UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

IN RE: GENERAC SOLAR POWER SYSTEMS MARKETING, SALES PRACTICES, AND PRODUCTS LIABILITY LITIGATION

MDL No. 23-MD-3078

This Document Relates to All Cases

DECISION AND ORDER

In this multidistrict litigation, plaintiffs allege that a component in solar power storage systems manufactured and marketed by Generac Power Systems, Inc. ("Generac"), is defective. Plaintiffs bring proposed class actions against Generac and its parent company, Generac Holdings, Inc., to recover for economic losses allegedly caused by the product defect. Before me now is defendants' partial motion to dismiss the complaint for failure to state a claim upon which relief can be granted.

I. BACKGROUND

Generac is an energy technology company that manufactures solar energy power systems. The present case involves Generac's "PWRcell" system, which is intended for residential use. It connects to rooftop solar panel arrays, which are sold separately, to convert and store electricity generated by the panels. A component of this system is known as the SnapRS (RS stands for "rapid shutdown"). There are multiple Snaps in each PWRcell system, one for each solar panel in the array. Their purpose is to isolate the voltage generated by the array in response to events such as lightning strikes. However, during normal operations, the Snaps allow electricity to flow through the solar panel array to other components of the system that allow the electricity to be used and stored. If a

single Snap within a circuit malfunctions, it can stop the flow of electricity through the circuit, rendering the entire array of solar panels inoperable. Generac expressly warrants in its Limited Warranty that the Snaps will be free from defects for 25 years. (Compl. ¶ 101.)[1]

Plaintiffs allege that the Snaps in their systems are defective in that they become overactive and turn on and off repeatedly. When this happens, the Snaps can overheat and bubble, burn, melt, char, or combust. Upon overheating, the entire PWRcell system can shut down and cease generating power until the malfunctioning Snap is replaced. Plaintiffs also allege that an overheating Snap can cause a fire, although plaintiffs do not allege that a Snap caused a fire at one of their residences. Plaintiffs allege that approximately 50% of all Snaps are defective. (Compl. ¶ 88.)

The named plaintiffs reside in sixteen states: Ohio, North Carolina, South Carolina, Georgia, Illinois, Michigan, Tennessee, Pennsylvania, Florida, Virginia, Oregon, Indiana, California, Missouri, New York, and Texas. Each alleges that he or she purchased a PWRcell system on a date between April 2020 and June 2022 "based upon Generac's and/or its authorized retailers' representations in marketing and advertising materials, pamphlets, brochures, and/or user manuals about the quality and functionality of its systems." (*E.g.* Compl. ¶ 22.) Each plaintiff also alleges that "[f]ollowing installation," he or she "began experiencing problems and errors with the system, resulting in the system ceasing the production of energy in whole or in part." (*E.g. id.*) Finally, each plaintiff alleges that, had he or she "been aware of the defective nature of the system," he or she

[1] Citations to the complaint are to the Consolidated Class Action Complaint, ECF No. 18.

"would not have purchased the system on the same terms if at all, and/or would have otherwise altered [his or her] purchase behavior." (*E.g. id.*)

Plaintiffs propose to represent both a nationwide class and a class for each of their home states. Plaintiffs generally seek remedies to redress the economic losses caused by the system's failure to produce and store solar energy. The complaint is organized into 30 different "counts," each of which purports to assert a different legal theory for relief. In Count I, plaintiffs allege that defendants are liable under the Magnuson-Moss Warranty Act ("MMWA") for breach of express and implied warranties. In Count II, plaintiffs allege that defendants are liable for breach of implied warranty under the versions of the Uniform Commercial Code ("UCC") adopted by each plaintiff's home state.[2] In Count III, plaintiffs allege that defendants are liable for breach of express warranty under the versions of the UCC adopted by each plaintiff's home state. In Count IV, plaintiffs allege an alternative warranty theory based on breach of contract or breach of "common law" warranties. In Count V, plaintiffs allege a common-law fraud theory in which they contend that Generac had a duty to disclose the alleged product defect to all purchasers of the PWRcell system and that it breached the duty by not disclosing the defect prior to each sale. In Count VI, plaintiffs allege that defendants are liable for intentional misrepresentation because defendants provided plaintiffs with "false or misleading material information that misrepresented and failed to disclose material facts about the true nature of the [PWRcell systems]." (Compl. ¶ 258.) In Count VII, plaintiffs allege that defendants are liable for negligent misrepresentation based on the same conduct underlying the other fraud

[2] Plaintiffs also assert an alternative legal theory under the UCC itself, but the UCC is merely a model code that does not have the force of law independently of its adoption by a state. I will ignore this supposed alternative legal theory.

theories. In Count VIII, plaintiffs allege that defendants are liable under a common-law negligence theory. In Count IX, plaintiffs allege that defendants' conduct has resulted in unjust enrichment. The remaining 21 counts mostly assert theories under the consumer-protection and deceptive-trade-practices statutes of plaintiffs' home states.[3]

Defendants have filed a motion to dismiss certain parts of the complaint under Federal Rule of Civil Procedure 12(b)(6).[4] First, they contend that all legal theories based on allegations of fraud should be dismissed for failure to satisfy Rule 9(b)'s requirement of pleading fraud with particularity. Second, they contend that many of plaintiffs' tort theories are barred by the version of the economic loss doctrine adopted by plaintiffs' home states. Third, defendants move to dismiss the implied-warranty theories asserted under the laws of eight states for lack of privity. Fourth, defendants move to dismiss common-law contract theories that are not based on the warranty statutes adopted in each state. Fifth, defendants move to dismiss plaintiff's unjust-enrichment theory. Finally, defendants move to dismiss certain statutory theories for failure to meet the technical requirements of the relevant statutes. Defendants do not seek dismissal of claims based on theories of breach of express warranty under state law, on theories of breach of implied warranty under the laws of half the states at issue, or on certain state statutes.

Separately from the motion to dismiss under Rule 12(b)(6), defendant Generac Holdings, Inc., moves to dismiss certain claims against it for lack of personal jurisdiction. Generac Holdings does not dispute that it is subject to personal jurisdiction in Wisconsin,

[3] The exception is Count XXV, which alleges a claim for "breach of implied warranty in tort" under Ohio law.

[4] Defendants' motion also seeks dismissal of all claims under the MMWA for lack of subject-matter jurisdiction. I address this part of the motion in a separate opinion issued today.

but it contests personal jurisdiction in each of the cases that were originally filed in districts outside Wisconsin.

I consider defendants' Rule 12(b)(2) and 12(b)(6) motions below.

II. DISCUSSION

A. Standards Applicable to Rule 12(b)(6) Motion

To avoid dismissal under Rule 12(b)(6), a complaint must "state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "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." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The complaint must, at a minimum, "give the defendant fair notice of what the claim is and the grounds upon which it rests." *Twombly*, 550 U.S. at 555. In evaluating a motion to dismiss under Rule 12(b)(6), I must "accept the well-pleaded facts in the complaint as true"; however, "legal conclusions and conclusory allegations merely reciting the elements of the claim are not entitled to this presumption of truth." *McCauley v. City of Chicago,* 671 F.3d 611, 616 (7th Cir. 2011).

Before addressing defendants' substantive arguments, I note that defendants do not dispute that the complaint adequately states a "claim," that is to say, a grievance. *See ACF 2006 Corp. v. Mark C. Ladendorf, Attorney at Law, P.C.*, 826 F.3d 976, 981 (7th Cir. 2016). Plaintiffs' grievance is that they purchased a product that did not meet their expectations, and they want compensation from defendants to redress their economic losses. Defendants do not contend that this grievance fails to state a claim for relief under some legal theory, such as breach of express warranty. Although they were not required to do so, *see Bartholet v. Reishauer A.G. (Zurich)*, 953 F.2d 1073, 1078 (7th Cir. 1992),

plaintiffs organized their complaint into 30 separate "counts." Defendants' motion targets certain of those counts. The counts, however, are not independent "claims" that are distinct from plaintiffs' single grievance for the recovery of economic losses caused by purchasing a defective product. Instead, they are the multiple legal theories under which plaintiffs might obtain relief. *See ACF 2006 Corp.*, 826 F.3d at 981. Because plaintiffs are not required to plead legal theories in the complaint, *see id.*, dismissal of the counts could not result in dismissal of plaintiffs' claim.

Still, on a motion to dismiss, a court can resolve pure legal questions that relate to the pleaded facts. *See Lott v. Levitt*, 556 F.3d 564, 569 (7th Cir. 2009). Relatedly, if a plaintiff pleads facts that show he cannot prevail on a specific legal theory, the court may dismiss the theory on the ground that the plaintiff has pleaded himself out of court. *See Shott v. Katz*, 829 F.3d 494, 497 (7th Cir. 2016). But because a plaintiff does not need to plead facts that correspond to every element of a cause of action, a court may not reject a legal theory at the pleading stage simply because the plaintiff did not plead a fact that he must prove to prevail on that theory at trial. *See Zimmerman v. Bornick*, 25 F.4th 491, 493 (7th Cir. 2022); *Chapman v. Yellow Cab Coop.*, 875 F.3d 846, 848 (7th Cir. 2017) (same).

Under Rule 9(b), however, a plaintiff must plead allegations of fraud with particularity. *See* Fed. R. Civ. P. 9(b). To satisfy this requirement, the plaintiff must allege the "who, what, when, where, and how" of the fraud. *DiLeo v. Ernst & Young*, 901 F.2d 624, 627 (7th Cir. 1990). Many of plaintiffs' legal theories depend on the allegation that defendants committed fraud either by making misleading statements or by failing to

disclose the alleged defect in the PWRcell system. Thus, I must apply this more exacting standard to the fraud allegations underlying those theories.

A final word before turning to the specific counts on which defendants seek dismissal. Because there is no dispute that the complaint generally states a claim, now is not the time to bring a scalpel to plaintiffs' specific legal theories and attempt to excise every last one that is destined to fail. The case, and the extensive discovery it entails, will proceed regardless of whether the complaint is partially dismissed. Further, because plaintiffs will have opportunities to file amended complaints as discovery proceeds, any legal theory I dismiss now is potentially subject to revival. Lastly, many of defendants' arguments rely on disputed interpretations of the laws of plaintiffs' home states. As a federal court sitting in diversity, I must attempt to predict how the highest court of each state would resolve the dispute. *See Allstate Ins. Co. v. Menards, Inc.*, 285 F.3d 630, 635 (7th Cir. 2002). This is a difficult task that has the potential to unduly interfere with the development of state law. *See id*. at 637–38. Defendants ask me to make dozens of such predictions based on only a few paragraphs of briefing per state. It would be unwise to make these predictions at such an early stage of the case and on such limited briefing, especially when the issues raised might change or become moot as the case develops. For these reasons, in the analysis that follows, I will not attempt to address every argument that defendants make in their motion to dismiss. Instead, I will focus on eliminating legal theories that clearly fail as a matter of law, and on determining whether plaintiffs have pleaded fraud with particularity.

B. Fraud-Based Legal Theories

Plaintiffs allege two broad forms of liability for fraud: (1) fraud based on omission, and (2) fraud by affirmative misrepresentation. These allegations apply to the legal theories alleged in Counts V (fraudulent concealment), VI (intentional misrepresentation), VII (negligent misrepresentation), and many of the state consumer protection statutes at issue. I address each form of fraud separately.

1. Fraud by omission

Plaintiffs' primary theory of fraud is based on Generac's failure to disclose the existence of the Snaps defect to potential purchasers. According to plaintiffs, the defect was so serious that Generac and its authorized dealers were under a duty to disclose it to all potential purchasers at the point of sale or earlier, and their failure to do so resulted in a fraud. Plaintiffs cite the Restatement (Second) of Torts § 551(2)(e) in support of this theory, which restates the circumstances under which a party to a business transaction is liable for failing to disclose "facts basic to the transaction" to the other party.

Defendants do not argue that plaintiffs' duty-to-disclose theory is implausible or that it would fail as a matter of law under any state's law. Instead, they contend that plaintiffs have not pleaded the fraud elements of this claim with particularity. According to defendants, to proceed with this claim, plaintiffs must plead (a) what specific statements were made, (b) to which plaintiffs, (c) by which unrelated third-party dealer or which defendants, (d) at what time, (e) how, and (f) where. (Reply Br. at 8.) Defendants' argument would have some force if plaintiffs' fraud theories were based on specific statements that were rendered misleading due to what was omitted from them, such as

misleading half-truths.[5] In that event, plaintiff would have to identify things like the specific statements, who made them, and when. But plaintiffs' theory of nondisclosure under § 551(2)(e) of the Restatement is different. That theory does not focus on any specific statement that was rendered misleading by omission. It focuses, instead, on whether defendants failed to disclose a fact that they were under a duty to disclose "before the transaction [was] consummated." Restatement (Second) of Torts § 551(2)(e) (Am. L. Inst. 1977). In other words, the lack of disclosure is actionable even if it does not render any specific statement misleading. As applied to a sales transaction, the theory treats the mere act of offering the product for sale without affirmatively disclosing the fact as a fraud. *See* Restatement (Second) of Torts § 551 cmt. *l*.

In the present case, plaintiffs allege that Generac never disclosed the Snaps defect to potential purchasers in any oral or written form (Compl. ¶ 112) even though it was under a duty to do so at some point before plaintiffs consummated their purchases (*id.* ¶ 248). These allegations are sufficient to plead fraud by omission based on § 551(2)(e) of the Restatement with particularity. Under this theory, the "who" is Generac,[6] the "what" is the Snaps defect, the "when" is the time each plaintiff purchased a PWRcell system

[5] In their brief, plaintiffs' briefly mention the possibility of alleging fraud based on the communication of misleading half-truths. (Br. in Opp. at 16.) However, plaintiffs identify no specific statements in the complaint that were rendered misleading by the omission of information about the Snaps defect. Thus, for the reasons I explain below in the context of affirmative misrepresentations, plaintiffs have not satisfied Rule 9(b) for any allegations based on half-truths.

[6] That is, Generac Power Systems, Inc. Although the complaint defines "Generac" to include Generac Holdings, that entity was not involved in the manufacture or sale of the PWRcell system, and so it could not have had a duty to disclose under § 551 of the Restatement. To the extent Generac Holdings could be liable for the fraud, it would be under theories of vicarious liability or piercing the corporate veil, which are not presently before me.

(which is pleaded for each named plaintiff), and the "where" is the point of sale. Thus, plaintiffs' allegations of fraudulent concealment are not subject to dismissal under Rule 9(b).[7]

2. Fraud by affirmative misrepresentation

In the complaint, each plaintiff alleges that he or she purchased a PWRcell system "based upon Generac's and/or its authorized retailers' representations in marketing and advertising materials, pamphlets, brochures, and/or user manuals about the quality and functionality of its systems, and the absence of any information regarding the [Snaps defect]." (*E.g.* Compl. ¶ 22.) This is perhaps a perfect example of how *not* to plead fraud with particularity. Plaintiffs might as well have pleaded that "everything ever published about the PWRcell system is false." Plaintiffs do not identify any specific statement that was false or made so by omission, who made the statement, or when it was made.

At other spots in their complaint, plaintiffs reference specific statements made in published reports, investor presentations, advertising brochures, and webpages. (Compl. ¶¶ 5–7, 61–74.) But plaintiffs do not allege that they saw any of these specific statements or even allege that the statements were false. Further, the statements are the kind of vague marketing statements that are commonly regarded as puffery. The statements at issue state things like the PWRcell system is "the complete clean energy system," that it is "the most flexible and scalable home energy system on the market," that customers can "[s]ave money with PWRcell," and that the system offers "[w]hole home power outage

[7] Because defendants have not argued that plaintiffs' theory under § 551(2)(e) is implausible or subject to dismissal on the ground that, as a matter of law, the alleged Snaps defect is not a fact that is "basic to the transaction," I express no view on the merits of that theory.

protection." (Compl. ¶¶ 6-7.) In their brief, plaintiffs make no effort to explain how any specific statement might be regarded as false. Without identifying any specific statement, plaintiffs merely assert that all statements quoted in the complaint are not puffery "because they go directly to the purpose for which consumers like Plaintiffs purchase residential solar power systems with backup batteries." (Br. in Opp. at 19.)

Ultimately, to plead fraud based on an affirmative misrepresentation or half-truth with particularity, each plaintiff must identify the statements that supposedly defrauded him or her and explain how they are false. This form of fraud is unlike the duty-to-disclose theory discussed above, under which a plaintiff may be defrauded by the very act of offering a product for sale without disclosing a known serious defect. Put differently, to adequately plead fraud based on an affirmative statement, plaintiff must allege something along the lines of "I read X and bought the PWRcell system as a result" and then allege that X is false or misleading. But an allegation along the lines of "X statements were made and are generally inconsistent with the quality of the product I received" does not plead fraud with particularity. Because plaintiffs' allegations of affirmative misrepresentations take the latter form, they must be dismissed.

Normally, when dismissing a complaint based on a pleading defect that might conceivably be cured, I would grant the plaintiff leave to amend. *See O'Boyle v. Real Time Resolutions, Inc.*, 910 F.3d 338, 346–47 (7th Cir. 2018). Here, however, I am not dismissing the entire complaint or even any claim, only eliminating plaintiffs' deficient allegations of fraud. The case will proceed to discovery despite the dismissal. During discovery, plaintiffs will have the opportunity to seek leave to amend. Thus, if they are later able to formulate fraud allegations that comply with Rule 9(b) based on specific

statements rather than a general duty to disclose the defect, they will be free to seek leave to amend. I see no reason to grant them leave to amend at this time.

C. Economic Loss Doctrine

Defendants contend that the economic loss doctrine bars certain of plaintiffs' tort theories. First, defendants contend that plaintiffs' negligence theory (Count VII) is barred under by the economic loss doctrine applied by each home state. Second, defendants contend that plaintiffs' fraud-by-omission and intentional-misrepresentation theories are barred by the economic loss doctrine of eight states: California, Florida, Michigan, New York, North Carolina, Tennessee, and Virginia. Finally, defendants contend that plaintiffs' negligent misrepresentation theories are barred by the economic loss doctrine of fifteen states (each home state except Georgia).

In general, the economic loss doctrine preserves the boundary between tort and contract law. *See East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 866 (1986). It does this by precluding contracting parties from pursuing tort recovery for purely economic losses—where "economic losses" refers to the costs of repairing or replacing a defective product and the consequent loss of use of the product—associated with a contractual relationship. *Trans States Airlines v. Pratt & Whitney Canada*, Inc., 86 F.3d 725, 729 (7th Cir. 1996); *Brame v. General Motors LLC*, 535 F. Supp. 3d 832, 841 (E.D. Wis. 2021). Such economic losses are deemed best addressed through a warranty claim. *See East River*, 476 U.S. at 872. However, the economic loss doctrine does not bar tort claims when the product causes personal injuries or damages property other than the product itself, as recovery for such harms is the proper domain of tort. *Id.* at 866–67.

Plaintiffs do not dispute that all of their home states apply the economic loss doctrine to negligence claims for economic losses based on a product defect that damages only the product itself. However, plaintiffs contend that the complaint alleges injuries that fall within the "other property" exception to the economic loss doctrine, and that therefore they may still pursue a negligence theory. Further, plaintiffs contend that additional states besides the ones conceded by defendants would permit plaintiffs' fraud and negligent-misrepresentation theories to proceed.

Beginning with the "other property" exception, the complaint reveals no basis for applying it. No named plaintiff alleges that the Snaps installed on their solar-power systems damaged property other than the Snaps themselves. Although plaintiffs allege that a malfunctioning Snap *can* cause fires and thus damage a consumer's residence or other property (Compl. ¶ 86), no named plaintiff alleges that his or her Snaps caught fire and damaged other property. Plaintiffs do not contend that any of their home states recognize an exception to the economic loss doctrine that allows for the recovery of purely economic losses when a product defect poses only a *risk* of damage to other property.[8] Further, although plaintiffs seem to suggest that a defective Snap may damage other components in a solar energy system (Compl. ¶ 11), no named plaintiff alleges damage to other components. Instead, each named plaintiff alleges only losses caused by the inability to produce solar power during times when the Snaps were malfunctioning. (*E.g.*,

[8] Plaintiffs cite a Missouri case stating that the economic loss doctrine will not bar a tort claim for damage to the product itself when a product defect causes damage through a "violent occurrence." *Clevenger & Wright Co. v. A.O. Smith Harvestore Prods., Inc.*, 625 S.W.2d 906, 909 (Mo. App. 1981). Still, the named plaintiffs don't allege that *their* Snaps precipitated a violent occurrence that destroyed the PWRcell system. They allege only that the Snaps malfunctioned and prevented them from using or storing solar energy. (*E.g.* Compl. ¶ 22.)

Compl. ¶ 22.) As this kind of loss-of-use injury is a classic economic loss, *see East River*, 476 U.S. at 861, 874 (applying doctrine to income lost while ships were out of service due to engine defect that damaged only the engine), plaintiffs' negligence theories would appear to be barred by the economic loss doctrine of each state.

At this early stage of the case, however, I cannot rule out the possibility that plaintiffs will be able to make a claim for damage to other property. Perhaps a named plaintiff or class member who experienced a house fire or other damage will be found, and a subclass can be created to represent the interests of similar plaintiffs. And because plaintiffs' negligence theory is only one of many legal theories and not a claim, there is nothing to "dismiss" in response to defendants' motion. Instead, I will merely note that, at this point, it appears that the economic loss doctrine of each state will prevent the current named plaintiffs from prevailing on a negligence theory.

Plaintiffs next contend that various states except certain fraud-based torts from the economic loss doctrine. Plaintiffs do not dispute that their negligent-misrepresentation theories are blocked by the economic loss doctrine under the laws of Indiana, Pennsylvania, South Carolina, and Tennessee, or that Tennessee law blocks their remaining fraud claims. But plaintiffs contest defendants' claim that some of their fraud claims are barred by the laws of California, Florida, Illinois, Michigan, Missouri, New York, North Carolina, Ohio, Oregon, Texas, and Virginia. Here, plaintiffs rely on cases recognizing an exception to the economic loss doctrine for claims that the contract at issue was fraudulently induced. And plaintiffs' surviving fraud theory is a type of fraudulent-inducement theory, in that it alleges that the fraud (the lack of disclosure of the Snaps defect) occurred before the parties entered into a contract for the sale of the

PWRcell systems. *See Kaloti Enters., Inc. v. Kellogg Sales Co.*, 283 Wis. 2d 555, 580 (2005) (liability for fraud in the inducement requires that the misrepresentation occur before contract formation).

However, the scope of the fraud-in-the-inducement exception to the economic loss doctrine varies across jurisdictions. As the Wisconsin Supreme Court noted 20 years ago, courts have generally taken three different approaches in determining whether and to what extent there is a fraud-in-the-inducement exception to the economic loss doctrine:

> (1) no exception; (2) a general exception for all fraud in the inducement claims; and (3) a narrow exception for fraud in the inducement where the fraud is not interwoven with the quality or character of the goods for which the parties contracted or otherwise involved performance of the contract.

Kaloti, 283 Wis. 2d at 580. If plaintiffs' were asserting fraud theories under Wisconsin law, it would be clear that those theories would be barred by the economic loss doctrine, since the Wisconsin Supreme Court applies the doctrine to fraudulent-inducement claims that relate to the quality of the product itself. *Id.* at 585. Plaintiffs allege that they were defrauded because Generac did not disclose a product defect that caused the PWRcell system to fail to reliably produce and store solar energy. This is a representation (or omission) that related to the quality or the characteristics of the goods for which the parties contracted.

But plaintiffs do not bring their fraud theories under Wisconsin law, and the parties have devoted only a few sentences to identifying the scope of the fraudulent-inducement exceptions of other jurisdictions. The parties have not cited cases from the states' highest courts akin to the Wisconsin Supreme Court's decision in *Kaloti* that clearly establish the scope of the economic loss doctrine in the context of fraudulent inducement. Thus, I am left to make an "*Erie* guess" as to how each state's highest court would address this issue.

See Lexington Ins. Co. v. Rugg & Knopp, Inc., 165 F.3d 1087, 1092 (7th Cir. 1999) (using term "*Erie* guess").[9] What's more, the parties have provided only a few sentences of briefing on this issue per state, so they essentially ask me to make a "drive by" *Erie* guess for each state. *Cf. Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 91 (1998) (discussing "drive-by jurisdictional rulings"). Because "a federal court sitting in diversity must proceed with caution in making pronouncements about state law," *Lexington*, 165 F.3d at 1092, I am reluctant to decide this issue for each state on such limited briefing. And I again emphasize that, at this stage of the case, there is limited utility in taking a scalpel to the complaint and excising only a few of plaintiffs' many legal theories. Accordingly, I will defer ruling on whether plaintiffs' duty-to-disclose fraud theory is barred by the economic loss doctrines of the states at issue until it becomes relevant to future proceedings and is adequately briefed.

D. Breach of Implied Warranty: Privity

Defendants contend that plaintiffs' theories of breach of implied warranty under the UCC of the following states must fail for lack of privity: California, Florida, Illinois, New York, North Carolina, Ohio, Oregon, and Tennessee. Defendants do not seek dismissal of the implied-warranty theories under the UCC of the other eight states, or under California's Song-Beverly Consumer Warranty Act. Defendants' privity argument is premised on the fact that plaintiffs "do not plead privity." (Br. in Supp. at 24.) But again, plaintiffs are not required to plead all elements necessary to support a legal theory,

[9] The phrase "*Erie* guess" refers to the Supreme Court's decision in *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938), which held that federal courts sitting in diversity must apply state common law. The term appears to have been coined by Third Circuit Judge Dolores Sloviter. *See* Dolores K. Sloviter, *A Federal Judge Views Diversity Jurisdiction through the Lens of Federalism*, 78 Va. L. Rev. 1671, 1679 (1992).

Zimmerman, 25 F.4th at 493, and therefore a failure to plead the facts establishing privity could not result in dismissal of any implied warranty theory. Nonetheless, plaintiffs appear to concede that they did not purchase the PWRcell systems directly from Generac or Generac Holdings, but instead purchased them from defendants' "authorized agents." (Br. in Opp. at 29.) Plaintiffs contend that the eight states at issue recognize implied warranty claims against a manufacturer when either the purchases were made through authorized agents or other exceptions to the privity requirement apply.

As with the fraudulent-inducement exception to the economic loss doctrine, the parties ask me to make drive-by *Erie* guesses about how the highest court of each of the eight states at issue would apply the exceptions to the privity requirement in this case. For the same reasons I gave in the fraudulent-inducement context, I will defer deciding these issues until they are relevant to future proceedings and adequately briefed.

E. Common Law Contract and Warranty Theories

In Count IV, plaintiffs plead a legal theory "under common law warranty and contract law" as an alternative theory that would apply if "Generac's commitment is deemed not to be a warranty under the Uniform Commercial Code or common law." (Compl. ¶ 236.) Defendants move to dismiss this theory on the ground that the UCC of each state is the sole source of warranty obligations. Defendants are almost certainly correct, but at this stage of the case, I will not foreclose plaintiffs from developing this legal theory further if they choose to do so. A party is entitled to present novel and alternative legal theories that are supported by nonfrivolous arguments for changing or extending existing law. *See* Fed. R. Civ. P. 11(b)(2). If plaintiffs' alternative contract/warranty theory were the only legal theory left to support the complaint, I might

have required them to come forth with a more fully developed argument to support it in response to the motion to dismiss. *See Cmty. Bank of Trenton v. Schnuck Mkts., Inc.*, 887 F.3d 803, 825 (7th Cir. 2018). But because the complaint is otherwise supported by viable legal theories, I will allow the novel theory to simmer in the background as a potential alternative to plaintiffs' conventional warranty claims.

F. Unjust Enrichment

In Count IX, plaintiffs plead an unjust-enrichment theory under the law of all 16 home states. Defendants move to dismiss this theory on the grounds that (1) all states prohibit recovery for unjust enrichment when plaintiffs have an adequate remedy at law, and (2) plaintiffs cannot satisfy the elements of unjust enrichment under the law of any state. Plaintiffs concede that unjust enrichment is unavailable when there is an adequate remedy at law, but they argue that they may plead unjust enrichment as an alternative legal theory. Again, because plaintiffs are not required to plead legal theories at all, I agree with them on this point.

As for the elements of unjust enrichment, if this case were brought under Wisconsin law, I might find based on the pleadings alone that the claim is not legally viable because unjust enrichment "involves getting something for nothing, not providing a product for a price." *T&M Farms v. CNH Indus. Am., LLC*, 488 F. Supp. 3d 756, 769 (E.D. Wis. 2020). But plaintiffs are proceeding under the laws of 16 other jurisdictions. So once again I am asked to predict, based on limited briefing, how each of these 16 states would apply their unjust-enrichment law to the facts alleged in the complaint. Because at this point unjust enrichment is only an alternative legal theory, I conclude that it is

premature to make any pronouncements about how these other states would handle the theory.

G. Injunction-Only Statutory Theories

Defendants next move to dismiss plaintiffs' theories under the Georgia and Illinois deceptive-trade-practices acts on the ground that the only relief available under those statutes is injunctive relief for which the named plaintiffs are not eligible. Plaintiffs do not dispute that these statutes allow for injunctive relief only. However, they contend that they are eligible for such relief.

The Georgia and Illinois statutes are based on the Uniform Deceptive Trade Practices Act. As adopted by those states, the Act provides: "A person likely to be damaged by a deceptive trade practice of another may be granted injunctive relief upon terms that the court considers reasonable." Ga. Code Ann. § 10-1-373(a); 815 Ill. Comp. Stat. § 510/3(a). Defendants argue that the named plaintiffs from Georgia and Illinois are not likely to be damaged by the alleged deceptive trade practice involving the Snaps defect in the future because they have already purchased their PWRcell systems. Plaintiffs, in turn, contend that they may seek injunctive relief to enforce Generac's limited warranty, such as by requiring Generac to repair or replace the defective—and allegedly dangerous—Snaps.

At this point, I cannot rule out the possibility that plaintiffs might be able to show that injunctive relief is warranted to prevent a future injury caused by a deceptive trade practice. Further, the question of whether defendants engaged in a deceptive trade practice will have to be litigated under the statutes of the other states regardless of whether I determine that no relief is available under the Georgia and Illinois statutes. For

these reasons, I conclude that it is premature to determine whether the Georgia and Illinois plaintiffs could obtain relief under the Uniform Deceptive Trade Practices Act.

H. Adequacy of Notice under California and Ohio Statutes

Defendants contend that plaintiffs' theories under the California Consumer Legal Remedies Act and the Ohio Consumer Sales Practices Act must fail because plaintiffs have not pleaded that they complied with the notice requirements of these statutes. However, defendants do not cite, and I am not aware of, a federal pleading rule that requires a plaintiff to plead that notice has been given in accordance with the terms of these statutes. *See Doe v. Smith*, 429 F.3d 706, 708 (7th Cir. 2005) ("Any district judge (for that matter, any defendant) tempted to write 'this complaint is deficient because it does not contain . . .' should stop and think: What rule of law *requires* a complaint to contain that allegation?"). Perhaps the claims could be targeted at summary judgment due to the failure to give notice, but because a plaintiff does not have to plead compliance with the notice requirement, I cannot dismiss the theories now.

I. Personal Jurisdiction over Generac Holdings

Defendant Generac Holdings moves to dismiss the claims of certain plaintiffs against it for lack of personal jurisdiction. Generac Holdings is a Delaware company with a principal place of business in Wisconsin, and it concedes that it is subject to general jurisdiction in Wisconsin. Most of the claims at issue in this MDL were filed directly in the Eastern District of Wisconsin, and thus Generac Holdings is unquestionably subject to personal jurisdiction with respect to those claims. The personal-jurisdiction defense applies only to the handful of claims filed in district courts in California, North Carolina, and Florida and transferred to this court as part of the MDL. Further, Generac Power

Systems, Inc., is concededly subject to personal jurisdiction in all states in which suits have been filed. Thus, at this point, granting Generac Holding's motion to dismiss would have virtually no effect on the likely course of the litigation. Even if I granted the motion to dismiss, Generac Holdings would have to participate in pretrial proceedings as a defendant to the Wisconsin cases, and the out-of-state plaintiffs would be entitled to litigate their claims against Generac Power Systems. Accordingly, I conclude that principles of judicial efficiency counsel against deciding the issue at this time. I will, however, make clear that Generac Holdings has preserved its objection to personal jurisdiction and will decide the issue once it becomes necessary to do so.

III. CONCLUSION

For the reasons stated, **IT IS ORDERED** that defendants' motion to dismiss the complaint (ECF No. 32) is **GRANTED IN PART** and **DENIED IN PART**. The motion is granted to the extent that plaintiffs' allegations of fraud based on misrepresentations or omissions in specific statements—rather than on a general duty to disclose the alleged defect prior to each sale—are dismissed under Rule 9(b). In all other respects, the motion is denied.

Dated at Milwaukee, Wisconsin, this 24th day of May, 2024.

/s/ Lynn Adelman
LYNN ADELMAN
District Judge