UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES—GENERAL

Case No.	**SA CV 13-1842 DMG (RNBx)**	Date	July 24, 2014
Title	***Joann Anderson, et al. v. Hyundai Motor Company Ltd, et al.***	Page	1 of 12

Present: The Honorable DOLLY M. GEE, UNITED STATES DISTRICT JUDGE

KANE TIEN	NOT REPORTED
Deputy Clerk	Court Reporter
Attorneys Present for Plaintiff(s) None Present	Attorneys Present for Defendant(s) None Present

Proceedings: IN CHAMBERS—ORDER RE MOTIONS TO DISMISS AND MOTIONS TO STRIKE [Doc. ## 27, 28, 44, 45]

On January 24, 2014, Plaintiffs Joanne Anderson, Terri Hill, and Jerome Jeffries filed the operative First Amended Class Action Complaint ("FAC"). [Doc. # 22.] The FAC alleges the following causes of action: (1) violation of California's Consumer Legal Remedies Act ("CLRA"), Cal. Civ. Code § 1750 *et seq.*; (2) violation of California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code § 17200 *et seq.*; (3) breach of implied warranty of merchantability, Cal. Com. Code § 2314; and (4) fraudulent concealment. (*Id.* ¶¶ 62-102.)

On February 11, 2014, Defendant Hyundai Motor America filed a motion to dismiss and motion to strike. [Doc. ## 27, 28.] On March 11, 2014, Plaintiffs filed oppositions to the motions. [Doc. ## 33, 35.] On March 25, 2014, Hyundai Motor America filed replies. [Doc. ## 37, 39.]

On April 14, 2014, Defendant Hyundai Motor Company Ltd. filed a motion to dismiss. [Doc. # 44.] In its motion, Hyundai Motor Company Ltd. joined Hyundai Motor America's motion to dismiss. (Mot. at 1-2.) Hyundai Motor Company Ltd. also joined Hyundai Motor America's motion to strike. [Doc. # 45.] On May 9, 2014, Plaintiffs filed oppositions. [Doc. ## 51, 52.] On June 6, 2014, Hyundai Motor Company filed a reply in support of its motion to dismiss. [Doc. # 57.]

On June 24, 2014, the Court took all the pending motions under submission. [Doc. # 58.] Having duly considered the parties' respective positions, the Court **GRANTS** Defendants' motions to dismiss under Rule 12(b)(1) and otherwise denies the motions as moot. The Court **DENIES** Defendants' motions to strike as moot.

I.
JUDICIAL NOTICE
AND INCORPORATION BY REFERENCE

The parties request that the Court take judicial notice of various documents. [Doc. ## 29, 38, 41, 43, 46.]

A court's review of a Rule 12(b)(6) motion to dismiss is generally limited to the contents of the complaint. *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). If considering evidence outside the pleadings on a Rule 12(b)(6) motion, a court "must normally convert the 12(b)(6) motion into a Rule 56 motion for summary judgment, and it must give the nonmoving party an opportunity to respond." *U.S. v. Ritchie*, 342 F.3d 903, 907-08 (9th Cir. 2003).

The Ninth Circuit has identified two exceptions to this general rule: (1) "a court may consider material which is properly submitted as part of the complaint," and "[i]f the documents are not physically attached to the complaint, they may be considered if the documents' authenticity . . . is not contested and the plaintiffs' complaint necessarily relies on them"; and (2) "under Fed. R. Evid. 201, a court may take judicial notice of matters of public record," but "a court may not take judicial notice of a fact that is subject to reasonable dispute." *Lee v. City of Los Angeles*, 250 F.3d 668, 688-89 (9th Cir. 2001) (internal quotations and citations omitted).

Defendants request that the Court take judicial notice of a docket in a state court case and a docket in a federal court case. [Doc. # 38.] Plaintiffs have not opposed the request. Accordingly, the Court takes judicial notice of these matters of public record. Fed. R. Evid. 201.

Defendants also request that the Court take judicial notice of (1) an October 27, 1999 report by Hyundai Electronics Industries Co., Ltd.; (2) a certified English translation of portions of the report that contain non-English text; and (3) an October 6, 2006 report by Hyundai's sensor designer, Robert Bosch LLC. [Doc. # 41.] Defendants contend that the FAC necessarily relies on the October 27, 1999 and October 6, 2006 reports. (*Id.* at 1, 4.) These documents are not attached to the FAC. Under the incorporation by reference doctrine, "[e]ven if a document is not attached to a complaint, it may be incorporated by reference into a complaint if the plaintiff refers extensively to the document or the document forms the basis of the plaintiff's claim." *U.S. v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003). Here, the reports form the basis of Plaintiffs' claims. Specifically, Plaintiffs rely on the reports to allege that the Tiburon vehicles contain a defect, and Defendants were aware of the defect. (*See* FAC ¶¶ 22-24, 26.) As Plaintiffs have not contested the authenticity of the reports, the Court finds that the reports are incorporated by

reference in the FAC. The Court also finds the certified English translation of the October 27, 1999 report to be incorporated by reference in the FAC. *See TAAG Linhas Aereas de Angola v. Transamerica Airlines, Inc.*, 915 F.2d 1351, 1353 (9th Cir. 1990) (taking judicial notice of English translation of document subject to judicial notice under Fed. R. Evid. 201).

Finally, Defendants request that the Court take judicial notice of various documents that bear on whether Plaintiffs satisfied the notice requirement of Cal. Civ. Code § 1782. [Doc. ## 29, 43, 46.] As the Court need not reach this issue for the reasons discussed *infra*, it declines to address the latter requests for judicial notice.[1]

II.
FACTUAL BACKGROUND

Plaintiffs purchased the Hyundai Tiburon ("Tiburon")[2] between 2004 and 2008. (First Amended Complaint ("FAC") ¶¶ 14-16.) Plaintiffs each "chose the Tiburon in part because [they] wanted the protection afforded by properly designed and manufactured side air bags." (*Id.*)

In the air bag safety manual "distributed with at least the 2008 Tiburon," Hyundai made the following representations: (1) "Hyundai brings the most advanced technology available to affordable vehicles. For instance, since 2003, every Hyundai vehicle sold in the United States has been equipped with side impact air-bags as standard equipment"; (2) "Side air bags are designed to inflate in moderate to severe side collisions"; and (3) "Hyundai has high standards and is dedicated to safety. . . . Each new Hyundai vehicle will continue to be designed to exceed those standards." (*Id.* ¶ 31.)

The Tiburon contains "standard side air bags intended to protect the head and thorax of front seat occupants in moderate to severe side collisions when serious injury or death is likely to occur without an air bag." (*Id.* ¶ 3.) The Tiburon's side air bag system includes the air bag modules, side impact sensors, and an air bag control unit. (*Id.* ¶ 4.) The side impact sensor

[1] Plaintiffs also filed a declaration and exhibits in support of their opposition to Hyundai Motor America's motion to dismiss. [*See* Doc. # 34.] Hyundai Motor America objected to the declaration and exhibits on the ground that the Court may not consider such evidence on a Rule 12(b)(6) motion to dismiss. [Doc. # 40.] Plaintiffs responded in part by requesting that the Court take judicial notice of the documents. [Doc. # 43.] The Court declines to consider Plaintiffs' evidence and declines to address Hyundai Motor America's objection because it does not reach the issue of whether Plaintiffs satisfied the notice requirement of Cal. Civ. Code § 1782.

[2] This action concerns model years 2003-2008 of the Tiburon. (FAC ¶ 2.)

gathers information about an impact and transmits the information to the air bag control unit. (*Id.* ¶ 19.) In all vehicles manufactured by Hyundai other than the Tiburon, the side impact sensor is located on the B Pillar of the vehicle. (*Id.* ¶ 21.) In the Tiburon, the side impact sensor is located on the crossmember of the vehicle. (*Id.* ¶ 20.)

Plaintiffs allege that the placement of the side impact sensor results in the sensor receiving a weak signal in response to a collision. (*See id.* ¶ 23.) Plaintiffs assert that the weak signal "significantly reduces the likelihood of deployment or timely deployment of the side air bags." (*Id.*)

Plaintiffs allege that two studies conducted by Hyundai demonstrate the defects associated with the location of the side impact sensor. (*See id.* ¶¶ 23, 26.) Plaintiffs allege that although Hyundai knew about the purportedly weak signal, it failed to move the Tiburon's side impact sensor to the B pillar. (*Id.* ¶ 24.)

The first study is entitled "GK Side-Impact CAE Data Analysis For Sensing Location Selection (Hyundai Side Impact Sensor)" and is dated October 27, 1999. [Doc. # 41-1; *see also* Doc. # 41-2 (English translation).] Much of the study is comprised of charts depicting what appears to be raw test data. [*See* Doc. # 41-1 at 8, 10, 13-17, 21-27.] The study states as follows with respect its testing: "In order to select the correct sensing location, six groups are classified as indicated below based on the sensing location of the signal, which makes analysis more convenient." [Doc. # 41-2 at 6.] Group three includes "B-PLR," which refers to the B pillar. (*Id.*) Group four includes "FRONT SEAT CROSS MBR," which refers to the cross member. (*Id.*) The study includes the following descriptions of the test results with respect to "B-PLR" and "FRONT SEAT CROSS MBR," (cross member also appears to be described as "FRONT SEAT MBR"):

> 2.1.3. Major Analyisis on SINCAP Crash Data . . .
>
> 3) The signal at B-PLR (BRP3 &#3) shows a very good shape, except D2 Delay and a fairly large Data Peak, and is considered a major candidate for Calibration.
> 4) The Signal at FR SEAT MBR & BRK (GRP4 & #4, 5, 6) is considered a major candidate for Calibration, as it is very similar to the real Crash Data, has small Oscillation, and has a good shape that leans towards the direction of crash.
>
> * * *
>
> 2.2.2 Major Analysis on POLE32 Crash Data . . .

3) The signal at B-PLR (GRP 3 & #3) concerning the POLE shows very poor responsive characteristics in that the signal is raised towards the acceleration direction in response to crash due to the Localization Effect. Thus, Calibration concerning the Pole is thought to be inadequate. In general, B=PLR [sic] is known to have poor responsive characteristics to Door Impact, which was also found in POLE32.
4) The Signal at FR SEAT MBR & BRK (GRP 4 & #4, 5, 6) presents a good acceleration Signal which leans towards the crash direction. . . .

* * *

2.2.3 Conclusion on Raw Data Analysis . . .

2) The Signal at B-PLR is poor with regards to the Pole but is fine for the rest of the Crashes.
3) The Signal at FR SEAT MBR & BRK is suitable for Calibration since it shows a good response to each Crash.

* * *

2.3.4 Analysis on Velocity Comparison for Each Sensor Location (#3, #4, #5, #6, #7, #8, #9, #10, #11, #12, #13, #14)

1) The Signal at B-PLR INR PNL (#3 in fig 3) is fairly distinguishable, but it presents a shape where the velocity of the initial response concerning the Pole oscillates to a smaller level than EURO25, as is pointed out in the foregoing Raw Data Analysis. In addition, the characteristics of the response for each Crash have a lot of Oscillation distribution, which makes maintaining TTF consistently for each Crash extremely difficult. Thereofre, B-PLR INR PNL is inadequate for Calibration.
2) The Signal at FR SEAT MBR & BRK (#4, #5, #6 in fig 3) shows a monotonously increasing velocity Profile, which hardly has any Oscillation at all three Positions. This type of shape is easily found in typical Real Crashes and is highly suitable for Calibration. Also, the velocity Profile shows linear distribution for each Crash Type, which indicates that it is extremely distinguishable and Calibration is very easy. . . .

(*Id.* at 9, 11-12, 18 (emphasis in original).)

The study concludes "[b]ased on the overall analysis, it seems that the most suitable sensing location for Calibration should be selected among #4, #5, and #6. Among these, #4 is thought to be the most suitable location, as it is estimated to have a stronger Stiffness of structure. However, the final decision will have to wait until various aspects are reviewed comprehensively . . . ." (*Id.* at 18 (emphasis in original).) The "#4" appears to refer to "FRT SEAT CROSS MBR." [Doc. # 41-1 at 5.]

Plaintiffs allege that the October 27, 1999 report and the study preceding it demonstrated that the signal from the Tiburon's side impact sensor on the cross member was weak, given that "[f]or example, in the simulated 32 km/h car-to-pole crash, the crossmember side impact sensor takes more than 20 ms to detect a change of velocity that is detected within 10 ms by the B pillar side impact sensor." (*Id.* ¶ 23.)

The second study is entitled "GK Advanced Calibration Report Including Confirmation Test data," and is dated October 6, 2006. [Doc. # 41-3.] On the first page, there is a "Summary" that states as follows, apparently with respect to the tests conducted on side air bags:

> Side result:
> The side calibration results are acceptable and especially the performance of 50km/h side was improved.

(October 6, 2006 Report at 1.)

Like the first report, the second report is mostly comprised of what appears to be raw data from testing. (*See id.* at 4-67.)

Plaintiffs allege that the 2006 study "confirmed that the [side air bag] was not deploying timely or effectively. For example, the [side air bag] failed to meet the required time to fire in the following tests: 29 km/h car-to-pole, 32 km/h car-to-car, 50 km/h EC side, and 50 km/h car-to-car. Late deployment indicates a defect in the [side air bag] System, which reduces the likelihood of deployment in foreseeable real world crashes that vary from crash test conditions, but which require an air bag to prevent serious injury." (FAC ¶ 26.)

Plaintiffs allege that they have suffered injury because (1) the Tiburon has a defect and "[a] car purchased or leased with a defect is worth less than the equivalent car leased or puchased without the defect," (2) Plaintiffs "paid more for the car, through a higher purchase price or

higher lease payments, than they would have had the defects and non-conformities been disclosed," and (3) Plaintiffs "are stuck with unsafe vehicles." (*Id.* ¶¶ 35-39.) Plaintiffs also allege that "[t]here have been numerous accidents in which the side air bags have failed to deploy" as a result of the purported defect in the Tiburon, and "[s]everal of the accidents have resulted in lawsuits against defendants." (*Id.* ¶¶ 39-40.)

III.
LEGAL STANDARD

"The Article III case or controversy requirement limits federal courts' subject matter jurisdiction by requiring, inter alia, that plaintiffs have standing and that claims be 'ripe' for adjudication." *Chandler v. State Farm Mut. Auto. Ins. Co.*, 598 F.3d 1115, 1121 (9th Cir. 2010) (citation omitted). As federal courts are "courts of limited jurisdiction" and "possess only that power authorized by Constitution and statute . . . . [i]t is to be presumed that a cause lies outside this limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377, 114 S. Ct. 1673, 128 L. Ed. 2d 391 (1994). "Standing addresses whether the plaintiff is the proper party to bring the matter to the court for adjudication." *Chandler*, 598 F.3d at 1122 (citation omitted). Because standing pertains to a federal court's subject-matter jurisdiction under Article III, it is properly raised in a motion to dismiss under Federal Rule of Civil Procedure 12(b)(1), not Rule 12(b)(6). *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000).

"[I]n a Rule 12(b)(1) motion, the district court is not confined by the facts contained in the four corners of the complaint—it may consider facts and need *not* assume the truthfulness of the complaint." *Americopters, LLC v. F.A.A.*, 441 F.3d 726, 732 n.4 (9th Cir. 2006) (citing *White*, 227 F.3d at 1242). In support of a motion to dismiss under Rule 12(b)(1):

> [T]he moving party may submit 'affidavits or any other evidence properly before the court . . . It then becomes necessary for the party opposing the motion to present affidavits or any other evidence necessary to satisfy its burden of establishing that the court, in fact, possesses subject matter jurisdiction.'

Colwell v. Dep't of Health and Human Servs., 558 F.3d 1112, 1121 (9th Cir. 2009) (quoting *St. Clair v. City of Chico*, 880 F.2d 199, 201 (9th Cir. 1989) (alteration in original)).

Under Rule 12(b)(6), a party may seek dismissal of a claim for failure to state a claim upon which relief can be granted. A court may grant such a dismissal only where the pleading party fails to present a cognizable legal theory or to allege sufficient facts to support a cognizable

legal theory. *Shroyer v. New Cingular Wireless Servs., Inc.*, 622 F.3d 1035, 1041 (9th Cir. 2010). In evaluating the sufficiency of a pleading, as discussed *supra*, courts generally must accept all factual allegations as true. Legal conclusions, in contrast, are not entitled to the assumption of truth. *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)).

Federal Rule 9(b) imposes a heightened pleading standard on a party alleging fraud. *See* Fed. R. Civ. P. 9(b) (requiring party to "state with particularity the circumstances constituting fraud or mistake"). Rule 9(b) requires that averments of fraud be specific enough to give the opposing party notice of the particular misconduct in order to allow the opposing party to defend against the charge and not just deny that it has done anything wrong. *See Vess v. CIBA-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003) ("Averments of fraud must be accompanied by 'the who, what, when, where, and how' of the misconduct charged.") (citations omitted). "[A] plaintiff must set forth *more* than the neutral facts necessary to identify the transaction. The plaintiff must set forth what is false or misleading about a statement, and why it is false." *Id.* (emphasis in original) (alteration in original).

IV.
DISCUSSION

A. Plaintiffs Lack Article III Standing

As jurisdiction must be established as a threshold matter, the Court considers it first. *See Lowry v. Barnhart*, 329 F.3d 1019, 1022 (9th Cir. 2003) (citing *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998)). "[T]he jurisdictional question of standing precedes, and does not require, analysis of the merits." *Maya v. Centex Corp.*, 658 F.3d 1060, 1068 (9th Cir. 2011) (internal quotation omitted).

The "'irreducible constitutional minimum of standing contains three elements,' all of which the party invoking federal jurisdiction bears the burden of establishing": (1) the plaintiff suffered an "'injury in fact,' i.e., an 'invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual and imminent, not conjectural or hypothetical'"; (2) the plaintiff's injury is "fairly traceable to the challenged conduct of the defendant" and thus, there is a causal connection; and (c) the injury will likely be redressed by a favorable decision. *Chandler*, 598 F.3d at 1122 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)).

Plaintiffs contend that they have satisfied the "injury in fact" requirement under Article III based on an economic theory, specifically, "Hyundai purchasers suffered an economic loss from purchasing a vehicle that was marketed as safe but was in fact unreasonably unsafe." (Opp'n at 9 [Doc. # 33]; *see* Opp'n at 3 [Doc. # 51].) The Court disagrees.

In *Birdsong v. Apple, Inc.*, the Ninth Circuit considered whether the plaintiffs had standing to bring UCL claims against Apple, Inc. ("Apple") based on their theory that the iPod was defective because it posed an unreasonable risk to its users of noise-induced hearing loss. 590 F.3d 955, 956-57, 960-62 (9th Cir. 2009). The Ninth Circuit considered whether the plaintiffs had standing under the UCL, but it noted that "insofar as the UCL incorporates Article III's injury in fact requirement, the plaintiffs would lack an Article III injury for the same reasons." *Id.* at 960-62 & n.4 (internal citation omitted). The *Birdsong* court held that the plaintiffs failed to demonstrate that they had an injury-in-fact because (1) they had not demonstrated that they suffered or imminently would suffer hearing loss, and rather at most they pled "a potential risk of hearing loss not to themselves, but to other unidentified iPod users who might *choose* to use their iPods in an unsafe manner"; (2) the alleged injury—the possibility of hearing loss under certain circumstances—was "conjectural and hypothetical" rather than actual or imminent; and (3) the plaintiffs' theories that the risk of hearing loss inherent to the iPod reduced the value of the product and that they were deprived of the full benefit of their bargain because of the safety risk, were belied by (a) the plaintiffs' failure to allege a cognizable defect, (b) the fact that the injury rested on a hypothetical risk of hearing loss rather than an actual or imminent injury, and (c) their alleged injury in fact was "premised on the loss of a 'safety' benefit that was not part of the bargain to begin with." *Id.* at 961-62 (emphasis in original).

In this case, as in *Birdsong*, plaintiffs do not allege that *they* have suffered any actual injury. Indeed, they do not allege that *anyone* has suffered actual injury. At most, they allege that "[t]here have been numerous accidents in which the side air bags have failed to deploy in Defective Tiburons as a result of the SAB System defect" (FAC ¶ 39), but they allege no details regarding *injuries* that they themselves have suffered, let alone injuries by those involved in the "numerous" accidents.

Nor do Plaintiffs allege any imminent injury. The gravamen of the FAC is that the side air bags in the Tiburon do not deploy or deploy more slowly in some percentage of cases as compared to side air bags in cars in which the side impact sensor is located on the B pillar, rather than on the cross member. Thus, their claim appears to be that in some number of collisions, the side air bags will not deploy or will deploy more slowly because of the location of the sensor and some Tiburon owners will suffer injury as a result. This alleged injury is conjectural and hypothetical, rather than actual and imminent, given that it depends on the occurrence of future

collisions which may result from a difference in signal strength due to the location of the side impact sensor. Moreover, as discussed *supra*, Plaintiffs allege that the placement of the sensor on the cross member is unsafe solely on the basis of two studies conducted by Defendants. Defendants have introduced the reports into evidence, and based on the Court's review, the reports do not appear to support Plaintiffs' assertions. Plaintiffs have introduced no evidence to the contrary, and on a Rule 12(b)(1) motion, the Court need not rely on Plaintiffs' pleadings when there is contrary evidence in the record. *Americopters*, 441 F.3d at 732 n.4 (court need not assume truthfulness of complaint on Rule 12(b)(1) motion); *Colwell*, 558 F.3d at 1121 (where moving party presents evidence in support of Rule 12(b)(1) motion, party opposing motion must present evidence to satisfy its burden of establishing court has subject matter jurisdiction). Thus, Plaintiffs have not adequately demonstrated that there is *any* defect in the Tiburon, let alone one that causes actual and imminent injury.

The Court notes that even if Plaintiffs had demonstrated that the Tiburon had a defect, their economic theory would be unpersuasive. To the extent Plaintiffs contend that their Tiburons are worth less because the vehicles are unsafe (*see, e.g.*, FAC ¶ 36), they have not alleged that they are unwilling to drive their vehicles, that they have sold or traded their vehicles at a loss, or any other facts that plausibly demonstrate that the Tiburons have diminished in value due to the alleged defect. *See Tae Hee Lee v. Toyota Motor Sales, U.S.A., Inc.*, No. 13-7431, 2014 WL 211462, at *6 (C.D. Cal. Jan. 9, 2014). District courts in this circuit have required plaintiffs alleging economic loss predicated solely on how a product functions when the product has not malfunctioned to allege "something more" to support their claims than merely alleging "overpaying for a defective product." *See, e.g.*, *In re Toyota Motor Corp.*, 790 F. Supp. 2d 1152, 1165-66 & n.11 (C.D. Cal. 2011); *In re LinkedIn*, 2014 WL 1323713, at *5 (collecting cases).

Nor have Plaintiffs demonstrated that they have not received the benefit of their bargain. (*See* FAC ¶ 38.) Even if the placement of the side impact sensor resulted in the side air bags' failure to deploy as quickly or as frequently as they would if the sensor were placed on the B pillar, Plaintiffs have not alleged that Defendants made *any* representations related to the *frequency* or *speed* with which the side air bags would deploy. *See Tae Hae Lee*, 2014 WL 211462, at *5 - *6 (citing *Birdsong*, 590 F.3d at 961). Rather, they have identified representations by Defendants that the Tiburon is "equipped with side impact air-bags" and the air bags are "designed to inflate in moderate to severe side collisions." (*Id.* ¶ 31.) Plaintiffs have not alleged that the Tiburons (1) lack side air bags, or that (2) the air bags are *not* designed to inflate in moderate to severe side collisions.

Moreover, Plaintiffs have not alleged facts demonstrating the causal connection required for Article III standing—that is, that their injury is "fairly traceable" to Defendants' alleged

misrepresentations. Plaintiffs do not allege that they relied on the representations in the air bag safety manual when they purchased the Tiburon. Indeed, they do not allege that *they read the safety manual* before purchasing the Tiburon. Plaintiffs do not even allege that the safety manual *was included with all Tiburons at issue*. Rather, they allege that the safety manual was "distributed with at least the 2008 Tiburon" (FAC ¶ 31), but two of the three named Plaintiffs purchased the *2004* Tiburon. (*See id.* ¶¶ 14-16.)

Plaintiffs' arguments that they satisfy the Article III standing requirement are unavailing. First, they attempt to distinguish *Birdsong* on the ground that the plaintiffs in that case had not identified any false advertising. (*See* Opp'n at 9 [Doc. # 33].) Here, as in *Birdsong*, Plaintiffs have not identified any misrepresentations made by Defendants. Second, Plaintiffs contend that *Birdsong* is distinguishable because the alleged injury—hearing loss due to listening to music at a high volume—was "contingent on the poor judgment of the user," while the "side airbag defect here exists *regardless* of how the driver operates the vehicle." (*Id.* at 9-10.) While the *Birdsong* court found that the injury at issue was conjectural and hypothetical *in part* on the ground that users could choose not to listen to their iPods at high volumes, it concluded that the plaintiffs failed to satisfy the injury-in-fact requirement for other reasons which the Court finds analogous, as discussed *supra*. Plaintiffs have not addressed the rest of the injury-in-fact analysis in *Birdsong*.

Plaintiffs' reliance on *In re Toyota Motor Corp.*, 790 F. Supp. 2d 1152, 1164-66 (C.D. Cal. 2011), is misplaced because they have made only conclusory statements that the Tiburon's airbags are defective and have not shown that they suffered any actual injury.

In short, Plaintiffs have not demonstrated that they have Article III standing. The Court therefore **GRANTS** Defendants' motions to dismiss under Rule 12(b)(1).

B. Leave to Amend

Should a court dismiss certain claims, it must also decide whether to grant leave to amend. "Courts are free to grant a party leave to amend whenever 'justice so requires,' and requests for leave should be granted with 'extreme liberality.'" *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 972 (9th Cir. 2009) (citation omitted) (quoting Fed. R. Civ. P. 15(a)(2)); *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 712 (9th Cir. 2001)). "Leave to amend should be granted unless the district court 'determines that the pleading could not possibly be cured by the allegation of other facts.'" *Knappenberger v. City of Phoenix*, 566 F.3d 936, 942 (9th Cir. 2009) (quoting *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (*en banc*)).

Plaintiffs request that they be given leave to amend. (Opp'n at 25.) As leave to amend should be granted with "extreme liberality," and the Court is not convinced that the pleading cannot possibly be cured, the Court grants Plaintiffs leave to amend their complaint.

"[A] judge who concludes that subject matter jurisdiction is lacking has no power to rule alternatively on the merits of the case." *Wages v. I.R.S.*, 915 F.2d 1230, 1234 (9th Cir. 1990). Inasmuch as the Court grants the motions to dismiss for lack of subject matter jurisdiction, it declines to consider the additional alternative grounds upon which Defendants moved to dismiss the FAC. In the event Plaintiffs choose to file an amended complaint, Plaintiffs may make any amendments they deem necessary in light of the arguments raised by Defendants in their motions to dismiss.

V.
CONCLUSION

In light of the foregoing, Defendants' motions to dismiss are **GRANTED** for lack of subject matter jurisdiction under Rule 12(b)(1) and otherwise **DENIED** as moot. Defendants' motions to strike are **DENIED** as moot.

Plaintiffs shall file an amended complaint, if any, by no later than **August 14, 2014**. Defendants shall file their response within 21 days after service of any amended complaint.

IT IS SO ORDERED.