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3
4 UNITED STATES DISTRICT COURT
5 NORTHERN DISTRICT OF CALIFORNIA

6 CHEAPSKATE CHARLIE'S LLC, et al.,

7 Plaintiffs,

8 v.

9 LOUISIANA-PACIFIC CORPORATION,

10 Defendant.

Case No. [13-cv-05888-JCS](#)

**ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANT'S
MOTION TO DISMISS**

Dkt. No. 34

11
12
13 **I. INTRODUCTION**

14 In this action, Plaintiffs Cheapskate Charlie's, LLC, Cabinets To Go, Inc., and Boston
15 Cedar, Inc. assert claims for fraud and negligent misrepresentation against Defendant Louisiana-
16 Pacific Corporation. Defendant has filed a Motion to Dismiss (hereafter, "Motion"), contending
17 the First Amended Complaint should be dismissed under Federal Rule of Civil Procedure 12(b)(6)
18 for failure to state a claim. The Court finds this Motion suitable for disposition without oral
19 argument, and vacates the hearing scheduled for July 11, 2014, at 9:30 a.m. *See* Civil L.R. 7-1(b).
20 The time of the Case Management Conference is changed to 2:00 p.m. on July 11, 2014. For the
21 reasons stated below, the Motion is GRANTED in part and DENIED in part.¹

22 **II. BACKGROUND**

23 **A. First Amended Complaint**

24 On or about August of 2008, Louisiana Pacific Corporation (hereafter, "LP" or
25 "Defendant") issued a product advisory for certain decking product sold after January 1, 2005.
26 First Amended Complaint ("FAC") ¶ 13. On May 13, 2009, certain decking products

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28 ¹ The parties have consented to the jurisdiction of a magistrate judge. *See* 28 U.S.C. § 636(c).

1 manufactured by LP were subject to a product recall pursuant to an agreement with the Consumer
2 Products Safety Commission (hereafter, “Recall”). *Id.* ¶ 14. In September of 2010, LP entered
3 into a settlement agreement regarding certain decking product in the class action lawsuit, *Postier,*
4 *et al. v. Louisiana-Pacific Corp.*, No. 09-cv-03290-JCS (hereafter, “Settlement Agreement”). *Id.* ¶
5 15.

6 Plaintiffs allege that on or about September of 2011, Cal Garland d/b/a Meadow River
7 Lumber contacted Boston Cedar with an offer to sell certain decking materials manufactured by
8 LP and suitable for resale to retailers and consumers (hereafter, “the subject decking”). *Id.* ¶ 16.
9 At the time, the subject decking was in LP’s possession. *See id.* ¶ 22.

10 Boston Cedar contacted LP to confirm that the subject decking was suitable for resale to
11 retailers and consumers. *Id.* ¶ 17. Boston Cedar spoke to a production supervisor for LP, Stanley
12 Oliver. *Id.* ¶ 19. Boston Cedar asked Oliver whether the subject decking was suitable for resale to
13 retailers and consumers, and whether it had been subject to the Recall. *Id.* ¶¶ 20-21. Oliver
14 “made statements” to Boston Cedar that the subject decking was suitable for resale to retailers and
15 consumers, and that it was not subject to the Recall. *Id.* ¶¶ 23-24.

16 Plaintiffs allege that prior to delivering the subject decking to Boston Cedar, LP repacked
17 the decking and attempted to remove all prior labels and branding. *Id.* ¶¶ 25-26. By repackaging
18 the decking, LP allegedly made it more difficult to ascertain whether it was subject to the Recall
19 and suitable for resale to retailers and consumers. *Id.* ¶ 27.

20 Boston Cedar purchased the subject decking for \$329,932.80. *Id.* ¶ 28. Boston Cedar then
21 sold the subject decking to Cabinets To Go (hereafter, “CTG”), which sold it to Cheapskate
22 Charlie’s (hereafter, “Cheapskate”). *Id.* ¶¶ 29-30. The decking currently remains in Cheapskate’s
23 possession and continues to accrue storage fees. *Id.* ¶ 31.

24 The First Amended Complaint omits certain allegations that were in Plaintiffs’ original
25 complaint. There, Plaintiffs alleged that Boston Cedar purchased the subject decking from Cal
26 Garland, who had purchased the decking from LP. *See* Dkt. No. 1 at 5-16 (“Original Compl.”) ¶
27 21 (“Garland did purchase directly from LP WeatherBest Decking materials ... which were in turn
28 sold to Boston Cedar, and in turn to Cabinets to Go, and in turn to Cheapskate Charlie’s.”).

1 Plaintiffs also alleged that each downstream purchase was the same price paid by Boston Cedar,
2 meaning that CTG purchased the subject decking from Boston Cedar, and Cheapskate from CTG,
3 for \$329,932.80. *Id.* ¶¶ 22, 24.

4 On September 19, 2012, LP sent a representative to inspect the decking in Cheapskate's
5 possession. *Id.* ¶ 32. Following an inspection, LP informed Plaintiffs that the decking was in fact
6 subject to the Recall and the Settlement Agreement, and therefore, was not suitable for resale to
7 retailers and consumers. *Id.* ¶ 33. LP offered to pay Plaintiffs only \$63,385.80, or \$0.15 per linear
8 foot, for the subject decking. *Id.* ¶ 34.

9 The First Amended Complaint asserts claims for fraud and negligent misrepresentation.
10 *See generally*, FAC. In the claim for fraud, Plaintiffs allege that LP, through its employee, Oliver,
11 falsely represented that the subject decking was not subject to the Recall and was suitable for
12 resale to retailers and consumers. *Id.* ¶ 37. Plaintiffs allege that Oliver knew his statements were
13 false and misleading because of his and LP's superior and first-hand knowledge as the decking
14 manufacturer. *Id.* ¶ 38. Plaintiffs allege that Oliver intentionally concealed the fact that the
15 decking was subject to the Settlement Agreement and not suitable for resale to retailers and
16 consumers, in part by removing all prior labels and branding and repackaging the materials. *Id.* ¶
17 39. Plaintiffs allege that LP intended to deceive and induce Boston Cedar, and that Boston Cedar
18 actually relied on LP's misrepresentations when it purchased the decking. *Id.* ¶¶ 45-46. Plaintiffs
19 allege that such reliance was reasonable, and that Plaintiffs have been damaged as a result. *Id.* ¶¶
20 48, 50.

21 In the claim for negligent misrepresentation, Plaintiffs allege that Oliver made false
22 representations which he either knew or should have known were false because of his and LP's
23 superior, first-hand knowledge as the decking manufacturer. *Id.* ¶¶ 52-53. Plaintiffs allege that
24 Oliver had a duty to disclose to Boston Cedar that the decking was subject to the Recall and not
25 suitable for resale to retailers and consumers, and that LP's repackaging of the decking shows its
26 first-hand familiarity. *Id.* ¶¶ 55, 57.

27 **B. Procedural History**

28 The original complaint in this case was filed on August 27, 2013, in the Circuit Court for

1 the County of Wayne, State of Michigan. *See generally*, Original Compl. Defendant removed the
2 case to United States District Court for the Eastern District of Michigan. Dkt. No. 1 (Notice of
3 Removal). The case was assigned to the Honorable Avern Cohn, who transferred the case to the
4 Northern District of California on December 11, 2013. Dkt. No. 11. The case was subsequently
5 related to *Postier, et al. v. Louisiana-Pacific Corp.*, No. 09-cv-03290-JCS. Dkt. No. 30. On April
6 21, 2014, this Court granted Plaintiffs’ motion to file an amended complaint. Dkt. No. 31.
7 Defendants filed the instant Motion to Dismiss on May 12, 2014. Dkt. No. 34.

8 **III. LEGAL STANDARD**

9 A complaint may be dismissed for failure to state a claim for which relief can be granted
10 under Rule 12(b)(6) of the Federal Rules of Civil Procedure. Fed.R.Civ.P. 12(b)(6). “The
11 purpose of a motion to dismiss under Rule 12(b)(6) is to test the legal sufficiency of the
12 complaint.” *N. Star. Int’l v. Ariz. Corp. Comm’n*, 720 F.2d 578, 581 (9th Cir. 1983). Rule 8(a)
13 requires a complaint to include “a short and plain statement of the claim showing that the pleader
14 is entitled to relief.” Fed.R.Civ.P 8(a). The complaint generally need not contain “detailed factual
15 allegations,” but must allege facts sufficient to “state a claim to relief that is plausible on its face.”
16 *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 547
17 (2007)). There must be sufficient factual allegations “to cross ‘the line between possibility and
18 plausibility.’” *Eclectic Properties E., LLC v. Marcus & Millichap Co.*, No. 12-16526, 2014 WL
19 1797676, at *2, --- F.3d ---- (9th Cir. 2014). “Where a complaint pleads facts that are merely
20 consistent with a defendant’s liability, it stops short of the line between possibility and plausibility
21 of entitlement to relief.” *Iqbal*, 556 U.S. at 678.

22 **IV. DISCUSSION**

23 Defendant contends that the First Amended Complaint should be dismissed under Federal
24 Rule of Procedure 12(b)(6) for failure to state a claim. Defendant argues that Plaintiffs fail to
25 plead facts establishing several of the elements of a fraud claim, specifically, the elements of LP’s
26 intent to induce reliance, Plaintiffs’ justifiable reliance, and injury. Defendant also contends that
27 Michigan law does not recognize a cause of action for negligent misrepresentation in these
28 circumstances, and that the negligent misrepresentation claim fails for the same reasons as the

1 fraud claim.

2 In response to Defendant’s Motion, Plaintiffs contend they have sufficiently pled a claim
3 for fraud under the three theories of fraud recognized under Michigan law: traditional fraud, silent
4 fraud and innocent misrepresentation. Defendant disputes this assertion in the reply brief.

5 Both parties apply Michigan common law when discussing the issues presented in this
6 case, implicitly suggesting and agreeing that Michigan law governs here. Accordingly, the Court
7 will consider whether Plaintiffs have stated claims for fraud and negligent misrepresentation under
8 Michigan law.

9 **B. Whether Plaintiffs State a Claim for Fraud**

10 Under Michigan law, there are six elements to a traditional fraud claim:

11 (1) the defendant made a material representation; (2) the
12 representation was false; (3) when the defendant made the
13 representation, it knew that it was false, or made the representation
14 recklessly, without any knowledge of its truth, and as a positive
15 assertion; (4) the defendant made the representation with the
intention that it should be acted on by the plaintiff; (5) the plaintiff
acted in reliance on the representation; and (6) the plaintiff suffered
injury due to his reliance on the representation.

16 *MacDonald v. Thomas M. Cooley Law Sch.*, 724 F.3d 654, 662 (6th Cir. 2013) (citing *Hord v.*
17 *Envtl. Research Inst. of Mich.*, 463 Mich. 399, 617 N.W.2d 543, 546 (2000) (per curiam)). As
18 noted above, Defendant challenges three of these elements: (1) intent to induce reliance; (2)
19 justifiable reliance; and (3) injury. Each of these issues is addressed in turn.

20 **1. Intent to Induce Reliance**

21 Defendant contends that Plaintiffs fail to adequately plead that LP intended Boston Cedar
22 to act in reliance on his misrepresentation. Plaintiffs allege that “LP, by and through its
23 employees, intended to induce Boston Cedar to act in reliance on its misrepresentations.” FAC ¶
24 45. Allegations of knowledge of falsity and intent to induce reliance may be alleged generally.
25 Fed.R.Civ.P. 9(b). Moreover, the Court finds this allegation plausible based on the facts alleged in
26 the First Amended Complaint. Oliver was a production supervisor for LP, and the subject decking
27 was in LP’s possession at the time of Boston Cedar’s inquiry. *Id.* ¶¶ 19, 22. LP also allegedly
28 removed all prior labels and branding and repackaged the materials prior to sending them to

1 Boston Cedar. *Id.* ¶ 39. These circumstances plausibly suggest that Oliver knew his statement
2 was false and intended Boston Cedar to rely on his statement.

3 Defendant contends that LP had already sold the subject decking to Cal Garland at the time
4 of Boston Cedar’s inquiry, and therefore, had no motivation to induce Boston Cedar’s reliance,
5 rendering this allegation implausible. Motion at 6. Defendants have not, however, cited any
6 authority in support of the proposition that a plaintiff must allege the defendant’s *motivation* to
7 commit fraud. The allegation that Oliver intended to induce reliance is plausible for the reasons
8 noted above, even if Oliver’s motivation is unknown.

9 Plaintiffs do not allege that LP intended CTG and Cheapskate to rely on any false
10 statements. *See* FAC ¶ 45 (alleging that LP intended Boston Cedar to rely). Plaintiffs
11 acknowledge this omission in their First Amended Complaint, and request leave to amend this
12 point. *See* Opposition at 8. Accordingly, the fraud claim asserted on behalf of CTG and
13 Cheapskate is dismissed with leave to amend. In an amended complaint, Plaintiffs may allege
14 facts which plausibly suggest that LP intended downstream purchasers from Boston Cedar to rely
15 on Oliver’s statements.²

16 2. Justifiable Reliance

17 Defendants note that Plaintiffs have failed to allege that CTG and Cheapskate reasonably
18 relied on any false statement made by LP. *See* FAC ¶¶ 46-49 (alleging only that Boston Cedar
19 relied on Oliver’s statements). Plaintiffs do not respond to this argument. *See* Opposition at 8.
20 Because there is no allegation of justifiable reliance on part of CTG and Cheapskate, the fraud
21 claim is dismissed as to CTG and Cheapskate for this additional reason.

22 The First Amended Complaint alleges that Boston Cedar reasonably relied on Oliver’s

23
24 ² Plaintiffs contend that CTG and Cheapskate Charlie’s were reasonably foreseeable
25 victims of LP’s alleged fraud, thus the cause of action for fraud runs to them. *See* Opposition at 8.
26 Plaintiffs cite *Molecular Tech. Corp. v. Valentine*, where the Sixth Circuit, applying Michigan law
27 when discussing a claim for *negligent misrepresentation*, wrote that a defendant owes “a duty in
28 favor of all those third parties who defendant knows will rely on the information *and* to third
parties who defendant should reasonably foresee will rely on the information.” 925 F.2d 910, 916
(6th Cir. 1991) (emphasis in original). “[D]uty is irrelevant in a fraud claim.” *Lucas v. Awaad*,
299 Mich.App. 345, 364, *appeal denied*, 495 Mich. 875 (2013). Therefore, *Valentine* does not
support Plaintiffs’ argument in the context of a claim for fraud.

1 statements because Oliver and LP had superior, first-hand knowledge about the decking as the
2 manufacturer, and there was no reason to believe that an employee of LP would make a
3 misrepresentation about the decking. FAC ¶¶ 48-49. At the time Boston Cedar contacted LP, the
4 subject decking was in LP’s possession, even though it had been sold to Cal Garland. See FAC ¶
5 22. It was not unreasonable for Boston Cedar to inquire with LP about the status of the decking
6 which it had manufactured and was in its possession. Nor was it unreasonable for Boston Cedar to
7 rely on the representations made by a production supervisor for LP. Accordingly, the First
8 Amended Complaint sufficiently pleads that Boston Cedar reasonably relied on Oliver’s
9 representations.

10 Defendant challenges the reasonableness of Boston Cedar’s reliance and contends that
11 Boston Cedar did not adequately investigate the truth of Oliver’s statements. Defendant argues
12 that Boston Cedar should have been suspicious when Cal Garland offered to sell the subject
13 decking with assurances that it was “suitable for resale to retailers and consumers,” FAC ¶ 17,
14 because such explicit assurances are unusual unless something is wrong. Defendants also contend
15 that Boston Cedar was aware of the Recall prior to contacting LP, and therefore, should have
16 inquired further about the status of the decking; for instance, by searching online or by asking Cal
17 Garland.

18 The crux of Defendant’s argument is that Boston Cedar should not have taken Oliver at his
19 word, and should have conducted a more thorough investigation before purchasing the subject
20 decking. Boston Cedar was not, however, under any “independent duty to investigate and
21 corroborate representations” made by Oliver unless Boston Cedar “was given direct information
22 refuting the misrepresentations.” *Titan Ins. Co. v. Hyten*, 491 Mich. 547, 555 n. 4 (2012)
23 (“Ignoring information that contradicts a misrepresentation is considerably different than failing to
24 affirmatively and actively investigate a representation.”). There is no indication that Boston Cedar
25 was ever “given direct information” that the subject decking was subject to the Recall. The fact
26 Boston Cedar was aware of the possibility is insufficient; in fact, that is the very reason Boston
27 Cedar inquired with Oliver.

28

1 Defendant also contends that there is no allegation Oliver was provided with the
2 information he would have needed to make a representation about the decking purchase. Motion
3 at 8. For instance, Defendant argues that Plaintiffs did not allege that Boston Cedar was even
4 considering a purchase, or that the product in question was the same decking that LP had
5 previously sold to Cal Garland. Motion at 8.

6 Defendant is incorrect. Plaintiffs allege that Boston Cedar asked Oliver “if the *subject*
7 *decking* was suitable for *resale* to retailers and consumers.” FAC ¶ 23 (emphasis added). The
8 inquiry regarding Boston Cedar’s ability to resell the decking should have put Oliver on notice
9 that Boston Cedar was considering a purchase so that it could be resold. In other words, the “very
10 nature of Boston Cedar’s question carries with it the undeniable and inherent implication that
11 Boston Cedar intended to resell the subject decking to retailers and consumers.” Opposition at 6.
12 Moreover, the term “subject decking” is defined in the First Amended Complaint as the decking
13 material which Cal Garland offered to sell to Boston Cedar. *See* FAC ¶ 16. Because Plaintiffs
14 allege that Boston Cedar asked Oliver about the “subject decking,” they sufficiently allege that
15 Oliver was provided with the information he would have needed to make an assessment. *See id.* ¶
16 23.

17 3. Injury

18 Defendant contends that Boston Cedar and CTG have suffered no injury because after
19 Boston Cedar purchased the subject decking for \$329,932.80, CTG bought the subject decking
20 from Boston Cedar, and then Cheapskate Charlie’s bought the subject decking from CTG. FAC
21 ¶¶ 29-30. Plaintiffs’ original complaint alleged that all parties paid the same price for the decking
22 (\$329,932.80). Original Compl. ¶¶ 22, 24. Defendants contend that Boston Cedar and CTG
23 cannot assert claims for fraud and negligent misrepresentation because “even if LP tortuously
24 misled Boston Cedar or Cabinets to Go into buying the decking, they have already recovered the
25 full purchase price.” Motion at 9.

26 Defendants cite no authority in support of this position. Even though Boston Cedar sold
27 the subject decking to CTG, who sold it to Cheapskate, their injuries arising from LP’s alleged
28 fraud still exist. Boston Cedar allegedly sold the decking subject to the Recall and the Settlement

1 Agreement to CTG, and therefore may be liable, at the very least, to indemnify CTG for the
2 diminution in the value of the decking. CTG allegedly sold the decking subject to the Recall and
3 the Settlement Agreement to Cheapskate, and therefore may be liable, at the very least, to
4 indemnify Cheapskate for the diminution in the value of the decking. Cheapskate has also
5 suffered an injury, as it may also own decking worth less than its purchase price. Plaintiffs need
6 not allege more to establish that all three Plaintiffs have suffered a plausible injury.³

7 **B. Whether Plaintiffs State a Claim for Silent Fraud or Innocent Misrepresentation**

8 In the opposition brief, Plaintiffs contend that in addition to traditional fraud, the First
9 Amended Complaint sufficiently pleads two other theories of fraud recognized under Michigan
10 law: silent fraud, and what Plaintiffs call “innocent/negligent misrepresentation.” See Opposition
11 at 4. As a threshold matter, the Court notes that under Michigan law, there is a distinction
12 between claims for innocent and negligent misrepresentation. See *Wargelin v. Bank of Am., NA*,
13 No. 12-15003, 2013 WL 5587817, at *7 (E.D. Mich. Oct. 10, 2013), *appeal dismissed* (Apr. 28,
14 2014) (“innocent misrepresentation and negligent misrepresentation are two separate claims, with
15 two separate requirements and therefore these claims cannot be conflated into one catchall”).
16 Plaintiffs plead a separate claim for negligent misrepresentation, which is discussed below. Here,
17 the Court addresses Plaintiffs’ allegations of fraud under the theories of innocent
18 misrepresentation and silent fraud.

19 //

21 ³ Defendant also contends that “[b]ecause these two plaintiffs have no damages, they have
22 *no standing* in this lawsuit and they are not proper parties.” Motion at 9 (emphasis added). To
23 have constitutional standing under Article III, a plaintiff must have suffered an “injury in fact” that
24 is “fairly traceable” to the defendant and can be “redressed” by a favorable decision. *Robins v.*
25 *Spokeo, Inc.*, 742 F.3d 409, 412 (9th Cir. 2014) (citing *Friends of the Earth, Inc. v. Laidlaw Envtl.*
26 *Servs., Inc.*, 528 U.S. 167, 180–81 (2000)). An injury must be “concrete and particularized” and
27 “actual or imminent.” *Id.* Boston Cedar and CGT, like Cheapskate, has standing to bring this
28 action because they are victims of an alleged fraud. This is an “invasion of a legally protected
interest which is ... concrete and particularized.” *Lujan*, 504 F.3d at 561. Boston Cedar and CTG
have a “personal stake in the outcome” of this case because if the dispute is not resolved, they may
be liable for any diminution in the value of the decking. *Baker v. Carr*, 369 U.S. 186, 204 (1962).
Plaintiffs need not allege more at the pleading stage, where “general factual allegations of injury
resulting from the defendant’s conduct may suffice.” *Lujan*, 504 U.S. at 561.

1 **1. Innocent Misrepresentation**

2 “A claim of innocent misrepresentation is shown if a party detrimentally relies upon a false
3 representation in such a manner that the injury suffered by that party inures to the benefit of the
4 party who made the misrepresentation.” *Unibar Maint. Serv. v. Saigh*, 283 Mich.App. 609, 769
5 N.W.2d 911, (Mich.Ct.App.2009) (quoting *M & D, Inc. v. McConkey*, 231 Mich.App. 22, 27, 585
6 N.W.2d 33 (Mich.Ct.App.1998)). “It is not necessary that a plaintiff show a ‘fraudulent purpose’
7 or intent on the defendant’s behalf, or even that the defendant knew that the representation was
8 false.” *Unibar*, 283 Mich.App. at 621 (quoting *McConkey*, 231 Mich.App. at 27-28). “The
9 plaintiff, however, must show that privity of contract existed between the plaintiff and the
10 defendant.” *Unibar*, 283 Mich.App. at 621 (citing *McConkey*, 231 Mich.App. at 28).

11 The First Amended Complaint does not state a claim for innocent misrepresentation
12 because Plaintiffs have not alleged that Boston Cedar was in privity of contract with LP, or that
13 the injury suffered inured to the benefit of LP. The First Amended Complaint demonstrates that
14 Cal Garland offered to sell Boston Cedar the subject decking. FAC ¶ 16. There is no mention of
15 any contract between LP and Boston Cedar. *See id.* Moreover, there is no indication Oliver has
16 benefitted in any way from the alleged fraud. Original Compl. ¶ 21. Accordingly, Plaintiffs
17 cannot prevail on a claim for innocent misrepresentation.

18 **2. Silent Fraud**

19 Under Michigan law, “[s]ilent fraud is essentially the same [as traditional fraud] except
20 that it is based on a defendant suppressing a material fact that he or she was legally obligated to
21 disclose, rather than making an affirmative misrepresentation.” *Barclae v. Zarb*, 300 Mich.App.
22 455, 476 (2013). “[T]he plaintiff must show that the defendant suppressed the truth with the intent
23 to defraud the plaintiff and that the defendant had a legal or equitable duty of disclosure.” *Id.*
24 “Michigan courts have recognized that silence cannot constitute actionable fraud *unless* it occurred
25 under circumstances where there was a *legal duty of disclosure*.” *M&D, Inc. v. W.B. McConkey*,
26 231 Mich.App. 22, 29 (1998) (emphasis added).

27 The “duty” in the context of silent fraud is a duty to disclose. *See id.* The duty to disclose
28 arises when a question is asked and not answered, or is not answered completely, triggering the

1 duty for more complete explanation. *W.B. McConkey*, 231 Mich.App. at 31 (“Our review of
2 Michigan Supreme Court precedent regarding this issue reveals that, in every case, the fraud by
3 nondisclosure was based upon statements by the vendor that were made in response to a specific
4 inquiry by the purchaser, which statements were in some way incomplete or misleading.”).

5 In this case, Plaintiffs allege that they specifically inquired as to whether the subject
6 decking was suitable for resale to retailers and consumers, and whether it had been previously
7 subject to the Recall. FAC ¶¶ 20-21. Plaintiffs also allege, however, that Oliver answered these
8 inquiries by confirming that the subject decking was suitable for resale and was not subject to the
9 Recall. *Id.* ¶¶ 23-24. Plaintiffs allege an *affirmative* misrepresentation, not fraud through silence
10 when there was a legal duty to speak. Accordingly, the facts alleged in the First Amended
11 Complaint do not support a claim for silent fraud.

12 **C. Whether Plaintiffs State a Claim for Negligent Misrepresentation**

13 Defendants contend the claim for negligent misrepresentation fails because Michigan law
14 has only recognized the tort of negligent misrepresentation in the context of an abstracter
15 negligently performing a title search. Motion at 9 (citing *Williams v. Polgar*, 391 Mich. 6 (1974)).
16 In *Polgar*, the Michigan Supreme Court “adopt[ed] the tort action of negligent misrepresentation
17 *in this context.*” *Id.* at 21 (emphasis added). The Michigan Supreme Court has not discussed the
18 tort of negligent misrepresentation since deciding *Polgar*. See *MacDonald v. Tomas M. Cooley*
19 *Law School*, 724 F.3d 654, 666 (6th Cir. 2013). Nevertheless, as discussed by the Sixth Circuit in
20 *MacDonald*, the Michigan Court of Appeals has recognized this tort in other contexts. See *id.*
21 (citing *Alfieri v. Bertorelli*, 295 Mich.App. 189 (2012); *Unibar Maint. Servs., Inc. v. Saigh*, 283
22 Mich.App. 609, 769 (2009); *The Mable Cleary Trust v. The Edward-Marlah Muzyl Trust*, 262
23 Mich.App. 485 (2004); *Law Offices of Lawrence J. Stockler, P.C. v. Rose*, 174 Mich.App. 14
24 1989)). “[O]rdinarily a state’s intermediate appellate court decisions are the best authority in the
25 absence of any supreme court precedent.” *MacDonald*, 724 F.3d at 663 (quoting *United States v.*
26 *Simpson*, 520 F.3d 531, 536 (6th Cir. 2008)). Accordingly, the Court finds that Michigan law
27 recognizes a cause of action for negligent misrepresentation.

28 Defendant argues that because the negligent misrepresentation claim requires many of the

1 same elements as the claim for fraud (i.e., materiality, actual reliance, justifiable reliance, and
2 damages), Plaintiffs’ claim for negligent misrepresentation fails for the same reason as the fraud
3 claim. The Court found above that Boston Cedar’s fraud claim is sufficiently pled. Accordingly,
4 the discussion above regarding the fraud claim does not provide grounds to dismiss the negligent
5 misrepresentation claim asserted on behalf of Boston Cedar.

6 However, as discussed above, the First Amended Complaint fails to allege that LP
7 intended CTG and Cheapskate to rely on the representations of its employees, or that CTG and
8 Cheapskate reasonably relied on Oliver’s statements. Accordingly, the negligent
9 misrepresentation claim fails as to CTG and Cheapskate.

10 Under Michigan law, “[a] claim for negligent misrepresentation requires plaintiff to prove
11 that a party justifiably relied to his detriment on information prepared without reasonable care by
12 one *who owed the relying party a duty of care.*” *Alfieri*, 295 Mich.App. at 194 (quoting *Unibar*
13 *Maint. Servs.*, 283 Mich.App. at 621) (emphasis added). Whether a defendant owed the plaintiff a
14 legal duty is a question of law. *Murdock v. Higgins*, 454 Mich. 46, 53 (1997). In determining
15 whether to impose a duty, courts evaluate factors such as the relationship of the parties, the
16 foreseeability of the harm, the burden on the defendant, and the nature of the risk presented. *Id.*
17 After a finding that a duty exists, the factfinder must then determine whether there was a breach of
18 the duty in light of the particular facts of the case. *Id.*

19 Plaintiffs allege that LP had a duty to disclose that the subject decking was subject to a
20 Recall. FAC ¶ 59. As a threshold matter, a “duty” in the context of negligent misrepresentation is
21 a duty of care. *Alfieri*, 295 Mich.App. at 194. Plaintiffs cite no authority for the proposition that
22 LP would owe Plaintiffs a duty of care under the circumstances of this case.

23 In *Polgar*, the Michigan Supreme Court emphasized that an abstracter would be liable for
24 negligently performing a title search, but only to the extent the abstracter was negligent in
25 performing his or her “contractual duty.” *Polgar*, 391 Mich. at 22. Moreover, in Michigan,
26 insurance agents owe no duty to advise the insured regarding the adequacy of coverage unless
27 there is some sort of “special relationship” between the insurer and the insured. *See e.g., Zaremba*
28 *Equip., Inc. v. Harco Nat’l Ins. Co.*, 280 Mich.App. 16, 21 (2008). Neither situation applies here:

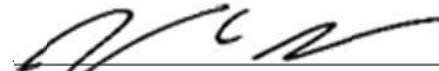
1 there was no contract between Defendant and Plaintiffs, and there appears to have been no special
2 relationship between Defendant and Plaintiffs. Because Plaintiffs fail to plead facts showing they
3 were owed a duty, the negligent misrepresentation claim fails as currently pled.

4 **V. CONCLUSION**

5 For the foregoing reasons, the Motion is GRANTED in part and DENIED in part. The
6 claim for fraud asserted on behalf of CTG and Cheapskate, and the claim for negligent
7 misrepresentation asserted on behalf of all plaintiffs, are DISMISSED WITH LEAVE TO
8 AMEND. If Plaintiffs choose to file an amended complaint, they must do so within thirty (30)
9 days of this order.

10 **IT IS SO ORDERED.**

11 Dated: June 24, 2014

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14 JOSEPH C. SPERO
15 United States Magistrate Judge
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