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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

MARY WIEG, et al.,
Plaintiffs,
v.
GENERAL MOTORS LLC,
Defendant.

Case No. [23-cv-04358-SI](#)

**ORDER GRANTING DEFENDANT’S
MOTION TO DISMISS PLAINTIFFS’
COMPLAINT WITH LEAVE TO
AMEND**

Re: Dkt. No. 11

Defendant has filed a motion to dismiss the fourth and fifth causes of action of plaintiffs’ complaint. Dkt. No. 11. Plaintiffs request leave to file a First Amended Complaint. Dkt. No. 19. Defendant does not oppose permitting plaintiffs to serve an Amended Complaint, but requests that the Court dismiss the fraud claims for failure to state a cause of action on which relief may be granted. Dkt. No. 21 at 3. For the reasons set forth below, the Court GRANTS defendant’s motion to dismiss WITH LEAVE TO AMEND. Plaintiffs shall file their first amended complaint no later than **November 17, 2023**.

BACKGROUND

I. Factual Allegations¹

This action arises from plaintiffs Mary Wieg and Stanley Wieg’s (“plaintiffs”) purchase of a new 2019 Chevrolet Bolt (“Bolt”). Dkt. No. 1 (“Compl.”) ¶¶ 7-9. On December 29, 2018, plaintiffs bought the Bolt from an “authorized dealer and agent” of General Motors (“GM”) in

¹ For the purposes of this motion to dismiss, the Court treats as true the factual allegations as stated in plaintiffs’ complaint and draws all reasonable inferences in plaintiffs’ favor. *See Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987).

1 California. *Id.* ¶ 9.

2 In 2021, GM issued a recall notice for the Bolt stating that its batteries may ignite when
3 nearing a full charge. *Id.* ¶¶ 18, 27. In that recall notice, GM warned that the vehicle’s charge
4 should not exceed 90%, the battery mileage should not fall below 70 miles, and the vehicle should
5 not be parked indoors overnight due to fire risk. *Id.* According to plaintiffs, GM “falsely
6 represented” that the Bolt was “safe and functional for normal use.” *Id.* ¶ 16.² Plaintiffs argue
7 defendant’s misrepresentation is proven by the recall notice. *Id.* ¶ 84.

8 According to plaintiffs, defendant “marketed the vehicle in a false and misleading manner
9 by advertising it as safe and function[al],” which it was not due to the “presence of defective and
10 dangerous lithium-ion battery modules.” *Id.* ¶ 17; *see also id.* ¶ 28 (alleging that GM “falsely
11 represented the safety of the vehicle”). GM also “willfully, falsely, and knowingly marketed the
12 [Bolt] as having the range capability to reach 259-miles on a full charge.” *Id.* ¶ 69. The mileage
13 range was at the center of GM’s marketing efforts and “featured prominently in virtually every
14 advertisement and consumer communication.” *Id.* ¶ 74. GM “pervasively and consistently
15 represented that the vehicle had the best-in-class fuel economy and touted its specific mileage range
16 on a single charge, as well as its supposedly superior battery, that was presumably safe.” *Id.* ¶ 74.

17 Based on GM’s advertising, plaintiffs “believed that they were purchasing a vehicle that was
18 functional and safe” and “could not have reasonably understood or expected these representations
19 to be untrue at the time of acquisition.” *Id.* ¶¶ 24-25. GM’s representations were false because the
20 vehicle’s lithium-ion battery causes the vehicle to overheat during prolonged use, “resulting in a
21 substantial reduction in the range capability of the vehicle.” *Id.* ¶ 70. GM “knew the representations
22 were false and intended Plaintiffs to rely on them,” as evidenced by GM’s advertising which stresses
23 the Bolt’s 259-mile range. *Id.* ¶¶ 71, 79. Defendant “took affirmative actions” to conceal and
24 suppress the fact, about which GM had exclusive knowledge, “that the vehicle could not achieve its
25 expected range and safety due to the overheating battery.” *Id.* ¶¶ 75, 78. Plaintiffs bought the
26 vehicle “based in part on the false and misleading representations” that were part of an “extensive
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28 ² It is unclear if plaintiffs assert that GM made this representation at the time of sale, or when
plaintiffs brought the Bolt into authorized repair facilities. *See* Compl. ¶¶ 12-16.

1 advertising campaign.” *Id.* ¶¶ 72, 80. “Knowledge and information about the vehicle’s defects were
2 in the exclusive and superior possession of the Defendant and their dealers” and plaintiffs “could
3 not reasonably discover the defect through due diligence.” *Id.* ¶ 76. Plaintiffs “reasonably and
4 detrimentally relied on Defendant’s misrepresentations when purchasing the vehicle and, had they
5 known the truth, they would not have purchased the vehicle or would have paid significantly less
6 for the vehicle.” *Id.* ¶ 81.

7 Regarding damages, plaintiffs allege they are entitled to replacement of the Bolt or
8 restitution of the amount paid or payable, plus prejudgment interest; incidental damages plus
9 interest; consequential damages plus interest; attorneys’ fees; civil penalties two times the amount
10 of actual, incidental, and consequential damages; and punitive damages. *Id.* ¶¶ 37-39, 43-46, 120.
11 Plaintiffs argue that due to the battery defect and risk of fire, they were forced “to make unforeseen
12 accommodations and take precautions that interfere with their normal and expected use of the
13 vehicle.” *Id.* ¶¶ 19, 30. “Plaintiffs expected to use the vehicle without fear of the vehicle igniting
14 and causing serious bodily harm or death” and “have suffered constant anxiety and loss of sleep as
15 a direct result of the risk the vehicle may spontaneously ignite.” *Id.* ¶¶ 29, 33.

16 Plaintiffs further allege an injury of overpaying for the vehicle and receiving a quality of
17 vehicle less than what they expected to receive. *Id.* ¶ 91. They argue they paid an unwarranted
18 premium and “would not have purchased the vehicle if they had known that the vehicle contained a
19 defective, unsafe battery.” *Id.* ¶ 100. Plaintiffs emphasize their “severely limited” and “significantly
20 diminished” use and enjoyment of the Bolt. *Id.* ¶¶ 31, 117.

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22 **II. Procedural History**

23 On July 26, 2023, plaintiffs filed this action in the Alameda County Superior Court against
24 General Motors and Doe defendants 1 through 10. Compl. The complaint alleges three causes of
25 action under the Song-Beverly Consumer Warranty Act, a fourth cause of action claiming fraud, and
26 a fifth cause of action alleging violations of California Business & Professions Code § 17200. *Id.*
27 At issue in this motion to dismiss are the fourth and fifth causes of action alleging fraud
28 (misrepresentation and concealment) and violations of the “fraudulent prong” of Business &

1 Professions Code § 17200³ (collectively the “fraud claims”). Dkt. No. 11 at 1. On August 24, 2023,
2 defendant filed a Notice of Removal based on diversity jurisdiction. Dkt. No. 1. On September 22,
3 2023, plaintiffs filed a motion for remand to state court, which this Court denied on October 26,
4 2023. Dkt. No. 27.

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6 **LEGAL STANDARD**

7 Under Federal Rule of Civil Procedure 12(b)(6), a district court must dismiss a complaint if
8 it fails to state a claim upon which relief can be granted. To survive a Rule 12(b)(6) motion to
9 dismiss, the plaintiff must allege “enough facts to state a claim to relief that is plausible on its face.”
10 *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). This “facial plausibility” standard requires
11 the plaintiff to allege facts that add up to “more than a sheer possibility that a defendant has acted
12 unlawfully.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). While courts do not require “heightened
13 fact pleading of specifics,” a plaintiff must allege facts sufficient to “raise a right to relief above the
14 speculative level.” *Twombly*, 550 U.S. at 555, 570.

15 In deciding whether the plaintiff has stated a claim upon which relief can be granted, the
16 court must assume that the plaintiff’s allegations are true and must draw all reasonable inferences
17 in the plaintiff’s favor. *Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987). However,
18 the court is not required to accept as true “allegations that are merely conclusory, unwarranted
19 deductions of fact, or unreasonable inferences.” *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055
20 (9th Cir. 2008). A pleading must contain allegations that have “factual content that allows the court
21 to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Iqbal*, 556
22 U.S. at 678. Dismissal under Rule 12(b)(6) is proper when the complaint “lacks a cognizable legal
23 theory” or “fails to allege sufficient facts to support a cognizable legal theory.” *Somers v. Apple,*
24 *Inc.*, 729 F.3d 953, 959 (9th Cir. 2013).

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27 ³ California’s Unfair Competition Law, Cal. Bus. & Prof. Code Section 17200, *et seq.*,
28 prohibits “any unlawful, unfair... or fraudulent business act or practice.” Defendant does not move
to dismiss alleged violations of the “unlawful” and “unfair” prongs.

1 Under Rule 9(b), fraud claims must be pled with particularity. Rule 9(b)'s heightened
2 pleading requirements demand that "[a]verments of fraud must be accompanied by the who, what,
3 when, where, and how" of the misconduct charged and "must set forth what is false or misleading
4 about a statement, and why it is false." *Vess v. Ciba-Geigy Corp. U.S.A.*, 317 F.3d 1097, 1106 (9th
5 Cir. 2003) (internal quotation marks omitted). Specifically, fraud allegations must include the "time,
6 place, and specific content of the false representations as well as the identities of the parties." *Swartz*
7 *v. KPMG LLP*, 476 F.3d 756, 764 (9th Cir. 2007). However, "[m]alice, intent, knowledge, and other
8 conditions of a person's mind may be alleged generally." Fed. R. Civ. P. 9(b). California Business
9 & Professions Code § 17200 claims based on fraud "must satisfy the particularity requirement of
10 Rule 9(b)." *Swartz*, 476 F.3d at 1105.

11 If the Court dismisses the complaint, it must then decide whether to grant leave to amend.
12 The Ninth Circuit has "repeatedly held that a district court should grant leave to amend even if no
13 request to amend the pleading was made, unless it determines that the pleading could not possibly
14 be cured by the allegation of other facts." *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000)
15 (citations and internal quotation marks omitted).

16
17 **DISCUSSION**

18 **I. Dismissal of Fraud (Affirmative Misrepresentation and Concealment) Claims Based**
19 **on Pleading Deficiencies**

20 GM argues that plaintiffs' fraud claims are not pled with particularity because they do not
21 contain "the required how, where, to whom, and by what means any misrepresentation or
22 concealment occurred." Dkt. No. 11 at 4. GM further argues that plaintiffs' fraud claims should be
23 dismissed for failure to plead the necessary element of justifiable reliance. *Id.* at 6. GM also argues
24 that setting aside plaintiffs' failure to meet the Rule 9(b) heightened pleading standard, the fraud
25 claims should be dismissed because plaintiffs "did not allege facts plausibly showing the
26 circumstances of GM's alleged knowledge, what was allegedly known, or how it was discovered
27 before Plaintiffs purchased the Subject Vehicle" and fraud claims "must be based upon conduct
28 before or at the time of the transaction." *Id.* at 6, 7.

1 Plaintiffs do not address defendant’s arguments about the complaint’s inadequacies but
2 request leave to amend, indicating they can plead the how, when, to whom and by what means the
3 fraud occurred. Dkt. No. 19.⁴ Plaintiffs indicate they will amend the complaint to allege that GM
4 knew of the risk of fires in the Bolt vehicles dating back to 2019, prior to the sale of the subject
5 vehicle, and that GM knew of at least twelve fires involving the Bolt by August 2020. *Id.*

6 The elements of fraud are: “(1) a misrepresentation (false representation, concealment, or
7 nondisclosure); (2) knowledge of falsity (or scienter); (3) intent to defraud, i.e., to induce reliance;
8 (4) justifiable reliance; and (5) resulting damages.” *Robinson Helicopter Co., Inc. v. Dana Corp.*,
9 34 Cal. 4th 979 (2004) (citations omitted).⁵

10 The Court agrees with defendant that plaintiffs’ fraud claims are not pled with the
11 particularity required by Rule 9(b). Plaintiffs’ complaint is identical to five other complaints before
12 this Court and includes boilerplate and conclusory allegations of fraud. Plaintiffs do not plead facts
13 about the who, when, how, and where with respect to misrepresentations about or concealment of
14 the battery defect. The complaint does not include allegations about the specific content of the
15 allegedly false representations, nor the identity of the GM employee(s) who made the allegedly false
16 statements. It is unclear whether plaintiffs allege GM had knowledge of the battery defect at the
17 time of sale. Intent to defraud and justifiable reliance are pled in only a conclusory fashion, and it
18 is unknown what specific advertisements or marketing materials plaintiffs relied on in purchasing
19 the Bolt.

20 The Court thus dismisses the fraud claims for lack of factual support. However, the factual
21 deficiencies in the pleading could be cured by the allegation of additional facts, so the Court grants

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23 ⁴ Plaintiffs’ brief does not contain page numbers.

24 ⁵ Under California law, intentional concealment can be a separate cause of action. *See*
25 *Kaldenbach v. Mutual of Omaha Life Ins. Co.*, 178 Cal. App. 4th 830, 850 (2009). The elements of
26 a cause of action for “fraud based on concealment” are: “(1) the defendant must have concealed or
27 suppressed a material fact, (2) the defendant must have been under a duty to disclose the fact to the
28 plaintiff, (3) the defendant must have intentionally concealed or suppressed the fact with the intent
to defraud the plaintiff, (4) the plaintiff must have been unaware of the fact and would not have
acted as he did if he had known of the concealed or suppressed fact, and (5) as a result of the
concealment or suppression of the fact, the plaintiff must have sustained damage.” *Id.* (internal
quotation marks omitted) (citations omitted).

1 plaintiffs leave to amend. *See Lopez*, 203 F.3d at 1130.

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3 **II. Whether Plaintiffs’ Fraudulent Concealment Claims Fail as a Matter of Law**

4 **A. Whether Plaintiffs’ Fraudulent Concealment Claims are Barred by the**
5 **Economic Loss Rule**

6 Defendant argues that plaintiffs second theory of fraud, fraudulent concealment, fails as a
7 matter of law for two reasons. Dkt. No. 11 at 7. The first reason is because plaintiffs seek purely
8 economic damages, “which are barred by the economic loss rule.” *Id.*

9 The California economic loss rule provides that when “a purchaser’s expectations in a sale
10 are frustrated because the product he bought is not working properly, his remedy is said to be in
11 contract alone, for he has suffered only economic losses.” *Robinson Helicopter Co., Inc. v. Dana*
12 *Corp.*, 34 Cal. 4th 979, 988 (2004) (internal quotation marks omitted). Economic loss consists of
13 “damages for inadequate value, costs of repair and replacement of the defective product or
14 consequent loss of profits—without any claim of personal injury or damages to other property.” *Id.*
15 In *Robinson*, the California Supreme Court held that the economic loss rule did not bar the plaintiff’s
16 fraud and intentional misrepresentations claims because they were independent of the breach of
17 contract. *Id.* at 991. The court clarified that this holding was “narrow in scope and limited to a
18 defendant’s affirmative misrepresentations on which a plaintiff relies and which expose a plaintiff
19 to liability for personal damages independent of the plaintiff’s economic loss.” *Id.* at 993.

20 Defendant argues that federal courts “routinely apply the economic loss rule to bar claims
21 for fraudulent concealment against vehicle manufacturers.” Dkt. No. 13 at 7. The cases defendant
22 cites (and the string citations contained in those cases) are all non-binding District Court decisions,
23 mostly decided on the merits and not at the motion to dismiss stage. The *Robinson* court based its
24 determination that the plaintiff’s fraud claim was not barred by the economic loss rule on the
25 defendant’s “affirmative intentional misrepresentations of fact,” but did not address whether the
26 defendant’s “intentional concealment constitutes an independent tort.” 34 Cal. 4th at 991. The
27 Court cannot find at this stage that the economic loss rule bars plaintiffs’ fraud claims as a matter
28 of law. Defendants may raise and further brief the economic loss rule argument in future dispositive

1 motions.

2
3 **B. Whether Plaintiffs’ Fraudulent Concealment Claims Fail Because Plaintiffs**
4 **Didn’t Purchase the Bolt Directly From GM**

5 Defendants next argue that plaintiffs’ fraudulent concealment claims fail as a matter of law
6 because “California law does not permit a cause of action for concealment that did not arise in a
7 fiduciary relationship, or from a transaction involving direct dealings between plaintiff and
8 defendant” and plaintiffs do not allege that they purchased the Bolt directly from GM or otherwise
9 entered into a transaction with GM. Dkt. No. 11 at 7.

10 Plaintiffs respond that a transactional relationship with GM does exist because plaintiffs
11 purchased the vehicle from a GM dealership, GM backed the purchase with an express warranty,
12 and GM’s authorized dealerships are its agents for the purposes of the sale of GM vehicles. Dkt.
13 No. 19. For purposes of the motion to dismiss, the Court takes as true plaintiffs’ allegation that they
14 bought the Bolt from “an authorized dealer and agent” of GM. Compl. ¶ 9.

15 One of the elements of a claim for fraudulent concealment is that the defendant was under a
16 duty to disclose the concealed fact to the plaintiff. *Kaldenbach*, 178 Cal. App. 4th at 850. “A duty
17 to disclose facts arises only when the parties are in a relationship that gives rise to the duty, such as
18 seller and buyer, employer and prospective employee, doctor and patient, or parties entering into
19 any kind of contractual arrangement.” *Bigler-Engler v. Breg, Inc.*, 7 Cal. App. 5th 276, 311 (2017).
20 The California Supreme Court has described the necessary relationship as a “transaction” between
21 plaintiff and defendant. *Id.* (citing *Warner Constr. Corp. v. City of Los Angeles*, 2 Cal. 3d 285, 294
22 (1970). “Such a transaction must necessarily arise from direct dealings between plaintiff and
23 defendant.” *Id.* at 312.

24 The Court finds that dismissal as a matter of law would be inappropriate at this stage. The
25 relationship between the “authorized dealer” from whom plaintiffs bought the Bolt and GM is a
26 factual matter, and all inferences must be drawn in favor of plaintiffs. GM argues this case is similar
27 to *Bigler-Engler*, where a California Court of Appeal reversed a jury verdict for fraudulent
28 concealment against the manufacturer of a medical device because there was “no evidence of a

1 relationship” between the plaintiff and the manufacturer “sufficient to give rise to a duty to
2 disclose.” 7 Cal. App. 5th at 314. The plaintiff had obtained the medical device from a third-party
3 without the manufacturer’s involvement. *Id.* There are factual differences between *Bigler-Engler*
4 and this case that are inappropriate for resolution at the motion to dismiss stage.⁶ Defendants may
5 raise and further brief this issue in future dispositive motions.

6
7 **CONCLUSION**

8 For the foregoing reasons and for good cause shown, the Court hereby **DISMISSES**
9 plaintiffs’ fourth cause of action (fraud) and the “fraudulent prong” of their fifth cause of action
10 (violations of California Business & Professions Code § 17200) **WITH LEAVE TO AMEND.**
11 Plaintiffs shall file their amended complaint no later than **November 17, 2023.**

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13 **IT IS SO ORDERED.**

14 Dated: November 7, 2023



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16 **SUSAN ILLSTON**
United States District Judge

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26 ⁶ For example, in *Bigler-Engler* the evidence did not show that the manufacturer knew prior
27 to the lawsuit that the plaintiff was a potential user of the medical device, that plaintiff was
28 prescribed the device, or that plaintiff used the device. 7 Cal. App. 5th at 314. The evidence also
did not show that the manufacturer “directly advertised its products to consumers” or that it received
any monetary benefit directly from plaintiff’s individual rental of the medical device. *Id.* Here,
plaintiffs allege that GM advertised the Bolt directly to consumers, and it is unknown whether GM
knew that plaintiffs had purchased a Bolt from the “authorized dealer.”