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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	SACV 13-1791 AG (DFMx)	Date	October 8, 2014
Title	CONSTANCE SIMS et al. v. KIA MOTORS AMERICA, INC. et al.		

Present: The Honorable	ANDREW J. GUILFORD	
Lisa Bredahl	Not Present	
Deputy Clerk	Court Reporter / Recorder	Tape No.

Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:

Proceedings: **[IN CHAMBERS] ORDER GRANTING MOTION TO DISMISS THIRD AMENDED CLASS ACTION COMPLAINT; DENYING MOTION TO STRIKE AS MOOT**

Plaintiffs Constance Sims and Sammy Rodriguez are owners of Kia vehicles they allege have gas tank defects. In their Third Amended Class Action Complaint, Plaintiffs sue Defendants Kia Motors America, Inc. and Kia Motors Corporation on behalf of a putative class of owners of Kia vehicles with defective gas tanks. (Third Amended Class Action Complaint ("TAC"), Dkt. No. 49.) Defendants have filed a Motion to Dismiss and/or Strike Allegations in Third Amended Class Action Complaint. (Motion to Dismiss and Strike, Dkt. No. 50.)

Despite amending their complaint three times, Plaintiffs still cannot point to new allegations that adequately support their claims. It is important that access to the judicial system not be permanently denied through improvident dismissals under Rule 12(b)(6). But here, there have been multiple amendments to the complaint, and Plaintiffs devote most of their briefing to rearguing legal issues already decided by the Court in its previous rulings. The Court is constrained by its earlier rulings. The Court GRANTS the Motion to Dismiss and dismisses Plaintiffs' claims without leave to amend. The Court

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DENIES the Motion to Strike as moot.

BACKGROUND

The following facts are taken primarily from the Plaintiff's TAC, whose allegations the Court accepts as true for the purposes of a motion to dismiss. *See Skilstaf, Inc., v. CVS Caremark Corp.*, 669 F.3d 1005, 1014 (9th Cir. 2012).

Plaintiffs allege that they purchased unsafe vehicles based on misleading advertisements promoting the safety and quality of the vehicles. Plaintiffs purchased Kia vehicles, and later learned about gas tank defects in the vehicles that increase "the risk that the gas tank will dislodge and ignite in a major collision." (TAC ¶¶ 13–14, 23.) Plaintiffs allege that these defects are the location of the fuel pump under the rear seat cushion, the use of a plastic service cover for the fuel pump, and that the gas tank is inadequately shielded and not reinforced with straps. (*Id.* ¶ 4.) These defects have resulted in "at least one accident" with a defective Kia vehicle in Texas, which resulted in the death of three passengers after the gas tank exploded. (*Id.* ¶ 5.)

Plaintiffs don't allege that the gas tanks in their vehicles have exploded. But they allege that they would not have purchased their vehicles, or would have paid less for them, had they known about the defects. (*Id.* ¶¶ 13–14.) Plaintiffs were influenced to purchase the vehicles by advertisements. Though Plaintiffs cannot "recall the specifics of many of the advertisements," they "recall that safety and quality were consistent themes." (*Id.*) Defendants promoted the vehicles as safe while knowing about the design defects of the gas tanks. (*Id.* ¶¶ 36–54.)

Plaintiffs sue on behalf of a putative, nationwide class, defined as: "All individuals or entities that purchased, leased, and/or currently own or lease a Kia vehicle model that (i) has a gas tank that is either not connected to the underside of the vehicle with reinforcing straps or is not protected by a whole-tank shield, and/or (ii) has a plastic fuel pump service cover that is accessible from the passenger compartment of the car

(hereinafter 'Defective Vehicles.')." (*Id.* ¶ 70.) These Defective Vehicles include "at least" the 2009–2014 models of the Kia Soul, Kia Soul Plus, Kia Soul Exclaim, and Kia Soul Sport, the 2006–2014 Rio models, the 2009–2014 Forte models, the 2004–2009 Amanti models, and the 2000–2006 Optima models. (*Id. ¶* 72.) Plaintiff Sims owns a 2013 Kia Soul Sport, and Plaintiff Rodriguez owns a 2011 and a 2013 Kia Soul Exclaim. (*Id.* ¶¶ 13–14.)

In the Third Amended Class Action Complaint, Plaintiffs allege five claims numbered as follows: 1) Violations of the Consumer Legal Remedies Act ("CLRA"), Cal Civ. Code § 1750; 2) Violation of the California Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code § 17200; 3) False Advertising Law ("FAL"), Cal. Bus. & Prof. Code § 17500; 4) Breach of Implied Warranty of Merchantability, Cal. Com. Code § 2314; and 5) Fraudulent Concealment. The Court previously dismissed all claims in Plaintiffs' Second Amended Class Action Complaint ("SAC"), under Rules 12(b)(6) and 9(b), with leave to amend those claims. (*See* Order Granting in Part and Denying in Part Motion to Dismiss Second Amended Class Action Complaint, Dkt. No. 48.)

LEGAL STANDARD

A court should grant a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) when, "accepting all factual allegations in the complaint as true and construing them in the light most favorable to the nonmoving party," a complaint fails to state a claim upon which relief can be granted. *Skilstaf, Inc. v. CVS Caremark Corp.*, 669 F.3d 1005, 1014 (9th Cir. 2012); *see* Fed. R. Civ. P. 12(b)(6). "[D]etailed factual allegations" aren't required. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks omitted). But there must be "sufficient allegations of underlying facts to give fair notice and to enable the opposing party to defend itself effectively . . . [and] plausibly suggest an entitlement to relief, such that it is not unfair to require the opposing party to be subjected to the expense of discovery and continued litigation." *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011). A court should not accept "threadbare recitals of a cause of action's

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elements, supported by mere conclusory statements." *Iqbal*, 556 U.S. at 678; *see also Eclectic Properties E., LLC v. Marcus & Millichap Co.*, 2014 WL 1797676, at *2–*3 (9th Cir. May 7, 2014).

Fraud claims must meet the heightened pleading standard of Federal Rule of Civil Procedure 9(b), which requires enough specificity to give a defendant notice of the particular misconduct to be able to defend against the charge. *Bly-Magee v. California*, 236 F.3d 1014, 1019 (9th Cir. 2001) (internal citations omitted). To satisfy this specificity requirement, "the who, what, when, where, and how" of the misconduct must be alleged. *Cooper v. Pickett*, 137 F.3d 616, 627 (9th Cir. 1997). Thus, factual allegations must include "the time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentations." *Swartz v. KPMG LLP*, 476 F.3d 756, 764 (9th Cir. 2007). Where the allegations in support of a claim fail to satisfy the heightened pleading requirements of Rule 9(b), the claim is subject to dismissal. *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1107 (9th Cir. 2003).

If a court dismisses a claim, it must also decide whether to allow the plaintiff to amend the complaint. "The court should freely give leave when justice so requires." Fed. R. Civ. P. 15(a)(2). But the "court may deny a plaintiff leave to amend if it determines that allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency or if the plaintiff had several opportunities to amend its complaint and repeatedly failed to cure deficiencies." *Telesaurus VPC, LLC v. Power*, 623 F.3d 998, 1003 (9th Cir. 2010) (internal quotation marks and citation omitted).

ANALYSIS

1. BREACH OF THE IMPLIED WARRANTY OF MERCHANTABILITY

In their breach of the implied warranty of merchantability claim, Plaintiffs allege that their vehicles "present unreasonably [sic] safety risks, are not safe for occupants and thus

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not fit for ordinary purposes." (TAC ¶ 111.) The Court previously dismissed this claim because Plaintiffs failed to allege either that the defect manifested in their vehicles or that the defect was substantially certain to manifest. (Order, Dkt. No. 48, at 13.) Defendants move to dismiss this claim, arguing that Plaintiffs haven't added any such allegations. The Court agrees.

As the Court discussed in its previous order, the implied warranty of merchantability requires that goods are "fit for the ordinary purposes for which such goods are used." Cal. Com. Code § 2314(2)(c). "[A] breach of the implied warranty of merchantability means the product [does] not possess even the most basic degree of fitness for ordinary use." *Mocek v. Alfa Leisure, Inc.*, 7 Cal. Rptr. 3d 546, 549 (Cal. App. 2003). Though the manifestation of a defect is not a necessary element of a claim for breach of the implied warranty of merchantability, the plaintiff must at least show that the product "contains an inherent defect which is substantially certain to result in malfunction during the useful life of the product." *Hicks*, 89 Cal. App. 4th at 918; *see also American Suzuki Motor Corp. v. Superior Court*, 37 Cal. App. 4th 1291, 1298 (1995) (concluding that owners of vehicles were not entitled to assert a breach of implied warranty action when "the evidence presented demonstrated that only a small percentage of the Samurais sold during the class period have been involved in rollover accidents"). At the pleading stage, Plaintiffs must provide allege either the manifestation of the defect in their product or a substantial certainty of manifestation. *See Birdsong v. Apple, Inc.*, 590 F.3d 955, 959 (9th Cir. 2009) (citing *Hicks* and *American Suzuki*, and upholding the dismissal of an implied warranty claim on a motion to dismiss)

Plaintiffs have failed to add such allegations to the TAC. Just like the SAC, the TAC alleges only that there was "one accident" involving an exploding gas tank with a defective Kia vehicle in Texas. (TAC ¶ 5.) Instead of pointing to any new allegations in the TAC satisfying the authority cited by the Court, Plaintiffs fight the legal conclusions of the Court's prior order, arguing that "a relaxation of the *Hicks* rule is warranted." (Opp'n at 20.)

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The purpose of granting leave to amend is not to give Plaintiffs another opportunity to reargue legal issues already decided by the Court. The purpose is to give Plaintiffs an opportunity to add allegations sufficient to state a claim, which Plaintiffs haven't done. The Court cited good authority in its previous order, including *Hicks*, and Plaintiffs have failed to satisfy the requirements under that authority.

The Court GRANTS the Motion as to the breach of implied warranty of merchantability claim. Because Plaintiffs have repeatedly failed to cure the deficiencies with this claim despite multiple opportunities to do so, and it does not appear possible to cure these deficiencies, the Court denies leave to amend. *See Telesaurus*, 623 F.3d at 1003.

2. CLRA, UCL, FAL, AND FRAUDULENT CONCEALMENT CLAIMS

Defendants seek dismissal of Plaintiff's CLRA, UCL, FAL, and fraudulent concealment claims. Plaintiffs allege that Defendants' misrepresentations and omissions concerning the safety defect support these claims. Defendants argue that the allegations of misrepresentations and omissions should be dismissed under both Rule 9(b) and Rule 12(b)(6). Because the Court concludes that these claims fail under Rule 9(b), the Court need not consider whether Rule 12(b)(6) independently requires dismissal of these claims.

2.1 Fraudulent Misrepresentations

The Court previously held that the alleged misrepresentations in the SAC failed to satisfy Rule 9(b) because "Plaintiffs fail[ed] to allege the specific advertisements they relied on and why those advertisements are misleading." (Order, Dkt. No. 48, at 10.) Plaintiffs haven't corrected these deficiencies in the TAC, which contains the same insufficient allegations of reliance as the SAC.

As in the SAC, Plaintiffs allege in the TAC that they "saw advertisements for Kia vehicles," and though they do "not recall the specifics of many of those advertisements, [they do] recall that safety and quality were consistent themes." (TAC ¶¶ 13–14.) Later in

the TAC, Plaintiffs provide examples of specific advertisements for Kia vehicles, though they do not allege that they saw any of these advertisements. (*Id.* ¶¶ 43–49.) As the Court held in its previous order, these allegations do not meet the Rule 9(b) standards because they "leave Defendants to guess which, if any, of the promotional materials Plaintiffs relied on." (Order, Dkt. No. 48, at 10 (citing *In re Stac Elec. Sec. Litig.*, 89 F.3d 1399, 1405 (9th Cir. 1996)).)

Plaintiffs don't point to any new allegations remedying this defect, but instead ask the Court to "reconsider its ruling on this issue." (Opp'n at 18.) Plaintiffs have not persuaded the Court that a sufficient basis exists for reconsidering its ruling, and the Court declines the invitation to rehash the same legal arguments based on the same authority.

Therefore, the Court concludes that the allegations of Defendants' misrepresentations are insufficient to support Plaintiffs' claims under Rule 9(b). The Court turns next to whether the allegations of Defendants' omissions support the claims.

2.2 Fraudulent Omissions

Plaintiffs also allege that Defendants fraudulently failed to disclose the defects to consumers. (*See* TAC ¶¶ 90, 99, 112, 127.) Claims of fraudulent omissions, like claims of fraudulent misrepresentations, are subject to Rule 9(b)'s heightened pleading standards. *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1127 (9th Cir. 2009). To meet Rule 9(b)'s requirements in this case, Plaintiffs at a minimum must "describe the content of the omission and where the omitted information should or could have been revealed." *Marolda v. Symantec Corp.*, 672 F. Supp. 2d 992, 1002 (N.D. Cal. 2009).

Plaintiffs' bare allegations of omission fail to meet this standard. For starters, by alleging that Defendants had a duty to disclose "[t]he gas tank defects described herein," without describing more specifically what Defendants had to disclose, Plaintiffs fail to make clear the specifics of the omission. (*See* TAC ¶ 36.) The TAC never states, for example, whether Defendants might have discharged their duty by disclosing the described design

choices (e.g., the use of a plastic fuel pump service cover), whether Defendants also had to disclose that these design choices created certain risks, or whether some other specific disclosure was required. The lack of precision in the TAC leaves Defendants to guess exactly what information it was obliged to disclose.

But even setting aside the lack of precision in describing the content of the omission, the TAC lacks any mention of "where the omitted information should or could have been revealed." *Marolda*, 672 F. Supp. 2d at 1002; *see also Guido v. L'Oreal, USA, Inc.*, 2013 WL 454861, at *11 (C.D. Cal. Feb. 6, 2013) (holding that a claim of fraudulent omission satisfied Rule 9(b) when the allegations " explain[ed] the content of the omission, and pinpoint[ed] the label or packaging as the place where plaintiffs would have looked for and found the omitted information had it been provided by defendants"). This lack of detail is doubly troubling because, as the Court already discussed, Plaintiffs don't allege what materials they relied upon in making their purchasing decisions. (*See* TAC ¶¶ 13–14.) Thus, Defendants are not only left to speculate as to where they should have disclosed the information, but also whether any such disclosure would have influenced the purchasing decision of Plaintiffs. *See Ehrlich v. BMW of N. Am., LLC*, 801 F. Supp. 2d 908, 916 (C.D. Cal. 2010) ("In an omissions case, omitted information is material if a plaintiff can allege that, had the omitted information been disclosed, *one would have been aware of it* and behaved differently." (internal quotation marks omitted) (emphasis added).) Simply alleging that information should have been disclosed, without greater specificity, is insufficient to satisfy Rule 9(b).

Plaintiffs cite cases where, they argue, courts denied motions to dismiss "similar allegations based on material omissions and concealment." (Opp'n at 12 (citing, e.g., *Aguilar v. General Motors, LLC*, 2013 U.S. Dist. LEXIS 149108 (E.D. Cal. Oct. 16, 2013); *Falco v. Nissan North America Inc.*, 2013 U.S. Dist. LEXIS 147060 (C.D. Cal. Oct. 10, 2013).) But even if the allegations in those cases were similar to the allegations here, the courts in those cases did not address the argument that Defendant makes here: that the allegations failed to satisfy Rule 9(b) for lack of precisely describing what content was omitted and where it should have been revealed. Thus, these cases do not persuade

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the Court that Plaintiffs made sufficient allegations of their omissions to satisfy Rule 9(b).

The Court therefore GRANTS the Motion as to the CLRA, UCL, FAL, and fraudulent concealment claims. Despite having amended their complaint three times, Plaintiffs still fail to allege claims of fraudulent misrepresentation or omission that meet Rule 9(b)'s pleading requirements. Because Plaintiffs have repeatedly failed to cure the deficiencies with these claims despite multiple opportunities to do so, and it does not appear possible to cure these deficiencies, the Court denies leave to amend. *See Telesaurus*, 623 F.3d at 1003.

3. CONCLUSION

The Court concludes that all of Plaintiffs' claims fail under either Rule 12(b)(6) or 9(b). The Court reaches these results after reviewing all arguments in the parties' papers. Any arguments not specifically addressed were either unpersuasive, not adequately developed, or not necessary to reach given the Court's holdings. For example, the Court need not rule on whether the doctrine of puffery provides an additional basis for dismissing these claims.

Because the Court dismisses all claims in the TAC, Defendants' request to strike various allegations in the TAC is moot.

DISPOSITION

The Court GRANTS the Motion to Dismiss and DISMISSES Plaintiffs' claims without leave to amend. The Motion to Strike is DENIED as moot. Defendants shall promptly submit a proposed judgment consistent with this Order.

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