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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

MONTEVILLE SLOAN, et al.,

Plaintiffs,

v.

GENERAL MOTORS LLC,

Defendant.

Case No. [16-cv-07244-EMC](#)

**ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANT’S
MOTION TO DISMISS SECOND
AMENDED COMPLAINT**

Docket No. 70

Plaintiffs allege that Defendant General Motors (GM) manufactured and sold a car engine that, due to several internal defects, consumes excessive amounts of oil, resulting in engine damage that presents a safety risk of sudden shutdowns or engine fires. GM moves to dismiss on several grounds which can broadly be grouped under challenges to personal jurisdiction for the out-of-state plaintiffs; failure to plead an unreasonable safety hazard or pre-sale knowledge that gives rise to a duty to disclose in support of the consumer protection and fraud claims; failure to adequately plead reliance on the omission; failure to allege the defect manifested during the implied warranty period; and various statute of limitations or pre-suit notice issues.

As explained below, Defendant’s motion is **GRANTED IN PART** and **DENIED IN PART**.

I. FACTUAL AND PROCEDURAL HISTORY

Plaintiffs allege that the Gen IV Vortec 5300 engine suffers from an “inherent” “Oil Consumption Defect.” SAC ¶ 7. The engine was installed in each of the Class Vehicles: the 2010-2014 Chevrolet Avalanche; 2010-2012 Chevrolet Colorado; 2010-2013 Chevrolet Express; 2010-2013 Chevrolet Silverado; 2010-2014 Chevrolet Suburban; 2010-2014 Chevrolet Tahoe; 2010-2013 GMC Canyon; 2010-2013 GMC Savana; 2010-2013 GMC Sierra; 2010-2014 GMC

1 Yukon; and the 2010-2014 GMC Yukon XL. *Id.* ¶ 2.

2 Plaintiffs identify five defects that “contribute” to the overall “Oil Consumption Defect.”
3 First, the “primary cause” are “piston rings . . . [that] do not maintain sufficient tension to keep oil
4 in the crankcase.” SAC ¶ 8. Second, the Active Fuel Management (AFM) system “contributes” to
5 the defect by “spraying oil directly at the piston skirts,” which “overloads and fouls the defective
6 piston rings, triggering oil migration past the rings.” SAC ¶ 9. Third, the PCV system “vacuums
7 oil from the valvetrain into the intake system, where it is ultimately burned in the combustion
8 chambers” contributing to excessive oil combustion. SAC ¶ 10. Fourth, the defective “Oil Life
9 Monitoring System” does not monitor oil level, but rather, engine conditions like revolutions and
10 temperature to predict oil quality. SAC ¶ 11. Because it does not take oil *level* into account, the
11 system “directs drivers to travel thousands of miles with inadequate engine lubricity levels,
12 wearing out and damaging moving internal engine components.” *Id.* Fifth, the oil pressure gauge
13 “*does not* provide any indication as to when the oil pressure . . . falls to levels low enough to
14 damage internally lubricated parts or cause engine failure” and the oil canister symbol does not
15 illuminate “until well past the time when the Class Vehicles are critically oil starved.” SAC ¶ 13.

16 Plaintiffs also discuss the impact of the alleged defect on their own vehicles and on other
17 consumers. The nature of these allegations is discussed in detail in the relevant sections below.

18 The chart below identifies each named plaintiff, the state of purchase, the date of purchase,
19 and the vehicle purchased.

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Chart of Named Plaintiffs in SAC

Name	State of Purchase	Car	Date of Purchase
Raul Siqueiros	California	2011 Chevrolet Silverado	N/A
Joseph Brannan	Alabama	2010 GMC Yukon	2011
Larry Goodwin	Arkansas	2011 Chevrolet Silverado	2010
Marc Perkins	Delaware	2011 Chevrolet Avalanche	2011
Donald Ludington	Florida	2010 Chevrolet Tahoe	2012
Thomas Shorter	Florida	2011 Chevrolet Silverado	N/A
Derick Bradford	Georgia	2010 Chevrolet Silverado	2014
Gabriel Del Valle	Idaho	2013 Chevrolet Avalanche	2/2016
Kevin Hanneken	Illinois	2011 GMC Sierra 1500	2011
Dan Madson	Kansas	2013 Chevrolet Silverado	12/2013
James Faulkner	Kentucky	2011 GMC Sierra	2015
Joseph Olivier	Louisiana	2013 GMC Sierra	N/A
Scott Smith	Massachusetts	2011 GMC Yukon	2012
Ross Dahl	Minnesota	2010 Chevrolet Silverado	2010
Drew Peterson	Minnesota	2013 Chevrolet Silverado	12/2012
Michael Ware	Mississippi	2013 Chevrolet Silverado	2016
Steve Kitchen	Missouri	2013 Chevrolet Silverado	07/2013
Barbara Molina	New Mexico	2012 Chevrolet Avalanche	N/A
Steven Ehrke	North Carolina	2013 Chevrolet Silverado	2/2016
Thomas Gulling	Ohio	2013 Chevrolet Silverado	N/A
Ronald Jones	Ohio	2013 Chevrolet Silverado	N/A
Mike Warpinski	Oklahoma	2012 Chevrolet Express	2014
John Graziano	Pennsylvania	2012 Chevrolet Silverado	12/2011
Monteville Sloan	California	2013 Chevrolet Silverado	08/2014
Joshua Byrge	Tennessee	2012 Chevrolet Silverado	2016
Rudy Sanchez	Texas	2013 Chevrolet Silverado	07/2013
Christopher Thacker	Virginia	2010 Chevrolet Silverado	06/2014
Randy Clausen	Washington	2012 Chevrolet Suburban	2013
James Robertson	West Virginia	2010 GMC Sierra 1500	2010
Jonas Bednarek	Wisconsin	2010 Chevrolet Suburban	2010
Todd & Jill Cralley	California	2010 Chevrolet Suburban	N/A
Edwin & Katelyn Doepel	Illinois	2013 GMC Yukon	N/A
Dennis Vita	New York	2013 GMC Sierra	N/A
William Martel	Oregon	2011 Chevrolet Silverado	2011
Kelly Harris	N/A (Received from employer)	2012 Chevrolet Silverado	2012

II. LEGAL STANDARD

In considering a Rule 12(b)(6) motion to dismiss, a court must take all allegations of fact as true and construe them in the light most favorable to the nonmoving party, although “conclusory allegations of law and unwarranted inferences are insufficient to avoid a Rule

1 12(b)(6) dismissal.” *Cousins v. Lockyer*, 568 F.3d 1063, 1067 (9th Cir. 2009). While “a
2 complaint need not contain detailed factual allegations . . . it must plead ‘enough facts to state a
3 claim to relief that is plausible on its face.’” *Id.* “A claim has facial plausibility when the plaintiff
4 pleads factual content that allows the court to draw the reasonable inference that the defendant is
5 liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 1949, 173
6 L.Ed.2d 868 (2009); *see also Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556, 127 S.Ct. 1955, 167
7 L.Ed.2d 929 (2007). “The plausibility standard is not akin to a ‘probability requirement,’ but it
8 asks for more than sheer possibility that a defendant acted unlawfully.” *Id.*

9 Claims sounding in fraud or mistake are subject to the heightened pleading requirements of
10 Federal Rule of Civil Procedure 9(b), which requires that a plaintiff alleging fraud “state with
11 particularity the circumstances constituting fraud.” Fed. R. Civ. P. 9(b); *see Kearns v. Ford Motor*
12 *Co.*, 567 F.3d 1120, 1124 (9th Cir. 2009) (holding that nondisclosure claims sound in fraud and
13 are subject to Rule 9(b)). To satisfy the heightened standard under Rule 9(b), the allegations must
14 be “specific enough to give defendants notice of the particular misconduct which is alleged to
15 constitute the fraud charged so that they can defend against the charge and not just deny that they
16 have done anything wrong.” *Semegen v. Weidner*, 780 F.2d 727, 731 (9th Cir. 1985). The
17 plaintiff must set forth “what is false or misleading about a statement, and why it is false.” *In re*
18 *Glenfed, Inc. Sec. Litig.*, 42 F.3d 1541, 1548 (9th Cir.1994) (en banc), *superseded by statute on*
19 *other grounds as stated in Ronconi v. Larkin*, 253 F.3d 423, 429 n. 6 (9th Cir. 2001).

20 **III. DISCUSSION**

21 Defendant raises numerous challenges to Plaintiffs’ Second Amended Complaint (“SAC”),
22 including whether:

- 23 • there is personal jurisdiction for the out-of-state plaintiffs;
- 24 • the fraud and consumer protection claims have been adequately pleaded;
- 25 • the implied warranty claims fail for failure to allege the vehicles were unfit for use;
- 26 and
- 27 • various statute of limitations or pre-suit notice procedural challenges bar Plaintiffs’
28 implied warranty, unjust enrichment, and consumer protection claims.

1 Each challenge is analyzed below.

2 A. Personal Jurisdiction

3 Defendant argues that *Bristol-Myers Squibb Co. v. Sup. Ct. of Cal.*, 137 S.Ct. 1773 (2017),
4 requires dismissal for lack of personal jurisdiction of all claims by non-California named plaintiffs
5 who did not purchase their cars in California. Plaintiffs argue this challenge has been waived
6 because Defendant made general appearances and did not object to personal jurisdiction in a
7 timely fashion. Defendant filed its first motion to dismiss on April 10, 2017, Docket No. 47, but
8 the hearing was held on July 5, 2017, Docket No. 60, after the Supreme Court decided *Bristol-*
9 *Myers* on June 19, 2017. Defendant counters that there was no waiver, and, even if there were, it
10 would not apply to the new plaintiffs who were added only to the Second Amended Complaint
11 and for whom this motion is the first opportunity to challenge personal jurisdiction. The Court
12 requested, and the parties have filed, supplemental briefing. *See* Docket Nos. 87 and 88.

13 As explained below, Defendant failed to raise its challenge to personal jurisdiction at the
14 first available opportunity with respect to 27 non-California plaintiffs.¹ However, this is
15 Defendant’s first opportunity to challenge personal jurisdiction with respect to five named
16 plaintiffs who were added to the case in the Second Amended Complaint: the Doepels (Illinois),
17 Vita (New York), Martell (Oregon), and Harris (Washington).

18 1. Waiver of Challenge to Personal Jurisdiction as to Original Plaintiffs Already in
19 Case

20 Rule 12 permits a party to request dismissal on the basis that a court lacks personal
21 jurisdiction. *See* Rule 12(b)(2). However, that defense is “waive[d]” if a party “fail[s] to . . . (i)
22 make it by motion under this rule; or (ii) include it in a responsive pleading or in an amendment
23 allowed by Rule 15(a)(1) as a matter of course.” Fed. R. Civ. P. 12(h)(1). This “strict waiver
24

25 ¹ There are only 5 named plaintiffs who reside in California or who purchased vehicles in
26 California, and for whom Defendant has not challenged personal jurisdiction (Sloan, Siqueiros,
27 Del Valle, and the Cralleys). Thus, the waiver applies to 27 plaintiffs who were previously named
28 and for whom timely challenges were not made (Brannan, Goodwin, Perkins, Ludington, Shorter,
Bradford, Hanneken, Madson, Faulkner, Olivier, Smith, Dahl, Peterson, Ware, Kitchen, Molina,
Ehrke, Gulling, Jones, Warpinski, Graziano, Byrge, Sanchez, Thacker, Clausen, Robertson, and
Bednarek).

1 rule” “extends only to defenses ‘then available.’” *Glater v. Eli Lilly & co.*, 712 F.2d 735, 738
2 (1983) (quoting Fed. R. Civ. P. 12(g)). To show a defense was not previously available, a
3 defendant must demonstrate that it “would have been directly contrary to controlling precedent in
4 this Circuit.” *Gucci Am., Inc. v. Weixing Li*, 768 F.3d 122, 135-36 (2d Cir. 2014).

5 Defendant did not challenge personal jurisdiction over the claims of the original Plaintiffs
6 at the first opportunity. Though the issue had been percolating (the appeal of *Bristol-Myers* to the
7 U.S. Supreme Court was already pending), Defendant failed to challenge personal jurisdiction
8 over those Plaintiffs. Then, *Bristol-Myers* was decided approximately two weeks *before* the
9 hearing on Defendant’s first motion to dismiss. Defendant could have filed a notice of
10 supplemental authority or could have requested leave from the Court to submit supplemental
11 briefing, but it failed to do so. Moreover, Defendant did not object to personal jurisdiction at the
12 hearing on its motion. Accordingly, the argument was waived.

13 Defendant has not shown that the exception for an argument previously “unavailable”
14 applies here. Contrary to Defendant’s contention, *Bristol-Myers* did not reverse any Ninth Circuit
15 precedent foreclosing Defendant’s challenge. Indeed, the Supreme Court expressly stated that its
16 decision did not inaugurate a change in law. *See Bristol-Myers*, 137 S.Ct. at 1781 (“Our settled
17 principles . . . control this case.”); *id.* at 1783 (“Our straightforward application in this case of
18 settled principles of personal jurisdiction will not result in the parade of horrors that respondents
19 conjure up.”). Further, the Supreme Court limited its holding and expressly stated that the very
20 question raised by Defendant’s challenge here was not addressed in *Bristol-Myers*. *Id.* at 1783-84
21 (“[S]ince our decision concerns the due process limits on the exercise of specific jurisdiction *by a*
22 *State*, we leave open the question whether the Fifth Amendment imposes the same restrictions on
23 the exercise of personal jurisdiction by a federal court.” (emphasis added)).

24 Moreover, Defendant has not identified a single Ninth Circuit case overturned by *Bristol-*
25 *Myers*. *See Alvarez v. Nbtv, Inc.*, 2017 WL 6059159, at *4, n.2 (S.D. Cal. Dec. 6, 2017) (holding
26 that personal jurisdiction defense was previously available because *Bristol-Myers* did not overturn
27 controlling precedent). Nor has Defendant identified controlling precedent in the Ninth Circuit
28 directly precluding its jurisdictional argument. Rather, Defendant’s sole argument is that the

1 Supreme Court reversed the California Supreme Court and Defendant should not have been
2 expected to take a position contrary to *that* court. This argument is unpersuasive for two reasons.

3 First, the California Supreme Court’s decision in *Bristol-Myers* did not control
4 Defendant’s available defenses. Though a federal court looks to the long-arm statute of the state
5 in which it resides to determine whether it may exercise personal jurisdiction over an out-of-state
6 defendant, California law permits the exercise of personal jurisdiction to the maximum extent
7 permitted under the U.S. constitution’s due process clause. *See* Cal. Civ. Proc. Code § 410.10.
8 Thus, the outer boundaries of California personal jurisdiction (and therefore this Court’s)
9 concerned a federal question over which the Ninth Circuit and U.S. Supreme Court had ultimate
10 authority, not a question of state law over which the California Supreme Court’s decisions
11 controlled. The California Supreme Court’s decision did not constitute controlling Ninth Circuit
12 authority.

13 Second, the California Supreme Court’s opinion was sharply divided in a four-three vote
14 with a published dissent, *see Bristol-Myers Squibb Co. v. Sup. Ct.*, 1 Cal.5th 783 (2016), and the
15 U.S. Supreme Court granted certiorari on January 19, 2017, *see* 137 S.Ct. 827 (2017). Thus, it is
16 not credible to suggest that by the time Defendant filed its first motion to dismiss four months later
17 on April 10, 2017, *see* Docket No. 47, it felt so constrained by the California Supreme Court’s
18 divided opinion that it could not have been expected to raise or at the very least preserve a
19 personal jurisdiction challenge in this case. And even to the extent Defendant felt constrained by
20 the California Supreme Court, that does not explain why Defendant did not take advantage of a
21 two-week window between *Bristol-Myers* and the hearing on its first motion to dismiss to notify
22 the Court it intended to challenge personal jurisdiction.

23 Finally, Defendant has argued that the waiver of personal jurisdiction is discretionary. The
24 Court is not persuaded. Rule 12’s language is mandatory, not discretionary. *See* Fed. R. Civ. P.
25 12(g)(2) (a party making a motion “*must not* make another motion under this rule raising a defense
26 or objection that was available to the party but omitted from its earlier motion” (emphasis added));
27 Fed. R. Civ. P. 12(h)(1) (“A party *waives* any defense listed in Rule 12(b)(2)-(5) by: (A) omitting
28 it from a motion in the circumstances described in Rule 12(g)(2)” (emphasis added)).

1 Defendant cites only one case to support this contention, *Greene v. Mizuho Bank, Ltd.*, 2017 U.S.
2 Dist. LEXIS 202802 (D. Ill. Dec. 11, 2017), but *Greene* is distinguishable. There, the defendant
3 filed a motion to dismiss for lack of personal jurisdiction *before* the Supreme Court’s decision in
4 *Bristol-Myers*, and sought reconsideration afterwards. In those circumstances, the court excused
5 the fact that Defendant’s initial personal jurisdiction challenge was based on a different theory and
6 explained that it “retain[ed] the independent power to identify and apply the proper construction of
7 governing law, even where the parties fail to advert to the applicable rule in their own briefing.”
8 *Id.* at *18 (quotations, citations, and alterations omitted). Importantly, there had been no waiver
9 because the defendant had actually challenged personal jurisdiction before *Bristol-Myers*. In
10 contrast, here, Defendant did not attempt to challenge personal jurisdiction prior to the present
11 motion.

12 Even if the Court could exercise its discretion to excuse the waiver, however, such an
13 excuse would be unwarranted. Defendant has not explained why it could not have alerted the
14 Court to its intention to challenge personal jurisdiction at the hearing on its initial motion to
15 dismiss. Moreover, the purpose of Rule 12(g)’s requirement that all challenges be presented in a
16 single motion to dismiss is “to eliminate unnecessary delay at the pleading stage.” Fed. Prac. &
17 Proc. § 1384 (3d ed.). By failing to notify the Court that it intended to challenge personal
18 jurisdiction at that initial hearing, Defendant forced the court to adjudicate plaintiffs’ claims on the
19 merits before considering a potentially dispositive threshold issue.

20 Because Defendant’s challenge to personal jurisdiction with respect to the original named
21 plaintiffs was not raised at the first available opportunity. Defendant’s jurisdictional challenge to
22 these Plaintiffs has been waived.

23 2. The Court Has Personal Jurisdiction Over the New Out-of-State Named Plaintiffs’
24 Claims

25 Nevertheless, this motion is Defendant’s first opportunity to challenge personal jurisdiction
26 with respect to the plaintiffs *newly* named in the SAC, so that challenge must be considered on the
27 merits. This challenge applies to Plaintiffs Mr. and Mrs. Doepel (Illinois), Plaintiff Vita (New
28 York), Plaintiff Martell (Oregon), and Plaintiff Harris (Washington). Their claims only involve

1 two new states (New York and Oregon) because Plaintiffs Hanneken and Clausen, with respect to
2 whom the personal jurisdiction challenge has been waived, also bring claims under Illinois and
3 Washington law, respectively.

4 Whether the Court may assert specific jurisdiction over a nonresident defendant “focuses
5 on the relationship among the defendant, the forum, and the litigation.” *Axiom Foods, Inc. v.*
6 *Acerchem Int’l, Inc.*, 874 F.3d 1064, 1068 (9th Cir. 2017) (quotation and citation omitted). “[T]he
7 defendant’s suit-related conduct must create a substantial connection with the forum State.” *Id.*
8 (quotation and citation omitted). Three requirements must be met: “(1) the defendant must either
9 purposefully direct his activities toward the forum or purposefully avail himself of the privileges
10 of conducting activities in the forum; (2) the claim must be one which arises out of or relates to the
11 defendant’s forum-related activities; and (3) the exercise of jurisdiction must comport with fair
12 play and substantial justice, i.e., it must be reasonable.” *Id.* (quotation and citations omitted).

13 a. The Supreme Court’s Holding in *Bristol-Myers*

14 Defendant challenges personal jurisdiction on the basis of *Bristol-Myers*, which relates to
15 the second prong, whether “the claim . . . arises out of or relates to the defendant’s forum-related
16 activities.” *Id.* In *Bristol-Myers*, plaintiffs from around the country sued Bristol-Myers Squibb
17 Company (BMS) in California state court, alleging that its drug Plavix damaged their health and
18 violated, *inter alia*, California products liability, negligent misrepresentation, and misleading
19 advertising laws. BMS itself was an out-of-state defendant, incorporated in Delaware and
20 headquartered in New York. It sold Plavix in California and engaged in other business activities
21 there, but it “did not develop Plavix in California, did not create a marketing strategy for Plavix in
22 California, and did not manufacture, label, package, or work on the regulatory approval of the
23 product in California.” 137 S.Ct. at 1778. The California Supreme Court had nevertheless
24 reasoned that the exercise of specific jurisdiction over the out-of-state plaintiffs’ claims was
25 reasonable under its “sliding scale approach to specific jurisdiction” under which “the more wide
26 ranging the defendant’s forum contacts, the more readily is shown a connection between the forum
27 contacts and the claim” because the claims by all plaintiffs were “based on the same allegedly
28 defective product and the assertedly misleading marketing and promotion of that product.” *Id.* at

1 1779 (quotations and citations omitted).

2 The U.S. Supreme Court disagreed. That Court emphasized that the interests to be
3 considered in determining whether personal jurisdiction exists include “the interests of the forum
4 State and of the plaintiff in proceeding with the cause in the plaintiff’s forum of choice,” but that
5 the “primary concern is the burden on the defendant.” *Id.* at 1780 (quotations and citations
6 omitted). This analysis “obviously requires a court to consider the practical problems resulting
7 from litigating in the forum, but it also encompasses the more abstract matter of submitting to the
8 coercive power of a State that may have little legitimate interest in the claims in question.” *Id.* As
9 the Supreme Court explained, the principle of personal jurisdiction is in part “a consequence of
10 territorial limitations on the power of the respective States,” as “[t]he sovereignty of each
11 State . . . implie[s] a limitation on the sovereignty of all its sister states.” *Id.* at 1780 (citations and
12 quotations omitted). These federalism concerns underpinned *Bristol-Myers*.

13 Because of these significant interstate federalism concerns, the Supreme Court rejected the
14 notion that mere factual or legal *similarity* between the California plaintiffs’ claims and the non-
15 resident plaintiffs’ claims somehow sufficed to create personal jurisdiction. “The mere fact that
16 *other* plaintiffs were prescribed, obtained, and ingested Plavix in California—and allegedly
17 sustained the same injuries as did the nonresidents—does not allow the State to assert specific
18 jurisdiction over the nonresidents’ claims.” *Bristol-Myers*, 137 S.Ct. at 1781. Rather, “[w]hat is
19 needed . . . is a connection between the forum and the specific claims at issue.” *Id.* The plaintiffs
20 could not demonstrate such a connection with respect to the out-of-state plaintiffs because
21 defendant had not done anything related to *their* claims in California. Accordingly, the Supreme
22 Court held that California state courts lacked specific personal jurisdiction over out-of-state
23 defendants for claims brought by out-of-state plaintiffs, where there were no sufficient contacts
24 between defendants’ conduct in connection with those claims and the forum state, California. 137
25 S. Ct. at 1782-83. This conclusion was driven by the limitations of state sovereignty. Indeed,
26 before analyzing the lack of a connection between California and the nonresident plaintiffs’
27 claims, the Supreme Court emphasized that “at times, [the] federalism interest may be decisive” in
28 the personal jurisdiction analysis. *Id.* at 1780 (quotation omitted). It noted that, “[e]ven if the

1 defendant would suffer minimal or no inconvenience from being forced to litigate before the
2 tribunals of another State; even if the forum State has a strong interest in applying its law to the
3 controversy; even if the forum State is the most convenient location for litigation, the Due Process
4 Clause, *acting as an instrument of interstate federalism*, may sometimes act to divest the State of
5 its power to render a valid judgment.” *Id.* at 1780-81 (quoting *World-Wide Volkswagen Corp. v.*
6 *Woodson*, 444 U.S. 286, 293 (1980) (alteration in original, emphasis added)).

7 b. Defendant’s Challenge Under *Bristol-Myers*

8 Defendant contends that *Bristol-Myers* applies in a straight-forward manner to this case
9 because the out-of-state plaintiffs cannot allege any act in California that touches on their claims.
10 Plaintiffs do not allege, for example, that the defective vehicles were designed or manufactured in
11 California, that the decision not to disclose the defect was made in California, or that marketing
12 materials omitting the defect and used nationwide were designed in or promulgated from
13 California to their states. *Compare Bristol-Myers Squibb*, 137 S.Ct. at 1778 (noting that
14 “[defendant] did not develop Plavix in California, did not create a marketing strategy for Plavix in
15 California, and did not manufacture, label, package, or work on the regulatory approval of the
16 product in California”).

17 The Court agrees, and Plaintiffs appear to concede, that the out-of-state plaintiffs have not
18 shown an independent relationship between their claims under the laws of Illinois, New York,
19 Washington, and Oregon, and Defendant’s contacts with the State of California which could
20 satisfy *Bristol-Myers*. Plaintiffs argue, however, that *Bristol-Myers* does not apply to federal
21 courts and that despite the lack of an independent connection between the out-of-state claims and
22 Defendant’s California contacts, the Court may exercise its discretion under the circumstances
23 here to apply the doctrine of “pendent personal jurisdiction,” citing *Action Embroidery Corp. v.*
24 *Atl. Embroidery, Inc.*, 368 F.3d 1174 (9th Cir. 2004).

25 The Court will first address the question whether *Bristol-Myers* applies straightforwardly
26 to federal courts and second whether the doctrine of pendent personal jurisdiction permits the out-
27 of-state Plaintiffs’ claims to be heard in this Court, at least under the particular facts of the instant
28 case.

1 i. Does *Bristol-Myers* Apply to Federal Courts?

2 *Bristol-Myers* expressly left open the question whether its holding extended to federal
3 courts. *Id.* at 1783-84. The Court is not persuaded that such a categorical extension is warranted.
4 *Bristol-Myers* was animated by unique interstate federalism concerns. Indeed, the Supreme Court
5 emphasized that, when analyzing the power of a state court to exercise personal jurisdiction, the
6 inquiry regarding the prospective burden on an out-of-state defendant “encompasses the more
7 abstract matter of submitting [the defendant] to the coercive power of a State that may have little
8 legitimate interest in the claims in question.” *Id.* at 1790. It noted that in certain cases this interest
9 could be “decisive,” irrespective of whether the exercise of jurisdiction by the state imposes a
10 burden on the defendant. *Id.* at 1780-81 (quotation omitted). Thus, the Supreme Court’s analysis
11 in *Bristol-Myers* must be understood through the lens of those interstate federalism concerns,
12 which the Court incorporated into its due process analysis.

13 As the Supreme Court has previously explained:

14 [i]t is true that we have stated that the requirement of personal
15 jurisdiction, as applied to state courts, reflects an element of
16 federalism and the character of state sovereignty vis-à-vis other
17 States. [. . .] The restriction on state sovereignty power . . .
18 however, must be seen as ultimately a function of the individual
liberty interest preserved by the Due Process Clause. That Clause is
the only source of the personal jurisdiction requirement and the
Clause itself makes no mention of federalism concerns.

19 *Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702, n. 10 (1982)
20 (citations omitted). This passage make clear that the due process analysis encompasses the
21 question of state sovereignty, but also that the due process analysis differs fundamentally when a
22 case is pending in federal court and no such concerns are raised. *Id.* (discussing “the requirement
23 of personal jurisdiction, *as applied to state courts*”) (emphasis added).

24 In *Bristol-Myers*, the Supreme Court did not address the question of whether BMS would
25 face any undue burden in California court; rather, the Court’s analysis focused exclusively on the
26 unfairness of submitting BMS to the jurisdiction to a foreign sovereign (California) with respect to
27 claims having no independent connection to that sovereign. *Bristol-Myers*, 137 S.Ct. at 1780.
28 The focus of the Court’s analysis, as well as its preface that interstate sovereignty concerns may be

1 “decisive” even when a defendant faces no burden, *id.* at 1780-81, provide the backdrop against
2 which *Bristol-Myers*’ import must be understood.

3 In contrast to *Bristol-Myers*, the due process right does not obtain here in the same manner
4 because all federal courts, regardless of where they sit, represent the same federal sovereign, not
5 the sovereignty of a foreign state government. There is no risk of a state court exceeding the
6 bounds of its state’s sovereignty and subjecting residents of another state to the coercing power of
7 its courts. Therefore, where a federal court presides over litigation involving a federal question,²
8 the due process analysis does not incorporate the interstate sovereignty concerns that animated
9 *Bristol-Myers* and which may be “decisive” in a state court’s analysis. *Id.* Without those
10 interstate federalism concerns, the due process analysis falls back on whether “the maintenance of
11 the suit . . . offend[s] ‘traditional notions of fair play and substantial justice,’” *Int’l Shoe Co. v.*
12 *Washington*, 326 U.S. 310, 316 (1945) (citation omitted), which itself focuses on the burden on
13 the defendant (other than a concern about subjecting it to the power of a foreign sovereign).³

14 The Court thus returns to the traditional three-part test summarized above: “(1) the

16 ² Plaintiffs have brought a claim under the Magnuson Moss Warranty Act, which confers the
17 Court with federal question jurisdiction. The Court does not address whether and how *Bristol-*
Myers would apply if jurisdiction arose exclusively on the basis of diversity.

18 ³ Ford has cited a number of federal district court cases applying *Bristol-Myers* to dismiss the
19 claims of out-of-state plaintiffs, however, those cases do not analyze or discuss this crucial
20 distinction and are therefore unpersuasive. *See Jordan v. Bayer Corp.*, 2017 U.S. Dist. LEXIS
21 109206, *8-11, 2017 WL 3006993, *4 (E.D. Mo. July 14, 2017) (dismissing out-of-state
22 plaintiffs’ claims without considering whether *Bristol-Myers* applies to federal courts in the same
23 way); *Turner v. Boehringer Ingelheim Pharms, Inc.*, 2017 WL 3310696, *2 (E.D. Mo. Aug. 3,
24 2017) (same); *In re Dental Supplies Antitrust Litig.*, 2017 WL 4217115, *9, 2017 U.S. Dist.
25 LEXIS 153265, *37-38 (E.D.N.Y. Sept. 20, 2017) (same); *Spratley v. FCA US LLC*, 2017 WL
26 4023348 (N.D.N.Y. Sept. 12, 2017) (same); *McDonnell v. Nature’s Way Prods., LLC*, 2017 U.S.
27 Dist. LEXIS 177892, *10-12, 2017 WL 4864910 (N.D. Ill. Oct. 26, 2017) (the court applied
28 *Bristol-Myers*’ analysis to dismiss claims that an Illinois plaintiff sought to bring on behalf of out-
of-state putative class members under out-of-state statutes, however, this analysis appears to
conflate standing with personal jurisdiction). Ford also cited several other cases but they are
inapposite for other reasons. *Ferrari v. Mercedes-Benz USA, LLC*, 2017 WL 3115198, *2 (N.D.
Cal. July 21, 2017) (inapposite because it does not discuss *Bristol-Myers* and how it applies to out-
of-state plaintiffs in federal courts); *Andrew v. Radiancy, Inc.*, 2017 WL 2692840, *6–7 (M.D.
Fla. June 22, 2017) (same); *Demedicis v. CVS Health Corp.*, 2017 U.S. Dist. LEXIS 19589, *10-
12, 2017 WL 569157 (N.D. Ill. Feb. 13, 2017) (single plaintiff case without discussion of *Bristol-*
Myers).

1 defendant must either purposefully direct his activities toward the forum or purposefully avail
2 himself of the privileges of conducting activities in the forum; (2) the claim must be one which
3 arises out of or relates to the defendant’s forum-related activities; and (3) the exercise of
4 jurisdiction must comport with fair play and substantial justice, i.e., it must be reasonable.” *Axiom*
5 *Foods*, 874 F.3d at 1068 (quotation and citations omitted).

6 Here it is undisputed that GM has availed itself of the privilege of conducting business in
7 the state of California, so the first prong is not at issue. The Court will therefore proceed to
8 analyze the second and third prongs below.

9 ii. Do the Nonresident Plaintiffs’ Claims Arise Out of GM’s Suit-
10 related Contacts?

11 Plaintiffs concede that the out-of-state plaintiffs cannot demonstrate an *independent*
12 connection between their claims and Defendant’s contacts with California. Instead, they rely on
13 the doctrine of “pendent personal jurisdiction,” as elaborated by the Ninth Circuit in *Action*
14 *Embroidery*. See 368 F.3d 1174. In *Action Embroidery*, the district court had dismissed the
15 plaintiffs’ California Cartwright Act claims against out-of-state defendants in the absence of any
16 related contacts with California. The plaintiffs’ federal Sherman Act claims were permitted to
17 proceed because that statute creates nationwide personal jurisdiction by virtue of permitting
18 nationwide service of process. See 15 U.S.C. § 22. On appeal, the Ninth Circuit reversed. It re-
19 affirmed the principle that “[p]ersonal jurisdiction must exist for each claim asserted against a
20 defendant,” and recognized that California’s long-arm statute “would not allow the exercise of
21 personal jurisdiction over the[] state-law claims if they were standing alone.” *Id.* However, the
22 Ninth Circuit observed that several other circuits had adopted the doctrine of “pendent personal
23 jurisdiction” in which “a court may assert pendent personal jurisdiction over a defendant with
24 respect to a claim for which there is no independent basis of personal jurisdiction so long as it
25 arises out of a common nucleus of operative facts with a claim in the same suit over which the
26 court does have personal jurisdiction.” *Id.* Adopting the doctrine, the Ninth Circuit held that
27 “[w]hen a defendant must appear in a forum to defend against one claim, it is often reasonable to
28 compel that defendant to answer other claims in the same suit arising out of a common nucleus of

1 operative facts.” *Id.* at 1181. It found that “judicial economy, avoidance of piecemeal litigation,
2 and overall convenience of the parties is best served by adopting this doctrine.” *Id.* Whether to
3 exercise pendent personal jurisdiction is afforded to the discretion of the district court. *Id.* In
4 essence, *Action Embroidery* holds that a claim that itself lacks an independent connection to the
5 federal forum nevertheless may have a sufficient nexus for purposes of the personal jurisdiction
6 analysis if it arises out of a common nucleus of operative facts with other claims properly before
7 the court.

8 To be sure, the relationship between the claims at issue in *Action Embroidery* and the
9 forum state were arguably closer than those at issue here because the same plaintiffs already
10 before the court asserted them in *Action Embroidery*. In contrast, here, the out-of-state plaintiffs
11 ask the Court to exercise pendent personal jurisdiction over their claims based on its jurisdiction
12 over the California plaintiffs’ claims—a situation analogous to *Bristol-Myers*. Although the Court
13 is mindful of these factual dissimilarities, the Ninth Circuit did not limit its holding in *Action*
14 *Embroidery* to situations involving the same parties. Rather, it focused on whether the new *claims*
15 arose out of the same nucleus of operative facts, not whether the claims belonged to the same
16 plaintiffs. *See Action Embroidery*, 368 F.3d at 1181 (“[w]hen a defendant must appear in a forum
17 to defend against one claim, it is often reasonable to compel that defendant to answer other *claims*
18 in the same suit arising out of a common nucleus of operative facts” (emphasis added)); *see also*
19 *id.* (“a court may assert pendent personal jurisdiction over a defendant with respect to a *claim* for
20 which there is no independent basis of personal jurisdiction so long as it arises out of a common
21 nucleus of operative facts with a *claim* in the same suit over which the court does have personal
22 jurisdiction” (emphasis added)). Thus, the Ninth Circuit has not limited the doctrine of pendent
23 personal jurisdiction to when a relationship is shown to “other claims by the same *plaintiff*” but
24 rather to “other claims in the same *suit*,” *id.* (emphasis added).⁴

25
26 ⁴ The Court is aware that some district courts around the country have declined to apply the
27 doctrine of pendent personal jurisdiction to bootstrap one plaintiff’s personal jurisdiction to
28 another’s, but those cases were not interpreting or applying the Ninth Circuit’s standard in *Action*
Embroidery. *See, e.g., Spratley v. FCA US LLC*, 2017 WL 4023348, at *7 (N.D.N.Y. Sep. 12,
2017) (rejecting theory of “pendent personal jurisdiction” and dismissing claims against of out-of-
state plaintiffs’ state-law claims against Chrysler alleging concealing of a known safety defect);

1 Despite the broad language of *Action Embroidery*, it may be argued that the nexus between
2 the claims in suit and the forum state are typically more attenuated where a different non-resident
3 plaintiff asserts the new claims than when the same resident plaintiff asserts new claims.

4 Applying pendent personal jurisdiction to such a plaintiff's claims therefore constitutes a factual
5 extension of *Action Embroidery*; the calculus may differ, particularly in light of *Bristol-Myers*'
6 holding that a common nucleus of operative facts was not in and of itself sufficient to justify the
7 exercise of a state court's sovereign power over an out-of-state defendant. Thus, it is by no means
8 clear whether *Action Embroidery*'s pendent personal jurisdiction doctrine extends categorically to
9 claims brought by different plaintiffs. However, there are several case-specific factors that weigh
10 in favor of finding a requisite nexus and hence personal jurisdiction here.

11 First, this is a putative nationwide class action. The Court may well have jurisdiction over
12 absent class members (including the named out-of-state plaintiffs) who are non-forum residents in
13 any event. *See, e.g., Fitzhenry-Russell v. Dr. Pepper Snapple Grp., Inc.*, 2017 WL 4224723 (N.D.
14 Cal. Sep. 22, 2017) (rejecting the argument that *Bristol-Myers* precludes a court from exercising
15 personal jurisdiction over the claims of absent class members who are out-of-state);⁵ *In re*
16 *Chinese-Manufactured Drywall Prods. Liability Litig.*, 2017 WL 5971622, at *12-13 (E.D. La.
17 Nov. 30, 2017) (same); *cf. Swamy v. Title Source, Inc.*, Case No. 17-01175 WHA, 2017 WL
18 5196780 (N.D. Cal. Nov. 10, 2017) (rejecting the argument that *Bristol-Myers* precludes a court
19 from exercising personal jurisdiction over the claims of out-of-state opt-in plaintiffs in a collective

20
21 *DeMaria v. Nissan N. Am., Inc.*, 2016 WL 374145, *8 (S.D. Ill. Feb. 1, 2016) (finding no personal
22 jurisdiction for out-of-state plaintiffs "where each plaintiff's claim is predicated on the law of the
23 particular state where he or she purchased a car and the claims of the other plaintiffs as alleged
24 remain unrelated to anything that transpired in Illinois"); *Plumbers' Local Union No. 690 Health*
Plan v. Apotex Corp., 2017 WL 3129147, at *9 (E.D. Penn. Jul. 24, 2017) (finding no personal
jurisdiction for out-of-state plaintiffs' claims under non-forum state laws because they "do not
arise out of or relate to any of [defendants'] conduct within the forum state").

25 ⁵ Although *Fitzhenry-Russell* rejected the plaintiffs' argument that *Bristol-Myers*' reasoning was
26 inherently limited to state courts because "federal courts routinely apply the specific jurisdiction
27 analysis to defendants in cases that are before them solely on the basis of diversity," *id.* at *4, that
28 case involved only claims under California state law, so arguably implicated interstate federalism
concerns. It did not address a situation where, like here, subject matter jurisdiction is also
premised on a federal question under the Magnuson Moss Warranty Act. *See* 15 U.S.C. §
2310(d). In any event, *Fitzhenry-Russell* did not fully analyze the federalism concerns which
underpin *Bristol-Myers* but which are absent here.

1 action proceeding under the Fair Labor Standards Act). They are not strangers to this litigation.

2 Second, as discussed in more detail in the following section, the exercise of personal
3 jurisdiction over the non-resident Plaintiffs' claims in this case will impose only a *de minimis*
4 burden on GM. Because the Court has found a waiver of personal jurisdiction with respect to the
5 non-California plaintiffs previously named in this suit, the Court's application of the pendent
6 personal jurisdiction doctrine permits inclusion of only 5 additional Plaintiffs asserting claims
7 under the laws of 2 additional states to this litigation. Those new claims overlap substantially with
8 the claims (including federal claims) already before this Court, arising out of the same nucleus of
9 operative facts.

10 Third, if the Court were to decline to exercise jurisdiction, GM would face piecemeal
11 litigation and would have to defend itself in several different courts on nearly identical issues.
12 Because the claims at issue arise out of the same nucleus of operative facts, the adjudication of
13 facts in those disparate proceedings would be likely to overlap and possibly to conflict with
14 proceedings in this case.

15 These factors weigh in favor of applying the doctrine of pendent personal jurisdiction as
16 explicated in *Action Embroidery* to the non-resident plaintiffs in this case. The Court is satisfied
17 that under *Action Embroidery* and the absence of interstate sovereignty concerns present in
18 *Bristol-Myers*, there is a sufficient nexus between the claims of the 5 out-of-state plaintiffs and
19 GM's contacts with California over which this Court has jurisdiction.

20 iii. Is the Exercise of Jurisdiction Reasonable and Does It Comport
21 With Fair Play and Substantial Justice?

22 This does not end the inquiry. The Court still must consider the third factor of the
23 traditional test for specific personal jurisdiction which focuses on whether the exercise of
24 jurisdiction is reasonable and comports with fair play and substantial justice. *See Axiom Foods*,
25 874 F.3d at 1068; *Int'l Shoe*, 326 U.S. at 316; *Bristol-Myers*, 137 S.Ct. at 1780 (noting that "the
26 primary concern" continues to be "the burden on the defendant"); *Action Embroidery*, 368 F.3d at
27 1181 (focusing on whether it is "reasonable to compel [the] defendant to answer other claims in
28 the same suit arising out of a common nucleus of operative facts). This focuses principally on the

1 burden on the defendant.

2 At the hearing, the Court asked GM to identify what prejudice it would suffer if it were
3 required to litigate the out-of-state plaintiffs' claims in this Court. GM stated that it could not
4 credibly suggest that it lacked resources to litigate in this district, but noted that a federal court
5 sitting in Florida, for example, might be more familiar with Florida law than a federal court sitting
6 in California. Though that may be the case, it is not clear how that translates into a burden, let
7 alone an unreasonable one. In any case, the argument is unpersuasive because federal courts are
8 frequently called upon to interpret the laws of the several States. *See, e.g., Rabinowitz v. Samsung*
9 *Electronics Am., Inc.*, Case No. 14-cv-00801-JCS, 2014 WL 5422576, at *7 (N.D. Cal. Oct. 10,
10 2014) (explaining that "federal courts have an equal ability to address claims arising out of state
11 law" and "[d]istrict courts regularly apply the law of states other than the forum state" (citations
12 and quotations omitted)). Furthermore, GM's argument is undercut by its own proposal that the
13 Court transfer the claims of the out-of-state and California plaintiffs to a single court, the Eastern
14 District of Michigan, which would similarly be called upon to apply non-Michigan state law. *See*
15 *Docket No. 90 at 10-12.* Defendant therefore has not identified a legitimate burden.

16 Further, the Court is hard-pressed to find any unreasonable burden on the facts of this case.
17 As discussed above, because the Court already has jurisdiction over the 5 California plaintiffs'
18 claims and those of 27 nonresident plaintiffs, the sole question here is whether it would be
19 unreasonably burdensome on Defendant for this Court to also exercise personal jurisdiction over
20 the claims of 5 new plaintiffs, which introduce claims under only 2 additional states' laws (New
21 York and Oregon). That burden is de minimis, particularly because the alternative would be for
22 those plaintiffs to file new, separate cases under their states' laws.⁶ Moreover, GM has not

23 _____
24 ⁶ Another reason why the exercise of pendent personal jurisdiction here would not be
25 unreasonable is that if each plaintiff were instead to file a separate case and then successfully
26 petition to consolidate the cases in an MDL, then Defendant would still be required to litigate the
27 same claims in whatever court is selected by the MDL panel. Although the MDL process does not
28 relieve a plaintiff of the burden of demonstrating personal jurisdiction (the transferee court would
analyze its personal jurisdiction according to whether each transferor court possessed it), it does
suggest that it is not unreasonable, per se, to require Defendant to litigate the out-of-state
plaintiffs' claims in this Court. It cannot be that the burden imposed on Defendant here is so
unreasonable as to be a due process violation but that an effectively identical burden resulting
from consolidation pursuant to the MDL statute would not be. Although a defendant might be

1 explained how it would be less burdensome to answer to those plaintiffs’ claims in New York,
2 Washington, Oregon, and Illinois rather than San Francisco, as those plaintiffs would likely be
3 able to exercise personal jurisdiction over GM in their home states.

4 In addition, the overarching circumstances meriting the exercise of pendent personal
5 jurisdiction—“judicial economy, avoidance of piecemeal litigation, and overall convenience of the
6 parties,” *Action Embroidery*, at 1181—counsel in favor of jurisdiction. Judicial economy is better
7 served by having the claims of all plaintiffs heard in this Court where they involve similar legal
8 issues and all arise out of a common nucleus of operative facts relating principally to whether
9 GM’s engine was defective, whether the defect was material or posed an unreasonable safety risk,
10 and when GM became aware of the defect. The alternative to hearing those claims in a single
11 forum is to populate the dockets of up to fifty federal courts with nearly identical legal and factual
12 issues.⁷ Additionally, there is an interest in avoiding piecemeal litigation, particularly since
13 Plaintiffs request injunctive relief and certification of a nationwide class. Having the same
14 question proceed in different courts creates the possibility of overlapping nationwide classes,
15 inconsistent outcomes, *cf.* Fed. R. Civ. P. 23(b)(2), and an obvious waste of judicial resources.
16 Finally, the overall convenience of the parties—including Defendant’s—is much better served by
17 having the claims heard in a single forum rather than fifty.

18 In sum, under the particular facts of *this* case, all three prongs of the test for specific
19

20 expected to argue that the MDL cases should be consolidated in the district of its headquarters
21 (*i.e.*, in a forum where it is subject to general personal jurisdiction), the MDL panel regularly
22 transfers them elsewhere, without due process concerns. *See, e.g., In re Chrysler-Dodge-Jeep*
23 *EcoDiesel Mktg. Sales Practices and Prods. Liability Litig.*, --- F.Supp.3d, 2017 WL 1282901
24 (J.P.M.L. Apr. 5, 2017) (consolidating cases in Northern District of California—not the home state
of any defendant); *In re Volkswagen “Clean Diesel” Mktg., Sales Practices, and Prods. Liability*
Litig., 148 F.Supp.3d 1367 (J.P.M.L. 2015) (centralizing cases in Northern District of California
despite defendant’s preference for Eastern District of Michigan).

25 ⁷ Though Plaintiffs would have the option of filing a single consolidated case in the Eastern
26 District of Michigan because Defendant is subject to general jurisdiction in that state, they would
27 not be required to do so because jurisdiction may lie in other courts of their choosing where
28 personal jurisdiction may also obtain. *See Lou v. Belzberg*, 834 F.2d 730, 739 (9th Cir. 1987)
(noting that “great weight is generally accorded plaintiff’s choice of forum”), *cert. denied*, 485
U.S. 993 (1988). Moreover, even if a party were to request consolidation by the Judicial Panel on
Multidistrict Litigation, there is no guarantee that such requests would be granted and, in any case,
that procedure itself creates additional burdens on the parties.

1 personal jurisdiction have been satisfied here. *See Axiom Foods*, 874 F.3d at 1068. It is
2 undisputed that GM has availed itself of the privileges of conducting business in California,
3 satisfying the first prong. In the absence of any particular federalism concerns, there is a sufficient
4 nexus between the additional non-California claims and GM’s contacts with California to satisfy
5 the second prong. The exercise of personal jurisdiction over the 5 new out-of-state plaintiffs’
6 claims would not offend fair play or substantial justice, satisfying the third prong. Moreover, all
7 factors that inform the due process analysis are present here: judicial economy, the avoidance of
8 piecemeal litigation, the overall convenience of the parties, and the minimal additional burden on
9 Defendant all counsel strongly in favor of exercising pendent personal jurisdiction over the 5 new
10 plaintiffs’ claims under the facts of this case.

11 B. Fraud and Consumer Protection Claims

12 Plaintiffs bring fraud and consumer protection claims under the laws of several states
13 alleging Defendant unlawfully failed to disclose the excessive oil consumption defect to
14 consumers. Defendant’s motion to dismiss is argued pursuant to California law on the basis that it
15 is the most developed.⁸ Because the parties have focused on California law and Defendant has not
16 argued that the laws of any other state would preclude a claim viable under California law, the
17 Court’s analysis also focuses on California authorities.⁹

18 _____
19 ⁸ The cases cited by Defendant do not appear to apply a standard different from California law.
20 *See McCabe v. Daimler AG*, 948 F.Supp.2d 1347, 1368 (N.D. Ga. 2013) (safety defects were
21 material facts for which a duty to disclose existed under Georgia law); *In re Takata Airbag*
22 *Products Liability Litig.*, 193 F.Supp.3d 1324, 1338 (S.D. Fla. 2016) (holding that under Florida
23 and Pennsylvania law plaintiffs sufficiently alleged a duty to disclose additional facts about the
24 safety of vehicles); *In re General Motors Ignition Switch Litig.* 2017 WL 2839154, *25, 46, 51
25 (S.D. N.Y. Aug. 9, 2017) (at motion to dismiss stage, finding that material omission was
26 adequately pleaded with respect to claims under Alabama law); *In re General Motors Ignition*
27 *Switch Litig.*, 2016 WL 3920353, *34, 38 (S.D.N.Y. July 15, 2016) (permitting failure to disclose
28 claim to proceed under Missouri and Oklahoma law where plaintiffs alleged the omitted
information pertained to safety defect); *Zwiercan v. General Motors Corp.*, 2003 WL 1848571, *2
(Pa. Ct. of Common Pleas, Mar. 18, 200) (“This Court’s holding in *Zwiercan* is limited to finding
a duty to disclose known and serious life-threatening latent defects.”). Moreover, Defendant has
not argued that the laws of any other state differ in any material respect, or that a claim permitted
by California law would not be permitted in another state.

⁹ The parties are advised that in future briefing, to the extent they ask the Court to decide matters
on the basis of several states’ laws, they must squarely address whether there are material
variations in state law. This will also be mandatory with respect to any motion for class
certification in order to enable the Court to adequately analyze questions of predominance under

1 Plaintiffs' California claims are brought pursuant to the California Consumer Legal
2 Remedies Act ("CLRA"), Cal. Civ. Code §§ 1750, *et seq.*, the Unfair Competition Law ("UCL"),
3 Cal. Bus. & Profs. Code §§ 17200, *et seq.*, and under the common law for fraudulent omission or
4 concealment. The CLRA forbids "unfair methods of competition and unfair or deceptive acts or
5 practices undertaken by any person in a transaction intended to result or which results in the sale
6 or lease of goods or services to any consumer." Cal. Civ. Code § 1770(a). The UCL prohibits
7 "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or
8 misleading advertising." Cal. Bus. & Profs. Code § 17200.

9 A common law fraudulent omission claim requires demonstrating that:

- 10 (1) the defendant must have concealed or suppressed a material fact,
11 (2) the defendant must have been under a duty to disclose the fact to
12 the plaintiff, (3) the defendant must have intentionally concealed or
13 suppressed the fact with the intent to defraud the plaintiff; (4) the
14 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.

15 *Hahn v. Mirda*, 147 Cal.App.4th 740, 748 (2007) (quotation and citation omitted).

16 1. Duty to Disclose

17 The first question is whether Defendant had a duty to disclose. *See Falk v. Gen. Motors*
18 *Corp.*, 494 F.Supp.2d 1088, 1094 (N.D. Cal. 2007). That duty may arise "(1) when the defendant
19 is in a fiduciary relationship with the plaintiff; (2) when the defendant had exclusive knowledge of
20 material facts not known to the plaintiff; (3) when the defendant actively conceals a material fact
21 from the plaintiff; and (4) when the defendant makes partial representations but also suppresses
22 some material fact." *Id.* (quoting *LiMandri v. Judkins*, 52 Cal.App.4th 326, 337 (1997)).

23 Plaintiffs argue that GM had a duty to disclose the defect based on the second and third
24

25 Rule 23(b)(3). *See In re Hyundai and Kia Fuel Economy Litig.*, --- F.3d ---, 2018 WL 505343, at
26 *12-13 (9th Cir. Jan. 23, 2018) (holding that district court in finding that predominance was
27 satisfied when certifying a settlement class abused its discretion "by failing to acknowledge . . .
28 that the laws in various states were materially different than those in California, and that these
variations prevented the court from applying only California law," and "failing to make a final
ruling as to whether the material variations in state law defeated predominance under Rule
23(b)(3)").

1 prongs: *i.e.*, that GM either had a duty to disclose because it had exclusive knowledge of the defect
2 (a material fact), or because it actively concealed that fact from Plaintiffs. GM disputes both of
3 these points. The Court first analyzes whether Plaintiffs adequately plead that GM had pre-sale
4 knowledge of the defect and that the defect was material. As to whether Defendant had exclusive
5 knowledge of the defect (assuming pre-sale knowledge is established) and whether Plaintiff knew
6 of the material facts, those facts are not disputed. As to whether Defendant actively concealed a
7 material fact, that is discussed below in connection with fraudulent concealment, *see infra* at 53-
8 54.

9 2. Pre-Sale Knowledge of Defect

10 To be liable for a failure to disclose, a defendant must have pre-sale knowledge of the
11 defect. The Court previously concluded Plaintiffs had failed to plead such pre-sale knowledge for
12 four reasons. First, the mere fact that GM subsequently re-designed its engine was not probative
13 where the whole engine was re-designed, rather than just the allegedly defective low-tension oil
14 rings. Docket No. 62 at 11. Second, the Court found 81 consumer complaints to the National
15 Highway Traffic Safety Administration (“NHTSA”) and consumer forums did not demonstrate
16 knowledge because they did not explicitly state that the cause of the oil consumption was the
17 Low-Tension Oil Ring Defect, and a majority of the complaints were posted in 2014 or later, after
18 the marketing and sale of the 2010-2013 Class Vehicles. *Id.* at 12. Third, Plaintiffs failed to
19 allege that 81 complaints posted over the course of 7 years was an unusually high number. *Id.* at
20 13. Fourth, the single Technical Safety Bulletin (“TSB”) identified by Plaintiffs did not show
21 knowledge of a low-tension oil ring defect (the sole defect previously alleged by Plaintiffs) where
22 it explicitly identified other causes for the excessive oil consumption (the AFM and PCV
23 systems). *Id.*

24 However, in the SAC, Plaintiffs have broadened their allegations concerning the nature of
25 the defect. They no longer allege that the low-tension oil ring defect was the sole problem that
26 caused excessive oil consumption. Rather, they allege an “Oil Consumption Defect” to which
27 there were several contributing factors, including defective piston rings, a defective AFM system,
28 a defective PVC system, and defective oil warning lights/pressure gauges. In addition to this

1 broader definition, Plaintiffs have bolstered the complaint with additional consumer complaints
2 and other allegations Plaintiffs contend support an inference of pre-sale knowledge.

3 The revised allegations alter the analysis. Most compellingly, Plaintiffs allege that
4 Defendant issued two TSBs specifically related to two of the components they allege contributed
5 to the overconsumption defect: the AFM and PCV systems. With respect to the AFM system, GM
6 issued a TSB in August 2010 that “acknowledged that the AFM system’s oil pressure relief valve
7 contributed to oil consumption and carbon buildup on the piston rings.” SAC ¶ 227. With respect
8 to the PCV system, GM issued a TSB in March 2011 that “acknowledged [the] system contributed
9 to oil consumption.” SAC ¶ 231. Because Plaintiffs’ class period covers sales from 2010-2013,
10 these two TSBs—issued relatively early in the Class Period in mid-2010 and early-2011—permit
11 the plausible inference that Defendant had knowledge prior to the Class Period. *Cf. In re MyFord*
12 *Touch*, 46 F.Supp.3d at 958 (“[I]t is still reasonable to infer that, if Ford had issued four TSBs and
13 two updates in 2012 alone, Ford should have known of problems with MFT by around 2011, *i.e.*,
14 before it could recommend what repairs or updates needed to be done. Presumably, the TSBs and
15 updates were [preceded] by an accretion of knowledge by Ford.”); *MacDonald*, 37 F.Supp.3d at
16 1093-94 (TSBs issued five and nine months after purchase, even if only dealing with a particular
17 model vehicle, support plausible inference of knowledge of defect prior to sale of other vehicles
18 including same defective cooling pump); *Philips*, 2015 WL 4111448, at *9-10 (same).

19 With respect to the consumer complaints, Plaintiffs not only present a significantly larger
20 number,¹⁰ but also allege that the number of complaints far exceeds the number of similar
21 complaints for competitor vehicles. *See* SAC ¶ 279 (only zero to five complaints regarding oil
22 consumption with respect to 7 competitor vehicles in the 2007-2013 model years). Thus, unlike
23 before, the Court now has a baseline upon which to conclude that Plaintiffs have plausibly pled an
24

25 ¹⁰ Plaintiffs identify a large number of consumer complaints about oil consumption on
26 carcomplaints.com. *See* SAC ¶¶ 258-262(68 re: 2007 Chevrolet Silverados, 33 re: 2008 Chevrolet
27 Silverados, 43 re: 2009 Chevrolet Silverados, 12 re: 2010 Chevrolet Silverados, 180 re: 2007
28 Chevrolet Suburbans, 34 re: 2008 Chevrolet Suburbans, 17 re: 2009 Chevrolet Suburbans, 68 re:
2007 Chevrolet Avalanches, 13 re: Chevrolet Avalanches, 8 re: 2007 Chevrolet Tahoes, 10 re:
2008 Chevrolet Tahoes, 15 re: 2009 Chevrolet Tahoes, 22 re: 2007 GMC Yukons and Yukon XLs,
9 re :2007 GMC Sierra 1500).

1 unusual number of complaints.

2 It is true, as Defendant points out, that a number of the complaints relate to non-Class
3 Vehicles (models of the same vehicles preceding the Class Period or other vehicles altogether).
4 However, all the vehicles are equipped with the same allegedly defective engine and thus bolster
5 the plausibility of inferring Defendant’s general knowledge of the over-consumption problem
6 associated with that engine. *Cf. MacDonald*, 37 F.Supp.3d at 1093-94 (TSB issued with respect to
7 only one vehicle model permits plausible inference with respect to knowledge of same defective
8 component in other vehicle model). Additionally, since the focus is on *pre-sale* knowledge with
9 respect to Class Vehicles, the emphasis is rightly on complaints that arose prior to sale of the Class
10 Vehicles. Thus, it is reasonable that complaints associated with earlier model years (several dating
11 as far back as 2008), *see* SAC ¶ 249, support a plausible inference of knowledge with respect to
12 later model years equipped with the same allegedly defective component.

13 That the complaints do not specifically identify the low-tension oil rings is no longer an
14 issue because Plaintiffs now allege that there were various failing parts associated with the Gen IV
15 Vortec 5300 engine that contributed to overconsumption. Where the complaints all relate to the
16 same phenomenon (excessive oil consumption), the number is unusually high, and all complaints
17 pertain to a group of vehicles with a common component (the engine), one plausible inference is
18 that GM was generally aware of the over-consumption problem with the engine even if it had not
19 yet isolated a specific cause for or solution to the problem. An inference of knowledge is further
20 supported by several consumer complaints which state that the dealers to whom vehicles were
21 presented for repair asserted that it was a “known” problem or common issue.¹¹

22 To be sure, other inferences might plausibly be drawn from the complaints. For example,

23

24 ¹¹ *See, e.g.*, SAC ¶ 255 (two consumers told that overconsumption was “normal” in 2014 and
25 2015); ¶ 256 (owner of 2007 Chevy Silverado told overconsumption was “normal”); ¶ 258 (dealer
26 told vehicle owner in 2010 that “Chevy had sent emails to them regarding this problem”); ¶ 259
27 (owner of truck purchased in 2008 told “several times” by GM that consumption was “normal”);
28 ¶ 260 (owner of 2009 Silverado told consumption was “normal”); ¶ 267 (owner of 2007 Chevy
Tahoe told that excessive consumption was a “known issue”); ¶ 269 (owner of 2009 Chevy Tahoe
told this was “a known problem, and not specific to [that] car”); ¶ 271 (owner of 2007 GMC Sierra
1500 says “every dealer I talked to says its normal”); *id.* (owner reports that “[t]he dealership
ignored [the problem] and told me it was normal”).

1 since more complaints appear to be associated with earlier models of the vehicles, another
2 plausible inference could be that the defect was substantially repaired or resolved with respect to
3 later vehicles. However, “[t]hat [GM] is able to identify competing inferences from the same set
4 of facts does not mean that Plaintiffs’ claims should be dismissed.” *MacDonald*, 37 F.Supp.3d at
5 1093.

6 At this pleading stage, Plaintiffs have included sufficient allegations to support a plausible
7 inference that Defendant was aware of the oil consumption defect with respect to the Class
8 Vehicles prior to their sale. Moreover, Defendant has not identified any basis to believe that
9 Plaintiffs could have been aware of the severity of the defect before purchasing the vehicles, so
10 Plaintiffs’ allegations support a plausible inference that the details about the cause, extent, and
11 resolvability *vel non* of the defect were within Defendant’s exclusive knowledge.

12 3. Materiality of Defect

13 Defendant argues that Plaintiffs fail to adequately plead that the information was material
14 because they have not shown it pertained to an unreasonable safety risk. The Court previously
15 dismissed Plaintiffs’ allegation of a material defect on two grounds. First, the Court held that as a
16 matter of law Plaintiffs must plead an unreasonable safety hazard under California law in order to
17 demonstrate the defect was material. *See* Docket No. 62 at 9. Second, the Court held that
18 Plaintiffs had failed to plead an unreasonable safety hazard because “no facts in this case suggest
19 that the risk of excess oil consumption causes a safety risk,” and “Plaintiffs admit that there [was]
20 a functioning oil level gauge that will give advance warning of low levels.” Docket No. 62 at 10-
21 11. Moreover, “not a single plaintiff allege[d] that his or her vehicle experienced any damage due
22 to excessive oil consumption;” no complaints of “sudden loss of power” were made; and Plaintiffs
23 did not establish a “risk of sudden failure.” *Id.*

24 In re-visiting the issue on this motion to dismiss the SAC, the Court notes that both parties
25 in both rounds of briefing overlooked a crucial distinction California law makes with respect to
26 defects arising in-warranty and those arising post-warranty. In its prior holding, the Court treated
27 both situations in an identical fashion, relying on language in *Wilson v. Hewlett-Packard* stating
28 that a “manufacturer’s duty to consumers is limited to its warranty obligations absent either an

1 affirmative misrepresentation or a safety issue.” 668 F.3d 1136, 1143-44 (9th Cir. 2012). The
2 Court also relied on language in *Williams v. Yamaha Motor Co.* cited by the parties stating that a
3 plaintiff must allege “the existence of an unreasonable safety hazard” to state a failure to disclose
4 claim. 851 F.3d 1015, 1025 (9th Cir. 2017) (quoting *Apodaca v. Whirlpool Corp.*, No. 13-00725
5 JVS (ANx), 2013 WL 6477821, at *9 (C.D. Cal. Nov. 8, 2013)). However, these quotations were
6 specific to the facts of both cases. A pivotal fact in both *Wilson* and *Williams* was that the alleged
7 defect did not manifest until *after* the warranty period. *See Wilson*, 668 F.3d at 1138 (laptop
8 charging defect did not arise until after expiration of two-year limited warranty); *Williams*, 851
9 F.3d at 1019 (explaining that the premature corrosion defect “will not manifest until the three-year
10 warranty period has expired”). Indeed, *Wilson* made clear that a safety issue must be alleged only
11 when it arises *after* the warranty period. *See* 668 F.3d at 1142, n.1 and 1144 (distinguishing cases
12 that found materiality in the absence of a safety defect on the basis that the defects arose “*within*
13 the express warranty period”).

14 Thus, as *Apodaca*—the same case quoted by the Ninth Circuit in *Williams* for the legal
15 standard for claims alleging a failure to disclose—explains, the materiality analysis turns on
16 whether the defect arises *during or after* an express warranty period:

17 First, a manufacturer has a duty to disclose *any* defects that fall
18 *within* the warranty period, *whether relating to safety or to costly*
19 *repairs*, that would have caused the consumer to not purchase the
20 car if they had been disclosed. Second, the manufacturer also has a
21 duty to disclose *safety issues* that fall *outside* of the warranty period.

22 *Apodaca*, 2013 WL 6477821, at *7 (quoting *Decker v. Mazda Motor of Am., Inc.*, No. 11-cv-0873,
23 2011 WL 5101705, at *4 (C.D. Cal. Oct. 24, 2011)) (emphasis added).¹² Although neither party

24 ¹² It appears that post-*Wilson* California authority may permit an omission-based claim to proceed
25 after the expiration of a warranty even without an allegation of an unreasonable safety hazard, at
26 least when the omission is contrary to representations made by the defendant and material. *See*
27 *Rutledge v. Hewlett-Packard Co.*, 238 Cal.App.4th 1164, 1171-76 (2015) (holding that plaintiff
28 adequately pled materiality with respect to faulty inverter that caused laptop screen to dim even
without safety issues and rejecting “argument that the expiration of the warranty period precludes
a claim for fraudulent concealment under the UCL”). However, the Ninth Circuit continues to
require that post-warranty omission claims allege a safety defect. *See Williams v. Yamaha Motor*
Co., 851 F.3d 1015, 1025 (9th Cir. 2017) (in absence of affirmative misrepresentation, duty to
disclose arises post-warranty only if plaintiff alleges “existence of an unreasonable safety
hazard”). The Court is obligated to follow the Ninth Circuit’s more recent authority. *Mohamed v.*
Uber Techs., Inc., 848 F.3d 1201, 1211 (9th Cir. 2016).

1 briefed the issue, the Court finds it necessary to analyze the viability of this claim separately with
2 respect to in-warranty and post-warranty claims.

3 a. Warranty Period Claims

4 As a preliminary matter, the Class Vehicles in this case consist of 2010-2014 model years.
5 Several plaintiffs allege they experienced excessive oil consumption during the warranty period.
6 See, e.g., SAC ¶ 58 (Plaintiff Shorter); SAC ¶¶ 154-155 (Plaintiff Martell); SAC ¶ 202 (Plaintiff
7 Bednarek). Consumer complaints also indicate that excessive oil consumption was experienced
8 within the warranty period. See, e.g., SAC ¶¶ 255, 258, 265, 271, 272. GM provides Class
9 Vehicles with a three-year, 36,000 miles “bumper to bumper” warranty and a five-year, 100,000
10 mile powertrain warranty. See SAC ¶¶ 223-31; see also ECF Docket No. 48-22 to 48-29.

11 Thus, Plaintiffs have plausibly alleged that the defect may arise during the limited
12 warranty period. To state a claim for failure to disclose the defect in these circumstances,
13 Plaintiffs need only allege that the defect “would have caused [them] to not purchase the car if [it]
14 had been disclosed” to show that it was material. *Apodaca*, 2013 WL 6477821, at *7 (quotation
15 and citation omitted). Plaintiffs have done so. See, e.g., SAC ¶¶ 20, 394-395, 411, 443-444, 460.
16 Thus, Plaintiffs have adequately pleaded materiality for the in-warranty claims.

17 b. Post-Warranty Period Claims

18 With respect to defects that manifested only after the warranty period, Plaintiffs must
19 allege that the defect poses an unreasonable safety hazard. As explained above, the purpose of this
20 limitation in the post-warranty context is to protect against the de facto extension of a warranty.

21 Whether the defect poses an unreasonable safety hazard is a two-step inquiry. “Where a
22 plaintiff alleges a sufficiently close nexus between the claimed defect and the alleged safety issue,
23 the injury risk need not have come to fruition.” *Williams*, at 1028. However, if the nexus is not
24 “sufficiently close,” then a plaintiff must allege examples of the safety risk coming to fruition to
25 plausibly plead an unreasonable safety hazard. *Id.* (explaining that “a party’s allegations of an
26 unreasonable safety hazard must describe more than merely conjectural and hypothetical injuries”)
27 (citation and quotation omitted). A “sufficiently close nexus” exists when the causal chain
28

1 between the alleged defect and the ultimate safety hazard is adequately explained.¹³ The nexus is
2 not sufficiently close, however, where the connection is not explained or appears illogical.¹⁴

3 Here, Plaintiffs adequately allege a sufficiently close nexus and have also provided
4 examples of injury that make their allegations of an unreasonable safety hazard plausible.
5 Plaintiffs allege the Oil Consumption Defect can lead to engine damage and engine failure,
6 exposing drivers to the risk of suddenly inoperable vehicles. SAC ¶ 245. They allege in detail
7 that the various defects cause excessive oil consumption. For example, the piston rings “fail to
8 achieve their intended purpose of keeping oil in the crankcase and out of the combustion
9 chamber,” resulting in “excessive oil consumption.” *Id.* ¶ 218; see SAC ¶¶ 214-222.
10 Additionally, the AFM system “overwhelm[s] the independently defective piston rings” by
11 “spray[ing] oil directly into the piston skirts (undersides) in quantities that the rings cannot
12 control” and therefore “allow[ing] excessive quantities of oil in the combustion chambers where it
13 is burned.” SAC ¶¶ 223-225. The PCV system “also contributes to oil consumption and engine

14
15 ¹³ See, e.g., *Apodaca v. Whirlpool Corp.*, 2013 WL 6477821, at *9 (C.D. Cal. Nov. 8, 2013)
16 (plaintiff did not need to “wait until his dishwasher actually catches fire” to establish a sufficient
17 nexus; although “catching fire would be the extreme result of th[e] causal chain, the [complaint]
18 sufficiently alleges its possibility as a logical outcome”); *Ehrlich v. BMW of N. Am., LLC*, 801
19 F.Supp.2d 908, 918 (C.D. Cal. 2010) (sufficient nexus where defective windshield susceptible to
20 cracking posed safety hazard because windshield was part of vehicle’s safety restraint system, and
21 cracked windshields could become dislodged, “compromising roof-crush resistance and causing
22 serious head and neck injuries, failure of the passenger side airbag to deploy, or the ejection of
23 passengers from the vehicle”); *Herremans v. BMW of N. Am., LLC*, 2014 WL 5017843, at *15
24 (C.D. Cal. Oct. 3, 2014) (sufficient nexus where water pump defect could cause engine to
25 overheat, overheating could occur at any time, and if it happened while vehicle was being driven,
26 it would experience failures that render vehicle unable to accelerate and cause steering and braking
27 problems); *Cholakyan v. Mercedes-Benz USA, LLC*, 796 F.Supp.2d 1220, 1236-37 (C.D. Cal.
28 2011) (safety risk adequately alleged where “[i]t is not implausible that the ‘electrical faults’
described in the TSB could give rise to the safety concerns alleged,” insofar as water leak defect
could cause “sudden and unexpected engine failure that could result in personal injury or death”);
Marsikian v. Mercedes Benz USA, LLC, 2009 WL 8379784, at *6 (C.D. Cal. 2009) (holding that
“[i]t is not implausible that the flooding [of a climate control system] would cause catastrophic
engine and electrical system failure while the car is on the road” (quotation omitted)).

25 ¹⁴ See, e.g., *Wilson*, 668 F.3d at 1144-45 (plaintiffs did “not allege *how* the weakening or loss of
26 the connection between the power jack and the motherboard causes the Laptops to ignite,” and “it
27 [was] difficult to conceive (and the complaint [did] not explain) how the Laptops could ignite if
28 they [were] ‘unable to receive an electrical charge’”) (emphasis added, citation omitted); *Elias v.*
Hewlett-Packard Co., 903 F.Supp.2d 843, 857 (N.D. Cal. 2012) (no sufficient nexus where
“Plaintiff does not allege any explanation for how a lack of sufficient power causes laptops to
catch fire” and “provides no explanation that clearly links the alleged insufficient power of the
laptops to their catching fire”).

1 damage by vacuuming oil from the valvetrain,” which it is not supposed to do, further contributing
2 to excessive oil consumption. SAC ¶¶ 228-231.

3 The excessive consumption of oil, in turn, results in insufficient oil and lubricity. SAC
4 ¶ 244. Low oil levels potentially cause the engine to seize or shut down unexpectedly (causing
5 accidents or stranding occupants), to overheat and catch fire, or to produce engine misfires that
6 cause sluggish throttle response, placing occupants in harm’s way by undermining their ability to
7 navigate traffic. SAC ¶¶ 244-46. Fouled spark plugs may also cause engine misfires, ignition
8 failure, and sluggish throttle response, undermining drivers’ ability to accelerate out of harm’s
9 way or even to drive at all. *Id.* ¶ 246.

10 Standing alone, these allegations would likely be insufficient to support a finding of
11 unreasonable safety risk not for lack of a causal chain, but because, as the Court previously
12 explained, arguably “there is no more of a safety concern [here] than where, *e.g.*, a car gets less
13 gas mileage than advertised,” as “the more rapid consumption of gas might lead to a driver
14 running out of fuel on a freeway or other dangerous location, [but] the driver has a fuel gauge to
15 warn him or her of low fuel.” *See* Docket No. 62 at 10, n.2.

16 Unlike in their prior complaint, however, Plaintiffs now specifically allege in the SAC that
17 the vehicle’s warning systems are inadequate and therefore fail to warn drivers before oil levels
18 are dangerously low. For example, Plaintiffs allege that “the oil pressure gauge in the Class
19 Vehicles fails to provide any indication as to when a vehicle is dangerously low on oil” and “do
20 not indicate a dangerously low oil level until the vehicles have no oil pressure,” which is “well
21 beyond the point at which a lack of oil, and oil pressure, will damage or destroy an engine.” SAC
22 ¶ 235. Further, Plaintiffs allege that “the oil canister symbol will not illuminate, and the Class
23 Vehicles will not provide *any* low oil pressure warning, until well past the time when the Class
24 Vehicles are critically low on oil.” *Id.* ¶ 236 (emphasis added). In particular, Plaintiffs claim they
25 performed testing demonstrating that the low oil pressure indicator does not illuminate until the oil
26 pressure drops below six PSI, below GM’s minimum oil specification of 24 PSI. *Id.* According to
27 Plaintiffs, “[a]n engine generating six PSI of oil pressure will suffer immediate internal destruction
28 if put under operating loads.” *Id.* Thus, “the Class Vehicles communicate *no* visible or audible

1 warnings of destructive oil pressure levels until the engines internally seize or disintegrate.” *Id.*
2 (emphasis added). Several Plaintiffs also allege that they suffered various forms of engine damage
3 without a warning from the vehicle.¹⁵

4 In light of these more detailed allegations including the lack of adequate warning,
5 Plaintiffs have pled a sufficiently close nexus between the alleged defects (overconsumption of
6 engine oil and a failure to provide adequate warning) and the safety risk (engine disintegration or
7 failure or engine fire) to plead an unreasonable safety hazard. Though Defendant argues that the
8 existence of its warning systems should preclude liability here, the cases Defendant cites are all
9 decided at the summary judgment or trial stage.¹⁶ Plaintiffs have included sufficient allegations to
10 create a plausible assertion as to the inadequacy of the warning system and hence the existence of
11 safety risk.

12 The plausibility of the causal chain between the defect and the safety hazard is bolstered by
13 allegations that consumers, including Plaintiffs, have reported virtually every problem on the way
14 to the ultimate safety hazard. For example, Plaintiff Perkins alleges that as a result of the Oil
15 Consumption Defect and resulting loss of lubricity, the lifters in his vehicle’s engine collapsed.
16 SAC ¶ 47. Plaintiffs Mr. and Mrs. Doepel allege that their vehicle’s engine exhibited loud
17 knocking and emitted white smoke from the tail pipe as a result of the over-consumption of oil.
18 *Id.* ¶ 78. Plaintiffs Bradford, Kitchen, and Warpinski experienced failures with their lifters and
19 cam shafts, and Warpinski experienced engine knocking, shaking, and running through. *Id.* ¶¶ 64,

21 ¹⁵ See SAC ¶¶ 33-34 (the Cralleys had to replace their engine due to damage from excessive oil
22 consumption but they “never saw a low oil warning light illuminate or appear in their vehicle”);
23 *id.* ¶ 42 (Goodwin’s vehicle “has been two quarts low on oil, without a low oil warning ever
24 illuminating on his vehicle”); *id.* ¶¶ 78-79 (excessive oil consumption caused knocking sounds and
25 white smoke, requiring purchase of new engine, yet the Doepels “never saw a low oil warning
illuminate or appear in their vehicle”); *id.* ¶ 107 (Dahl noticed excessive consumption when his oil
screen clogged and mechanic informed him his vehicle was low on oil, “although a low oil
warning never illuminated”).

26 ¹⁶ See *Gauthier v. AMF, Inc.*, 788 F.2d 634, 635-36 (9th Cir. 1986) (because Montana law had
27 adopted Restatement position on warnings, failure to instruct jury on the legal effect of the
28 adequacy of defendant’s warnings, if jury were to find they were adequate, was abuse of
discretion); *Rodriguez v. JLG Indus.*, 2012 WL 12883784, at *20-21 (C.D. Cal. Aug. 3, 2012)
(denying defendant’s motion for summary judgment in strict product liability case where jury
could reasonably come to either conclusion on whether warnings were adequate).

1 124, 149. Plaintiffs’ allegations are supplemented by a multitude of consumer complaints alleging
2 a variety of similar problems. *See, e.g.*, SAC ¶ 276 (car “started smoking really bad whenever I
3 would start it”); ¶ 278 (“[A]fter turning feels like the throttle goes flat”); ¶ 258 (“Traction control
4 problems, engine reduced power, this problem cripples the vehicle”).¹⁷ A number of consumer
5 complaints also allege that their vehicles’ operability became impaired.¹⁸

6 Defendant argues that the consumer complaints carry little weight because they did not
7 involve Class Vehicles. However, the complaints involve the same alleged problem
8 (overconsumption of oil), the same types of intermediate problems (spark plugs, smoke, etc.), and
9 the same allegedly defective engine (Gen IV Vortec 5300). Although it is plausible the problems
10 experienced by the non-Class Vehicles were caused by something other than the alleged engine
11 defect, it is at least equally plausible that the engine common to all the vehicles was the common
12 cause. *See Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011) (“If there are two alternative
13 explanations, one advanced by defendant and the other advanced by plaintiff, both of which are
14 plausible, plaintiff’s complaint survives a motion to dismiss under Rule 12(b)(6). Plaintiff’s
15 complaint may be dismissed only when defendant’s plausible explanation is so convincing that
16 plaintiff’s explanation is *implausible*.” (emphasis in original)).

17 Finally, the Court must consider whether this safety risk was “unreasonable” such that the
18

19 ¹⁷ *See also* SAC ¶ 33 (spark plug fouling); ¶ 90 (spark plugs); ¶ 101 (spark plug, cam, and lifters
20 failed); ¶ 108 (spark plugs); ¶ 133 (spark plugs); ¶ 155 (spark plugs, rough idle, engine shaking); ¶
21 180 (spark plugs and smoke emission); ¶¶ 190-91 (spark plugs and misfiring); ¶ 256 (consumer
22 claims vehicle “would continue to drive sluggish”); ¶ 261 (spark plugs fouled); ¶ 262 (observing
23 “blue smoke when we start [the car]” and “terrible knocking” by the engine); ¶ 264 (noting “more
24 serious symptoms of loud engine tapping and black smoke”); ¶ 268 (smoke coming out of
exhaust); ¶ 269 (reporting that car “feels sluggish and seems to miss[fire?] at times but no check
engine light”); ¶ 270 (“[e]ngine is making rattle noises”); 271 (reporting bad rings); 272 (reporting
“spark plugs burning out or failing sluggish engine clicking noise in engine”); *id.* (stating “truck is
running like crap”).

25 ¹⁸ *See* SAC ¶ 262 (2007 Chevy Suburban owner states that “[t]he vehicle was miss [sic] firing and
26 running rough, so much so you could not drive it. . . . It turned out to be two plugs fowed [sic]
27 with oil.”); ¶ 266 (2008 Chevy Avalanche owner reported “while on the highway, the engine
28 started making a loud banging noise, oil pressure dropped off again, and lights came back on. Had
to have it towed to a repair shop on a Saturday”); ¶ 277 (Re 2010 Chevy Crew Cab z71, “[a]
fouled no 1 cylinder spark plug left me on the side of the road”); *See* SAC ¶ 269 (2009 Chevy
Tahoe owner stated that “[t]he engine light came on . . . and the car was sluggish at stops. We
took it to the dealership right away”).

1 omission may be considered material even for post-warranty claims, and thus may give rise to a
2 duty to disclose. In considering this question, the Court is mindful that, in *Williams*, the Ninth
3 Circuit rejected a claim that a boat motor experiencing premature corrosion posed an
4 “unreasonable safety hazard” because of the plaintiffs’ “own characterization of the defect” as one
5 which “merely accelerates the *normal* and *expected* process of corrosion.” *Williams*, 851 F.3d at
6 1028 (emphasis in original). The Ninth Circuit reasoned that “[w]ere we to conclude that
7 [plaintiffs’] allegations of premature but otherwise normal wear and tear plausibly establish an
8 unreasonable safety hazard, we would effectively open the door to claims that *all* of Yamaha’s
9 outboard motors eventually pose an unreasonable safety hazard.” *Id.* (emphasis in original).
10 Thus, “the nature of the alleged defect as being primarily one of accelerated timing rather than the
11 manifestation of a wholly abnormal condition weighs against its characterization as
12 ‘unreasonable.’” *Id.* Arguably, the consumption of oil is normal and expected, and the excessive
13 consumption of oil is another way of stating that such consumption is simply an accelerated but
14 otherwise normal process.¹⁹

15 *Williams* might appear to stand for the proposition that a claim based on what is essentially
16 premature or accelerated wear-and-tear that is otherwise normal or expected is categorically
17 precluded. Such a broad interpretation, however, would conflict with prior Ninth Circuit
18 precedent. In *Daniel v. Ford Motor Co.*, for example, the plaintiffs alleged that a rear suspension
19 defect caused “premature tire wear,” yet the Ninth Circuit held that “[a] reasonable fact finder
20 could infer that a vehicle that experiences premature and more frequent tire wear would pose an
21 unreasonable safety risk” 806 F.3d 1217, 1226 (9th Cir. 2015). Because *Williams* does not
22 cite or discuss *Daniel*, the Court cannot infer that *Williams* announced a broad rule new rule and
23

24 ¹⁹ That seems to be the case even though the various defects causing overconsumption are not
25 themselves “normal.” For example, the piston rings failed to seal oil in the crankcase to keep it
26 out of the combustion chamber (SAC ¶ 218), the AFM system sprays oil directly into the piston
27 skirts in quantities that the rings cannot control (SAC ¶ 225), and the PCV system is solely
28 intended to circulate fresh air to the engine’s combustion chambers but inadvertently vacuums oil
from the valvetrain into the combustion chamber too (SAC ¶¶ 229-30). The warning systems do
not function normally because they do not inform drivers about insufficient oil levels until *after*
engine damage or damage to other components like spark plugs and piston rings have already
started to occur. SAC ¶¶ 235-236.

1 silently overturned prior precedent.

2 Regardless of how one might reconcile *Williams* and *Daniel*, the alleged facts in this case
3 present a situation where safety risks, even if due to a gradual (and not sudden) process, may not
4 be discovered in time to prevent harm. Plaintiffs have alleged enough detail to suggest that a
5 reasonable jury on these allegations could conclude the safety risk was unreasonable in light of the
6 inadequate warning system. In light of these allegations, the issue of unreasonableness is a
7 question of fact more appropriately resolved at summary judgment or trial rather than on the
8 pleadings. *See In re MyFord Touch Consumer Litig.*, 46 F.Supp.3d 936, 960 (N.D. Cal. 2014);
9 *Daniel*, 806 F.3d at 1226.

10 In sum, assuming as the Court must that Plaintiffs' allegations concerning the failure of the
11 warning systems and the severity of the overconsumption defect are true, a jury could conclude
12 there was an unreasonable safety hazard for post-warranty claims, and that there was a material
13 defect for in-warranty claims.

14 4. Reliance

15 Defendant also argues that Plaintiffs do not adequately plead reliance because they do not
16 plead with specificity that they reviewed or relied upon GM's advertising materials, such that
17 omission of the material information could have influenced their purchasing decisions. Mot. at
18 11-12. Plaintiffs instead generally plead that they "relied on the omissions of GM with respect to
19 the quality and reliability of the Class Vehicles" and "would not have purchased or leased" the
20 vehicles "but for" the omissions. *See, e.g., SAC ¶ 411* (similar allegations are made with respect
21 to the relevant counts).

22 "An essential element for a fraudulent omission claim is actual reliance." *Daniel*, 806 F.3d
23 at 1225. "To prove reliance on an omission, a plaintiff must show that the defendant's
24 nondisclosure was an immediate cause of the plaintiff's injury-producing conduct." *Id.* One way
25 to do so is "by simply proving that, had the omitted information been disclosed, one would have
26 been aware of it and behaved differently." *Id.* (quotation and citation omitted). Thus, reliance has
27 two components. The first relates to whether one would have behaved differently, which "can be
28 presumed, or at least inferred, when the omission is material." *Id.* (citation omitted); *see also In re*

1 *Tobacco II Cases*, 46 Cal.4th 298, 327 (2009) (“[A] presumption, or at least an inference, of
2 reliance arises wherever there is a showing that a misrepresentation was material. A
3 misrepresentation is judged to be ‘material’ if a reasonable man would attach importance to its
4 existence or nonexistence in determining his choice of action in the transaction in question, and as
5 such materiality is generally a question of fact”) (quotations omitted); *McAdams v. Monier,*
6 *Inc.*, 182 Cal.App.4th 174, 184 (2010) (failure to disclose information “which would have been
7 material to any reasonable person who purchased” the product permits a presumption of reliance).
8 As explained above, Plaintiffs have demonstrated that the defect was material, so this component
9 of reliance can be inferred at this stage. In any case, Plaintiffs have explicitly pled that they
10 “would not have purchased . . . and/or paid as much for” the vehicles if they had been aware of the
11 omitted information. *See, e.g.*, SAC ¶ 411.

12 The second component of reliance requires showing that Plaintiffs “would have been
13 aware of a disclosure by [the defendant].” *Id.* at 1226. This component of the reliance analysis is
14 different for omission and concealment than affirmative misrepresentation. In an affirmative
15 misrepresentation case, a plaintiff obviously must plead that they in fact viewed or were exposed
16 to the misleading misrepresentation; otherwise, they could not have relied on it. In contrast, the
17 very premise of an omission case is that the plaintiff was never exposed to certain information that
18 should have been disclosed.²⁰ Thus, the reliance analysis proceeds from a very different starting
19 point. Here, the parties dispute the meaning of this distinction in an omission case. GM argues
20 Plaintiffs must allege what advertisements they viewed to plead reliance; this argument appears to
21 confuse the reliance analysis for affirmative misrepresentation with that for omission. Plaintiffs,
22 on the other hand, argue that they are not required to plead what advertisements they viewed with
23 specificity under Rule 9(b) in an omissions case; while Plaintiffs’ argument is correct, the main
24 issue, which Plaintiffs do not quite articulate, is that an omissions case does not necessarily require
25 a plaintiff to have viewed an advertisement at all. Rather, a plaintiff’s ultimate burden at trial is to

26 _____
27 ²⁰ Indeed, it would hardly make sense to hold that a plaintiff in an omission case must always
28 plead that they viewed an advertisement to satisfy the reliance requirement, because such a
categorical rule would overlook the possibility that a defendant who has not engaged in any
advertising whatsoever may nevertheless have an obligation to disclose certain information.

1 present sufficient evidence to “establish a plausible method of disclosure and to establish that they
2 *would have been aware* of information disclosed using that method.” *Id.* at 1227 (emphasis
3 added). For example, in *Daniel*, the plaintiffs met that burden at summary judgment by
4 introducing evidence “that they interacted with and received information from sales
5 representatives at authorized Ford dealerships prior to purchasing their Focuses.” *Id.* at 1226.
6 That was sufficient even though “Ford presented evidence that conclusively establishes that
7 Plaintiffs did not view any advertising materials produced by Ford prior to purchase.” *Id.* To the
8 extent what advertisements Plaintiffs saw may have some relevance as to what channels of
9 disclosure were available to the Defendant disabuse consumers of the omission, *Daniel* makes
10 clear that the actual viewing of advertisements is not required in an omission case.

11 In *Daniel*, Ford had argued that the plaintiffs could not simply show that they could have
12 received the information through dealerships, but had to demonstrate that the dealerships were
13 contractually obligated to pass on disclosures from Ford or would have done so voluntarily. The
14 Ninth Circuit disagreed. Rather, it was sufficient “that Ford communicates indirectly through its
15 authorized dealerships,” that the plaintiffs “received information about the ‘characteristics,’
16 ‘benefits,’ and ‘quality,’ of the Ford Focus from Ford’s dealerships,” that the warranty required
17 plaintiffs “to return to Ford dealerships to perform warranty repairs,” and that Ford “circulated its
18 special service messages and technical service bulletins when issues arose with the Focus.” *Id.* at
19 1227. Based on that evidence, the Ninth Circuit held “a reasonable fact finder could conclude that
20 Ford knew that its customers depended at least in part on its authorized dealerships for information
21 about its vehicles and that Ford’s authorized dealerships would have disclosed the alleged rear
22 suspension defect to consumers if Ford had required it.” *Id.*

23 The proper focus in an omission case such as this is, therefore, what channels of
24 information customers depend upon and whether the defendant could have taken action to
25 disseminate information through those channels (*e.g.*, by requiring dealerships to disclose it as in
26 *Daniel*). This analysis is consistent with the fact that an omission-based fraud claim is premised
27 on the defendant’s affirmative *duty* to disclose. *See, e.g., LiMandri*, 52 Cal.App.4th at 337;
28 *Daugherty v. Am. Honda Motor Co., Inc.*, 144 Cal.App.4th 824, 838 (2006). A defendant must

1 exercise “reasonable care” to bring the information to the plaintiff’s attention when under such a
2 duty. *See* Restatement (Second) of Torts § 551, Comment on Subsection (2) (1977) (“If
3 reasonable care is exercised, the fact that the information does not reach the person entitled to it
4 does not subject [the defendant] to liability.”); *Hoffman v. 162 North Wolfe LLC*, 228 Cal.App.4th
5 1178, 1187, n.11 (2014) (noting that “Section 551 of the Restatement Second of Torts has been
6 cited with approval and relied upon by several California courts”). Thus, focus is on whether the
7 Defendant *could have* disclosed the information to Plaintiffs through the exercise of reasonable
8 care, and whether Plaintiffs *would have* received it had Defendant done so. What matters in an
9 omission case under *Daniel* is whether the plaintiff had an *opportunity* to receive and therefore
10 rely on the omitted information, not whether they actually received some other, irrelevant
11 information. Although the actual receipt of some information from a defendant might tend to
12 demonstrate that the plaintiff had an opportunity to receive additional information, it is not
13 necessarily the only way to establish such an opportunity.

14 Here, the Plaintiffs who purchased their vehicles (both new and used²¹) directly from
15 authorized GM dealerships have adequately pleaded that they had an opportunity to receive the
16 information at the dealerships had it been disclosed to them. Although they have not specifically
17 alleged that they interacted with and received information from sales representatives at the
18 dealerships, it is plausible to infer that they did so (at least at the pleading stage) because it would
19 be highly improbable for a person to walk into a dealership and purchase a vehicle without
20 interacting with a sales representative.

21 Further, it is fair to treat Plaintiffs’ opportunity to receive information from GM’s
22 authorized dealerships as an opportunity to receive the information directly from GM because an
23 agency relationship has plausibly been pled. Though Plaintiffs have not explicitly alleged an
24 agency relationship, the complaint includes allegations from which an agency relationship may

25
26 ²¹ Defendant argued that plaintiffs who purchased used vehicles (Bradford, Del Valle, the
27 Doepels, Faulkner, Ware, Ehrke, Warpinski, Sloan, Byrge, and Thacker) failed to allege that they
28 viewed GM marketing materials or had direct contact with GM, but several of them purchased
used vehicles from GM dealerships. As explained above, the more relevant question is not
whether the vehicle was new or used, but whether it was purchased from an authorized GM
dealership or some other entity.

1 plausibly be inferred. For example, the complaint alleges that GM “instructed” dealerships how to
2 respond to excessive oil complaints. *See* SAC ¶¶ 15, 18. Moreover, the express warranties
3 submitted by Defendant state that “GM requests that the vehicle be returned to the selling dealer
4 for all warranty repairs,” and that “[i]f you are unable to return to the selling dealer, contact a GM
5 dealer in the United States or Canada for warranty service.” *See, e.g.*, Oxford Decl., Ex. 22 at 1
6 (Docket No. 48-22) (2010 Chevrolet Limited Warranty).²² Thus, for pleading purposes, Plaintiffs
7 have adequately alleged an agency relationship between the dealerships and GM. *Cf. In re*
8 *MyFord Touch*, 46 F.Supp.3d at 956 (holding that “the scope of the agency is a factual one for the
9 jury to resolve, especially as information about Ford’s precise relationship with its dealers . . . is
10 largely within Ford’s possession, custody or control” and holding that allegations that Ford sent
11 instructions to dealers about how to repair vehicle defect was sufficient at pleading stage).
12 Because Plaintiffs have adequately pled an agency relationship between GM and its authorized
13 dealerships, Plaintiffs’ interactions with the dealerships are sufficient under *Daniel* to constitute
14 the opportunity through which they would have received the omitted information from GM had
15 GM undertaken reasonable steps to disseminate it through its dealerships.

16 However, a small number of Plaintiffs alleged that they purchased vehicles from an entity
17 other than a GM dealership.²³ The inference that effective disclosure would have been made by
18 Defendant cannot be drawn as to those Plaintiffs because it is not clear what relationship, if any,
19 those dealerships had with GM and whether or not they generally passed information from GM on
20 to consumers, as in *Daniel*. The Court acknowledges that Plaintiffs make general allegations
21 concerning GM’s advertising campaigns targeting the public, including through brochures, online,
22 television, radio, and print advertisements, annual reports, and so on. *See* SAC ¶¶ 281-302. At
23 least some of those could plausibly have been possible channels for GM to disclose the omitted
24 information. However, Plaintiffs do not allege that they would have received the disclosed
25

26 ²² Though the warranty is not attached to the complaint, it may be incorporated by reference.

27 ²³ These are Plaintiffs the Doepels (Toyota dealer, SAC ¶ 76); Ware (Barnes Crossing Hyundai
28 Mazda, SAC ¶ 117); Warpinski (Toyota dealer, SAC ¶ 146); Byrge (Honda dealer, SAC ¶ 168);
and Thacker (Ford dealer, SAC ¶ 178).

1 information if it had been disclosed through those mediums, and the Court cannot draw that
2 inference from the pleadings without more specific allegations as to, *e.g.*, the likelihood that GM’s
3 disclosure channels would have found their way through these non-GM entities or the
4 pervasiveness of that advertising or other public dissemination which would have reached
5 consumers. *Compare In re Tobacco II Cases*, 46 Cal.4th 298, 327 (2009) (explaining that where
6 “a plaintiff alleges exposure to a long-term advertising campaign, the plaintiff is not required to
7 plead with an unrealistic degree of specificity that the plaintiff relied on particular advertisements
8 or statements”) with *Mazza v. American Honda Motor Co., Inc.*, 666 F.3d 581, 595-96 (9th Cir.
9 2012) (holding that a presumption of reliance is not justified where “it is likely that many class
10 members were never exposed to the allegedly misleading advertisements, insofar as advertising of
11 the challenged system was very limited,” and interpreting *Tobacco II* “in the context of a
12 ‘decades-long’ tobacco advertising campaign where there was little doubt that almost every class
13 member had been exposed to defendants’ misleading statements”). The Court dismisses their
14 claims with leave to amend.

15 In dismissing those claims with leave to amend, the Court rejects Defendant’s argument
16 that Rule 9(b) requires Plaintiffs to allege with specificity in what particular advertisements the
17 omitted information should have been included. Claims based on an omission “can succeed
18 without the same level of specificity required by a normal fraud claim.” *Cooper v. Pickett*, 137
19 F.3d 616, 627 (9th Cir. 1997). As Judge Tigar has observed, “[t]his is because a plaintiff alleging
20 an omission-based fraud will not be able to specify the time, place, and specific content of an
21 omission as would a plaintiff in a false representation claim.” *MacDonald v. Ford Motor Co.*, 37
22 F.Supp.3d 1087, 1096 (N.D. Cal. 2014). In this context, as in *MacDonald*, the “whom” is GM, the
23 “what” is the oil consumption defect, the “when” is prior to the sale of class vehicles, and the
24 “where” is the “various channels of information through which Ford sold Class Vehicles.” *Id.*
25 What the non-dealership Plaintiffs are missing is a plausible allegation that they would have
26 received the information if disclosed through those various channels of information.

27 Defendant relies on *Marolda v. Symantec Corp.*, 672 F.Supp.2d 992 (N.D. Cal. 2009) in
28 arguing to the contrary. In *Marolda*, the plaintiff had identified a particular advertisement as

1 misleading or deceptive but failed to include any identifying information about that advertisement
2 or its purported omissions in the complaint. The court held that “[i]n this case” more detail had to
3 be pled about the particular advertisement. *Id.* at 1002.

4 Virtually every court to consider of *Marolda* where there are claims like the instant case—
5 alleged omission regarding a material safety defect in a vehicle—has rejected its applicability.
6 *See, e.g., MacDonald*, 37 F.Supp.3d at 1096 (distinguishing *Marolda* as “dissimilar” because it
7 “concerned an alleged omission within a particular advertisement, which the plaintiff had failed to
8 produce or adequately describe”); *Philips v. Ford Motor Co.*, Case No. 14-CV-02989-LHK, at *12
9 (N.D. Cal. 2015) (stating that “*Marolda* involved an alleged fraudulent omission within a
10 particular advertisement produced by the defendant” and agreeing its requirements were not
11 appropriate for all cases, siding instead with *MacDonald*); *Velasco v. Chrysler Grp. LLC*, 2014
12 WL 4187796, at * (C.D. Cal. Aug. 22, 2014) (distinguishing *Marolda* and following *MacDonald*
13 to conclude that reliance met Rule 9(b) requirements despite failure to identify a particular
14 advertisement in undisclosed safety defect automobile case).²⁴ However, one court, *Parenteau v.*
15 *GM, LLC*, 2015 WL 1020499, at *7 (C.D. Cal. Mar. 5, 2015), is an outlier case that follows
16 *Marolda* in an omission context, but is inconsistent with the Ninth Circuit’s holding in *Daniel* that
17 the focus should be on the defendant’s opportunity to disseminate the information to the plaintiff,
18 *not* whether the plaintiff has in fact viewed any advertisements. *See Daniel*, 806 F.3d at 1226
19 (holding that jury’s finding of reliance adequate even though “Ford presented evidence that
20 conclusively establishes that Plaintiffs did not view any advertising materials produced by Ford
21 prior to purchase”).

22 Accordingly, as in *MacDonald*, *Philips*, and *Velasco*, the non-dealership Plaintiffs would
23 likely meet their burden under Rule 9(b) even without specifically identifying a particular
24

25 ²⁴ Defendant also relies on *Weaver v. Chrysler Corp.*, 172 F.R.D. 96, 102 (S.D.N.Y. 1997), but
26 that is distinguishable for the same reason as *Marolda*. There, the plaintiffs had alleged “reliance
27 on representations, advertisements and other promotional materials prepared and approved” by the
28 defendant, but “fail[ed] to specify the period during which he read, saw, or heard [those]
representations, advertisements and promotional materials.” *Id.* In contrast, Plaintiffs here have
not failed to be specific about which advertisements they read and relied on because they do not
allege that they did so.

1 advertisement in which the omitted information should have been included, so long as they
2 provide plausible allegations, consistent with *Daniel*, that they would have received the
3 information in some way had Defendant exercised reasonable care.²⁵ The dealership Plaintiffs
4 have met their burden because the mere fact that they purchased their vehicles from an authorized
5 dealership supports a plausible inference under *Daniel* that they interacted with a sales agent and
6 would have received the material information during the purchase process.

7 5. Conclusion Regarding Fraud and Consumer Protection Claims

8 Plaintiffs have adequately pleaded a claim for fraudulent omission. The omission was
9 material for the in-warranty claims because Plaintiffs allege that they would not have purchased
10 the vehicle if they had known, and it is material for the post-warranty claims because it related to
11 an unreasonable safety hazard. The safety hazard is adequately pleaded because there is a
12 sufficient nexus between the alleged defect and the safety risk and because Plaintiffs have
13 adequately supported their allegation with several factual assertions of engine damage and other
14 reliability or operability problems. Most importantly, Plaintiffs have adequately alleged that there
15 was no adequate warning system before potentially catastrophic damage (and therefore safety
16 issues) could arise.

17 However, only the dealership Plaintiffs have adequately pled reliance at this stage. The
18 non-dealership Plaintiffs have not, for reasons explained above, so the Court **GRANTS**
19 Defendant's motion to dismiss with respect to Plaintiffs the Doepels, Ware, Warpinski, Byrge, and
20

21 ²⁵ The other cases cited by Defendant do not require otherwise. In *Asghari v. Volkswagen Grp. Of*
22 *Am., Inc.*, 42 F.Supp.3d 1306, 1325-26 (C.D. Cal. 2013), another safety defect case involving
23 excessive oil consumption, the court held that Rule 9(b) was satisfied where the "what" was the
24 excessive oil defect, the "why" was selling more vehicles at a higher price and misleading owners
25 to avoid warranty repairs, and the "how" was denying the problem by asserting it was normal
26 upon receiving a complaint. Thus, *Asghari* supports this Court's holding. In *Davidson v. Apple,*
27 *Inc.*, 2017 WL 976048 (N.D. Cal. Mar. 14, 2017), the alleged omission pertained to defective
28 touchscreens on iPhones. The court rejected the applicability of *Marolda* but found that a
Plaintiff's statement that he "purchased an iPhone 6 Plus from a Best Buy store in Illinois"
without information about the date of the purchase or the specific store, or any allegation that he
was exposed to any information about iPhones whatsoever before making the purchase, failed to
satisfy Rule 9(b). *Id.* *Davidson* did not hold that a plaintiff must plead actual exposure to
information, nor did it analyze *Daniel*.

1 Thacker with leave to amend.

2 C. Implied Warranty Claims

3 Plaintiffs bring claims for breach of the implied warranty of merchantability under the
4 Magnuson-Moss Act (Count 1), California’s Song-Beverly Act, § 1791.1 (Count 4), and UCC
5 section 2-314 as enacted in 22 other states (Counts 9, 14, 19, 28, 33, 42, 47, 58, 63, 67, 72, 77, 82,
6 87, 97, 102, 117, 122, 127, 136). The UCC provides that “a warranty that the goods shall be
7 merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods
8 of that kind” and that “[g]oods to be merchantable must be at least such as . . . are fit for the
9 ordinary purposes for which such goods are used.” UCC § 2-314.

10 Defendant challenges these claims on the basis that (1) Plaintiffs fail to plead the vehicles
11 were not fit for ordinary use because none claim they could not use them; (2) Plaintiffs did not
12 suffer harm or damage to their vehicles within the durational period for implied warranty; (3) lack
13 of privity under New York and Oregon law; (4) non-cognizability of Ohio “implied warranty in
14 tort” under Magnuson-Moss; and (5) failure to provide pre-suit notice. Each is discussed below.

15 1. Fit For Ordinary Use

16 To state a claim for breach of the implied warranty of merchantability, a plaintiff must
17 plead that “the product did not possess even the most basic degree of fitness for ordinary use.”
18 *Mocek v. Alfa Leisure, Inc.*, 114 Cal.App.4th 402, 406 (2003). Defendant argues that Plaintiffs
19 cannot make that showing because none of them allege they were forced to stop driving their cars
20 or that vehicle operation was drastically undermined. However, whether a defect is so severe that
21 “the cars at issue could not be said to provide safe, reliable transportation” is a question of fact for
22 the jury. *In re MyFord Touch*, 46 F.Supp.3d at 980. In light of the Court’s holding above that
23 Plaintiffs have adequately pled an unreasonable safety hazard, including several examples of
24 engine damage, fouled spark plugs, engine misfires, emission of white smoke, and so on, Plaintiffs
25 have created a fact question for the jury regarding the reliability and safety of the vehicles. *Id.*

26 Defendant’s cases do not support the proposition that a vehicle is fit for ordinary use so
27 long as it continues to provide transportation, irrespective of safety concerns. *American Suzuki*
28 *Motor Corp. v. Sup. Ct.*, cited by Defendant, reversed class certification in a case where plaintiffs

1 alleged the vehicle design created an unreasonable risk of vehicle roll-over but failed to allege a
2 single example of such a roll-over, thus leading the court to conclude the alleged risk was
3 “speculative.” 37 Cal.App.4th 1291, 1295-96 (1995). Here, the safety risk has been plausibly
4 alleged for purposes of Rule 12(b)(6). Moreover, later California authority has distinguished
5 *American Suzuki* and explicitly “reject[ed] the notion that merely because a vehicle provides
6 transportation from point A to point B, it necessarily does not violate the implied warranty of
7 merchantability. A vehicle that smells, lurches, clanks, and emits smoke over an extended period
8 of time is not fit for its intended purpose.” *Isip v. Mercedes-Benz USA, LLC*, 155 Cal.App.4th 19,
9 27 (2007). Similarly, here, a finder of fact based on the allegations of the SAC could reasonably
10 conclude that vehicles in which spark plugs and lifters fail unexpectedly, white smoke is emitted,
11 or engines become sluggish or suddenly shut down are not fit for ordinary use.²⁶

12 By pleading a material safety-related defect, Plaintiffs have adequately pled that the
13 vehicle was unfit for ordinary use.²⁷ The Court **DENIES** GM’s request to dismiss on this basis.

14 2. Durational Limit on Implied Warranty Claims

15 Defendant also argues that Plaintiffs’ implied warranty claims fail because none of them
16 allege that the harms they suffered occurred within the one-year warranty period of
17 merchantability. *See* Cal. Civ. Code § 1791.1(c). California appellate courts, however, have held

18
19 ²⁶ The other cases cited by Defendant are also distinguishable because they do not involve safety
20 or other defects that impair vehicle operability. *See Avedisian v. Mercedes-Benz USA, LLC*, 43
21 F.Supp.3d 1071, 1079 (C.D. Cal. 2014) (recognizing that “a defect need not render a vehicle
22 inoperable to establish a breach of implied warranty” so long as the vehicle is “in safe condition
23 and substantially free of defects,” and concluding that peeling chrome “did not impact the
24 operability of Plaintiff’s vehicle”); *Lee v. Toyota Motor Sales, U.S.A., Inc.*, 992 F.Supp.2d 962,
25 980 (C.D. Cal. 2014) (no breach of implied warranty where premium automatic braking feature
26 achieved only “negligible” reduction in speed, but vehicle otherwise was fully functional and
operator could still brake and no safety risk was shown); *Kent v. Hewlett-Packard Co.*, 2010 U.S.
27 Dist. LEXIS 76818, *12 (N.D. Cal. Jul. 10, 2010) (plaintiffs alleged that computers froze and
28 locked up with frequency due to defect, but failed to state claim for breach of implied warranty
where they did “not allege that they have been forced to abandon the use of their computers
completely, that the computers freeze multiple times per day, or that they in fact have lost data as a
result of the malfunctions,” nor “how often [their] computers exhibit the subject problems”).

²⁷ GM also states in a footnote that Count 51 under La. Civ. Code Art. 2524 fails for the same
reasons because the statute only requires that “the thing sold must be reasonably fit for its ordinary
use.” GM does not cite any caselaw suggesting that this standard differs from California law on
the breach of implied warranty.

1 that this durational limit “does not create a deadline for discovering latent defects or for giving
2 notice to the seller.” *Mexia v. Rinker Boat Co., Inc.*, 174 Cal.App.4th 1297, 1301 (2009). Rather,
3 “[i]n the case of a latent defect, a product is rendered unmerchantable, and the warranty of
4 merchantability is breached, by the existence of the unseen defect, not by its subsequent
5 discovery.” *Id.* at 1305. Therefore, that the engine damage was not discovered within the one-
6 year period is not determinative because the underlying defect was already allegedly present
7 before the discovery.

8 Defendant cites *Valencia v. Volkswagen Grp. of Am., Inc.* to argue for a “limited reading”
9 of *Mexia*. 119 F.Supp.3d 1130, 1139-40 (N.D. Cal. 2015) (holding that plaintiffs failed to plead
10 brake defect manifested within one year of purchase, and vaguely alleging that they experienced
11 “symptoms” within one year was insufficient). However, the Ninth Circuit has expressly
12 disapproved of *Valencia*, holding that *Mexia*—as the highest state court authority—“must be
13 followed.” *Daniel v. Ford Motor Co.*, 806 F.3d 1217, 1223 (9th Cir. 2015) (reversing district
14 court’s grant of summary judgment with respect to late discovery of latent defect). All the other
15 federal district court cases cited by Defendant pre-date *Daniel*.

16 Thus, Plaintiffs’ claims are not barred by failure to specify that the harms manifested
17 within 1 year of purchasing new vehicles or 3 months of purchasing used vehicles. They allege
18 the defect was inherent to the engine design and, therefore, existed at the time of purchase. That is
19 a “latent” defect arising at the time of purchase and cognizable under *Mexia*.

20 Defendant also cursorily asserts that Plaintiffs “do not allege manifestation within the
21 unspecified implied warranty periods under their States’ laws,” Mot. at 9, but does not discuss the
22 laws of any state other than California. The question whether those states’ laws differ from
23 California’s with respect to latent defects is therefore inadequately briefed and waived on this
24 motion. *See, e.g., Parrish v. Mabus*, 679 Fed.Appx. 620, 621 (9th Cir. Mar. 9, 2017) (“A bare
25 assertion in a brief with no supporting argument, or an argument made only in passing, is
26 insufficient to avoid waiver.”).

27 The Court **DENIES** Defendant’s request to dismiss Plaintiffs’ implied warranty claims for
28 failure to assert manifestation of the defect within the limitations period.

1 3. Privity Under New York and Oregon Law

2 GM argues that New York and Oregon law require privity of contract as an essential
3 element of an implied warranty claim unless a plaintiff alleges personal injury. *See, e.g., Prue v.*
4 *Fiber Composites, LLC*, 2012 U.S. Dist. LEXIS 54027, *30-32 (E.D.N.Y. Apr. 17, 2012), citing
5 *Arthur Jaffee Assocs. v. Bilco Auto Serv.*, 89 A.D.2d 785 (1982); *Davis v. Homasote*, 281 Ore.
6 383, 386 (1978). GM argues that Plaintiff Vita (New York) and Plaintiff Martell (Oregon)
7 therefore fail to state a claim because they purchased their vehicles from dealers and do not allege
8 personal injuries. *See* SAC ¶¶ 130, 152.

9 Plaintiffs counter that New York law finds privity where dealerships act as GM’s sales
10 agent. *See Gordon v. Ford Motor Co.*, 239 A.D. 2d 156 (N.Y. App. Div. May 6, 1997) (denying
11 motion to dismiss because “privity would exist if the dealerships with which plaintiffs dealt were
12 defendant’s sales or leasing agents”). Defendant points out, however, that Plaintiffs fail to allege
13 that the dealership acted as GM’s sales agent in the complaint. That is true, but as explained
14 above, Plaintiffs have pleaded sufficient information to permit a plausible inference of such an
15 agency relationship in light of allegations that GM instructed dealers how to respond to excessive
16 oil consumption complaints and its warranty requires presentation to a dealership. *See supra* at
17 36-37.

18 Defendant’s request to dismiss Plaintiff Vita’s implied warranty claim under New York
19 law is **DENIED**.

20 Plaintiffs also counter that Oregon law permits “a plaintiff within the normal distribution
21 chain [to] recover property damages from a seller with whom he is not in privity based on breach
22 of an implied warranty.” *McFadden v. Dryvit Sys., Inc.*, 2004 WL 2278542, at *8 (D. Or. Oct. 8,
23 2004).²⁸ However, as Defendant points out, *McFadden* distinguishes property damage and
24 personal injury from mere economic loss. *Id.* Privity is not required for the former, but is
25 required for the latter. *Id.* Plaintiff Martell therefore cannot proceed on a claim for economic loss
26 because of lack of privity. Although he claims that his engine has been damaged, SAC ¶ 155, that
27

28 ²⁸ Plaintiffs do not argue that privity exists by virtue of an agency relationship under Oregon law.

1 does not appear to be the type of property damage that gives rise to a cognizable claim. *See East*
2 *River S.S. Corp. v. Transamerica Delaval*, 476 U.S. 858 (1986) (“In the traditional ‘property
3 damage’ cases, the defective product damages *other* property.” (emphasis added)). *See also*
4 *McFadden*, 2004 WL 2278542, at *6 (plaintiffs were “seeking damages to repair their homes, not
5 simply to replace the defective EIFS [which leaked and trapped water, causing physical damage to
6 their homes]”). Thus, because Plaintiff Martell fails to establish privity or allege cognizable
7 property damage, GM’s request to dismiss his implied warranty claim under Oregon law is
8 **GRANTED** with leave to amend only if he can plausibly allege he was in privity with GM.

9 4. Implied Warranty In Tort

10 Defendant argues that Ohio Plaintiffs Gulling and Jones’ claims for “implied warranty in
11 tort,” SAC Count 92 ¶¶ 1241-47, must be dismissed because the Magnuson Moss Warranty Act
12 does not cover such claims.

13 The Magnuson-Moss Warranty Act, 15 U.S.C. § 2300, *et seq.*, sets forth minimum federal
14 standards for express and implied warranties for consumer products, and creates federal
15 jurisdiction over civil actions premised on violations of those standards or failure to comply with
16 “a written warranty, implied warranty, or service contract,” when certain amount-in-controversy
17 thresholds are satisfied. *See* 15 U.S.C. § 2310(d)(1), (d)(3). Plaintiffs do not respond to
18 Defendant’s contention that a claim for implied warranty in tort (as opposed to contract) may not
19 proceed under the Magnuson-Moss Warranty Act. Nevertheless, Defendant appears to be correct
20 that a non-contract implied warranty claim may not proceed under Magnuson Moss. *See In re*
21 *Porsche Cars, N. Am., Inc. Plastic Coolant Tubes Prods. Liab. Litig.*, 880 F.Supp.2d 801, 819-20
22 (S.D. Ohio 2012) (“Although Ohio courts recognize two forms of implied warranty claims—
23 implied warranty in tort and implied warranty of merchantability (contract)—only the latter can
24 form the basis of a Magnuson-Moss claim.”). The Court therefore **GRANTS** GM’s request to
25 dismiss Count 92.

26 Defendant also argues that Plaintiffs Clausen, Harris, Ludington, Shorter, Bednarek,
27 Hanneken, and the Doepels do not bring implied warranty claims under their states’ laws, so their
28 Magnuson-Moss claims should be dismissed because they have abandoned express warranty

1 claims except for purposes of a future appeal in light of the Court’s prior ruling regarding express
2 warranty. *See* SAC at 59, n. 40. Plaintiffs do not respond to this request, and Defendant’s
3 assertion that these Plaintiffs have not brought a separate implied warranty claim in the SAC is
4 correct. In the absence of either an express or implied warranty claim, Plaintiffs have not
5 identified any other actionable claim under the Magnuson-Moss Warranty Act. *See* 15 U.S.C. §
6 2310(d) (permitting cause of action only for “a consumer who is damaged by the failure of a
7 supplier, warrantor, or service contractor to comply with any obligation under this chapter, or
8 under a written warranty, implied warranty, or service contract”). The Court therefore **GRANTS**
9 GM’s request to dismiss Magnuson-Moss Act claims of Plaintiffs Clausen, Harris, Ludington,
10 Shorter, Bednarek, Hanneken, and the Doepels.

11 5. UCC § 2-607: Pre-Suit Notice

12 Defendant argues that seven Plaintiffs’ implied warranty claims are barred because they
13 failed to make notice to the seller within a reasonable time after discovering the alleged breach, a
14 necessary step under their states’ laws. *See* UCC § 2-607(3). Plaintiff responds that Plaintiff
15 Ludington provided GM with notice on behalf of the class on October 27, 2016, and therefore,
16 sufficient notice has been made. *See* SAC ¶ 303. No case-law is cited by either side regarding the
17 sufficiency of class-wide notice under the laws of the states in question. Although the parties
18 addressed this question in a categorical fashion, the Court analyzes it on a state-by-state basis.

19 a. Alabama (Ala. Code § 7-2-607) – Plaintiff Brannan

20 Alabama law requires direct notice from the buyer to the manufacturer where the
21 manufacturer (and not the seller) is being sued. *See Hobbs v. Gen. Motors Corp.*, 134 F.Supp.2d
22 1277, 1285 (M.D. Ala. 2001); *see also In re MyFord Touch*, 46 F.Supp.3d at 974. Additionally,
23 the filing of a lawsuit does not constitute sufficient notice under Alabama law. *Hobbs*, 134
24 F.Supp.2d at 1285 (stating that the notice must “precede the filing of the complaint” in cases
25 involving economic harm).

26 The question therefore is whether Plaintiff Ludington’s class-wide notice suffices.
27 Generally speaking, the sufficiency of notice is “tested in light of the facts of the particular case”
28 to determine whether it is “sufficient to inform the seller of the breach and its possible

1 ramifications,” unless notice is inadequate as a matter of law. *Page v. Camper City and Mobile*
2 *Home Sales*, 292 Ala. 562, 565 (1974). Class-wide notice provided by a plaintiff in another state
3 likely is insufficient as a matter of law. Courts applying Alabama law have refused, for example,
4 to accept the argument that notice is not required where a manufacturer is already “aware” of
5 alleged defects. *See, e.g., Smith v. Apple*, No. 08-AR-1498-S, 2009 WL 3958096, at *1 (N.D. Ala.
6 Nov. 4, 2009) (“[A] general awareness on Apple’s part of alleged defects in its iPhone does not
7 extinguish the purpose of the notice requirement, nor does it substitute for that requirement under
8 Alabama law.”). The purpose of pre-suit notice under Alabama law is to provide the seller an
9 opportunity to cure the defect or the parties an opportunity to settle. Notice provided by a person
10 in another state that purports to be made on behalf of all purchasers around the country—perhaps
11 numbering in the hundreds of thousands—does not create a meaningful opportunity for the seller
12 to cure or settle. Indeed, how would Plaintiff Ludington’s notice have made GM aware that
13 Plaintiff Brannan in particular was experiencing problems with his vehicle?

14 The Court therefore **GRANTS** GM’s request to dismiss Plaintiff Brannan’s implied
15 warranty claim for failure to give pre-suit notice under Alabama law.

16 b. Arkansas (Ark. Code § 4-2-607) – Plaintiff Goodwin

17 Under Arkansas law, notice is required before suit can be brought for implied warranties.
18 *See Hartness v. Nuclkes*, 475 S.W.3d 558, 563 (Ark. 2015) (notice unreasonable when given for
19 first time in lawsuit). The class-wide notice is insufficient here too. A “[r]easonable notice by
20 [the buyer] would have informed [the seller] exactly how the vehicle failed to live up to [the
21 buyer’s] expectations.” *Id.* at 563. It “would have given [the seller] an opportunity to cure any
22 defects and would have allowed [it] to mitigate any damages.” *Id.* And it would “give[] both
23 parties an opportunity to document the condition of the car once the restoration was complete.”

24 Although “[t]he requirements of notification are not stringent” and “[n]o particular form of
25 notice is required,” the notice must still “be sufficient to inform the seller that the transaction is
26 claimed to involve a breach and thus to open the way for negotiation of a normal settlement.”
27 *Jarrett v. Panasonic Corp. of N. Am.*, 8 F.Supp.3d 1074, 1083 (E.D. Ar. 2013). Plaintiff
28 Ludington’s class-wide notice does nothing to inform GM that Plaintiff Goodwin claims his

1 transaction involved a breach. Thus, a reasonable jury could not conclude that notice by a person
2 in another state that does not specifically identify Plaintiff Goodwin or his vehicle afforded GM
3 such an opportunity as guaranteed by Arkansas law. Accordingly, the Court **GRANTS** GM’s
4 request to dismiss Plaintiff Goodwin’s claim for breach of implied warranty.

5 c. Georgia (Ga. Stat. § 11-2-607) – Plaintiff Bradford

6 Georgia law also requires notice before a breach arises, but it does not appear to preclude,
7 as a matter of law, the giving of notice through a lawsuit. *See Wal-Mart Stores, Inc. v. Wheeler*,
8 262 Ga.App. 607, 609-611 (2003). “[T]he question of reasonableness of notice is ordinarily a
9 factual one[.]” *Great Western Press, Inc. v. Atlanta Film Converting Co.*, 223 Ga.App. 861, 862
10 (1996). Moreover, Georgia law does not “require a buyer to do a futile and useless thing,” so
11 notice is not required when it would be futile. *BDI Distributors, Inc. v. Beaver Computer Corp.*,
12 232 Ga.App. 316, 317 (1998).

13 Plaintiffs’ allegations are sufficient to create a question of fact whether the failure to
14 provide notice separate from the lawsuit was unreasonable under Georgia law. Plaintiffs also
15 allege that participation in informal mediation would have been futile, and that GM failed to cure
16 the defects or all damage caused when repairs were attempted by consumers, including Plaintiffs.
17 *See, e.g.*, SAC ¶¶ 340, 425. Accordingly, because Georgia law does not preclude notice to be
18 given through a lawsuit itself and also permits a plaintiff to file suit when notice would have been
19 futile, the Court **DENIES** GM’s motion to dismiss Plaintiff Bradford’s warranty claims.

20 d. Minnesota (Minn. Stat. § 336.2-607) – Plaintiffs Dahl and Peterson

21 Minnesota law requires notice of a breach, but the “bar for sufficiency is low” as long as
22 the notice lets the seller know about the basis for the claimed breach and a delay does not
23 prejudice the seller. *See City of Wyoming v. Procter & Gamble Co.*, 210 F.Supp.3d 1137, 1157
24 (D. Minn. 2016) (declining to dismiss claim where plaintiffs failed to provide notice before
25 initiation of lawsuit where no showing of prejudice was made). Moreover, it does not appear that
26 class-wide notice is insufficient per se where there is reason to think the defendant is already
27 aware of similar claims. *Id.* (refusing to dismiss in part because defendant had been “locked in
28 litigation” over the same issue “in courts all across the country” and “it could hardly be said that

1 Plaintiffs’ complaint was the first time Defendants received notice of the kind and type of claims
2 raised by Plaintiffs”). Rather, notice might be “bootstrap[ed] . . . onto notices given by other
3 persons” if they are “clearly similarly situated.” *Drobnak v. Andersen Corp.*, 2008 U.S. Dist.
4 LEXIS 1343, *16-17 (D. Minn. Jan. 8, 2008) (notice was not sufficient because it was not given
5 by similarly situated persons).

6 Here, Plaintiffs Dahl and Peterson allege the same defect, the same type of legal claim, and
7 the same type of injury as Plaintiff Luddington. Thus, Minnesota law likely permits Plaintiffs
8 Dahl and Peterson to rely on Plaintiff Luddington’s notice. Accordingly, the Court **DENIES**
9 GM’s motion to dismiss the Minnesota plaintiffs’ claims.

10 e. New York (N.Y. U.C.C. § 2-607(3)(a)) – Plaintiff Vita

11 New York law does not categorically bar notice to be given through a lawsuit itself. *See*
12 *Panda Capital Corp. v. Kopo Intern., Inc.*, 242 A.D.2d 690, 692 (1997) (holding that “the
13 complaint and subsequent amended complaint in this action themselves constituted such notice”
14 and that it was “at the very least an issue of fact as to whether reasonably timely notice of breach
15 was given”).

16 Plaintiff Vita does not state when he purchased his vehicle, but states that he purchased it
17 “new” and that it was a 2013 GMC Sierra, so it is reasonable to infer he purchased it in or around
18 2013. SAC ¶ 130. He was first added to the Second Amended Complaint, filed Aug. 31, 2017.
19 *See* Docket No. 67. Thus, approximately 3.5 years have passed since he purchased the vehicle. It
20 is not clear, however, when he discovered the defect, except that he alleges he “noticed excessive
21 oil consumption when his vehicle had approximately 80,000 miles on the odometer.” *See* SAC ¶
22 132. Thus, it is plausible that he did not discover the defect until well after his initial purchase.
23 Given the lack of clarity, it is not possible to conclude, as a matter of law on the pleadings, that his
24 notice through the lawsuit was unreasonable. *Compare Tomasino v. Estee Lauder Cos.*, 44
25 F.Supp.3d 251, 260-61 (E.D.N.Y. 2014) (notice unreasonable as a matter of law when provided 3
26 years after purchase date where defect related to cosmetic product intended for immediate
27 consumption and cosmetic failed to produce claimed anti-aging effects). Accordingly, Plaintiff
28

1 Vita’s allegations are sufficient to create a question of fact as to the reasonableness of his notice.²⁹

2 The Court **DENIES** GM’s motion to dismiss Plaintiff Vita’s implied warranty claim for
3 failure to give timely notice.

4 f. South Carolina (S.C. Code § 36-2-607) – Plaintiff Sloan

5 South Carolina appears to follow a lenient standard for notice—“virtually any notification
6 that fairly apprises the seller of the problems will suffice.” *U.S. v. So. Contracting of Charleston,*
7 *Inc.*, 862 F.Supp. 107, 111 (D. S.C. 1994). So long as the buyer communicates that a problem
8 exists, notice is sufficient and there is no need to “assert the intention to make a claim for damages
9 or pursue any other remedy” to fulfill the requirement. *Id.* at 112 (citation and quotation omitted).

10 Here, Plaintiff Sloan alleges he “has complained about the excessive oil consumption to
11 Nevado Chevrolet,” apparently a dealership (but not the one he purchased from). SAC ¶ 165. The
12 parties have not identified, and the Court has not located, South Carolina authority on whether
13 notice to an authorized dealer other than the seller is sufficient, or whether notice to a dealer in
14 lieu of a manufacturer is sufficient where the manufacturer is being sued. In light of the
15 apparently lenient standard, Plaintiff Sloan’s complaint to a dealership, GM’s express warranty’s
16 instructions that problems be reported to a dealer, and Plaintiff Luddington’s purported class-wide
17 notice, the Court **DENIES** GM’s motion to dismiss Plaintiff Sloan’s implied warranty claim at
18 this time.

19 D. Statutes of Limitation

20 Defendant raises many arguments regarding whether Plaintiffs’ claims have been brought
21 within the applicable statutes of limitation. Each argument is discussed below.

22 1. Implied Warranty Claims

23 UCC section 2-725 states that “[a]n action for breach of any contract for sale must be
24 commenced within four years after the cause of action has accrued” and that “[a] cause of action
25 accrues when the breach occurs, regardless of the aggrieved party’s lack of knowledge of the
26

27 ²⁹ Because the filing of the complaint on Aug. 31, 2017 creates a question of fact, it is
28 unnecessary to reach the question whether Vita may bootstrap off of Luddington’s third-party
notice under New York law.

1 breach.” UCC § 2-725. Defendant argues that the cause of action accrued at the time of initial
2 retail sale because Plaintiffs allege an inherent defect, which itself constitutes the breach. *See*
3 *MacDonald*, 37 F.Supp.3d at 1101-02. Accordingly, GM requests dismissal of 17 plaintiffs who
4 allege a purchase date more than four years prior to the litigation and 10 plaintiffs who did not
5 plead a purchase date.

6 A threshold issue concerns whether the cause of action accrues as of the time of initial
7 retail sale or the subsequent delivery of a used vehicle. GM is correct that, for purposes of implied
8 warranty claims against the *manufacturer*, the accrual date is the time of initial retail sale, not
9 subsequent re-sale to purchaser of a used vehicle. *See, e.g., Lecates v. Hertrich Pontiac Buick Co.*,
10 515 A.2d 163 (Del. Sup. Ct. 1963) (holding that for purpose of implied warranty claim, cause of
11 action accrues as of original sale date of vehicle, not when used car was purchased). That is the
12 operative date for statute of limitations purposes.

13 Plaintiffs argue that 10 plaintiffs who did not plead a purchase date should not have their
14 claims dismissed because “[s]tatute of limitations is . . . an affirmative defense that a plaintiff has
15 no obligation to plead around in his or her complaint.” *MyFord Touch*, 46 F.Supp.3d at 961.
16 However, this rule only applies when there is no “statute-of-limitations problem apparent from the
17 face of the complaint.” *Id.* The model year for certain vehicles that Plaintiffs allege they
18 purchased new may suggest that the four-year limitations period has been exceeded; thus, although
19 a statute of limitations is generally an affirmative defense, it is fair to address it at this time where
20 a problem may be apparent based on Plaintiffs’ allegations.

21 Because this inquiry is fact-specific, it is summarized with respect to each Plaintiff in the
22 chart below. However, as explained below the chart, the doctrine of fraudulent concealment may
23 operate to toll the statute of limitations for those Plaintiffs who failed to file timely claims.

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Implied Warranty – Chart of Statute of Limitations (Before Consideration of Tolling)

Name	Used/New	Initial Purchase	Model	Complaint	Holding
Siquieros (¶ 25)	New	N/A	2011	12/19/16	UNTIMELY – Implausible new MY 2011 vehicle purchased after 12/19/12
M/M Cralley (¶ 30)	New	N/A	2010	8/13/17	UNTIMELY – Implausible new MY 2011 vehicle purchased after 8/13/12
Brannan (¶ 37)	Used	2011	2011	12/19/16	UNTIMELY – Vehicle purchased before 12/19/16.
Goodwin (¶ 40)	New	2010	2010	2/27/17	UNTIMELY – Vehicle purchased before 2/27/12.
Perkins (¶ 45)	New	2011	2011	2/27/17	UNTIMELY – Vehicle purchased before 2/27/12.
Bradford (¶ 62)	Used	N/A	2010	2/27/17	UNTIMELY – Implausible MY 2010 vehicle originally purchased after 2/27/12.
Faulkner (¶ 87)	Used	N/A	2011	12/19/16	UNTIMELY – Implausible MY 2010 vehicle originally purchased after 2/19/16.
Smith (¶ 99)	New	2012	2011	2/27/17	TIMELY – Face of complaint does not suggest vehicle was purchased before 2/27/12.
Dahl (¶ 105)	New	2010	2010	12/19/16	UNTIMELY - Vehicle purchased before 12/19/12.
Molina (¶ 127)	Used	N/A	2012	12/19/16	TIMELY – Face of complaint does not suggest MY 2012 vehicle was purchased before 12/19/12.
Warpinski (¶ 146)	Used	N/A	2012	2/27/17	TIMELY – Face of complaint does not suggest MY 2012 vehicle was purchased before 2/27/13.
Martell (¶ 152)	New	N/A	2011	8/31/17	UNTIMELY – Implausible new MY 2011 vehicle purchased after 8/31/13.
Graziano (¶ 158)	New	2011	2012	12/19/16	UNTIMELY – Vehicle purchased before 12/19/12.
Byrge (¶ 168)	Used	N/A	2012	2/27/17	TIMELY – Face of complaint does not suggest MY 2012 vehicle purchased before 2/27/13.
Thacker (¶ 178)	Used	N/A	2010	2/27/17	UNTIMELY – Implausible new MY 2010 vehicle originally purchased after 2/27/13.
Robertson (¶ 194)	New	2010	2010	2/27/17	UNTIMELY – Vehicle purchased before 2/27/13.

	Name	Used/New	Initial Purchase	Model	Complaint	Holding
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2	Del Valle (¶ 67)	Used	N/A	2013	12/19/16	TIMELY – Face of complaint does not suggest MY 2013 purchased before 12/19/12.
3						
4	Olivier (¶ 94)	New	N/A	2013	2/27/17	TIMELY – Face of complaint does not suggest MY 2013 vehicle purchased before 2/27/13.
5						
6	Peterson (¶ 111)	New	12/2012	2012	12/19/16	UNTIMELY – Plaintiff Peterson alleges only “December 2012” without specificity, but claim would be untimely if purchased before 12/19/12. In light of problem apparent from face of complaint, Plaintiff should clarify the purchase date.
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11	Ware (¶ 117)	Used	N/A	2013	2/27/17	TIMELY – Face of complaint does not suggest MY 2013 vehicle purchased before 2/27/13.
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13	Kitchen (¶ 121)	Used	N/A	2013	2/27/17	TIMELY – Face of complaint does not suggest vehicle purchased before 2/27/13.
14						
15	Vita (¶ 130)	New	N/A	2013	8/31/17	TIMELY – Face of complaint does not suggest vehicle purchased before 8/31/13.
16						
17	Ehrke (¶ 136)	Used	N/A	2013	12/19/16	TIMELY – Face of complaint does not suggest vehicle purchased before 12/19/12.
18						
19	Gulling ¶ 139	N/A	N/A	2013	12/19/16	TIMELY – Face of complaint does not suggest vehicle purchased before 12/19/12.
20						
21	Jones ¶ 142	N/A	N/A	2013	12/19/16	TIMELY – Face of complaint does not suggest vehicle purchased before 12/19/12.
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						TIMELY – South Carolina has a 6 year statute of limitations, so vehicle purchased after 12/19/10. <i>See</i> S.C. Code Ann. § 36-2-725; <i>Green v. Bradley Co.</i> , 194 F.Supp.3d 479, 484 (D.S.C. 2016).

Though claims by Plaintiffs Siqueros, the Cralleys, Brannan, Goodwin, Perkins, Bradford, Faulkner, Dahl, Martell, Graziano, Thacker, Robertson and Peterson appear to be untimely, Plaintiffs argue that all the implied warranty claims are tolled pursuant to the fraudulent concealment doctrine. *See* SAC ¶¶ 308-313. This doctrine applies when a defendant’s “own

1 deception, has caused a claim to become stale and a plaintiff dilatory.” *Regents of Univ. of Cal. v.*
2 *Super. Ct.*, 20 Cal.4th 509, 533 (Cal. 1999).³⁰ To toll the statute of limitations under the doctrine,
3 a plaintiff must plead “(a) the substantive elements of the fraud, and (b) an excuse for late delivery
4 of the facts.” *Sater v. Chrysler Grp., LLC*, 2015 WL 736273, at *9 (C.D. Cal. Feb. 20, 2015)
5 (fraudulent concealment adequately pled where defendant “intentionally kept” plaintiff ignorant of
6 information, “continued to manufacture” product without disclosing defect, and delay in discovery
7 was reasonable at least until vehicle was recalled); *see also Roberts v. Electrolux Home Prods.,*
8 *Inc.*, 2013 WL 7753579, at *8 (C.D. Cal. Mar. 4, 2013) (fraudulent concealment adequately pled
9 where manufacturer failed to disclose material facts about the dryer’s defect within its exclusive
10 knowledge and late discovery was excused by such exclusive knowledge).

11 Plaintiffs sufficiently plead fraudulent concealment. As explained above, they adequately
12 allege that Defendant knew about the defect by the beginning of the Class Period, as demonstrated
13 in part by the issuance of two TSBs to dealers specifically identifying two components allegedly
14 contributing to the overall defect. Additionally, Plaintiffs allege that several different dealerships
15 informed separate individuals across the span of several years that the oil consumption was
16 “normal.” Though Defendant points out these were statements by the dealer and not necessarily
17 the manufacturer, Plaintiffs have adequately pled an agency relationship as explained above to
18 create a question of fact for discovery. Additionally, Defendant continued to sell the allegedly
19 defective engines without any disclosure. It is plausible that Plaintiffs’ delayed discovery, in the
20 absence of any manufacturer recall and given the active concealment by Defendant of the alleged
21 defect, was reasonable.

22 The Court therefore holds that the statute of limitations for the otherwise untimely claims
23 has been tolled (for purposes of Rule 12(b)(6)) under the doctrine of fraudulent concealment.
24 Defendant’s motion to dismiss the implied warranty claims on statute of limitations grounds is
25 thus **DENIED**.

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³⁰ Defendant has not challenged cases cited by Plaintiffs to demonstrate that the doctrine is recognized under the laws of other states as well. *See Opp.* at 19, n. 15.

1 2. Consumer Protection Claims

2 Defendant challenges the consumer protection claims as untimely. GM’s arguments fall
3 into three categories: (1) some Plaintiffs’ states do not recognize the discovery rule; (2) some do,
4 but the conditions for invoking the rule are inadequately pleaded; and (3) some Plaintiffs do not
5 satisfy other conditions for the statute of limitations. Each argument is discussed below.

6 a. No Discovery Rule States

7 **Louisiana (Olivier):** Louisiana does not recognize the discovery rule for claims under the
8 Louisiana Unfair Trade Practices Act, La. Rev. State. § 51:1401, *et seq.* See *Morris v. Sears,*
9 *Roebuck & co.,* 765 So. 2d 419, 422 (La. App. 2000) (“Any claims that plaintiffs may have had
10 under the LUTPA ceased one year after they came into existence without regard to plaintiffs’
11 knowledge of or ability to act on the alleged cause of action.”). Plaintiffs maintain that the statute
12 of limitations cannot run, however, “until a continuing violation ceases.” *CheckPoint Fluidic Sys.*
13 *Int’l, Ltd. v. Guccione,* 888 F.Supp.2d 780 (E.D. La. 2012). However, Defendant correctly points
14 out that *CheckPoint* applied the continuing violation rule reluctantly under binding Fifth Circuit
15 precedent, but pointed out that more recent Louisiana appellate authority had held that the
16 continuing violation doctrine does not apply to LUTPA claims. See *CheckPoint,* 888 F.Supp.2d at
17 792 (“Although this Court concludes that the better view of Louisiana statutory law and
18 jurisprudence is that the continuing violation doctrine does not apply under LUTPA, if La. R.S.
19 51:1409(E) is preemptive, the Louisiana Supreme Court has not ruled squarely on the issue, and
20 the Fifth Circuit’s opinion to the contrary has not been overruled.”). Because this Court is not
21 bound by the Fifth Circuit, it will follow more recent Louisiana appellate authority as the highest
22 state authority on the issue. See *Glod v. Baker,* 899 So.2d 642, 646-49 (La. Ct. App. 2005)
23 (holding that LUTPA is a preemptive statute because it creates a right and specifies the time in
24 which the right must be exercised, so the continuing violation doctrine does not apply). Further,
25 Plaintiffs have not argued or identified, and the Court has not located, a case that permits the
26 LUTPA statute of limitations to be tolled by the defendant’s fraudulent concealment. GM’s
27 request to dismiss Plaintiff Olivier’s LUTPA claim is therefore **GRANTED** because he purchased
28 a new 2013 GMC Sierra and did not bring a cause of action until February 28, 2017, after the one-

1 year statute of limitations.

2 **Florida (Shorter and Luddington):** Florida does not recognize the discovery rule under
3 the Florida Deceptive and Unfair Trade Practices Act, Fla. Stat. § 502.201, *et seq.*, either. *See*
4 *Yusuf Mohamed Excavation v. Ringhaver Equip. Co.*, 793 So. 2d 1127, 1128 (Fla. App. 2001)
5 (holding that the “delayed discovery” rule does not apply to FDUTPA and that the four-year
6 statute of limitations applies). However, the doctrine of fraudulent concealment, discussed above,
7 can toll FDUTPA claims. *In re Takata Airbag Prods. Liab. Litig.*, 193 F.Supp.3d 1324, 1344,
8 1346 (S.D. Fla. 2016). Thus, the Court **DENIES** GM’s motion to dismiss Plaintiff Shorter and
9 Ludington’s consumer protection claims.³¹

10 **Kansas (Madison):** Kansas does not recognize the discovery rule, so the three year statute
11 of limitations applies. *See* Kan. Stat. § 50-623 *et seq.*; Kan. Stat. § 60-512; *Louisburg Bldg. &*
12 *Dev. Co. v. Albright*, 252 P.3d 597, 607 (Kan. App. 2011), *aff’d in pertinent part* 393 Kan. 1107
13 (2012) (three-year limitations period “starts running with the occurrence of the alleged conduct
14 constituting the violation, not the discovery of the violations”). However, Kansas recognizes the
15 doctrine of fraudulent concealment. *See Freebird, Inc. v. Merit Energy Co.*, 883 F.Supp.2d 1026,
16 1034-36 (D. Kans. 2012). The Court thus **DENIES** GM’s motion to dismiss Plaintiff Madison’s
17 consumer protection claim.³²

18 **New York (Vita):** Similarly, claims under the New York General Business Law, § 349
19 are not “dependent upon any date when discovery of the alleged deceptive practice is said to
20 occur.” *Marshall v. Hyundai Motor Am.*, 51 F.Supp.3d 451, 461-62 (S.D.N.Y. 2014). However,
21 New York permits tolling of these claims by the doctrine of fraudulent concealment. *See State ex*
22 *rel. Spitzer v. Daicel Chemical Industries, Ltd.*, 42 A.D.3d 301, 303 (N.Y. Sup. Ct. 2007). The
23 Court **DENIES** GM’s motion to dismiss Plaintiff Vita’s consumer protection claim.³³

24
25 ³¹ Plaintiff Shorter bought a new 2011 Chevrolet Silverado but did not file a claim until December
26 19, 2016. Plaintiff Ludington bought a used 2010 Chevrolet Tahoe in 2012 but did not assert a
claim until December 19, 2016. No date of discovery is alleged.

27 ³² Plaintiff Madison purchased a vehicle in December 2013 but did not make a claim until
28 February 28, 2017.

³³ Plaintiff Vita bought a new 2013 GMC Sierra but did not assert a claim until August 31, 2017.

1 **Ohio (Jones and Gulling):** Similarly, under Ohio law, “the statute of limitations begins to
2 run when the violation occurs, not when the consumer discovers the violation.” *Quetot v. M&M*
3 *Homes, Inc.*, 2013 Ohio 752, ¶ 12 (Ohio App. 2013); *see also* Ohio Rev. Code § 1345.01 (Ohio
4 Consumer Sales Practices Act); Ohio Rev. Code § 1345.10(C) (providing for two-year statute of
5 limitations). However, Ohio also recognizes the doctrine of fraudulent concealment. *See*
6 *Thornton v. State Farm Mut. Auto. Ins. Co.*, 2006 WL 3359448, at *6-7 (N.D. Ohio Nov. 17,
7 2006). Thus, the Court **DENIES** GM’s motion to dismiss Plaintiff Jones and Gulling’s consumer
8 protection claims.³⁴

9 **Wisconsin (Bednarek):** Wisconsin law provides for a three-year statute of limitations,
10 also not dependent upon the date of discovery. *See* Wis. Stat. § 100.18(11)(b)(3); *Selzer v.*
11 *Brusnell Bros.*, 652 N.W.2d 806, 815 (Wis. App. 2002). However, under Wisconsin law the
12 statute of limitations is tolled in the case of a continuing violation. *See Werner v. Pittway Corp.*,
13 90 F.Supp.2d 1018, 1033-34 (W.D. Wis. 2000) (plaintiff alleging misleading advertisements failed
14 to state continuing violation where they did not “demonstrate that they received one of defendants’
15 allegedly misleading statements” and “relied” on it). Plaintiff Bednarek bought his vehicle in
16 2010 and did not file a claim until February 2017; however, because Plaintiffs allege that
17 Defendant’s concealment of the defect has continued to the present, the Court **DENIES** the
18 request to dismiss Plaintiff Bednarek’s consumer protection claim.

19 To summarize, the Court **GRANTS** the request to dismiss Plaintiff Olivier’s consumer
20 protection claim under Louisiana law because tolling is not permitted, but **DENIES** the request to
21 dismiss the claims of Plaintiffs Shorter and Luddington (Florida), Madison (Kansas), Vita (New
22 York), Jones and Gulling (Ohio), and Bednarek (Wisconsin) because the fraudulent concealment
23 or continuing violation doctrine tolls their claims.

24 b. Inadequate Pleading for Discovery Rule

25 Defendant argues that six plaintiffs fail to allege the time of discovery or that reasonable
26 diligence would not have permitted earlier discovery, as required. *See Gerstle v. Am. Honda*

27 _____
28 ³⁴ Plaintiffs Jones and Gulling bought 2013 Silverados but did not assert claims until over two
years later, on December 19, 2016.

1 *Motor Co.*, 2017 U.S. Dist. LEXIS 62809, at *19 (N.D. Cal. Apr. 17, 2017) (plaintiffs are required
2 to “plead facts which show (1) the time and manner of discovery and (2) the inability to have
3 made earlier discovery despite reasonable diligence”). “The burden of pleading and proving
4 belated discovery of a cause of action falls on the plaintiff.” *Investors Equity Life Holding Co. v.*
5 *Schmidt*, 195 Cal.App.4th 1519, 1533 (2011). Plaintiffs must show they acted “reasonably and
6 diligently” to benefit from the discovery rule. *Gerstle*, 2017 U.S. Dist. LEXIS 62809 at *21.

7 Plaintiffs claim they may invoke the discovery rule because their complaint alleges
8 generally that “Plaintiffs could not have discovered through the exercise of reasonable diligence
9 that their Class Vehicles were defective within the time period of any applicable statutes of
10 limitation,” SAC ¶ 306, and that they “could [not] have known that the Class Vehicles are
11 equipped with Generation IV Vortek 5300 Engines with the Oil Consumption Defect,” SAC ¶
12 307. These bare and conclusory allegations are insufficient for the Court to determine “the time
13 and the manner by which each plaintiff discovered the defect.” *Gerstle*, 2017 U.S. Dist. LEXIS
14 62809 at *21. Plaintiffs have not argued or cited cases indicating that these claims may be tolled
15 by the doctrine of fraudulent concealment. Accordingly, the Court **GRANTS** Defendant’s request
16 to dismiss the consumer protection claims of Plaintiffs Goodwin (Arkansas), Bradford (Georgia),
17 Hanneken (Illinois), Smith (Massachusetts), Sanchez (Texas), and Thacker (Virginia). These
18 plaintiffs shall have leave to amend to attempt to satisfy the requirements of the discovery rule.

19 c. Other Conditions Under Delaware & Louisiana Law

20 GM contends that Plaintiff Perkins (Delaware) does not allege if or when he complained to
21 a GM dealer about excessive oil consumption, a complaint which would have started running the
22 three-year limitations period under 10 Del. Code § 8106. *See Stenta v. GMC*, 2009 Del. Super.
23 LEXIS 199, *20-23 (Del. Super. May 29, 2009). However, because the statute of limitations is an
24 affirmative defense and no problem is apparent from the face of the complaint, Plaintiff Perkins is
25 not required to affirmatively plead when he first made a complaint that would have accrued his
26 cause of action. Accordingly, the Court **DENIES** GM’s request to dismiss Plaintiff Perkins’ claim
27 at this time.

28 Louisiana law recognizes a civil action for a breach of warranty against redhibitory

1 defects; “a defect is redhibitory when it renders the thing useless, or its use so inconvenient that it
2 must be presumed that a buyer would not have bought the thing had he known of the defect. The
3 existence of such a defect gives a buyer the right to obtain rescission of the sale.” *See* La. Civ.
4 Code Art. 2520. A defect is also redhibitory “when, without rendering the thing totally useless, it
5 diminishes its usefulness or its value so that it must be presumed that a buyer would still have
6 bought it but for a lesser price,” in which case the remedy is limited to “a reduction of the price.”
7 *Id.* However, Louisiana law requires a claim for breach of warranty against redhibitory defects to
8 be made within one year of the buyer’s discovery of the defect or four years after delivery to the
9 buyer, whichever occurs first. *See* La. Civ. Code Art. 2534. As discussed above in the context of
10 the implied warranty claim, Plaintiff Olivier’s claim should not be dismissed on the basis of the
11 four-year statute of limitations because the complaint does not indicate that he is outside of it.
12 Thus, it may only be dismissed if he discovered the defect more than one year before filing the
13 complaint. There is no indication in the complaint that he discovered the defect more than one
14 year before filing suit, and because statute of limitations is an affirmative defense, Plaintiff Olivier
15 was not required to plead around it. Accordingly, the Court **DENIES** GM’s request to dismiss
16 Plaintiff Olivier’s redhibitory defects claim under Louisiana law.

17 E. Unjust Enrichment Claims

18 Defendant principally argues that Plaintiffs have failed to state a claim for unjust
19 enrichment because restitution is a remedy, not a cause of action; thus, because Plaintiffs have
20 failed to state any viable causes of action, they no longer have a basis to seek an unjust enrichment
21 remedy. However, in light of the Court’s holding denying GM’s request to dismiss the consumer
22 protection and fraud claims, it does not follow that the remedy is no longer available to them and
23 should be dismissed. Moreover, as Plaintiffs point out, the Ninth Circuit has held that “[w]hen a
24 plaintiff alleges unjust enrichment, a court may ‘construe the cause of action as a quasi-contract
25 claim seeking restitution.’” *Astiana v. Hain Celestial Grp., Inc.*, 783 F.3d 753, 762 (9th Cir.
26 2015). Thus, that restitution may be a remedy is not a basis for dismissing the unjust enrichment
27 claims, and Defendant has not argued that a quasi-contract claim seeking restitution is
28 insufficiently pled or precluded as a matter of law. The Court declines to dismiss on this basis.

1 Defendant also argues that 22 plaintiffs’ claims are barred by the applicable statute of
 2 limitations for unjust enrichment in their state. Plaintiffs do not dispute Defendant’s
 3 representations regarding each state’s statute of limitations except for Alabama and New York
 4 (discussed in footnotes), *see* Mot. at 23, nn. 12, 13, 14, but argue that the claims are tolled by
 5 virtue of the delayed discovery rule or fraudulent concealment. For the same reasons as above,
 6 however, Plaintiffs have failed to adequately plead tolling under the delayed discovery rule. They
 7 have, however, adequately pleaded fraudulent concealment.

8 The table below summarizes the Court’s holding with respect to each Plaintiff based on the
 9 foregoing.

Statutes of Limitation for Unjust Enrichment Claims

Plaintiff	Purchase Date	Limitations Period	Filing Date	Tolling Permitted?	Holding on Motion to Dismiss
Siqueiros (¶ 25)	New MY 2011	3 years (CA)	12/19/16	Discovery rule	GRANT
M/M Cralley (¶ 30)	New MY 2010	3 years (CA)	8/31/17	Discovery rule	GRANT
Brannan (¶ 37)	2011	6 years (AL) ³⁵	12/19/16		DENY – not clear that claim was not brought within 6 years
Goodwin (¶ 40)	2010	3 years (AR)	2/27/17	Fraudulent concealment	DENY
Perkins (¶ 45)	2011	3 years (DE)	2/27/17	Fraudulent concealment	DENY
Ludington (¶ 50)	2012	4 years (FL)	12/19/16	Delayed discovery	GRANT
Shorter (¶ 56)	New MY 2011	4 years (FL)	12/19/16	Delayed discovery	GRANT

35 Plaintiffs and Defendant cite the same Alabama case, but disagree whether a two or six year statute of limitations period applies. The distinction turns on whether the unjust enrichment claim sounds in tort (2 years) or contract (6 years). *See Auburn Univ. v. IBM Corp.*, 716 F.Supp.2d 1114, 1118 (M.D. Ala. 2010). Here, Plaintiff Brannan’s unjust enrichment claim arises from GM’s alleged “selling and leasing at an unjust profit defective Class Vehicles that had artificially inflated prices due to GM’s concealment of the Oil Consumption Defect.” SAC ¶ 447 (Count 11). This claim may sound in either tort (fraud) or contract (implied and express warranty). At this stage and in the absence of authorities to the contrary, the Court relies on the 6-year statute of limitations at this stage.

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Plaintiff	Purchase Date	Limitations Period	Filing Date	Tolling Permitted?	Holding on Motion to Dismiss
Hanneken (¶ 71)	2011	5 years (IL)	2/27/17	Delayed discovery	GRANT
Madison (¶ 82)	2013	3 years (KS)	2/27/17	Delayed discovery	GRANT
Smith (¶ 99)	2012	3 years (MA)	2/27/17	Delayed discovery	GRANT
Dahl (¶ 105)	2010	6 years (MN)	12/19/16	Fraudulent concealment	DENY
Molina (¶ 82)	Used MY 2012	4 years (NM)	12/19/16	Delayed discovery	GRANT
Vita (¶ 130)	New MY 2013	6 years (NY) ³⁶	8/31/17	Delayed discovery	DENY – 6 year SOL applies, not 3 years
Warpinski (¶ 146)	2014	2 years (OK)	2/27/17	Delayed discovery	GRANT
Martell (¶ 152)	2011	2 years (OR)	8/31/17	Delayed discovery	GRANT
Graziano (¶ 158)	2011	4 years (PA)	12/19/16	Delayed discovery	GRANT
Sanchez (¶ 172)	2013	2 years (TX)	2/27/17	Delayed discovery	GRANT
Clausen (¶ 183)	2013	3 years (WA)	2/27/17	Delayed discovery	GRANT
Harris (¶ 189)	2012	3 years (WA)	8/31/17	Delayed discovery	GRANT
Robertson (¶ 194)	2010	5 years (WV)	2/27/17	Delayed discovery	GRANT
Bednarek (¶ 199)	2010	6 years (WI)	2/27/17	Delayed discovery	GRANT

IV. CONCLUSION

In sum, the Court:

- **DENIES** Defendant’s motion to dismiss claims by the out-of-state plaintiffs for

³⁶ Defendant maintains that unjust enrichment claims based on tortious conduct are subject to a three-year limitations period rather than six under New York law. *See Maya NY, LLC v. Hagler*, 106 A.D.3d 583, 585 (2013). *Maya*, in fact, does not make that statement, but rather, as Plaintiffs point out, explains that “[u]nder New York law, there is no identified statute of limitations period within which to bring a claim for unjust enrichment, but where, as here, the unjust enrichment and breach of contract claims are based upon the same facts and pleaded in the alternative, a six-year statute of limitations applies.” *Id.* at 585. Defendant does not contest that statement. Accordingly, the Court follows New York law’s six-year general statute of limitations. *See* N.Y. C.P.L. § 213(2) (for actions based “upon a contractual obligation or liability”) and § 213(8) (for actions “based upon fraud”).

1 lack of personal jurisdiction because the challenge is waived with respect to the original named
2 plaintiffs and the exercise of personal jurisdiction over the new named plaintiffs' claims is
3 permitted under the pendent personal jurisdiction doctrine;

4 • **DENIES** Defendant's motion to dismiss the fraud and consumer protection claims
5 because Plaintiffs have adequately pled materiality, pre-sale knowledge, and reliance, except with
6 respect to the non-dealership Plaintiffs the Doepels, Ware, Warpinski, Byrge, and Thacker, for
7 whom GM's motion is **GRANTED**, with leave to amend;

8 • **GRANTS** Defendant's request to dismiss the consumer protection claims on
9 statute of limitations grounds as follows:

10 ○ Where tolling is unavailable under the relevant state law (Plaintiff Olivier);

11 ○ Delayed discovery rule tolling is available but inadequately pled (Plaintiffs
12 Goodwin, Bradford, Hanneken, Smith, Sanchez, and Thacker), with leave to
13 amend;

14 • **DENIES** Defendant's request to dismiss consumer protection claims on statute of
15 limitations grounds because tolling is available for Plaintiffs Shorter, Luddington, Madison, Vita,
16 Jones, Gulling, and Bednarek.

17 • **DENIES** Defendant's request to dismiss the implied warranty claims for Plaintiffs
18 Smith, Molina, Warpinski, Byrge, Del Valle, Olivier, Peterson, Ware, Kitchen, Vita, Ehrke,
19 Gulling, Jones, and Sloan because the face of the complaint does not demonstrate their claims are
20 time-barred;

21 • **DENIES** Defendant's request to dismiss the implied warranty claims for Plaintiffs
22 Siquieros, the Cralleys, Brannan, Goodwin, Perkins, Bradford, Faulkner, Dahl, Martell, Graziano,
23 Thacker, Robertson because, although they failed to bring their claims within the applicable
24 limitations period, their claims may be tolled by the fraudulent concealment doctrine;

25 • **GRANTS** Defendant's request to dismiss the implied and express warranty claims
26 of Plaintiff Martell (Oregon), with leave to amend, because Oregon law requires privity, which has
27 not been demonstrated;

28 • **GRANTS** Defendant's request to dismiss the Magnuson Moss Warranty Act

1 claims of:

- 2 ○ Plaintiffs Clausen, Harris, Ludington, Shorter, Bednarek, Hanneken, and the
3 Doepels because they do not bring implied warranty claims, and the express
4 warranty claims are pled only to preserve them on appeal, having been previously
5 dismissed by the Court;
- 6 ○ Plaintiffs Gulling and Jones' claims for "implied warranty in tort" under Ohio law;
- 7 • **GRANTS** Defendant's request to dismiss claims of Plaintiffs Brannan and
8 Goodwin for failure to give pre-suit notice, but **DENIES** the request for Plaintiffs Bradford, Dahl,
9 Peterson, Vita, Sloan, due to the variations in state law discussed above;
- 10 • **GRANTS** Defendant's request to dismiss unjust enrichment claims as time-barred,
11 with leave to amend, because Plaintiffs Siquieros, the Cralleys, Ludington, Shorter, Hanneken,
12 Madison, Smith, Molina, Warpinski, Martell, Graziano, Sanchez, Clausen, Harris, Robertson, and
13 Bednarek fail to adequately plead delayed discovery;
- 14 • **DENIES** Defendant's request to dismiss the unjust enrichment claims on statute of
15 limitations grounds for Plaintiffs Brannan and Vita because the claims are brought within the
16 statute of limitations, and for Plaintiffs Goodwin, Perkins, and Dah because tolling is permitted
17 and adequately pleaded under the fraudulent concealment doctrine.

18
19 This order disposes of Docket No. 70. Consistent with this order, Plaintiffs may file an
20 amended complaint within 30 days.

21
22 **IT IS SO ORDERED.**

23
24 Dated: February 7, 2018

25
26 
27 EDWARD M. CHEN
28 United States District Judge