UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

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CASE NO.: **CV 12-06878 SJO (SHx)** **DATE:** **January 4, 2013**

TITLE: **United Desert Charities, et al. v. Flushmate, et al.**

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PRESENT: THE HONORABLE S. JAMES OTERO, UNITED STATES DISTRICT JUDGE

Victor Paul Cruz	Not Present
Courtroom Clerk	Court Reporter
COUNSEL PRESENT FOR PLAINTIFFS:	**COUNSEL PRESENT FOR DEFENDANTS:**
Not Present	Not Present

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PROCEEDINGS (in chambers): ORDER GRANTING DEFENDANT MANSFIELD PLUMBING PRODUCTS INC.'S MOTION FOR JOINDER [Docket No. 55]; **GRANTING IN PART AND DENYING IN PART DEFENDANT FLUSHMATE'S MOTION TO DISMISS** [Docket No. 52]; **GRANTING IN PART AND DENYING IN PART DEFENDANTS AS AMERICA, INC., KOHLER CO., AND GERBER PLUMBING FIXTURES LLC'S MOTION TO DISMISS** [Docket No. 53]; **DENYING AS MOOT DEFENDANT HOME DEPOT USA, INC'S MOTION TO DISMISS** [Docket No. 60]

This matter is before the Court on Defendant Flushmate's ("Flushmate") Motion to Dismiss Plaintiffs' First Amended Class Action Complaint ("Flushmate Motion") and Defendants AS America, Inc. ("AS America"), Kohler Co. ("Kohler"), and Gerber Plumbing Fixtures, LLC's ("Gerber") (collectively, "Toilet Manufacturers") Motion to Dismiss Plaintiffs' First Amended Class Action Complaint ("Toilet Manufacturers Motion") (collectively, "Motions"),[1] both filed November 5, 2012. Plaintiffs filed their Consolidated Opposition to Defendants' Motions to Dismiss ("Opposition") on November 19, 2012. Flushmate and the Toilet Manufacturers filed their Replies on December 3, 2012. The Court found this matter suitable for disposition without oral argument and vacated the hearing set for December 17, 2012. *See* Fed. R. Civ. P. 78(b). For the following reasons, the Motions are **GRANTED IN PART** and **DENIED IN PART**.

I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs allege the following facts. Plaintiffs each own or owned toilets equipped with a "Series 503 Flushmate III Pressure-Assist Flushing System" manufactured between October 14, 1997, and February 29, 2008 (the "Flushmate System"), and sold by Flushmate. (First Am. Class Action Compl. ("FAC") ¶ 1, ECF No. 20.) Flushmate sold the Flushmate System to the Toilet

[1] Defendant Mansfield Plumbing, Inc. filed a Motion for Joinder on November 9, 2012. The Court **GRANTS** this motion.

Manufacturers, who incorporated it into their toilets, which were then made available for sale to consumers, including by Defendant Home Depot. (FAC ¶¶ 23, 30, 32.)

The Flushmate System is subject to a 2012 nationwide recall by the Consumer Product Safety Commission ("CPSC"), as there have been "at least 304 failures of the Flushmate System and at least 14 injuries stemming from catastrophic failure of the Flushmate System" due to an alleged design defect. (FAC ¶¶ 1-2.) The recall notice states that "[c]onsumers should immediately turn off the water supply to the recalled Flushmate III unit and stop using the system . . . ." (FAC ¶ 80.) Flushmate had earlier issued two product advisories concerning the Flushmate System in 2000 and 2003 in which Flushmate stated that "a very small number" of Flushmate Systems had developed leaks, "or separation of the joints in the vessels that are accompanied by the rapid release of the pressurized water contained in the vessel." (FAC ¶¶ 71-73.) These product advisories only referenced models manufactured between "January 1998 and April 1998, May 4, 1998, and May 13, 1998." (FAC ¶ 73.) Flushmate has made a repair kit available to owners of the Flushmate System free of charge, although Plaintiffs allege that installation of the repair kit requires the skills of a professional plumber, and Flushmate has refused to pay for the installation of the kit. (FAC ¶ 82.)

Two of the Plaintiffs, UDC and Pelka, own Flushmate System-equipped toilets that allegedly failed and leaked. (FAC ¶¶ 4-5.) One Plaintiff, Ede, owned a Kohler toilet with a Flushmate System that exploded in winter 2011, causing property damage. (FAC ¶ 115.) The remaining Plaintiffs have not alleged any failure of their Flushmate-equipped toilets, although Plaintiffs do allege that they would not have "purchased or acquired" any toilet with the Flushmate System had they known of the alleged defect. (FAC ¶¶ 29, 71, 78.)

Plaintiffs assert the following causes of action in their FAC: (1) fraudulent concealment and intentional misrepresentation against Flushmate; (2) violation of Cal. Bus. & Prof. Code § 17200, the unfair competition law ("UCL"), against all Defendants; (3) breach of express warranty against Flushmate; (4) breach of express warranty against the Toilet Manufacturers; (5) breach of implied warranty against Flushmate and the Toilet Manufacturers; (6) violation of Cal. Civ. Code § 1761(a), the Consumer Legal Remedies Act ("CLRA"), against Flushmate, Gerber, and Kohler; (7) breach of express warranty in violation of the Magnuson-Moss Warranty Act ("MMWA"), 15 U.S.C. § 2301 *et seq.*, against Flushmate; (8) breach of implied warranty in violation of the MMWA, 15 U.S.C. § 2301 *et seq.*, against Flushmate and Home Depot; (9) breach of implied warranty in violation of Cal. Civ. Code § 1792, the Song-Beverly Consumer Warranty Act (the "Song-Beverly Act"), against Flushmate and the Toilet Manufacturers; and (10) breach of express warranty in violation of the Song-Beverly Act against Flushmate and the Toilet Manufacturers. (FAC ¶¶ 163-259.) Plaintiffs bring this action as a class action on behalf of themselves and all others similarly situated. (FAC ¶¶ 151-152.)

Defendants filed the instant Motions on November 5, 2012, seeking to dismiss Plaintiffs' claims for failure to state a claim upon which relief can be granted pursuant to Federal Rule of Civil Procedure 12(b)(6).

II. DISCUSSION

Defendants contend that Plaintiffs' claims fail for the following reasons: (1) Plaintiffs' fraud claims under the common law, the UCL, and the CLRA fail because they are not set forth with sufficient particularity as required by Federal Rule of Civil Procedure 9(b), the allegedly fraudulent statements are not actionable, Plaintiffs do not plead actual reliance, and Plaintiffs' only remedy is in warranty, and not fraud, under the economic loss doctrine; (2) Plaintiffs' express warranty claim fails because Plaintiffs have not met the conditions precedent of the Flushmate Limited Warranty and do not allege the existence of any other express warranty; (3) Plaintiffs' implied warranty claim fails because Plaintiffs have not established vertical privity, and a latent defect such as is alleged here does not render a product unmerchantable; (4) Plaintiffs' Song-Beverly Act and MMWA claims fail because they are derived from Plaintiffs' warranty claims and because they fail to satisfy the provisions of those statutes; and (5) all claims against the Toilet Manufacturers fail because Plaintiffs do not allege facts regarding these defendants that could be the basis for any liability on their part. (*See generally* Flushmate Motion; Toilet Manufacturers Motion.)

A. Legal Standard

In reviewing a motion to dismiss under Rule 12(b)(6), a court may only consider the complaint, documents incorporated by reference in the complaint, and matters of judicial notice. *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003). A court must accept as true the allegations of the complaint, *Hosp. Bldg. Co. v. Trs. of Rex. Hosp.*, 425 U.S. 738, 740 (1976), and "the complaint is to be liberally construed in favor of plaintiff," *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969). Dismissal is appropriate only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of [a] claim." *Abramson v. Brownstein*, 897 F.2d 389, 391 (9th Cir. 1990).

Dismissal under Rule 12(b)(6) is proper if the claim lacks a "cognizable legal theory" or "sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990). To plead sufficient facts, a party must proffer "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is facially plausible when "the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief." *Id.* (internal quotation marks omitted). This plausibility standard requires "more than a sheer possibility that the defendant has acted unlawfully." *Id.*

B. Plaintiffs' Fraud Claims

1. Common Law Fraud

Under California law, a claim of fraud has five elements that the plaintiff must prove: "[1] misrepresentation (false representation, concealment, or nondisclosure); [2] knowledge of falsity (or 'scienter'); [3] intent to defraud, i.e., to induce reliance; [4] justifiable reliance; and [5] resulting damage." *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1126 (9th Cir. 2009) (emphasis omitted) (internal quotation marks omitted). *See also Conroy v. Regents of Univ. of Cal.*, 45 Cal. 4th 1244, 1255 (2009).

a. Rule 9(b)

Flushmate argues that Plaintiffs' fraud-based claims do not comply with Rule 9(b) of the Federal Rules of Civil Procedure ("Rule 9(b)"). A state law claim of fraud in federal court must comply with the pleading requirements of Rule 9(b). *L'Garde, Inc. v. Raytheon Space & Airborne Sys.*, 805 F. Supp. 2d 932, 944 (C.D. Cal. 2011). Rule 9(b) states that "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally." Fed. R. Civ. P. 9(b). The particularity requirement is satisfied if the pleading is "specific enough to give defendants notice of the particular misconduct which is alleged to constitute the fraud charged so that they can defend against the charge and not just deny that they have done anything wrong." *Semegen v. Weidner*, 780 F.2d 727, 731 (9th Cir. 1985). "While statements of the time, place and nature of the alleged fraudulent activities are sufficient, mere conclusory allegations of fraud are insufficient." *Moore v. Kayport Package Express, Inc.*, 885 F.2d 531, 540 (9th Cir. 1989).

In their FAC, Plaintiffs allege that Flushmate both intentionally misrepresented and fraudulently concealed material information.

i. Intentional Misrepresentation

Plaintiffs allege that "Flushmate represented in marketing materials that their Flushmate System was 'free of defects in material and workmanship,' 'designed with continuous improvements to be the most reliable, consistent, and trouble-free system available,' as well as 'No leaks,' 'No Callbacks,' and 'Easier to maintain.'" (FAC ¶ 25.) Plaintiffs further allege that Flushmate represented that the Flushmate System met industry standards (FAC ¶ 26)

Flushmate argues that Plaintiffs' fraud claim fails to comport with Rule 9(b) because Plaintiffs "do not identify the specific 'marketing materials' they purport to quote, when and where they saw them, or how . . . each statement is untrue or misleading." (Flushmate Mot. 8.) Flushmate further contends that Plaintiffs fraud claims fail because Plaintiffs do not allege "that they heard any of the alleged statements [or] when they purchased the product, much less that any particular statement

influenced their buying decision." (Flushmate Mot. 8.) In their Opposition, Plaintiffs state that "this is a case about omissions, not misrepresentations." (Opp'n 1.) This is belied by Plaintiffs' own FAC, however, which states in the first cause of action for "Fraudulent Concealment/Intentional Misrepresentation" that Flushmate "made representations concerning the safety and reliability of the Flushmate Systems which were materially misleading in light of the facts it suppressed." (FAC ¶ 169.)

To the extent that Plaintiffs' fraud claim relies on affirmative misrepresentations on the part of Flushmate, the Court finds that it does not comport with Rule 9(b). Plaintiffs never identify the specific marketing materials in which the allegedly misleading statements were made. More significantly, Plaintiffs do not allege when they were exposed to these purportedly misleading statements or where the statements were made. Plaintiffs counter that the statements were made "[b]etween October 14, 1997 and February 29, 2008," when the Flushmate System was being manufactured, and that the statements were made "in every communication Defendants had with Plaintiffs and the proposed Class members." (Opp'n 4.) These generalized and conclusory allegations are plainly insufficient under Rule 9(b). *See Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1126 (9th Cir. 2009) (finding that allegations of fraudulent advertisements did not comply with Rule 9(b) when the plaintiff did not "specify when he was exposed to them" and "failed to articulate the who, what, when, where, and how of the misconduct alleged"); *see also Tait v. BSH Home Appliances Corp.*, No. SACV 10-00711 DOC (ANx), 2011 WL 1832941, at *2-3 (allegations did not satisfy Rule 9(b) when "Plaintiffs offer[ed] no information regarding ***when***, or even ***if***, each of the named Plaintiffs" viewed the allegedly misleading material.)

Plaintiffs attempt to avoid their obligation to plead their fraud claims with specificity by noting that this requirement is relaxed when the requisite information is "peculiarly within the opposing party's knowledge," and thus "plaintiffs cannot be expected to have personal knowledge of the facts constituting the wrongdoing." (Opp'n 11 (citing *Wool v. Tandem Computers Inc.*, 818 F.2d 1433, 1439-40 (9th Cir. 1987).) This is not the case here, as is apparent from examining *Wool*. There, the Ninth Circuit found that plaintiff's fraud allegations, which were based on information and belief, nevertheless satisfied Rule 9(b) because many of the underlying facts were "peculiarly within" the defendant's knowledge. *Wool*, 818 F.2d at 1439-40. The court noted, however, that the plaintiffs' allegations "alleging misleading statements, misrepresentations, and specific acts of fraud were very precise. Each alleged misstatement is identified by content, date, and the document or announcement in which it appeared." *Id.* By contrast, here Plaintiffs have not specifically identified where any of Flushmate's purportedly misleading statements appeared, when they appeared, or when Plaintiffs were exposed to this material. In other words, the specific information that Plaintiffs fail to allege in this case is **not** "peculiarly within" Defendants' knowledge. To the contrary, it is information that should be readily available to Plaintiffs, and thus the relaxed pleading requirement identified in *Wool* is inapplicable.

Accordingly, the Court **DISMISSES WITH LEAVE TO AMEND** Plaintiff's common law fraud claim, as Plaintiffs' have not alleged a viable claim for intentional misrepresentation Nevertheless, the

Court will consider Defendants' remaining arguments on this claim in the interest of judicial economy.

ii. Fraudulent Concealment

Plaintiffs also allege that "Defendants made numerous material omissions" concerning the Flushmate System (FAC ¶ 69), including "the failure to inform Plaintiffs . . . about the history of hundreds of failures in the form of leaks and explosions of the Flushmate Systems . . . resulting in property damage and serious bodily injury," which Defendants allegedly knew about "since at least 2000 . . . ." (FAC ¶ 70). Defendants argue that these fraudulent concealment allegations also do not comport with Rule 9(b) because they too generalized and conclusory in nature. (Flushmate Mot. 8-9.)

The Ninth Circuit has held that, under California law, "nondisclosure is a claim for misrepresentation in a cause of action for fraud" and thus "it (as any other fraud claim) must be pleaded with particularity under Rule 9(b)." *Kearns*, 567 F.3d at 1127. Applying this standard, the court in *Kearns* held that the plaintiff's "general pleadings alleging [defendant's] intent to conceal from customers" that the product would not perform as advertised did not satisfy the requirements of Rule 9(b). *Id.*

The only communications by Flushmate that Plaintiffs specifically identify are the product advisories issued in 2000 and 2003. In those advisories, Flushmate stated that "a very small number" of Flushmate Systems had developed leaks, "or separation of the joints in the vessels that are accompanied by the rapid release of the pressurized water contained in the vessel." (FAC ¶¶ 71-73.) In their first claim for relief for fraudulent concealment, Plaintiffs allege that Flushmate concealed "the fact that the Flushmate System sold to [sic] was defective and susceptible to leaks and weld separation which could cause the toilet tank to explode posing an unreasonable safety risk." (FAC ¶ 164.)

The Court finds that these allegations of fraudulent concealment satisfy Rule 9(b). They "describe the content of the omission and where the omitted information should or could have been revealed . . . ." *Marolda v. Symantec Corp.*, 672 F. Supp. 2d 992, 1002 (N.D. Cal. 2009). Specifically, Plaintiffs allege that the omitted information was the fact that some toilet tanks with the Flushmate System had exploded, causing property damage and personal injuries, and that this information should have been revealed in the 2000 and 2003 product advisories. (FAC ¶ 144.) Plaintiffs also allege that had these facts been disclosed, they would not have purchased a toilet with a Flushmate System. (FAC ¶ 144.) These allegations are more specific than those in cases cited by Defendants. *Cf. Oestreicher v. Alienware Corp.*, 544 F. Supp. 2d 964, 974 (N.D. Cal. 2008) (stating that plaintiff's allegations of fraudulent concealment of a design defect "could be made about any alleged design defect in any manufactured product").

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b. Whether the Alleged Intentional Misrepresentations are Actionable

Flushmate also contends that, even if Plaintiffs' allegations of intentional, affirmative misrepresentations satisfied the requirements of Rule 9(b), they would still not be actionable as fraud. (Flushmate Mot. 11.) This is so, Flushmate argues, because (1) much of the language cited by Plaintiffs as being misleading is mere puffery; and (2) Plaintiffs' reference to "technical engineering standards and codes" cannot give rise to a consumer fraud claim because they are not targeted at consumers such as Plaintiffs. (Flushmate Mot. 11-12.) Plaintiffs do not address these arguments in their Opposition.

i. Puffery

"The distinguishing characteristics of puffery are vague, highly subjective claims as opposed to specific, detailed factual assertions." *Haskell v. Time, Inc.*, 857 F. Supp. 1392, 1399 (E.D. Cal. 1994) (citing *Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv., Inc.*, 911 F.2d 242, 246 (9th Cir. 1990)). "[C]onsumer reliance will be induced by specific rather than general assertions. Advertising which merely states in general terms that one product is superior is not actionable. However, misdescriptions of specific or absolute characteristics of a product are actionable." (*Cook*, 911 F.2d at 246) (internal citations and quotation marks omitted). A court may find an alleged misrepresentation to be puffery as a matter of law on a motion to dismiss. *Newcal Indus., Inc. v. Ikon Office Solution*, 513 F.3d 1038, 1053 (9th Cir. 2008).

Plaintiffs allege that "Flushmate represented in marketing materials that their Flushmate System was 'free of defects in material and workmanship,' 'designed with continuous improvements to be the most reliable, consistent, and trouble-free system available,' as well as 'No leaks,' 'No Callbacks,' and 'Easier to maintain.'" (FAC ¶ 25.) The Court finds that Flushmate's alleged statement that their Flushmate System was "free of defects in material and workmanship" is not puffery. This is a specific factual assertion that might reasonably induce consumers to purchase a toilet with a Flushmate System.

On the other hand, the remaining statements—that the Flushmate System was "designed with continuous improvements to be the most reliable, consistent, and trouble-free system available" and that it would result in "no leaks," "no callbacks," and would be "easier to maintain"—all constitute non-actionable puffery. These statements are "vague, highly subjective claims" that merely assert that the Flushmate System is superior to competing products in general terms. Thus, Plaintiffs' fraud claim fails as a matter of law to the extent that it relies on these statements.

ii. Compliance with Industry Standards

In their FAC, Plaintiffs also allege that Flushmate made material misrepresentations by claiming that the Flushmate System and the toilets incorporating the Flushmate System met industry

standards. (FAC ¶¶ 62-68.) Flushmate argues that these statements cannot be the basis for fraud as these standards are not targeted at consumers. The Court agrees.

Plaintiffs do not allege that any of them actually saw or relied upon Defendants' representations that their respective products complied with industry standards. Thus, "[i]t simply is not credible for [Plaintiffs] to claim that [these standards] are supposed to be relied upon by consumers" such as Plaintiffs. *Johnson v. Mitsubishi Digital Elecs. Am., Inc.*, 578 F. Supp. 2d 1229, 1237 (C.D. Cal. 2008). The Court therefore finds that Plaintiffs' fraud claim fails as a matter of law to the extent it relies on statements of compliance with industry standards.

c. Actual Reliance

Next, Flushmate argues that "Plaintiffs do not plead that they actually relied, justifiably or otherwise, on any statement or omission by Defendants. There are no allegations that Plaintiffs ever read, considered, or relied on any affirmative representation." (Flushmate Mot. 12.) Plaintiffs respond that under California law, "[a]ctual reliance is presumed or inferred when a defendant's omission is material." (Opp'n 8 (citing *In re Tobacco II Cases*, 46 Cal. 4th 298, 327 (2009)).) Plaintiffs argue that the omission here was material because "but for Flushmate's concealment of the defect, they would not have purchased toilets equipped with the Flushmate System." (Opp'n 8; FAC ¶¶ 29, 71, 78.)

Plaintiffs' reliance on *Tobacco II* is misplaced. While it is true that actual reliance may be "presumed or inferred" when a defendant's omission is material, plaintiffs must still allege that the misrepresentation or the material from which information has been omitted has "actually been communicated to" plaintiffs. *Mirkin v. Wasserman*, 5 Cal. 4th 1082, 1095 (1993). Put another way, the inference or presumption referred to in *Tobacco II* is that a plaintiff who is exposed to a material misrepresentation or documents from which material information has been omitted actually relied on that misrepresentation or omission in purchasing the defendant's product. In the absence of such a presumption, a plaintiff would also be required to demonstrate that the misrepresentation or omission influenced their decision-making.

In this case, Plaintiffs do not allege that they were ever exposed to any materials containing Defendants' alleged misrepresentations or materials in which the allegedly omitted information would have been communicated. Thus, *Monaco v. Bear Stearns Companies, Inc.*, No. CV 09-05438 SJO (JCx), 2011 WL 4059801 (C.D. Cal. Sept. 12, 2011), cited by Plaintiffs, is inapposite. There, this Court upheld a claim for fraudulent concealment where plaintiffs alleged that they would not have entered into loans with defendants if defendants had disclosed material information in loan documents provided to plaintiffs. *Monaco*, 2011 WL 4059801, at *9-10. In that case, however, it was undisputed that all plaintiffs had been exposed to the loan documents in question. By contrast, here Plaintiffs do not allege that **any** of them were exposed to material misrepresentations or documents from which material information had been omitted. This is plainly insufficient under California law. *See Mathison v. Bumbo*, No. SA CV 08-0369 DOC (ANx),

2008 WL 8797937, at *7 (C.D. Cal. Aug. 18, 2008) (holding that plaintiffs had failed to plead justifiable reliance because they did not allege they were aware of advertisements from which material information had been omitted).

As such, Plaintiffs must allege facts demonstrating actual reliance on Flushmate's purported fraudulent acts.

d. The Economic Loss Doctrine

Defendants contend that Plaintiffs' fraud-based claims also fail under California's economic loss doctrine because the only damages claimed are "performance/disappointed expectation claims [which] are properly covered by warranty law and cannot be the basis for fraud . . . ." (Flushmate Mot. 13.)

Under California's economic loss doctrine, "when 'a purchaser's expectations in a sale are frustrated because the product he bought is not working properly, his remedy is said to be in contract alone, for he has suffered only 'economic' losses.'" *Stearns v. Select Comfort Retail Corp.*, No. 08-2746 JF, 2009 WL 1635931, at *3 (N.D. Cal. June 5, 2009) (citing *Robinson Helicopter Co., Inc. v. Dana Corp.*, 34 Cal. 4th 979, 988 (2004). The doctrine draws a distinction "between transactions involving the sale of goods for commercial purposes where economic expectations are protected by commercial and contract law, and those involving the sale of defective products to individual consumers who are injured in a manner which has traditionally been remedied by resort to the law of torts." *Robinson Helicopter*, 34 Cal. 4th at 988. In *Robinson Helicopter*, the California Supreme Court held that plaintiff's fraud claim was **not** barred by the economic loss doctrine because the defendant's misrepresentations induced the plaintiff to purchase and use the defective product, and thus "[defendant's] tortious conduct was separate from the breach itself, which involved [defendant's] provision of the nonconforming [products.]" *Id.* at 990-91.

This reasoning is applicable here: as in *Robinson*, Plaintiffs allege that Flushmate's affirmative misrepresentations and fraudulent concealment are wrongful acts separate from any breach of warranty. More specifically, Plaintiffs allege that they would not have purchased toilets equipped with a Flushmate System but for Flushmate's fraudulent concealment of the fact that Flushmate knew that such toilets sometimes exploded, causing property damage and personal injury. The Court therefore finds that Plaintiffs' fraud claims are not barred by the economic loss doctrine.[2]

[2] Flushmate's reliance on *Food Safety Net Services v. Eco Safe Systems USA, Inc.*, 209 Cal. App. 4th 1119, 1130-32 (2012), cited in Defendants' Reply (Reply 3 n.5), is also misplaced. There the court held the economic loss doctrine barred plaintiff's fraudulent inducement claim because the evidence only tended to show defendant's nonperformance of the underlying contract. *Id.* at 1131-32. This was so, the court reasoned, because the

2. CLRA

Plaintiffs also allege violation of the CLRA. (FAC ¶¶ 210-228.) Plaintiffs allege that "[b]y failing to disclose and concealing the seam weld defects associated with the Flushmate System and they physical injury associated therewith, Defendants engaged in unfair violation of California Civil Code section 1770(a)(5) and (7) when they represented . . . that toilets containing the Flushmate System had benefits or characteristics that they did not actually have . . ." (FAC ¶ 216.)

Plaintiffs' CLRA claim is also subject to the heightened pleading standard of Rule 9(b). *See Kearns*, 567 F.3d at 1127-28 ("The requirement in Rule 9(b) of the Federal Rules of Civil Procedure that allegations of fraud be pleaded with particularity applies to claims which are made in federal court under the CLRA and UCL").[3] The Court therefore finds that, as with Plaintiffs' common law fraud claim, Plaintiffs' allegations of intentional misrepresentation under the CLRA fail to meet this standard, as Plaintiffs do not describe the specific materials in which these misrepresentations were made, when they were made, or where they were made. However, as discussed above, Plaintiffs have pleaded their fraudulent concealment claims with the requisite specificity.

The Court also finds that Plaintiffs' CLRA claim fails because they fail to plead actual reliance, as established above. The CLRA provides a cause of action to "[a]ny consumer who suffers any damage **as a result of the use or employment** by any person of a method, act, or practice declared to be unlawful by Section 1770." Cal. Civ. Code § 1780(a) (emphasis added). Thus, "plaintiffs in a CLRA action [must] show not only that a defendant's conduct was deceptive but that the deception caused them harm." *Buckland v. Threshold Enterprises, Ltd.*, 155 Cal. App. 4th 798, 809 (2007). Because Plaintiffs have not alleged that they were exposed to and relied upon either (1) material containing affirmative misrepresentations or (2) material from which information had been omitted in deciding to purchase toilets equipped with the Flushmate System, the Court finds that Plaintiffs' CLRA claim fails.

Plaintiffs' CLRA claim against Flushmate is therefore **DISMISSED WITH LEAVE TO AMEND**.

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3. UCL

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defendant only made the allegedly false statements based on contractual language requiring it to do so. *Id.* This is not the case here—the facts of *Robinson Helicopter* are more closely analogous.

[3] *Kearns* directly contradicts and supersedes *Nordberg v. Trilegiant Corp.*, 445 F. Supp. 2d 1082, 1097 (N.D. Cal. 2006), cited by Plaintiffs for the proposition that claims under the CLRA may not be subject to Rule 9(b). (Opp'n 12 n.6.)

Plaintiffs further allege that Defendants' actions violated the UCL. (FAC ¶¶ 172-181.) "Because [the UCL] is written in the disjunctive, it establishes three varieties of unfair competition - acts or practices which are unlawful, or unfair, or fraudulent." *Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co.*, 20 Cal. 4th 163, 180 (1999). Plaintiffs allege that Defendants violated all three prongs of the UCL. (FAC ¶¶ 172-181.) Flushmate contends that Plaintiffs have not made out any claim under the unlawful or unfair prongs of the UCL, and that Plaintiffs' claim under the fraudulent prong fails for substantially similar reasons as Plaintiffs' common law fraud and CLRA claims. (Flushmate Mot. 6-8.) The Court therefore considers whether Plaintiffs have pleaded a cause of action under the unlawful, fraudulent, and unfair prongs separately.[4]

a. Unlawful

Flushmate argues that the FAC fails to plead a cause of action under this prong of the UCL because Plaintiffs do not identify what other law Flushmate has allegedly violated. (Flushmate Mot. 7 n.5.) Plaintiffs counter that "[b]ecause Plaintiffs adequately state their CLRA claim, their [UCL] claim for 'unlawful' conduct against Flushmate also survives." (Opp'n 9.)

A UCL "claim must identify the particular section of the statute that was violated, and must describe with reasonable particularity the facts supporting the violation." *Brothers v. Hewlett-Packard Co.*, No. C-06-02254 RMW, 2006 WL 3093685, at *7 (N.D. Cal. Oct. 31, 2006) (citing *Khoury v. Maly's of California, Inc.*, 14 Cal. App. 4th 612, 619 (1993)). Here, Plaintiffs have not pleaded a violation of the UCL pursuant to the unlawful prong, as their UCL cause of action fails to articulate a violation of any other statute.

b. Fraudulent

Plaintiffs have also failed to plead a valid UCL claim under the fraudulent practices prong, as Plaintiffs have neither alleged actual reliance, nor have Plaintiffs alleged Flushmate's purportedly fraudulent acts with the requisite specificity under Rule 9(b), as set forth above. Specifically, as pointed out by Flushmate, any plaintiff under the UCL must establish that they "ha[ve] suffered injury in fact and ha[ve] lost money or property as a result of the unfair competition." Cal. Bus. & Prof. Code § 17204. Plaintiffs argue that they need not allege actual deception and reasonable

[4] The Court also notes at the outset that Pelka and Steiner cannot maintain any claim under the UCL because they do not reside in California and they do not allege a nexus between their injuries and California. *See Meridian Project Systems, Inc. v. Hardin Const. Co., LLC*, 404 F. Supp. 2d 1214, 1225 (E.D. Cal. 2005) (finding that non-California plaintiff's UCL claim failed because plaintiff did not allege that its injuries occurred in California). Thus, their UCL claims are **DISMISSED WITHOUT LEAVE TO AMEND**.

reliance under the fraudulent practices prong of the UCL pursuant to *Tobacco II*, where the California Supreme Court stated:

> It is necessary only to show that members of the public are likely to be deceived. . . . A [common law] fraudulent deception must be actually false, known to be false by the perpetrator and reasonably relied upon by a victim who incurs damages. None of these elements are required to state a claim . . . under the UCL.

Tobacco II, 46 Cal. 4th at 312 (internal citations and quotation marks omitted).

Plaintiffs' argument fails, however, because the quoted language refers to the requirements of the UCL **prior to** the enactment of Proposition 64, which acted to limit the UCL by amending the language of California Business and Professions Code section 17204, quoted above. Later in the opinion, the California Supreme Court discusses the impact of Proposition 64 on the UCL, stating that the language of section 17204 "imposes an actual reliance requirements on plaintiffs prosecuting a private enforcement action under the UCL's fraud prong." *Id.* at 326; *see also Pfizer Inc. v. Superior Court*, 182 Cal. App. 4th 622, 630-31 (2010). The court went on to explain that while "individualized reliance on specific misrepresentations" is not required to satisfy the reliance requirement of the UCL, plaintiffs must at the least demonstrate that they relied on a series of misrepresentations made by the defendant, and that such misrepresentations played a role in the plaintiff's decision-making. *Tobacco II*, 46 Cal. 4th at 326-28.

In the instant case, Plaintiffs fail to plead actual reliance as required by the UCL because they do not allege that they were exposed to any intentional misrepresentations or material from which material had been omitted. Plaintiffs do not even allege that they were exposed to a "long-term advertising campaign" on the part of Defendants, as had the plaintiffs in *Tobacco II,* which the court concluded was sufficient to show actual reliance for the purposes of the UCL. *Tobacco II*, 46 Cal. 4th at 328.

In addition, as already discussed, Plaintiffs have not met the heightened pleading standard of Rule 9(b). *See Kearns*, 567 F.3d at 1127-28. Thus, Plaintiffs' claim under the fraud prong of the UCL fails.

c. Unfair

Flushmate also contends that Plaintiffs have failed to state a cause of action under the unfair prong of the UCL because Plaintiffs do not "tether" their UCL claim to "some legislatively declared policy" pursuant to the California Supreme Court's decision in *Cel-Tech*. (Flushmate Mot. 7 n.5.) However, as noted by Plaintiffs, the "[California] Supreme Court has not established a definitive test to determine whether a business practice is unfair" in **consumer** cases under the UCL; the California Supreme Court's holding in *Cel-Tech* is limited to cases involving **competitors**. *Drum*

v. San Fernando Valley Bar Ass'n, 182 Cal. App. 4th 247, 256 (2010); *Cel-Tech*, 20 Cal. 4th at 187 n.12. This has led to a split of authority among the state's Courts of Appeal and the application of three different tests for unfairness. *Drum*, 182 Cal. App. 4th at 256.

To establish that a business practice is unfair, one line of cases requires "that the public policy which is a predicate to a consumer unfair competition action under the 'unfair' prong of the UCL must be tethered to specific constitutional, statutory, or regulatory provisions." *Id.* A second line of cases requires a finding that the business practice "is immoral, unethical, oppressive, unscrupulous[,] or substantially injurious to consumers and requires the court to weigh the utility of the defendant's conduct against the gravity of the harm to the alleged victim." *Id.* The "utility" of particular conduct is defined by the "reasons, justifications, and motives" behind the conduct. *S. Bay Chevrolet v. Gen. Motors Acceptance Corp.*, 72 Cal. App. 4th 861, 888 (1999). "The test applied in a third line of cases . . . requires that (1) the consumer injury must be substantial; (2) the injury must not be outweighed by any countervailing benefits to consumers or competition; and (3) it must be an injury that consumers themselves could not reasonably have avoided." *Drum*, 182 Cal. App. 4th at 257.

The Court finds that the FAC states a claim for violation of the unfair prong of the UCL upon which relief may be granted under the second two tests articulated above. Plaintiffs' unfair UCL claim fails the first test—whether the unfair competition action is tethered to a specific constitutional, statutory, or regulatory provision—for the same reason that Plaintiffs' UCL claim under the unlawful prong fails: the UCL claim does not mention any other provision of law that Defendants have allegedly violated. However, because the California Supreme Court expressly limited the use of this test to cases involving unfair **competitor** practices, this is not dispositive of Plaintiffs' UCL claim under the unfair prong.

As for the other two tests for unfair consumer practices under the UCL, the Court finds that Plaintiffs have stated a valid claim under either formulation. First, taking Plaintiffs' allegations as true, Flushmate has acted unscrupulously in a way that is substantially injurious to consumers by concealing information concerning the danger posed by their defective toilets and continuing to sell such toilets even after they were made aware of the danger. Further, such conduct has no "utility" at all, other than to avoid liability. Thus, Flushmate's alleged conduct is unfair under the UCL as analyzed under the "immoral, unethical, oppressive, unscrupulous, or substantially injurious" test.

Second, Plaintiffs' allegations also state a valid UCL claim under the third test because (1) concealing information concerning a dangerous product defect that potentially affects millions of consumers constitutes a substantial consumer injury; (2) the alleged concealment offers no countervailing benefits to consumers or competition; and (3) consumers could not avoid the injury on their own because Flushmate allegedly concealed the information relating to possible property damage and personal injury.

Thus, the Court finds that Plaintiffs state a claim upon which relief may be granted against Flushmate under the unfair prong of the UCL.

4. Plaintiffs' Fraud Claims Against the Toilet Manufacturers

The Toilet Manufacturers argue that Plaintiffs' fraud-based claims against them under the UCL and CLRA must fail because "Plaintiffs do not and cannot allege how notice of [the possibility that the Flushmate System was defective could transform the [Toilet Manufacturers'] preexisting description of toilets equipped with the Flushmate System into a 'deception' . . . ." (Toilet Manufacturers Mot. 4.) In addition, the Toilet Manufacturers note that, as the FAC alleges that Flushmate was in "exclusive possession" of purported material undisclosed facts concerning the defect, the Toilet Manufacturers cannot be liable for fraudulent concealment of such facts. (Toilet Manufacturer Reply 2; FAC ¶¶ 78, 169.) Plaintiffs do not respond to these arguments, stating that they have "at a minimum sufficiently pled express and implied warranty claims against these Defendants." (Opp'n 2.)

Plaintiffs' fraud claims against the Toilet Manufacturers under the UCL and CLRA are without merit. Even taking Plaintiffs' allegations as true, it does not appear that the Toilet Manufacturers had any more notice of the alleged defect than did consumers such as Plaintiffs; namely, the information contained in the 2000 and 2003 product advisories issued by Flushmate. According to the FAC, Flushmate was in "exclusive possession" of the allegedly undisclosed facts. (FAC ¶¶ 78, 169.) "[T]he failure to disclose a fact that a manufacturer does not have a duty to disclose, *i.e.*, a defect of which it is not aware, does not constitute an unfair or fraudulent practice." *Wilson v. Hewlett-Packard Co.*, 668 F.3d 1136, 1145 n.5 (9th Cir. 2012)

Plaintiffs do allege that the Toilet Manufacturers "received claims and complaints" concerning failures of toilets containing the Flushmate System (FAC ¶¶ 39, 45, 51), but these generalized allegations do not substantiate the claim that the Toilet Manufacturers thereby had material information beyond that contained in the product advisories. *See Baba v. Hewlett-Packard Co.*, No. C 09-05946 RS, 2011 WL 317650, at *3 (N.D. Cal. Jan. 28, 2011) (reasoning that "anecdotal complaints without dates or any other information are insufficient to allege that [the manufacturer of the allegedly defective product] possessed knowledge of the putative defect.").

Further, even if the Toilet Manufacturers did possess material information that they failed to disclose, Plaintiffs have not met the specificity requirements of Rule 9(b), as Plaintiffs do not state the circumstances under which material information was either misrepresented or omitted. Plaintiffs also do not demonstrate actual reliance with respect to the Toilet Manufacturers.

Because it does not appear that Plaintiffs can allege any set of facts giving rise to a claim upon which relief may be granted, the Court **DISMISSES WITHOUT LEAVE TO AMEND** the UCL and CLRA claims as to the Toilet Manufacturers.

C. Plaintiffs' Warranty Claims

1. Plaintiffs' Express Warranty Claim

"A manufacturer's liability for breach of an express warranty derives from, and is measured by, the terms of that warranty." *Cipollone v. Liggett Grp.*, 505 U.S. 504, 525 (1992). To plead a claim of breach of express warranty, a plaintiff must allege that the defendant "(1) made an affirmation of fact or promise or provided a description of its goods; (2) the promise or description formed part of the basis of the bargain; (3) the express warranty was breached; and (4) the breach caused injury to the plaintiff." *Stearns v. Select Comfort Retail Corp.*, 763 F. Supp. 2d 1128, 1142 (N.D. Cal. 2010). Further, such "a claim must describe the exact terms of the warranty, allege that the buyer reasonably relied on those terms, and that the breach of the warranty was the proximate cause of the buyer's injury." *Id.*

Flushmate contends that Plaintiffs' breach of express warranty claim fails because (1) Plaintiffs did not meet conditions precedent contained in the Flushmate limited express warranty (the "Flushmate Limited Warranty"); and (2) Plaintiffs do not allege the existence of any other express warranty upon which they could have relied. (Flushmate Mot. 14-17.) In addition, the Toilet Manufacturers argue that Plaintiffs have not asserted a valid breach of express warranty claim as to them because "Plaintiffs have alleged no defect of any kind in the various toilets manufactured by these [Toilet Manufacturers], in which the Flushmate Systems have been installed." (Toilet Manufacturers Mot. 4-5.)

a. The Flushmate Limited Warranty Conditions Precedent

While Plaintiffs did not attach the Flushmate Limited Warranty, the Court may nevertheless consider its contents, as Plaintiffs clearly rely on it in their FAC. *See Neilson v. Union Bank of Cal., N.A.*, 290 F. Supp. 1101, 1114 (C.D. Cal. 2003). The Flushmate Limited Warranty provides that Flushmate "promises to replace any part of this product that proves . . . to be defective in material or workmanship" provided that the product proves to be defective in material or workmanship upon inspection by Flushmate. (Flushmate Mot. 15; Decl. of Joseph M. Bosman in Supp. of Mot. to Dismiss Ex. A (the "Flushmate Limited Warranty"), ECF No. 52-1.) Plaintiffs contend that they need not meet these conditions precedent because Flushmate is a "remote manufacturer with which [Plaintiffs] have not dealt directly", and giving notice to Flushmate would have been futile given Flushmate's public admissions of the defect. (Opp'n 13-14.)

Plaintiffs are correct that consumers who did not deal with a manufacturer need not provide notice to the manufacturer of a **breach** of express warranty, as is generally required when consumers allege a breach of express warranty by a dealer. *See Keegan v. Am. Honda Motor Co., Inc.*, 838 F. Supp. 2d 929, 950 (C.D. Cal. 2012). Defendants, however, are not arguing that Plaintiffs failed to give them notice of a breach; rather, Defendants' argument is that **there was no breach in the first instance** due to Plaintiffs' failure to comport with the terms of the Flushmate Limited

Warranty. The Court agrees with Defendants that Plaintiffs must allege that they complied with the terms of the Flushmate Limited Warranty before they can allege any breach on the part of Flushmate. *See Campion v. Old Republic Home Prot. Co., Inc.*, 272 F.R.D. 517, 530 (S.D. Cal. 2011) ("The nature of some [warranties] is such that a demand for performance by one party is a necessary condition precedent to the obligation of the other to perform. In these circumstances, non-performance is not a breach unless performance is due."); *Marchante v. Sony Corp. of Am., Inc.*, 801 F. Supp. 2d 1013, 1020 (S.D. Cal. 2011).

Defendants' argument falters, however, because Plaintiffs **have** alleged that Ede, Williams, and Steiner all contacted Flushmate with respect to the allegedly defective Flushmate System, and Flushmate did not replace the Flushmate System as warranted. (FAC ¶¶ 118, 119, 126, 131, 137, 138.) Instead, Flushmate provided the allegedly inadequate repair kit, the installation of which Flushmate refused to pay for. (FAC ¶¶ 118, 119, 126, 131, 137, 138.) The Court finds that these allegations satisfy the Flushmate Limited Warranty's conditions precedent, and so these plaintiffs have made out a prima facie case for breach of express warranty under the Flushmate Limited Warranty.[5]

b. Other Express Warranties

Plaintiffs contend that Flushmate also breached other express warranties because "Flushmate made [express warranties] in its promotional literature, including statements that the Flushmate Product is 'free of defects in material and workmanship' . . . and comes with a 'lifetime warranty' . . . ." (Opp'n 14.) These generalized descriptions of these purported warranties that Flushmate allegedly breached fail under the plausibility standard articulated by the Supreme Court in *Iqbal* and *Twombly*, as Plaintiffs have not set forth when and where Flushmate made these representations, "the form of the warranty, the terms of the warranty, . . . [or] which actions constituted a breach of warranty." *Markel Am. Ins. Co. v. Pac. Asian Enters., Inc.*, No. C-07-5749 SC, 2008 WL 2951277, at *5-6 (N.D. Cal. July 28, 2008) (finding plaintiff's breach of express warranty claim failed where plaintiff made only generalized and conclusory allegations).

Further, Plaintiffs do not plead that they relied upon these other express warranties to their detriment. Plaintiffs do allege that these warranties "formed part of the basis of the bargain

[5] Plaintiffs do not allege that UDC or Pelka contacted Flushmate, and so their breach of express warranty claims fail; the dicta cited by Plaintiffs from *Metowski v. Traid Corp.*, 28 Cal. App. 3d 332, 339 (1972) ("Conceivably, the statutory demand for notice might be satisfied by proof of complaints from some but not all the buyer of the product") is not applicable because the issue here is not any **statutory** requirement for notice, but rather whether the terms of the Flushmate Limited Warranty have been satisfied. Further, Plaintiffs do not allege that Pritchard purchased his toilet at all, and so he cannot state a claim for breach of express warranty

between" Plaintiffs and Defendants (FAC ¶ 186), but this conclusory allegation is implausible on its face when Plaintiffs do not allege that they were exposed to these express warranties. Plaintiffs contend that they need not show reliance because "Flushmate extended express warranties to Plaintiffs and the proposed Class, not directly, but through the [Toilet Manufacturers]." (Opp'n 15.) Plaintiffs attempt to support this argument by citing to unrelated law holding that a third party beneficiary to a contract may enforce that contract without demonstrating reliance. This argument is without merit, as California law provides that when there is no privity of contract, as is the case here, a claim for breach of express warranty may **only** succeed when there is "reliance on a seller's representations . . . ." *Coleman v. Boston Scientific Corp.*, No. 1:10-CV-01968-OWW-SKO, 2011 WL 3813173, at *4 (E.D. Cal. Aug. 29, 2011) (citing *Fieldstone Co. v. Briggs Plumbing Prods., Inc.*, 54 Cal. App. 4th 357, 369 n.10 (1997). The Court therefore finds that Plaintiffs' breach of express warranty claim fails to the extent that it is predicated on breaches of express warranties other than the Flushmate Limited Warranty. *See In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices, and Prods. Liability Litig.*, 754 F. Supp. 2d 1145, 1183 (C.D. Cal. 2010) ("California law does not permit [plaintiffs], in the absence of specific allegations that they were aware of the statements . . . to base their express warranty claims on [those] statements . . . .").

Thus, Plaintiffs' breach of express warranty claim against Flushmate is **DISMISSED WITH LEAVE TO AMEND**. While Ede, Williams, and Steiner have stated a viable claim for breach of express warranty under the Flushmate Limited Warranty, Plaintiffs' other claims of breach of express warranty fail as currently pleaded.[6]

c. Plaintiffs' Express Warranty Claim Against the Toilet Manufacturers

Finally, the Court finds that Plaintiffs have failed to allege a valid claim for breach of express warranty against the Toilet Manufacturers. Per Plaintiffs' own allegations, the Toilet Manufacturers "provid[e] their own warranties for their toilets and 'flow[] down' Flushmate's warranties for the Flushmate System. For example, Gerber states at the bottom of their warranty, "For warranty issues related to Flushmate, contact [Flushmate]." (FAC ¶ 32.) Thus, the warranties provided by the Toilet Manufacturers specifically do not cover the Flushmate System. Because breaches of express warranties must be determined with respect to the exact terms of the warranties, Plaintiffs'

[6] The parties also dispute whether the Flushmate Limited Warranty is completely integrated such that language disclaiming all other express warranties is effective. (Flushmate Mot. 15 n.11; Opp'n 14-15 n.11.) Because the Court dismisses Plaintiffs' claims of breach of express warranty based on promises other than those contained in the Flushmate Limited Warranty, the Court declines to address this issue at this time. The Court does note, however, that questions concerning whether a contract is fully integrated are generally best decided on a more fully developed record.

breach of express warranty claim against the Toilet Manufacturers is **DISMISSED WITHOUT LEAVE TO AMEND**.

2. Plaintiffs' Breach of Implied Warranty Claim

Flushmate argues that Plaintiffs' breach of implied warranty claim also fails because (1) Plaintiffs have not established vertical privity between Plaintiffs and Defendants; and (2) the claims are untimely. (Flushmate Mot. 17-18.) In addition, the Toilet Manufacturers contend that no implied warranty claim may lie as to them because Plaintiffs have only alleged that the Flushmate System is defective, and not the toilets containing the Flushmate System. (Toilet Manufacturer Mot. 4-5.)

a. Vertical Privity

Plaintiffs argue that vertical privity is not required for their breach of implied warranty claims because "[u]nder California law, a manufacturer who extends a written warranty to a consumer brings itself into constructive privity with the consumer, regardless of whether the consumer purchased the product from an intermediate seller." (Opp'n 16.) Plaintiffs' argument fails by its own terms. Although California courts have held that vertical privity is not required to assert a claim for breach of express warranty when manufacturers extend written warranties directly to consumers, *see Cardinal Health 301, Inc. v. Tyco Elecs. Corp.*, 169 Cal. App. 4th 116, 143-44 (2008), this is not true for alleged breaches of **implied** warranty. Under California Commercial Code section 2314, "a plaintiff asserting breach of [implied] warranty claims must stand in vertical contractual privity with the defendant." *Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017, 1023-24 (9th Cir. 2008) (holding that plaintiff's implied warranty claim failed because of a lack of vertical privity with the defendant). While there are exceptions to this requirement—such as cases "involving foodstuffs, pesticides, and pharmaceuticals, and where the end user is an employee of the purchaser"—Plaintiffs have not alleged that this case falls within one of these exceptions. *Clemens*, 534 F.3d at 1023.

Plaintiffs' citations to *Atkinson v. Elk Corp. of Tex.*, 142 Cal. App. 4th 212, 229 (2006), and *Alvarez v. Felker Mfg. Co.*, 230 Cal. App. 2d 987, 997 (1964), for their argument that vertical privity is not required when a manufacturer extends an express warranty to consumers, are unavailing. "As several courts have noted, [the cited language] in *Atkinson* is dicta . . . Moreover, *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-Pacific Corp.*, No. C-09-3290 JCS, 2009 WL 3320470, at *6 (N.D. Cal. Oct. 13, 2009). *Alvarez* is similarly inapposite because, again, the language cited by Plaintiffs is dicta, and the cases to which *Alvarez* itself cites state only that vertical privity is not required in implied warranty claims in certain exceptional situations, as set forth above. This case does not present one of these exceptions.

Thus, Plaintiffs' implied warranty claims fail as pleaded, as they do not allege that they were in vertical privity with Flushmate, American Standard, Kohler, Gerber, or Mansfield, the defendants named in Plaintiffs' implied warranty cause of action.[7]

b. Latent Defects and Merchantability

Defendants further contend that "[b]ecause the implied warranty of merchantability applies to the initial condition of a product, and a breach thereof accrues at the time of delivery, Plaintiffs must demonstrate that their new product was not merchantable when they purchased it." (Flushmate Mot. 17.) Because Plaintiffs do not allege that their Flushmate System-equipped toilets were leaking or had burst at the time of purchase, Defendants argue, Plaintiffs' implied warranty claims must fail. (Flushmate Mot. 17-18.) Plaintiffs respond that, pursuant to the decision in *Mexia v. Rinker Boat Co.*, 174 Cal. App. 4th 1297 (2009), their implied warranty claims may proceed because the alleged defect here is a latent defect, and the toilets were thus unmerchantable at the time of sale.

The court in *Mexia* stated that "[t]he implied warranty of merchantability may be breached by a latent defect undiscoverable at the time of sale." *Id.* at 1304. Defendants counter that *Mexia* is contrary to established California law. Specifically, Defendants point to *Am. Suzuki Motor Corp. v. Superior Court*, 37 Cal. App. 4th 1291, 1298-99 (1995), which held that owners of a sports utility vehicle that was allegedly defective in that it tended to roll over could not assert a breach of implied warranty claim because most vehicles had not rolled over, and thus they remained fit for their ordinary purpose. *Id.* at 1297. Defendants' reliance on *Suzuki* is misplaced, as not only is *Mexia* a more recent decision, but the weight of authority clearly supports Plaintiffs' contention that latent defects render a product unmerchantable. *See Moore v. Hubbard & Johnson Lumber* Co., 149 Cal. App. 2d 236, 241 (1957); *Brittalia Ventures v. Stuke Nursery Co., Inc.*, 153 Cal. App. 4th 17, 24 (2007); *Garlock Sealing Techs., LLC v. NAK Sealing Techs. Corp.*, 148 Cal. App. 4th 937, 950-52 (2007). It therefore appears that the holding of *Suzuki* is best read as being restricted to the facts of that case; such a distinction is likely warranted, as the court in *Suzuki* seemed to be concerned that any consumer that used a product in a dangerous or foolhardy way such that it caused injury might thereby have a claim for breach of implied warranty. *Suzuki*, 37 Cal. App. 4th at 1297 (rejecting claim that the test of merchantability is whether the use of product "is free of all speculative risks, safety-related or otherwise.") This concern is not present here, as, to the Court's knowledge, Plaintiffs are not using their toilets in a dangerous or risky manner.

c. Plaintiffs' Implied Warranty Claim Against the Toilet Manufacturers

[7] While Steiner alleges that she purchased a toilet equipped with the Flushmate System from Defendant Home Depot, Home Depot is not named as a defendant in Plaintiffs' implied warranty cause of action.

Unlike Plaintiffs' express warranty claim, Plaintiffs' implied warranty claim against the Toilet Manufacturers is viable to the extent that Plaintiffs are able to establish vertical privity. The distinction arises because while the Toilet Manufacturers' express warranty explicitly did not extend to the Flushmate System, the implied warranty of merchantability warrants that the toilets sold by the Toilet Manufacturers were "fit for ordinary purposes for which such goods are used." *Hauter v. Zogarts*, 14 Cal. 3d 104, 117 (1975). The alleged latent defect in the Flushmate System causes the toilets sold by the Toilet Manufacturers to be unfit for their ordinary purpose: "to flush waste and flush it safely, without risk of property damage or personal injury." (Opp'n 20.) Because such latent defects may be the basis for breaches of the implied warranty of merchantability, as established above, Plaintiffs' implied warranty claim against the Toilet Manufacturers is just as viable as that against Flushmate.

Accordingly, Plaintiffs' breach of implied warranty claim is **DISMISSED WITH LEAVE TO AMEND**. Plaintiffs must establish vertical privity with Defendants to make out a viable claim for breach of implied warranty

D. Plaintiffs' Song-Beverly Act and MMWA Claims

Plaintiffs also allege breach of express and implied warranty under the Song-Beverly Act and the MMWA. The Song-Beverly Act "regulates warranty terms, imposes service and repair obligations on manufacturers, distributors, and retailers who make express warranties, requires disclosure of specified information in express warranties, and broadens a buyer's remedies to include costs, attorney's fees, and civil penalties." *Murillo v. Fleetwood Enters., Inc.*, 17 Cal. 4th 985, 989 (1998). The MMWA "establishes minimum standards for express and implied warranties for goods and offers consumer remedies when said warranties are found to be inadequate." *Hatami v. Kia Motors Am., Inc.*, No. SA CV 08-0226 DOC (MLGx), 2009 WL 1396385, at *2 (C.D. Cal. Apr. 20, 2009).

Flushmate alleges that Plaintiffs' claims under these statutes are defective for the following reasons: (1) Because Plaintiffs' California state warranty claims fail, so do their claims under these statutes; (2) Plaintiffs' Song-Beverly Act claims are not limited to those who purchased their toilets at retail in California; (3) Plaintiffs have not restricted their claims to consumer goods because UDC is a corporation; (4) Plaintiffs' Song-Beverly Act claim fails because they have not alleged that "their toilets leaked or burst in the first year after purchase"; and (5) Plaintiffs have failed to give Flushmate an opportunity to address their warranty concerns. (Flushmate Mot. 18-20). The Court addresses each argument in turn.

1. Plaintiffs' State Warranty Claims

As discussed above, the Court is dismissing with leave to amend Plaintiffs' express and implied breach of warranty claims. Thus, Plaintiffs' Song-Beverly Act and MMWA claims must also be dismissed. *See Birdsong v. Apple, Inc.*, 590 F.3d 955, 958 n.2 (9th Cir. 2009) (holding that "both

[the Song-Beverly Act and the MMWA] . . . require the plaintiff to plead successfully a breach of state warranty law."). Nevertheless, because Plaintiffs are being given leave to amend, the Court will consider Flushmate's remaining arguments in the interest of judicial economy.

2. Limiting Plaintiffs' Song-Beverly Act Claim to Toilets Purchased in California

The Song-Beverly Act applies only to "sale[s] of consumer goods that are sold at retail **in this state** . . . ." Cal. Civ. Code § 1792 (emphasis added). Although Plaintiffs' FAC alleges that "Plaintiffs and Class Members purchased toilets with a Flushmate System in the State of California," this assertion is belied by the fact that Plaintiffs are bringing this action as a putative **nationwide** class action. (FAC ¶ 152.) It is not possible that all of the proposed class members purchased their Flushmate System-equipped toilets in California. Further, Steiner is an Arizona resident who alleges that she purchased her toilet from Home Depot. (FAC ¶ 136.) It is not clear, however, that this transaction occurred in California.

Accordingly, when amending their complaint, Plaintiffs must limit their Song-Beverly Act claims to Plaintiffs and proposed class members who purchased their Flushmate System-equipped toilets in California.

3. Limiting Plaintiffs' Song-Beverly Act Claim to Consumer Goods

As just stated, the Song-Beverly Act applies only to "sale[s] of **consumer goods** . . . ." Cal. Civ. Code § 1792 (emphasis added). In turn, "consumer goods" is defined as "any new product or part thereof that is used, bought, or leased for use primarily for personal, family, or household purposes . . . ." Cal. Civ. Code § 1791(a). Defendants contend that because UDC is organized as a corporation, the toilets it purchased are not consumer goods under this definition, and so UDC may not bring a claim under the Song-Beverly Act. (Flushmate Mot. 19.) Plaintiffs respond only that "the California Plaintiffs include consumers who bought the offending toilets for personal, family, or household use." (Opp'n 19.)

Plaintiffs allege that UDC is a charitable organization that purchased seven toilets equipped with the Flushmate System that were installed at the UDC facility. (FAC ¶¶ 104-106.) These toilets "are used by a large volume of members of the public." (FAC ¶ 104.) This use of the toilets does not comport with the Song-Beverly Act's definition of consumer goods. The Court therefore finds that UDC may not assert a claim for relief under the Song-Beverly Act.

4. The Timeliness of Plaintiffs' Claim under the Song-Beverly Act

The Song-Beverly Act provides that "in no event shall [the implied warranty of merchantability] have a duration of less than 60 days nor more than one year following the sale of new consumer goods to a retail buyer." Cal. Civ. Code § 1791.1(c). Defendants argue that Plaintiffs' Song-

Beverly Act claim accordingly fails because "they do not allege that their toilets leaked or burst in the first year of purchase." (Flushmate Mot. 19.)

Defendants' argument is contravened by the court's decision in *Mexia*, which thoroughly considered this precise issue. *Mexia*, 174 Cal. App. 4th at 1308-11. After examining the language of the statute at length, as well as "the policy considerations at play in construing a provision of the Song-Beverly Act," the court concluded that the duration provision for the implied warranty of merchantability set forth in the Song-Beverly Act does not bar an action for breach of that warranty when the action is based on a latent condition that is not discovered by the consumer and reported to the seller within the duration period. *Id.* at 1310-11; *see also Ehrlich v. BMW of N. Am., LLC*, 801 F. Supp. 2d 908, 924 (C.D. Cal. 2010) (following the court's holding in *Mexia* and holding that plaintiff had adequately alleged a breach of the implied warranty under the Song-Beverly Act even though plaintiff did not discover the latent defect until three years after the purchase of the product).

As such, the Court adopts the reasoning of *Mexia.* Because the alleged defect in the Flushmate System is a latent defect, Plaintiffs' claim under the Song-Beverly Act is not barred by their failure to allege that the toilets leaked or burst in the first year of purchase.

5. Flushmate's Opportunity to Address Plaintiffs' Warranty Concerns under the Song-Beverly Act and the MMWA

Defendants next contend that Plaintiffs' Song-Beverly Act and MMWA claims fail because Plaintiffs have not "give[n] Flushmate any opportunity to address their warranty concerns, much less a 'reasonable number of attempts[.]" (Flushmate Mot. 20.) The Song-Beverly Act provides that "if the manufacturer or its representative in this state does not service or repair the goods to conform to the applicable express warranties after a reasonable number of attempts, the manufacturer shall either replace the goods or reimburse the buyer in an amount equal to the purchase price paid by the buyer . . . ." Cal. Civ. Code § 1792.3(d)(1). The MMWA provides that no class action may be brought "unless the person obligated under the warranty . . . is afforded a reasonable opportunity to cure such failure." 15 U.S.C. § 2310(e). Defendants argue that Plaintiffs have not satisfied these provisions.

As already discussed, the Court finds that Plaintiffs gave Flushmate adequate notice of the alleged defect. Further, Flushmate is clearly on notice of the existence of the alleged defect in light of the nationwide recall. The Court therefore finds that Plaintiffs have complied with these provisions of the Song-Beverly Act and the MMWA.

III. RULING

For the foregoing reasons, the Motions are **GRANTED IN PART** and **DENIED IN PART**. The Court orders as follows:

1. Plaintiffs' claim for fraudulent concealment/intentional misrepresentation against Flushmate is **DISMISSED WITH LEAVE TO AMEND**. Plaintiffs have failed to plead their intentional misrepresentation claim with the requisite specificity under Rule 9(b). Plaintiffs have also failed to allege actual reliance. Finally, the claim fails as a matter of law to the extent that Plaintiffs' claim relies on (1) phrases identified by the Court as constituting mere puffery and (2) Flushmate's compliance with industry standards.

2. Plaintiffs' claim under the CLRA against Flushmate is **DISMISSED WITH LEAVE TO AMEND**. Plaintiffs have failed to plead this claim with the requisite specificity under Rule 9(b), in addition to failing to allege actual reliance.

3. With respect to the Toilet Manufacturers, Plaintiffs' claims under the UCL and CLRA, as well as Plaintiffs' claim for breach of express warranty, are **DISMISSED WITHOUT LEAVE TO AMEND.**

4. Pelka and Steiner's claims under the UCL are **DISMISSED WITHOUT LEAVE TO AMEND**.

5. Plaintiffs' claim for breach of express warranty against Flushmate is **DISMISSED WITH LEAVE TO AMEND**. Plaintiffs have failed to allege that UDC and Pelka contacted Flushmate concerning the alleged defect. Plaintiffs have also not alleged that Pritchard actually purchased his toilet containing the Flushmate System. Further, Plaintiffs have failed to plead the existence of express warranties other than the Flushmate Limited Warranty.

6. Plaintiffs' claim for breach of implied warranty is **DISMISSED WITH LEAVE TO AMEND**. Plaintiffs have failed to allege that they were in vertical privity with the Defendants named in their implied warranty cause of action.

7. UDC's claim under the Song-Beverly Act is **DISMISSED WITHOUT LEAVE TO AMEND**. The remaining Plaintiffs' claims under the Song-Beverly Act and the MMWA are **DISMISSED WITH LEAVE TO AMEND** based on this Court's dismissal of Plaintiffs' state warranty claims.

8. Defendants' Motions are **DENIED** in all other respects.

Additionally, because the Court is dismissing Plaintiffs' FAC and granting Plaintiffs leave to amend, Defendant Home Depot's Motion to Dismiss (ECF No. 60) is **DENIED AS MOOT**. Plaintiffs shall file a Second Amended Complaint in strict accordance with this Order **on or before January 28, 2012**. Defendants shall file a responsive pleading **on or before February 18, 2012**.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

CASE NO.: CV 12-06878 SJO (SHx) **DATE: January 4, 2013**

IT IS SO ORDERED.