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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

IRIS GONZALEZ, et al.,
Plaintiffs,
v.
MAZDA MOTOR CORPORATION, et al.,
Defendants.

Case No. [16-cv-02087-MMC](#)

**ORDER GRANTING DEFENDANTS'
MOTION TO STRIKE AND TO
DISMISS; SETTING CASE
MANAGEMENT CONFERENCE**

Re: Dkt. No. 63

Before the Court is defendants Mazda Motor Corporation and Mazda Motor of America, Inc.'s (collectively, "Mazda") "Motion to Strike [Pursuant to Fed. R. Civ. P. 12(f)] Allegations Pertaining to Lithia Motors, Inc. and Motion to Dismiss [Pursuant to Fed. R. Civ. P. 12(b)(6)] Claims Alleged in the Third Amended Complaint," filed September 8, 2017. Plaintiffs have filed opposition, to which Mazda has replied. Having read and considered the parties' respective written submissions, the Court rules as follows.

PROCEDURAL BACKGROUND

By order filed August 1, 2017, the Court dismissed, with leave to amend, the Fifth, Tenth, and Twelfth Causes of Action brought in plaintiffs' Second Amended Complaint on behalf of plaintiffs Heather Weeter ("Weeter") and Gregory Schaaf ("Schaaf"). On August 16, 2017, plaintiffs filed their Third Amended Complaint ("TAC"). By the instant motion, Mazda again seeks dismissal of the Fifth, Tenth, and Twelfth Causes of Action, as well as to strike certain newly added portions of the TAC.

FACTUAL BACKGROUND

Plaintiffs allege Weeter is a "citizen of the State of Florida" who, "[o]n January 29, 2011," purchased a new Mazda vehicle "from Gunther Mazda, an authorized Mazda

1 dealer in Fort Lauderdale, Florida.” (See TAC ¶¶ 88-89.) Plaintiffs allege that “[o]n or
2 around June 6, 2014,” Weeter’s vehicle required clutch-related repairs that “should have
3 been covered by Mazda's Powertrain Warranty,” but that Gunther Mazda told her the
4 repairs were a “wear item not covered by warranty” and charged her for the cost of those
5 repairs. (See id. ¶ 91.) Plaintiffs further allege that “[o]n or around September 6, 2016,”
6 Weeter “again brought her vehicle to Gunther Mazda,” which informed her she needed
7 additional clutch-related repairs that were, once more, “not covered by warranty.” (See
8 id. ¶ 92.) After paying Gunther Mazda “a diagnostic fee,” plaintiffs allege, Weeter paid to
9 have her vehicle repaired by “W M Auto Services, Inc.” and, in October 2016, “disposed
10 of” her vehicle “out of concern” that it had “an ongoing defect.” (See id. ¶¶ 92, 93, 95.)

11 Plaintiffs allege Schaaf is a “citizen of the State of North Carolina” who, “[i]n or
12 around Spring 2011,” purchased a new Mazda vehicle from “Sport Durst Mazda, an
13 authorized Mazda dealer in Durham, North Carolina.” (See id. ¶¶ 97, 98.) Plaintiffs
14 allege that “[o]n or around January 3, 2013,” Schaaf’s vehicle required clutch-related
15 repairs, which were made by Sport Durst Mazda “at no cost.” (See id. ¶ 100.) Plaintiffs
16 further allege that “[o]n or around April 1, 2016,” Schaaf “was again forced to bring his
17 vehicle to Sport Durst [Mazda],” which informed him he needed additional clutch-related
18 repairs for which Schaaf was charged, even though, according to Schaaf, those repairs
19 “should have been covered by Mazda's Powertrain Warranty.” (See id. ¶ 102.)

20 DISCUSSION

21 A. Motion to Strike

22 A “court may strike from a pleading . . . any redundant, immaterial, impertinent, or
23 scandalous matter.” See Fed. R. Civ. P. 12(f). The TAC cites to and quotes passages
24 from a dealer agreement between Mazda and Lithia Mazda of Fresno, California
25 (“Lithia”), a Mazda dealer that is not a party to the instant action and from which no
26 plaintiff alleges to have purchased a vehicle. By the instant motion, Mazda seeks to
27 strike, as immaterial or impertinent, all reference to Lithia from paragraphs 113 and 114
28 of said dealer agreement (“hereinafter, “Lithia Dealer Agreement”), and to strike

1 paragraphs 115 and 126 in their entirety. (See Mot. at 1:10-22.)¹

2 In response, plaintiffs state the challenged language is intended to “illustrate the
3 manner in which Mazda controls elements of vehicle advertising, and whether and how it
4 discloses pervasive defects to its authorized dealers.” (See Opp. at 3 n.2; see also TAC
5 at 23:4 (describing Lithia Dealer Agreement as “example”).) As Mazda correctly notes,
6 however, the TAC contains no factual allegations to support an inference that the
7 agreement between Mazda and Lithia is identical, or even similar, to any dealer
8 agreement that may exist between Mazda and either Gunther Mazda or Sport Durst
9 Mazda.

10 Accordingly, the motion to strike will be granted.

11
12 **B. Motion to Dismiss**

13 **1. Legal Standard**

14 Dismissal under Rule 12(b)(6) of the Federal Rules of Civil Procedure “can be
15 based on the lack of a cognizable legal theory or the absence of sufficient facts alleged
16 under a cognizable legal theory.” See Balistreri v. Pacifica Police Dep’t, 901 F.2d 696,
17 699 (9th Cir. 1990). Rule 8(a)(2), however, “requires only ‘a short and plain statement of
18 the claim showing that the pleader is entitled to relief.’” See Bell Atlantic Corp. v.
19 Twombly, 550 U.S. 544, 555 (2007) (quoting Fed. R. Civ. P. 8(a)(2)). Consequently, “a
20 complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual
21 allegations.” See id. Nonetheless, “a plaintiff’s obligation to provide the grounds of his
22 entitlement to relief requires more than labels and conclusions, and a formulaic recitation
23 of the elements of a cause of action will not do.” See id. (internal quotation, citation, and
24 alteration omitted).

25
26 ¹ Mazda’s unopposed Request for Judicial Notice of the Lithia Dealer Agreement,
27 as well as a technical service bulletin (“TSB”), specifically, TSB #RF-12-17, both of which
28 are cited in the TAC as support for plaintiffs’ claims, is hereby GRANTED. See Knievel v.
ESPN, 393 F.3d 1068, 1076 (9th Cir. 2005) (holding courts may take judicial notice of
documents “whose contents are alleged in a complaint and whose authenticity no party
questions, but which are not physically attached to the [plaintiff’s] pleading”).

1 In analyzing a motion to dismiss, a district court must accept as true all material
2 allegations in the complaint, and construe them in the light most favorable to the
3 nonmoving party. See NL Indus., Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986). “To
4 survive a motion to dismiss, a complaint must contain sufficient factual material, accepted
5 as true, to ‘state a claim to relief that is plausible on its face.’” Ashcroft v. Iqbal, 556 U.S.
6 662, 678 (2009) (quoting Twombly, 550 U.S. at 570). “Factual allegations must be
7 enough to raise a right to relief above the speculative level[.]” Twombly, 550 U.S. at 555.
8 Courts “are not bound to accept as true a legal conclusion couched as a factual
9 allegation.” See Iqbal, 556 U.S. at 678 (internal quotation and citation omitted).

10 **2. Plaintiffs’ Claims**

11 As noted above, Mazda moves to dismiss certain of Weeter and Schaaf’s claims,
12 each of which the Court addresses below.

13 **a. Fifth Cause of Action (Weeter’s Claim Under Florida Unfair and**
14 **Deceptive Trade Practices Act)**

15 In the Fifth Cause of Action, plaintiffs, on behalf of Weeter and those similarly
16 situated, allege Mazda violated Florida’s Deceptive and Unfair Trade Practices Act
17 (“FDUTPA”), by “willfully fail[ing] to disclose and actively conceal[ing] the dangerous risk
18 of the [clutch-related] [d]effect.” (See TAC ¶ 231).

19 In its prior order, the Court dismissed plaintiffs’ FDUTPA claim as barred by the
20 applicable four-year statute of limitations, and, in particular, for failure to allege facts
21 sufficient to support tolling predicated on a theory of fraudulent concealment. (See Order,
22 filed August 1, 2017, at 7:3-4 (“August 1 Order”).) By the instant motion, Mazda again
23 seeks dismissal of said claim as time-barred.

24 As set forth in the Court’s prior order, a plaintiff, to “establish fraudulent
25 concealment sufficient to toll the statute under Florida law, . . . must show”: (1) the
26 defendant’s “successful concealment of the cause of action,” (2) the defendant’s use of
27 “fraudulent means to achieve that concealment,” and (3) the plaintiff’s “reasonable care
28 and diligence in seeking to learn the facts which would disclose the fraud.” (See August

1 1 Order, at 5:24-6:7 (citing Berisford, 667 So. 2d. at 811-12).) As further set forth therein,
2 “[t]he ‘fraudulent means’ alleged must go beyond mere non-disclosure, and must
3 constitute active and willful concealment.” (See id. (citing Licul v. Volkswagen Grp. of
4 Am., Inc., No. 13-6186-CIV, 2013 WL 6328734, at *6 (S.D. Fla. Dec. 5, 2013) (applying
5 Florida law)).)

6 Here, plaintiffs argue, Mazda took “*active steps to conceal*” the defect. (See Opp.
7 at 10:11 (emphasis in original).) In support thereof, plaintiffs first rely on their previous
8 allegation that Gunther Mazda, on two occasions, told Weeter the clutch failure was due
9 to a “wear item not covered by the warranty” and proceeded to make repairs (see TAC
10 ¶¶ 91-92) using components which, plaintiffs assert, were “similarly defective” (see Opp.
11 at 10:18). Plaintiffs then argue that the actions and statements of Gunther Mazda may
12 be imputed to Mazda because “the authorized technician acted in accordance with
13 Mazda policy.” (See Opp. at 9-10.) As set forth below, however, plaintiffs have failed to
14 allege in the TAC facts to show the existence of any such policy.

15 Plaintiffs allege that “Mazda has yet to disclose the [d]efect’s existence to its
16 authorized dealers.” (See TAC ¶ 127.) In particular, plaintiffs now allege that in the
17 absence of a TSB or recall, by which Mazda dealers ordinarily are informed of a defect,²
18 such dealers “generally remain[ed] unaware of [the] defect’s existence,” conducted
19 repairs using defective components, and “almost uniformly misinformed” plaintiffs. (See
20 TAC ¶¶ 125, 127.)³ Plaintiffs’ new allegations as to conduct on the part of Mazda,

21 ² Plaintiffs also cite to provisions in the Lithia Dealer Agreement whereby Mazda
22 “agree[d] to ‘(e) keep DEALER promptly and fully advised with respect to customer
23 matters involving DEALER, and timely respond to notices from DEALER in situations
24 involving claims of defects in MAZDA Products, and (f) provide suitable information to
25 permit DEALER to respond to customers, consumer organizations and government
26 agencies in a timely and courteous fashion in customer satisfaction matters involving
27 DEALER.’” (See TAC ¶ 126 (quoting Lithia Dealer Agreement).) Even if those
28 allegations were not stricken, however, the Court’s resolution of the motion to dismiss
would remain unchanged. As set forth herein, non-disclosure is not sufficient to establish
fraudulent concealment.

³ Plaintiffs’ reliance on In re Takata Airbag Productions Liability Litigation, 193 F.
Supp. 3d 1324 (S.D. Fla. June 15, 2016), is unavailing, as the issue of whether a
manufacturer may be held liable for a dealer’s statements was not raised by the
defendant or otherwise addressed therein. See id. at 1344.

1 however, plead no more than non-disclosure, which, as discussed above, is not sufficient
2 to plead “active and willful concealment.” See Licul, 2013 WL 6328734, at *6.

3 The cases on which plaintiffs rely for the proposition that “illusory repairs”
4 performed by dealers can be imputed to the manufacturer (see Opp. at 11:4) are
5 distinguishable. In two of the cited cases, the alleged illusory repairs were made under
6 warranty and, consequently, were paid for and authorized by the manufacturer, see
7 Valencia v. Volkswagen Group of America Inc., 119 F. Supp. 3d 1130, 1134, 1137 (N.D.
8 Cal. Aug. 11, 2015) (explaining repairs were made by manufacturer under warranty “in
9 order to ensure that the defect [would] manifest itself outside of the warranty period”);
10 Falk v. General Motors Corp., 496 F. Supp. 2d 1088, 1097 (N.D. Cal. July 3, 2007)
11 (noting plaintiffs’ argument that “[w]here GM replaced the Truck’s speedometers
12 pursuant to warranty provisions, GM utilized equally defective” parts), whereas, here,
13 plaintiffs allege the subject repairs were not made under warranty (see TAC ¶¶ 91-92). In
14 the third case on which plaintiffs rely, the court did not reach the issue “because neither
15 [plaintiff] actually alleg[ed] that he received repairs during the statute of limitations
16 period.” See Majdipour v. Jaguar Land Rover North America, LLC, No. 12-CV-07849-
17 WHW, 2015 WL 1270958 (D.N.J. Mar. 18, 2015)

18 Accordingly, plaintiffs again having failed to allege a basis on which Gunther
19 Mazda’s conduct can be imputed to Mazda, the Fifth Cause of Action will be dismissed
20 without further leave to amend.

21 **b. Tenth Cause of Action (Schaaf’s Claim under North Carolina Unfair
22 & Deceptive Trade Practices Act)**

23 In the Tenth Cause of Action, plaintiffs, on behalf of Schaaf and those similarly
24 situated, allege Mazda violated North Carolina’s Unfair and Deceptive Trade Practices
25 Act (“NCUDTPA”), by “willfully fail[ing] to disclose and actively conceal[ing] the [d]efect.”
26 (See TAC ¶ 282.)

27 Mazda argues the Tenth Cause of Action is subject to dismissal for failure to
28 allege sufficient aggravating circumstances to convert a breach of warranty claim into a

1 NCUDTPA claim. Under North Carolina law, as set forth in the Court’s prior order, a
2 “breach of warranty, standing alone, does not constitute a violation of” the NCUDTPA
3 (see August 1 Order, at 7:14-15 (citing Walker v. Fleetwood Homes of N. Carolina, Inc.,
4 362 N.C. 63, 72 (2007)), nor does “a mere breach of contract, even if intentional” (see id.
5 at 7:16-17 (citing Branch Banking & Trust Co. v. Thompson, 107 N.C. App. 53, 62
6 (1992)); rather, “some type of egregious or aggravating circumstances must be alleged
7 and proved before [the NCUDTPA’s] provisions may take effect” (see id. at 7:17-19
8 (citing Dalton v. Camp, 353 N.C. 647, 657 (2001)), e.g., “deception either in the formation
9 of the contract or in the circumstances of the breach” (see id. at 7:20-22 (citing
10 Bartolomeo v. S&B Thomas, Inc., 889 F.2d 530, 535 (4th Cir. 1989); Branch Banking &
11 Tr. Co. v. Thompson, 107 N.C. App. 53, 62 (1992)).

12 In its prior order, the Court dismissed the Tenth Cause of Action, finding plaintiffs
13 failed to allege facts to show conduct on the part of Mazda sufficient to constitute
14 aggravating circumstances, or, alternatively, to show any conduct on the part of Sport
15 Durst Mazda could be imputed to Mazda. Plaintiffs now contend they have alleged
16 sufficient aggravating circumstances, namely that “Mazda’s refusal to disclose the latent
17 [d]efect” amounted to deception in the formation of Schaaf’s vehicle sales contract. (See
18 Opp. at 7:18-19.)

19 Under North Carolina law, to establish actionable deception based on a failure to
20 disclose a fact, the plaintiff must show the defendant had a duty to disclose that fact. See
21 Bear Hollow, L.L.C. v. Moberk, L.L.C., No. 05-CV-210, 2006 WL 1642126, at *6
22 (W.D.N.C. June 5, 2016 (citing North Carolina law)). Such a duty, however, only arises
23 under a limited number of circumstances, one of which, plaintiffs contend, is applicable
24 here, specifically, where “the parties are negotiating at arm’s length” and “one party has
25 knowledge of a latent defect in the subject matter of the negotiations about which the
26 other party is both ignorant and unable to discover through reasonable diligence.” See id.

27 In support thereof, plaintiffs again allege that Schaaf, “[p]rior to purchasing his
28 vehicle, . . . test drove the vehicle, viewed advertisements for the vehicle and the

1 vehicle’s window sticker, and spoke with Mazda sales representatives concerning the
2 vehicle’s features,” and that none of those interactions “disclosed or revealed” the defect.
3 (See TAC ¶ 99.) In addition, plaintiffs now allege that Mazda “developed the marketing
4 material referenced [in the TAC]” and “design[ed], determin[ed] the substance of, and
5 affix[ed]” the window stickers to its vehicles. (See TAC ¶¶ 113, 114). As before,
6 however, plaintiffs fail to allege any facts demonstrating that Mazda, as opposed to only
7 Sport Durst Mazda, was a party to the negotiations leading to Schaaf’s purchase of the
8 subject vehicle.

9 Plaintiffs’ reliance on Johnson v. Ford Motor Company, No. 13-CV-6529, 2015 WL
10 7571841 (S.D. W.Va. Nov. 24, 2015), the sole case plaintiffs cite as applying North
11 Carolina law and holding a vehicle manufacturer liable for a failure to disclose, is
12 unavailing. In Johnson, in contrast to the instant case, the manufacturer did not simply
13 fail to disclose a known defect, but, rather, was alleged to have directly made affirmative
14 misrepresentations. See 2015 WL 7571841, at *13 (noting allegation that manufacturer
15 itself “blamed [the defect] on driver error or other circumstances”).

16 Further, to the extent plaintiffs may be contending Mazda’s advertisements or
17 stickers constituted misrepresentations, plaintiffs fail to allege the content of any such
18 materials; rather, as discussed above, plaintiffs only allege the absence of content, i.e., a
19 failure to disclose.

20 Accordingly, the Tenth Cause of Action will be dismissed without further leave to
21 amend.

22 **c. Twelfth Cause of Action (Weeter and Schaaf’s Breach of Implied**
23 **Warranty Claims)**

24 In the Twelfth Cause of Action, plaintiffs, on behalf of Weeter, Schaaf, and those
25 similarly situated, allege Mazda provided to plaintiffs an “implied warranty that [their
26 vehicles] and any parts thereof are merchantable and fit for the ordinary purposes for
27 which they are sold,” which implied warranty, plaintiffs allege, was breached because the
28 vehicles “suffered from the [d]efect at the time of sale that causes the vehicles’ clutch to

1 fail prematurely.” (See TAC ¶ 296.)

2 By its prior order, the Court dismissed plaintiffs’ Twelfth Cause of Action, “with
3 leave to amend to allege facts sufficient to establish privity.” (See August 1 Order, at
4 11:9, 12:4.) In the TAC, plaintiffs allege no new facts bearing on privity and indeed
5 “concede they cannot meet the pleading requirements set forth by the Court.” (See Opp.
6 at 2 n.1.)

7 Additionally, to the extent the Court also dismissed the Twelfth Cause of Action on
8 the further ground that Schaaf’s claim, in the absence of allegations to support tolling, is
9 barred by the applicable four-year statute of limitations, plaintiffs, although given leave to
10 plead tolling, have failed to allege any new facts to make such showing.

11 Accordingly, the Twelfth Cause of Action will be dismissed without further leave to
12 amend.

13 **CONCLUSION**

14 For the reasons stated:


15 (1) Mazda’s motion to strike is hereby GRANTED, and

16 (2) Mazda’s motion to dismiss is hereby GRANTED and the Fifth, Tenth, and
17 Twelfth Causes of Action are DISMISSED without further leave to amend.

18 Lastly, the Case Management Conference is rescheduled for January 5, 2018. A
19 Joint Case Management Statement shall be filed no later than December 29, 2017.

20
21 **IT IS SO ORDERED.**

22
23 Dated: December 18, 2017

24 
25 MAXINE M. CHESNEY
26 United States District Judge
27
28