LINK:

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No.	**CV 14-00496 BRO (VBKx)**	Date	January 7, 2015
Title	**PHILIP KIRSOPP ET AL. v. YAMAHA MOTOR CO. LTD. ET AL.**		

Present: The Honorable	**BEVERLY REID O'CONNELL, United States District Judge**	
Renee A. Fisher	Not Present	N/A
Deputy Clerk	Court Reporter	Tape No.
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:	
Not Present	Not Present	

Proceedings: (IN CHAMBERS)

ORDER GRANTING MOTION TO DISMISS [46]

Pending before the Court is Defendant Yamaha Motor Corporation, U.S.A.'s motion to dismiss Plaintiffs' First Amended Class Action Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). (Dkt. No. 46.) After reviewing the parties' papers filed in support of and in opposition to this motion, in addition to hearing oral argument from the parties on the matter, the Court agrees with Defendant that Plaintiffs have failed to state a claim in their First Amended Complaint. Accordingly, Defendant's motion is **GRANTED**.

I. FACTUAL BACKGROUND

Defendant Yamaha Motor Corporation, U.S.A. ("Yamaha USA") is a wholly owned subsidiary of Yamaha Motor Co. Ltd. ("Yamaha Japan"), a Japanese corporation. (Dkt. No. 40 at 1.)[1] Yamaha USA imports and markets Yamaha Japan's products in the United States. (Dkt. No. 40 at 1.) Among its business activities, Yamaha USA designs and manufactures outboard motors for recreational boats. (First Am. Class Action Compl. ("FAC") ¶ 15.) One model in particular lies at the center of this lawsuit: the first-generation F-series four-stroke outboard motor.

[1] Yamaha Japan is a Japanese corporation headquartered in Shizauka, Japan. (Dkt. No. 40.) This Court has dismissed Plaintiffs' claims in this action as to Yamaha Japan for lack of jurisdiction. (Dkt. No. 40.)

A. Plaintiffs' Motors

Plaintiffs are individuals who have purchased first-generation F-series outboard motors. They allege that the first-generation F-series motor was flawed in its design, resulting in significant internal corrosion of the motor's dry exhaust system, which, if left untreated, ultimately causes the motor to failure prematurely. The Court will briefly summarize each plaintiff's experience.

1. Philip Kirsopp's Motor

Plaintiff Philip Kirsopp purchased a pre-owned boat equipped with a 2002 model of a Yamaha F225 outboard motor from a Yamaha dealer in Massachusetts in 2008. (Dkt. No. 40 at 1; FAC ¶ 11.) After the motor had accumulated approximately 500 hours of use, Kirsopp discovered internal corrosion of its exhaust components. (FAC ¶ 38.)

2. William Kratz's Motor

Plaintiff William Kratz purchased a pre-owned boat equipped with a 2003 model of a Yamaha F225 outboard motor from a Yamaha dealer in Maryland in 2005. (Dkt. No. 40 at 2; FAC ¶ 12.) After the motor had accumulated approximately 970 hours of use, Kratz discovered internal corrosion of its exhaust components while inspecting the motor with the lower unit removed using a bore scope. (FAC ¶ 39.)

3. William Neff's Motor

Plaintiff William Neff purchased a pre-owned boat equipped with a 2002 model of a Yamaha F225 outboard motor in 2008. (Dkt. No. 40 at 2; FAC ¶ 13.) After the motor accumulated approximately 475 hours of use, Neff discovered internal corrosion of its exhaust components during an oil pump service. (FAC ¶ 40.)

4. James Krapf's Motor

Plaintiff James Krapf purchased a pre-owned boat equipped with two 2002 models of Yamaha F225 outboard motors in Maryland in 2010. (Dkt. No. 40 at 3; FAC ¶ 14.) After the motors had accumulated approximately 700 cumulative hours of use, Krapf discovered internal corrosion of its exhaust components while inspecting the motors with

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a bore scope. (FAC ¶ 14.) Repairs to the corroded components cost Mr. Krapf $6000.00. (FAC ¶ 41.)

B. Plaintiffs' Allegations

Plaintiffs allege that many other consumers have experienced similar problems with corrosion in their Yamaha F225 motors. They also allege that *BoatUS Magazine* reported on the corrosion problem in a November 2012 article. (FAC ¶¶ 32–36.)

According to Plaintiffs, Yamaha has corrected the corrosion problem in its second-generation F-series motors. (FAC ¶ 86.) Plaintiffs therefore contend that Yamaha must have known of the corrosion problem, and that its failure to remedy the problems in the first-generation motors was reckless. (FAC ¶¶ 86–87.) A related class action complaint is also currently proceeding in this District. *See George Williams v. Yamaha Motor Co. Ltd.*, No. 13-cv-05066.

C. Procedural History

Plaintiffs filed their initial Complaint on April 1, 2014, alleging violations of (1) the Magnuson-Moss Federal Warranty Act, 15 U.S.C. §§ 2301 *et seq.*; (2) California's Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200 *et seq.*; (3) the Connecticut Unfair Trade Practices Act, Conn. Gen. Stat. §§ 42-110a *et seq.*; and (4) the Maryland Consumer Protection Act, Md. Code Ann., Com. Law § 13-301 *et seq.* (Compl.) On August 27, 2014, the Court dismissed Yamaha Japan from the lawsuit for lack of personal jurisdiction and dismissed many of Plaintiffs' claims against Yamaha USA. (Dkt. No. 40.) Plaintiffs then filed a First Amended Class Action Complaint on September 12, 2014. (Dkt. No. 41.) On October 13, 2014, Defendant Yamaha USA filed the instant motion to dismiss Plaintiffs' First Amended Class Action Complaint. (Dkt. No. 46.) Plaintiffs opposed this motion on November 12, 2014, (Dkt. Nos. 47–48), and Defendant replied on November 26, 2014, (Dkt. Nos. 49–50). The Court then heard oral argument by the parties on December 15, 2014.

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II. LEGAL STANDARD

Under Rule 8(a), a complaint must contain a "short and plain statement of the claim showing that the [plaintiff] is entitled to relief." Fed. R. Civ. P. 8(a). If a complaint fails to do this, the defendant may move to dismiss it under Rule 12(b)(6). Fed. R. Civ. P. 12(b)(6). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim that is plausible on its face.'" *Iqbal*, 556 U.S. at 678. A claim is plausible on its face "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* "Factual allegations must be enough to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Thus, there must be "more than a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 556 U.S. at 678. "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility'" that the plaintiff is entitled to relief. *Id.*

Where a district court grants a motion to dismiss, it should provide leave to amend unless it is clear that the complaint could not be saved by any amendment. *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008).

III. REQUEST FOR JUDICIAL NOTICE

When considering a motion to dismiss, a court normally does not look beyond the complaint in order to avoid converting a motion to dismiss into a motion for summary judgment. *See Mack v. S. Bay Beer Distribs., Inc.*, 798 F.2d 1279, 1282 (9th Cir. 1986), *overruled on other grounds by Astoria Fed. Sav. & Loan Ass'n Solimino*, 501 U.S. 104 (1991). Notwithstanding this precept, a court may properly take judicial notice of (1) material which is included as part of the complaint or relied upon by the complaint, and (2) matters in the public record. *See Marder v. Lopez*, 450 F.3d 445, 448 (9th Cir. 2006); *Lee v. City of L.A.*, 250 F.3d 668, 688–89 (9th Cir. 2001). Under Federal Rule of Evidence 201(b), a judicially noticed fact must be one "not subject to reasonable dispute in that it (1) is generally known within the territorial jurisdiction of the trial court; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Further, a court "must take judicial notice if a party requests

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it and the court is supplied with the necessary information." *See* Fed. R. Evid. 201(c)(2); *In re Icenhower*, 755 F.3d 1130, 1142 (9th Cir. 2014).

Defendant requests that the Court take judicial notice of four documents: (1) the "Yamaha Motor Corporation, U.S.A. Four-Stroke Outboard Motor Three-Year Limited Warranty" that accompanied the sale of Defendant's F-Series Four-Stroke motors; (2) Yamaha USA's standard dealer agreement titled "Yamaha Motor Corporation, U.S.A. Sales and Service Agreement"; (3) excerpts from a report titled "2012 Recreational Boating Statistics" published by the United States Coast Guard Office of Auxiliary and Boating Safety; and (4) excerpts from the 2004 Owner's Manual for Yamaha F225 outboard motors. (Dkt. No. 46-1 at 2.) Defendant argues that taking judicial notice of these documents would be proper because the complaint either references these documents specifically or necessarily relies on them. *See Tellabs Inc. v. Makor Issues & Rights Ltd.*, 551 U.S. 308, 322 (2007) ("courts must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference"); *Parrino v. FHP Inc.*, 146 F.3d 699, 706 (9th Cir. 1998) (holding that a court "may consider a document the authenticity of which is not contested, and upon which the plaintiff's complaint necessarily relies" even if the complaint does not reference it); *Dent v. Cox Commc'ns Las Vegas, Inc.*, 502 F.3d 1141, 1143 (9th Cir. 2007) (finding it proper to take judicial notice of a document that was "integral to [the plaintiff]'s claim").

As Defendant argues, Plaintiffs either specifically reference or necessarily rely on each of these documents in their First Amended Class Action Complaint. (*See, e.g.*, FAC ¶ 42 (referring to the "standardized Yamaha warranty for the Four Stroke Outboards"); ¶ 44 (describing Yamaha's "Dealer Agreements"); ¶ 77 (discussing the results of a "2012 report on Recreational Boating Statistics published by the United States Coast Guard"); ¶ 79 (quoting various excerpts from Defendant's "owners' manuals for the Four Stroke Outboards").)

Plaintiffs nevertheless oppose Defendant's request for judicial notice as to each document to the extent that it is being introduced for the purpose of establishing the truth of the contents thereof. (Dkt. No. 48 at 2.) In support of their opposition, Plaintiffs note that the "truth of the facts contained" in the documents is "not the proper subject of judicial notice." *Dicey v. Pickens*, 506 F. App'x 647, 648 (9th Cir. 2013). While the

Court agrees that the *truth* of the documents' contents is not properly the subject of judicial notice, the *existence* of the contents—including, for example, the existence of various provisions in a warranty—is. *See Keegan v. Am. Honda Motor Co.*, 838 F. Supp. 2d 929, 936 n.38 (C.D. Cal. 2012) ("The court considers only the *existence and contents* of the documents, not the truth of information contained in them." (emphasis added)); *Tietsworth v. Sears*, 720 F. Supp. 2d 1123, 1131 (N.D. Cal. 2010) (considering "the actual terms of [defendant's] one-year limited warranty . . . under the incorporation by reference doctrine").

Moreover, Plaintiffs' argument that the First Amended Class Action Complaint referred to different *sections* of these documents is unpersuasive. "One purpose of the [incorporation-by-reference] rule is to prevent a plaintiff from quoting 'an isolated statement from a document' in the complaint, when the complete document refutes the allegations." *In re Easysaver Rewards Litig.*, 737 F. Supp. 2d 1159, 1166 (S.D. Cal. 2010) (quoting *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1426 (3d Cir. 1997) (consideration of entire document made clear that isolated statement was not fraudulent)); *accord Parrino*, 146 F.3d at 705–06 (applying rule to documents "critical to plaintiff's claims" to prevent "plaintiffs from surviving a Rule 12(b)(6) motion by deliberately omitting references to documents upon which their claims are based"). Accordingly, Defendant's request for judicial notice is **GRANTED**.

IV. DISCUSSION

In their First Amended Class Action Complaint, Plaintiffs allege two causes of action for breach of implied warranties, (FAC ¶¶ 106–24); as well as several claims for violations of California, Connecticut, and Maryland's consumer protection statutes, (FAC ¶¶ 125–52). The Court will address each in turn.

A. Plaintiffs' Implied Warranty Claims

To begin, Defendant argues that Plaintiffs' implied warranty claims should be dismissed for several reasons. Because the Court agrees that Plaintiffs' implied warranty claims are barred, the Court **DISMISSES** these claims **with prejudice**.

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1. Plaintiffs' Implied Warranty Claims Are Time-Barred

First, Defendant contends that Plaintiffs' implied warranty claims are barred by the applicable statutes of limitations. The parties agree that the statute of limitations governing Plaintiffs' implied warranty claims—regardless of whether California, Connecticut, or Maryland law is applied—is four years. (*See* Dkt. Nos. 46 at 12; 47 at 12; *see also* Cal. Com. Code § 2725(1); Conn. Gen. Stat. § 42a-2-725(1); Md. Code Ann., Com. Law § 2-725(1).)[2] And Plaintiffs do not dispute Defendant's argument that the motors—all of which Plaintiffs purchased used—could not have been initially purchased later than December 31, 2003. As a result, without tolling the statute of limitations, Plaintiffs' claims would all be barred as of December 31, 2007:

Plaintiff	Initial Purchase Date	State of Residence	Implied Warranty Statute of Limitations	End Date of Implied Warranty
Philip Kirsopp	December 31, 2003	Connecticut	Four Years	December 31, 2007
William Neff	December 31, 2003	Connecticut	Four Years	December 31, 2007
William Kratz	December 31, 2003	Maryland	Four Years	December 31, 2007
James Krapf	December 31, 2003	Maryland	Five Years	December 31, 2007

Nevertheless, Plaintiffs claim that the statute of limitations should be tolled based on application of the doctrines of fraudulent concealment and equitable tolling. Indeed, a court may toll the statute of limitations on an implied warranty claim pursuant to these doctrines. *See, e.g.*, *Roberts v. Electrolux Home Prods., Inc.*, No. CV 12-1644 CAS VBKX, 2013 WL 7753579, at *8 (C.D. Cal. Mar. 4, 2013); *Doll v. Ford Motor Co.*, 814 F. Supp. 2d 526, 536–37 (D. Md. 2011); *Maslak v. Maslak*, No. LLICV126006437, 2013 WL 5663798, at *4–6 (Conn. Super. Ct. Sept. 27, 2013). Although they argue that these

[2] The same statute of limitations is also applicable to Plaintiffs' federal implied warranty claim under the Magnuson Moss Federal Warranty Act. "Because Magnuson-Moss contains no express statute of limitations, district courts must look to the most analogous state statute to determine what statute of limitations to apply." *Horne v. Harley-Davidson Inc.*, 660 F. Supp. 2d 1152, 1157 (C.D. Cal. 2009).

doctrines "are in fact two separate theories," Plaintiffs do not engage in a separate analysis for each, and they acknowledge that "[b]oth require that the plaintiff demonstrate the defendant took some affirmative act to conceal the cause of action." (Dkt. No. 47 at 12–13.) In fact, the Court explained in its previous order that in order to toll the statute of limitations on the basis of fraudulent concealment, Plaintiff "must point to . . . some active conduct by the defendant '*above and beyond* the wrongdoing upon which the plaintiff's claim is filed, to prevent the plaintiff from suing in time.'" *Coppinger-Martin v. Solis*, 627 F.3d 745, 751 (9th Cir. 2010) (quoting *Lukovsky v. City & Cnty. of S.F.*, 535 F.3d 1044, 1052 (9th Cir. 2008)).

In its prior order, the Court found that, while Plaintiffs had provided general allegations of fraud, including "conclusory allegations that Defendants 'conceal[ed]' the defects in their motors," they had failed to identify specifically any "active conduct" that goes "above and beyond" the underlying basis for Plaintiffs' claims. (Dkt. No. 40 at 15.) Plaintiffs claim that they have cured these deficiencies in their First Amended Class Action Complaint by alleging that Defendant knew, but failed to warn consumers, that the motors contained a serious defect that created safety risks and would cause the engines prematurely to require significant repair or replacement costs. (FAC ¶¶ 7–8, 30, 65–66, 75–79, 81–87.) Plaintiffs also allege that Defendant concealed this defect (1) by never issuing a service bulletin or a recall, (2) by representing in various mediums that the motors could last for thousands of hours, and (3) by telling consumers to fix the problem by flushing their motors with fresh water. (FAC ¶¶ 5, 20, 35, 51–63, 67–74.)

Plaintiffs' renewed allegations detailing Defendant's acts of concealment are inadequate for several reasons. First, Plaintiffs' allegations that Defendant *never* issued a bulletin or recall are insufficient because failure to act does not constitute "active conduct." *Coppinger-Martin*, 627 F.3d at 751; *accord Herremans v. BMW of N. Am., LLC*, No. CV 14-02363 MMM PJWX, 2014 WL 5017843, at *6 (C.D. Cal. Oct. 3, 2014) ("[I]n the absence of a fiduciary relationship, non-disclosure will not support a finding of fraudulent concealment."). Second, Plaintiffs' allegations regarding Defendant's marketing representations—*i.e.*, that the motors could last for thousands of hours—constitute only general allegations of fraud and do not demonstrate any affirmative act of

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concealment on behalf of Defendant.[3] These marketing representations also partially form the basis for several of Plaintiffs' claims in this case, and thus these allegations fail to specify conduct "*above and beyond* the wrongdoing upon which the plaintiff's claim is filed." *Coppinger-Martin*, 627 F.3d at 751; *accord Juniper Networks v. Shipley*, No. C 09-0696 SBA, 2009 WL 1381873, at *5 (N.D. Cal. May 14, 2009) ("[Plaintiff] has done nothing more than restate his false marking claim, which is insufficient as a matter of law, to invoke the doctrine of equitable estoppel."). Finally, Plaintiffs' allegations regarding Defendant's instruction to consumers to flush their motors with fresh water is insufficient for the simple reason that it occurred following an article in 2012, (FAC ¶¶ 32, 35), several years *after* the statute of limitations had run on Plaintiffs' implied warranty claims. Clearly, conduct occurring after the statute of limitations has run cannot possibly "prevent the plaintiff from suing in time." *Coppinger-Martin*, 627 F.3d at 751.

Accordingly, Plaintiffs have again failed to plead facts demonstrating that Defendant fraudulently concealed a defect in its product. As a result, Plaintiffs' implied warranty claims were time-barred at the latest as of December 31, 2007. For this reason, Plaintiffs' implied warranty claims are **DISMISSED with prejudice**.

2. Plaintiffs' Implied Warranty Claims Fail for Lack of Privity

Alternatively, the Court finds that Plaintiffs' implied warranty claims are also barred for lack of privity. As Plaintiffs concede, a "plaintiff alleging breach of warranty claims must stand in 'vertical privity' with the defendant." *Anunziato v. eMachines, Inc.*, 402 F. Supp. 2d 1133, 1141 (C.D. Cal. 2005); *accord Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017, 1024 (9th Cir. 2008) ("[Under California law, a] lack of vertical privity requires the dismissal of Clemens's implied warranty claims."); *TD Props., LLC v. VP Bldgs., Inc.*, 602 F. Supp. 2d 351, 362 (D. Conn. 2009) ("In Connecticut, privity of contract is required.").[4] In general, "[w]here a product is not sold to a plaintiff, there is no privity of contract." *Source One Fin. Corp. v. Rd. Ready Used Cars, Inc.*, CV136034341S, 2014 WL 1013121, at *5 (Conn. Super. Ct. Feb. 14, 2014). "Indeed, the

[3] The Court rejected substantially similar allegations as a basis for invoking fraudulent concealment in its previous order. (Dkt. No. 40 at 14–15.)

[4] *Accord Abraham v. Volkswagen of Am., Inc.*, 795 F.2d 238, 241 (2d Cir. 1986) ("implied warranty claims brought under the Magnuson-Moss Act are subject to state law privity rules").

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prevailing view is that there is no privity between a purchaser of a used car and a prior dealer." *Id.* at *7. It is undisputed that Plaintiffs did not purchase their motors directly from Yamaha. Nevertheless, Plaintiffs contend that they fit within an exception to the privity requirement because they are third-party beneficiaries of a contract between Defendant and Defendant's authorized dealers.

In its prior order, the Court applied *Clemens v. DaimlerChrysler Corp.* to find that the Ninth Circuit does not recognize the third-party beneficiary exception under California law. (Dkt. No. 40 at 17.) In *Clemens*, the Ninth Circuit found that the plaintiff's implied warranty claim failed for lack of vertical privity. 534 F.3d at 1023–24. After noting the general rule that "a plaintiff asserting breach of warranty claims must stand in vertical contractual privity with the defendant," the court reasoned:

> Some particularized exceptions to the rule exist. The first arises when the plaintiff relies on written labels or advertisements of a manufacturer. The other exceptions arise in special cases involving foodstuffs, pesticides, and pharmaceuticals, and where the end user is an employee of the purchaser. Clemens does not claim that any of these exceptions apply directly. Instead, he urges that they are exemplary rather than exhaustive, and that similar equities support an exception for his case.

Id. at 1023. The court then "decline[d] this invitation to create a new exception that would permit Clemens's action to proceed." *Id.* at 1023–24. In doing so, the court noted that the privity requirement may be "an archaism in the modern consumer marketplace," but that "California courts have painstakingly established the scope of the privity requirement under California Commercial Code section 2314, and a federal court sitting in diversity is not free to create new exceptions to it." *Id.* at 1024.

Some courts have interpreted the Ninth Circuit's opinion in *Clemens* to foreclose the application of the third-party-beneficiary exception to the privity requirement for implied warranty claims. *See, e.g., Long v. Graco Children's Prods. Inc.*, 13-CV-01257-WHO, 2013 WL 4655763, at *12 (N.D. Cal. Aug. 26, 2013) ("[T]he Ninth Circuit does not recognize such an exception under California law, and the Court follows *Clemens*. Although Long identifies several district court cases that allegedly allowed a third-party beneficiary exception, those cases are not binding on the Court whereas *Clemens* is.");

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Xavier v. Philip Morris USA Inc., 787 F. Supp. 2d 1075, 1083 (N.D. Cal. 2011) ("No reported California decision has held that the purchaser of a consumer product may dodge the privity rule by asserting that he or she is a third-party beneficiary of the distribution agreements linking the manufacturer to the retailer who ultimately made the sale."). Other courts, however, have read *Clemens* more narrowly to find that a plaintiff may invoke the third-party-beneficiary exception in this context. In *In re MyFord Touch Consumer Litigation*, No. C-13-3072 EMC, 2014 WL 2451291, at *31 (N.D. Cal. May 30, 2014), for example, the court rejected *Long*'s reading of *Clemens* "as foreclosing the third-party beneficiary exception" because of the "lack of a clear holding to the contrary in *Clemens*." The court reasoned: "Although *Clemens*, like this case, involved a plaintiff who bought a car from a dealership and then sued the manufacturer for a defect with the car, it is not clear whether the plaintiff argued for application of the third-party beneficiary exception specifically." *Id.* As a result, the court rejected the contention that the third-party-beneficiary exception was not cognizable under California law. *Id.*; *accord In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices & Prods. Liab. Litig.*, 754 F. Supp. 2d 1145, 1185 (C.D. Cal. 2010) (reasoning that "the Ninth Circuit had no occasion in *Clemens* to consider the California appellate cases recognizing the third-party beneficiary exception to the vertical privity requirement of implied warranty claims").

While the Court is not persuaded that the third-party-beneficiary exception necessarily remains viable in California following *Clemens*, the Court need not decide the issue here. As Defendant argues, even assuming such an exception does apply, Plaintiffs have failed to plead facts demonstrating that they are intended beneficiaries of a contract between Defendant and a third party. In the First Amended Class Action Complaint, Plaintiffs allege that Defendant does not sell its outboard motors directly to consumers but requires them to purchase their motors from authorized dealers. (FAC ¶¶ 42–49.) Even assuming that this fact is sufficient to make Plaintiffs third-party beneficiaries of a contract between Defendant and its dealers, the intended third-party beneficiary of that contract would be the *original* consumer who purchases the motors from the dealer, not secondary or tertiary consumers like Plaintiffs who purchase used motors. Moreover, while Plaintiffs allege that they are "intended third party beneficiaries of any contract for sale that takes place between Yamaha and its authorized dealers," (FAC ¶ 47), they do not provide "specific allegations identifying or describing the agreements under which Plaintiffs claim third party beneficiary status." *Tait v. BSH Home Appliances Corp.*, No.

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SACV 10-711 DOC AN, 2011 WL 1832941, at *4 (C.D. Cal. May 12, 2011). Generally, "a person seeking to enforce a contract as a third party beneficiary 'must plead a contract which was made expressly for his or her benefit and one in which it clearly appears that he or she was a beneficiary.'" *Pershing Pac. W., LLC v. Ferretti Grp., USA, Inc.*, No. 10-CV-1345-L DHB, 2013 WL 275691, at *6 (S.D. Cal. Jan. 24, 2013). Faced only with Plaintiffs' vague allegations that they are beneficiaries of "any contract for sale," (FAC ¶ 47), the Court must conclude that Plaintiffs have failed to satisfy this burden.

Accordingly, Plaintiffs' implied warranty claims fail for the additional reason that they lack privity and have failed adequately to plead any exception to the privity requirement. For this reason as well, Plaintiffs' implied warranty claims are **DISMISSED with prejudice**.[5]

B. Plaintiffs' Consumer Fraud Claims

Plaintiffs' remaining claims allege violations of state consumer protection statutes. (FAC ¶¶ 125–52.) Specifically, Plaintiffs allege violations of California's Unfair Competition Law ("UCL"), the Connecticut Unfair Trade Practices Act ("CUTPA"), and the Maryland Consumer Protection Act ("MCPA"). The Court previously dismissed these claims because Plaintiffs had failed to allege either an affirmative misrepresentation or an omission of material fact. (Dkt. No. 40 at 17.) Plaintiffs claim to have cured this deficiency by alleging both affirmative misrepresentations and actionable omissions in their amended complaint. Because the Court finds that Plaintiffs have again failed to identify any actionable misrepresentation or omission, however, and for the additional reason that Plaintiffs have failed to allege that Defendant had presale knowledge of any defect, Plaintiffs' consumer fraud claims are **DISMISSED with leave to amend**.

1. Plaintiffs Have Failed to Allege an Affirmative Misrepresentation

To begin, Plaintiffs identify two affirmative misrepresentations that they contend are sufficient to sustain a consumer fraud claim. First, Plaintiffs allege that Defendant publicized their motors and covered up the defect through various marketing statements

[5] Because the Court finds that Plaintiffs' implied warranty claims fail for lack of timeliness and privity, the Court need not consider Defendant's argument that there was no breach during the warranty period.

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and customer testimonials available on Defendant's website and through various other advertising forums. Indeed, the First Amended Class Action Complaint provides specific allegations of statements made either by Defendant or by its customers on Defendant's website. (*See, e.g.*, FAC ¶ 51 ("Yamaha represents its outboard engines as versatile, powerful, reliable, and dependable. Yamaha particularly focuses on the ***reliability*** of its engines, claiming they represent the 'top ***reliability*** in marine engines,' 'superior reliability and durability,' 'exceptional product life, unmatched ***reliability*** and durability," and more."); ¶ 52 (describing Defendant's website dedicated to the reliability of its outboard engines, which recounts specific stories and quotes purchasers as saying "Yamaha will be our power of choice again and again," and "You just can't beat that kind of reliability and durability").) Plaintiffs argue that these statements regarding the reliability of Defendant's engines are false and misleading given that the motors suffered from a defect that caused them to fail prematurely.

Even assuming these statements are more than non-actionable puffery, what is conspicuously missing from Plaintiffs' complaint is any specific allegation that Plaintiffs actually saw any of these statements before purchasing their motors. The closest Plaintiffs come to alleging that they saw and relied on any such statements are the following allegations:

- Plaintiffs each "believed the motor was dependable and reliable as Yamaha had represented," (FAC ¶¶ 38–41);

- Neff "purchased his Four Stroke Outboard after conducting research that indicated Yamaha's four stroke outboards should last several thousand hours," and "chose a Four Stroke Outboard over Yamaha's two stroke outboard in large part because of Yamaha's representations regarding the superiority and reliability of the Four Stroke Outboard," (FAC ¶ 40); and

- Krapf, "[i]n connection with his purchase," "read the Yamaha owner's manual and associated materials, which failed to warn him of any concerns relating to internal corrosion," (FAC ¶ 41).

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None of these allegations, however, state with particularity the "circumstances constituting fraud" as required by the stringent pleading requirements of Civil Rule of Civil Procedure 9(b).[6] For example, no Plaintiff alleges with any particularity that he actually *saw* any of these statements made by Defendant, let alone relied on it. Even Neff, who "conduct[ed] research" and selected a Yamaha motor "because of Yamaha's representations," (FAC ¶ 40), cannot identify a single statement or advertising material that he relied on in making his purchase. "At best, the [First Amended Class Action Complaint] invites the reader to *infer* [Plaintiffs] viewed these webpages, but this is insufficient to state a claim: absent an express allegation that [Plaintiffs] viewed the misleading content, there can be no reliance and the claim fails under Rules 8(a) and 9(b)." *Boris*, 2014 WL 1477404, at *9.

Plaintiffs also argue that other putative class members "may have relied on Yamaha's current misrepresentations on its website, as well as on its widely disseminated false message that owners flush their motors with fresh water to prevent the corrosion." (Dkt. No. 47 at 24.) Whether other individuals relied on these statements, however, is immaterial to this dispute. To survive a motion to dismiss, Plaintiffs must specifically allege that *they* relied on affirmative misrepresentations or actionable omissions. Absent the type of "'extensive and long-term [fraudulent] advertising campaign' at issue in" *In re Tobacco II Cases*, 46 Cal. 4th 298, 328 (Cal. 2009), "the relevant class must be defined in such a way as to include only members who were exposed to advertising that is alleged to be materially misleading." *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 596 (9th Cir. 2012). Because Plaintiffs have failed to allege that *they personally* have

[6] *Accord Odom v. Microsoft Corp.*, 486 F.3d 541, 553 (9th Cir. 2007) ("Rule 9(b) 'requires the identification of the circumstances constituting fraud so that the defendant can prepare an adequate answer from the allegations.'" (quoting *Schreiber Distrib. Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1400 (9th Cir. 1986))); *Boris v. Wal-Mart Stores, Inc.*, No. CV 13-7090 ABC FFMX, 2014 WL 1477404, at *8 (C.D. Cal. Apr. 9, 2014) ("Rule 9(b) applies to claims under California's consumer protection statutes when such claims are 'grounded in fraud' or 'sound in fraud.'" (quoting *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1125–26 (9th Cir. 2009))); *F.T.C. v. Lights of Am., Inc.*, 760 F. Supp. 2d 848, 852 (C.D. Cal. 2010) ("A claim 'sounds in fraud' where the plaintiff 'alleges a unified course of fraudulent conduct and relies entirely on that course of conduct as the basis of the claim. In that event, the pleading of that claim as a whole must satisfy the particularity requirement of Rule 9(b).'" (internal modifications omitted) (quoting *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1104–05 (9th Cir. 2003))).

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seen and relied on the statements at issue, they have again failed to allege an affirmative misrepresentation on which to rest their consumer protection claims.

2. Plaintiffs Have Failed to Allege an Actionable Omission

As for Plaintiffs' claims of fraudulent omission of material facts,[7] Plaintiffs' allegations are again insufficient. Plaintiffs concede that "a manufacturer's duty to consumers is limited to its warranty obligations absent either an affirmative misrepresentation or a safety issue." *Wilson v. Hewlett-Packard Co.*, 668 F.3d 1136, 1141 (9th Cir. 2012) (internal modifications omitted) (quoting *Oestreicher v. Alienware*, 322 F. App'x 489, 493 (9th Cir. 2009)). In its previous order dismissing Plaintiffs' claims, the Court found that Plaintiffs had failed to "point to any safety issue that would give rise to Yamaha's duty to disclose the defect to consumers," and that "engine failure does not present a distinct and palpable risk of injury to consumers." (Dkt. No. 40 at 19.)

In their amended complaint, Plaintiffs contend that they have cured these deficiencies by adding "significant allegations . . . detailing the safety risks associated with the defect that go beyond simply being stranded on the water." (Dkt. No. 47 at 25.) For example, Plaintiffs now allege that:

- "Boats whose engine has experienced damage or failure while out on the water may be unable to avoid a collision with larger vessels that have limited maneuverability, avoid drifting into bridges or rocks in high-current areas, or operate safely to avoid waves or other hazards which could result in sinking and death." (FAC ¶ 76.)

- "The likelihood of a boating accident causing casualties is a significant danger presented by total engine failure. According to the 2012 report on Recreational Boating Statistics published by the

[7] "A failure to disclose a fact can constitute actionable fraud or deceit in four circumstances: (1) when the defendant is the plaintiff's fiduciary; (2) when the defendant has exclusive knowledge of material facts not known or reasonably accessible to the plaintiff; (3) when the defendant actively conceals a material fact from the plaintiff; and (4) when the defendant makes partial representations that are misleading because some other material fact has not been disclosed." *Collins v. eMachines, Inc.*, 202 Cal. App. 4th 249, 255 (Cal. Ct. App. 2011).

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United States Coast Guard, there were over 400 accidents which were caused by Equipment Failure and Machinery Failure in the United States. The over 400 accidents resulted in 14 deaths and 131 injuries. In the broader category of Equipment Failure and Machinery Failure, the Coast Guard reported that engine failure specifically caused 171 accidents in 2012 alone. These accidents resulted in five deaths and 49 injuries due to engine failure. The actual numbers for 2012 may be even higher as these figures include only accidents reported to the Coast Guard in accordance with Coast Guard regulations." (FAC ¶ 77.)

- "The United States Coast Guard . . . has declared that the loss of power-generating equipment is considered an occurrence materially and adversely affecting a vessel's seaworthiness and must be reported to the Coast Guard on a 'Report of Marine Accident, Injury or Death' form, wherever the accident may occur." (FAC ¶ 78.)

- "Yamaha has acknowledged and admitted in its owners' manuals for the Four Stroke Outboards that the loss of engine power means '***the loss of most steering control***.' Yamaha states further in the owners' manual for the 2004 F225 model that 'without engine power, the boat could slow rapidly. ***This could cause people and objects in the boat to be thrown forward***.'" (FAC ¶ 79.)

Accordingly, Plaintiffs contend that Defendant had a duty to disclose a defect that it knew could cause engine failure. Implicit in this argument, however, is the notion that engine failure constitutes an "unreasonable safety hazard," *Wilson*, 668 F.3d at 1143, a conclusion that this Court rejected in its previous order, (Dkt. No. 40 at 19.)

Nevertheless, even assuming that engine failure does present an unreasonable safety hazard, Plaintiffs have failed to present anything more specific than "hypothetical consequences." *Elias v. Hewlett-Packard Co.*, 903 F. Supp. 2d 843, 857 (N.D. Cal. 2012) (holding that "a cursory reference" to "catching fire" by "listing it as one of many hypothetical consequences of equipping a computer with an inadequate power supply" "does not establish a sufficient nexus between the alleged defect and safety hazard").

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Plaintiffs are correct to argue that it need not "plead that consumers have been injured by the alleged unreasonable safety risk." *Ehrlich v. BMW of N. Am., LLC*, 801 F. Supp. 2d 908, 918 (C.D. Cal. 2010). Yet Plaintiffs still must allege a sufficient causal nexus between the alleged defect and the safety hazard. And while Plaintiffs allege that engine failure has caused deaths in the past and that it *could* cause loss of steering or people and things to be thrown forward, "Plaintiffs do not plead any facts indicating how the alleged design defect . . . causes [these safety hazards]." *Wilson*, 668 F.3d at 1145. Without this causal nexus, the Court cannot conclude that the alleged defect presents an unreasonable safety hazard giving rise to a duty to disclose. *See Smith v. Ford Motor Co.*, 749 F. Supp. 2d 980, 991 (N.D. Cal. 2010) ("[T]o impose such a duty based on risks of the [speculative] nature cited by plaintiffs, would effectively require auto manufacturers to disclose the failure rate of every part that potentially could immobilize a vehicle.").

Accordingly, because Plaintiffs have failed to identify with sufficient particularity any affirmative misrepresentation or actionable omission, Plaintiffs' consumer fraud claims fail and must therefore be **DISMISSED with leave to amend**.

3. Plaintiffs Have Failed to Allege that Defendant Had Presale Knowledge of the Alleged Defect

Alternatively, Plaintiffs' consumer fraud claims fail for the additional reason that they have failed adequately to plead that Defendant had presale knowledge of the alleged defect. Presale knowledge of a product defect is a required element of claims brought under each of the statutes invoked by Plaintiffs. *See Wilson*, 668 F.3d at 1145 ("[U]nder the CLRA, plaintiffs must sufficiently allege that a defendant was aware of a defect at the time of sale to survive a motion to dismiss. . . . Plaintiffs' UCL claim also requires that they allege HP's knowledge of a defect."); *Allen v. Bank of Am., N.A.*, 933 F. Supp. 2d 716, 727 (D. Md. 2013) (granting summary judgment on MCPA claim because there was "no evidence in the record that [defendant] knew or had reason to know of the [software] glitch" alleged by plaintiffs); *Hudson River Cruises, Inc. v. Bridgeport Drydock Corp.*, 892 F. Supp. 380, 387 (D. Conn. 1994) (finding meritless plaintiff's CUTPA claim based on defendant's "fail[ure] to advise of the need to subcontract" because "before the actual dry dock the need for extensive steel repair was not realized").

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Plaintiffs argue that they have adequately alleged presale knowledge of the alleged defect for two primary reasons. First, they contend that Defendant "knew and/or should have known" about the defect because Defendant "had exclusive access to data and research conducted prior to and during the design and manufacture of the Four Stroke Outboards." (FAC ¶ 82.) But this vague allegation that Defendant should have known about the defect "is speculative and does not suggest how any tests or information could have alerted [Defendant] to the defect." *Wilson*, 668 F.3d at 1147; *accord Tietsworth v. Sears, Roebuck & Co.*, No. 5:09-CV-00288 JFHRL, 2009 WL 3320486, at *4 (N.D. Cal. Oct. 13, 2009) (rejecting as "purely conclusory" the argument that defendants knew of a defect because they "were in a 'superior position to know the truth about the Machines'"). This allegation is therefore insufficient.

Second, Plaintiffs argue that Defendant must have learned of the defect before (1) creating and selling a repair "kit" designed to replace corroded engine parts, (2) fixing the defect for the next-generation of motors in 2005, and (3) updating the user manual for the 2006 version to include a maintenance chart that recommends owners inspect or replace their exhaust guide and exhaust manifold every 1000 hours or five years. (FAC ¶¶ 83–87.) In addition to being speculative, these allegations also suffer from the fatal deficiency that they fail to allege that Defendant had *presale* knowledge. Rather, these allegations create only the weak inferences that Defendant had knowledge of the alleged defect in 2005 or later. As discussed above, however, Plaintiffs' motors could not have been initially purchased later than December 31, 2003. None of these allegations demonstrate that Defendant had knowledge of any defect prior to that date.

Essentially, these allegations require the Court to draw the inference that Defendant's *opportunity* to learn about this alleged defect before selling their engines to the public necessarily means that they *did* learn about the defect. But the Court is required only to draw inferences that are *reasonable* in light of the factual content pleaded by the plaintiff. *See Ashcroft*, 556 U.S. at 678. And without any specific allegation demonstrating Defendant's knowledge during a timeframe when a Plaintiff purchased one of Defendant's motors, the Court cannot reasonably conclude that Plaintiffs have adequately alleged Defendant's presale knowledge of any defect.

Plaintiffs nevertheless cite various cases in support of their contention that these allegations are sufficient to demonstrate presale knowledge. Specifically, Plaintiffs'

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authority demonstrates that a manufacturer's introduction of a replacement part shortly after the plaintiff's purchase creates the inference that the manufacturer knew of the defect when the plaintiff purchased the product. *See, e.g.*, *Falco v. Nissan N. Am. Inc.*, No. CV 13-00686 DDP MANX, 2013 WL 5575065, at *6 (C.D. Cal. Oct. 10, 2013) (holding that allegations that a manufacturer introduced replacement parts in 2006 and 2007 created the "plausible inferences that [the manufacturer] was aware of the defect at the time they sold the vehicles in 2005 and 2006"). None of these cases, however, stands for the proposition that actions suggesting knowledge of a defect taken two to three years (at least) after a sale are sufficient by themselves to demonstrate knowledge at the time of the sale. *Cf. Falco*, 2013 WL 5575065, at *7 (referring to "other adequate bases to permit an inference that [defendant] was aware of the alleged defect"); *Mui Ho v. Toyota Motor Corp.*, 931 F. Supp. 2d 987, 991 (N.D. Cal. 2013) (discussing a service bulletin "[a]s further proof of Defendants' knowledge of the alleged defect"). Moreover, the gap between the purchases, which occurred at the latest in 2003, and Defendant's actions in 2005, 2006, or later, is much wider than the one-year gap in *Falco*. *Cf. Herremans*, 2014 WL 5017843, at *18 (finding a four-year gap to be "simply too great" to create such an inference). And the court in *Falco* also found "other adequate bases to permit an inference" of presale knowledge. *Falco*, 2013 WL 5575065, at *7. Without "further proof of [Defendant's] knowledge of the alleged defect," Plaintiffs' allegations are insufficient to create an inference of presale knowledge. *Mui Ho*, 931 F. Supp. 2d at 991.

Accordingly, Plaintiffs' consumer fraud claims fail for the additional reason that they have failed adequately to plead Defendant's presale knowledge of any alleged defect in their products. Plaintiff's consumer fraud claims are therefore **DISMISSED with leave to amend** for this reason as well.

C. Leave to Amend

In the Ninth Circuit, "[d]ismissal without leave to amend is improper unless it is clear . . . that the complaint could not be saved by any amendment." *Manzarek*, 519 F.3d at 1031. As discussed above, by the dates and facts provided by Plaintiffs in the First Amended Complaint, it is clear that Plaintiffs' implied warranty claims (claims one and two) are barred by the applicable statute of limitations and must be dismissed. Moreover, "because the current Complaint cannot be amended to state a claim without contradicting any of the previous allegations, this dismissal should be without leave to amend." *Evans*

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v. Evans, No. CV 05-05044 DDP SS, 2007 WL 4969524, at *4 (C.D. Cal. Oct. 17, 2007). As for Plaintiffs' consumer fraud claims (claims three, four, and five), however, the Court deems it appropriate to permit Plaintiffs one additional opportunity to plead facts supporting these claims. Accordingly, Plaintiffs' third, fourth, and fifth claims are **DISMISSED with leave to amend**.

V. CONCLUSION

For the foregoing reasons, Defendant Yamaha Motor Corporation U.S.A.'s motion to dismiss for failure to state a claim is **GRANTED**. Plaintiffs' first and second claims are **DISMISSED with prejudice**. Plaintiffs' third, fourth, and fifth claims are **DISMISSED with leave to amend**. Plaintiffs are ordered to file an amended complaint by no later than **9 a.m. on Monday, February 2, 2015**.

IT IS SO ORDERED.

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