

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ABERIN ET AL.,

Plaintiffs,

v.

AMERICAN HONDA MOTOR
COMPANY, INC.,

Defendant.

Case No. 16-cv-04384-JST

**ORDER GRANTING IN PART AND
DENYING IN PART MOTION TO
DISMISS, AND DENYING MOTION TO
STRIKE; ORDER SETTING CASE
MANAGEMENT CONFERENCE**

Re: ECF No. 105

Before the Court is Defendant American Honda Motor Company, Inc. (“AHM”)’s Motion to Dismiss certain claim in Plaintiffs’ Second Amended Complaint (“SAC”) and Motion to Strike certain restitution claims.¹ The Court will grant the motion to dismiss in part and deny it in part. The Court denies the motion to strike in full.

I. FACTUAL BACKGROUND²

Plaintiffs’ claims arise from their purchase of Acura vehicles which contained a Bluetooth pairing device entitled “HandsFreeLink” (“HFL”) that allowed for hands-free cell phone calls. ECF No. 98 (“SAC”) ¶ 2. AHM was an early adopter of the hands-free technology, so many

¹ AHM’s motion to dismiss originally included a motion for sanctions. ECF No. 105 at 14. However, AHM refiled its sanctions request as a separate motion, which the Court has already resolved. ECF No. 130.

Also, since the filing of AHM’s motion to dismiss, plaintiffs Donald Tran, Mark Gerstle and Jordan Moss have voluntarily dismissed their claims. Accordingly, the Court does not address those former plaintiffs’ claims.

² The Court takes the facts from the SAC. Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001). For further factual detail, the Court refers the reader to its prior amended order granting and denying in part AHM’s motion to dismiss. ECF No. 91.

1 consumers purchased the vehicles precisely for this technology and the technology featured
 2 heavily in AHM's advertising campaigns. Id. ¶¶ 279-83. According to Plaintiffs, the HFL device
 3 regularly malfunctioned by failing to switch off when not in use. Id. ¶ 3. As a result, Plaintiffs'
 4 vehicles suffered parasitic electrical drain, requiring frequent battery replacement and causing the
 5 premature failure of other electronic components. Id. AHM was aware of the defect, but failed to
 6 resolve it. Id. ¶ 4. Beginning in 2005, AHM issued internal Technical Service Bulletins ("TSBs")
 7 to its dealers describing the defect but offering no solution or warranty. Id. In some cases,
 8 Plaintiffs purchased their Acura vehicles specifically because they had HFL, and because Acuras
 9 had a reputation for reliability. Id. ¶ 10. The states where Plaintiffs purchased their vehicles and
 10 experienced defect related problems include California, Delaware, Florida, Kansas, New
 11 Hampshire, New York, Ohio, and Washington. Id. ¶ 316.

12 As pertinent to the statutes of limitations, Plaintiffs also allege facts relevant to tolling. In
 13 California, the Aberin plaintiffs (a married couple) purchased a new Acura in 2005 and brought it
 14 in for service for battery and other electronic component failures related to an HFL defect seven
 15 times between February 2008 and June 2015. Id. ¶¶ 9, 13-21. The Aberin plaintiffs learned of the
 16 HFL defect in November 2015, and had their HFL disconnected in 2016. Id. ¶ 21-22. Plaintiff
 17 Kelly purchased his 2007 Acura in 2015, and experienced battery failures regularly. Id. ¶¶ 32, 37.
 18 In August 2016, Kelly learned of the defect when an Acura dealership informed his wife that they
 19 were aware of a defect in the HFL, spurring Kelly to read about the defect, including in this
 20 lawsuit. He disabled the device that same month. Id. ¶¶ 39-40.

21 Lou, the Delaware plaintiff, purchased a new Acura in 2011, and experienced frequent
 22 battery issues. Id. ¶¶ 71, 75-82. Lou learned about the link between his battery issues and the
 23 HFL defect in August 2016 when he read about this lawsuit. Id. ¶ 83.

24 Criner, the Florida plaintiff, purchased a used 2009 Acura in 2012 and began to experience
 25 regular issues with his battery and power steering in 2013. Id. ¶¶ 95, 100-103. Criner learned of
 26 the link between his electronic issues and his HFL in August 2016 when he read about this
 27 lawsuit. Id. ¶ 104.

28 Awtrey, the Kansas plaintiff, purchased a new 2005 Acura in November 2004, and

1 experienced electrical issues in 2009, 2014, and 2016. Id. ¶¶ 115, 120-22. Awtrey learned of the
2 connection between his electrical issues and the HFL in August 2016 when he read about this
3 lawsuit. Id. ¶ 123.

4 Yeung, the New Hampshire plaintiff, purchased a new 2008 Acura in September 2007 and
5 experienced regular battery problems requiring replacements and jumps beginning in at least 2010.
6 Id. ¶¶ 134, 139-143. Yeung learned of the connection between the HFL and her electrical issues
7 in late 2013 or early 2014 at an Acura dealership. Id. ¶ 144.

8 As for the New York plaintiff, Matza purchased a new Acura in 2006 and experienced
9 battery issues seven times between 2007 and 2016. Id. ¶¶ 177, 182-89. Matza learned of the
10 connection between her battery issues and the HFL defect through the internet in July 2016. Id.
11 ¶¶ 191-94. Matza sold her Acura in May 2017, after she learned of the defect, but before
12 obtaining counsel. Id. ¶ 180-81. She sold the car for a lower price because of the defect. Id.

13 Crooks, the Ohio Plaintiff, purchased a used 2007 Acura in 2012, and his battery began
14 dying regularly in June 2014. Id. ¶¶ 205, 210-13. At that time, his dealership suggested that he
15 disconnect the HFL, which Crooks declined to do because he used the feature. Id. ¶ 213. Crooks
16 also learned about the connection between his battery issues and the HFL in June 2014 through
17 internet research. Id. ¶ 214.

18 Burgess, the Washington plaintiff, purchased a new Acura in 2008. Id. ¶ 244. Burgess
19 experienced problems with both his battery and the HFL in 2014, 2016. Id. ¶¶ 251-58. Burgess's
20 dealer told him in December 2016 that his HFL drained his battery and that this was a problem the
21 dealer had encountered before. Id. ¶ 257. The dealer disconnected Burgess's HFL at the same
22 time, despite the fact that Burgess used the HFL regularly for work. Id.

23 **II. PROCEDURAL BACKGROUND**

24 Plaintiffs filed this putative class action alleging claims under California and various other
25 state consumer protection and warranty laws against Defendant on August 3, 2016. ECF No. 1.
26 AHM filed a motion to dismiss that complaint, ECF No. 42, which the Court granted in part and
27 denied in part, ECF No. 91. The Court then consolidated Burgess' case, 17-cv-1060, also against
28 AHM with this case. ECF No. 92.

1 Plaintiffs filed a SAC, amending the complaint to comply with the Court's order. ECF No.
2 98. AHM then filed a second motion to dismiss, which is the subject of this order. ECF No. 105.

3 **III. LEGAL STANDARDS**

4 While the Court accepts the material facts alleged in the complaint, along with all
5 reasonable inferences to be drawn from those facts, as true, Navarro, 250 F.3d at 732, "the tenet
6 that a court must accept a complaint's allegations as true is inapplicable to . . . [t]hreadbare recitals
7 of the elements of a cause of action, supported by mere conclusory statements," Ashcroft v. Iqbal,
8 556 U.S. 662, 678 (2009). To be entitled to the presumption of truth, a complaint "must contain
9 sufficient allegations of underlying facts to give fair notice and to enable the opposing party to
10 defend itself effectively." Starr v. Baca, 652 F.3d 1202, 1216 (9th Cir. 2011).

11 Plaintiffs' fraud claims are subject to a heightened pleading standard. "In alleging fraud or
12 mistake, a party must state with particularity the circumstances constituting fraud or mistake."
13 Fed. R. Civ. P. 9(b). To satisfy Rule 9(b), a complaint must supply "the circumstances
14 constituting the alleged fraud" with a description "specific enough to give defendants notice of
15 the particular misconduct . . . so that they can defend against the charge and not just deny that they
16 have done anything wrong." Kearns v. Ford Motor Co., 567 F.3d 1120, 1124 (9th Cir. 2009)
17 (citation omitted). Fraud claims must allege "an account of the time, place, and specific content of
18 the false representations as well as the identities of the parties to the misrepresentations." Swartz
19 v. KPMG LLP, 476 F.3d 756, 764 (9th Cir. 2007) (per curiam) (internal quotation marks omitted);
20 see also Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1106 (9th Cir. 2003) ("Averments of
21 fraud must be accompanied by the who, what, when, where, and how of the misconduct charged."
22 (internal quotation marks omitted)). "[I]ntent, knowledge, and other conditions of a person's
23 mind" need not be stated with particularity, and "may be alleged generally." Fed. R. Civ. P. 9(b).

24 **IV. DISCUSSION**

25 **A. Whether AHM's arguments should be dismissed under Rule 12(g)**

26 Plaintiffs contend that many of AHM's arguments should be dismissed under Rule 12(g) of
27 the Federal Rules of Civil Procedures because AHM could have raised those arguments in its
28 earlier motion, but failed to do so. ECF No. 112 at 8-9. Because Plaintiffs do not specify which

arguments AHM could have raised earlier, the Court does not address the topic further. Id.

B. Whether the consumer protection and warranty claims of new Plaintiffs' Matza and Burgess are timely

First, AHM argues that New York plaintiff Matza and Washington plaintiff Burgess, both new to the SAC (Burgess by consolidation and Matza by amendment), have several untimely claims. AHM argues that Matza's consumer protection claim is untimely because New York's law has a three-year statute of limitations that accrued on the date of purchase in September 2006. ECF No. 105 at 17; C.P.L.R. § 214(2); Corsello v. Verizon N.Y., Inc., 18 N.Y.3d 777, 788-89 (N.Y. 2012). AHM argues that Burgess's consumer protection claim is untimely because Washington's law has a four year statute of limitations that accrued on his date of purchase, October 25, 2008. ECF No. 105 at 17; RCW 19.86.120; Shepard v. Holmes, 185 Wash. App. 730, 739 (Wash. Ct. App. 2014).

Second, AHM argues that Matza's claims for express warranty, implied warranty, and under the MMWA have a four year statute of limitations. ECF No. 105 at 10; Statler v. Dell, Inc., 775 F. Supp. 2d 474, 481 (E.D.N.Y. 2011). AHM argues that Burgess's claims for express warranty and the MMWA also have a four-year statute of limitations accruing from October 2008. ECF No. 105 at 18; RCW 62A.2-725(2); Holbrook, Inc. v. Link-Belt Constr. Equip. Co., 103 Wash. App. 279, 284 (Wash Ct. App. 2000).

AHM's recitation of the statutes of limitations for the New York and Washington state consumer protection and warranty statutes is correct, and under these statutes, the claims are untimely. But this is not the end of the timeliness inquiry. Plaintiffs argue that Matza and Burgess's consumer protection and warranty claims are all timely as fraudulent concealment and delayed discovery tolling apply. Statler, 775 F. Supp. 2d at 482-84 (fraudulent concealment tolling applies to section New York consumer protection and MMWA claims); Hunter v. Bank of Am., N.A., 2017 WL 2289034, at *2 (W.D. Wash. May 25, 2017) (delayed discovery applies to consumer protection, including because of fraud); Giraud v. Quincy Farm & Chem., 102 Wn. App. 443, 455 (2000) (fraudulent concealment tolling applies to RCW 62A.2-725). Plaintiffs are correct that tolling applies, but AHM's challenges to the warranty claims are addressed below.

C. Whether Plaintiffs' consumer protection and warranty claims are timely through tolling

As in the prior motion to dismiss, AHM challenges whether the claims of certain plaintiffs are timely. ECF No. 105 at 18.³ Specifically, it argues that the claims of the following plaintiffs are untimely because they fail adequately plead a basis for tolling: the Aberin Plaintiffs from California ; plaintiff Lou from Delaware; plaintiff Yeung from New Hampshire; plaintiff Matza from New York; and plaintiff Burgess from Washington.

As before, the question is whether the plaintiffs have adequately invoked the discovery rule to toll the statute of limitations. “Generally, California law allows tolling of the statute of limitations under the discovery rule; that is, ‘the statute of limitations does not begin to run until the plaintiff discovered or had notice of all facts which are essential to the cause of action.’” In re Conseco Ins. Co. Annuity Mktg. & Sales Practices Litig., No. C-05-04726 RMW, 2008 WL 4544441, at *8 (N.D. Cal. Sept. 30, 2008) (quoting Saliter v. Pierce Bros. Mortuaries, 81 Cal.App.3d 292, 296 (1978)). Reliance on the discovery rule requires the plaintiff to plead facts “which show (1) the time and manner of discovery and (2) the inability to have made earlier discovery despite reasonable diligence However, mere conclusory assertions that delay in discovery was reasonable are insufficient.” Id. (internal citations omitted); see also Asghari v. Volkswagen Grp. of Am., Inc., 42 F. Supp. 3d 1306, 1320–21 (C.D. Cal. 2013). To invoke the discovery rule, *each* Plaintiff must allege the time and manner by which he discovered the cause of action. See Philips v. Ford Motor Co., No. 14-CV-02989-LHK, 2015 WL 4111448, at *8 (N.D. Cal. July 7, 2015).

For fraudulent concealment tolling, Plaintiffs must allege when and under what circumstances the fraud was discovered, and that Plaintiffs were not at fault in failing to discover the fraud. In re Conseco, 2008 WL 4544441, at *9. “Fraudulent concealment tolling must be pled with particularity under Fed. R. Civ. P. 9(b).” In re Ford Tailgate Litig., No. 11-CV-2953-RS, 2014 WL 1007066, at *8 (N.D. Cal. Mar. 12, 2014), order corrected on denial of reconsideration, No. 11-CV-2953-RS, 2014 WL 12649204 (N.D. Cal. Apr. 15, 2014).

³ AHM does not seek to dismiss as untimely the claims of: one California plaintiff (Kelly), the Florida plaintiff (Criner), the Kansas plaintiff (Awtrey), and the Ohio plaintiff (Crooks). ECF No. 112 at 12.

AHM argues that the above-named plaintiffs fail to allege both fraudulent concealment and delayed discovery because each fails to allege facts showing that they acted diligently in determining that the HFL defect caused their battery issues, and in some cases fail to allege facts showing how and when they discovered the defect. Id. at 18-19.⁴ The Court addresses the allegations regarding each plaintiff in turn.

The Aberin Plaintiffs. The Plaintiffs' allegations about when the Aberins learned of the HFL are confusing at best. In their opposition to the motion to dismiss, the Plaintiffs state that "Plaintiffs Lindsay and Jeff Aberin experienced problems with numerous electrical components and replaced several parts, but did not learn the problems were caused by a defect in the HFL system until they brought their car to Hinshaw's Acura to have a headlight bulb, ignitor, and door lock actuator replaced in June 24, 2015." ECF No. 112 at 13 (citing SAC ¶¶ 13-21). But that is not what the complaint says. Instead, it alleges that the Aberins most recently brought their Acura to Hinshaw's on November 20, 2015 for servicing related to electrical defects, and that the dealership replaced "the driver side headlight bulb, ignitor, and driver side rear door lock actuator." SAC ¶ 21. Even on that date, however, the Aberins did not learn about the alleged HFL defect, because "neither the dealership nor Honda disclosed that the HandsFreeLink™ unit was the reason for the low battery phenomenon, nor did they ever fix the defect." Id. And then, contrary to all of the foregoing, the complaint states a few paragraphs later that the Aberin Plaintiffs "only discovered that Plaintiff [sic] may have a cause of action when Plaintiff [sic] learned that the vehicle's battery-drain issues were linked to the HFL unit on the aforementioned service date." Id. ¶ 25. If no one at the dealership disclosed the defect to the Aberins, how did they figure it out? The SAC is silent on the point, and the Court concludes that the Aberin Plaintiffs have failed to allege when they discovered the alleged defect. Their consumer protection

⁴ In its first order, this Court determined that (a) Plaintiffs' implied and express warranty claims are subject to tolling based on fraudulent concealment; (b) Plaintiffs' Magnuson-Moss Warranty Act claims are subject to tolling; and (c) Plaintiffs' consumer protection claims are subject to tolling under fraudulent concealment and the discovery rule. ECF No. 91 at 16-23. The Court also held that Plaintiffs adequately plead several subparts of their tolling claims: that the alleged defect posed a safety risk; that AHM had exclusive knowledge of this defect, and that AHM withheld this knowledge from Plaintiffs. Id. at 14. This order affirms those conclusions.

1 and warranty claims are dismissed. Because Plaintiffs have already been an opportunity to cure
2 these allegations, dismissal is with prejudice.

3 Plaintiff Lou. AHM argues that Lou experienced persistent battery problems but was not
4 diligent in researching the cause until he conducted internet research. ECF No. 105 at 20.
5 Plaintiffs argue the Lou did not know that his battery problems were caused by the HFL defect
6 until he read the complaint online in August 2016. ECF No. 112 at 13 (SAC ¶¶ 75-83). The Court
7 concludes that Lou adequately pleads the time and manner of discovery for the purposes of
8 delayed discovery and fraudulent concealment tolling.

9 Plaintiff Yeung. AHM argues that Yeung did not allege facts showing she acted diligently
10 because she did not bring her vehicle to an Acura dealership until after her warranty expired, and
11 only then did she learn the HFL might cause battery drain. ECF No. 105 at 20-21. Plaintiffs
12 argue that Yeung learned of the defect only when she brought her vehicle to a dealership and was
13 told about the HFL defect in late 2013 or early 2014. ECF No. 112 at 13 (SAC ¶¶ 139-44). The
14 Court concludes that Lou adequately pleads the time and manner of discovery for the purposes of
15 delayed discovery and fraudulent concealment tolling.

16 Plaintiff Matza. AHM argues that Matza failed to conduct reasonable inquiry into the
17 source of her regular battery drain over nine years until her husband conducted internet research
18 and discovered the connection. ECF No. 105 at 21. Plaintiffs argue that Matza did not learn of
19 the defect until she read about it online in July 2016. ECF No. 112 at 13 (SAC ¶¶ 182-94). The
20 Court concludes that Matza adequately pleads the time and manner of discovery for the purposes
21 of delayed discovery and fraudulent concealment tolling.

22 Plaintiff Burgess. AHM argues that Burgess never pleads when he became aware of the
23 defect. ECF No. 105 at 17 n.6, 21-22. This is incorrect. Burgess claims that he became aware
24 that the HFL defect caused electrical issues in his vehicle in December 2016 when a dealer told
25 him that the HFL was draining his battery. SAC ¶ 254-60. Burgess adequately pleads the time
26 and manner of discovery for the purposes of delayed discovery and fraudulent concealment
27 tolling.

28 The Court concludes that Plaintiffs Lou, Yeung, Matza, and Burgess adequately plead the

time and manner of their discovery. However, that is not the end of the inquiry. To invoke the discovery rule, each Plaintiff must also show he acted reasonably and diligently. Plumlee v. Pfizer, Inc., No. 13-CV-00414-LHK, 2014 WL 4275519, at *6 (N.D. Cal. Aug. 29, 2014), aff'd, No. 14-16924, 2016 WL 6610223 (9th Cir. Nov. 9, 2016). AHM argues that these plaintiffs were not diligent because they knew they had problems with their batteries, but did not investigate the source of the problems. See, e.g., ECF No. 105 at 20 (Plaintiff Yeung experienced battery problems the same year he bought his car, and had to jump start his car nine times, but “did not act reasonably or diligently (or at all really) to inquire about his alleged battery issue in a timely fashion.”). Plaintiffs respond that AHM’s “concealment, combined with the fact that the defect manifests by causing apparently unrelated electrical components to fail, left Plaintiffs unable to discover the defect on their own.” ECF No. 112 at 7. Plaintiffs have the better argument.

Plaintiffs argue that their duty to investigate was never triggered because they did not have reason to suspect the true cause. ECF No. 112 at 14. Plaintiffs experienced many seemingly unrelated defects including batteries, fog lights, headlights, ignitors, starters, door locks, and motor assemblies, and Plaintiffs argue plausibly that it would be unreasonable to expect them to connect these issues to a single, undisclosed, underlying defect. ECF No. 112 at 14-15.

For one thing, these plaintiffs allege that they had their cars repaired by dealerships who purported to fix the reported problems but never identified the underlying HFL issue causing those problems. In an analogous situation, another court in this district held that plaintiffs alleged fraudulent concealment when a car manufacturer pretended to fix problems with the defect instead of admitting that the problems could not be fixed. In re MyFord Touch Consumer Litig., 46 F. Supp. 3d 936, 948-49, 961 (N.D. Cal. 2014); see also Ho v. Toyota Motor Corp., 931 F. Supp. 2d 987, 999 (N.D. Cal. 2013) (Conti, J.) (finding that plaintiffs adequately pleaded active concealment by alleging that defendants repaired the class vehicles’ headlamps only temporarily or replaced them with other defective parts). Courts have also recognized that a consumer without sophisticated knowledge of automobiles might not suspect a defect, and therefore not investigate further, when it appeared that a repair fixed the problem. Herremans v. BMW of N. Am., LLC, 2015 WL 12712082, at *5 (C.D. Cal. Feb. 19, 2015).

Plaintiffs also argue that further investigation would not have revealed additional facts. MyFord Touch, 46 F. Supp. 3d at 961 (applying fraudulent concealment tolling where defendant pretended to fix a defect and concealed TSBs that would have alerted plaintiffs to the defect). The Court previously concluded that Plaintiffs sufficiently allege fraudulent concealment because AHM had exclusive information about the HFL defect that it withheld from Plaintiffs. ECF No. 91 at 12-14. Moreover, AHM's internal TSBs explain that the HFL defect eludes diagnosis because battery failures present only as intermittent battery problems, and drivers and mechanics have no reason to suspect any other problem. SAC ¶¶ 286, 288. In Philips, the court relied on similar allegations to deny a motion to dismiss a fraudulent omission claim. 2015 WL 4111448, at *1. Here, Plaintiffs have adequately alleged that further investigation of their known battery issues would not have uncovered sufficient facts about the underlying HFL defect.

Finally, as to Plaintiffs' fraudulent concealment claims, defendant must show not only that Plaintiffs should have known about the defect itself, but also that they know about the Defendant's alleged fraud in concealing the defect. MyFord Touch, 46 F. Supp. 3d at 962. The Court's prior holding that Plaintiffs sufficiently allege a defect within Honda's exclusive knowledge, and that Honda withheld information from Plaintiffs, are sufficient in this regard.

In short, plaintiffs Lou, Yeung, Matza, and Burgess, adequately allege tolling. The motion to dismiss their consumer protection and warranty claims on statute of limitations grounds is denied.

D. Whether Plaintiffs' Express Warranty claims should be dismissed as a matter of law

Plaintiffs Criner, Matza, and Burgess allege express warranty claims. ECF No. 105 at 22. The warranty provides that AHM will repair or replace a part "that is defective in material or workmanship" within four years of purchase. ECF No. 44-1; ECF No. 91 at 3-4. AHM argues that all four plaintiffs fail to state a claim for express warranty because (1) the new vehicle warranty included with each Acura excludes repairs for design defects, and (2) in each case, the warranty had expired by the time the defect arose. ECF No. 105 at 22. Plaintiffs concede that a manufacturer need not repair a defect past the expiration date of the warranty. Clemens v.

1 Daimler Chrysler, 534 F.3d 1017, 1022-23 (9th Cir. 2008); see also Ho, 931 F. Supp. 2d at 994.⁵

2 Plaintiffs argue that the durational limit is unconscionable, pointing to a number of cases
3 from other circuits for the proposition that the durational limit on an express warranty is
4 unconscionable when the manufacturer is aware of a defect that will manifest after the warranty
5 expires. ECF No. 112 at 19-20 (collecting cases). Plaintiffs place heavy weight on a quote from a
6 Fourth Circuit case, Carlson v. Gen. Motors Corp., 883 F.2d 287 (4th Cir. 1989).

7 Plaintiffs' argument is not persuasive. For one thing, their reliance on Carlson is
8 unhelpful, since it addresses implied rather than express warranties. 883 F.2d 287, 296 (4th Cir.
9 1989). More importantly, as to express warranties, California courts have adopted a rule counter
10 to Carlson: even a manufacturer's awareness of a latent defect cannot make an express warranty's
11 duration unconscionable. Clemens, 534 F.3d at 1023 ("Every manufactured item is defective at
12 the time of sale in the sense that it will not last forever; the flip-side of this original sin is the
13 product's useful life.").

14 Plaintiffs also argue that the warranty fails its essential purpose if it does not cover design
15 defects, under the UCC § 2-719. ECF No. 112 at 21-24. Plaintiffs again cite to a number of out
16 of district and circuit cases for this proposition, arguing that design defects are interchangeable
17 with workmanship or manufacturing defects at the pleadings stage. Id. at 22. However, many
18 "courts in this district and circuit have repeatedly held that warranties covering 'materials or
19 workmanship' do not cover design defects." Johnson v. Nissan N. Am., Inc., No. 17-CV-00517-
20 WHO, 2017 WL 4570712, at *4 (N.D. Cal. Aug. 29, 2017) (collecting cases).

21 AHM's motion to dismiss Plaintiffs' express warranty claims is granted.

22 **E. Whether Plaintiffs' implied warranty claims should be dismissed as a matter**
23 **of law**

24 AHM argues that Plaintiffs' implied warranty claims under California and Florida law fail
25 because there is no contract between Plaintiffs and AHM, because Plaintiffs purchased their cars

26 ⁵ AHM also argues that any reliance on Acura's reputation as reliable is mere puffery. ECF No.
27 105 at 24. Azoulai v. BMW of N. Am. LLC, No. 16-CV-00589-BLF, 2017 WL 1354781, at *7-8
28 (N.D. Cal. Apr. 13, 2017) (generalized assertions regarding a vehicles "safety" or "durability" are
mere puffery and cannot support an express warranty claim). The Court agrees that any
reputational statements about safety or reliability are puffery and not actionable.

from AHM's franchisee dealers and not from AHM itself. ECF No. 105 at 24. In its order on AHM's prior motion to dismiss, the Court concluded that the California implied warranty claims do not fail for lack of privity, citing Atkinson v. Elk Corp. of Texas, 142 Cal. App. 4th 212, 48 Cal. Rptr. 3d 247 (2006). ECF No. 91 at 21 n.20. The Court has examined the authorities cited by AHM, however, and now concludes AHM is correct that "Atkinson appears to be an anomaly in that it contravenes the well-established principle under California law that privity is required in cases alleging breach of an implied warranty." Postier v. Louisiana-Pac. Corp., No. C-09-3290 JCS, 2009 WL 3320470, at *6 (N.D. Cal. Oct. 13, 2009). Nonetheless, AHM's motion fails as to the California plaintiffs. Under California law, "a third party beneficiary can enforce a contract made expressly for his benefit. . . . A contract made expressly for a third party's benefit does not need to specifically name the party as the beneficiary; the only requirement is that the party is more than incidentally benefitted by the contract." Cartwright v. Viking Indus., Inc., 249 F.R.D. 351, 356 (E.D. Cal. 2008) (internal citations and quotation marks omitted) (concluding that plaintiffs were, as third party beneficiaries, entitled to maintain a breach of implied warranty claim against the manufacturer where plaintiffs, not the distributors, were the intended consumers). Plaintiffs successfully invoke this exception.

As to Florida Plaintiff Criner, however, AHM's motion has more force. Under Florida law, the rule is simple: "a plaintiff cannot recover economic losses for breach of implied warranty in the absence of privity." Mesa v. BMW of N. Am., LLC, 904 So. 2d 450, 458 (Fla. Dist. Ct. App. 2005); see also Kramer v. Piper Aircraft Corp., 520 So. 2d 37 (Fla.1988) (holding that plaintiffs must have privity for warranty claims more broadly).

Accordingly, AHM's motion to dismiss on the grounds of implied warranty for lack of privity under California law is denied but the motion to dismiss on the grounds of implied warranty for lack of privity under Florida law is granted.

F. Whether Plaintiffs' MMWA claims should be dismissed

Defendants are correct that to the extent that this Court dismisses Plaintiffs' implied and express warranty claims, it must also dismiss their MMWA claims. ECF No. 105 at 26; Ford Tailgate, 2014 WL 1007066, at *5 (dismissing MMWA warranty claims when state warranty

claims were dismissed). The MMWA claims on the basis of the express warranties are dismissed but the claims for implied warranties are granted, in part. Accordingly, the motion to dismiss the MMWA claim under Florida law is granted, but the motion under all other laws is denied because implied warranty claims survive.

G. Whether restitution claims for Plaintiffs who purchased used cars should be stricken

AHM argues that because it obtained no money from the purchases of used vehicles, restitution is not an available remedy for those plaintiffs who purchased used vehicles (Kelly, Criner, and Crooks). AHM argues that such claims for restitution should be stricken. ECF No. 105 at 26; Korea Supply v. Lockheed Martin Corp., 29 Cal. 4th 1134, 1140 (2003) (holding that “disgorgement of profits allegedly obtained by means of an unfair business practice” is not “an authorized remedy under the UCL where the profits are neither money taken from a plaintiff nor funds in which the plaintiff has an ownership interest”).

AHM overreads Korea Supply. The plaintiff in that case was a business that represented manufacturers of military equipment. It represented one such manufacturer in a deal with the government of the Republic of Korea that would have netted the plaintiff a commission of \$30 million had its bid been accepted. The plaintiff alleged that it lost the contract to another bidder, Lockheed Martin, even though plaintiff’s bid was lower and its product superior, because Lockheed Martin’s agent had “offered bribes and sexual favors to key Korean officials.” Korea Supply, 29 Cal. 4th at 1140. The Supreme Court rejected the plaintiff’s restitution claim, holding that

The remedy sought by plaintiff in this case is not restitutionary because plaintiff does not have an ownership interest in the money it seeks to recover from defendants. First, it is clear that plaintiff is not seeking the return of money or property that was once in its possession. KSC has not given any money to Lockheed Martin; instead, it was from the Republic of Korea that Lockheed Martin received its profits. Any award that plaintiff would recover from defendants would not be restitutionary as it would not replace any money or property that defendants took directly from plaintiff. Further, the relief sought by plaintiff is not restitutionary under an alternative theory because plaintiff has no vested interest in the money it seeks to recover KSC itself acknowledges that, at most, it had an “expectancy” in the receipt of a commission

Korea Supply, 29 Cal. 4th at 1149–50. Importantly, not only had the plaintiff in Korea Supply not paid the defendant any money; the plaintiff had not paid anyone any money.

Subsequent cases have made clear that Korea Supply’s holding is limited. “Nothing in Korea Supply conditions the recovery of restitution on the plaintiff having made direct payments to a defendant who is alleged to have engaged in . . . unlawful practices under the UCL. Rather, the holding of Korea Supply on the issue of restitution is that the remedy the plaintiff seeks must be truly ‘restitutionary in nature’ – that is, it must represent the return of money or property the defendant acquired through its unfair practices.” Shersher v. Superior Court, 154 Cal. App. 4th 1491, 1494 (2007). In Shersher, the California Court of Appeal reinstated the plaintiffs’ UCL restitution claim against Microsoft, even though they had purchased the products at issue from third party retailers. 154 Cal. App. 4th at 1499–500.

The Court finds the analogy to Shersher persuasive. (Notably, AHM makes no effort to distinguish Shersher.) Accordingly, the Court declines to strike the claims for restitution.

H. Whether Plaintiffs’ claims for equitable relief under the UCL and CLRA should be dismissed

Finally, AHM argues that plaintiffs cannot obtain equitable relief under the UCL because they have an adequate remedy at law. ECF No. 105 at 28. AHM is correct that some federal courts have so held. E.g., Munning v. Gap, Inc., 238 F. Supp. 3d 1195, 1204 (N.D. Cal. 2017); Philips, 2015 WL 411448, at *16. This Court joins the many other courts, however, that have reached the opposite conclusion, finding no bar to the pursuit of alternative remedies at the pleadings stage. E.g., Adkins v. ComcastCorp., No. 16-CV-05969-VC, 2017 WL 3491973, at *3 (N.D. Cal. Aug. 1, 2017) (“A few federal courts seem to have decided that claims for equitable relief should be dismissed at the pleading stage if the plaintiff manages to state a claim for relief that carries a remedy at law But this Court is aware of no basis in California or federal law for prohibiting the plaintiffs from pursuing their equitable claims in the alternative to legal remedies at the pleadings stage.”); Cabrales v. Castle & Cooke Mortg., LLC, No. 1:14-CV-01138-MCE, 2015 WL 3731552, at *3 (E.D. Cal. June 12, 2015) (the pleading of alternative remedies “is amply supported by Ninth Circuit cases applying California law”); Colucci v. ZonePerfect

Nutrition Co., 2012 WL 6737800 at *10 (N.D. Cal. Dec. 28, 2012) (“[C]laims for restitution or unjust enrichment may survive the pleadings stage when pled as an alternative avenue of relief, though the claims, as alternatives, may not afford relief if other claims do.”); Vicuna v. Alexia Foods, Inc., 2012 WL 1497507 at *3 (N.D. Cal. April 27, 2012) (“[W]hile a claim for restitution is inconsistent and incompatible with a related claim for breach of contract or a claim in tort, at the pleading stage, a plaintiff is allowed to assert inconsistent theories of recovery[.]”).

AHM’s motion to dismiss Plaintiffs’ claims for equitable relief under the UCL and CLRA is denied.

CONCLUSION

For the aforementioned reasons, AHM’s motion to dismiss is granted in part and denied in part and the motion to strike is denied in full.

1. AHM’s motion to dismiss Burgess’s and Matza’s consumer protection claims on the grounds of timeliness is DENIED.

2. AHM’s motion to dismiss Burgess’s and Matza’s warranty claims on the grounds of timeliness is DENIED.

3. AHM’s motion to dismiss the consumer protection and warranty claims of the Aberin Plaintiffs and Plaintiffs Lou, Yeung, Matza, and Burgess on the grounds of failure to plead tolling of the statute of limitations is GRANTED as to the Aberin Plaintiffs and DENIED as to Plaintiffs Lou, Yeung, Matza, and Burgess.

4. AHM’s motion to dismiss the express warranty claims of Plaintiffs Criner, Matza, and Burgess on the grounds of failure to manifest during the warranty period is GRANTED.

5. AHM’s motion to dismiss the implied warranty claims under California law on the basis of privity is DENIED but the motion to dismiss the implied warranty claims under Florida law on the basis of privity is GRANTED.

6. AHM’s motion to dismiss the MMWA warranty claims is DENIED except as to claims under Florida law, as to which the motion is GRANTED.

7. AHM’s motion to strike the restitutionary claims is DENIED.

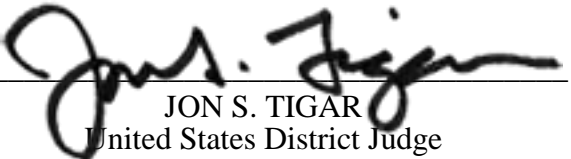
8. AHM’s motion to dismiss Plaintiffs’ claims for equitable relief is DENIED.

1 All claims dismissed by this order are dismissed with prejudice, as Plaintiffs have had the
2 opportunity to amend. ECF No. 91.

3 The Court will conduct a case management conference on April 18, 2018 at 11:00 a.m. An
4 updated joint case management statement is due by April 9, 2018.

5 **IT IS SO ORDERED.**

6 Dated: March 26, 2018

7 
8 JON S. TIGAR
United States District Judge

United States District Court
Northern District of California