begun peeling. (FAC ¶ 108.) When he took his car to be repaired, he was informed that the warranty had expired and Hyundai would offer him no recourse. (FAC ¶ 109.)

Plaintiff Tara Mulrey is the original owner of a 2010 Hyundai Sonata. (FAC ¶ 113.) In Spring 2015, [*10] Ms. Mulrey noticed the paint on her hood and doors had begun peeling. (FAC ¶ 114.) After contacting her local dealership, she was told it was "normal wear and tear" and there was nothing Hyundai could do. (FAC ¶ 115.)

Plaintiff Lorraine Strand is the original owner of a 2013 Hyundai Sonata purchased in Fort Myers, Florida in August 2012. (FAC ¶ 120.) In 2015, Ms. Strand noticed a small spot of paint on her hood had begun peeling. (FAC ¶ 121.) The spot soon grew larger with additional paint peeling. (*Id.*) She called her Hyundai dealership "but she was offered no help whatsoever." (*Id.*)

Plaintiff William Geers is the original owner of a 2009 Hyundai Santa Fe purchased in Clarkesville, Maryland in January 2009. (FAC ¶ 126.) In 2015, he noticed a small spot of paint on the hood of his vehicle was peeling. (FAC ¶ 127.) The spot grew larger and more paint began peeling. (*Id.*) Mr. Geers took his car to a local body shop and was told that the defect "was common" in the make and model of his vehicle. (FAC ¶ 128.) He called his Hyundai dealership but was provided no assistance. (FAC ¶ 130.)

Plaintiff Krista Verstraete is the owner of a 2009 Hyundai Santa Fe purchased in Peoria, Illinois in 2013. [*11] (FAC ¶ 135.) In 2015, Ms. Verstraete noticed a small spot of paint on the hood of her vehicle was peeling. (FAC ¶ 136.) She took her car back to the dealership, but was told the paint was not under warranty. (FAC ¶ 137.)

Plaintiff Scott Shieber purchased a 2013 Hyundai Santa Fe in Macon, Georgia in November 2012. (FAC ¶ 140.) In December 2015, Mr. Shieber noticed a small spot of paint on the hood of his vehicle was peeling. (FAC ¶ 141.) He contacted the service manager at his dealership in Macon and was informed that he should contact Hyundai Motors America. (*Id.*) Hyundai Motors America responded by indicating that they would pay for the materials needed, but Mr. Shieber would be required to pay for the labor. (FAC ¶ 142.) After researching the issue, Mr. Shieber declined Hyundai Motors America's

offer and informed it that another area on his car had begun peeling. (FAC ¶ 144.)

Plaintiff Leida Thomas is the owner of a 2010 Hyundai Sonata that she purchased in Cathedral City, California in 2010. (FAC ¶ 146.) In 2015, Ms. Thomas noticed that, after a heavy rain, the paint on her vehicle had begun to chip and that in several other areas it appeared to be bubbling. (FAC ¶ 147.) She returned [*12] to the dealership where she purchased the vehicle but was told the paint was no longer under warranty. (FAC ¶ 148.)

Plaintiff Elizabeth Vargo purchased a 2012 Hyundai Santa Fe in Clearwater, Florida in March 2012. (FAC ¶ 151.) In April 2016, Ms. Vargo noticed the paint on her vehicle had begun peeling. (FAC ¶ 152.) She returned to the Hyundai dealership, but the dealership referred her to a body shop for her to have the vehicle repainted at her own expense. (FAC ¶ 153.) Ms. Vargo called the customer service number for Hyundai Motors America and was told by a representative that if her dealership had a body shop, she would be issued a voucher for the repair. (FAC ¶ 153.) Hyundai Motors America never reduced this offer to writing, and Ms. Vargo has not received any relief from Hyundai. (FAC ¶ 153-54.)

Plaintiff Daniella Tirone purchased a 2009 Hyundai Santa Fe in Springfield, Massachusetts in September 2009. (FAC ¶ 158.) In 2012, Ms. Tirone noticed the paint on the hood of her vehicle was peeling. (FAC ¶ 159.) Her vehicle had approximately 20,000 miles on it at the time. (*Id.*) Ms. Tirone contacted her Hyundai dealership and was initially denied any relief. (FAC ¶ 160.) After she continued [*13] to contact the dealership, one of the sales managers agreed to cover the costs of repainting the hood. (FAC ¶ 161.) Within six months of having the work performed, the paint on the hood began peeling again. (*Id.*) Since then, other areas of Ms. Tirone's car have begun peeling as well. (FAC ¶ 162.)

D. Procedural History

Plaintiffs first filed this action in this Court on March 30, 2016. (Dkt. No. 1.) On August 15, 2016, Plaintiffs filed a First Amended Complaint ("FAC"). (*See* Dkt. No. 29.) On August 29, 2016, Plaintiffs filed a Notice of Errata and a Corrected FAC. (*See* FAC.) In their FAC, Plaintiffs seek to represent a nationwide class, or, in the alternative, statewide classes for California, Maryland, Louisiana, Georgia, Massachusetts, Texas, South Carolina, Florida, and Illinois. (FAC ¶¶ 167-68.) Plaintiffs' FAC alleges fourteen causes of action: (1) breach of express warranty (on behalf of the nationwide class), (FAC ¶¶ 182-98); (2) negligent misrepresentation (on behalf of the nationwide class), (FAC ¶¶ 199-206); (3) fraudulent concealment (on behalf of the nationwide class), (FAC ¶¶ 207-13); (4) violation of the Song-Beverly Consumer Warranty Act (the "Song-Beverly Act"), for breach [*14] of implied warranty (on behalf of Plaintiff Leida Thomas and a California class), (FAC ¶¶ 214-28); (5) violation of California's Unfair Competition Law ("UCL") (on behalf of Leida Thomas and a California class), (FAC ¶¶ 229-41); (6) violation of California's False Advertising Law ("FAL") (on behalf of Leida Thomas and a California class), (FAC ¶¶ 242-50); (7) violation of the California Consumer Legal Remedies Act ("CLRA") (on behalf of Leida Thomas and California class), (FAC ¶¶ 251-70); (8) violation of Maryland Unfair and Deceptive Trade Practice Act (on behalf of Plaintiff Michelle Resnick and a Maryland class), (FAC ¶¶ 271-83); (9) violation of Louisiana Unfair and Deceptive Trade Practice Act (on behalf of Plaintiff Shelby Cramer and a Louisiana class and against Defendants Hyundai Motors America, Inc. and Hyundai Motor Co., Ltd. only), (FAC ¶¶ 284-95); (10) violation of Texas Unfair and Deceptive Trade Practice Act (on behalf of Plaintiff Paul Sandlin and a Texas class), (FAC ¶¶ 296-312); (11) violation of North Carolina Unfair and Deceptive Trade Practice Act (on behalf of Plaintiff Christopher Baker and a North Carolina class), (FAC ¶¶ 313-28); (12) violation of Florida Unfair [*15] and Deceptive Trade Practice Act (on behalf of Plaintiffs Tara Mulrey, Lorraine Strand, William Geers, and Elizabeth Vargo and a Florida class), (FAC ¶¶ 329-40); (13) violation of Illinois Consumer Fraud and Deceptive Business Practices Act (on behalf of Plaintiff Krista Verstraete and an Illinois class), (FAC ¶¶ 341-56); (14) violation of Massachusetts Unfair and Deceptive Trade Practice Act (on behalf of Plaintiff Daniella Tirone and a Massachusetts class), (FAC ¶¶ 357-65).

On September 9, 2016, Defendants filed the instant Motion to Dismiss and Motion to Strike Nationwide Class Allegations, (*see* MTD; Mot. to Strike), along with a Request for Judicial Notice, (Dkt. No. 41 (hereinafter, "RJN")). On October 7, 2016, Plaintiffs timely opposed the Motion to Dismiss, (Dkt. No. 45 (hereinafter, "MTD Opp'n")), and the Motion to Strike, (Dkt. No. 44). On October 28, 2016, Defendants timely replied regarding the Motion to Dismiss, (Dkt. No. 55 (hereinafter, "MTD Reply")), and the Motion to Strike, (Dkt. No. 54).

III. REQUEST FOR JUDICIAL NOTICE

Defendants request that the Court take judicial notice of relevant pages of the 2015 Hyundai Owner's Handbook and Warranty Information.[4] (*See* RJN at 1.) When [*16] considering a motion to dismiss, a court typically does not look beyond the complaint in order to avoid converting a motion to dismiss into a motion for summary judgment. *See Mack v. S. Bay Beer Distribs., Inc., 798 F.2d 1279, 1282 (9th Cir. 1986), overruled on*

other grounds by Astoria Fed. Sav. & Loan Ass'n v. Solimino, 501 U.S. 104, 111 S. Ct. 2166, 115 L. Ed. 2d 96 (1991). Notwithstanding this precept, a court may properly take judicial notice of (1) material which is included as part of the complaint or relied upon by the complaint, and, (2) matters in the public record. *See Marder v. Lopez, 450 F.3d 445, 448 (9th Cir. 2006)*; *Lee v. City of Los Angeles, 250 F.3d 668, 688-89 (9th Cir. 2001)*; *see also Yumul v. Smart Balance, Inc., 733 F. Supp. 2d 1134, 1137 (C.D. Cal. 2010)* ("A court may "consider documents that are incorporated by reference but not physically attached to the complaint if they are central to the plaintiff's claim and no party questions their authenticity."). A court "must take judicial notice if a party requests it and the court is supplied with the necessary information." *See Fed. R. Evid. 201(c)(2)*; *In re Icenhower, 755 F.3d 1130, 1142 (9th Cir. 2014)*.

> 4 This handbook is publicly available for download at https://www.hyundaiusa.com/assurance/assurance_pdf/2015_warranty/AME-ALL15MY-140513.pdf. (*See* RJN at 1.)

Defendants argue that the warranty handbook is judicially noticeable because Plaintiffs include allegations as to the handbook's contents in their FAC. (RJN at 2.) For instance, Plaintiffs allege that the Class Vehicles are advertised as "being backed by 'America's best warranty,'" (FAC ¶ 38), that "Plaintiffs and the Class Members have complied with all obligations under the warranty," (FAC [*17] ¶ 198), and that "Hyundai inserted an unconscionable provision in its consumer agreements by including a limitation on the warranty for the paint on the Class Vehicles," (FAC ¶ 264(f)). Plaintiffs do not object to Defendants' Request.

"Even if a document is not attached to a complaint, it may be incorporated by reference into a complaint if the plaintiff refers extensively to the document or the document forms the basis of the plaintiff's claim." *United States v. Ritchie, 342 F.3d 903, 908 (9th Cir. 2003)*. This doctrine may apply, for instance, "when a plaintiff's claim about insurance coverage is based on the contents of a coverage plan, . . . or when a plaintiff's claim about stock fraud is based on the contents of SEC filings." *Id.* (citation omitted). The Court finds that Hyundai's warranty forms the basis of Plaintiffs' claims, much as an insurance plan forms the basis of a dispute over insurance coverage. *See id.* Therefore, the Court **GRANTS** Defendants' Request for Judicial Notice and will "assume that [the handbook's] contents are true" for the purposes of Defendants' Motion to Dismiss. *Id.*

III. LEGAL STANDARD

A. *Rule 8(a)*

Under *Rule 8(a)*, a complaint must contain a "short and plain statement of the claim showing that the [plaintiff] is entitled to relief." [*18] *Fed. R. Civ. P. 8(a)*. If a complaint fails to do this, the defendant may move to dismiss it under *Rule 12(b)(6)*. *Fed. R. Civ. P. 12(b)(6)*. "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim that is plausible on its face.'" *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (citation omitted). A claim is plausible on its face "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.* "Factual allegations must be enough to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. Thus, there must be "more than a sheer possibility that a defendant has acted unlawfully." *Iqbal, 556 U.S. at 678*. "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility'" that the plaintiff is entitled to relief. *Id.* (quoting *Twombly, 550 U.S. at 557*).

In ruling on a motion to dismiss for failure to state a claim, a court should follow a two-pronged approach: first, the court must discount conclusory statements, which are not presumed to be true; and then, assuming any factual allegations are true, the court shall determine "whether they plausibly give rise to entitlement to relief." *See id. at 679*; *accord* [*19] *Chavez v. United States, 683 F.3d 1102, 1108 (9th Cir. 2012)*. A court should consider the contents of the complaint and its attached exhibits, documents incorporated into the complaint by reference, and matters properly subject to judicial notice. *Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 322-23, 127 S. Ct. 2499, 168 L. Ed. 2d 179 (2007)*; *Lee, 250 F.3d at 688*.

Where a district court grants a motion to dismiss, it should provide leave to amend unless it is clear that the complaint could not be saved by any amendment. *Manzarek v. St. Paul Fire & Marine Ins. Co., 519 F.3d 1025, 1031 (9th Cir. 2008)* ("Dismissal without leave to amend is improper unless it is clear, upon de novo review, that the complaint could not be saved by any amendment.").

2. *Rule 9(b)*

Rule 9(b) requires a party alleging fraud to "state with particularity the circumstances constituting fraud." *Fed. R. Civ. P. 9(b)*. To plead fraud with particularity, the pleader must state the time, place, and specific content of the false representations. *Odom v. Microsoft Corp., 486 F.3d 541, 553 (9th Cir. 2007)*. The allega-

tions "must set forth more than neutral facts necessary to identify the transaction. The plaintiff must set forth what is false or misleading about the statement, and why it is false." *Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1106 (9th Cir. 2003)* (internal quotation marks omitted). In essence, the defendant must be able to prepare an adequate answer to the allegations of fraud. *Odom, 486 F.3d at 553*. Where multiple defendants allegedly engaged in fraudulent activity, "*Rule 9(b)* does not allow a complaint to merely lump multiple defendants together." [*20] *Swartz v. KPMG LLP, 476 F.3d 756, 764 (9th Cir. 2007)*. Rather, a plaintiff must identify each defendant's role in the alleged scheme. *Id. at 765*.

IV. DISCUSSION

A. Whether Out-of-State Plaintiffs Can Invoke California Law

As a preliminary matter, the parties disagree as to whether the out-of-state Plaintiffs in this proceeding can invoke California law over their common-law breach of express warranty, negligent misrepresentation, and fraudulent concealment claims. Defendants argue that California follows a presumption against extraterritorially applying California law to out-of-state plaintiffs and claims. (*See* MTD at 7-8); *see Sullivan v. Oracle Corp., 51 Cal. 4th 1191, 1207, 127 Cal. Rptr. 3d 185, 254 P.3d 237 (Cal. 2011)* (acknowledging that "Plaintiffs' claim implicates the so-called presumption against extraterritorial application"). Plaintiffs counter, however, by arguing that this presumption applies only to statutory claims, not common-law claims. (MTD Opp'n at 2-3). It appears that Plaintiffs are correct, as most cases addressing the extraterritorial presumption rely explicitly on whether California's Legislature intended a *statute* to apply extraterritorially. *See, e.g., Sullivan, 51 Cal. 4th at 1207*; *O'Connor v. Uber Techs., Inc., 58 F. Supp. 3d 989, 1003-07 (N.D. Cal. 2014)*; *see also Leibman v. Prupes, No. 2:14-CV-09003-CAS (VBKx), 2015 U.S. Dist. LEXIS 80101, 2015 WL 3823954, at *6 (C.D. Cal. June 18, 2015)* ("As a preliminary matter, [the plaintiff] has not proffered any authority supporting the proposition that the presumption against [*21] extraterritoriality applies to common law claims.").

"However, even though the presumption against extraterritoriality does not apply to common law claims, there are still limits on the extraterritorial application of California law." *Russo v. APL Marine Servs., Ltd., 135 F. Supp. 3d 1089, 1096 (C.D. Cal. 2015)*. "Under California law, the relevant inquiry for whether state law should be applied extraterritorially is . . . whether 'the conduct which gives rise to liability . . . occurs in California.'" *Id.* (quoting *Diamond Multimedia Sys., Inc. v. Superior Court, 19 Cal. 4th 1036, 1059, 80 Cal. Rptr. 2d 828, 968 P.2d 539 (Cal. 1999))*. Here, Plaintiffs allege, and Defendants do not dispute, that Hyundai's customer relations, marketing, and warranty departments are located in California. (*See* MTD Opp'n at 3.) As Plaintiffs' claims arise nearly exclusively from Hyundai's marketing and warranty activities, it appears that "the conduct which gives rise to liability" occurred primarily in California in this case. *See Russo, 135 F. Supp. 3d at 1096* (internal quotation marks omitted). Thus, the application of California common law extraterritorially in this case appears to be appropriate. *See Leibman, 2015 U.S. Dist. LEXIS 80101, 2015 WL 3823954, at *7* (holding that applying California common law extraterritorially was proper).

B. Express Warranty

Plaintiffs' first cause of action is for breach of express warranty. (FAC ¶¶ 182-98.) "To state a claim for breach of express warranty [*22] under California law, a plaintiff must allege (1) the exact terms of the warranty; (2) reasonable reliance thereon; and (3) a breach of warranty which proximately caused plaintiff's injury." *Nabors v. Google, Inc., No. 5:10-CV-03897 EJD, 2011 U.S. Dist. LEXIS 97924, 2011 WL 3861893, at *4 (N.D. Cal. Aug. 30, 2011)*. For the following reasons, the Court finds that Plaintiffs fail to plead an express warranty claim.[5]

> 5 As Defendants note, Plaintiffs fail to identify any conduct on behalf of Defendants Hyundai Motor Co., Ltd., Hyundai Motor Manufacturing Alabama, LLC, and Kia Motors Manufacturing Georgia, Inc. that may subject them to liability. (*See* MTD.) For instance, Plaintiffs do not allege facts indicating that these Defendants provided Plaintiffs with warranty coverage on their vehicles. Thus, it is unclear to the Court how these Defendants can be held liable for violations of alleged warranties. Nonetheless, as the Court finds Plaintiffs have failed to state a viable claim, regardless, the Court addresses Plaintiffs' allegations as to all Defendants.

1. Express Paint Warranty

Hyundai provides an express warranty for the paint used on its vehicles. (*See* RJN, Ex. 1 at 1-3.) In California, "[t]he law governing express warranties is clear." *Daugherty v. Am. Honda Motor Co., 144 Cal. App. 4th 824, 830, 51 Cal. Rptr. 3d 118 (Cal. Ct. App. 2006)*. "A warranty is a contractual promise [*23] from the seller that the goods conform to the promise. If they do not, the buyer is entitled to recover the difference between the value of the goods accepted by the buyer and the value of the goods had they been as warranted." *Id.* A seller may

enumerate an express warranty, however, to "limit its liability for defective goods." *Id.* "The general rule is that an express warranty 'does not cover repairs made after the applicable time or mileage periods have elapsed.'" *Id.* (quoting *Abraham v. Volkswagen of Am., Inc., 795 F.2d 238, 250 (2d Cir. 1986)).*

In *Daugherty*, the California Court of Appeal addressed a dispute similar to the instant case. There, the Court rejected a plaintiff's breach of express warranty claim where Honda's warranty was for "3 years or 36,000 miles, whichever comes first" and the alleged malfunction did not arise during the warranty period. *See id.* The court held that "as a matter of law, in giving its promise to repair or replace any part that was defective in material or workmanship and stating the car was covered for three years or 36,000 miles," Honda was not required "to repair latent defects that lead to a malfunction after the term of the warranty." *Id. at 832* (internal quotation marks omitted); *see also Clemens v. DaimlerChrysler Corp., 534 F.3d 1017, 1023 (9th Cir. 2008)* ("The repairs in this case were [*24] made after the warranty period expired. Therefore, we affirm the dismissal of the express warranty claims."); *Elias v. Hewlett-Packard Co., 903 F. Supp. 2d 843, 850 (N.D. Cal. 2012)* ("Accordingly, the law in California does not consider an express warranty to include malfunctions that occur after the warranty has ended.").

Plaintiffs contend that because Hyundai knew at the time it sold the Class Vehicles that the paint was defective, Hyundai cannot rely on the terms of its express warranty. (*See* MTD Opp'n at 4-5.) This argument fails. The *Clemens* and *Daugherty* courts each expressly rejected this contention. *See Clemens, 534 F.3d at 1022-23* (affirming dismissal of breach of express warranty claim even though plaintiff alleged that the defect "existed before the warranty expired, and that DaimlerChrysler had knowledge of the defect at the time of sale"); *Daugherty, 144 Cal. App. 4th at 830* ("Daugherty argues, however, that Honda's warranty does not require discovery of the defect during the warranty period, and that a defect that exists during the warranty period is covered, particularly where it results from an 'inherent design defect,' if the warrant knew of the defect at the time of the sale. We disagree."). Here, none of Plaintiffs' claims arose during the express warranty period; thus, their express warranty claim [*25] fails.

2. Whether Hyundai's Warranty Terms are Unconscionable

Plaintiffs next allege that Hyundai's warranty terms were unconscionable, and therefore, unenforceable. (MTD Opp'n at 6.) In support of their proposition, Plaintiffs cite only non-binding decisions from other jurisdictions. (*Id.*) The Court is unpersuaded by Plaintiffs' argument. In California, "[t]he law of contractual unconscionability . . . requires both procedural and substantive unconscionability," though "the two types of unconscionability need not be present to the same degree." *Marchante v. Sony Corp. of Am., Inc., 801 F. Supp. 2d 1013, 1022 (S.D. Cal. 2011)* (citation omitted). The standard is a sliding scale, whereby a stronger presence of procedural unconscionability requires less substantive unconscionability, and vice versa. *See Armendariz v. Found. Health Psychcare Servs., Inc., 24 Cal. 4th 83, 114, 99 Cal. Rptr. 2d 745, 6 P.3d 669 (Cal. 2000).* "Procedural unconscionability focuses on 'oppression or surprise due to unequal bargaining power.'" *Marchante, 801 F. Supp. 2d at 1022* (quoting *Armendariz, 24 Cal. 4th at 114*). "Oppression arises from an inequality of bargaining power which results in no real negotiation and an absence of meaningful choice," while "[s]urprise involves the extent to which the supposedly agreed upon terms of the bargain are hidden in a prolix printed form drafted by the party seeking to enforce the disputed terms." *Fisher v. Honda N. Am., Inc., No. LA CV 13-09285 JAK(PLAx), 2014 U.S. Dist. LEXIS 84570, 2014 WL 2808188, at *8 (C.D. Cal. June 12, 2014)* (citations [*26] omitted). "The substantive prong focuses on the actual terms of the agreement and whether the agreement creates overly harsh or one-sided results that shock the conscience." *Marchante, 801 F. Supp. 2d at 1023.*

In their FAC, Plaintiffs allege broadly that Hyundai's warranty's time limits were unconscionable, because Plaintiffs "had no meaningful choice in determining these time limitations" and there was a "gross disparity in bargaining power" between Plaintiffs and Hyundai. (FAC ¶ 196.) Plaintiffs fail to plead a prima facie case of procedural unconscionability. "[B]road allegations of procedural unconscionability" stating only "that there was unequal bargaining power and there was a lack of meaningful choice relating to the limitations on the warranties" are insufficient to state a prima facie claim for unconscionability. *Marchante, 801 F. Supp. 2d 1013, 1022.* Where, as here, Plaintiffs do not plead that they lacked any other reasonable alternatives (i.e., other vehicles they could have purchased), or that the manufacturer failed to offer any extended warranty options, Plaintiffs fail to establish procedural unconscionability. *See Id.* (explaining that the plaintiffs failed to establish the procedural unconscionability prong where they did not allege that they [*27] lacked any other meaningful product alternatives); *Fisher, 2014 U.S. Dist. LEXIS 84570, 2014 WL 2808188, at *9* (finding plaintiff failed to plead procedural unconscionability where there were no allegations that extended warranties were not an option and no allegations that the plaintiff lacked reasonable alternatives).

Moreover, as to substantive unconscionability, Plaintiffs allege that "[t]he time limits contained in Hyundai's warranty period" were unconscionable. (FAC ¶ 196.) However, as at least one court has already held, "a three-year, 36,000 mile warranty does not, on its face, create one-sided results." *Fisher, 2014 U.S. Dist. LEXIS 84570, 2014 WL 2808188, at *9*. As addressed above, Plaintiffs have not adequately pleaded facts indicating that Hyundai knew that any paint defects would arise when it offered the warranty. Moreover, even if Hyundai knew that peeling paint was a risk, Plaintiffs have not "provided sufficient allegations to show that [Hyundai] was aware that the defect would only become manifest *after* the warranty period ended." *Id.* Therefore, the Court finds that Plaintiffs have failed to establish procedural or substantive unconscionability. Accordingly, the Court finds that Plaintiffs have failed to sufficiently plead their claim that Hyundai's warranty was unconscionable.

3. Hyundai's [*28] **Advertisements as an Express Warranty**

Plaintiffs also allege that statements Hyundai made in advertising gave rise to an express warranty. (FAC ¶¶ 183-84.) Specifically, Plaintiffs claim that Hyundai's statements that its paint is "state-of-the-art," "will stand the test of time," and will "prevent rust" and protect against corrosion were guarantees. (*Id.*) Express warranties are created by "[a]ny affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain." *Cal. Com. Code § 2313(1)(a)*. Defendants argue that any advertising Plaintiffs reference was non-actionable puffery. (*See* MTD at 8-10.) "Puffery is 'exaggerated advertising, blustering, and boasting upon which no reasonable buyer would rely.'" *In re Clorox Consumer Litig., 894 F. Supp. 2d 1224, 1233 (N.D. Cal. 2012)* (quoting *Southland Sod Farms v. Stover Seed Co., 108 F.3d 1134, 1145 (9th Cir. 1997)*); *see also Annunziato v. eMachines, Inc., 402 F. Supp. 2d 1133, 1139 (C.D. Cal. 2005)* ("Generalized, vague, and unspecified assertions constitute 'mere puffery' upon which a reasonable consumer could not rely, and hence are not actionable."). The general rule is that "[a]dvertising which merely states in general terms that one product is superior is not actionable." *Viggiano v. Hansen Natural Corp., 944 F. Supp. 2d 877, 895 (C.D. Cal. 2013)*. However, misdescriptions of specific or absolute characteristics of a product are actionable." *Id.* "Determining whether an alleged misrepresentation [*29] constitutes puffery is a question of law appropriate for resolution on a *Rule 12(b)(6)* motion to dismiss." *In re Clorox, 894 F. Supp. 2d at 1233*.

First, the Court finds that Defendants' representations that its paint process was "state-of-the art" and "will stand the test of time" were mere puffery.[6] These statements are the "generalized," "vague," or unspecified assertions that courts frequently consider non-actionable puffery. *See Elias v. Hewlett-Packard Co., 950 F. Supp. 2d 1123, 1133 (N.D. Cal. 2013)* (holding advertisements that a computer was "ultra-reliable" and "packed with power" was puffery); *Oestreicher v. Alienware Corp., 544 F. Supp. 2d 964, 973 (N.D. Cal. 2008)* (holding claims that product was of "superb, uncompromising quality" and "faster, more powerful, and more innovative than competing machines" constituted non-actionable puffery). These statements do not speak to a "specific or absolute" characteristic of a Hyundai's paint, *see In re Clorox, 894 F. Supp. 2d at 1233*; rather, they are generalized assertions speaking to the paint's overall quality. On the other hand, the Court finds that Hyundai's assertion that its paint will prevent rust or corrosion is sufficiently specific and tangible to constitute a potentially actionable claim. *See Consumer Advocates v. Echostar Satellite Corp., 113 Cal. App. 4th 1351, 1361, 8 Cal. Rptr. 3d 22 (Cal. Ct. App. 2012)* (holding television service's claims that it would provide "50 channels" and the consumer could view the schedule "up to seven days in advance" were sufficiently [*30] factual to be actionable); *see also Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv. Inc., 911 F.2d 242, 246 (9th Cir. 1990)* (comparing non-actionable statement that "lamps were 'far brighter than any lamp ever before offered for home movies'" with the actionable representation that a lamp had a "35,000 candle power and 10-hour life").

> 6 The Court finds several other statements mentioned in Plaintiffs' FAC but not specifically referenced in regards to Plaintiffs' express warranty claim are also puffery. For example, Hyundai's assertions that it had "[b]etter paint quality than Mercedes CLS550," (FAC ¶ 41), had "one of the highest quality paint jobs in the industry," (FAC ¶ 42), and that its vehicles would "retain a high residual value," (FAC ¶ 46), are too vague and subjective to be the basis of an actionable claim.

However, Plaintiffs' claims arising from these representations suffer from another flaw: Plaintiffs have failed to establish that they were exposed to any of these alleged representations such that they could have become "part of the basis of the bargain."[7] *Brown v. Hain Celestrial Grp., Inc., 913 F. Supp. 2d 881, 899-900 (N.D. Cal. 2012)*. To the extent Plaintiffs' claims arise from Defendants' alleged concealments or misrepresentations contained on Hyundai's website or in its advertising, Plaintiffs fail to plead sufficient facts indicating that they [*31] were aware of these online representations or advertisements. First, as addressed above, the Court finds that the only potentially actionable representation made by Defendants are the representations that Hyundai's

paint protects against rust or corrosion. (*See* FAC ¶¶ 183-84.) According to the allegations in Plaintiffs' FAC, these assertions first appeared on Hyundai's website on February 5, 2012. (FAC ¶ 42.) But Plaintiffs' FAC does not indicate that any of the Plaintiffs looked at Hyundai's website or were otherwise made aware of Hyundai's representations regarding its paint. In fact, many Plaintiffs purchased their vehicles before February 5, 2012, (*see* FAC ¶ 74, 81, 101, 113, 126, 146, 158)[8]; thus, it is unclear how these representations could have been a part of the basis of the bargain of these Plaintiffs' purchase of their vehicles. Plaintiffs' FAC fails to establish a breach of express warranty claim. Accordingly, Plaintiffs' first cause of action is **DISMISSED without prejudice**.

7 There is disagreement amongst courts as to whether reliance is a necessary element of a breach of express warranty claim. *Compare Nabors, 2011 U.S. Dist. LEXIS 97924, 2011 WL 3861893, at *4* (including reliance as element of breach of express warranty claim) [*32] *with In re ConAgra Foods, Inc., 90 F. Supp. 3d 919, 984 (C.D. Cal. 2015)* (holding proof of reliance on specific promises or representations not required for breach of express warranty claim). Regardless of whether reliance is an element, however, Courts agree that any statement or representation must have been "part of the basis of the bargain." *Id. at 984* (internal quotation marks omitted). As Plaintiffs fail to establish here that they were aware of the allegedly misleading representations when they purchased their vehicles, it is unclear how these statements could have become a basis of the bargain. Accordingly, the Court finds that Plaintiffs have failed to establish this element.

8 Plaintiffs do not indicate when several of them purchased their vehicles. Therefore, it is unclear from the face of Plaintiffs' FAC whether these Plaintiffs could have relied on any of Hyundai's representations when they made their purchases.

C. Negligent Misrepresentation

Defendants next argue that Plaintiffs' second cause of action for negligent misrepresentation is barred by the economic loss rule.[9] (MTD at 10-11.) "The economic loss rule requires a purchaser to recover in contract for purely economic loss due to disappointed expectations, unless he can demonstrate harm above and beyond a broken [*33] contractual promise." *Robinson Helicopter Co. v. Dana Corp., 34 Cal. 4th 979, 988, 22 Cal. Rptr. 3d 352, 102 P.3d 268 (Cal. 2004)*. The purpose of the economic loss rule is to ensure that a plaintiff relies "on the law of contracts and implied and express warranties to recover damage to the product sold, rather than resort to tort law." *Bret Harte Union High Sch. Dist. v. Fieldturf, USA, Inc., No. 1:16-cv-00371-DAD-SMS, 2016 U.S. Dist. LEXIS 83295, 2016 WL 3519294, at *4 (E.D. Cal. June 27, 2016)*. "When applied to product liability suits, one may still sue for damage to property other than the product under the economic loss rule, but losses to the allegedly defective product itself are barred as 'economic' losses." *Id.* Plaintiffs argue that they have alleged damages beyond those caused by the defective paint because the defective paint caused harm to the body of the vehicles through rust and corrosion. (MTD Opp'n at 8-9.) Plaintiffs' FAC, however, alleges only that Plaintiffs suffered losses "associated with the paint defect, including, but not limited to, out of pocket losses associated with the paint defect and repairs."[10] (FAC ¶¶ 79, 83, 92, 98, 104, 110, 117, 123, 132.) Thus, while Plaintiffs may allege that the claimed paint defect caused rust or body damage, Plaintiffs have not alleged that they themselves have suffered costs above those associated with repainting their [*34] vehicles and the associated repairs.[11] Thus, Plaintiffs' claims for negligent misrepresentation are barred by the economic loss rule. Therefore, Plaintiffs' negligent misrepresentation claims are **DISMISSED without prejudice**.

9 Claims for "negligent misrepresentation must meet *Rule 9(b)*'s particularity requirements." *Neilson v. Union Bank of Cal., N.A., 290 F. Supp. 2d 1101, 1141 (C.D. Cal. 2003)*.

10 Further, to the extent Plaintiffs allege specific details about the repairs performed on Plaintiffs' vehicles, they address only the repainting of the vehicles. (*See* FAC ¶¶ 138, 143, 149, 152, 161.)

11 The Court need not determine at this stage whether damages associated with rust repair are included in the costs associated with the paint repairs and therefore also barred by the economic loss rule or constitute damages *beyond* those associated with the paint repair.

D. Breach of the Implied Warranty of Merchantability Under the Song-Beverly Act

Ms. Thomas brings a claim for breach of the implied warranty of merchantability under the Beverly-Song Act. (FAC ¶¶ 214-28.) The Song-Beverly Act "was enacted to regulate warranties and strengthen consumer remedies for breaches of warranty." *Cholakyan v. Mercedes-Benz USA, LLC, 796 F. Supp. 2d 1220, 1241 (C.D. Cal. 2011)*. Thus, "[u]nless specific disclaimer methods are followed, an implied warranty of merchantability accompanies every [*35] retail sale of consumer goods in the state." *Id.* The Song-Beverly Act provides that the implied warranty of merchantability means that the "consumer goods" at issue: (1) pass without objection in the trade

under the contract description; (2) are fit for the ordinary purposes for which such goods are used; (3) are adequately packaged and labeled; and, (4) conform to the affirmations of fact included on the container or label. *See Cal. Civ. Code § 1791.1(a).* The Act defines "consumer goods as "any new product or part thereof that is used, bought, or leased for use primarily for personal, family, or household purposes." *Cal. Civ. Code § 1791(a).*

There is disagreement between the parties as to the consumer good at issue. Defendants argue that the Plaintiffs' vehicles were not made unmerchantable by the alleged paint defect.[12] (MTD at 11-12.) Plaintiffs, however, argue that it is not the *vehicle's* merchantability they challenge; rather, they claim it is the merchantability of the paint itself. (MTD Opp'n at 11-12.) The Court disagrees with Plaintiffs' characterization of the consumer good at issue and agrees with Defendants that any defect in the paint did not render the car unmerchantable.

> 12 Defendants also argue that the implied warranty was explicitly [*36] limited by the express terms of Hyundai's paint warranty and therefore applies only to defects that arose within three years or 36,000 miles of the vehicle's purchase. (MTD at 11.) The Court finds this argument unconvincing. "The implied warranty of merchantability may be breached by a latent defect undiscoverable at the time of sale." *Mexia v. Rinker Boat Co., 174 Cal. App. 4th 1297, 1304, 95 Cal. Rptr. 3d 285 (Cal. Ct. App. 2009).* And, in the case of a latent defect, the warranty of merchantability is breached "by the existence of the unseen defect, not by its subsequent discovery." *Id. at 1305.* "Thus, although a defect may not be discovered for months or years after a sale, merchantability is evaluated as if the defect were known." *Id.*; *see also Daniel v. Ford Motor Co., 806 F.3d 1217, 1223 (9th Cir. 2015)* (following *Mexia* and holding that the Song-Beverly Act does not create a deadline for discovering latent defects). Therefore, if, as Plaintiffs allege, the paint defect existed at its inception, the issue would have arisen within the confines of the express warranty. Accordingly, Defendants' argument fails.

As noted above, the Song-Beverly Act applies only to "consumer goods." *See Cal. Civ. Code § 1791.1(a).* The Court disagrees with Plaintiffs' interpretation that the paint itself is the "consumer good" at issue in this case.[13] Plaintiffs have brought this suit against Hyundai as [*37] the manufacturer of their *vehicles* and has alleged diminution in value of their *vehicles*. Plaintiffs purchased pre-assembled vehicles from Hyundai; Plaintiffs did not purchase the plastic used to create the vehicle's door handles, the screws holding the transmission together, or the paint used on the car. Thus, even though there may be multiple consumer goods that compose the vehicle, to parse the inquiry so finely as to whether each of the individual components is itself merchantable would create absurd results. Thus, the inquiry in this case is whether Hyundai violated the implied warranty of merchantability as to the vehicle as purchased as a whole.

> 13 Moreover, Plaintiffs explicitly allege in their FAC that the Class Vehicles are the consumer goods at issue in this case. (*See* FAC ¶ 215.)

Therefore, in determining whether Plaintiffs have stated a viable claim for breach of the implied warranty of merchantability, the Court examines whether Plaintiffs' vehicles were merchantable at the time of their sale. Under the Song-Beverly Act, the implied warranty of merchantability "requires only that a vehicle be reasonably suited for ordinary use." *Keegan v. Am. Honda Motor Co., 838 F. Supp. 2d 929, 945 (C.D. Cal. 2012).* "It need not be perfect in every detail so [*38] long as it 'provides for a minimum level of quality.'" *Id.* (citation omitted); *see also Am. Suzuki Motor Corp. v. Superior Court, 37 Cal. App. 4th 1291, 1296, 44 Cal. Rptr. 2d 526 (Cal. Ct. App. 1995)* ("Courts in other jurisdictions have held that in the case of automobiles, the implied warranty of merchantability can be breached only if the vehicle manifests a defect that is so basic it renders the vehicle unfit for its ordinary purpose of providing transportation."). Courts have held that defects based on aesthetics or mere annoyances do not render a vehicle unmerchantable. *See Barakezyan v. BMW of North Am., LLC, F. Supp. 3d , No. CV 16-00173 SJO (GJSx), 2016 U.S. Dist. LEXIS 68839, 2016 WL 2840803, at *9-*10 (C.D. Cal. Apr. 7, 2016)* (dismissing implied warranty of merchantability claim where brakes emitted "long, high-pitched noise" but the vehicle "provide[d] transportation from one point to another and stop[ped]" when needed); *see also Troup v. Toyota Motor Corp., 545 F. App'x 668, 669 (9th Cir. 2013)* (affirming dismissal of claim where "defect did not compromise the vehicle's safety, render it inoperable, or drastically reduce its mileage range"). Here, Plaintiffs allege that the paint defect affected the aesthetics of the vehicle, not that it rendered the vehicle inoperable, useless, or unsafe. Accordingly, the Court finds that Plaintiff has failed to state a viable claim for breach of the implied warranty of merchantability as to the vehicles. Therefore, Plaintiffs' breach of the implied warranty of merchantability [*39] claims are **DISMISSED without prejudice**.

E. Fraudulent Concealment, UCL, CLRA, and FAL Claims

Next, Defendants argue that Plaintiffs have failed to sufficiently plead their third, fifth, sixth, and seventh causes of action for fraudulent concealment, violation of California's UCL, violation of California's FAL, and violation of the CLRA.[14]

> 14 The Court agrees with Defendants that, because each of these causes of action sounds in fraud, to sufficiently plead their claims, Plaintiffs must comply with the heightened pleading standards of *Rule 9(b)*. *See In re Sony Grand Wega KDF-E A10/A20 Series Rear Projection HDTV Television Litig., 758 F. Supp. 2d 1077, 1088 (S.D. Cal. 2010)* (holding that UCL, FAL, and CLRA claims "are rooted in theories of fraudulent concealment and fraudulent misrepresentation and therefore must satisfy *Rule 9(b)*'s heightened pleading requirements").

These claims, as the Court understands them, are based on the same (or substantially similar) facts and come in two varieties: (1) that Defendants made affirmative misrepresentations of fact; and, (2) that Defendants fraudulently concealed their knowledge of the alleged paint defect. These claims collectively turn on one primary issue: whether Plaintiffs have adequately pleaded that Defendants had sufficient knowledge of the alleged [*40] defect such that they could have affirmatively concealed it or been required to disclose it. Thus, the Court first addresses whether Plaintiffs have adequately pleaded knowledge and then will address each claim in turn.

1. Knowledge

To succeed on their fraud, UCL, and CLRA claims, Plaintiffs must allege that Defendants had sufficient knowledge of any alleged defect at the time of the product's sale. *See Wilson v. Hewlett-Packard Co., 668 F.3d 1136, 1145 (9th Cir. 2012)* (explaining that fraud, CLRA, and UCL claims require that the plaintiffs sufficiently allege "knowledge of a defect"). Plaintiffs make the following allegations regarding Defendants' alleged knowledge of the defect: (1) that self-healing paints and coats have "since their inception" caused concern that they had weaknesses that would lead to vehicles' paint peeling, (FAC ¶ 53); (2) Nissan was one of the first automobile manufacturers to use the technology in 2005, "but the experiment was short-lived" due to customer complaints of peeling paint, (FAC ¶ 56); (3) that consumer complaints regarding the peeling paint began as early as November 6, 2008, on websites such as "Hyundai-Forums.com," "carcomplaints.com," and "edmunds.com," (FAC ¶ 63 & nn.21, 22); and, (4) that Hyundai began monitoring [*41] the SureCritic website on November 13, 2013, where it received numerous complaints, concerns, and reviews, (FAC ¶ 70). From these allegations, the Court concludes that Plaintiffs have failed to sufficiently allege that Defendants had knowledge of the alleged defects at the time Plaintiffs purchased their vehicles.[15]

> 15 In addition, Defendants correctly note that Plaintiffs impermissibly fail to differentiate between the allegedly fraudulent conduct of each Defendant. "*Rule 9(b)* does not allow a complaint to merely lump multiple defendants together." *Swartz, 476 F.3d at 764*. Plaintiffs have addressed only the group conduct of "Defendants" or "Hyundai." Thus, Plaintiffs' claims sounding in fraud could be dismissed on this ground alone. *See Cisneros v. Instant Capital Funding Grp., Inc., 263 F.R.D. 595, 605-07 (E.D. Cal. 2009)* (dismissing fraud claims where "[t]he complaint lump[ed] all defendants without differentiating them").

Though Plaintiffs allege generally that there were "concerns" regarding the possibility of self-healing paints or coats peeling, these "concerns" are insufficient to establish that Defendants were aware of any alleged paint defect at the time Plaintiffs purchased their vehicles. Plaintiffs do not allege who had these concerns, the substance of the concerns, or whether the concerns were ever communicated [*42] to Hyundai. Thus, allegations regarding any purported concerns are insufficient to establish that Hyundai had knowledge of the complained-of defects in this case at the time Plaintiffs purchased their vehicles.

In addition, Plaintiffs' allegations that "Hyundai likely conducts testing on components, including paints and coatings, to verify that the materials are free from defects" are insufficient to establish Defendant's knowledge for three reasons. (FAC ¶ 73.) First, these allegations are entirely speculative. Second, to the extent they are based in fact, they fail to establish *when* any such testing occurred, thus, the Court cannot conclude that Defendants had knowledge of the alleged paint defect at the time Plaintiffs purchased their vehicles. Third, even if Defendants had performed this alleged testing, Plaintiffs' allegations fail to adequately establish that it would have informed Hyundai of a possible, post-warranty failure of its paint.

Next, Plaintiffs allege that Nissan used the self-healing paint technique for a short period of time. (FAC ¶ 56.) But Plaintiffs do not sufficiently allege facts suggesting that (1) Hyundai was aware Nissan was using (or that it then stopped [*43] using) this paint technique, or, (2) Hyundai was aware of the reason for *why* Nissan stopped using the technique. Thus, Plaintiffs' allegations regarding Nissan also fail to establish that

Hyundai had sufficient knowledge of any alleged paint defect when Plaintiffs purchased their vehicles.

In addition, though Plaintiffs include allegations and examples of complaints placed on websites such as "Hyundai-Forums.com," "carcomplaints.com," and "edmunds.com," Plaintiffs have not presented any facts indicating that Hyundai monitored these websites or was aware of these complaints. *Cf. Long v. Graco Children's Prods. Inc., No. 13-cv-01257-WHO, 2013 U.S. Dist. LEXIS 121227, 2013 WL 4655763, at *6 (N.D. Cal. Aug. 26, 2013)* (finding that the defendants had a duty to disclose a product's defects where the plaintiff had sufficiently alleged that defendants had knowledge of the defects because consumers had complained directly to the defendants, the defendants had responded, and the defendants had admitted they were aware of data and testing prior to the plaintiff's purchase of the product); *Cirulli v. Hyundai Motor Co., No. SACV 08-0854 AG (MLGx), 2009 U.S. Dist. LEXIS 125139, 2009 WL 5788762, at *3-*4 (C.D. Cal. June 12, 2009)* (finding that plaintiff had pleaded sufficient facts indicating knowledge of a defect where he alleged that Hyundai had consistently reviewed data [*44] to track reports of defective Hyundais and learned that its vehicles were experiencing "unusually high levels" of defects). Further, complaints on websites do not, by themselves, commute knowledge to a manufacturer. *See Berenblat v. Apple, Inc., Nos. 08-4696 JF (PVT), 09-1649 JF (PVT), 2010 U.S. Dist. LEXIS 46052, 2010 WL 1460297, at *9 (N.D. Cal. Apr. 9, 2010)* ("[T]he complaints on Apple's consumer website merely establish the fact that some consumers were complaining. By themselves they are insufficient to show that Apple had knowledge that the memory slot in fact was defective and sought to conceal that knowledge from consumers."). And, to the extent the proffered online complaints indicate that consumers complained directly to their dealerships, the Court finds these few various complaints to dealerships all over the country are insufficient to establish Defendants' knowledge. As with the complaints in *Berenblat*, these complaints merely establish that several customers had issues with their specific vehicles, not that there was a widespread defect affecting all Hyundais.[16] Plaintiffs do, however, allege facts indicating that Hyundai began monitoring the SureCritic website in November 2013. (*See* FAC ¶ 70.) But, even assuming this monitoring alerted Hyundai to the alleged defect, [*45] November 2013 appears to post-date all of Plaintiffs' vehicle purchases.[17]

> 16 Further, to the extent Plaintiffs allege that Defendants, in their role as manufacturer and retailer, had access to the information necessary to know of the alleged defect, these allegations are "speculative and do[] not suggest how any tests or information could have alerted [Hyundai] to the defect." *Wilson, 668 F.3d at 1147.*
>
> 17 As to Plaintiff Krista Verstraete, Plaintiffs allege only that she bought her vehicle in "2013," but do not indicate when exactly she made her purchase. (FAC ¶ 135.) Thus, this allegation fails to allege that her purchase post-dated Hyundai's monitoring of the SureCritic website.

Thus, Plaintiffs have failed to allege sufficient facts to establish that Defendants had knowledge of the alleged paint defect at the time Plaintiffs purchased their vehicles. Next, the Court will examine whether this lack of knowledge precludes Plaintiffs' fraudulent concealment, UCL, FAL, or CLRA claims.

2. Fraudulent Concealment

To state a claim for fraudulent concealment, Plaintiffs must establish:

> (1) concealment or suppression of a material fact; (2) by a defendant with a duty to disclose the fact to the plaintiff; (3) the defendant intended [*46] to defraud the plaintiff by intentionally concealing or suppressing the fact; (4) the plaintiff was unaware of the fact and would not have acted as he or she did if he or she had known of the concealed or suppressed fact; and (5) plaintiff sustained damage as a result of the concealment or suppression of the fact.

Graham v. Bank of Am., N.A., 226 Cal. App. 4th 594, 606, 172 Cal. Rptr. 3d 218 (Cal. Ct. App. 2014). "A plaintiff alleging fraudulent concealment must establish that its failure to have notice of its claim was the result of affirmative conduct by the defendant." *Conmar Corp. v. Mitsui & Co. (U.S.A.), Inc., 858 F.2d 499, 505 (9th Cir. 1988).* However, it is unclear to the Court how, absent sufficient allegations that Defendants were aware of the alleged paint defect at the time Plaintiffs purchased their vehicles, Defendants could have affirmatively concealed or suppressed any facts regarding the defect. Therefore, Plaintiffs' fraudulent concealment claim is **DISMISSED without prejudice**.

3. UCL

A UCL claim may be based on "any unlawful, unfair or fraudulent business act or practice," *Cal. Bus. & Prof. Code § 17200*; thus, "it prohibits three separate types of unfair competition: (1) unlawful acts or practices, (2) unfair acts or practices, and (3) fraudulent acts or practices," *In re Sony Grand, 758 F. Supp. 2d at 1091*. Here,

Plaintiffs allege that Defendants' conduct constitutes "an unlawful, unfair, and fraudulent business [*47] practice," apparently bringing claims under all three prongs of the UCL. (FAC ¶ 230.)

The "unlawful" prong "borrows violations of other laws and treats them as unlawful practices independently actionable." *In re Sony Grand, 758 F. Supp. 2d at 1091*. Therefore, to have a valid claim under the unlawful prong of the UCL, Plaintiffs must tether its claim to Defendants' violation of another law. As addressed below, Plaintiffs have failed to sufficiently plead a claim for the violation of any other statute; thus, Plaintiffs'"unlawful" UCL claim fails.

"An act or practice is 'unfair' under the UCL 'if the consumer injury is substantial, is not outweighed by any countervailing benefits to consumers or to competition, and is not an injury the consumers themselves could reasonably have avoided.'" *Id.* (quoting *Tietsworth v. Sears, 720 F. Supp. 2d 1123, 1137 (N.D. Cal. 2010)*. "Failure to disclose a defect that might shorten the effective life span of a component part to a consumer product does not constitute a 'substantial injury' under the unfair practices prong of the UCL where the product functions as warranted throughout the term of its Express Warranty." *Id.* (citing *Clemens, 534 F.3d at 1026-27*). Thus, as Plaintiffs do not allege that Hyundai's paint failed during the term of its express warranty, Plaintiffs fail to state [*48] an "unfair" UCL claim.

To state a claim under the "fraudulent" prong, "'it is necessary only to show that members of the public are likely to be deceived' by the business practice or advertising at issue." *Kowalsky v. Hewlett-Packard Co., 771 F. Supp. 2d 1156, 1159 (N.D. Cal. 2011)* (citation omitted). However, "when federal district courts have considered fraudulent prong claims based on representations about defective products, they have generally required a plausible showing that the defendant knew of the alleged defect when it made the representations alleged to be deceptive." *Id. at 1160* (citing *In re Sony Grand, 758 F. Supp. 2d at 1090*); *see also Neu v. Terminix Int'l, Inc., No. C 07-6472 CW, 2008 U.S. Dist. LEXIS 60505, 2008 WL 2951390, at *3 (N.D. Cal. July 24, 2008)* (dismissing complaint where the plaintiff failed to sufficient allege that the defendants knew statements were false at the time they were made). As determined above, Plaintiffs have not sufficiently established that Defendants were aware of the alleged paint defect at the time it made any of the alleged misleading or false statements. Therefore, Plaintiffs have not sufficiently pleaded a "fraudulent" UCL claim.

Accordingly, Plaintiffs' UCL claim is **DISMISSED without prejudice**.

4. FAL

California's FAL prohibits a company from producing an advertisement that "is untrue or [*49] misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading." *Cal. Bus. & Prof. Code § 17500*. As addressed above, Plaintiffs have failed to establish that Defendants knew or should have known of any alleged paint defect at the time they advertised or provided information on their website. Thus, Plaintiffs' FAL claim is **DISMISSED without prejudice**.

5. CLRA

"The CLRA prohibits unfair methods of competition and unfair or deceptive acts or practices in transactions for the sale or lease of goods to consumers." *Elias, 903 F. Supp. 2d at 853* (internal quotation marks omitted). "Generally, the standard for deceptive practices under the fraudulent prong of the UCL applies equally to claims for misrepresentation under the CLRA." *In re Sony Gaming Networks & Customer Data Sec. Breach Litig., 903 F. Supp. 2d 942, 965 (S.D. Cal. 2012)* (citing *Consumer Advocates, 113 Cal. App. 4th at 1360*). Therefore, just as knowledge is generally required to establish a UCL claim under its fraudulent prong, courts have generally required a defendant to have knowledge of any false statement before allowing an action based on that false statement to proceed. *See Wilson, 668 F.3d at 1145* ("Consequently, California federal courts have held that, under the CLRA, plaintiffs must sufficiently allege that a defendant was aware of a defect at the time of sale to survive a motion to dismiss."). [*50] Thus, as Plaintiffs have not sufficiently established that Defendants were aware of the alleged paint defect at the time Plaintiffs purchased their vehicles, Plaintiffs have failed to state a viable CLRA claim. Accordingly, Plaintiffs' CLRA claim is **DISMISSED without prejudice**.

6. Reliance

Moreover, even if Plaintiffs had sufficiently pleaded facts establishing that Defendants had knowledge of the alleged paint defect at the time it provided information regarding the paint, Plaintiffs' claims suffer from a second flaw. To succeed on their fraudulent concealment, UCL, FAL, and CLRA claims, Plaintiffs must adequately plead facts establishing Plaintiffs' relied on these alleged misrepresentations. *See Kwikset Corp. v. Superior Court, 51 Cal. 4th 310, 326, 120 Cal. Rptr. 3d 741, 246 P.3d 877 (Cal. 2011)* ("[A] plaintiff 'proceeding on a claim of misrepresentation as the basis of his or her UCL action must demonstrate actual reliance on the allegedly deceptive or misleading statements, in according with well-settled principles regarding the element of reliance in ordinary fraud actions' . . . ." (citation omitted)); *En-*

galla v. Permanente Med. Grp., Inc., 15 Cal. 4th 951, 974, 64 Cal. Rptr. 2d 843, 938 P.2d 903 (Cal. 1997) (noting that fraudulent concealment claim has "justifiable reliance" element); *see also In re Sony Gaming, 903 F. Supp. 2d at 969* ("For fraud-based claims under [the UCL, the CLRA, and the FAL] the named Class members [*51] must allege actual reliance to have standing."). As addressed above, Plaintiffs have failed to establish that they were aware of the alleged misrepresentations at the time they purchased their vehicles. Thus, they have failed to sufficiently plead reliance. *See Durell v. Sharp Healthcare, 183 Cal. App. 4th 1350, 1363, 108 Cal. Rptr. 3d 682 (Cal. Ct. App. 2010)* (affirming dismissal of a plaintiff's UCL claims where he did not allege facts indicating that he had relied on representations found on the defendant's website or on language found in an agreement he signed).

Plaintiffs argue that they are entitled to an inference of reliance. (MTD Opp'n at 21-23.) "[A]n inference of common reliance arises only when plaintiffs can show that but for defendant's material misrepresentation or omission plaintiffs would have proceeded differently." *In re Sony Gaming, 903 F. Supp. 2d at 969*. To establish an inference of reliance, Plaintiffs must sufficiently plead two elements: (1) that they would have been aware of a disclosure by Hyundai if Hyundai had made the requisite disclosure; and, (2) that they would have behaved differently had they been made aware of the defect. *See Daniel, 806 F.3d at 1225-26*. In *Daniel*, the Ninth Circuit held that Plaintiffs established the first element by presenting evidence "that they interacted with and received information from sales [*52] representatives at authorized Ford dealerships prior to purchasing their [Ford] Focuses." *Id. at 1226*. But the Court noted that it was a "close[] question," because there was evidence that "Plaintiffs did not view any advertising materials produced by Ford prior to purchase." *Id.* Here, Plaintiffs have failed to plead facts sufficient to meet the first element of an inference of reliance. They have presented no allegations indicating that Plaintiffs viewed the specific representation on Hyundai's website regarding rust and corrosion, nor have they indicated that they spoke to Hyundai representatives who may have made similar representations before purchasing their vehicles. Thus, Plaintiffs have presented no allegations to allow the Court to conclude that they would have been aware of a disclosure had Hyundai made one.[18] Therefore, Ms. Thomas has failed to establish she relied on any alleged misrepresentations. Accordingly, her UCL, FAL, and CLRA claims fail.

> 18 Plaintiffs also allege that they are entitled to an inference of reliance due to the "extent and expansiveness of Hyundai's advertising campaign, commercials, and website materials making specific representations regarding the quality of the [*53] paint it uses." (MTD Opp'n at 21.) However, as identified above, the only representation that the Court finds potentially actionable is Hyundai's claim regarding rust and corrosion prevention, which, according to the allegations in Plaintiffs' FAC, appeared only on one portion of its website. (FAC ¶¶ 42, 44, 47.) The Court finds that representations made in one paragraph on a website falls well short of "an extensive and long-term advertising campaign" that may warrant an inference of reliance. *See In re Tobacco II Cases, 46 Cal. 4th 298, 328, 93 Cal. Rptr. 3d 559, 207 P.3d 20 (Cal. 2009)*.

F. Plaintiffs' State Law Claims

The knowledge and reliance deficiencies addressed above also preclude Plaintiffs from adequately pleading any of their non-California state law claims, though the Court dismisses Ms. Cramer's claims on other grounds, as addressed below. The Court will address the various state law claims in turn.

1. Louisiana's Unfair Trade Practices Act

Defendants argue that Ms. Cramer's claim arising under the Louisiana Unfair Trade Practices Act ("LUTPA") is time barred. (MTD at 26.) "According to the language of the statute, plaintiffs have one year from the time of the 'transaction or act which give rise to this right of action' to sue under [LUTPA]." *Morris v. Sears, Roebuck & Co., 765 So. 2d 419, 422 (La. Ct. App. 2000)* (quoting La. Stat. Ann. *§ 51:1409(E)*). [*54] "The plain language of the statute shows an intent to make the period absolute." *Id.* Thus, "[t]he date of the alleged wrongful act begins the running of the prescription, even if the plaintiff was unaware of the act." *Id.* Plaintiffs argue that the date triggering the act in this case was when the paint on Ms. Cramer's car began to fail, (MTD Opp'n at 26), while Defendants argue it should be the date on which Ms. Cramer purchased her vehicle, (MTD Reply at 19). The Court agrees with Defendants. As the unlawful conduct at issue occurred when Defendants allegedly failed to inform (or actively concealed) Ms. Cramer of the alleged paint defect at the time she purchased her vehicle, it is the date of purchase that triggers the statute of limitations. *See Morris, 765 So. 2d at 422* ("Any claims that the plaintiffs may have had under [LUTPA] ceased one year after they came into existence without regard to plaintiffs' knowledge of or ability to act on any alleged cause of action."). Therefore, Ms. Cramer's claim arising under the LUTPA fail and, because any amendment would be futile, is **DISMISSED with prejudice**.

2. Plaintiffs' Other State Law Claims

The remainder of Plaintiffs' non-California state law claims fail because [*55] each requires knowledge or reliance.

a. Maryland's Consumer Protection Act:

"A party seeking to recover damages on a material omission theory under the [Maryland Consumer Protection Act ("MCPA")] must prove reliance." *Bank of Am., N.A. v. Jill P. Mitchell Living Tr., 822 F. Supp. 2d 505, 534 (D. Md. 2011)*; *see also Lloyd v. Gen. Motors Corp., 397 Md. 108, 916 A.2d 257, 277 (Md. 2007)* (explaining that to state a claim under the MCPA, the consumer must have "reli[ed] on the sellers' misrepresentation."). "The requirement of reliance flows from the MCPA's prescription that the party's 'injury or loss' be 'the result of' the prohibited practice (i.e., material omission)." *Id.* As addressed above, Plaintiffs have failed to establish reliance; therefore, Ms. Resnick's claim arising from the MCPA fails. Moreover, though Plaintiffs do not identify when Ms. Resnick purchased her vehicle, to the extent she purchased it before Hyundai made any representations on its website in February 2012, it is unclear how Ms. Resnick could have relied on these statements. Accordingly, Ms. Resnick's claim arising under the MCPA is **DISMISSED without prejudice**.

b. Texas's Deceptive Trade Practices--Consumer Protection Act

Plaintiffs' failure to establish that Defendants' had sufficient knowledge of the alleged defect also causes Mr. Sandlin's claim arising under Texas's Deceptive [*56] Trade Practices--Consumer Protection Act ("TDTPA") to fail. "Under the Texas DTPA, there is no duty to disclose if the defendant did not know the material information at the time of the transaction." *Marcus v. Apple Inc., No. C 14-03824 WHA., 2015 U.S. Dist. LEXIS 50399, 2015 WL 1743381, at *4 (N.D. Cal. Apr. 16, 2015)* (citing *Doe v. Boys Club of Greater Dallas, Inc., 907 S.W.2d 472, 479 (Tex. 1995))*. Further, "[d]emonstrating that the defendant should have known the material information is insufficient." *Id.* As addressed above, Plaintiffs have failed to establish that Defendants knew of the alleged defect at the time any representation (or omission) was made.[19] Therefore, Mr. Sandlin's claim arising under the TDTPA is **DISMISSED without prejudice**.

> 19 Defendants also allege that Mr. Sandlin failed to provide Defendants with notice of its suit at least sixty-days prior to bringing this action as is required under the TDTPA. (MTD at 27.) The TDTPA provides that as a "prerequisite" for filing a suit for damages, "a consumer shall give written notice to the person at least 60 days before filing the suit advising the person in reasonable detail of the consumer's specific complaint and the amount of economic damages . . . reasonably incurred by the consumer in asserting the claim against the defendant." *Tex. Bus. & Com. Code Ann. § 17.505(a)*. Plaintiffs have failed to plead facts showing that Mr. Sandlin complied with this [*57] requirement. However, it is not clear that dismissal is the proper remedy for Mr. Sandlin's failure to provide notice; rather, the Texas Supreme Court has held that if a party raises the plaintiff's failure to provide sixty-days' notice, the trial court should "abate the proceedings for 60 days." *Hines v. Hash, 843 S.W.2d 464, 469 (Tex. 1992)*. Defendants do not request an abatement in this case. Therefore, Mr. Sandlin's failure to provide notice has no effect on these proceedings.

c. North Carolina's Unfair and Deceptive Trade Practice Act

Mr. Baker's claim arising under the North Carolina's Unfair and Deceptive Trade Practice Act ("NCUDTPA") fail based both on Defendants' lack of knowledge and Mr. Baker's lack of reliance. *See Breeden v. Richmond Comm. Coll., 171 F.R.D. 189, 196 (M.D.N.C. 1997)* ("[I]n order for silence or an omission by the defendants to be an actionable fraud, it must relate to a material matter *known by the defendants* which they had a legal duty to communicate to plaintiff . . . ." (emphasis added); *see also Darne v. Ford Motor Co., No. 13 C 03594, 2015 U.S. Dist. LEXIS 169752, 2015 WL 9259455, at *12 (N.D. Ill. Dec. 18, 2015)* (applying the NCUDTPA and holding that misrepresentation claim failed where plaintiff did not allege facts indicating that he relied on misrepresentation before making decision). Therefore, Mr. Baker's claim under the NCUDTPA is **DISMISSED without prejudice**.

d. Florida's Unfair [*58] **& Deceptive Trade Practices Act**

Lack of reliance also dooms Plaintiffs' claims arising under Florida's Unfair and Deceptive Trade Practices Act ("FUDTPA"). "[W]here a plaintiff has not seen or heard an allegedly deceptive advertisement, she cannot challenge it under the FDUTPA." *In re NJOY, Inc. Consumer Class Action Litig., 120 F. Supp. 3d 1050, 1089 (C.D. Cal. 2015)*; *see also Hall v. Sea World Entm't, Inc., No. 3:15-CV-660-CAB-RBB, 2015 U.S. Dist. LEXIS 174294, 2015 WL 9659911, at *15 (S.D. Cal. Dec. 23, 2015)* (dismissing FUDTPA claim where the plaintiffs failed "to specifically allege that they viewed any . . . statements or advertisements" that were the basis of the dispute). As Plaintiffs have failed to establish that Ms.

Mulrey, Ms. Strand, Mr. Geers, or Ms. Vargo viewed any of Hyundai's representations on its website, their claims under the FUDTPA fail.

Defendants also argue that Ms. Mulrey and Mr. Geers's FUDTPA claims are time barred. (MTD at 29.) A Florida district court addressed a dispute that is highly analogous to the instant case in which the plaintiffs filed a putative class action alleging that 2003-2007 Honda vehicles were sold with a paint defect that caused discoloration and delamination. *See Matthews v. Am. Honda Motor Co., No. 12-60630-CIV, 2012 U.S. Dist. LEXIS 90802, 2012 WL 2520675, at *1 (S.D. Fla. June 6, 2012)*. The Court discussed without deciding that the plaintiff's claims were likely barred by the FUDTPA's four-year statute [*59] of limitations because the statute was triggered when the plaintiff bought his car, not when he discovered the paint defect. *2012 U.S. Dist. LEXIS 90802, [WL] at *3-*4*. While the Court was "skeptical" that the plaintiff's claim was timely, it refused to hold that his claim was time barred. *2012 U.S. Dist. LEXIS 90802, [WL] at *5*. Therefore, the Court is not convinced that *Matthews* requires the dismissal of Ms. Mulrey and Mr. Geers's claims here on statute of limitations grounds. Accordingly, Plaintiffs' claims arising under the FUDTPA are **DISMISSED without prejudice**.

e. Illinois's Consumer Fraud and Deceptive Business Practices Act

Similarly, Ms. Verstraete's claims under Illinois's Consumer Fraud and Deceptive Business Practices Act ("ICFDPA") fail due to a lack of reliance and knowledge. *See Avery v. State Farm Mut. Auto. Ins. Co., 216Ill. 2d 100, 835 N.E.2d 801, 861, 296 Ill. Dec. 448 (Ill. 2005)* ("[I]n a cause of action for fraudulent misrepresentation brought under the Consumer Fraud Act, a plaintiff must prove that he or she was *actually deceived* by the misrepresentation in order to establish the element of proximate causation." (emphasis added)); *see also White v. DaimlerChrysler Corp., 368 Ill. App. 3d 278, 856 N.E.2d 542, 549, 305 Ill. Dec. 737 (Ill. Ct. App. 2006)* ("For purposes of the [ICFDPA], it is important that the defendant be aware of the existence of the material fact before the time of the sale to the plaintiff. Otherwise, an omission of a material cannot be the proximate [*60] cause of the plaintiff's damages."). Therefore, Ms. Verstraete's claims arising under the ICFDPA are **DISMISSED without prejudice**.

f. Massachusetts's Unfair and Deceptive Trade Practice Act

Finally, Ms. Tirone's claims under Massachusetts's Unfair and Deceptive Trade Practice Act ("MUDTPA") fail on knowledge grounds. *See Underwood v. Risman, 414 Mass. 96, 605 N.E.2d 832, 835 (1993)* ("There is no liability for failing to disclose what a person does not know."). Defendants also allege that Ms. Tirone's claims should be dismissed for failing to comply with the MUDTPA's requirement to provide Defendants with notice of her suit at least thirty days before bringing this action. (MTD at 31); *see Mass. Gen. Laws ch. 93A, § 9(3)* ("At least thirty days prior to the filing of any such action, a written demand for relief, identifying the claimant and reasonably describing the unfair or deceptive act or practice relied upon and the injury suffered, shall be mailed or delivered to any prospective respondent."). "The statutory notice requirement is not merely a procedural nicety, but, rather, 'a prerequisite to suit.'" *Rodi v. S. New England Sch. of Law, 389 F.3d 5, 19 (1st Cir. 2004)* (quoting *Entrialgo v. Twin City Dodge, Inc., 368 Mass. 812, 333 N.E.2d 202, 204 (Mass. 1975)*). Further, "'as a special element' of the cause of action, it must be alleged in the plaintiff's complaint." *Id.* Plaintiffs' FAC makes no mention of Ms. Tirone providing Defendants [*61] with notice at least thirty days prior to bringing this suit.[20] Thus, Ms. Tirone's claim is subject to dismissal on this ground, as well. *See id.* (holding that failure to plead notice "is sufficient ground to justify dismissal of the Chapter 93A claim").

> 20 Ms. Tirone did send Defendants a CLRA letter; however, this letter was sent on March 22, 2016, while Plaintiffs brought this suit on March 30, 2016. (*Compare* Dkt. No. 1-2 *with* Dkt. No. 1.) Thus, thirty days had not passed before she brought suit.

V. CONCLUSION

For the foregoing reasons, the Court **GRANTS** Defendants' Motion to Dismiss. All of Plaintiffs' claims are **DISMISSED without prejudice**, except for Ms. Cramer's LUTPA claim, which is **DISMISSED with prejudice**. As all of Plaintiffs' claims are dismissed, Defendants' Motion to Strike Class Allegations is **DENIED as moot**. Plaintiffs are **ORDERED** to file a Second Amended Complaint, if any, by 4:00 p.m. on November 28, 2016.

IT IS SO ORDERED.

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