IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

IN RE: SMITTY'S/CAM2 303 TRACTOR HYDRAULIC FLUID MARKETING, SALES PRACTICES, AND PRODUCTS LIABILITY LITIGATION	)	MDL No. 2936
	)	Master Case No. 4:20-MD-02936-SRB

ORDER

Before the Court is Defendants Smitty's Supply, Inc. ("Smitty's") and CAM2 International, LLC ("CAM2") (collectively, "Defendants") Motion for Summary Judgment as to Time-Barred Claims. (Doc. #849.) For the reasons discussed below, the motion is DENIED.

I. BACKGROUND

This MDL arises from Defendants' manufacture, sale, and marketing of tractor hydraulic fluid ("THF"), a multifunctional lubricant designed to offer certain protective benefits when used in tractors and heavy equipment as a hydraulic fluid, transmission fluid, and gear oil. Plaintiffs represent a putative class of consumers who purchased at least one of four allegedly defective products at issue in this case: Smitty's Super S Super Trac 303 Tractor Hydraulic Fluid ("Smitty's Super Trac 303"), Smitty's Super S 303 Tractor Hydraulic Fluid ("Smitty's Super S 303"), Cam2's Promax 303 Tractor Hydraulic Oil ("Cam 2 Promax 303"), and Cam2's 303 Tractor Hydraulic Oil ("Cam2 303") (collectively, the "303 THF Products"). Defendants manufactured the 303 THF Products, which were sold nationwide by multiple retailers under various label names.

A. Alabama

Plaintiffs Bryan Nelms, Joe Jackson, and Robert Shane Morgan ("Alabama Plaintiffs") are members of the Alabama Class and purchased the 303 THF Products in Alabama. Nelms filed suit on behalf of an Alabama putative class as part of *Graves v. Cam2 Int'l, LLC*, No. 19-

cv-05089 (W.D. Mo.) on November 27, 2019. Nelms purchased the 303 THF Products from 2013 to 2019. Although his Ford 3000 tractor began leaking in 1999, he used the 303 THF Products in other equipment that he now claims are damaged as a result. Jackson purchased the 303 THF Products from 2013 to 2019. While he originally stated that he noticed damage to his equipment in 2014, he amended his statement, saying he began experiencing hydraulic leaks in his equipment in 2016. Morgan purchased the 303 THF Products from 2014 to 2018. Morgan first noticed damage to his equipment in 2017. None of the Alabama Plaintiffs suspected that the 303 THF Products were damaging their equipment until after their last purchase of the 303 THF Products.

B. Georgia

Plaintiffs Anthony Shaw ("A. Shaw"), Rusty Shaw ("R. Shaw"), and Cody Farner ("Georgia Plaintiffs") are members of the Georgia Class and purchased the 303 THF Products in Georgia. A. Shaw and R. Shaw filed suit on behalf of a Georgia putative class as part of *Graves v. Cam2 Int'l, LLC*, No. 19-cv-05089 (W.D. Mo.) on November 27, 2019. A. Shaw purchased the 303 THF Products in December 2013 or January 2014 and until 2018. He first noticed damage to his equipment in or around 2013. R. Shaw purchased the 303 THF Products from 2013 to 2018. He first noticed leaks in 2015. Farner purchased the 303 THF Products from December 2013 until 2018. He first repaired damage in 2016. None of the Georgia Plaintiffs suspected that the 303 THF Products were damaging their equipment until after their last purchase of the 303 THF Products.

In February 2018, the Georgia Department of Agriculture, Fuel, & Measures Division issued a Stop Sale Order for "Tractor Hydraulic Fluids (THF) products in the market labeled, claimed or implied as meeting the THF '303' specification." (Doc. #850-3, p. 2.)

C. Louisiana

Plaintiffs Simon Vicknair and Pat Beaver ("Louisiana Plaintiffs") are members of the Louisiana Class and purchased the 303 THF Products in Louisiana. The Louisiana Plaintiffs filed suit on behalf of a Louisiana putative class on September 1, 2020. Vicknair purchased the 303 THF Products from August 2014 until 2018. He first noticed and repaired damaged equipment in 2015. Beaver purchased the 303 THF Products beginning on or before April 29, 2013, and until 2019. He first noticed damage to his equipment beginning in 2014. Neither of the Louisiana Plaintiffs suspected that the 303 THF Products were damaging their equipment until after their last purchase of the 303 THF Products.

D. Maryland

Plaintiff Vonda Moreland is a member of the Maryland Class and purchased the 303 THF Products in Maryland. Moreland filed suit on behalf of a Maryland putative class as part of *Graves v. Cam2 Int'l, LLC*, No. 19-cv-05089 (W.D. Mo.) on November 27, 2019. Moreland first purchased the 303 THF Products on or around May 25, 2014, and until October 2018. She first noticed damage to her equipment in 2016. Moreland did not suspect that the 303 THF Products were damaging her equipment until after her last purchase of the 303 THF Products.

E. Massachusetts

Plaintiff Cosimo Ferrante is a member of the Massachusetts Class and purchased the 303 THF Products in Massachusetts. Ferrante filed suit on behalf of a Massachusetts putative class as part of *Graves v. Cam2 Int'l, LLC*, No. 19-cv-05089 (W.D. Mo.) on November 27, 2019. Ferrante first purchased the 303 THF Products in May 2014, and until 2018. He first noticed damage to his equipment in 2014. Ferrante did not suspect that the 303 THF Products were damaging his equipment until after his last purchase of the 303 THF Products.

F. Montana

Plaintiff Tom Karnatz is a member of the Montana Class and purchased the 303 THF Products in Montana. Karnatz filed suit on behalf of a Montana putative class as part of *Graves v. Cam2 Int'l, LLC*, No. 19-cv-05089 (W.D. Mo.) on November 27, 2019. Karnatz first purchased the 303 THF Products from 2014 until 2019. He first noticed damage to his equipment in 2017. Karnatz did not suspect that the 303 THF Products were damaging his equipment until after his last purchase of the 303 THF Products.

G. North Carolina

Plaintiffs William White; Justin Lemonds; John Sigmon, H&S Farms, Inc., and Windmill Acres, Inc. (collectively "Sigmon"); and Steve Upchurch ("North Carolina Plaintiffs") are members of the North Carolina Class and purchased the 303 THF Products in North Carolina. The North Carolina Plaintiffs' claims were asserted as part of *Graves v. Cam2 Int'l, LLC*, No. 19-cv-05089 (W.D. Mo.) on November 27, 2019. White purchased the 303 THF Products from 2013 to 2018. White first noticed damage to his equipment in 2013. Lemonds purchased the 303 THF Products from 2010 to 2017. Lemonds first noticed damage to his equipment in 2013. Sigmon purchased the 303 THF Products from 2013 to 2018. Sigmon first noticed damage to his equipment in 2014. Upchurch purchased the 303 THF Products from 2010 to 2017. Upchurch alleges damage to his equipment beginning in 2013. None of the North Carolina Plaintiffs suspected that the 303 THF Products were damaging their equipment until after their last purchase of the 303 THF Products.

In August 2018, the North Carolina Department of Agriculture and Consumer Services issued a Stop Sale Order for "tractor hydraulic fluid (THF) products labeled, claimed or implied as meeting THF 303, which has no known specifications available." (Doc. #850-4, p. 2.)

H. Oklahoma

Plaintiffs Wayne Wells, Ron Nash, Joe Pate and Arno Graves ("Oklahoma Plaintiffs") are members of the Oklahoma Class and purchased the 303 THF Products in Oklahoma. The Oklahoma Plaintiffs' claims were asserted as part of *Graves v. Cam2 Int'l, LLC*, No. 19-cv-05089 (W.D. Mo.) on November 5, 2019. Wells purchased the 303 THF Products from 2014 to 2019. Wells first noticed damage to his equipment in 2014. Nash purchased the 303 THF Products from 2013 to 2019. Nash first noticed damage to his equipment in 2014. Pate purchased the 303 THF Products from 2014 to 2018. Pate first noticed damage to his equipment in 2014. Graves purchased the 303 THF Products from 2014 to 2019. Graves alleges damage to his equipment beginning in 2014. None of the Oklahoma Plaintiffs suspected that the 303 THF Products were damaging their equipment until after their last purchase of the 303 THF Products.

I. Pennsylvania

Plaintiffs Joshua Farley, Earnest Jenkins, Kyle Minich, Terry Puskarich, and Robert Stanton ("Pennsylvania Plaintiffs") are members of the Pennsylvania Class who purchased the 303 THF Products in Pennsylvania. The Pennsylvania Plaintiffs' claims were asserted as part of *Graves v. Cam2 Int'l, LLC*, No. 19-cv-05089 (W.D. Mo.) in November 2019. Farley purchased the 303 THF Products from 2014 to 2019. Farley first noticed damage to his equipment in 2016. Jenkins purchased the 303 THF Products from 2013 to 2019. Jenkins first noticed damage to his equipment in 2014. Minich purchased the 303 THF Products from 2013 to 2019. Minich first noticed damage to his equipment in 2014. Puskarich purchased the 303 THF Products from 2015 to 2019. Puskarich first noticed damage to his equipment in 2015. Stanton purchased the 303 THF Products from 2014 to 2019. Stanton alleges harm to his equipment beginning when he first purchased the 303 THF Products in 2014. None of the Pennsylvania Plaintiffs suspected

that the 303 THF Products were damaging their equipment until after their last purchase of the 303 THF Products.

J. West Virginia

Plaintiffs Roger Bias, and Clinton Curry ("West Virginia Plaintiffs") are members of the West Virginia Class who purchased the 303 THF Products in West Virginia. The West Virginia Plaintiffs' claims were asserted as part of *Graves v. Cam2 Int'l, LLC*, No. 19-cv-05089 (W.D. Mo.) on November 27, 2019. Bias purchased the 303 THF Products from 2013 to 2019. Bias first noticed damage to his equipment in 2015. Curry purchased the 303 THF Products from 2013 to 2019. Curry first noticed damage to his equipment in 2015. None of the West Virginia Plaintiffs suspected that the 303 THF Products were damaging their equipment until after their last purchase of the 303 THF Products.

K. Wyoming

Plaintiff Dan Smith is a member of the Wyoming Class and purchased the 303 THF Products in Wyoming. Smith filed suit on behalf of a Wyoming putative class as part of *Graves v. Cam2 Int'l, LLC*, No. 19-cv-05089 (W.D. Mo.) in November 2019. Smith first purchased the 303 THF Products in 2013, and until 2019. He alleges damage to his equipment beginning in 2016. Smith did not suspect that the 303 THF Products were damaging his equipment until after his last purchase of the 303 THF Products.

L. The Instant Action

Plaintiffs initiated suit against Defendants in multiple federal district courts where the 303 THF products were sold. On February 11, 2020, Defendants requested all pending actions be consolidated and transferred pursuant to 28 U.S.C. § 1407. On June 2, 2020, the Judicial Panel on Multidistrict Litigation ("J.P.M.L.") consolidated and transferred the eight then-pending

actions to the Western District of Missouri.[1] *See In re: Smitty's/CAM2 303 Tractor Hydraulic Fluid Mktg., Sales Pracs. & Prods. Liab. Litig.*, No. 2936, 2020 WL 2848377, at *1 (J.M.P.L. June 2, 2020). Following the creation of this MDL, Plaintiffs filed another lawsuit, *Feldkamp v. Smitty's Supply, Inc.*, No. 20-cv-02177, in the U.S. District Court for the Central District of Illinois, which was subsequently transferred to this Court. Pursuant to this Court's order dated August 3, 2020, Plaintiffs were permitted to file a Consolidated Amended Complaint that would supersede all prior pleadings in the individual cases and the Court allowed direct joinder of new claims through the Consolidated Amended Complaint.

On September 24, 2021, Plaintiffs filed the Fourth Amended Consolidated Complaint ("FACC"). On October 25, 2021, Defendants filed a motion to dismiss the FACC, which the Court granted in part and denied in part on March 9, 2022. On April 21, 2023, Plaintiffs filed a Fifth Amended Consolidated Complaint ("5ACC"). Plaintiffs subsequently filed a corrected version of the 5ACC on November 27, 2023.

On April 24, 2023, Defendants filed the instant motion for summary judgment. Plaintiffs oppose the motion. The parties' arguments are addressed below.

II. LEGAL STANDARD

Under Rule 56, summary judgment is warranted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The moving party has the burden of identifying "the basis for its motion, and must identify those portions of the record which it believes demonstrate the absence

[1] The pending actions consolidated before the undersigned are as follows: *Buford v. Smitty's Supply, Inc.*, No. 19-cv-00082 (E.D. Ark.); *Fosdick v. Smitty's Supply, Inc.*, No. 19-cv-01850 (E.D. Cal.); *Blackmore v. Smitty's Supply, Inc.*, No. 19-cv-04052 (N.D. Iowa); *Zornes v. Smitty's Supply, Inc.*, No. 19-cv-02257 (D. Kan.); *Wurth v. Smitty's Supply, Inc.*, No. 19-cv-00092 (W.D. Ky.); *Mabie v. Smitty's Supply, Inc.*, No. 19-cv-03308 (S.D. Tx.); *Klingenberg v. Smitty's Supply, Inc.*, No. 19-cv-02684 (D. Minn.); and *Graves v. Cam2 Int'l, LLC*, No. 19-cv-05089 (W.D. Mo.).

of a genuine issue of material fact." *Torgerson v. City of Rochester*, 643 F.3d 1031, 1042 (8th Cir. 2011) (en banc) (cleaned up). If the moving party makes this showing, "the nonmovant must respond by submitting evidentiary materials that set out 'specific facts showing that there is a genuine issue for trial.'" *Id.* (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986)). "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." *Id.* (quoting *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000)).

III. DISCUSSION

Defendants argue that all claims brought by the following classes are time-barred: Alabama, Georgia, Louisiana, Maryland, Massachusetts, Montana, North Carolina, Oklahoma, Pennsylvania, West Virginia, and Wyoming. The parties' arguments as to each separate class are addressed below.

A. Alabama

The Alabama Plaintiffs' remaining claims are: Count I, negligence; Count V, unjust enrichment; Count VI, fraudulent misrepresentation;[2] and Count VII, negligent misrepresentation. Defendants argue that they are entitled to summary judgment on the Alabama Plaintiffs' claims because "their claims accrued at purchase" and "[t]he doctrine of fraudulent concealment does not save the Alabama Plaintiffs' untimely claims." (Doc. #850, pp. 20, 21.) Plaintiffs argue, however, that "the limitations periods on Alabama Plaintiffs' claims are tolled based on Defendants' fraudulent concealment." (Doc. #1116, p. 93.)

The parties agree that the statute of limitations for the Alabama Plaintiffs' claims is two years. *See* Ala. Code § 6-2-38(1) (2008); *see also Auburn Univ. v. Int'l Bus. Machines, Corp.*,

[2] The corrected 5ACC refers to Count VI as Fraud/Misrepresentation, but for the sake of clarity, the Court will refer to Count VI as Fraudulent Misrepresentation.

716 F. Supp. 2d 1114, 1118 (M.D. Ala. 2010). "The statute of limitations begins to run when the cause of action accrues, which [Alabama c]ourt[s] ha[ve] held is the date the first legal injury occurs." *Ex parte Abbott Lab'ys*, 342 So. 3d 186, 194 (Ala. 2021) (quoting *Ex parte Integra LifeSciences Corp.*, 271 So. 3d 814, 818 (Ala. 2018)).

However, "Alabama law provides a discovery rule for fraud claims, which conceivably abates the running of a limitations period." *Whitesell Corp. v. Screw Prods., Inc.*, No. 3:16-CV-00929-HNJ, 2018 WL 2048377, at *8 (N.D. Ala. May 2, 2018). This rule "applies not only to the tort of fraud, but also to torts where the existence of the cause of action has been fraudulently concealed." *Weaver v. Firestone*, 155 So. 3d 952, 957 (Ala. 2013). The rule provides:

> In actions seeking relief on the ground of fraud where the statute has created a bar, the claim must not be considered as having accrued until the discovery by the aggrieved party of the fact constituting the fraud, after which he must have two years within which to prosecute his action.

Ala. Code § 6-2-3. "[G]eneralized allegations that a defendant had concealed a cause of action, unsupported by specific facts concerning that concealment or the plaintiffs' discovery of that concealment, [are] insufficient to toll the statute of limitations under § 6–2–3." *Newton v. Ethicon, Inc.*, No. 3:20-CV-00021-ALB-JTA, 2020 WL 1802927, at *3 (M.D. Ala. Apr. 8, 2020) (quoting *McKenzie v. Janssen Biotech, Inc.*, No. 1170787, 2019 WL 4727472, at *5 (Ala. Sept. 27, 2019)). "To benefit from this rule, a plaintiff must introduce substantial evidence of (1) the time and circumstances of the discovery of the cause of action, (2) the facts surrounding how defendant concealed the cause of action or injury, and (3) what prevented plaintiff from discovering the cause of action." *Id.* "The assessment regarding the period a reasonable person would have discovered alleged fraud generally comprises a question for the factfinder at trial." *Whitesell Corp.*, 2018 WL 2048377, at *8.

Here, the Court finds that Defendants failed to meet their burden to prove that the Alabama Plaintiffs' claims are barred by the statute of limitations. The Alabama Plaintiffs joined the lawsuit on November 27, 2019, so their claims must have accrued on or after November 27, 2017, given the two-year statute of limitations. *See* Ala. Code § 6-2-38(1) (2008). However, Alabama's discovery rule is applicable to fraud and the other claims asserted here. *See Weaver*, 155 So. 3d at 957. The Alabama Plaintiffs assert the rule applies because Defendants "fraudulently concealed the truth, and Plaintiffs were unaware the Defendants' fluid was the cause of their damage" when they last purchased the 303 THF Products in 2018 and 2019. (Doc. #1116, p. 92.) The Court finds that they assert more than generalized allegations, providing evidence that: (1) the Alabama Plaintiffs were unaware that the 303 THF Products they bought might damage their equipment until after the date of their last purchase of the products; (2) the 303 THF Products contained "flush oil, line wash, used transformer oil, used turbine oil, and other waste oils," but Defendants marketed and sold the products to appear as a 303 tractor hydraulic fluid; and (3) they could not easily discover the truth about the 303 THF Products as the labels were "diametrically opposed to what the fluid actually was." (Doc. #1116, pp. 68, 79); *Cf. Newton*, 2020 WL 1802927, at *4. Taken as true, the limitations period would be tolled at least until 2018, the date of Morgan's last purchase, so filing suit in November 2019 would be within the two-year period. Thus, there is a genuine dispute of material fact as to whether Defendants fraudulently concealed the Alabama Plaintiffs' cause of action, which prevents their claims from being time-barred. Therefore, the Court finds that the Alabama Plaintiffs' claims are not barred by the statute of limitations at this stage.

B. Georgia

The Georgia Plaintiffs' claims are: Count I, negligence; Count II, breach of express warranty; Count III, breach of the implied warranty of merchantability; Count IV, breach of the

implied warranty of fitness for a particular purpose; Count V, unjust enrichment; Count VI, fraudulent misrepresentation; and Count VII, negligent misrepresentation. Defendants argue that they are entitled to summary judgment on the Georgia Plaintiffs' claims because they were not timely filed, and the limitations period was not tolled. Plaintiffs argue that the limitations period was tolled due to Defendants' fraud.

The parties agree that the statute of limitations for the Georgia Plaintiffs' claims is four years. *See* Ga. Code Ann. § 9-3-31; *see also* Ga. Code Ann. § 11-2-725; *see also Chase Manhattan Mortg. Corp. v. Shelton*, 722 S.E.2d 743, 748 (Ga. 2012); *see also Copeland v. Miller*, 817 S.E.2d 692, 694 (Ga. Ct. App. 2018). "On a tort claim for personal injury the statute of limitation generally begins to run at the time damage caused by a tortious act occurs, at which time the tort is complete." *Everhart v. Rich's, Inc.*, 194 S.E.2d 425, 428 (Ga. 1972). For actions based on breach of implied warranties, the statute of limitations begins to run "when delivery or tender of delivery of the goods purchased was made." *Everhart v. Rich's, Inc.*, 196 S.E.2d 475, 476 (Ga. Ct. App. 1973).

However, Georgia law provides, "[i]f the defendant or those under whom he claims are guilty of a fraud by which the plaintiff has been debarred or deterred from bringing an action, the period of limitation shall run only from the time of the plaintiff's discovery of the fraud." Ga. Code Ann. § 9-3-96.

> A plaintiff who seeks to toll a limitation period under OCGA § 9-3-96 must make three showings: first, that "the defendant committed actual fraud"; second, that "the fraud concealed the cause of action from the plaintiff," such that the plaintiff was debarred or deterred from bringing an action; and third, that "the plaintiff exercised reasonable diligence to discover his cause of action despite his failure to do so within the statute of limitation."

Doe v. Saint Joseph's Cath. Church, 870 S.E.2d 365, 371 (Ga. 2022) (quoting *Daniel v. Amicalola Elec. Membership Corp.*, 711 S.E.2d 709, 716 (Ga. 2011)). "Generally speaking, the

question of whether there was fraudulent concealment justifying the tolling of the limitation period 'is a proper question for determination by a jury under proper instructions from the court.'" *Smith v. Suntrust Bank*, 754 S.E.2d 117, 124 (Ga. Ct. App. 2014) (quoting *Brown v. Brown*, 75 S.E.2d 13, 17 (Ga. 1953)).

Here, the Court finds that Defendants failed to meet their burden to prove that the Georgia Plaintiffs' claims are barred by the statute of limitations. The Georgia Plaintiffs joined the lawsuit on November 27, 2019, so their claims must have accrued on or after November 27, 2015, given the four-year statute of limitations. *See* Ga. Code Ann. § 9-3-31. However, Georgia law provides tolling when the Defendants' actions involve fraud. *See* Ga. Code Ann. § 9-3-96. For many of the same reasons cited above regarding the Alabama Plaintiffs, the Court finds that the Georgia Plaintiffs provide sufficient evidence that: (1) Defendant sold a bucket of line wash, but marketed and sold the product to appear as a 303 tractor hydraulic fluid; (2) the Georgia Plaintiffs were unaware that the 303 THF Products they bought might damage their equipment until after the date of their last purchase of the products; and (3) they could not easily discover the truth about the 303 THF Products. *See Saint Joseph's Cath. Church*, 870 S.E.2d at 371–77. Taken as true, the claims would be barred by the statute of limitations four years after the date of the last purchase of the 303 THF Product, in 2022, so filing suit in November 2019 would be within the four-year period. Thus, there is a genuine dispute of material fact as to whether Defendants fraudulently concealed the Georgia Plaintiffs' cause of action, which would prevent their claims from being time-barred. Therefore, the Court finds that the Georgia Plaintiffs' claims are not barred by the statute of limitations at this stage.

C. Louisiana

The Louisiana Plaintiffs' claims are: Count LII, breach of express warranty under the Louisiana Product Liability Act ("LPLA"); Count LIII, design defect under the LPLA; and

Count LIV, failure to warn under the LPLA. Defendants argue that they are entitled to summary judgment on the Louisiana Plaintiffs' claims because they were not timely filed, and the limitations period was not tolled. Plaintiffs argue that the limitations period was tolled due to Defendants' fraud.

The parties agree that the statute of limitations, or prescription period, for the Louisiana Plaintiffs' claims brought under the LPLA is one year from the date of injury. *See* La. Civ. Code Ann. art. 3492; *see also Cook v. Rigby*, 316 So.3d 545, 550 (La. Ct. App. 2020). However, "the Louisiana Supreme Court recognizes the doctrine of *contra non valentum non currit praescriptio* (i.e., '*contra non valentum*') which 'means that prescription does not run against a person who could not bring his own suit.'" *Body By Cook v. Ingersoll-Rand Co.*, 39 F. Supp. 3d 827, 836 (E.D. La. 2014) (quoting *Wells v. Zadeck*, 89 So.3d 1145, 1150 (La. 2012)). *Contra non valentum* can be applied in four instances:

> (1) where there was some legal cause which prevented the courts or their officers from taking cognizance of or acting on the plaintiff's action; (2) where there was some condition coupled with the contract or connected with the proceedings which prevented the creditor from suing or acting; (3) where the debtor himself has done some act effectually to prevent the creditor from availing himself of his cause of action; and (4) where the cause of action is not known or reasonably knowable by the plaintiff, even though this ignorance is not induced by the defendant.

Id. (quoting *Wells*, 89 So.3d at 1150). The third category "prevents the running of prescription 'when the defendant has done some act effectually to lull the victim into inaction and prevent him from availing himself of his cause of action.'" *M.R. Pittman Grp., L.L.C. v. Plaquemines Par. Gov't*, 182 So. 3d 312, 322 (La. Ct. App. 2015) (quoting *Albe v. City of New Orleans*, 150 So.3d 361, 368 (La. Ct. App. 2014)). This category:

> has been applied to cases where a defendant has concealed the fact of the offense or has committed acts (including concealment, fraud, misrepresentation, or other 'ill practices') which tend to hinder, impede, or

> prevent the plaintiff from asserting his cause of action, as long as plaintiff's delay in bringing suit is not willful or the result of his own negligence.

Id. (quoting *Albe*, 150 So.3d at 368). Further, "the party alleging *contra non valentem* . . . must demonstrate that genuine issues of material fact exist relating to one or more of the four categories of *contra non valentem*, thus entitling the opponent to invoke the doctrine so as to defeat summary judgment." *Id.* at 319.

Here, the Court finds that Defendants failed to meet their burden to prove that the Louisiana Plaintiffs' claims are barred by the statute of limitations. The Louisiana Plaintiffs joined the lawsuit on September 1, 2020, so their claims must have accrued on or after September 1, 2019, given the one-year statute of limitations. *See* La. Civ. Code Ann. art. 3492. However, for many of the same reasons cited above, the Court finds that there is a genuine dispute of material fact as to whether the *contra non valentem* doctrine applies. Specifically, Plaintiffs have submitted evidence that the Defendants engaged in fraud, that fraud concealed the Louisiana Plaintiffs' cause of action until "at least the 2019-2020 time period[,]" and their inaction was reasonable. (Doc. #1116, p. 97); *see also Plaquemines Par. Gov't*, 182 So. 3d at 324 ("One cannot conclude that [the defendant] did not commit fraud, engage in ill practices, or prohibit [the plaintiff] from discovering the cause of the damage without evaluating testimony, making factual findings, or engaging in credibility determinations as to the parties' respective motives and intents.") Thus, there is a genuine dispute of material fact as to whether the *contra non valentem* doctrine applies, which would prevent their claims from being time-barred. Therefore, the Court finds that the Louisiana Plaintiffs' claims are not barred by the statute of limitations at this stage.

D. Maryland

Moreland, on behalf of a Maryland putative class, claims: Count I, negligence; Count III, breach of the implied warranty of merchantability; Count IV, breach of the implied warranty of fitness for a particular purpose; Count V, unjust enrichment; Count VI, fraudulent misrepresentation; Count VII, negligent misrepresentation; and Count XXXVIII, a violation of the Maryland Consumer Protection Act ("MCPA"). Defendants argue that they are entitled to summary judgment on Moreland's claims because they were not timely filed, and the limitations period was not tolled. Moreland argues that the limitations period was tolled due to Defendants' fraud.

The parties agree that the statute of limitations for Moreland's claims are four years for breach of implied warranty claims, and three years for all the other claims. *See* Md. Code Ann., Com. Law § 2-725; Md. Code Ann., Cts. & Jud. Proc. § 5-101; *Greene Tree Home Owners Ass'n, Inc. v. Greene Tree Assocs.*, 749 A.2d 806, 820–21 (Md. 2000). "Absent any specific facts demonstrating fraud or concealment designed to frustrate a potentially aggrieved party's ability to discover evidence of wrongdoing[,] . . . the statute of limitations begins to run when the harmed party becomes aware of the [injury]." *Dual Inc. v. Lockheed Martin Corp.*, 857 A.2d 1095, 1104 (Md. 2004).

However,

> whether Maryland's statute of limitations will be tolled as a result of a defendant's alleged fraud is governed by section 5–203 of the Courts & Judicial Proceedings Article, which states, "If the knowledge of a cause of action is kept from a party by the fraud of an adverse party, the cause of action shall be deemed to accrue at the time when the party discovered, or by the exercise of ordinary diligence should have discovered the fraud."

Douglass v. NTI-TSS, Inc., 632 F. Supp. 2d 486, 491 (D. Md. 2009).

> Thus, the fraudulent concealment theory may serve to toll the statute of limitations where "(1) the plaintiff has been kept in ignorance of the cause of

> action by the fraud of the adverse party, and (2) the plaintiff has exercised usual or ordinary diligence for the discovery and protection of his or her rights."

Brown v. Neuberger, Quinn, Gielen, Rubin & Gibber, P.A., 495 F. App'x 350, 355–56 (4th Cir. 2012) (quoting *Frederick Road Ltd. P'ship v. Brown & Strum*, 756 A.2d 963, 975 (Md. 2000)). "In order to invoke the tolling provision, the plaintiff 'must properly plead fraud with particularity,' thus, 'general or conclusory allegations of fraud are insufficient.'" *Douglass*, 632 F. Supp. 2d at 491 (quoting *Doe v. Archdiocese of Washington*, 689 A.2d 634, 643 (Md. Ct. Spec. App. 1997)).

Here, the Court finds that Defendants failed to meet their burden to prove that the Moreland's claims are barred by the statute of limitations. Moreland joined the lawsuit on November 27, 2019, so her breach of implied warranty claims must have accrued on or before November 27, 2015, given the four-year statute of limitations, and November 27, 2016, for all of her other claims, given the three-year statute of limitations. *See* Md. Code Ann., Com. Law § 2-725; Md. Code Ann., Cts. & Jud. Proc. § 5-101; *Greene Tree Assocs.*, 749 A.2d at 820–21. However, for many of the same reasons cited above, the Court finds that there is a genuine dispute of material fact as to whether the Defendants fraudulently concealed the cause of action. Specifically, Plaintiffs have submitted evidence that the Defendants engaged in fraud and that fraud concealed Moreland's cause of action, despite her exercise of usual or ordinary diligence. *See Brown*, 495 F. App'x at 355–56. Plaintiffs submit evidence that Moreland "had no reason prior to at least the 2019-2020 time period to suspect that the equipment issues were due to Defendants' 303 THF[.]" (Doc. #1116, p. 99.) Given that Moreland purchased the 303 THF Products until October 2018 and did not suspect they were damaging her equipment until after that date, the Court finds that there is a genuine dispute of material fact as to whether the tolling

provision applies, which would prevent her claims from being time-barred. Therefore, the Court finds that Moreland's claims are not barred by the statute of limitations at this stage.

E. Massachusetts

Ferrante, on behalf of a Massachusetts putative class, claims: Count I, negligence; Count II, breach of express warranty; Count III, breach of the implied warranty of merchantability; Count IV, breach of the implied warranty of fitness for a particular purpose; Count V, unjust enrichment; Count VI, fraudulent misrepresentation; and Count VII, negligent misrepresentation. Defendants argue that they are entitled to summary judgment on Ferrante's claims because they were not timely filed, and the limitations period was not tolled. Ferrante argues that the limitations period was tolled due to Defendants' fraud.

The parties agree that the statute of limitations for Ferrante's negligence, breach of the implied warranty of merchantability, unjust enrichment, fraudulent misrepresentation, and negligent misrepresentation claims is three years, and four years for the breach of express warranty and breach of the implied warranty of fitness for a particular purpose claims. *See* Mass. Gen. Laws Ann. ch. 260, § 2A; Mass. Gen. Laws Ann. ch. 106, § 2-725. "Under [Massachusetts'] common-law discovery rule, 'a cause of action accrues when the plaintiff discovers or with reasonable diligence should have discovered that (1) [she] has suffered harm; (2) [her] harm was caused by the conduct of another; and (3) the defendant is the person who caused that harm.'" *Magliacane v. City of Gardner*, 138 N.E.3d 347, 357 (Mass. 2020) (quoting *Harrington v. Costello*, 7 N.E.3d 449, 455 (Mass. 2014)).

However,

> [i]n Massachusetts, a statute of limitations can be tolled because of fraudulent concealment if "the wrongdoer . . . concealed the existence of a cause of action through some affirmative act done with intent to deceive," but "[t]he statute of limitations . . . is not tolled if the plaintiff has actual knowledge of the facts giving rise to his cause of action."

Abdallah v. Bain Cap. LLC, 752 F.3d 114, 119–20 (1st Cir. 2014) (quoting *Massachusetts Eye & Ear Infirmary v. QLT Phototherapeutics, Inc.*, 412 F.3d 215, 239 (1st Cir. 2005)). "[F]raudulent concealment requires, at least, concealment of facts necessary to bring a cause of action." *Id.* at 121. Additionally, "equitable tolling . . . applies 'if a plaintiff exercising reasonable diligence could not have discovered information essential to the suit.'" *Abdallah*, 752 F.3d at 120 (quoting *Bernier v. Upjohn Co.*, 144 F.3d 178, 180 (1st Cir. 1998)). "Equitable tolling is to be 'used sparingly,' and the circumstances where tolling is available are exceedingly limited." *Halstrom v. Dube*, 116 N.E.3d 626, 632 (Mass. 2019) (quotation omitted). However, it is available when "the plaintiff is excusably ignorant about the . . . tolling period . . . or where the defendant . . . has affirmatively misled the plaintiff." *Andrews v. Arkwright Mut. Ins. Co.*, 673 N.E.2d 40, 41 (Mass. 1996).

Here, the Court finds that Defendants failed to meet their burden to prove that Ferrante's claims are barred by the statute of limitations. Farrente joined the lawsuit on November 27, 2019, so his claims for breach of express warranty and breach of the implied warranty of fitness for a particular purpose must have accrued on or before November 27, 2015, given the four-year statute of limitations, and November 27, 2016, for all his other claims, given the three-year statute of limitations. *See* Mass. Gen. Laws Ann. ch. 260, § 2A; Mass. Gen. Laws Ann. ch. 106, § 2-725. However, for many of the same reasons cited above, the Court finds that there is a genuine dispute as to whether Defendants fraudulently concealed the cause of action. Specifically, Plaintiffs have submitted evidence that "Ferrante also had no reason prior to at least the 2019-2020 time period to suspect that the equipment damages were due to Defendants' 303 THF." (Doc. #1116, p. 101.) Ferrante alleges he did not have knowledge of the claim because he had no way of knowing that the 303 THF Products were harmful to his equipment. *See Abdallah*, 752 F.3d at 119–20. Given that Ferrante purchased the 303 THF Products until 2018

and did not suspect they were damaging his equipment until after that date, the Court finds that there is a genuine dispute of material fact as to whether the statute of limitations was tolled, which would prevent his claims from being time-barred. Therefore, the Court finds that Ferrante's claims are not barred by the statute of limitations at this stage.

F. Montana

Karnatz, on behalf of a Montana putative class, claims: Count I, negligence; Count II, breach of express warranty; Count III, breach of the implied warranty of merchantability; Count IV, breach of the implied warranty of fitness for a particular purpose; Count V, unjust enrichment; Count VI, fraudulent misrepresentation; and Count VII, negligent misrepresentation. Defendants argue that they are entitled to summary judgment on Karnatz's claims because they were not timely filed, and the limitations period was not tolled. Karnatz argues that the limitations period was tolled due to Defendants' fraud.

The parties agree that the statute of limitations for Karnatz's breach of warranty claims is four years, two years for his fraud claims, and three years for his remaining claims. *See* Mont. Code Ann. §§ 30-2-725, 27-2-203, 27-2-204. "[A] claim or cause of action accrues when all elements of the claim or cause exist or have occurred, the right to maintain an action on the claim or cause is complete, and a court or other agency is authorized to accept jurisdiction of the action[.]" Mont. Code Ann. § 27-2-102(1)(a). "Lack of knowledge of the claim or cause of action, or of its accrual, by the party to whom it has accrued does not postpone the beginning of the period of limitation." Mont. Code Ann. § 27-2-102(2).

However, "[t]he discovery rule provides that a limitations period does not begin until the party discovers, or in the exercise of reasonable diligence would have discovered, the facts constituting the claim." *Draggin' y Cattle Co. v. Addink*, 312 P.3d 451, 456 (Mont. 2013). "[T]his rule only applies when the facts constituting the claim are concealed, self-concealing, or

when the defendant has acted to prevent the injured party from discovering the injury or cause." *Id.* When the discovery rule is invoked because of the defendant's actions, "there must be an affirmative act committed by the defendant, and the affirmative act must be calculated to obscure the existence of the cause of action." *Yarbro, Ltd. v. Missoula Fed. Credit Union*, 50 P.3d 158, 163 (Mont. 2002) (quoting *Yellowstone Conference of the United Methodist Church v. D.A. Davidson, Inc.*, 741 P.2d 794, 798 (Mont. 1987)). However, "equitable tolling for this purpose does not require that the defendant's conduct rise to the level of fraud, or even be intentional, but only that the nature of the defendant's actions has concealed from the plaintiff the existence of the claim." *Schoof v. Nesbit*, 316 P.3d 831, 840 (Mont. 2014). Montana courts "have held that when material issues of fact exist about when a party discovered or reasonably should have discovered all the facts necessary to make out a claim, that issue is a question of fact for the jury." *Draggin' y Cattle Co.*, 312 P.3d at 458.

Here, the Court finds that Defendants failed to meet their burden to prove that Karnatz's claims are barred by the statute of limitations. Karnatz joined the lawsuit on November 27, 2019, so his claims for breach of warranty must have accrued on or before November 27, 2015, on or before November 27, 2017, for his fraud claims, and on or before November 27, 2016, for his remaining claims. *See* Mont. Code Ann. §§ 30-2-725, 27-2-203, 27-2-204. However, for many of the same reasons cited above, the Court finds that there is a genuine dispute as to whether Defendants fraudulently concealed the cause of action. Specifically, Plaintiffs have submitted evidence that "Karnatz had no reason prior to at least the 2019-2020 time period to suspect that the equipment damages were due to Defendants' 303 THF." (Doc. #1116, p. 103.) Karnatz alleges he did not have knowledge of the claim because he had no way of knowing that the 303 THF Products were harmful to his equipment due to Defendants' actions. *See Yarbro, Ltd.*, 50 P.3d at 163. Given that Karnatz purchased the 303 THF Products until 2019 and did not

suspect they were damaging his equipment until after that date, the Court finds that there is a genuine dispute of material fact as to whether the statute of limitations was tolled, which would prevent his claims from being time-barred. Therefore, the Court finds that Karnatz's claims are not barred by the statute of limitations at this stage.

G. North Carolina

The North Carolina Plaintiffs' claims are: Count I, negligence; Count V, unjust enrichment; Count VI, fraudulent misrepresentation; Count VII, negligent misrepresentation; and Count XXVI, a violation of the North Carolina Consumer Protection Act ("NCCPA"). Defendants argue that they are entitled to summary judgment on the North Carolina Plaintiffs' claims because they were not timely filed, and the limitations period was not tolled. Plaintiffs argue that the limitations period was tolled due to Defendants' fraud.

The parties agree that the statute of limitations for the NCCPA claim is four years, and three years for the remaining claims. *See* N.C. Gen. Stat. Ann. §§ 75-16.2, 1-52; *Carlisle v. Keith*, 614 S.E.2d 542, 548–49 (N.C. Ct. App. 2005). "For actions based on fraud, [an action accrues] at the time the fraud is discovered or should have been discovered with the exercise of reasonable diligence." *Nash v. Motorola Commc'ns & Elecs., Inc.*, 385 S.E.2d 537, 538 (N.C. Ct. App. 1989), *aff'd*, 400 S.E.2d 36 (N.C. 1991) (emphasis omitted).

However, the statute of limitations may be tolled if the fraudulent concealment doctrine applies. "For the fraudulent concealment doctrine to apply, a plaintiff must demonstrate: (1) 'the party pleading the statute of limitations fraudulently concealed facts that are the basis of the plaintiff's claim'; (2) 'the plaintiff failed to discover those facts within the statutory period'; despite (3) 'the exercise of due diligence.'" *Withers v. BMW of N. Am., LLC*, 560 F. Supp. 3d 1010, 1022 (W.D.N.C. 2021) (quoting *Supermarket of Marlinton, Inc. v. Meadow Gold Dairies, Inc.*, 71 F.3d 119, 122 (4th Cir. 1995)).

Here, the Court finds that Defendants failed to meet their burden to prove that the North Carolina Plaintiffs' claims are barred by the statute of limitations. The North Carolina Plaintiffs joined the lawsuit on November 27, 2019, so their claim involving a breach of the NCCPA must have accrued on or before November 27, 2015, given the four-year statute of limitations, and on or before November 27, 2016, for their remaining claims, given the three-year statute of limitations. *See* N.C. Gen. Stat. Ann. §§ 75-16.2, 1-52. However, for many of the same reasons cited above, the Court finds that there is a genuine dispute as to whether Defendants fraudulently concealed the cause of action. Specifically, Plaintiffs have submitted evidence that "the North Carolina Plaintiffs also had no reason prior to at least the 2019-2020 time period to suspect that the equipment damages were due to Defendants' 303 THF[,]" because of Defendants' fraud. (Doc. #1116, p. 105.) Given that the North Carolina Plaintiffs purchased the 303 THF Products until 2018 or 2017 and did not suspect they were damaging their equipment until after that date, the Court finds that there is a genuine dispute of material fact as to whether the statute of limitations was tolled, which would prevent their claims from being time-barred. Therefore, the Court finds that the North Carolina Plaintiffs' claims are not barred by the statute of limitations at this stage.

H. Oklahoma

The Oklahoma Plaintiffs' claims are: Count I, negligence; Count II, breach of express warranty; Count III, breach of the implied warranty of merchantability; Count IV, breach of the implied warranty of fitness for a particular purpose; Count V, unjust enrichment; Count VI, fraudulent misrepresentation; Count VII, negligent misrepresentation; and Count XXVIII, a violation of the Oklahoma Consumer Protection Statute ("OCPS"). Defendants argue that they are entitled to summary judgment on the Oklahoma Plaintiffs' claims because they were not

timely filed, and the limitations period was not tolled. Plaintiffs argue that the limitations period was tolled due to Defendants' fraud.

The parties agree that the statute of limitations for the tort claims and unjust enrichment claims is two years, five years for the breach of warranty claims, and three years for the OCPA claim. *See* Okla. Stat. Ann. tit. 12, §§ 95(2)–(3); Okla. Stat. Ann. tit. 12A §§ 2-725(1)–(2). "A cause of action accrues when the injury occurs." *Calvert v. Swinford*, 382 P.3d 1028, 1033 (Okla. 2016); *see also Walls v. Am. Tobacco Co.*, 11 P.3d 626, 630 (Okla. 2000).

However,

> Oklahoma law has long recognized that fraudulent concealment constitutes an implied exception to the statute of limitations, and a party who wrongfully conceals material facts and thereby prevents a discovery of its wrong, or the fact that a cause of action has accrued against it, is not allowed to take advantage of its own wrong by pleading the statute, the purpose of which is to prevent wrong and fraud.

Dinwiddie v. Suzuki Motor of Am., Inc., 111 F. Supp. 3d 1202, 1211 (W.D. Okla. 2015) (quoting *Masquat v. DaimlerChrysler Corp.*, 195 P.3d 48, 54–55 (Okla. 2008)) (cleaned up). "[S]ome actual artifice or some affirmative act of concealment, or some misrepresentation which induces the other party to inaction, or to forgo inquiry [is required]." *Id.* (quoting *Masquat*, 195 P.3d at 55). "One relying on fraudulent concealment to toll the statute of limitation must not only show that he did not know facts constituting a cause of action, but that he exercised reasonable diligence to ascertain such facts." *Funnell v. Jones*, 737 P.2d 105, 107 (Okla. 1985) (quoting *Kansas City Life Insurance Co. v. Nipper*, 51 P.2d 741, 747 (Okla. 1935)).

> Where the period of limitations starts when the claimant knew, or, in the exercise of reasonable diligence would have discovered the act which gives rise to the claim, the beginning of the running of the statute of limitations is usually to be determined from the facts and circumstances of the particular case; and, where these are such that reasonable men might reach conflicting opinions thereon, the issue is a question for determination by the trier of fact.

Woods v. Prestwick House, Inc., 247 P.3d 1183, 1191 (Okla. 2011).

Here, the Court finds that Defendants failed to meet their burden to prove that the Oklahoma Plaintiffs' claims are barred by the statute of limitations. The Oklahoma Plaintiffs joined the lawsuit on November 5, 2019, so their tort and unjust enrichment claims must have accrued on or before November 5, 2017, their breach of warranty claims must have accrued on or before November 5, 2014, and their claim involving the OCPS by November 5, 2016. *See See* Okla. Stat. Ann. tit. 12, §§ 95(2)–(3); Okla. Stat. Ann. tit. 12A §§ 2-725(1)–(2). However, for many of the same reasons cited above, the Court finds that there is a genuine dispute as to whether Defendants fraudulently concealed the cause of action. Specifically, Plaintiffs have submitted evidence that "the Oklahoma Plaintiffs also had no reason prior to at least the 2019-2020 time period to suspect that the equipment damages were due to Defendants' 303 THF." (Doc. #1116, p. 108.) The Oklahoma Plaintiffs allege they did not have knowledge of the claims because they had no way of knowing that the 303 THF Products were harmful to their equipment, due to Defendants fraudulently concealing the true nature of the 303 THF Products. Given that the Oklahoma Plaintiffs purchased the 303 THF Products until 2018 or 2019, and did not suspect they were damaging their equipment until after that date, the Court finds that there is a genuine dispute of material fact as to whether the statute of limitations was tolled, which would prevent their claims from being time-barred. Therefore, the Court finds that the Oklahoma Plaintiffs' claims are not barred by the statute of limitations at this stage.

I. Pennsylvania

The Pennsylvania Plaintiffs' claims are: Count I, negligence; Count II, breach of express warranty; Count III, breach of the implied warranty of merchantability; Count IV, breach of the implied warranty of fitness for a particular purpose; Count V, unjust enrichment; Count VI, fraudulent misrepresentation; and Count VII, negligent misrepresentation. Defendants argue that they are entitled to summary judgment on the Pennsylvania Plaintiffs' claims because they were

not timely filed, and the limitations period was not tolled. Plaintiffs argue that the limitations period was tolled due to Defendants' fraud.

The parties agree that the statute of limitations for the breach of express and implied warranties and unjust enrichment claims is four years, and two years for the tort claims. *See* 13 Pa. Stat. and Cons. Stat. Ann. § 2725(a)–(b); 42 Pa. Stat. and Cons. Stat. Ann. § 5524(7). "Generally, 'a cause of action accrues, and thus the applicable limitations period begins to run, when an injury is inflicted.'" *In re Risperdal Litig.*, 223 A.3d 633, 640 (Pa. 2019) (quoting *Wilson v. El-Daief*, 964 A.2d 354, 361 (Pa. 2009)).

However, "[w]here, through fraud or concealment, the defendant causes the plaintiff to relax his vigilance or deviate from his right of inquiry, the defendant is estopped from invoking the bar of the statute of limitations." *Kingston Coal Co. v. Felton Min. Co.*, 690 A.2d 284, 290 (Pa. Super. Ct. 1997) (cleaned up) (quoting *Molineux v. Reed*, 532 A.2d 792, 794 (Pa. 1987)). "The discovery rule will toll the applicable statute until a plaintiff could reasonably discover the cause of his action, including in circumstances where the connection between the injury and the conduct of another are not readily apparent." *Risperdal Litig.*, 223 A.3d at 640. "Moreover, defendant's conduct need not rise to fraud or concealment in the strictest sense, that is, with an intent to deceive; unintentional fraud or concealment is sufficient." *Felton Min. Co.*, 690 A.2d at 290 (quoting *Reed*, 532 A.2d at 794).

> [A] court must determine whether the plaintiff exhibited "those qualities of attention, knowledge, intelligence and judgment which society requires of its members for the protection of their own interests and the interests of others." [*Fine v. Checcio*, 870 A.2d 850, 858 (Pa. 2005).] Because this determination typically involves many fact determinations, it is normally for the jury to decide it. *Gleason* [*v. Borough of Moosic*], 15 A.3d [479,] 485 [(Pa. 2011)] (quoting *Fine*, 870 A.2d at 859).

Risperdal Litig., 223 A.3d at 640. "Affirmative acts of concealment sufficient to invoke equitable tolling typically must be distinct from the underlying wrong, unless the latter is

inherently fraudulent or 'self-concealing.'" *White v. PNC Fin. Servs. Grp., Inc.*, No. 11-7928, 2013 WL 3090823, at *3 (E.D. Pa. June 20, 2013) (quoting *In re Aspartame Antitrust Litig.*, No. 2:06–CV–1732, 2007 WL 5215231, at * 4–5 (E.D. Pa. Jan.18, 2007)).

Here, the Court finds that Defendants failed to meet their burden to prove that the Pennsylvania Plaintiffs' claims are barred by the statute of limitations. The Pennsylvania Plaintiffs joined the lawsuit in November 2019, so their breach of warranty and unjust enrichment claims must have accrued on or before November 2015, and their remaining claims must have accrued on or before November 2017. *See* 13 Pa. Stat. and Cons. Stat. Ann. § 2725(a)–(b); 42 Pa. Stat. and Cons. Stat. Ann. § 5524(7). However, for many of the same reasons cited above, the Court finds that there is a genuine dispute as to whether Defendants fraudulently concealed the cause of action. Specifically, Plaintiffs have submitted evidence that "the Pennsylvania Plaintiffs also had no reason prior to at least the 2019-2020 time period to suspect that the equipment damages were due to Defendants' 303 THF." (Doc. #1116, p. 111.) The Pennsylvania Plaintiffs allege they did not have knowledge of the claims because they had no way of knowing that the 303 THF Products were harmful to their equipment, due to the nature of the 303 THF Products, as they were inherently self-concealing. *White*, 2013 WL 3090823, at *3. Given that the Pennsylvania Plaintiffs purchased the 303 THF Products until 2019 and did not suspect they were damaging their equipment until after that date, the Court finds that there is a genuine dispute of material fact as to whether the statute of limitations was tolled, which would prevent their claims from being time-barred. Therefore, the Court finds that the Pennsylvania Plaintiffs' claims are not barred by the statute of limitations at this stage.

J. West Virginia

The West Virginia Plaintiffs' claims are: Count I, negligence; Count II, breach of express warranty; Count III, breach of the implied warranty of merchantability; Count IV, breach of the

implied warranty of fitness for a particular purpose; Count V, unjust enrichment; Count VI, fraudulent misrepresentation; Count VII, negligent misrepresentation; and Count XXXII, a violation of the West Virginia Consumer Protection Statute ("WVCPS"). Defendants argue that they are entitled to summary judgment on the West Virginia Plaintiffs' claims because they were not timely filed, and the limitations period was not tolled. Plaintiffs argue that the limitations period was tolled due to Defendants' fraud.

The parties agree that the statute of limitations for the breach of warranty, unjust enrichment, and WVCPS claims are four years, and for the remaining claims, two years. *See* W. Va. Code §§ 46-2-725(1)–(2), 46A-5-101(1), 55-2-12.

> Under the discovery rule the statute of limitations begins to run when the plaintiff knows, or by the exercise of reasonable diligence, should know (1) that the plaintiff has been injured, (2) the identity of the entity who owed the plaintiff a duty to act with due care, and who may have engaged in conduct that breached that duty, and (3) that the conduct of that entity has a causal relation to the injury.

Teets v. Mine Safety Appliances Co., LLC, No. 3:19-CV-195, 2021 WL 3280528, at *2 (N.D.W. Va. July 28, 2021), *aff'd*, No. 21-1834, 2022 WL 14365086 (4th Cir. Oct. 25, 2022). Specifically, "[a] plaintiff does not have enough information to sue until he knows that he has been injured, he knows the identity of the maker of the product, and he knows that the product had a causal relation to his injury." *Gaither v. City Hosp., Inc.*, 487 S.E.2d 901, 909 (W. Va. 1997) (quoting *Hickman v. Grover*, 358 S.E.2d 810, 813–14 (W. Va. 1987)).

If "the defendant fraudulently concealed facts that prevented the plaintiff from discovering or pursuing the cause of action . . . the statute of limitations is tolled." *Teets*, 2021 WL 3280528, at *3 (cleaned up). "The relevant inquiry is simple: did the [d]efendant fraudulently conceal[ ] facts that prevented the plaintiff from discovering or pursuing the cause of action?" *Id.* (quotation marks and citations omitted). "In the great majority of cases, the issue

of whether a claim is barred by the statute of limitations is a question of fact for the jury." *Gaither*, 487 S.E.2d at 909–10.

Here, the Court finds that Defendants failed to meet their burden to prove that the West Virginia Plaintiffs' claims are barred by the statute of limitations. The West Virginia Plaintiffs joined the lawsuit in November 2019, so their breach of warranty, unjust enrichment, and WVCPS claims must have accrued on or before November 2015, and their remaining claims must have accrued on or before November 2017. *See* W. Va. Code §§ 46-2-725(1)–(2), 46A-5-101(1), 55-2-12. However, for many of the same reasons cited above, the Court finds that there is a genuine dispute as to whether Defendants fraudulently concealed the cause of action. Specifically, Plaintiffs have submitted evidence that "the West Virginia Plaintiffs also had no reason prior to at least the 2019-2020 time period to suspect that the equipment damages were due to Defendants' 303 THF." (Doc. #1116, p. 113.) The West Virginia Plaintiffs allege they did not have knowledge of the claims because they had no way of knowing that the 303 THF Products were harmful to their equipment, due to Defendants fraudulently concealing the true nature of the 303 THF Products. Given that the West Virginia Plaintiffs purchased the 303 THF Products until 2019 and did not suspect they were damaging their equipment until after that date, the Court finds that there is a genuine dispute of material fact as to whether the statute of limitations was tolled, which would prevent their claims from being time-barred. Therefore, the Court finds that the West Virginia Plaintiffs' claims are not barred by the statute of limitations at this stage.

K. Wyoming

Smith, on behalf of a Wyoming putative class, claims: Count I, negligence; Count II, breach of express warranty; Count III, breach of the implied warranty of merchantability; Count IV, breach of the implied warranty of fitness for a particular purpose; Count V, unjust

enrichment; Count VI, fraudulent misrepresentation; and Count VII, negligent misrepresentation. Defendants argue that they are entitled to summary judgment on Smith's claims because they were not timely filed, and the limitations period was not tolled. Smith argues that the limitations period was tolled due to Defendants' fraud.

The parties agree that the statute of limitations for all Smith's claims is four years. *See* Wyo. Stat. Ann. §§ 34.1-2-725(a)–(b), 1-3-105(iv). "[T]he statute of limitations begins to run when the injured party knows or reasonably ought to know that some damage has resulted from the wrongful act[.]" *Rawlinson v. Cheyenne Bd. of Pub. Utilities*, 17 P.3d 13, 16 (Wyo. 2001). The plaintiff must know or reasonably ought to know "the causal connection between the injury and the alleged negligence of the [defendant]." *Olson v. A.H. Robins Co.*, 696 P.2d 1294, 1297 (Wyo. 1985). "[Wyoming courts] have recognized that application of the discovery rule is a difficult candidate for summary judgment." *Pioneer Homestead Apartments III v. Sargent Engineers, Inc.*, 421 P.3d 1074, 1079 (Wyo. 2018) (quotation marks and citation omitted).

Additionally, equitable tolling may prevent the action from accruing, where "1) a delay in filing an action that is induced by the defendant; 2) the defendant misled the plaintiff; and 3) the plaintiff must have acted on the misinformation in good faith to the extent that he failed to pursue his action in a timely manner." *Inman v. Boykin*, 330 P.3d 275, 283 (Wyo. 2014) (quoting *Lucky Gate Ranch, L.L.C. v. Baker & Assoc., Inc.*, 208 P.3d 57, 66 (Wyo. 2009)).

Here, the Court finds that Defendants failed to meet their burden to prove that Smith's claims are barred by the statute of limitations. Smith joined the lawsuit in November 2019, so his claims must have accrued on or before November 2015, given the four-year statute of limitations. *See* Wyo. Stat. Ann. §§ 34.1-2-725(a)–(b), 1-3-105(iv). However, for many of the same reasons cited above, the Court finds that there is a genuine dispute whether Defendants fraudulently concealed the cause of action. Specifically, Plaintiffs have submitted evidence that

Smith "had no reason prior to at least the 2019-2020 time period to suspect that the equipment damages were due to Defendants' 303 THF." (Doc. #1116, p. 115.) Smith alleges he did not have knowledge of the claim because he had no way of knowing that the 303 THF Products were harmful to his equipment. While he alleges damages beginning in 2016, he did not know the cause of those damages. *See Olson*, 696 P.2d at 1297. Given that Smith purchased the 303 THF Products until 2019 and did not suspect that Defendants were responsible for those damages until after that date, the Court finds that there is a genuine dispute of material fact as to whether the statute of limitations was tolled, which would prevent his claims from being time-barred. Therefore, the Court finds that Smith's claims are not barred by the statute of limitations at this stage.

IV. CONCLUSION

Accordingly, Defendants' Motion for Summary Judgment as to Time-Barred Claims (Doc. #849) is DENIED.

IT IS SO ORDERED.

/s/ Stephen R. Bough
STEPHEN R. BOUGH
UNITED STATES DISTRICT JUDGE

Dated: February 13, 2024