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**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA**

SHELLY STEWART AND ROBERT STEWART, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

ELECTROLUX HOME PRODUCTS, INC.,

Defendant.

1:17-cv-01213-LJO-SKO

MEMORANDUM DECISION AND ORDER ON ELECTROLUX'S MOTION TO DISMISS

(Doc. 8.)

I. INTRODUCTION

In September 2017, Plaintiffs filed a putative class action complaint against Electrolux Home Products, Inc. ("Electrolux") alleging defects in a self-cleaning oven Electrolux manufactures. (Doc. 1.) Electrolux filed a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) asserting many of Plaintiffs' claims are insufficiently pled. Plaintiffs filed a brief in opposition, Electrolux filed a reply brief, and the matter was taken under submission. For the reasons set forth below, Electrolux's motion to dismiss is GRANTED in PART and DENIED in PART.

1 **II. FACTUAL BACKGROUND**

2 In June 2015, Plaintiffs purchased a Kenmore Elite oven, manufactured by Electrolux, from
3 Sears for \$1,964.99. Plaintiffs purchased this model for its self-cleaning feature. On September 9,
4 2016, Plaintiffs used the self-cleaning feature for the first time, but after a few hours, discovered that
5 the oven had stopped working. When Plaintiffs contacted Sears, they were told that Sears was aware of
6 the issues with the oven, but the warranty had expired and Plaintiffs would need to pay for the repairs
7 themselves. On inspection of the oven by a Sears' repairperson, the oven's thermostat could not support
8 the temperature that was reached when the oven's self-cleaning feature was engaged. The repairperson
9 advised Plaintiffs never to engage the self-cleaning function again. Plaintiffs were charged \$184.37 for
10 Sears to install a new thermostat.

11 Plaintiffs assert claims on behalf of themselves and on behalf of a National and a California
12 State Class which include all persons who "acquired an Electrolux designed and/or manufactured oven
13 range primarily for personal, family, or household purposes" (Cmplt., ¶ 27.) Plaintiffs identify
14 the following defect in the oven: "[t]he oven's thermostat burns out while using the self-cleaning
15 feature of the oven. Because of inherent design and manufacturing flaws (the "Defect") known to
16 Electrolux, its Frigidaire and Kenmore oven thermostats are defective." (Cmplt., ¶ 12.)

17 Electrolux has filed a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6),
18 challenging the sufficiency of the claims alleged in the complaint.

19 **III. LEGAL STANDARDS**

20 A motion to dismiss pursuant to Rule 12(b)(6) is a challenge to the sufficiency of the allegations
21 set forth in the complaint. Dismissal under Rule 12(b)(6) is proper where there is either a "lack of a
22 cognizable legal theory" or "the absence of sufficient facts alleged under a cognizable legal theory."
23 *Balisteri v. Pacifica Police Dep't.*, 901 F.2d 696, 699 (9th Cir. 1990). In considering a motion to
24 dismiss for failure to state a claim, the court generally accepts as true the allegations in the complaint,
25 construes the pleading in the light most favorable to the party opposing the motion, and resolves all

1 doubts in the pleader's favor. *Lazy Y. Ranch LTD v. Behrens*, 546 F.3d 580, 588 (9th Cir. 2008).

2 To survive a 12(b)(6) motion to dismiss, the plaintiff must allege "enough facts to state a claim
3 to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim
4 has facial plausibility when the Plaintiff pleads factual content that allows the court to draw the
5 reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556
6 U.S. 662, 678 (2009). "The plausibility standard is not akin to a 'probability requirement,' but it asks
7 for more than a sheer possibility that a defendant has acted unlawfully." *Id.* (quoting *Twombly*, 550
8 U.S. at 556). "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed
9 factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires
10 more than labels and conclusions." *Twombly*, 550 U.S. at 555 (internal citations omitted). Thus, "bare
11 assertions . . . amount[ing] to nothing more than a 'formulaic recitation of the elements'. . . are not
12 entitled to be assumed true." *Iqbal*, 556 U.S. at 681. "[T]o be entitled to the presumption of truth,
13 allegations in a complaint . . . must contain sufficient allegations of underlying facts to give fair notice
14 and to enable the opposing party to defend itself effectively." *Starr v. Baca*, 652 F.3d 1202, 1216 (9th
15 Cir. 2011). In practice, "a complaint . . . must contain either direct or inferential allegations respecting
16 all the material elements necessary to sustain recovery under some viable legal theory." *Twombly*,
17 550 U.S. at 562. To the extent that the pleadings can be cured by the allegation of additional facts, a
18 plaintiff should be afforded leave to amend. *Cook, Perkiss and Liehe, Inc. v. N. Cal. Collection Serv.,*
19 *Inc.*, 911 F.2d 242, 247 (9th Cir. 1990) (citations omitted).

20 **IV. ANALYSIS**

21 **A. Economic Loss Rule Precludes Plaintiffs' Strict Liability and Fraudulent Concealment** 22 **Claims as Currently Pled**

23 Electrolux contends that Plaintiffs' strict liability and fraudulent concealment claims are barred
24 by the economic loss rule, which prohibits a tort claim for purely economic loss. According to
25 Electrolux, Plaintiffs' damages are limited to paying for a repair to the oven and for loss of use resulting

1 from being told not to use the self-cleaning feature on the oven.

2 Plaintiffs argue they allege more than just economic loss: Plaintiffs and other putative class
3 members have suffered property loss, financial harm, loss of use, and other damages. Plaintiffs
4 maintain that at the pleading stage, this is sufficient. Plaintiffs also assert that the economic loss rule
5 does not preclude their claims because they have a special relationship with Electrolux.

6 **1. The Nature of the Alleged Defect and Resulting Damages**

7 As an initial matter, the complaint's allegations about the nature of the defect and the damages
8 incurred are inconsistent. As it pertains to their own Electrolux oven, Plaintiffs allege a defect with
9 their oven's thermostat such that it cannot withstand the temperatures during the self-cleaning cycle –
10 i.e., the thermostat malfunctions and quits operating (Cmplt., ¶ 12), apparently causing the entire oven
11 to be unusable until the thermostat is replaced (Cmplt., ¶ 26). After specifically defining the "Defect"
12 as the burning out of the oven's thermostat during the oven's self-cleaning function, the complaint
13 subsequently refers more generally to "Defects" in the oven caused by an unspecified problem in the
14 "electrical system" creating a fire hazard (Cmplt., ¶¶ 26, 31, 85). Plaintiffs apparently kept their oven
15 even after the thermostat was repaired (Cmplt. ¶¶ 23-24), and never allege they were informed or
16 believed it presented a safety or fire hazard. They state only that the repair technician told them never
17 to engage the self-cleaning function, presumably because it would again damage the thermostat. Later
18 in the complaint, however, there are allegations that the "Defects would cause their ovens to fail,
19 combust, and catch fire – damaging the ovens and other property, and threatening the personal safety of
20 customers." (Cmplt., ¶ 82.)

21 The nature of the alleged defect and the problems it purportedly cause are directly related to
22 assessing whether the economic loss rule applies, what problem Electrolux was allegedly aware of
23 before the product was sold to Plaintiffs, and what may or may not be covered by any implied or
24 express warranty. The Court will evaluate Plaintiffs' claims on the basis of the defect as they define it
25 and allege to have experienced it (design and manufacturing defects causing the oven's thermostat to

1 burn out while using the self-cleaning feature of the oven (Cmplt., ¶ 12)). Subsequent allegations
2 pertaining to different, unspecified defects in the oven's electrical system that posed a safety hazard or
3 caused damage to property other than the oven will not be considered.¹

4 **2. Economic Loss Rule Precludes Plaintiffs' Claims**

5 In California, under the "economic loss rule," a manufacturer or distributor may be strictly
6 liable or liable for negligence for injury to property caused by a defective product, but is not liable in
7 tort for purely economic loss. The product defect must cause damage to other property, that is,
8 property other than the product itself. *Jimenez v. Super. Ct.*, 29 Cal. 4th 473, 483 (2003) (economic
9 loss rule allows a plaintiff to recover in strict products liability in tort when product defect causes
10 damage to "other property," that is, property *other than the product itself.*)

11 Plaintiffs' damages from the thermostat failure during the self-cleaning cycle are limited to
12 economic loss, precluding their strict liability and fraudulent concealment claims. Arguing there are
13 damages alleged beyond purely economic loss, Plaintiffs point to allegations of "property loss, financial
14 harm, loss of use, and other damages," but the only property loss Plaintiffs alleged was to the oven
15 itself, which does not constitute more than economic loss. *Jimenez*, 29 Cal. 4th at 483 (damage to
16 property must be property *other* than the product). "Financial harm" and "loss of use" as alleged
17 generally by Plaintiffs are economic losses only. *Casden Builders Inc. v. Entre Prises USA, Inc.*, No.
18 10-cv-2353 ODW (CWx), 2010 WL 2889496, at *3-4 (C.D. Cal. July 21, 2010) (defective product
19 installed on climbing wall rendered wall inoperable; loss of use of climbing wall was economic loss).
20 The "other" damage Plaintiffs allege is simply too vague and conclusory to credit as true. *Twombly*,
21 550 U.S. at 554-55 (conclusory allegations not entitled to assumption of truth). Plaintiffs note they
22 alleged damage to the oven and *other property* in light of resulting fire danger from the defect, but

23
24 ¹ Plaintiffs seek to amend the complaint to clarify certain allegations, including the date when the oven was repaired, and the
25 terminology used in describing the oven as a "range." (Doc. 10, 5:13, n. 1-2.) The Court also notes Plaintiffs allege the
oven's defect rendered the ovens unusable in "their essential purpose as phones." (Cmplt., ¶ 106). As the complaint requires
amendment for other reasons, Plaintiffs will have opportunity to cure these issues, including clarification regarding the
nature of the oven's defect or defects.

1 Plaintiffs do not allege *they* suffered any fire damage or that their oven posed a fire threat or hazard
2 related to the oven's thermostat defect.² Plaintiffs' alleged damage is limited to purely economic loss.

3 **3. No Exception to the Economic Loss Rule Applies**

4 Plaintiffs maintain their claims are exempt from the economic loss rule because they have a
5 special relationship with Electrolux. An exception to the economic loss rule exists where the
6 relationship between the parties is such that it would be equitable to impose a duty of care to avoid
7 purely economic loss. *Ott v. Alfa-Laval Agri, Inc.*, 31 Cal. App. 4th 1439, 1148-49 (1995). A special
8 relationship depends on "(1) the extent to which the transaction was intended to affect the plaintiff,
9 (2) the foreseeability of harm to the plaintiff, (3) the degree of certainty that the plaintiff suffered
10 injury, (4) the closeness of the connection between the Electrolux's conduct and the injury suffered, (5)
11 the moral blame attached to the defendant's conduct, and (6) the policy of preventing future harm."
12 *J'Aire Corp. v. Gregory*, 24 Cal. 3d 799, 804 (1979).

13 Whether a transaction is intended to affect the plaintiff in a particular manner under the first
14 factor of the *J'Aire* test is a critical foundational requirement for a special relationship. *Ott*, 31 Cal.
15 App. 4th at 1455-56. Under *J'Aire*, the transaction must be intended to affect the plaintiff in a manner
16 *particular to him*. *Id.*; see also *Fieldstone Co. v. Briggs Plumbing Prods., Inc.*, 54 Cal. App. 4th 357,
17 368 (1997) (under common law, no special relationship where evidence did not suggest transactions
18 intended to affect plaintiff or any other homeowners in a way particular to them, as opposed to all

20
21 ² When Plaintiffs describe how their claim is typical of the class, they add allegations not included in alleging their own
22 experience with their Electrolux oven: "Plaintiffs and all Class Members own . . . an oven . . . with a uniform defect that
23 makes [them] immediately dangerous upon purchase and causes them to fail within their expected useful lives and burn,
24 melt, catch on fire, and burn areas surrounding the [ovens] in consumers' homes." (Cmplt., ¶ 31.) Plaintiffs had their oven
25 thermostat repaired in 2016, but there is no allegation they removed the oven from their house after discovery of the defect,
or that it posed a safety risk before or after it was repaired. Indeed, in alleging the self-cleaning function caused the
thermostat to stop working, Plaintiffs do not allege any melting of the oven, risk of fire damage, or other safety hazards
posed by the defect causing the thermostat to stop functioning. They allege only that the Sears repairperson told them not to
engage the self-cleaning function again. (Cmplt., ¶¶ 23, 26.) The allegations about the nature of the purported defect and
the potential damages and safety risks associated with the defect are not consistent between Plaintiffs' experience and the
class allegations.

1 potential purchasers of equipment).³ A special relationship is precluded where intent to affect the
2 particular buyer in a particular way is absent. *Ott*, 31 Cal. App. 4th at 1455-56.

3 In a typical retail transaction, the product is intended to affect a particular purchaser in the same
4 manner as all other retail buyers, not in a manner particular to any individual buyer. Plaintiffs have
5 alleged no facts showing the transaction was intended to affect Plaintiffs specifically. There is no
6 allegation Electrolux was aware of Plaintiffs' oven purchase, and no suggestion that the oven was
7 intended to affect Plaintiffs in any way different from any other purchaser. As Plaintiffs do not allege
8 Electrolux intended to affect them in a particular manner, distinct from other retail buyers, a special
9 relationship with Electrolux is foreclosed. *Platte Anchor Bolt, Inc. v. IHI, Inc.*, 352 F. Supp. 2d 1048,
10 1054 (N.D. Cal. 2004) ("In this regard, California courts have been able to prevent the expansion of
11 manufacturer liability for economic injuries suffered by a retail buyer *at large*, while at the same time
12 allowing a particular party of whom the manufacturer has *specific knowledge* to go forward with a
13 negligence action.").

14 Finally, Plaintiffs assert the economic loss rule does not apply to their claim of fraudulent
15 concealment pursuant to *Robinson Helicopter Co., Inc. v. Dana Corp.*, 34 Cal. 4th 979, 988 (2004).
16 *Robinson* involved a contractual dispute where the court permitted damages in tort for fraudulent
17 concealment, despite that damages were limited to economic loss. *Id.* at 985. Robinson manufactured
18 helicopters, contracting with the defendant to provide a safety clutch made to particular specifications.
19 Robinson's Federal Aviation Administration certification was predicated, in part, on the precise
20 measurements of the clutch. *Id.* After some time, the defendant changed how it manufactured the part,
21 altering the part specifications. *Id.* at 986. It did not, however, notify Robinson or the FAA of the
22 change, but continued to provide certificates that the clutch had been manufactured in conformance

23
24 ³ *Superseded by* Right to Repair Act, California Civil Code § 896, under which manufacturers of individual products could
25 be liable to homeowners for economic losses resulting from violations of the Act's standards. Thus, the common law duty
assessed under *J'Aire* in that instance was supplanted by a statutory duty under the Act. *Greystone Homes, Inc. v. Midtec,*
Inc., 168 Cal. App. 4th 1194, 1213 (2008).

1 with the precise measurements as required by Robinson and the FAA. After consumers began
2 returning defective clutches to Robinson, the defendant finally disclosed that it had changed the
3 manufacturing process and the clutch measurements for a certain period of time, during which the
4 clutches failed at a statistically higher rate. *Id.*

5 While the clutch failures did not result in any helicopter accidents, injury, or property damage,
6 Robinson was required to recall all the faulty clutch assemblies. Robinson sought replacement parts
7 from the defendant, the defendant refused to contribute to the replacement costs, and Robinson filed
8 suit for breach of contract, misrepresentation, and fraud. *Id.* at 987. On appeal, the court held that
9 because Robinson suffered only economic loss, it could not recover in tort. The California Supreme
10 Court reversed, holding that a contractual obligation may create a legal duty and the breach of that duty
11 may support a tort claim. *Id.* at 988-93. In Robinson's case, the Court reasoned the defendant had
12 made affirmative misrepresentations about the clutches by supplying false certificates of conformance
13 which went beyond simply breaching the contract by providing faulty clutches. The Court explained
14 that public policy favored extending tort remedies in this situation. *Id.* A breach of contract remedy
15 assumes the parties can negotiate the risk of loss occasioned by a breach, and it is appropriate to
16 enforce only such obligations as each party voluntarily assumed. *Id.* But, a party cannot rationally
17 calculate the possibility the other party will deliberately misrepresent the terms critical to the contract;
18 this makes it impossible to allocate the risks appropriately, and favors a remedy beyond contract. In
19 reaching this determination, however, the court purposely and expressly noted the narrow scope of its
20 holding applied only to a defendant's *affirmative* misrepresentations, actually relied upon, which
21 exposes a plaintiff to liability for personal damages independent of any economic loss contemplated
22 under the contract. *Id.* at 993.

23 Plaintiffs do not articulate any affirmative misrepresentations Electrolux made; they contend
24 instead that Electrolux concealed the oven's defect. The lack of an identifiable affirmative
25 misrepresentation forecloses the narrow exception envisaged in *Robinson*. Further, Plaintiffs were not

1 exposed to any personal injury damages independent of the economic loss that was foreseeable from a
2 defective oven – the oven purportedly did not function until the thermostat was replaced. The type of
3 damage Plaintiffs suffered is distinguishable from Robinson's exposure to personal injury liability,
4 among other types of damage. The fraudulent concealment claim in this case is not predicated on
5 affirmative misrepresentations that led Plaintiffs to be exposed to liability or damages beyond those
6 expected from a defective oven. *Robinson* does not apply to Plaintiffs' fraudulent concealment claims
7 as currently pled.

8 In sum, Plaintiffs' claims in strict liability and fraudulent concealment (Counts V, VI, and VII)
9 as currently pled are precluded by the economic loss rule. Due to the discrepancies in the allegations
10 regarding the nature of the oven's defect and the type of damages incurred, Plaintiffs will be given an
11 opportunity to amend these claims if, and only if, they can cure the deficiencies as noted above.

12 **B. Plaintiffs' Fraud-Based Claims (Counts VII, VIII, IX, and X) Are Not Pled with**
13 **Specificity**

14 Plaintiffs' fraud-based claims include Count VII (common law fraudulent concealment),⁴ Count
15 VIII (California Legal Remedies Act ("CLRA")), County IX (California's Unfair Competition Law
16 ("UCL")), and Count X (California False Advertising Law ("FAL")). These claims are based on
17 Plaintiffs' theory that Electrolux knew its ovens contained defects with the thermostat during the self-
18 cleaning function, but concealed that fact so that consumers had no knowledge of the defect. (Cmplt.,
19 ¶¶ 92, 104, 115, 122.) Each of these claims sound in fraud, and thus must be alleged with particularity
20 under Federal Rule of Civil Procedure 9(b). *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1125 (9th Cir.
21 2009) (even though fraud is not a necessary element under the CLRA or the UCL, such a claim alleging
22 the defendant engaged in fraudulent conduct is grounded in fraud and must satisfy heightened pleading
23

24 ⁴ Plaintiffs' Count VII for fraudulent concealment is dismissed pursuant to the economic loss rule, as discussed in the
25 previous section. The lack of specificity discussed in this section is another deficiency Plaintiffs must cure in any amended
claim for fraudulent concealment.

1 standard under rule 9(b)).

2 **1. Elements of Plaintiffs' Fraud-Based Claims**

3 Under California law, the elements of fraud include (1) a misrepresentation (false
4 representation, concealment or nondisclosure); (2) knowledge of falsity; (3) intent to defraud, i.e., to
5 induce reliance; (4) justifiable reliance; and (5) resulting damage. *Robinson Helicopter Co.*, 34 Cal. 4th
6 at 990. Fraudulent concealment is a type of fraud or deceit that requires proof of the same elements.
7 *Lovejoy v. AT&T Corp.*, 119 Cal. App. 4th 151, 158 (2004).

8 The UCL prohibits unfair competition, which it broadly defines as including "any unlawful,
9 unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising."
10 Cal. Bus. & Prof. Code § 17200. Plaintiffs' claim here is predicated on the fraudulent prong of the
11 UCL.⁵ To plead fraud under the UCL, the allegations must be "specific enough to give defendants
12 notice of the particular misconduct which is alleged to constitute the fraud charged so that they can
13 defend against the charge and not just deny that they have done anything wrong." *Semegen v. Weidner*,
14 780 F.2d 727, 731 (9th Cir. 1986). A UCL claim must allege the injuries resulted from the fraudulent
15 conduct, there was a causal connection or reliance on the alleged misrepresentation, and that reasonably
16 prudent purchasers exercising ordinary care would have been misled. *Pirozzi v. Apple, Inc.*, 966 F.
17 Supp. 2d 909, 920-21 (N.D. Cal. 2013).

18 The CLRA prohibits certain "unfair methods of competition and unfair or deceptive acts or
19 practices undertaken by any person in a transaction intended to result or which results in the sale or
20 lease of goods or services to any consumer." Cal. Civ. Code § 1770(a). Generally, the standard for
21 deceptive practices under the fraudulent prong of the UCL applies equally to claims for
22 misrepresentation under the CLRA. *See Consumer Advocates v. Echostar Satellite Corp.*, 113 Cal.

23
24 ⁵ A claim under the UCL's fraud prong is distinct from common law fraud and does not require a plaintiff to plead and prove
25 the elements of a tort. *Boschma v. Home Loan Center, Inc.*, 198 Cal. App. 4th 230, 252 (2011). However, California
Proposition 64, approved in 2004, imposed new standing requirements on UCL Plaintiffs. *In re Tobacco II Cases*, 46 Cal.
4th at 314. As a class representative in this action, Plaintiff must plead actual reliance. *Id.* at 328.

1 App. 4th 1351, 1360 (2003). As such, courts often analyze the statutes together. *See, e.g., Paduano v.*
2 *Am. Honda Motor Co., Inc.*, 169 Cal. App. 4th 1453, 1468-73 (2009). In CLRA claims, like those
3 under the fraudulent prong of the UCL, the representation will not violate the CLRA if the defendant
4 did not know or have reason to know of the facts that rendered the representation misleading at the time
5 it was made. *See Neu*, 2008 WL 2951390, at *3-4 (dismissing CLRA and UCL claims because plaintiff
6 did not sufficiently allege that defendant knew its statements were false or misleading at the time they
7 were made); *see also Wilson v. Hewlett-Packard*, 668 F.3d 1136, 1145-46 (9th Cir. 2012) (UCL and
8 CLRA claims require actual knowledge).

9 The FAL proscribes "mak[ing] or disseminat[ing] . . . any statement . . . which is untrue or
10 misleading, and which is known, or by the exercise of reasonable care should be known, to be untrue or
11 misleading . . ." "with intent directly or indirectly to dispose of real or personal property." Cal. Bus. &
12 Prof. Code § 17500.

13 Electrolux argues Plaintiffs' fraud-based claims lack the requisite specificity to show how
14 Electrolux had actual knowledge of the purported defect in its ovens, what specific misrepresentations
15 or omissions were made by Electrolux, and how Plaintiffs relied on these misrepresentations or
16 omissions to their detriment.

17 **2. Misrepresentation or Omission/Concealment Allegations**

18 Electrolux argues Plaintiffs have failed to articulate with any degree of specificity either an
19 affirmative misrepresentation or concealment or omission by Electrolux. Plaintiffs maintain their
20 fraud-based claims are predicated on fraudulent omissions or concealment, a type of misrepresentation
21 subject to a "somewhat relaxed" 9(b) standard such that a plaintiff only need set forth an explanation as
22 to why the omission was false or misleading, which Plaintiffs argue they have sufficiently alleged.

23 //

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25 //

1 **(a) Plaintiffs' Fraudulent Concealment, CLRA, and UCL Claims Insufficiently**
2 **Plead an Omission/Concealment**

3 Alleging fraudulent omission or concealment is somewhat different from pleading an
4 affirmative misrepresentation in that a plaintiff cannot generally plead either the specific time of an
5 omission or the place it occurred. *Falk v. General Motors*, 496 F. Supp. 2d 1088 (N.D. Cal. 2007)
6 ("Clearly, a plaintiff in a fraud by omission suit will not be able to specify the time, place, and specific
7 content of an omission as precisely as would a plaintiff in a false representation claim."). Despite this
8 distinction, claims sounding in fraud, even concealment or omission claims, still must be pled with
9 particularity. *Kearns*, 567 F.3d at 1126 ("the contention that . . . nondisclosure claims need not be
10 pleaded with particularity is unavailing."). "[T]o plead the circumstances of omission with specificity,
11 [a] plaintiff must describe the content of the omission and where the omitted information should or
12 could have been revealed, as well as provide representative samples of advertisements, offers, or other
13 representations that plaintiff relied on to make her purchase and that failed to include the allegedly
14 omitted information." *Eisen v. Porsche Cars N.A., Inc.*, No. 11-cv-9405 CAS (FEMx), 2012 WL
15 841019, at * 3 (C.D. Cal. Feb. 22, 2012).

16 Plaintiffs allege the thermostat in Electrolux's oven is defective and "burns out" while using the
17 self-cleaning function. (Cmplt., ¶ 12, 13.) Plaintiffs claim Electrolux knew its ovens contained this
18 defect but concealed this fact from consumers. (Cmplt. ¶ 92.) As discussed above, the nature of the
19 defect, and thus the nature of the information Electrolux concealed, is not clear and thus not specific.
20 While Plaintiffs allege and define their oven defect as one pertaining to the oven thermostat causing it
21 to fail during the self-cleaning function, Plaintiffs later appear to allege a broader "electrical defect"
22 that caused ovens to combust and catch fire, melt, and cause damage to other property besides the oven
23 itself, creating a safety hazard. (*Compare* Cmplt., ¶ 12 (defining defect as "oven's thermostat burns out
24 while using the self-cleaning feature of the oven") *with* ¶ 90, 92 (defect in "the electrical system").)
25 Plaintiffs themselves, however, did not allege they experienced an electrical defect in the oven that

1 caused a safety and fire hazard – in fact, Plaintiffs apparently fixed their oven's thermostat and kept the
2 oven, albeit on the admonition not to engage the self-cleaning function without risk of damaging the
3 thermostat again. After defining the "Defect" (Cmplt., ¶ 12), the complaint then refers inconsistently to
4 "Defects" (¶¶ 15, 16). Paragraph 27 uses Defect and Defects interchangeably, and Paragraph 31 returns
5 to claiming there is a "uniform Defect." It is possible the allegations can be clarified, but as the
6 complaint is pled, it is difficult to know the specific nature of *what* defect or defects Electrolux
7 allegedly concealed from Plaintiffs. For this reason, the Court cannot conclude that the circumstances
8 of Electrolux' alleged omission or what information Electrolux withheld from consumers is pled with
9 specificity. Plaintiffs' fraud-based omission/concealment claims are insufficiently pled for this reason.

10 **(b) Plaintiffs' FLA Claim Does Not Plead An Affirmative Misrepresentation**

11 As with Plaintiffs' other fraud-based claims, Electrolux argues Plaintiffs have failed to identify
12 any misrepresentations or untrue and misleading statements to support their FAL claim. Plaintiffs
13 maintain their primary theory is predicated on an omission/concealment and argue it can be sufficiently
14 pled by stating a reason why the omission was false and misleading. Even if the omission/concealment
15 was not identified with requisite specificity, Plaintiffs contend they have adequately alleged Electrolux
16 made misleading statements in the oven's express warranty.

17 A FAL claim is not cognizable when based solely on an omission of material information. *See,*
18 *e.g., Norcia v. Samsung Telecomms. Am., LLC*, No. 14-cv-00582-JD, 2015 WL 4967247, at * 8 (N.D.
19 Cal. Aug. 20, 2015) ("There can be no FAL claim where there is no 'statement' at all.") Even if a FAL
20 claim involves a fraudulent omission or concealment, the complaint must still identify an affirmative
21 statement that was made false or misleading by the omission of relevant and material information.
22 *Hodsdon v. Mars, Inc.*, 162 F. Supp. 3d 1016, 1023 (N.D. Cal. 2016). To the extent Plaintiffs' FAL
23 claim is predicated on a theory of omission, Plaintiffs must identify an actual affirmative statement by
24 Electrolux that was made false by the omission of some material fact. Plaintiffs' FAL claim alleges
25 only generally that Electrolux, through "advertising, marketing and other publications, [made]

1 statements that were untrue or misleading" (Cmplt., ¶ 122.)⁶ If Plaintiffs' FAL claim is predicated
2 on express statements in the warranty, as Plaintiffs suggest in their opposition brief, the complaint must
3 specifically identify these statements so that Electrolux has sufficient notice of the representations
4 Plaintiffs claim were false and misleading. As it stands, Plaintiffs' FAL claim fails to identify an
5 affirmative misrepresentation or misleading statement with the requisite specificity. (See Cmplt., ¶¶
6 120-126.)

7 **3. Plaintiffs' Actual Knowledge Allegations are Insufficient**

8 Electrolux argues Plaintiffs have not sufficiently alleged its actual knowledge of the defect with
9 the self-cleaning feature and the thermostat. Plaintiffs maintain they have thoroughly alleged that
10 Electrolux knew or should have known of the defect through (1) customer complaints posted on a
11 website; (2) early warning systems, statistical analyses, audits, after-market testing, monitoring of
12 warranty statistics and service call rates, tracking of returned products and parts, investigating of
13 product faults, monitoring call center consumer complaints, and monitoring consumer complaints from
14 other sources.

15 The Ninth Circuit's decision in *Wilson v. Hewlett-Packard Co*, 668 F.3d 1136 (9th Cir. 2012)
16 explains the degree of specificity a plaintiff must allege a defendant's actual knowledge of a product
17 defect in fraud claims. Pursuant to *Wilson*, to successfully allege a manufacturer was aware of a defect,
18 a plaintiff is typically required to allege *how* the defendant obtained knowledge of the specific defect
19 *prior* the plaintiff's purchase of the defective product. *Id.* at 1145-48. In that case, Wilson alleged his
20 HP laptop would run on battery power, even when plugged into an a/c adapter, requiring him to replace
21 the motherboard to utilize the laptop. Wilson alleged HP knew of this defect because of its access to
22 aggregate information and data, another lawsuit against HP involving the same defect, and Wilson
23 produced several customer complaints about the defect made by others.

24
25 ⁶ Plaintiffs claim the statements about the oven were false because the oven was sold with a "Defect" (Cmplt., ¶ 124), but the specific defect Plaintiffs is claiming is unclear.

1 The *Wilson* court contrasted actual knowledge allegations in several cases, first comparing cases
2 where the allegations were sufficient. For example, in *Cirulli v. Hyundai Motor Co.*, No. 08-cv-0854-
3 AG-MLGx, 2009 WL 5788762, at *4 (C.D. Cal. June 12, 2009), the plaintiff alleged Hyundai vehicles
4 were defective due to unusual vulnerability to premature oxidation and corrosion leading to structural
5 deterioration. The plaintiff sufficiently alleged Hyundai knew about this defect because it constantly
6 tracked the National Highway Traffic Safety Administration database for reports of defective Sonata
7 sub-frames, and that database revealed Sonatas were experiencing unusually high levels of sub-frame
8 deterioration and other structural deterioration issues. Contrarily, in cases where plaintiffs provided
9 only conclusory allegations that the defendant manufacturer had access to information about the defect
10 or was in a "superior position to know the truth about the [product]," the claims were deemed deficient.
11 *Wilson*, 668 F.3d at 1147 (citing *Tietsworth v. Sears, Roebuck & Co.*, No. 5:09-cv-00288 JF (HRL),
12 2009 WL 3320486, at *4 (N.D. Cal. Oct. 13, 2009); *Oestreicher v. Ailenware Corp.*, 544 F. Supp. 2d
13 964, 974 (N.D. Cal. 2009)). Applying these cases, the *Wilson* court determined the allegation that HP
14 had access to information and data was insufficient to suggest how any tests or information could have
15 alerted HP, the other lawsuit did not specify the defect or allege the same problems, and most of the
16 customer complaints were undated and from an unknown origin.

17 Here, Plaintiffs allege Electrolux had knowledge of the defect, in part, through consumer
18 complaints posted on a consumer affairs website. Electrolux argues it had no reason to know of these
19 complaints because it has no connection to this consumer affairs website nor have Plaintiffs alleged
20 such a connection. Moreover, Electrolux maintains, very few of the complaints are relevant to the
21 thermostat defect Plaintiffs experienced with their oven, and over half the complaints were posted *after*
22 Plaintiffs had purchased Electrolux's oven.⁷

23
24 ⁷ The parties' argument about actual knowledge exemplifies again the vacillation in the complaint with respect to the
25 definition of the "Defect." Even assuming the complaints were made on a forum Electrolux was connected to and would
have or should have known about, only two of the consumer complaints deal with the thermostat and the self-cleaning
function. The other complaints reference problems with the electrical "motherboard" or the electrical system in the oven

1 Consumer complaints or consumer reports of defects at a relevant time and in a manner that
2 would provide notice of the defect to the defendant may be sufficient to show actual knowledge.
3 *Kowalsky v. Hewlett-Packard Co.*, 771 F. Supp. 2d 1156, 1164-65 (N.D. Cal. 2011). Plaintiffs present
4 complaints from a consumer affairs website, but unlike the consumer complaints in *Cirulli* and similar
5 to those considered in *Wilson*, Plaintiffs allege no link between that website and Electrolux, such that
6 Electrolux would have been aware of the complaints. Several people who posted complaints noted they
7 had called Sears to report problems, but none alleged they contacted Electrolux. Without any factual
8 basis showing how Electrolux would have been aware of these consumer complaints, they are
9 insufficient to allege Electrolux's knowledge of the defect. Additionally, of the 23 consumer
10 complaints Plaintiff references, only 10 were made before Plaintiffs purchased Electrolux's product,
11 and of those 10, only two relate to the thermostat and the self-cleaning feature defect.

12 Plaintiffs also allege Electrolux obtained notice of the oven's defect through its own early
13 warning systems and statistical analyses, and because Electrolux conducts a significant amount of after-
14 market testing that should have informed it that the ovens had a defective electrical system. (Cmplt., ¶
15 17.) While Plaintiffs' allegations are more than speculative assertions that Electrolux has knowledge of
16 the defect due to its access to aggregate data or its "superior position," allegations found lacking in
17 *Wilson*, they are too generic and non-specific to meet the requirements under Rule 9(b). Plaintiffs
18 allege Electrolux knew of the defect because of its "early warning systems and statistical analyses that
19 it employs, or should have employed" (Cmplt., ¶ 16.) Not only does this allegation lack
20 specificity as to what early warning system or analyses were employed, it equivocates whether
21 Electrolux actually has such early warning systems or analyses in place. Plaintiffs also allege
22 Electrolux conducted a significant amount of after-market testing, but the complaint lacks any specific
23 details about what type of after-market testing was performed and whether this unidentified testing was

24
25 generally, and do not appear connected to the self-cleaning function burning out the thermostat. (Cmplt., ¶ 31.)

1 performed prior to Plaintiffs' purchase of Electrolux's oven in June 2015.

2 Finally, Plaintiffs allege that Electrolux (1) monitors warranty statistics and service call rates to
3 detect problems as soon as customers begin to experience them, (2) tracks returned products and parts
4 to investigate faults and reduce warranty claims rates, and (3) employs quality engineers to monitor
5 customer complaints from Electrolux's call center to detect problems. However, there are no
6 allegations showing whether complaints were made to Electrolux's call center, or whether customers
7 were otherwise reporting problems to Electrolux or returning the product or parts to Electrolux. To the
8 extent these allegations are made on "information and belief" as noted in the complaint, this lacks the
9 requisite specificity because there is no explanation upon what the belief is founded. *Shroyer v. New*
10 *Cingular*, 622 F.3d 1035, 1043 (9th Cir. 2010) ("Fraud claims predicated on information and belief are
11 not usually sufficiently particular, unless accompanied by a statement of facts on which the belief is
12 founded.").

13 Plaintiffs' claims sounding in fraud (fraudulent concealment, CLRA, UCL, and FAL) lack the
14 requisite specificity in alleging Electrolux had actual knowledge of the purported defect in its ovens.
15 The customer complaints on a consumer affairs website have not been linked to Electrolux to show
16 how Electrolux would have necessarily been aware of these complaints, and the allegations regarding
17 systems or testing that Electrolux may or may not have had in place lack specificity and detail about
18 what testing was performed, when such testing was done, or any allegation showing that complaints or
19 defects were reported to Electrolux during the period before Plaintiffs purchased their oven.

20 **4. Actual Reliance Allegations Are Insufficient**

21 Electrolux argues Plaintiffs' actual reliance allegations for each of their fraud-based claims are
22 inadequate because they fail to explain what marketing materials, statements, or representations
23 Plaintiffs relied upon in making their purchase of Electrolux's product. Reliance can be shown in a
24 fraudulent omission case by establishing that "had the omitted information been disclosed, [the
25 plaintiff] would have been aware of it and behaved differently." *Boschma v. Home Loan Center, Inc.*,

1 198 Cal. App. 4th 230, 250-51 (2011). To sufficiently plead reliance for a UCL claim, the plaintiff
2 must establish that the defendant's misrepresentation or concealment was an immediate cause of the
3 injury-causing conduct. *In re Tobacco II Cases*, 46 Cal. 4th at 326-27.

4 Plaintiffs allege if they, or any of the class members, had known about the defect, they would
5 not have purchased their oven. (Cmplt., ¶¶ 26, 96.) Plaintiffs' allegations about the nature of the defect
6 are inconsistent, and their allegations of reliance on Electrolux's misrepresentations or omissions are
7 mixed with other allegations about a seemingly different type of defect in the oven. Without a specific
8 and clear allegation about the nature of the defect, it is unclear what was concealed from Plaintiffs
9 about the product and whether that information would influence the consumers' decision to buy the
10 product. For this reason, the actual reliance allegations are insufficient.

11 **C. Plaintiff's Claim for Injunctive Relief is Not An Independent Cause of Action**

12 Count IV of the complaint seeks injunctive relief, but injunctive relief is a remedy not an
13 independent cause of action and is subject to dismissal as such. *City of South Pasadena v. Dep't of*
14 *Transp.*, 29 Cal. App. 4th 1280, 1293 (1994). This claim is dismissed as an independent cause of
15 action, but Plaintiffs may include their request for injunctive relief in the prayer of an amended
16 complaint.

17 **D. Warranty-Based Claims**

18 **1. Plaintiff's MMWA Claim**

19 The Magnuson-Moss Warranty Act ("MMWA"), codified at 15 U.S.C. §§ 2301-2312, provides
20 that a consumer may assert a civil cause of action to enforce the terms of an implied or express
21 warranty. Section 2310(d) provides that any "consumer who is damaged by the failure of a supplier,
22 warrantor, or service contractor to comply with any obligation under this chapter, or under a written
23 warranty, implied warranty, or service contract" may sue for damages and any other legal and equitable
24 relief.

1 Plaintiffs allege that Electrolux provided a written warranty to them and the putative class that
2 warranted the oven would be free from defects in materials or workmanship for a year from the original
3 date of purchase including to those customers who purchased extended warranties that added an
4 additional three years' guarantee of non-defective material workmanship. (Cmplt., ¶ 43.) According to
5 Plaintiffs, Electrolux breached the warranty obligations by failing to repair or replace the oven at no
6 charge.

7 Electrolux asserts Sears provided the warranty to Plaintiffs, and since Electrolux did not provide
8 the warranty, Plaintiffs' express warranty claim against it fails.⁸ Electrolux also argues that even if it
9 had issued the warranty, it is limited to materials and workmanship and does not cover design defects.
10 In response, Plaintiffs argue the warranty is available on Electrolux's website, and Electrolux has
11 therefore either authorized the warranty or ratified it. Plaintiffs also argue they alleged manufacturing
12 defects, along with design defects.

13 With few exceptions, the Court must accept as true a complaint's well-pleaded facts in
14 considering a motion to dismiss. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 508 n.1 (2002). The
15 complaint alleges clearly that Electrolux provided a written warranty to Plaintiffs. (Cmplt., ¶ 43.)
16 Electrolux's argument that it did not actually issue the warranty is a dispute about the veracity of the
17 allegations, not the sufficiency of the pleading. Whether the warranty was *actually* issued by Sears or
18 whether Electrolux somehow ratified the warranty by making it available to retailers or otherwise
19 publishing it on its website is a factual determination requiring evidentiary support; it is not appropriate
20 for decision on a motion to dismiss. *Stamas v. County of Madera*, No. 09-cv-0752-LJO-SMS, 2010
21 WL 2556560, at *4-5 (E.D. Cal. June 21, 2010) (factual disputes cannot be resolved on a motion to
22 dismiss).

23
24 ⁸ Electrolux's request for judicial notice of the "Sears' Use & Care Guide for the Kenmore Elite Electric Built-In Oven" for
25 the model number of the Kenmore oven Plaintiffs allegedly purchased is granted. Plaintiffs have referenced the document
in their complaint, and do not dispute the authenticity of the document. Fed. R. Evid. 201(b)(2); *See Parrino v. FHP, Inc.*,
146 F.3d 699, 705-06 (9th Cir.), cert. denied, 525 U.S. 1001 (1998) (holding district court, in ruling on motion to dismiss,
"may consider documents whose contents are alleged in a [pleading] and whose authenticity no party questions").

1 Electrolux also argues the warranty does not cover design defects, which is the sole type of
2 defect Plaintiffs allege. Plaintiffs maintain they have alleged a materials defect covered by the
3 warranty's guarantee of materials and workmanship. The complaint sufficiently alleges the thermostat
4 defect was both a design and manufacturing flaw. (Cmplt., ¶¶ 12, 18 (defect caused by inherent design
5 and manufacturing flaws).) Plaintiffs' warranty claim cannot, at this stage, be considered limited only
6 to a design defect. While the nature of the specific defect alleged should be clarified in an amended
7 complaint, the MMWA claim is pled sufficiently.

8 **2. Plaintiffs' Implied Warranty Claims (Count III and XI)**

9 Plaintiffs allege two implied warranty claims. In Count III, Plaintiffs allege an implied
10 warranty of merchantability under the California Uniform Commercial Code. In Count XI, Plaintiffs
11 state a claim for violation of the California Song-Beverly Consumer Warranty Act. Electrolux argues
12 these claims fail because Plaintiffs have not alleged facts showing their oven was unfit for its ordinary
13 purpose of cooking food.

14 The Song-Beverly Consumer Warranty Act is a "remedial measure intended for the protection
15 of consumers and should be given a construction consistent with that purpose." *Brand v. Hyundai*
16 *Motor Am.*, 226 Cal. App. 4th 1538, 1545 (2014). "The Act provides for both express and implied
17 warranties." *Id.* The substantive elements are the same under the Song-Beverly Act and the [federal]
18 Magnuson-Moss Act." *Birdsong v. Apple, Inc.*, 590 F.3d 955, 958 n.2 (9th Cir. 2009). "Under both,
19 the court applies state warranty law." *Id.*

20 The implied warranty of merchantability requires that "every sale of consumer goods that are
21 sold at retail in [California] shall be accompanied by the manufacturer's and the retail seller's implied
22 warranty that the goods are merchantable." Cal. Civ. Code § 1792. The implied warranty of
23 merchantability requires that the goods "(1) pass without objection in the trade under the contract
24 description; (2) are fit for the ordinary purpose for which those goods are used; (3) are adequately
25 contained, packaged, and labeled; and (4) conform to the promises or affirmation of fact made on the

1 container or label." *Birdsong v. Apple, Inc.*, 590 F.3d 955, 958 n.2 (9th Cir. 2009). A "core test of
2 merchantability is fitness for the ordinary purpose for which the goods are used." *Brand v. Hyundai*
3 *Motor Am.*, 226 Cal. App. 4th 1538, 1546 (2014). "Such fitness is shown if the product is 'in safe
4 condition and substantially free from defects.'" *Id.* (quoting *Mexia v. Rinker Boat Co., Inc.*, 174 Cal.
5 App. 4th 1297, 1303 (2009)). A breach of the implied warranty of merchantability requires a plaintiff
6 to show that the product does "not possess even the most basic degree of fitness for ordinary use."
7 *Mocek v. Alfa Leisure, Inc.*, 114 Cal. App. 4th 402, 406 (2003).

8 **(a) Lack of Fitness for Ordinary Purpose Adequately Alleged**

9 Electrolux maintains that despite the alleged problem with the self-cleaning feature, the oven
10 still performed its basic function to safely and reliably cook food, which negates Plaintiffs implied
11 warranty claim. According to Electrolux, Plaintiffs used their oven for approximately a year after they
12 purchased it and then continued to use the oven after the thermostat problem emerged and was repaired.
13 Plaintiffs respond that the oven was not fit for its ordinary purpose because the oven created a safety
14 hazard. Moreover, Plaintiffs maintain that when an ancillary feature on a product, like the self-cleaning
15 function on Plaintiffs' oven, cannot be used due to a defect, at least one case has held that a product
16 may not be usable for its ordinary purpose. (Doc. 10, 27:18 (citing *Corzine v. Whirlpool Corp.*, No. 15-
17 cv-05764-BLF, 2016 WL 6476172, at * 11-12 (N.D. Cal. Nov. 2, 2016).)

18 While a defective product that causes a safety hazard will generally render that product unfit for
19 its ordinary purpose,⁹ Plaintiffs have not adequately alleged the defective self-cleaning function of their
20 oven created a safety hazard. The allegations indicate Plaintiffs kept their oven after the thermostat
21 problem was discovered and repaired, even though they were warned by the repairperson not to
22 reengage the self-cleaning function. From this allegation, it cannot be presumed the existence of the
23 defect created a safety hazard if Plaintiffs continued to use the oven despite awareness of the defect

24 ⁹ *Roberts v. Electrolux Home Prods. Inc.*, No. 12-cv-1644-CAS (VBKx), 2013 WL 7753579, at *1 (C.D. Cal. Mar. 4, 2013)
25 (breach of implied warranty where, even though drier still functioned, it was not safe for its ordinary purposes because it
caused a fire hazard during use).

1 with the thermostat. The oven was not unfit for its ordinary purposes based on a safety issue, at least as
2 the defect is defined in the complaint. (*See* Cmplt. ¶ 12.)

3 Nevertheless, it appears Plaintiffs oven was unusable for its ordinary purpose between the time
4 the defect manifested during use of the self-cleaning cycle and when Plaintiffs had the thermostat
5 repaired by Sears. (Cmplt., ¶ 21 (after engaging the self-cleaning function, Plaintiffs discovered the
6 oven had stopped working). The inability of the oven to properly heat and cook food after the
7 thermostat was broken by the self-cleaning function rendered the oven unfit for its ordinary purpose.
8 After the thermostat was repaired, Plaintiffs were told never to engage the self-cleaning function again.
9 While the self-cleaning function may be an ancillary feature of the oven, the situation here is different
10 from cases where an ancillary feature itself does not operate as promised, but the product still operates
11 in a safe and reliable manner. For example, as long as a car can provide safe, reliable transportation, it
12 is generally considered merchantable even if certain features such as a navigation system, do not
13 function properly. *See generally In re MyFord Touch Consumer Litig.*, 46 F. Supp. 3d 963, 2014 WL
14 2451291, at *27-28 (N.D. Cal. 2014) (ultimately concluding warranty claim cognizable because failure
15 of navigation/entertainment system created a potential safety hazard). Here, engagement of the self-
16 cleaning function rendered the oven unusable until the thermostat was replaced, and any use of the self-
17 cleaning cycle after that would have allegedly resulted in complete failure of the oven again due to the
18 broken thermostat. To restore the oven to any use, the thermostat had to be replaced. This is
19 distinguishable from an ancillary feature that does not function properly due to a defect, yet the product
20 itself continues to be fit for its ordinary purposes. Neither claim is deficient for failure to allege a lack
21 of fitness for the oven's ordinary purposes.

22
23 **(b) Implied Warranty Claim Under California Commercial Code Fails for Lack
of Vertical Privity**

24 Electrolux argues Plaintiffs' implied warranty claim (Count III) fails because Plaintiffs allege
25 they bought their oven from Sears, so there is no vertical privity between Plaintiffs and Electrolux.

1 Although the Beverly-Song Consumer Warranty Act allows for an implied warranty claim
2 regardless of privity, implied warranty claims under the California Commercial Code still require
3 privity of contract. Under California law, "[t]he general rule is that privity of contract is required in an
4 action for breach of either express or implied warranty and that there is no privity between the original
5 seller and a subsequent purchaser who is in no way a party to the original sale." *Burr v. Sherwin*
6 *Williams Co.*, 42 Cal. 2d 682, 695 (1954). An end consumer who buys from a retailer is not in privity
7 with a manufacturer.

8 Although the parties do not dispute the privity rule applies to Plaintiffs' implied warranty claim
9 under the California Commercial Code, Plaintiffs assert they are third-party beneficiaries of the
10 agreement between Electrolux, the manufacturer of the oven, and Sears, the distributor from whom
11 Plaintiffs purchased the oven. Plaintiffs maintain third-party-beneficiary status is an exception to the
12 rule of privity. Electrolux argues the third-party beneficiary exception is not one recognized under
13 California law in the consumer warranty context, and the Ninth Circuit's decision in *Clemens v.*
14 *DaimlerChrysler Corp.*, 534 F.3d 1017 (9th Cir. 2008) foreclosed such an exception.

15 In *Clemens*, an automobile purchaser alleged DaimlerChrysler had breached express and
16 implied warranties in the sale of a Dodge Neon containing defective head gaskets. The implied
17 warranty claim was dismissed by the district court for lack of privity, and the Ninth Circuit affirmed
18 reasoning that while some particularized exceptions to privity exist, neither the existing exceptions, nor
19 the "similar equities" argued by the plaintiff, applied. The court declined the plaintiff's invitation to
20 create a new privity exception as the "California courts [had] painstakingly established the scope of the
21 privity requirement under California Commercial Code section 2314," and no new exception could be
22 created by a federal court sitting in diversity." *Id.* at 1024.

23 District courts in California are split on a third-party beneficiary exception to privity in the
24 consumer warranty context. Some courts have interpreted *Clemens* to foreclose application of the
25

1 third-party-beneficiary exception to the privity requirement for implied warranty claims.¹⁰ Other courts
2 have distinguished *Clemens* on the ground that it did not expressly consider a third-party-beneficiary
3 exception to privity, and note it was unclear whether the plaintiff in *Clemens* had specifically argued
4 the third-party-beneficiary exception as articulated in *Gilbert Financial Corp. v. Steelform Contracting*
5 *Co.*, 82 Cal. App. 3d 65 (1978).¹¹ In *Gilbert*, a plaintiff engaged a general contractor to construct a
6 building, and the plaintiff subsequently sued a subcontractor whom the general contractor had hired to
7 work on the project. *Id.* at 76. Although the trial court had dismissed the implied warranty claim for
8 lack of privity, the appellate court found it did not need to decide the issue of privity, but instead found
9 the plaintiff was a third-party beneficiary of the contract between the general and the subcontractor and
10 was therefore able to maintain an implied warranty claim.

11 The Court is persuaded that *Clemens* forecloses a third-party-beneficiary exception to the rule of
12 privity. As discussed in *Seagate Tech. LLC Litig.*, 233 F. Supp. 3d 776, 787 (N.D. Cal. 2017), *Clemens*
13 specifically addressed exceptions to privity in the consumer warranty context, but it did not recognize
14 or acknowledge a third-party beneficiary exception. Further, there is no published California authority
15 recognizing this exception to privity in the consumer warranty context. Although other district courts
16 have cited *Gilbert* as California authority recognizing this privity exception,¹² *Gilbert* involved a
17 subcontractor who was building a roof for a specific, identifiable customer. As noted by *Seagate Tech.*,

18
19 ¹⁰ See, e.g., *Long v. Graco Children's Prods. Inc.*, 13-cv-01257-WHO, 2013 WL 4655763, at *12 (N.D. Cal. Aug. 26, 2013)
20 ("[T]he Ninth Circuit does not recognize such an exception under California law, and the Court follows *Clemens*. Although
21 Long identifies several district court cases that allegedly allowed a third-party beneficiary exception, those cases are not
binding on the Court whereas *Clemens* is."); *Xavier v. Philip Morris USA Inc.*, 787 F. Supp. 2d 1075, 1083 (N.D. Cal. 2011)
("No reported California decision has held that the purchaser of a consumer product may dodge the privity rule by asserting
that he or she is a third-party beneficiary of the distribution agreements linking the manufacturer to the retailer who
ultimately made this sale.")

22 ¹¹ *In re MyFord Touch Consumer Litig.*, No. 13-cv-3072-EMC, 2014 WL 2451291, at *31 ("Although *Clemens*, like this
23 case, involved a plaintiff who bought a car from a dealership and then sued the manufacturer for a defect with the car, it is
not clear whether the plaintiff argued for application of the third-party beneficiary exception specifically."); *In re Toyota*
24 *Motor Corp. Unintended Acceleration Mktg., Sales Practices & Prods. Liab. Litig.*, 754 F. Supp. 2d 1145, 1185 (C.D. Cal.
2010) (reasoning that "the Ninth Circuit had no occasion in *Clemens* to consider the California appellate cases recognizing
the third-party beneficiary exception to the vertical privity requirement of implied warranty claims").

25 ¹² See, e.g., *Cartwright v. Viking Industries, Inc.*, 249 F.R.D. 351, 356 (E.D. Cal. 2008).

1 it is not clear that *Gilbert* "compels relaxing the privity rule for all end purchasers of products sold
2 through retailers." *Seagate Tech*, 233 F. Supp. 3d at 787. Standing alone, *Gilbert* is not sufficient to
3 establish that the third-party-beneficiary exception is within the scope of the privity exceptions
4 California courts have "painstakingly established." *Clemens*, 534 F.3d at 1024. This Court is bound by
5 *Clemens* and must dismiss without leave to amend for lack of privity Plaintiffs' implied warranty of
6 merchantability claim under the California Commercial Code. *In re Seagate Tech*, 233 F. Supp. 3d at
7 787; *Xavier*, 787 F. Supp. 2d at 1083; *Gonzalez v. Mazda Motor Corp.*, No. 16-cv-02087-MMC, 2017
8 WL 345878, at *3 (N.D. Cal. Jan. 5, 2017).

9 **V. CONCLUSION**

10 For the reasons set forth above, IT IS HEREBY ORDERED that:

11 1. Electrolux's Motion to Dismiss the following claims is DENIED:

12 a. Count I: Violation of the Magnuson-Moss Warranty Act;

13 b. Count XI: Violation of the Song-Beverly Consumer Warranty Act;

14 2. Electrolux's Motion to Dismiss the following Claims is **GRANTED with leave to**
15 **amend:** Counts V, VI, VII, VIII, IX, and X;

16 3. Electrolux' Motion to dismiss the following claims is **GRANTED without leave to**
17 **amend:**

18 a. Count III: Breach of the Implied Warranty;

19 b. Count IV: Injunctive Relief;¹³ and

20 4. An amended complaint shall be filed within 14 days from the date of this order.

21 IT IS SO ORDERED.

22 Dated: **January 8, 2018**

/s/ Lawrence J. O'Neill
UNITED STATES CHIEF DISTRICT JUDGE

23
24
25 ¹³ This does not preclude Plaintiffs from seeking injunctive relief as a remedy.