UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. 8:20-cv-00060-JLS-JDE Date: June 03, 2020
Title: Donald R. Nickerson v. Goodyear Tire and Rubber Corp.

Present: **Honorable JOSEPHINE L. STATON, UNITED STATES DISTRICT JUDGE**

Terry Guerrero	N/A
Deputy Clerk	Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFF:	ATTORNEYS PRESENT FOR DEFENDANT:
Not Present	Not Present

PROCEEDINGS: (IN CHAMBERS) ORDER (1) GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION TO DISMISS (Doc. 20) AND (2) DENYING DEFENDANT'S MOTION TO STRIKE CLASS ALLEGATIONS (Doc. 19)

Before the Court are two Motions filed by Defendant Goodyear Tire & Rubber Company: (1) a Motion to Dismiss (MTD, Doc. 20), and (2) a Motion to Strike Class Allegations (MTS, Doc. 19.). Plaintiff Donald Nickerson opposed each Motion (MTD Opp., Doc. 28; MTS Opp., Doc. 29), and Goodyear replied (MTD Reply, Doc. 31; MTS Reply, Doc. 30). Having taken the Motions under submission and considered the parties' briefs and all relevant papers on file, for the following reasons, the Court (1) GRANTS IN PART AND DENIES IN PART Goodyear's Motion to Dismiss and (2) DENIES Goodyear's Motion to Strike Class Allegations.

I. BACKGROUND[1]

Defendant Goodyear is in the business of designing, manufacturing, distributing, and selling tires for Recreational Vehicles ("RV"). (First Amended Complaint ("FAC") ¶ 1, Doc. 18.) This putative class action concerns Goodyear's line of Special Trailer Marathon Tires, which, according to Nickerson's FAC, "are used for boat trailers, fifth-

[1] For the purposes of Goodyear's Motion to Dismiss, the Court deems the well-pleaded allegations of the Complaint to be true.

wheels (trailers that require a coupling to be installed on the bed of a towing vehicle), travel trailers, and pop-up campers." (*Id.* ¶ 2.)

On approximately June 19, 2015, Nickerson purchased Marathon Tires, in size ST225/75R15, from Daniel's Tire Service in Orange, California. (*Id.* ¶ 42.) In July 2019, Nickerson prepared his trailer for a family trip to Lake Tahoe, the popular year-round destination which straddles the California-Nevada border. (*Id.* ¶ 45.) He "checked the condition and air pressure of the Marathon Tires to confirm that they were safe to use for traveling with his family." (*Id.*) On July 26, 2019, the trailer's right rear Marathon Tire blew out, failing while Nickerson was traveling at approximately fifty-five to sixty miles per hour with clear weather and road conditions near Visalia, California. (*Id.* ¶ 46.) Then, during the same trip, on August 7, 2019, the trailer's left rear Marathon Tire blew out, failing while Nickerson was traveling at approximately fifty miles per hour in "wet but clear" road conditions near Mono Lake, California. (*Id.* ¶ 48.) Nickerson alleges that he "did not hit any unexpected object" prior to either tire's failure. (*Id.* ¶¶ 46, 48.) Despite being over four years old at the time of the failures, the right and left rear tires had been driven only 2,700 and 2,900 miles respectively. (*Id.* ¶¶ 47, 49.) Nickerson avers that even though he "followed all of Goodyear's instructions regarding proper use of his Marathon Tire[s,]" each failed catastrophically, causing damage to his trailer requiring $1,841.73 in repairs and posing an extreme safety risk.[2] (*Id.* ¶ 50.) He then contacted the business from which he purchased his Marathon Tires in order to obtain replacements. (*Id.* ¶ 73.) The business informed Nickerson that the tires were out of warranty and refused to replace them. (*Id.*)

As the FAC puts it, Goodyear makes various representations as to the design, quality, and safety of the tires it places into the market. (*See id.* ¶¶ 3, 14-21.) Nickerson alleges that, despite these representations, Goodyear's Marathon tires have an inherent dangerous defect which causes them to "become susceptible to blowouts, and to prematurely fail as a result of bubbles or blisters on the tire side wall, loss of pressure, flat tires, and tread separation" (the "Defect"). (*Id.* ¶¶ 22-23.) He further asserts that

[2] The FAC notes that "[t]ire problems are inherently hazardous to vehicle safety" and "[t]ire blowouts, loss of tread, tire belt peel off, and other tire defects can make a vehicle driver lose control, often leading to a rollover crash." (FAC ¶ 40.)

Goodyear was aware of the existence of the defect as early as 2011 and yet failed to disclose it to consumers such as Nickerson. (*See id*. ¶¶ 26-39.) Nickerson does not provide the exact terms of the alleged Goodyear warranty in the body of the FAC, but states upon information and belief that:

> Plaintiff's Marathon tires have a warranty that extends until the treadwear indicators become visible or six years from the date of purchase, whichever occurs first. Within this warranty period, Marathon tires that become unserviceable due to a covered warranty condition during the first 2/32" (inch) treadwear or 12 months from date of purchase, whichever comes first, will be replaced with a comparable new Goodyear tire without charge. However, those owners remain responsible for the cost of mounting and balancing, which is not covered under the tire warranty. Tires that are not eligible for a "no-charge replacement" that become unserviceable due to a covered warranty condition are replaced on a prorated basis. Once again, these owners, including Plaintiff, remain responsible for mounting, balancing, and any additional related services, as well as any damages to their RVs caused by the failure of the tires.[3]

(*Id*. ¶ 52.)

Nickerson filed this action on January 13, 2020. (Complaint, Doc. 1.) He seeks to represent a class of individuals defined as:

> All persons who purchased Goodyear's ST Marathon Tires for personal or family use in the State of California.

(FAC ¶ 53.) In his operative pleading, he brings claims for: (1) breach of express warranty; (2) breach of implied warranty; (3) breach of express and implied warranties under the Magnuson-Moss Warranty Act ("MMWA"), 28 U.S.C. Section 2301, et seq.; (4) violation of California's Song-Beverly Consumer Warranty Act, California Civil Code Section 1790, et seq.; (5) violation of California's Consumer Legal Remedies Act ("CLRA"), California Civil Code Section 1770, et seq.; (6) violation of California's

[3] These warranty terms are derived from the Goodyear Tire and Care Guide referenced in the FAC. (*See, e.g.*, FAC ¶ 16 n.8.)

Unfair Competition Law ("UCL"), California Business & Professions Code Section 17200, et seq.; and, (7) injunctive and declaratory relief. (*Id.* ¶¶ 70-138.)

II. LEGAL STANDARD

A. Rules 12(b)(6) and 9(b)

"Federal Rule of Civil Procedure 12(b)(6) allows a court to dismiss a complaint for 'failure to state a claim upon which relief can be granted.' Dismissal of a complaint can be based on either a lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." *Alfred v. Walt Disney Co.*, 388 F. Supp. 3d 1174, 1180 (C.D. Cal. 2019) (citation omitted) (quoting Fed R. Civ. P. 12(b)(6)). In deciding a motion to dismiss under Rule 12(b)(6), courts must accept as true all "well-pleaded factual allegations" in a complaint. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). Courts must also draw all reasonable inferences in the light most favorable to the non-moving party. *See Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998 (9th Cir. 2010). Yet, "courts 'are not bound to accept as true a legal conclusion couched as a factual allegation.'" *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Papasan v. Allain*, 478 U.S. 265, 286 (1986)).

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 556). A plaintiff must not merely allege conduct that is conceivable. When "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." *Iqbal*, 556 U.S. at 678 (internal quotation marks omitted).

Claims sounding in fraud must also pass muster under Rule 9(b) of the Federal Rules of Civil Procedure, which requires that allegations of fraud be made "with particularity." *See* Fed. R. Civ. P. 9(b). To satisfy Rule 9(b)'s higher pleading standard,

plaintiffs bringing claims sounding in fraud must sufficiently allege "'the who, what, when, where, and how' of the misconduct charged[.]" *Hunt v. Sunny Delight Beverages Co.*, No. 8-18-cv-00557-JLS-DFM, 2018 WL 4057812, at *5 (C.D. Cal. Aug. 23, 2018). However, "[w]hile the factual circumstances of the fraud itself must be alleged with particularity, the state of mind—or scienter—of the defendants may be alleged generally." *Odom v. Microsoft Corp.*, 486 F.3d 541, 554 (9th Cir. 2007) (citing *In re GlenFed, Inc. Sec. Litig.*, 42 F.3d 1541, 1547 (9th Cir.1994)); Fed. R. Civ. P. 9(b).

Finally, the Court may not dismiss a complaint without leave to amend unless "it is absolutely clear that the deficiencies of the complaint could not be cured by amendment." *Karim-Panahi v. Los Angeles Police Dep't*, 839 F.2d 621, 623 (9th Cir. 1988) (internal quotation marks omitted).

B. Rule 12(b)(1)

"When a motion is made pursuant to Rule 12(b)(1), the plaintiff has the burden of proving that the court has subject matter jurisdiction." *Marino v. Countrywide Fin. Corp.*, 26 F. Supp. 3d 955, 959 (C.D. Cal. 2014) (citing *Tosco Corp. v. Cmtys. for a Better Env't*, 236 F.3d 495, 499 (9th Cir. 2001)). "Dismissal for lack of subject matter jurisdiction is appropriate if the complaint, considered in its entirety, on its face fails to allege facts sufficient to establish subject matter jurisdiction." *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, 546 F.3d 981, 984-85 (9th Cir. 2008). When considering a Rule 12(b)(1) motion, the Court "is not restricted to the face of the pleadings, but may review any evidence, such as affidavits and testimony, to resolve factual disputes concerning the existence of jurisdiction." *McCarthy v. United States*, 850 F.2d 558, 560 (9th Cir. 1988). "The plaintiff bears the burden of proving by a preponderance of the evidence that each of the requirements for subject-matter jurisdiction has been met" and "must support her jurisdictional allegations with 'competent proof.'" *Leite v. Crane Co.*, 749 F.3d 1117, 1121 (9th Cir. 2014).

C. Rules 12(f) and 23

Under Rule 12(f), a court "may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. P. 12(f). Pursuant to Rule 23, a Court need not wait until a plaintiff files a motion seeking to certify a class before addressing the matter of class certification. *See Vinole v. Countrywide Home Loans, Inc.*, 571 F.3d 935, 939-41 (9th Cir. 2009). And "[t]he function of a 12(f) motion to strike is to avoid the expenditure of time and money that must arise from litigating spurious issues by dispensing with those issues prior to trial. . .." *Whittlestone, Inc. v. Handi–Craft Co.*, 618 F.3d 970, 973 (9th Cir. 2010) (quoting *Fantasy, Inc. v. Fogerty*, 984 F.2d 1524, 1527 (9th Cir.1993), *rev'd on other grounds*, 510 U.S. 517 (1994)).

However, "[m]otions to strike, as a general rule, are disfavored." *Beal v. Lifetouch, Inc.*, No. CV 10–8454–JST (MLGx), 2011 WL 995884, at *7 (C.D. Cal. Mar. 15, 2011) (quoting *Stabilisierungsfonds Fur Wein v. Kaiser*, 647 F.2d 200, 201 (D.C. Cir. 1981)). "This is because they are 'often used as delaying tactics, and because of the limited importance of pleadings in federal practice.'" *Id.* (quoting *Bureerong v. Uvawas*, 922 F. Supp. 1450, 1478 (C.D. Cal. 1996)). Thus, "[m]otions to strike should not be granted unless it is clear that the matter to be stricken could have no possible bearing on the subject matter of the litigation." *Id.* (quoting *Liley v. Charren*, 936 F. Supp. 708, 713 (N.D.Cal.1996)); *see also Varsam v. Lab. Corp. of Am.*, 120 F. Supp. 3d 1173, 1184 (S.D. Cal. 2015) ("While class allegations can be stricken at the pleadings stage if the claim *could not possibly* proceed on a classwide basis, 'it is in fact rare to do so in advance of a motion for class certification.'") (emphasis added). "Rule 12(f) is 'neither an authorized nor a proper way to procure the dismissal of all or a part of a complaint.'" *Yamamoto v. Omiya*, 564 F.2d 1319, 1327 (9th Cir.1977). "Were [courts] to read Rule 12(f) in a manner that allowed litigants to use it as a means to dismiss some or all of a pleading ..., [they] would be creating redundancies within the Federal Rules of Civil Procedure, because a Rule 12(b)(6) motion (or a motion for summary judgment at a later stage in the proceedings) already serves such a purpose." *Whittlestone*, 618 F.3d at 974.

III. DISCUSSION

The Court addresses, in turn, Goodyear's arguments for the dismissal of each of Nickerson's claims before explaining why Goodyear's Motion to Strike Class Allegations is premature.

A. Breach of Warranty-Based Claims

1. Breach of Express Warranty

"To prevail on a breach of express warranty claim, a plaintiff must prove that the seller (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." *McCarthy v. Toyota Motor Corp.*, No. 8:18-cv-00201-JLS-KES, 2018 WL 6318841, at *7 (C.D. Cal. Sept. 14, 2018) (quoting *Asghari v. Volkswagen Grp. of Am., Inc.*, 42 F. Supp. 3d 1306, 1333 (C.D. Cal. 2013)). Goodyear argues that Nickerson fails to sufficiently allege: (1) the terms of warranty; (2) a breach of the alleged warranty; or (3) reliance on the alleged warranty. (MTD at 15-18.)

First, the Court finds that Nickerson has adequately alleged the material terms of the express warranty in question. As noted above, he specifically alleges that Goodyear expressly warrants its Marathon Tires "until the treadwear indicators become visible or six years from the date of purchase, whichever occurs first." (FAC ¶ 52.) For tires covered under the warranty, those that become unserviceable in the first twelve months following their purchase are eligible for no-charge replacement with a comparable, new Goodyear tire. (*Id.*) For the next five years, such unserviceable tires are eligible for replacement "on a prorated basis." (*Id.*) "These allegations are sufficient to put [Goodyear] on notice of the terms of the express warranty that [Nickerson is] asserting." *McCarthy*, 2018 WL 6318841, at *7 (citing *Sater v. Chrysler Grp. LLC*, No. EDCV 14-00700-VAP, 2015 WL 736273, at *4 (C.D. Cal. Feb. 20, 2015)).

Second, as to a breach, in both the FAC and his Opposition, Nickerson references Goodyear's Recreational Vehicle Tire and Care Guide. (*See, e.g.*, FAC ¶ 16; MTD Opp. at 3 n.2.) He asserts that the warranty at issue in this case is outlined in that Guide. (MTD Opp. at 3, n.2; Pltfs.' RJN at 2, Doc. 27.)[4] Goodyear argues that, assuming this written warranty was in effect when Nickerson purchased his Marathon Tires, the document's written terms demonstrate that Nickerson must amend his Complaint to allege all exclusions from warranty coverage, state that his tires failed specifically from a covered condition, and declare that he complied with all requirements regarding presentation of the allegedly faulty tires to Goodyear. (Mot. at 16; Reply at 12-13.) But as noted above, Nickerson has already alleged that he followed all Goodyear instructions regarding proper use of the tires and upon failure, properly presented the tires to a Goodyear-authorized dealership for replacement but was unable to obtain any relief under the express warranty. (FAC ¶¶ 50, 71, 73.) Thus, as Nickerson sets forth the material terms of the warranty and details his contention that Goodyear failed to adhere to those terms by replacing his tires, Goodyear's argument bears squarely on whether there was an actual breach of the express warranty. However, any assertion that Goodyear did not breach the warranty is more appropriately tested at the summary judgment stage – at the pleading stage the Court accepts Nickerson's allegations clearly indicating that he complied with the terms of the express warranty and Goodyear did not.

[4] Nickerson requests that the Court take judicial notice of the Goodyear Recreational Tire and Care Guide as well as the complaint and docket sheet in *Kalustian v. Goodyear Tire & Rubber Co.*, Case No. 18-cv-2592 (N.D. Ohio). (Pltfs.' RJN, Doc. 27.) Similarly, Goodyear requests that the Court take judicial notice of two National Highway Traffic Safety Administration documents, a report titled "Tire-Related Factors in the Pre-Crash Phase" and a letter written by its Director of Governmental Affairs regarding a consumer's experience with Marathon Tires. (Def's. RJNs, Docs. 21, 32.) Nickerson's RJN is GRANTED as to the Tire and Care Guide. *Better Homes Realty, Inc. v. Watmore*, Case No.: 3:16-cv-01607-BEN-MDD, 2017 WL 1400065, at *2 (C.D. Cal. April 18, 2017) (noting that a court "may take judicial notice of material which is included in, referenced in, or relied upon by the complaint"). The parties' RJNs are otherwise DENIED. *Neylon v. Cty. of Inyo*, No. 1:16- CV-0712 AWI JLT, 2016 WL 6834097, at *4 (E.D. Cal. Nov. 21, 2016) (citing *Adriana Intern. Corp. v. Thoeren*, 913 F.2d 1406, 1410 n. 2 (9th Cir. 1990)) ("if an exhibit is irrelevant or unnecessary to deciding the matters at issue, a request for judicial notice may be denied").

Goodyear also takes issue with Nickerson's allegation that "Goodyear materially breached its express warranties by manufacturing and selling Marathon Tires that contained the Defect." (FAC ¶ 72; Mot. 16-17; Reply at 12.) While that allegation does not support a breach of express warranty claim, *see Punian v. Gillette Co.*, No. 14-CV-05028-LHK, 2016 WL 1029607, at *6 (N.D. Cal. Mar. 15, 2016) ("An express warranty is not a representation that a product has no defects, but rather a promise to repair, replace, or refund a failed product."), the allegation that Goodyear refused to properly furnish a replacement does. (FAC ¶¶ 72, 73.)

Finally, the parties dispute whether, under the circumstances of this case, Nickerson must plead facts demonstrating that he relied on Goodyear's express warranty in purchasing his Marathon Tires. (Mot. at 16; MTD Opp. at 7; Reply at 14-15.) This Court has previously held that where, as here, "the parties are not in privity, 'California law requires a showing that a plaintiff relied on an alleged warranty.'" *McCarthy*, 2018 WL 6318841, at *7 (*citing Asghari*, 42 F. Supp. 3d at 1335).[5] Nickerson does not dispute that the FAC is utterly devoid of allegations showing that he relied on, or was even exposed to, the alleged express warranty. (MTD Opp. at 7.) Instead, he simply argues that it need not contain any. (*Id.*)

Because Nickerson has made no allegation that he was ever exposed to the statements concerning the express warranty in Goodyear's Tire and Care Guide, and relied thereon, his claim for breach thereof is DISMISSED.[6]

[5] The Court acknowledges the split of authority on this point. *See, e.g.*, *In re 100% Grated Parmesan Cheese Mktg. & Sales Practices Litig.*, 393 F. Supp. 3d 745, 762 (N.D. Ill. 2019) (collecting cases and explaining three different approaches taken in recent years by federal and California state courts with respect to whether reliance is required to assert a breach of express warranty claim absent privity); *compare In re MyFord Touch Consumer Litig.*, 46 F. Supp. 3d 936, 972-74 (N.D. Cal. 2014) (finding reliance not required in this context), *with Asghari*, 42 F. Supp. 3d at 1333-35 (reaching the opposite conclusion). However, this Court finds more persuasive the argument that, in cases lacking privity between the parties, the California Supreme Court, which has yet to speak on the matter, would continue to find some form of reliance significant. *See Parmesan Cheese*, 393 F. Supp. 3d at 763.

[6] In his FAC, Nickerson additionally contends that the express warranty is "unconscionable, and therefore fails of its essential purpose." (FAC ¶ 74.) Despite Goodyear's challenge to this contention as untenable, Nickerson failed to offer any response in Opposition. (Mot. at 17-18.;

2. Breach of Implied Warranty

"Merchantability," is generally construed as the requirement that a product conforms to, and is fit for, its ordinary and intended use. *McCarthy*, 2018 WL 6318841, at *9. "With respect to defective cars, courts have interpreted this to require that plaintiffs allege that the defect either actually manifested or 'is substantially certain to result in malfunction during the useful life of the product.'" *Id.* (quoting *Sims v. Kia Motors Am., Inc.*, No. SACV-13-1791-AGD (FMx), 2014 WL 12558251, at *3 (C.D. Cal. Oct. 8, 2014)). That automotive standard is applicable here.

Goodyear argues that Nickerson's claims for breach of the implied warranty of merchantability under the Uniform Commercial Code and in violation of the Song Beverly Act are deficient because he (1) is not in vertical privity with Goodyear and (2) does not allege facts sufficient to support the inference that a defect exists. (Mot. at 18-19.)

First, this Court has previously explained that there is an established "exception to the privity requirement for a breach of implied warranty of merchantability claim if a plaintiff can show that he was a third party beneficiary of a contract between the defendant and a third party." *Kearney v. Hyundai Motor Am.*, No. SACV09-1298-JST MLGX, 2010 WL 8251077, at *10 (C.D. Cal. Dec. 17, 2010) (collecting cases). "'Because third party beneficiary status is a matter of contract interpretation, a person seeking to enforce a contract as a third party beneficiary must plead a contract which was made expressly for his or her benefit and one in which it clearly appears that he or she was a beneficiary.'" *Id*. (quoting *In re NVIDIA GPU Litig.*, No. C 08-04312 JW, 2009 WL 4020104, at *6 (N.D. Cal. Nov. 19, 2009)). "While 'the third person need not be named or identified individually to be an express beneficiary,' he must show that 'he is a member of a class of persons for whose benefit [a contract] was made.'" *Id*. (quoting

MTD Opp. at 6-7; Reply at 14.) As Goodyear notes, Nickerson has thus waived his unconscionability argument. *Resnick v. Hyundai Motor Am., Inc.*, No. CV 16-00593-BRO (PJWx), 2017 WL 1531192, at *22 (C.D. Cal. Apr. 13, 2017) ("Failure to oppose an argument raised in a motion to dismiss constitutes waiver of that argument."); *see also* C.D. Cal. L.R. 7-12.

Schauer v. Mandarin Gems of California, Inc., 125 Cal. App. 4th 949, 1023 (2005)). Nickerson alleges that Goodyear's warranties accompanied his Marathon Tires and "were intended to benefit the ultimate customer." (FAC ¶ 84.) He asserts that while he purchased his tires from an intermediate seller, he is an intended beneficiary of the contracts between Goodyear and the intermediary. (*Id.*) "[W]here a plaintiff pleads that he or she is a third-party beneficiary to a contract that gives rise to the implied warranty of merchantability, he or she may assert a claim for the implied warranty's breach.'" *Kearney*, 2010 WL 8251077, at * 10 (citing *In re Toyota*, 2010 WL 4867562, at *30), Thus, privity is not an obstacle to the assertion of Nickerson's claim.

Second, the allegations of the FAC are adequate to support the inference that there exists an inherent defect in the Marathon Tires. Goodyear contends that it is not substantially certain that any supposed defect will manifest in a future malfunction during the tires' service life and further, that there are many potential reasons why a tire might fail. (Mot. at 18-19.) But Goodyear relies on inapposite caselaw. In *Keegan*, the court addressed a plaintiff's burden of proof at the class certification stage, ultimately explaining that a plaintiff is not required to "adduce evidence that a defect is substantially certain to arise in all class vehicles during the vehicles' useful life" in order to overcome Rule 23(b)(3)'s predominance hurdle, and never addressing the type of allegations necessary at the pleading stage. *Keegan v. Am. Honda Motor Co.*, 284 F.R.D. 504, 527-28, 534-37 (C.D. Cal. 2012). In *Elias*, a plaintiff asserted that even if his computer did not malfunction during the warranty period, his claim for breach of express warranty was still valid because he identified an inherent defect which was substantially certain to cause that malfunction. *Elias v. Hewlett-Packard Co.*, 903 F. Supp. 2d 843, 851 (N.D. Cal. 2012). The *Elias* court noted that the allegations neither described a defect that was "inherent" to the product, nor adequately explained how the defect was likely to lead to the malfunction at issue. *Id.* In contrast, here, Nickerson's tires failed within the six-year warranty period, allegedly due to the Defect, by which bubbles or blisters on the side wall, loss of pressure, flat tires, and tread separation render the tires susceptible to blowouts. (FAC ¶¶ 23, 46-49.) Nickerson alleges that his experience is not unique, but part of a years-long "pattern of low-mileage, low-speed tire failures" experienced by

purchasers of certain of Goodyear's tires. (MTD Opp. at 10; FAC ¶¶ 26-37.) These allegations are sufficient to suggest an inherent defect in the Marathon Tires.

Accordingly, Nickerson has adequately pleaded his breach of implied warranty claim.

3. Magnuson-Moss Warranty Act Claim

The Magnuson-Moss Warranty Act "explicitly divests federal courts of jurisdiction over MMWA claims in suits brought as class actions with fewer than 100 named plaintiffs." *Sosenko v. LG Elecs. U.S.A., Inc.*, No. 8:19-cv-00610-JLS-ADS, 2019 WL 6118355, at *6 (C.D. Cal. Aug. 29, 2019) (citing 15 U.S.C. § 2310(d)(3)(C)). Although Goodyear raised this jurisdictional requirement in its Motion to Dismiss, Nickerson declined to address it, thereby conceding the validity of the argument. *See* Mot. at 19; MTD Opp. at 10; *Tatum v. Schwartz*, No. CIV S-06-01440DFLEFB, 2007 WL 419463, at *3 (E.D. Cal. Feb. 5, 2007).

Because Nickerson does not name least 100 plaintiffs and does not request leave to amend that aspect of his FAC, the Court lacks jurisdiction over his MMWA claim, and the claim is therefore DISMISSED without leave to amend.

B. Consumer Fraud Claims

In order to prevail on his CLRA and UCL claims, Nickerson "must show that Toyota made an actionable misrepresentation in the form of either an affirmative false representation, concealment, or nondisclosure of a material fact." *McCarthy*, 2018 WL 6318841, at *3. Both claims are founded on the same underlying facts: that Goodyear (1) failed to disclose the Defect inherent in its Marathon Tires, (2) represented the Marathon Tires would function normally, as intended, and not prematurely fail, (3) represented the Marathon Tires were of a higher standard or quality that they truly were, and (4) "advertis[ed] the Marathon Tires with the intent not to sell them as advertised." (FAC ¶¶ 114-131.)

Goodyear argues that, as a threshold matter, Nickerson failed to provide Goodyear with the proper pre-suit notice of his CLRA claim. (MTD at 29.) Goodyear also contends that Nickerson's CLRA and UCL claims require dismissal because he fails to allege with any particularity that he relied on, or was even exposed to, any statement made by Goodyear through its advertising efforts – or that he would have altered his purchasing behavior had Goodyear disclosed the purportedly omitted information. (*Id*. at 20-22.) Goodyear further asserts that Nickerson has not sufficiently identified the alleged defect, and that Nickerson's alleged facts do not give rise to either an actionable affirmative misrepresentation or an actionable omission. (*Id*. at 22-29). The Court addresses each argument in turn.

1. Failure to Allege Compliance with CLRA Notice Provision

California Civil Code Section 1782 requires that a plaintiff provide thirty-day advance notice to a defendant before filing an action for damages under the CLRA. Cal. Civ. Code § 1782(a)-(c). Where a plaintiff fails to provide such notice, the damages "'claim must simply be dismissed until 30 days or more after the plaintiff complies'" with the dictates of Section 1782. *Bitton v. Gencor Nutrientes, Inc.*, 654 F. App'x 358, 362 (9th Cir. 2016) (quoting *Morgan v. AT & T Wireless Servs., Inc.*, 177 Cal. App. 4th 1235 (2009)).

Nickerson acknowledges his failure to plead satisfaction of Section 1782 and requests leave to amend in order to cure the deficiency. (MTD Opp. at 20-21.) Therefore, while this failure warrants dismissal, Nickerson shall be granted leave to amend to plead compliance with the notice provision.

2. Failure to Allege Reliance with Particularity

"The CLRA makes illegal various 'unfair methods of competition and unfair or deceptive acts or practices undertaken by any person in a transaction intended to result or which results in the sale or lease of goods or services to any consumer.'" *Asghari*, 42 F.

Supp. 3d at 1314 (quoting Cal. Civ. Code § 1770(a)). "The UCL prohibits, and provides civil remedies for, unfair competition, which it defines as 'any unlawful, unfair or fraudulent business act or practice.'" *Kwikset Corp. v. Superior Court*, 51 Cal. 4th 310, 320 (2011) (quoting Cal. Bus. & Prof. Code § 17200). "The Ninth Circuit has 'specifically ruled that Rule 9(b)'s heightened pleading standards apply to claims for violations of the CLRA and UCL.'" *Kearney*, 2010 WL 8251077, at *4 (quoting *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1125 (9th Cir. 2009). "Thus, for [his] CLRA and UCL claims to satisfy Rule 9(b), [Nickerson] must provide the 'who, what, when, where, and how of the misconduct charged.'" *Id.* (quoting *Kearns*, 567 F.3d at 1124).

Accordingly, Nickerson is required to plead, with particularity, facts to satisfy the UCL and CLRA's "'independent requirements for standing, which mandate allegations of actual reliance.'" *Paul Guzman et al. v. Polaris Indus., Inc. et al.*, No. 8:19-cv-01543-JLS-KES, 2020 WL 2477684, at *3 (C.D. Cal. Feb. 13, 2020); *see also Elias*, 903 F. Supp. 2d at 855 (citing *Kwikset*, 51 Cal. 4th 310; *In re Tobacco II Cases*, 46 Cal.4th 298, 326 (2009)) (disposing of conclusory allegations and explaining that to assert CLRA and UCL claims, it must be specifically explained "*how* Plaintiff relied on Defendants' representations"). As mentioned above, the FAC is deficient in this respect – its sole allegation bearing on reliance is the conclusory statement that "[Nickerson] and Class Members reasonably relied upon Goodyear's knowing [misrepresentations] and/or omissions." (FAC ¶ 65.) While Nickerson recounts numerous statements made by Goodyear regarding its Marathon Tires, (*id.* ¶¶ 16-20), the FAC is completely devoid of any allegation indicating that he was ever exposed to a single such statement. (*See generally id.*)

Nor may Nickerson satisfy the actual reliance requirement by pointing to his allegations that Goodyear made material omissions. (*See* MTD Opp. at 13-14.) Just as with claims based on affirmative misrepresentations, actual reliance is "an essential element" of claims based on omissions. *Daniel v. Ford Motor Co.*, 806 F.3d 1217, 1225 (9th Cir. 2015). "To prove reliance on an omission, a plaintiff must show that the defendant's nondisclosure was an immediate cause of the plaintiff's injury-producing conduct." *Id.* "A plaintiff may do so by simply proving 'that, had the omitted information been disclosed, one would have been aware of it and behaved differently.'"

Id. (quoting *Mirkin v. Wasserman*, 5 Cal.4th 1082 (1993)). But Nickerson is presently incapable of making that kind of showing because he has submitted no allegation demonstrating that he would have been aware of information allegedly omitted by Goodyear, had that information been disclosed.

The complete absence of allegations relating to reliance alone requires dismissal of Nickerson's CLRA and UCL claims. However, because leave to amend is appropriate in this instance, the Court addresses Goodyear's remaining arguments as to these claims.

3. Failure to Identify the Defect

With respect to the consumer fraud claims, Goodyear renews and adds to its arguments that Nickerson has not sufficiently described a defect. (MTD at 24-27.) But as the Court explained above, in Section III.A.2., Nickerson satisfactorily alleges the existence of a defect in the Marathon Tires. It is very clear what Nickerson is alleging – that the Marathon Tires are prone to developing bubbles on the tire sidewall, tread separation, and loss of pressure, which causes the tires to fail prematurely. (FAC ¶ 23.) And again on this issue, the caselaw Goodyear cites to the contrary is inapposite, involving (1) determinations made at the class certification stage and (2) concerns regarding tire failure where there was very limited information on the wear experienced by, and usage life of, the tire. (See MTD at 26-27 (citing *Wolin v. Jaguar Land Rover North America, LLC*, 617 F.3d 1168, 1174 (9th Cir. 2010); *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1018-21 (7th Cir. 2002); *Beauregard v. Continental Tire North America, Inc.*, 695 F.Supp.2d 1344 (M.D. Fla. 2010)). In contrast, this case is at the pleading stage and Nickerson has affirmatively alleged that he followed all Goodyear instructions on proper use of his Marathon Tires, which failed prior to being used for 3,000 miles. (FAC ¶¶ 47, 49, 50.) Nickerson has adequately pleaded an inherent defect in the Marathon Tires.

4. Failure to Allege Actionable Misrepresentation or Omission

Goodyear argues that because the FAC (1) identifies only affirmative Goodyear statements that qualify as puffery and (2) does not plausibly allege that Goodyear had knowledge of the Defect prior to Nickerson's purchase, it lacks allegations of either an actionable misrepresentation or omission. The Court agrees.

a. Misrepresentation

The CLRA and UCL are each governed by the "reasonable consumer" test under which Nickerson "must show that members of the public are likely to be deceived." *Williams v. Gerber Prod. Co.*, 552 F.3d 934, 938 (9th Cir. 2008) (internal quotations omitted). "Although misdescriptions of specific or absolute characteristics of a product are actionable, generalized, vague, and unspecified assertions constitute mere puffery upon which a reasonable consumer could not rely." *McKinney v. Google, Inc.*, No. 10–cv–01177–EJD, 2011 WL 3862120, at *6 (N.D. Cal. Aug. 30, 2011) (internal quotation marks, citations, and modifications omitted). "[T]o be actionable as an affirmative misrepresentation, a statement must make a specific and measurable claim, capable of being proved false or of being reasonably interpreted as a statement of objective fact." *Vitt v. Apple Computer, Inc.*, 469 Fed. Appx. 605, 607 (9th Cir. 2012) (internal quotation marks omitted). "[P]roduct superiority claims that are vague or highly subjective often amount to nonactionable puffery." *Peviani v. Nat. Balance, Inc.*, 774 F. Supp. 2d 1066, 1072 (S.D. Cal. 2011). And "[w]hether a statement is puffery or a representation of fact is a question of law that can be properly decided on a motion to dismiss." *Yetter v. Ford Motor Co.*, 428 F. Supp. 3d 210, 234 (N.D. Cal. 2019) (citing *Cook, Perkiss & Liehe, Inc. v. N. California Collection Serv. Inc.*, 911 F.2d 242, 245 (9th Cir. 1990)).

Contrary to Nickerson's assertions, each of the statements currently relied on in the FAC falls on the unactionable side of the line between puffery and specific descriptions of products on which reasonable consumers might rely. For example, Nickerson highlights Goodyear's statements that Marathon Tires are "optimized for on-

/off-road conditions" and "designed to deliver performance durability and comfort;" (See FAC ¶¶ 16-20; MTD Opp. at 12.) Such statements are far from the sort of "misdescriptions of specific or absolute characteristics" capable of supporting a claim. *See Yetter*, 428 F. Supp. 3d at 234 (collecting cases) (concluding that similar statements were not actionable); *Cook*, 911 F.2d at 246 (discussing district court's finding that general statements of a lamp's brightness were mere puffery while specific numerical quantifications of brightness and usage life were actionable). Other identified statements – for example, that the tires are "built for high mileage," designed to "resist weather cracking," and "have higher load capacities and stiffer sidewalls" – present a closer call but are still not actionable. (FAC ¶¶ 16-20; MTD Opp. at 12.) Each remains a general assertion regarding the tires' quality and superiority, and not a specific or measurable claim. *See Finney v. Ford Motor Co.*, No. 17-CV-06183-JST, 2018 WL 2552266, at *8 (N.D. Cal. June 4, 2018) (holding Ford's statements that its vehicles had '"best in-class: horsepower, gas torque, unsurpassed diesel horsepower," and had superior towing capacity" were nonactionable and collecting cases where generalized assertions of product quality were found nonactionable puffery).

b. Omission

To maintain his CLRA and UCL claims in connection with an alleged omission of material fact, Nickerson must plausibly, and with specificity pursuant to Rule 9(b), allege that Goodyear was aware of the Defect at the time of his June 2015 purchase of Marathon Tires. *See Wilson v. Hewlett-Packard Co.*, 668 F.3d 1136, 1145 (9th Cir. 2012). Nickerson alleges that Goodyear was placed on notice of the Defect (1) "as early as July 8, 2011 when it was confronted by a consumer complaint for damage caused by four Marathon Tire blowouts within the span of a few days" and (2) because "the NHSTA database contains over 100 consumer complaints related to Marathon Tires . . . many of which . . . predated Plaintiff's purchase," with "several of them being passed on to Goodyear for review." (MTD Opp. at 15-17; FAC ¶¶ 22-37.) However, reference to *a single consumer's* 2011 complaint sent to directly to Goodyear and conclusory averments that numerous other complaints were filed, some of which were forwarded to Goodyear,

do not amount to "allegations regarding the method by which complaints were recorded and transmitted to management, or otherwise reviewed or received." *McCarthy*, 2018 WL 6318841, at *4 (quoting *Resnick*, 2017 WL 1531192, at *17). These bald allegations are "wholly insufficient to allow the Court to infer that [Goodyear] actually knew of" the Defect or even of an unusually high failure rate of Marathon Tires. *Id*. (collecting cases indicating that allegations beyond the filing of an unexceptional number of consumer complaints over a multi-year period are required to make a showing of pre-sale knowledge).[7]

In sum, Nickerson's CLRA and UCL claims are dismissed because he fails to allege (1) compliance with the CLRA notice provision, (2) reliance on any affirmative misrepresentation or omission made by Goodyear, and (3) any potentially actionable statements or omissions.

C. Equitable Relief and Damages

Goodyear argues that Nickerson's "claims for equitable relief under the UCL and his claims for declaratory and injunctive relief fail because they are based on the same allegations as his claims for damages, which acknowledge he has an adequate remedy at law." (Mot. at 29.) This Court has previously addressed this issue at length in a similar context. *See McCarthy*, 2018 WL 6318841, at *6. While several district courts in this circuit have dismissed equitable claims at the pleading stage when they are based on identical facts as other claims providing the legal remedy of damages, "[t]his Court joins

[7] In *McCarthy*, this court discussed a "finding that 56 alleged consumer complaints over a period of more than seven years was not a sufficiently 'unusual' number to permit an inference of pre-sale knowledge." 2018 WL 6318841, at *4 (citing *Deras v. Volkswagen Grp. of Am., Inc.*, No. 17-CV-05452-JST, 2018 WL 2267448, at *4 (N.D. Cal. May 17, 2018)). The Court contrasted that case with instances where plaintiffs demonstrated knowledge by alleging (1) the establishment of "a separate consumer response system dedicated to handling an unusually high volume of complaints specific to" an alleged defect and (2) the distribution of "internal technical service bulletins" regarding an alleged defect. *Id*. (discussing *Williams v. Yamaha Motor Co.*, 851 F.3d 1015, 1028 (9th Cir. 2017); *Falco v. Nissan N. Am. Inc.*, No. CV 13-00686 DDP (MANx), 2013 WL 5575065, at *7 (C.D. Cal. Oct. 10, 2013)).

the many other district courts that 'find no bar to the pursuit of alternative remedies at the pleadings stage.'" *Id*. (collecting cases and quoting *Aberin v. Am. Honda Motor Co., Inc.*, No. 16-CV-04384-JST, 2018 WL 1473085, at *9 (N.D. Cal. Mar. 26, 2018)).

Accordingly, insofar as Nickerson sets forth a viable CLRA or UCL claim in an amended pleading, he may proceed with his claims for equitable relief.

D. Standing to Seek Injunctive Relief

Goodyear additionally contends that Nickerson lacks standing to seek prospective injunctive relief because he sets forth no allegation indicating that there is "a sufficient likelihood that he will again be wronged in a similar way." (Mot. at 30.) The Ninth Circuit recently addressed this issue, holding that "a previously deceived consumer may have standing to seek an injunction against false advertising or labeling, even though the consumer now knows or suspects that the advertising was false at the time of the original purchase, because the consumer may suffer an 'actual and imminent, not conjectural or hypothetical' threat of future harm." *Davidson v. Kimberly-Clark Corp.*, 889 F.3d 956, 969 (9th Cir.), *cert. denied*, 139 S. Ct. 640, (2018) (citing *Summers v. Earth Island Institute*, 555 U.S. 488, 493 (2009)). "Knowledge that the advertisement or label was false in the past does not equate to knowledge that it will remain false in the future." *Id*. Thus in order to demonstrate standing to seek injunctive relief, a plaintiff need only plausibly allege an intention to purchase the implicated product again in the future and explain "'that she will be unable to rely on the product's advertising . . . in the future, and so will not purchase the product although she would like to.'" *Tran v. Sioux Honey Ass'n, Coop.*, No. 8:17-CV-00110-JLS-SS, 2020 WL 905571, at *8 (C.D. Cal. Feb. 24, 2020) (quoting *Ries v. Arizona Beverages USA LLC*, 287 F.R.D. 523, 533 (N.D. Cal. 2012). Here, such allegations would indicate the potential not only to be similarly harmed in the future by misleading statements, but also by the alleged Defect.

The allegations of the FAC are insufficient to demonstrate standing, (*see* FAC ¶ 138 (alleging, in a brief and conclusory manner, only that "Plaintiff suffered actual damage or injury and is at risk of suffering additional actual damage or injury due to the Defect.")), but this deficiency may be remedied upon amendment of the FAC.

E. Goodyear's Motion to Strike Class Allegations

Finally, Goodyear moves to strike the FAC's class allegations, arguing that the putative class (1) is overbroad and includes individuals who experienced none of the injuries alleged in this action and (2) lacks commonality because individual questions of reliance will predominate over common questions. (MTS.) As explained above "[m]otions to strike, as a general rule, are disfavored." *Beal v. Lifetouch, Inc.*, No. CV 10–8454–JST (MLGx), 2011 WL 995884, at *7 (C.D. Cal. Mar. 15, 2011) (quoting *Stabilisierungsfonds Fur Wein v. Kaiser*, 647 F.2d 200, 201 (D.C. Cir. 1981)). Further, this court has repeatedly held that "while class allegations may be stricken at the pleading stage, the issue of class relief is generally more appropriately determined through a motion for class certification." *Lightbourne v. Printroom Inc.*, No. SACV 13-876-JLS (RNBx), 2014 WL 12597108, at *8 (C.D. Cal. Sept. 8, 2014) (internal quotation omitted); *see, e.g., Daniel v. Lennar Corp.*, No. 8:19-cv-00452-JLS-DFM, 2019 WL 8194735, at *6 (C.D. Cal. Oct. 16, 2019). That is because "'the shape and form of a class action evolves only through the process of discovery.'" *Lightbourne*, 2014 WL 12597108, at *8. Goodyear presents no persuasive reason to depart from this logic and attendant conclusion. "Therefore, the Court finds the better course in this case, as in most, is 'to analyze the elements of the parties' substantive claims and review facts revealed in discovery in order to evaluate whether the requirements of Rule 23 have been satisfied.'" *Id*. (quoting *In re Ford Motor Ignition Switch Prods. Liab. Litig.*, 174 F.R.D. 332, 338 (D.N.J. 1997)).

Accordingly, Goodyear's Motion to Strike is DENIED.

IV. LEAVE TO AMEND

The Court grants Nickerson leave to amend his complaint to remedy the deficiencies identified herein. Specifically, as to his breach of express warranty claim, he must allege facts showing that he relied on statements regarding the express warranty. To remedy his CLRA and UCL claims, he must (1) satisfy the CLRA's notice provision;

(2) allege, with particularity, actionable misrepresentations and omissions made by Goodyear; and (3) allege with particularity facts demonstrating that he relied thereon. Finally, in support of his claims for prospective injunctive relief, he must allege facts demonstrating a likelihood that he may be injured again.

V. CONCLUSION

For the foregoing reasons, the Court rules as follows:

1) Goodyear's Motion to Dismiss is GRANTED IN PART AND DENIED IN PART. The Motion is:
    a. GRANTED, WITH LEAVE TO AMEND, as to Nickerson's breach of express warranty claim;
    b. GRANTED, WITHOUT LEAVE TO AMEND as to Nickerson's Magnuson-Moss Warranty Act claim;
    c. GRANTED, WITH LEAVE TO AMEND, as to Nickerson's CLRA claim;
    d. GRANTED, WITH LEAVE TO AMEND, as to Nickerson's UCL claim;
    e. GRANTED, WITH LEAVE TO AMEND, as to Nickerson's claims for prospective injunctive relief; and
    f. Otherwise DENIED.
2) Goodyear's Motion to Strike Class Allegations is DENIED.

Finally, the Court grants Nickerson leave to amend only as to the deficiencies identified herein. Any amended pleading shall be filed within **twenty-one (21) days** after the date of this Order. Nickerson may not add claims or Defendants to his pleading.

Initials of Preparer: tg