IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

KEVIN BRNICH ELECTRIC LLC, PERFORMANCE ELECTRIC, INC., ARTISTIC ELECTRIC INC., BOLT ELECTRIC LLC, NATIONAL SENTRY SECURITY SYSTEMS, INC., ELECTRICALIFORNIA, CHARLES VODICKA, PATRICK CATES, BRYAN BUTAKIS, NELS GORDON, RICK KEYSER, TYLER BARRETTE, and CLIFFORD OAKLEY, individually and on behalf of all others similarly situated, **Plaintiffs,** **v.** **SIEMENS INDUSTRY, INC.,** **Defendant.**	**CIVIL ACTION FILE** **NO. 1:22-CV-1229-MHC**

ORDER

This case comes before the Court on Defendant Siemens Industry, Inc. ("Siemens")'s Amended Motion to Dismiss Counts II through V and VII of Plaintiffs' Consolidated Class Action Complaint ("Def.'s Am. Mot.") [Doc. 52].

I. FACTUAL BACKGROUND

This is a putative class action brought by thirteen named Plaintiffs on behalf of themselves and all other similarly situated electricians and consumers who suffered losses as a result of purchasing allegedly defective Arc Fault Circuit Interrupters ("AFCIs") manufactured by Siemens. Pls.' Consolidated Class Action Compl. ("Consol. Compl.") [Doc. 40]. The factual background of this matter was previously set forth in this Court's May 18, 2023, Order and is incorporated herein. May 18, 2023, Order [Doc. 48] at 2-8. The Court supplements that factual background with the following allegations, as they are particularly relevant to the Court's current inquiry.[1]

Plaintiffs allege that Siemens designs, manufactures, advertises, and sells AFCIs and other electrical products through Siemens's Sales and Distributor locations throughout the United States. Consol. Compl. ¶¶ 13, 30, 33, 60. Siemens also represents on its website that it offers "a complete portfolio of electrical services, including preventative maintenance, emergency services, technical support, equipment reconditioning, retrofits and upgrades that limit risk

[1] Because this case is before the Court on a motion to dismiss, the facts are presented as alleged in Plaintiffs' Consolidated Class Action Complaint. See Silberman v. Miami Dade Transit, 927 F.3d 1123, 1128 (11th Cir. 2019) (citation omitted).

of downtime, increase safety, extend equipment lifecycle, reduce operating costs, and meet regulatory compliance." Id. ¶ 61 (internal quotation and punctuation omitted). According to Plaintiffs, Siemens recognizes that "Arc Flash Mitigation Solutions" must be able to ensure the "reliability, uptime, performance, safety, and lifecycle management of your electrical systems infrastructure," which includes "avoiding system downtime." Id. ¶ 62. Plaintiffs also allege that Siemens purports to recognize the high "costs of downtime," "in terms of both lost productivity and equipment replacement." Id. ¶ 63. Siemens further advertises that its AFCIs "provide electricians valuable time savings in installation." Id. ¶ 67.

Plaintiffs allege that, although Siemens made these representations, Siemens AFCIs are "defective and frequently and unnecessarily trip in the presence of common and harmless arcs." Id. ¶ 68. According to Plaintiffs, the "algorithms Siemens' breakers use to identify dangerous arcs fail to distinguish between dangerous arcs and harmless arcs (for example, from commonly used appliances), which causes the breakers to trip where no, or otherwise harmless, electrical arcing is occurring." Id. Plaintiffs allege that Siemens's failure to update its AFCIs to distinguish the harmless arcs has resulted in repeated nuisance tripping. Id.

Plaintiffs allege that Siemens knew that its AFCIs "experienced abnormally high rates of nuisance tripping" but "omitted and concealed that fact from

electricians and consumers." Id. ¶ 74. Plaintiffs allege that Siemens knew of the defects because of numerous complaints received online. Id. ¶¶ 75-82. With regard to these complaints, Plaintiffs provide the text of seven complaints posted by electricians on third-party websites, including Mike Holt's Forum, Electrician Talk, Amazon, Home Depot, and Reddit. Id. The earliest of these complaints appears to have been posted on January 6, 2017, by an electrician who wrote of issues with Siemens AFCIs nuisance tripping.[2] Id. ¶ 77. The electrician stated, "The Siemens rep claims there wasn't anything wrong." Id. These online postings complain about the AFCIs tripping when certain kitchen appliances are used and the fact that any investigation by the electrician has been unavailing. Id. ¶¶ 75-81. Plaintiffs also allege that Siemens received complaints directly, id. ¶¶ 75, 82, including from the named Plaintiffs. Id. ¶¶ 110, 164.

According to Plaintiffs, Siemens itself conducted testing on "hundreds" of AFCIs that had been returned as defective. Id. ¶ 83. Siemens confirmed through the testing that they "trip in inappropriate circumstances"—i.e., not only when an actual arc is detected, but also when an appliance draws high amps and when there

[2] *Filters for AFCI Nuisance Tripping*, Mike Holt's Forum, https://forums.mikeholt.com/threads/filters-for-afci-nuisance-tripping.132330/ (last visited Feb. 2, 2024).

is electrical noise caused by loads on the circuits. Id. However, Siemens concluded that the AFCIs were not defective even though "AFCI breakers should ***only*** be tripping in ***one*** of those circumstances." Id. (emphasis in original).

Plaintiffs allege that, despite this knowledge, Siemens did not disclose and, instead, actively concealed the fact that its breakers experienced frequent nuisance tripping and that the nuisance tripping occurred due to defects in the AFCIs. Id. ¶ 84. According to Plaintiffs, "Siemens AFCI breaker labels and brochures omit any information describing that Siemens AFCI breakers trip when using common household appliances or in the presence of electronic noise." Id. Plaintiffs further allege that Siemens instead "deflect[ed] blame" for the nuisance tripping onto homeowners and electricians. Id. ¶ 85, 87. According to Plaintiffs, a Siemens employee, during an interview with Electrical Contractor Magazine, stated that "[p]eople believe that certain arc fault breakers are defective because they frequently trip," but "[t]he majority of the time, these breakers trip because they are supposed to." Id. ¶ 85.[3] Plaintiffs also allege that a Siemens employee gave a

[3] This interview was quoted in an online article published on May 15, 2017. See ACCAC ¶ 85 n.29; William Atkinson, *Debunking Six AFCI Myths*, ELEC. CONTRACTOR (May 15, 2017), https://www.ecmag.com/magazine/articles/article-detail/systems-debunking-six-afci-myths.

presentation, entitled "Debunking the Myths of AFCI," in which Siemens allegedly blamed nuisance tripping on "creative wiring practices." Id. ¶ 88.

According to Plaintiffs, Siemens offers several tools to the public that purport to help homeowners and electricians find the cause of unwanted tripping. Id. ¶ 88-89. One such tool is a troubleshooting guide, which represents that Siemens AFCIs "have been thoroughly tested to dramatically decrease the amount of nuisance tripping," and provides guidance to both homeowners and electrical contractors to lower the frequency of nuisance tripping, which includes checking the connections between wiring, ensuring that circuits are not overloaded, and ensuring that wires are routed in "strategic areas." Id. ¶ 90.

Siemens also offers "innovated trip indicators" and the "Intelli-Arc Diagnostic Tool," which are advertised as tools to help in the troubleshooting process and to "help electricians pinpoint the type of trip." Id. ¶ 92. Plaintiffs allege that these tools instead "help[ed] conceal the underlying issue with Siemens' breakers and perpetuate[d] Siemens' misrepresentation that nuisance tripping is the fault of the homeowner or electrician." Id. Plaintiffs allege that Performance Electric, Inc., purchased the Intelli-Arc tool, but that the tool "often failed to provide Performance Electric with any indication of the actual cause of the trip."

Id. ¶ 112. Plaintiffs do not allege that any other named Plaintiff has purchased the Intelli-Arc tool.

Plaintiffs allege that "Siemens provided Plaintiffs . . . with an express warranty for the AFCIs whereby Siemens agreed to repair or replace the defective AFCIs for one year from the initial operation of the goods but not more than eighteen months from Siemens' shipment of the goods." Id. ¶ 246. However, Plaintiffs offer no additional information regarding the warranty and did not attach a copy to their Consolidated Complaint.

II. PROCEDURAL HISTORY

In its May 18, 2023, Order, this Court reviewed the procedural history of the three lawsuits that were previously filed by one or more of Plaintiffs in this consolidated action. May 18, 2023, Order at 8-9. For simplicity, the following chart lists the named Plaintiffs by their original lawsuits and home states:

Original Lawsuit	Plaintiff	Home State
Nat'l Sentry Sec. Sys., Inc., et al. v. Siemens Corp., et al.[4]	National Sentry Security Services, Inc. ("NSSS")	Ohio
	Electrocalifornia	California
	Rick Keyser	Nebraska
	Tyler Barrette	New Hampshire
Kevin Brnich Electric, LLC, et al., v. Siemens Indus., Inc.[5]	Kevin Brnich, LLC ("Brnich")	Pennsylvania
	Performance Electric Inc. ("Performance Electric")	Washington
	Artistic Electric Inc. ("Artistic Electric")	Pennsylvania
	Bolt Electric LLC ("Bolt Electric")	Maine
	Charles Vodicka	North Carolina
	Clifford Oakley[6]	Oregon
Cates et al. v. Siemens Indus., Inc.[7]	Patrick Cates	California
	Bryan Butakis	Pennsylvania
	Nels Gordon	Washington

This Court granted Plaintiffs' unopposed motions to consolidate these three cases. June 24, 2022, Order [Doc. 30]; Sept. 8, 2022, Order [Doc. 42]. The

[4] No. 1:21-cv-1072 (CJN) (D.D.C. Apr. 19, 2021) [Doc. 1 in No. 1:22-CV-3043-MHC] (the "NSSS Plaintiffs").

[5] No. 1:22-cv-1229-MHC (N.D. Ga. Mar. 29, 2022); Compl. [Doc. 1] (the "Brnich Plaintiffs").

[6] Oakley was added as a Plaintiff in the Consolidated Complaint in this case.

[7] No. 1:22-cv-1914-MHC (N.D. Ga. May 13, 2022) (the "Cates Plaintiffs").

Consolidated Complaint, filed on August 2, 2022, asserted the following causes of action:

1. Violations of ten different state-specific consumer protection statutes (Counts I and VIII through XVI);

2. State law claims for fraudulent concealment (Count II), negligent misrepresentation (Count III), breach of implied warranty of merchantability (Count IV), breach of express warranty (Count V), and unjust enrichment (Count VII); and

3. Breach of warranty pursuant to the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301 et seq. (Count VI).

Consol. Compl. ¶¶ 201-365. This Court granted Siemens's unopposed motion to dismiss Plaintiffs' claims under the Magnuson-Moss Warranty Act (Count VI) with prejudice. May 18, 2023, Order at 12-13. The Court also granted Siemens's motion to dismiss Counts I, VIII, IX, X, XIV, XV, and XVI[8] without prejudice for Plaintiffs' failure to state a claim. Id. at 20-31, 39-45. However, the Court denied Siemens's motion to dismiss Counts XI, XII, and XIII,[9] concluding that Plaintiffs

[8] These Counts consisted of claims arising out of Georgia, Washington, North Carolina, Pennsylvania, Nebraska, New Hampshire, and Oregon consumer protection statutes, respectively. See Consol. Compl. ¶¶ 201-12, 266-300, 330-65.

[9] These Counts consist of claims arising out of California's Song-Beverly Act, the California Consumer Legal Remedies Act, Cal. Civ. Code § 1750 et seq, and the California Business & Professional Code § 17200 et seq., respectively. See Consol. Compl. ¶¶ 301-29.

pleaded sufficient facts to state claims under three California consumer protection statutes. Id. at 31-39.

With regard to Counts II through V and VII,[10] the Court stated that Plaintiffs failed to "indicate which state's laws are alleged to be violated" or "how those claims might vary depending upon Plaintiffs' states of residence." Id. at 13. The Court also noted that Siemens failed to discuss the choice of law issue in its motion to dismiss and only mentioned it in a reply brief to which Plaintiffs had no opportunity to respond. Id. at 13-14. The Court denied Siemens's motion to dismiss those Counts without prejudice with leave for Siemens to file an amended motion to dismiss to provide the parties with an opportunity to address and respond to "both the choice of law issue and the substantive claims for each Plaintiff." Id. at 18.

After receiving Siemens's amended motion to dismiss, Plaintiffs' response, and Siemens's reply, the Court concluded "that D.C. choice of law rules govern the NSSS Plaintiffs' claims because the NSSS Plaintiffs waived their right to object to venue," and ordered additional briefing as to the impact of District of Columbia

[10] These Counts consist of claims for fraudulent concealment, negligent misrepresentation, breach of the implied warranty of merchantability, breach of express warranty, and unjust enrichment, respectively.

choice of law rules on Plaintiffs' fraudulent concealment, negligent misrepresentation, and unjust enrichment claims. Oct. 13, 2023, Order [Doc. 76] at 3, 10-11.

III. LEGAL STANDARD

Federal Rule of Civil Procedure 8(a)(2) requires that a pleading contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Under Federal Rule of Civil Procedure 12(b)(6), a claim will be dismissed for failure to state a claim upon which relief can be granted if it does not plead "enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). The Supreme Court has explained this standard as follows:

> 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. The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully.

Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (internal citation omitted). Thus, a claim will survive a motion to dismiss only if the factual allegations in the pleading are "enough to raise a right to relief above the speculative level." Twombly, 550 U.S. at 555.

At the motion to dismiss stage, the court accepts all well-pleaded facts in the plaintiff's complaint as true, as well as all reasonable inferences drawn from those facts. McGinley v. Houston, 361 F.3d 1328, 1330 (11th Cir. 2004); Lotierzo v. Woman's World Med. Ctr., Inc., 278 F.3d 1180, 1182 (11th Cir. 2002). Not only must the court accept the well-pleaded allegations as true, but these allegations must also be construed in the light most favorable to the pleader. Powell v. Thomas, 643 F.3d 1300, 1302 (11th Cir. 2011). However, the court need not accept legal conclusions, nor must it accept as true legal conclusions couched as factual allegations. Iqbal, 556 U.S. at 678. Thus, evaluation of a motion to dismiss requires the court to assume the veracity of well-pleaded factual allegations and "determine whether they plausibly give rise to an entitlement to relief." Id. at 679.

Under Federal Rule of Civil Procedure 9(b), a complaint alleging fraud "must state with particularity the circumstances constituting fraud."

> Rule 9(b) is satisfied if the complaint sets forth (1) precisely what statements were made in what documents or oral representations or what omissions were made, and (2) the time and place of each such statement and the person responsible for making (or, in the case of omissions, not making) same, and (3) the content of such statements and the manner in which they misled the plaintiff, and (4) what the defendants obtained as a consequence of the fraud.

United States ex rel. Clausen v. Lab. Corp. of Am., 290 F.3d 1301, 1310 (11th Cir. 2002) (quoting Ziemba v. Cascade Int'l, Inc., 256 F.3d 1194, 1202 (11th Cir.

2001)). "Failure to satisfy Rule 9(b) is a ground for dismissal of a complaint." Corsello v. Lincare, Inc., 428 F.3d 1008, 1012 (11th Cir. 2005).

However, Rule 9(b) also provides that "[m]alice, intent, knowledge, and other conditions of a person's mind may be alleged generally." FED. R. CIV. P. 9(b). Thus, Rule 9(b) "does not require a plaintiff to allege specific facts related to the defendant's state of mind when the allegedly fraudulent statements [or omissions] were made." Mizzaro v. Home Depot, Inc., 544 F.3d 1230, 1237 (11th Cir. 2008). Instead, it is sufficient to plead "the who, what, when, where, and how" of the allegedly fraudulent statements or omissions and then allege generally that those statements or omissions were made with the requisite intent. Id.

IV. CHOICE OF LAW[11]

Generally, a federal court sitting in diversity applies the choice of law rules of the forum state. Boardman Petroleum, Inc. v. Federated Mut. Ins. Co., 135 F.3d

[11] As noted in the Court's October 13, 2023, Order, the parties do not dispute that the warranty claims (Counts IV and V) are governed by Plaintiffs' "home states" (i.e., the states where each Plaintiff resides and where Siemens AFCIs were purchased), and the parties do not distinguish between the applicability of this choice of law concession as to the NSSS Plaintiffs and the remaining Plaintiffs. Pls.' Resp. at 9; Def.'s Reply at 4. The Court concludes that all of Plaintiffs' breach of warranty claims are governed by the laws of their respective home states. Consequently, the Court needs only to consider choice of law with respect to Plaintiffs' fraudulent concealment, negligent misrepresentation, and unjust enrichment claims (Counts II, III, and VII).

750, 752 (11th Cir. 1998). But when a case is transferred under 28 U.S.C. § 1404(a) from one proper venue to another, the transferee court must apply the law of the transferor state. Ferens v. John Deere Co., 494 U.S. 516, 516 (1990); Oct. 13, 2023, Order at 3-4, 7. Accordingly, the Court applies District of Columbia choice of law rules to the NSSS Plaintiffs' claims because these Plaintiffs originally filed in the United States District Court for the District of Columbia and transferred the case to this Court under § 1404(a). In addition, the Court applies Georgia choice of law rules to the Brnich/Cates Plaintiffs' claims because their lawsuits originally were filed in Georgia.

A. The NSSS Plaintiffs

Siemens argues that the substantive laws of Ohio, California, Nebraska, and New Hampshire govern the fraudulent concealment, negligent misrepresentation, and unjust enrichment claims of NSSS, Electrocalifornia, Keyser, and Barrette, respectively, while Plaintiffs argue that Georgia law should apply to these claims. See generally Def.'s Suppl. Br. Applying D.C. Choice of Law Rules to Counts II, III, and VII ("Def.'s Suppl. Br.") [Doc. 79]; Pls.' Suppl. Br. Regarding the Application of the District of Columbia's Choice of Law Rules ("Pls.' Suppl. Br.") [Doc. 81].

> The District of Columbia "employ[s] 'a modified governmental interests analysis which seeks to identify the jurisdiction with the most

> significant relationship to the dispute.'" Washkoviak v. Student Loan Mktg. Ass'n, 900 A.2d 168, 180 (D.C. 2006) (quoting Moore v. Ronald Hsu Constr. Co., 576 A.2d 734, 737 (D.C. 1990)). Under this approach, a court must first "determine whether a true conflict exists between the laws of the two jurisdictions—that is, whether more than one jurisdiction has a potential interest in having its law applied and, if so, whether the law of the competing jurisdictions is different." In re APA Assessment Fee Litig., 766 F.3d [39,] 51–52 [(D.C. Cir. 2014)] (internal quotation marks omitted) (quoting GEICO v. Fetisoff, 958 F.2d 1137, 1141 (D.C. Cir. 1992)). A "false conflict" exists, on the other hand, "when either (1) the laws of the interested states are the same; (2) when those laws, though different, produce the same result when applied to the facts at issue; or (3) when the policies of one state would be advanced by the application of its law and the policies of the states whose laws are claimed to be in conflict would not be advanced by application of their law." Long v. Sears Roebuck & Co., 877 F. Supp. 8, 11 (D.D.C. 1995) (citing Biscoe v. Arlington Cnty., 738 F.2d 1352, 1360 (D.C. Cir. 1984)). If "there is no 'true conflict' " among the purportedly interested jurisdictions, and where one of those jurisdictions is the District of Columbia, D.C. courts will "apply the law of the District of Columbia by default." GEICO, 958 F.2d at 1141 (citing Fowler v. A & A Co., 262 A.2d 344, 348 (D.C. App. 1970); Restatement (Second) of Conflict of Laws § 186 cmt. c (Am. Law Inst. 1971)).

Atlanta Channel, Inc. v. Solomon, 583 F. Supp. 3d 174, 197 (D.D.C. 2022) (quoting Beach TV Props., Inc. v. Solomon, 306 F. Supp. 3d 70, 92 (D.D.C. 2018)).

> If there is a true conflict between the laws of two jurisdictions, the Court "must balance the competing interests of the two jurisdictions, and apply the law of the jurisdiction with the more substantial interest in the resolution of the issue." E.M. v. Shady Grove Reprod. Sci. Ctr. P.C., 496 F. Supp. 3d 338, 366 (D.D.C. 2020) (internal punctuation and citation omitted). Courts look to "the governmental policies underlying the applicable laws and determine which jurisdiction's policy would be

> more advanced by the application of its laws" while also considering (1) where the injury occurred, (2) where the conduct causing the injury occurred, (3) where the parties reside or are incorporated, and (4) where the parties' relationship is centered.

Id. (quoting Washkoviak, 900 A.2d at 180).

As an initial matter, the Court agrees with the parties that the District of Columbia has no interest in the outcome of this litigation, so that the only potential sources of governing law are Georgia, on the one hand, and the NSSS Plaintiffs' home states of Ohio, California, Nebraska, and New Hampshire, on the other hand. This creates a bit of a quandary as to which state law to apply if this Court determines that there is no true conflict between the laws of Georgia and the home state of an NSSS Plaintiff. No party has cited, nor has this Court found, a case in which, applying District of Columbia choice of law rules, a true conflict was not found, and a jurisdiction other than the District of Columbia was determined to be the place for the law's application. See, e.g., Atlanta Channel, 598 F. Supp. 3d at 199 ("[T]here does not appear to be any difference between Georgia, D.C., and Virginia law on the measure of lost asset value damages. Therefore, D.C. law applies to ACI's diminution-in-value claims by default."); Vantage Commodities Fin. Servs. I, LLC v. Willis Ltd., 531 F. Supp. 3d 153, 177 (D.D.C. 2021), aff'd sub nom. Vantage Commodities Fin. Servs. I, LLC v. Assured Risk Transfer PCC, LLC, 31 F.4th 800 (D.C. Cir. 2022) ("The Court here starts and ends with the

economic loss rule, which exists in all three jurisdictions without meaningful differences. So the Court will apply D.C. law.").

Plaintiffs contend that Georgia law should apply in the absence of a true conflict "because doing so will not affect the outcome of the case." Pls.' Suppl. Br. at 3. Siemens, on the other hand, asserts that, where no true conflict exists, "courts apply the laws of each of the interested states," citing a case from the Eleventh Circuit. Def.'s Suppl. Br. at 2 (citing Cooper v. Meridian Yachts, Ltd., 575 F.3d 1151, 1171 (11th Cir. 2009)). However, Cooper is irrelevant because the court there dealt with a conflict between federal maritime law and Dutch law and was not applying District of Columbia choice of law rules to any of the claims before it. Cooper, 575 F.3d at 1171.

Although there appears to be no binding precedent on this issue, the Court is mindful that, under District of Columbia choice of law rules, "any uncertainty with respect to choice of law questions at the motion to dismiss stage should be resolved in favor of the plaintiff." Intelect Corp. v. Cellco P'ship GP, 160 F. Supp. 3d 157, 179 (D.D.C. 2016) (citing Washkoviak, 900 A.2d at 182). Consequently, this Court will apply Georgia law in the absence of a true conflict.

The Court now reviews the NSSS Plaintiffs' claims to determine whether there is a true conflict between the laws of Georgia and the various home states of

the NSSS Plaintiffs and, if so, which jurisdiction has the more substantial interest in the resolution of the claim.

1. Whether There is a True Conflict

a. Fraudulent Concealment Claims

The NSSS Plaintiffs contend that Siemens fraudulently concealed the defects in its AFCI breakers despite knowledge that they suffered from nuisance tripping and, instead, represented that its products were "thoroughly tested to dramatically decrease the amount of nuisance tripping" and sought to deflect the blame for the faulty tripping on electricians and homeowners. Consol. Compl. ¶¶ 214-22. Siemens contends that the NSSS Plaintiffs' fraudulent concealment claims are barred by the economic loss doctrine as applied in Ohio, California, Nebraska, and New Hampshire, but that there is no such bar in Georgia due to the "misrepresentation exception." Def.'s Suppl. Br. at 3-7. In response, Plaintiffs contend that there is no true conflict between Georgia and the NSSS Plaintiffs' home states because all interested states "recognize the same exception to the economic loss doctrine where, as here, the defendant's duty to disclose exists independently of the contract." Pls.' Suppl. Br. at 4.

The economic loss rule is the same in Georgia, California, Ohio, Nebraska, and New Hampshire—a contracting party who suffers purely economic losses

must seek his or her remedy in contract and not in tort. Gen. Elec. Co. v. Lowe's Home Ctrs., Inc., 279 Ga. 77, 78 (2005); Cho v. Hyundai Motor Co., Ltd., 636 F. Supp. 3d 1149, 1161 (C.D. Cal. 2022); Corporex Dev. & Constr. Mgmt., Inc. v. Shook, Inc., 835 N.E.2d 701, 704 (Ohio 2005); Lesiak v. Cent. Valley Ag Coop., Inc., 808 N.W.2d 67, 80-81 (Neb. 2012); Wyle v. Lees, 33 A.3d 1187, 1190-91 (N.H. 2011).

"Georgia law recognizes an exception to the economic loss rule, known as the misrepresentation exception, under which '[o]ne who supplies information during the course of his business' owes an independent duty of reasonable care to parties who rely on that information and use the information as the supplier intended." Monopoli v. Mercedes-Benz USA, LLC, No. 1:21-CV-01353-SDG, 2022 WL 409484, at *15 (N.D. Ga. Feb. 10, 2022) (quoting Holloman v. D.R. Horton, Inc., 241 Ga. App. 141, 148 (1999)). Accordingly, Georgia courts do not apply the economic loss rule "in the presence of passive concealment or fraud." Holloman, 241 Ga. App. at 148. Plaintiffs' fraudulent concealment claims would therefore survive under Georgia law notwithstanding the economic loss rule. The issue is whether a similar exception applies in the NSSS Plaintiffs' home states or would produce the same result in these home states applying the facts of this case.

i. California

The Supreme Court of California has carved out an exception to the economic loss rule in cases where a contract was induced by affirmative fraudulent misrepresentations. Robinson Helicopter Co. v. Dana Corp., 102 P.3d 268, 273-74 (Cal. 2004). However, courts in California and throughout the Ninth Circuit are split on whether the exception extends to fraudulent omissions or concealment, as opposed to affirmative fraudulent misrepresentations. Compare Anderson v. Apple Inc., 500 F. Supp. 3d 993, 1019-22 (N.D. Cal. 2020) (concluding that, although Robinson "explicitly left the question of omissions unaddressed," there is nothing "in Robinson's rationale that requires treating affirmative misrepresentations and omissions differently," so "fraud by concealment 'above and beyond' any contractual breach" is not foreclosed by the economic loss rule), and Dhital v. Nissan N. Am., Inc., 300 Cal. Rptr. 3d 715, 726-27 (Cal. Ct. App. 2022) ("We acknowledge the differing views taken by courts that have considered this issue. But for reasons we have discussed above, we conclude that, under California law, the economic loss rule does not bar plaintiffs' claim here for fraudulent inducement by concealment."), with Cho, 636 F. Supp. 3d at 1161-62 (concluding that, "because Plaintiffs seek only economic damages and concede that their fraud claims are based only on omissions and concealment, the Court finds those claims

are barred by the economic loss rule under California law."), and Salcedo v. Nissan N. Am., Inc., No. CV 22-4152-GW-MARx, 2023 WL 332761, at *8 (C.D. Cal. Jan. 18, 2023) (finding that Dhital "holds no precedential value" and the court "will continue to follow the majority of courts in this district in concluding that Plaintiff's fraudulent omission claim is barred by the economic loss rule.")). The Ninth Circuit, in December 2021, certified the question of whether fraudulent concealment claims are exempt from the economic loss rule under California law to the Supreme Court of California, and the certified question remains pending. Rattagan v. Uber Techs., Inc., 19 F.4th 1188, 1193 (9th Cir. 2021); see also Rattagan v. Uber Techs., No. S272113 (Sup. Ct. of Cal. Dec. 6, 2021).

Given the unsettled nature of California law on the application of the economic loss rule to fraudulent concealment claims, with the apparent majority of California courts holding that fraudulent omission or concealment claims are barred by the doctrine, the Court concludes that a true conflict exists between Georgia and California as to whether the economic loss rule bars Electrocalifornia's fraudulent concealment claim.

ii. Ohio

Ohio recognizes an exception to the economic loss rule where a plaintiff's tort claim is "based exclusively upon [a] discrete, preexisting duty in tort and not

upon any terms of a contract or rights accompanying privity." Windsor Med. Ctr., Inc. v. Time Warner Cable, Inc., 167 N.E.3d 23, 29 (Ohio Ct. App. 2021) (quotation and citation omitted) (stating that "[t]hese type of exempt claims may include negligent misrepresentation, breach of fiduciary duty, fraud, and conversion") (citations omitted); see also Sinmier LLC v. Everest Indem. Ins. Co., No. 3:19 CV 2854, 2023 WL 2711306, at *10 (N.D. Ohio Mar. 30, 2023) ("This exception has been applied in the context of intentional torts, fraud, and negligent misrepresentation."); Reengineering Consultants Ltd. v. EMC Corp., No. 08-47, 2009 WL 113058, at *6 (S.D. Ohio Jan. 14, 2009) (citation omitted) ("The economic loss rule prevents recovery in negligence of purely economic loss, not recovery under an intentional tort theory for economic loss."). Siemens's reliance on Wells Fargo Bank, N.A. v. Fifth Third Bank, 931 F. Supp. 2d 834, 839-42 (S.D. Ohio 2013) to argue otherwise is inapposite. See id. at 839-42 (agreeing that a plaintiff in Ohio may state a tort claim for the breach of a duty owed separately from the contract but declining to extend the exception to the economic loss doctrine to an action for gross negligence).

Therefore, there is no true conflict between the law in Georgia and Ohio with respect to NSSS's fraudulent concealment claim.

iii. Nebraska

The analysis of whether there is a similar exception to the economic loss rule in Nebraska is more complex. In Kuecker Logistics Grp., Inc. v. Greater Omaha Packing Co., No. 8:20CV307, 2023 WL 3198418 (D. Neb. Apr. 14, 2023), the district court indicated that, although it could not locate any controlling Nebraska case law holding that fraud in the inducement claims are exceptions to the economic loss doctrine, "[the] general agreement among courts is sufficient for this Court to predict that the Nebraska Supreme Court would recognize the 'fraud in the inducement' exception to the economic loss doctrine." Id. at *19 (citation omitted). Nevertheless, the court also predicted that the Nebraska Supreme Court would recognize "an exception to [the fraud in the inducement] exception" where the only misrepresentation concerns the quality or character of the goods sold, meaning that in those cases the economic loss rule would apply to bar the claim. Id., at *20. In this case, the NSSS Plaintiffs allege that Siemens misrepresented the quality or character of its ACFIs.

It therefore appears that a true conflict exists between the laws of Georgia and Nebraska as to whether the economic loss rule bars Keyser's fraudulent concealment claim.

iv. New Hampshire

In New Hampshire, the economic loss rule "precludes a harmed contracting party from recovering in tort unless he is owed an independent duty of care outside the terms of the contract." Wyle, 33 A.3d at 1191. Although an exception is recognized when negligent misrepresentation is used as an inducement to enter into the contract, Pickering v. Citizens Bank, N.A., No. 18-cv-229-JD, 2019 WL 3457602, at *5 (D.N.H. July 31, 2019) (citing Wyle, 33 A.3d at 1191-92), the Court has not found a case in which a New Hampshire court has recognized an exception to the economic loss rule for a fraudulent concealment claim.[12] Consequently, it appears that there is a true conflict between Georgia and New Hampshire as to whether the economic loss rule bars Barrette's fraudulent concealment claim.

b. Negligent Misrepresentation Claims

i. Georgia

In Georgia, a claim for negligent misrepresentation requires the following elements: "(1) the defendant's negligent supply of false information to foreseeable

[12] Siemens's citation to Schaefer v. IndyMac Mortg. Servs., No. 12-cv-159-JD, 2012 WL 4929094, at *5 (D.N.H. Oct. 16, 2012), is not helpful, because the court in that case merely indicated that a claim for negligence would be barred by the economic loss rule.

persons, known or unknown; (2) such persons' reasonable reliance upon that false information; and (3) economic injury proximately resulting from such reliance." Liberty Cap., LLC v. First Chatham Bank, 338 Ga. App. 48, 54 (2016) (quoting Hardaway Co. v. Parsons, Brinckerhoff, Quade & Douglas, Inc., 267 Ga. App. 424, 426 (1997)). Because of the misrepresentation exception to the economic loss rule in Georgia, as previously discussed, a claim of negligent misrepresentation is not barred by the economic loss rule. City of Cairo v. Hightower Consulting Eng'rs, Inc., 278 Ga. App. 721, 729 (2006).

However, it is unclear whether an omission can support a claim for negligent misrepresentation in Georgia. Although the Georgia Court of Appeals has stated that the first element of a negligent misrepresentation claim includes "a false representation or omission of a material fact," see, e.g., CoreVest Am. Fin. Lender LLC v. Stewart Title Guar. Co., 358 Ga. App. 596 (2021), recons. denied (Feb. 26, 2021) (quoting Home Depot U.S.A. v. Wabash Nat. Corp., 314 Ga. App. 360, 367 (2012)), no definitive answer to the question appears to have been provided in Georgia appellate case law.

In a case decided in this district, another district judge concluded that an affirmative representation is required to maintain a claim for negligent misrepresentation in Georgia. In Intellicig USA, LLC v. CN Creative Ltd., No.

1:15-cv-1832-AT, 2017 WL 11634374 (N.D. Ga. Mar. 6, 2017), the plaintiff claimed negligent misrepresentation based in part on omissions by the defendant. The court concluded that the failure to disclose a fact does not state a claim for negligent misrepresentation:

> In the absence of any affirmative statements upon which Plaintiffs could reasonably rely, their negligent misrepresentation theory rests on whether Creative's failure to disclose its merger negotiations with BAT constitutes "a negligent supply of false information to foreseeable persons." Negligent misrepresentation claims are premised on the notion that "one who supplies information during the course of his business, profession, employment, or in any transaction in which he has a pecuniary interest has a duty of reasonable care and competence to parties who rely upon the information [. . . .]" Robert & Co. Associates v. Rhodes-Haverty P'ship, 300 S.E.2d 503, 504 (Ga. 1983) (emphasis added). While plaintiffs are not required to allege scienter and intent as they would be in a fraud claim, they must allege that it was foreseeable that plaintiffs would rely on the information that defendants provided. New York Life Ins. Co. v. Grant, 57 F. Supp. 3d 1401, 1412 (M.D. Ga. 2014) (citing Martha H. West Trust v. Market Value of Atlanta, Inc., 584 S.E.2d 688, 691 (2003)) (emphasis added). Ultimately, a negligent misrepresentation claim requires some connection between false information that defendants negligently supplied defendant and reasonable reliance on that false information by the plaintiff. See Marquis Towers, Inc. v. Highland Group, 593 S.E.2d 903, 907 (Ga. Ct. App. 2004) (plaintiff's reliance on information in statements that defendant supplied to it created issues of fact for a jury).

Intellicig USA, 2017 WL 11634374, at *7. In a footnote, the court acknowledged that, although Georgia's appellate courts have not expressly ruled on the issue, "the language that these courts use in analyzing negligent misrepresentation cases

strongly suggests that a negligent misrepresentation claim requires an affirmative representation." Id., at *7, n.6.

Lafontaine v. Alexander, 343 Ga. App. 672 (2017), cited by Plaintiffs in support of their contention that Georgia appears to permit an omission-based negligent misrepresentation claim, did not in fact concern an omission but an allegation that a statement made with the filing of a plat was reckless. Lafontaine, 343 Ga. App. at 677-78. Like the plaintiffs in Intellicig USA, Plaintiffs in this case "have not pointed to a case decided under Georgia law where the Georgia appellate courts have found an omission sufficient to state a claim for negligent misrepresentation." Intellicig USA, 2017 WL 11634374, at *7, n.6. This Court concludes that Georgia appears to require an affirmative representation to state a claim for negligent misrepresentation.

ii. California

Siemens contends that, in California, negligent misrepresentation claims (1) are barred by the economic loss doctrine, and (2) require a showing that the defendant intended to induce reliance, neither of which apply under Georgia law. Def.'s Suppl. Br. at 5.[13]

[13] Both parties also contend that a negligent misrepresentation claim may not be made in California by an alleged omission. Def.'s Suppl. Br. at 5; Pl.'s Suppl. Br at 5. Given the decision in Intellicig USA, as discussed above, Georgia also would

In California, the elements for a negligent misrepresentation claim are as follows: "(1) the misrepresentation of a past or existing material fact, (2) without reasonable ground for believing it to be true, (3) with intent to induce another's reliance, (4) justifiable reliance, and (5) resulting damage." Novalk, LLC v. Kinsale Ins. Co., No. 22-cv-00290-BEN-RBB, 2022 WL 17574076 (S.D. Cal. Dec. 9, 2022) (citing Nat'l Union Fire Ins. Co. v. Cambridge Integrated Servs. Grp., Inc., 89 Cal. Rptr. 3d 473, 483 (Cal. Ct. App. 2009)). While justifiable reliance is an essential element of both fraud and negligent misrepresentation claims in Georgia, Real Estate Int'l , Inc. v. Buggay, 220 Ga. App. 449, 451 (1996), unlike in California, there is no requirement of an intent to induce reliance by the defendant. Accordingly, the Court concludes that a true conflict exists between Georgia and California law as to the required elements of Electrocalifornia's negligent misrepresentation claim.[14]

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not permit such a claim based upon an omission, and this Court does not find a conflict is created based upon this fact.

[14] There is a dispute among California courts as to whether the economic loss rule bars negligent misrepresentation claims. Dawood v. Gamer Advantage LLC, No. 2:22-cv-00562 WBS KJN, 2022 WL 3108846, at *3 (E.D. Cal. Aug. 4, 2022) (citing cases). This Court need not resolve this issue given the conflict in the elements of the cause of action between Georgia and California as noted above.

iii. Ohio

Aside from contending that Ohio and Georgia are in conflict due to different approaches to omissions-based negligent misrepresentation claims, which this Court rejects,[15] Siemens contends that a negligent misrepresentation claim under Ohio law requires a "special relationship" between the parties, while Georgia law does not. Def.'s Suppl. Br. at 5 (citing Premier Bus. Grp., LLC v. Red Bull, Inc., No. 08-CV-01453, 2009 WL 3242050, at *11 (N.D. Ohio Sept. 30, 2009)).

> Of particular relevance here, [t]he elements for negligent misrepresentation clearly require (1) a defendant who is in the business of supplying information; and (2) a plaintiff who sought guidance with respect to his business transactions from the defendant. In short, negligent misrepresentation requires a special relationship under which the defendant supplied information to the plaintiff for the latter's guidance in a business transaction.

Premier Bus. Grp., 2009 WL 3242050, at *10-11 (internal quotations and citations omitted). In Premier Business Group, the court held that the plaintiff had failed to allege such a special relationship and stated that "the mere act of supplying information in itself is not sufficient to give rise to a negligent misrepresentation claim." Id. at 11 (providing examples of a defendant who is a "professional" in the business of supplying information: accountants, attorneys, surveyors, inspectors of

[15] The NSSS Plaintiffs make the same argument. Pls.' Suppl. Br. at 5.

goods, and abstractors or title). Courts in Ohio have also held that "the tort of negligent misrepresentation has no application to consumer transactions or typical business transactions." Li-Conrad v. Curran, 50 N.E.3d 573, 578 (Ohio Ct. App. 2016) (internal quotation omitted). Because Georgia law contains no such restrictions on negligent misrepresentation claims, the Court concludes that a true conflict exists between the laws of Georgia and Ohio as to NSSS's negligent misrepresentation claim.

iv. Nebraska

In Nebraska, a claim for negligent misrepresentation requires a plaintiff to establish the following elements: (1) a representation was made; (2) the representation was false; (3) when made, the representation was known to be false, or made recklessly or negligently; (4) the plaintiff relied on the representation; and the plaintiff suffered damage as a result of the representation. Nelson v. Wardyn, 820 N.W.2d 82, 87 (Neb. Ct. App. 2012). There is no requirement of an intent to induce reliance. Id. ("In a claim for negligent misrepresentation, one may become liable even though acting honestly and in good faith if one fails to exercise the level of care required under the circumstances.").

Siemens and the NSSS Plaintiffs cite as a conflict between Georgia and Nebraska law the fact that Nebraska does not recognize an omissions-based

negligent representation claim, Def.'s Suppl. Br. at 6; Pls.' Suppl. Br. at 5, but, again, this Court concludes that Georgia does not permit such a claim either. Siemens also asserts that, unlike Georgia, the economic loss doctrine would bar such a claim in Nebraska. Def.'s Suppl. Br. at 6. This Court agrees because, unlike in Georgia, the same "exception to the [fraud in the inducement] exception" discussed in Kuecker Logistics would apply to bar such a claim in Nebraska. Kuecker Logistics, 2023 WL 3198418, at *20. Thus, the Court concludes there is a true conflict between Georgia and Nebraska as to whether the economic loss rule bars Keyser's negligent misrepresentation claim.

iv. New Hampshire

Siemens asserts that there is a conflict between Georgia and New Hampshire laws because, unlike Georgia, the economic loss doctrine bars negligent misrepresentation claims in New Hampshire. Def.'s Suppl. Br. at 7 (citing L'Esperance v. HSBC Consumer Lending, Inc., No. 11–cv–555–LM, 2012 WL 2122164 (D.N.H. June 12, 2012)). The NSSS Plaintiffs contend that New Hampshire has an exception for negligent misrepresentation claims. Pls.' Suppl. Br. at 5 n.3.

It appears that New Hampshire does recognize an exception to the economic loss doctrine for certain types of negligent misrepresentation claims. See

L'Esperance, 2012 WL 2122164, at *15-16 (finding that, while some negligent misrepresentations claims would be permitted, the one brought by the plaintiff was barred by the economic loss rule because "the alleged misrepresentation on which L'Esperance's claim is based relates directly to [the defendant]'s performance of its agreement with her"); see also Plourde Sand & Gravel v. JGI Eastern, Inc., 917 A.2d 1250, 1257-58 (N.H. 2007) (recognizing a negligent misrepresentation exception to economic loss rule, but finding that the plaintiff's claim did not rise to a claim for negligent misrepresentation because the plaintiff had failed to show that it relied on the misrepresentations or that it was "reasonably foreseeable" that the plaintiff would rely on the misrepresentation).

Because Georgia and New Hampshire appear to allow negligent misrepresentation claims under some circumstances as exceptions to the economic loss rule, the Court concludes that there is no true conflict between Georgia and New Hampshire.

c. Unjust Enrichment Claims

Finally, the Court finds that no true conflict exists between the laws of Georgia and those of California, Ohio, Nebraska, and New Hampshire regarding the NSSS Plaintiffs' alternative claims for unjust enrichment. Each state allows a plaintiff to plead quasi-contractual claims for relief in the alternative, even where

the pleadings are inconsistent. See Clark v. Aaron's Inc., 914 F. Supp. 2d 1301, 1309 (N.D. Ga. 2012) ("While a party, indeed, cannot recover under both a breach of contract and unjust enrichment theory, a plaintiff may plead these claims in the alternative."); Cristino v. Bur. of Workers' Comp., 977 N.E.2d 742, 753 (Ohio Ct. App. 2012) ("Because alternative pleading is permissible, a party may plead both a breach-of-contract claim and an unjust-enrichment claim without negating the validity of either claim."); Klein v. Chevron U.S.A., Inc., 137 Cal. Rptr. 3d 293, 330 (Cal. Ct. App. 2012) ("It is true that modern rules of pleading generally permit plaintiffs to 'set forth alternative theories in varied and inconsistent counts.'") (quoting Rader Co. v. Stone, 223 Cal. Rptr. 806, 816 (Cal. Ct. App. 1986)); Klug v. Watts Regul. Co., No. 8:15CV61, 2015 WL 13893247 (D. Neb. Dec. 29, 2019) ("[The p]laintiffs' alternative theories of recovery against defendant cannot be said to be precluded as a matter of law until it is clear that the express warranty is valid and enforceable."); N.H. Elec. Coop., Inc. v. Elster Sol'ns, LLC, No. 16-cv-440-PB, 2017 WL 2861667 (D.N.H. July 5, 2017) ("Although it is true that an unjust enrichment claim ordinarily cannot be used to supplement the relief that a party is entitled to under a contract, the Cooperative is entitled to plead that Elster is liable under alternative theories.").

Siemens's argument that California law differs from Georgia law because California does not allow for a standalone claim for unjust enrichment is meritless. Def.'s Suppl. Br. at 5-6. Siemens cites to Smith v. Ford Motor Co., 749 F. Supp. 2d 980, 997 (N.D. Cal. 2010), but the plaintiffs in that case did not allege the possible existence of any contractual claim, whereas the NSSS Plaintiffs here have pleaded unjust enrichment as an alternative to their breach of express warranty claim. Further, Georgia law contains a similar rule that unjust enrichment may not be pleaded as a stand-alone tort. See, e.g., Elder v. Reliance Worldwide Corp., 563 F. Supp. 3d 1221, 1233 (N.D. Ga. 2021) (noting that "unjust enrichment must be pled as an alternate remedy and not . . . as a separate tort") (quoting Collins v. Athens Orthopedic Clinic, 356 Ga. App. 776, 779 n.6 (2020)).

Accordingly, the Court finds that no true conflict exists between the laws of Georgia and the NSSS Plaintiffs' home states as to their unjust enrichment claims.

2. The "Significant Relationship" Test as Applied to the NSSS Plaintiffs' Fraudulent Concealment and Negligent Misrepresentation Claims

Because the Court has found a true conflict between the law of Georgia and the laws of California, Nebraska, and New Hampshire with respect to the NSSS Plaintiffs' fraudulent concealment claims, and between the law of Georgia and the laws of California, Ohio, and Nebraska with respect to the NSSS Plaintiffs'

negligent misrepresentation claims, the Court now balances the competing interests of the jurisdictions in order to identify the jurisdiction with the most significant interest in the dispute. Atlanta Channel, 583 F. Supp. 3d at 197. Under the significant relationship test, courts must "evaluate the governmental policies underlying the applicable laws and determine which jurisdiction's policy would be most advanced by the application of its laws" while also considering "(1) where the injury occurred, (2) where the conduct causing the injury occurred, (3) where the parties reside or are incorporated, and (4) where the parties' relationship is centered." Id.

a. The Place of Injury

The parties agree that the first factor of the significant relationship test—the place of injury—favors application of Plaintiffs' home states. Def.'s Suppl. Br. at 8-9; Pls.' Suppl. Br. at 7. In misrepresentation cases, "the injury occurs where the plaintiff 'received the alleged misrepresentations' or made the alleged payments." Boomer Dev., LLC v. Nat'l Ass'n of Home Builders, 258 F. Supp. 3d 1, 10 (D.D.C. 2017) (quoting Washkoviak, 900 A.2d at 181). The NSSS Plaintiffs each purchased Siemens AFCIs and experienced nuisance tripping in their home states. See Consol. Compl. ¶¶ 133-148; 171-185. However, the parties disagree as to how much weight this factor is given—while Siemens argues that "[t]his factor strongly

favors plaintiffs' home states," Plaintiffs contend that "this factor is given little weight because the claims concern economic harm stemming from fraud, misrepresentations, and omissions." Def.'s Suppl. Br. at 9; Pls.' Suppl. Br. at 7.

District of Columbia courts have held that "the place of injury is less significant in the case of fraudulent misrepresentations than in the case of personal injuries and of injuries to tangible things." Washkoviak, 900 A.2d at 181-82 (internal punctuation omitted) (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 cmt. f (AM. L. INST. 1971)). Accordingly, the Court concludes that this factor weighs in favor of applying the laws of the NSSS Plaintiffs' home states, but its significance is diminished because of the nature of the claims.

b. The Place of the Injury-Causing Conduct

The second factor—the place of the conduct causing the injury—weighs in favor of applying Georgia law. Plaintiffs allege that "Siemens operates its principal place of business in this District," and that "a substantial part of the events and conduct giving rise to the Plaintiffs' claims occurred in this State, specifically, Siemens' development, manufacturing, advertising, and sale of its AFCI breakers." Consol. Compl. ¶ 8. Further, Plaintiffs allege that Siemens made representations regarding the functionality of its AFCIs with the knowledge that they experienced high rates of nuisance tripping. Id. ¶ 74. Under District of

Columbia law, "the principal location of the defendant's conduct is the contact that will usually be given the greatest weight" in cases involving misrepresentation. Krukas v. AARP, Inc., 376 F. Supp. 3d 1, 30 (D.D.C. 2019) (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 cmt. f).

Nevertheless, Siemens argues that the "relevant injury-causing conduct is the sale of the purportedly defective product and the communication of any purported misrepresentations," and that both of these actions occurred in the NSSS Plaintiffs' home states. Def.'s Suppl. Br. at 9. However, the principal case that Siemens cites for support, Rowland v. Novartis Pharmaceuticals Corp., 983 F. Supp. 2d 615 (W.D. Pa. 2013), is unpersuasive. The failure-to-warn product liability claims in Rowland arose out of the plaintiffs' use of an FDA-approved drug designed, manufactured, marketed, distributed, and sold by the defendant. Id. at 618. The plaintiffs, all residents of Pennsylvania who had been prescribed and injected with the drug in Pennsylvania, alleged that their use of the drug caused them to develop osteonecrosis of the jaw. Id. The district court for the Western District of Pennsylvania, applying District of Columbia choice of law rules, held that Pennsylvania law applied. Id. at 624. With regard to the second factor, the court held that, "[i]n prescription drug products liability cases involving an alleged

failure to warn, the conduct causing injury occurs primarily where the injured party was prescribed and ingested the drug." Id. at 625.

The instant case does not involve prescription drugs, product liability, a failure-to-warn theory, or physical injury. Instead, Plaintiffs are alleging that Siemens concealed and misrepresented known defects in its AFCIs that caused economic injury to Plaintiffs. "[I]n cases alleging a misrepresentation, the place where the conduct causing the injury occurred is the place where the defendant has its principal place of business and sets its policies and practices." Krukas, 376 F. Supp. 3d at 30 (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 cmt. e) (where the conduct occurred will usually be given particular weight when the place of injury "can be said to be fortuitous or when for other reasons it bears little relation to the occurrence and the parties with respect to the particular issue . . . such as in the case of fraud and misrepresentation.")); see also Boomer Dev., 258 F. Supp. 3d at 10 (citation and quotations omitted) (stating that "both the D.C. Court of Appeals and the D.C. Circuit have looked to the place where the [fraudulent] statements at issue were formulated and transmitted"). Taking the facts alleged in the complaint to be true for the purposes of resolving this issue at the motion to dismiss stage, the Court concludes that the second factor weighs in favor of applying Georgia law because Siemens's principal place of business is

located in Georgia, the misrepresentations were formulated and transmitted in Georgia, and the NSSS Plaintiffs have alleged that Siemens develops, manufactures, advertises, and sells its AFCIs in Georgia.

c. The Place of the Parties' Domicile, Nationality, Incorporation, and Business

The Court agrees with the parties that the third factor—the parties' domicile—is neutral. Def.'s Suppl. Br. at 10; Pls.' Suppl. Br. at 10. Defendant is incorporated in Delaware and headquartered in Georgia. Consol. Compl. ¶ 12. The NSSS Plaintiffs are each domiciled in their respective home states. Id. ¶¶ 20-21, 26-27; see also Washkoviak, 900 A.2d at 18.

d. The Place where the Relationship is Centered

The NSSS Plaintiffs argue that the fourth factor—where the relationship is centered—is neutral because "there is no relationship between the parties" since the NSSS Plaintiffs did not directly purchase AFCIs from Siemens or communicate with Siemens while they were in their home states. Pls.' Suppl. Br. at 10-11. Siemens, on the other hand, contends that the NSSS Plaintiffs purchased Siemens AFCIs from unidentified third parties in their own home states, which is where the "consumer 'relationship' was 'established and consummated.'" Def.'s Suppl. Br. at 10 (citing Lagor v. Eli Lilly & Co., No. 06-1967 (JDB), 2007 WL 1748888, at *6 (D.D.C. June 18, 2007), and Long, 877 F. Supp at 12).

The NSSS Plaintiffs purchased AFCIs, or homes with Siemens AFCIs already installed, in their home states and experienced nuisance tripping there. However, Siemens's misrepresentations and omissions are alleged to have occurred in Georgia, allegations which must be accepted as true at this phase of the litigation.

The court in Krukas held that the relationship between the parties was centered in the District of Columbia because this was where the defendant's membership organization was located, where the defendant's decision to market the insurance policies "emanated," and where the defendant segregated the plaintiff's membership payments, even though the plaintiff was a resident of Louisiana when she purchased the insurance policy and a resident of Florida when she renewed the policy. Krukas, 376 F. Supp. 3d at 11-12, 31 ("[W]here the gravamen of the plaintiff's complaint is misrepresentation and false advertising, the Court agrees that the plaintiff's relationship with the defendant is centered in the District of Columbia, where the defendants have their primary place of business and where they make their policies and practices regarding advertising."); see also Boomer Dev., 258 F. Supp. 3d at 10 (favoring the state where the fraudulent statements were developed and transmitted).

The Court acknowledges that both Lagor and Long provide some support for the proposition that some of the events giving rise to the NSSS Plaintiffs' claims occurred in the various home states of these Plaintiffs where the AFCIs were purchased and/or installed and malfunctioned. However, given the equally clear precedent that the place where the misrepresentations were made can also be a controlling factor in where the relationship is centered, the Court finds that this factor is neutral.

e. Weighing the Factors

Having analyzed the states' relationship to the NSSS Plaintiffs' fraudulent concealment and negligent misrepresentation claims, the Court finds that the first factor—the place of injury—slightly weighs in favor of applying the laws of Plaintiffs' home states, while the second factor—the place of the conduct causing injury—strongly weighs in favor of applying Georgia law. Finally, the third and fourth factors—the place of the parties' domicile and the place where the relationship is centered—are neutral. "Given the discounted value of the place of injury in cases, such as this one, involving claims of misrepresentation, we cannot say that a qualitative weighing of the factors clearly favors [Plaintiffs' home states]." Washkoviak, 900 A.2d at 182.

> The District of Columbia Court of Appeals instructs that "any uncertainty" with respect to choice of law questions at the motion to

> dismiss stage should be resolved in favor of the plaintiff and, furthermore, that if the court "cannot determine from the pleadings which jurisdiction has a greater interest in the controversy" the court "must apply the law of the forum state"—in this case the District of Columbia.

Intelect Corp. v. Cellco P'ship GP, 160 F. Supp. 3d 157, 179 (D.D.C. 2016) (quoting Washkoviak, 900 A.2d at 183). Accordingly, this issue being decided at the motion to dismiss stage, and the Court having already concluded that the District of Columbia has no interest in this litigation, the Court will apply Georgia law to the NSSS Plaintiffs' fraudulent concealment and negligent misrepresentation claims, as well as the unjust enrichment claims.[16]

Accordingly, Georgia law will govern the NSSS Plaintiffs' fraudulent concealment, negligent misrepresentation, and unjust enrichment claims.

B. The Brnich/Cates Plaintiffs

Siemens argues that Georgia's choice of law rule regarding tort claims mandates that each Brnich/Cates Plaintiffs' home state's laws govern their claims because each home state has adopted statutes that "displace Georgia common law." Def.'s Am. Mot. at 5-6, 8. Siemens further argues that application of Georgia law

[16] If, after discovery, it appears that one or more of the NSSS Plaintiffs' home states that have a conflict with Georgia law have a greater interest than Georgia in the resolution of a particular claim, the Court could reconsider the determinations made here on motions for summary judgment. See Washkoviak, 900 A.2d at 183.

to all of the Brnich/Cates Plaintiffs' claims would violate Siemens's due process rights. Id. at 8-12. The Brnich/Cates Plaintiffs contend that Georgia law governs pursuant to the "unusual characteristic" in Georgia's "choice of law system," under which "the application of another's jurisdiction's laws is limited to statutes and decisions construing those statutes," so that if there is no applicable foreign statute, Georgia common law applies. Pl.'s Opp'n at 8 (citations omitted). In reply, Siemens contends that, because it has "identified statutes in each of plaintiffs' home states that are implicated by (i.e., 'involved' in) Plaintiffs' state law claims," the law of the home states should control. Def.'s Reply in Supp. of Def.'s Am. Mot. [Doc. 67] at 4 (citation omitted).

In diversity cases, "[a] federal court faced with the choice of law issue must look for its resolution in the choice of law rules of the forum state." Frank Briscoe Co. v. Ga. Sprinkler Co., 713 F.2d 1500, 1503 (11th Cir. 1983). In Georgia, choice of law issues are governed by the rules of *lex loci contractus* and *lex loci delicti*. Rayle Tech, Inc. v. DEKALB Swine Breeders, Inc., 133 F.3d 1405, 1409 (11th Cir. 1988) (citing Lloyd v. Prudential Sec., Inc., 211 Ga. App. 247, 248 (1993)). Under *lex loci delicti*, tort cases are governed by the substantive law of the state where the tort was committed. Id.; see also McCarthy v. Yamaha Motor Mfg. Corp., 994 F. Supp. 2d 1329, 1332 (N.D. Ga. 2014) ("[T]he place of wrong, the

locus delicti, is the place where the injury sustained was suffered rather than the place where the act was committed, or . . . it is the place where the last event necessary to make an actor liable for an alleged tort takes place.") (quoting Risdon Enters., Inc. v. Colemill Enters., Inc., 172 Ga. App. 902, 903 (1984)).

However, Georgia's choice of law has a "unique characteristic" in that the application of another jurisdiction's laws, whether via the rule of *lex loci contractus* or *lex loci delicti*, "is limited to statutes and decisions construing those statutes. When no statute is involved, Georgia courts apply the common law as developed in Georgia rather than foreign case law." Frank Briscoe Co., 713 F.2d 1500, 1503 (11th Cir. 1983) (citation omitted); see also Kirkpatrick v. J.C. Bradford & Co., 827 F.2d 718, 725 n.6 (11th Cir. 1987) ("If a particular state does not have a controlling statute, however, the Georgia choice of law rule requires application of the common law as construed by the courts of Georgia.").[17] "[T]he Supreme Court of Georgia has held that '[w]here no statute of the foreign State is

[17] Georgia law is unclear regarding what standard applies when determining whether a statute is "involved." Although the Eleventh Circuit has held that Georgia courts apply common law when no statute is "involved," see Frank Briscoe Co., 713 F.2d at 1503, it has also held that Georgia common law applies where no statute is "controlling." Kirkpatrick, 827 F.2d at 725 n.6; see also Deutz Corp. v. Engine Distrib., Inc., No. 1:16-cv-1144-TCB, 2017 WL 11692626, at *4 (N.D. Ga. May 12, 2017) (noting that the defendant failed to cite to a statute that would "govern" the plaintiff's tortious interference claims).

pleaded, it will be presumed that the common law prevails in such State." Elder, 563 F. Supp. 3d at 1231 (quoting Avnet, Inc. v. Wyle Lab'ys, Inc., 263 Ga. 615, 620 (1993)). And, in such a case, "the choice of law rules of the State of Georgia require the Court to apply Georgia law, unless such application is inconsistent with due process." In re Tri-State Crematory Litig., 215 F.R.D. 660, 677-78 (N.D. Ga. 2003).

1. Unjust Enrichment

Siemens contends, and Plaintiffs concede, that the Washington Product Liability Act ("WPLA") "governs [Performance Electric's and Gordon's] claims for alleged product defects, regardless of the liability theory." Def.'s Am. Mot. at 7; Pls.' Opp'n to Def.'s Am. Mot. ("Pls.' Opp'n") [Doc. 59] at 11 ("Siemens cites to one statute, the WPLA, which displaces the Washington Plaintiffs' unjust enrichment claim."); see also Blangeres v. U.S. Seamless, Inc., 725 F. App'x 511, 514 (9th Cir. 2018) (noting that "[t]he WPLA is the exclusive remedy for product liability claims . . . and supplants all common law claims or actions based on harm caused by a product") (alterations accepted) (quoting Macias v. Saberhagen Holdings, Inc., 282 P.3d 1069, 1073 (2012)). The unjust enrichment claims of Performance Electric and Gordon are thus governed by Washington law because such claims are expressly covered by a foreign statute.

Siemens fails to cite any statute of any remaining Plaintiffs' home state that would control those claims for unjust enrichment. As such, the Court finds that Georgia law will govern these claims unless due process requires otherwise, which is discussed below. See Elder, 563 F. Supp. 3d at 1231; Mt. Hawley Ins. Co. v. E. Perimeter Pointe Apartments, 861 F. App'x 270, 277 (11th Cir. 2021) (affirming district court's application of Georgia law where no foreign statute "directly govern[ed] the outcome" of the case").

2. Fraudulent Concealment and Negligent Misrepresentation

In support of its argument that Plaintiffs' home states' laws apply to their fraudulent concealment and negligent misrepresentation claims, Siemens points to statutes in California, Maine, North Carolina, Oregon, Pennsylvania, and Washington. Def.'s Am. Mot. at 7-8, 8 n.1; see also State Statute Chart [Doc. 59-2] at 1. However, with the exception of one California statute and the WPLA, none of the other states' statutes cited by Siemens are applicable to Plaintiffs' claims, but instead either provide remedies for fraud under the Uniform Commercial Code ("U.C.C.") or provide for comparative negligence as a defense. See Me. Stat. tit. 11, § 2-721 ("Remedies for material misrepresentation or fraud include all remedies available under this Article for nonfraudulent breach. Neither rescission or a claim for rescission of the contract for sale nor rejection or return of

the goods shall bar or be deemed inconsistent with a claim for damages or other remedy."); N.C. Gen. Stat. § 25-2-721 (same); Or. Rev. Stat. § 72.7210 (same); 13 Pa. Cons. Stat. § 2721 (same); Wash Rev. Code. § 62A.2-721 (same); see also Me. Stat. tit. 14, § 156 (setting out rules for damages recoverable when injured party is deemed comparatively negligent); N.C. Gen. Stat. § 1-139 (burden of proof of contributory negligence); Or. Rev. Stat. § 31.600 (rules for contributory and comparative negligence); Wash. Rev. Code §§ 4.22.005 & 4.22.015 (effect of contributory fault and defining "fault," respectively).

The statutes outlining remedies for fraud under the U.C.C. are not relevant to Plaintiffs' claims for fraudulent concealment. Nothing in Plaintiffs' complaint suggests that Plaintiffs seek to pursue remedies for fraud under a breach-of-contract theory governed by the U.C.C. Instead, Plaintiffs allege the common law elements for fraudulent concealment. See Consol. Compl. ¶¶ 214-223. Thus, the Court finds that the other states' statutes implicating the U.C.C. do not "displace," nor are they "involved" in, the interpretation of common law with regard to Plaintiffs' fraudulent concealment claims.

Similarly, the statutes offered by Siemens that purportedly govern Plaintiffs' negligent misrepresentation claims are irrelevant. Each of the statutes cited by Siemens refer to either contributory or comparative negligence or fault by the

injured party raised as a defense against a plaintiff's negligence claim. Siemens has not raised in its Answer nor argued in its Amended Motion to Dismiss that Plaintiffs were contributorily negligent as a defense to their claims of negligent misrepresentation. Accordingly, the Court finds that the contributory negligence statutes do not displace common law as to Plaintiffs' negligent misrepresentation claims.[18]

Siemens also argues that the negligent misrepresentation claims of Performance Electric and Gordon are preempted by the WPLA. Def.'s Am. Mot. at 9. In response, Plaintiffs contend that "the WPLA does not preempt fraud-based claims like negligent misrepresentation," Pls.' Opp'n at 42 n.25, but this argument fails. "The WPLA clearly contemplates negligence and negligent misrepresentation within its scope of preemption." Rodman v. Ethicon, Inc., No. C20-6091-BHS, 2021 WL 2434521, at *3 (W.D. Wash. June 15, 2021) (citing Wash. Rev. Code § 7.72.010(4)). Thus, the negligent misrepresentation claims of

[18] Although Siemens cites to these various statutes, it fails to "clarify how any of these statutes apply" specifically to Plaintiff's claims. Elder, 563 F. Supp. 3d at 1233. Siemens's generic recitation of statutes containing the words "negligence" or "fraud" does not convince this Court that these unrelated foreign statutes control Plaintiffs' claims.

Performance Electric and Gordon are governed by Washington law because such claims are expressly covered by statute.

Finally, the California statutes cited by Siemens define "deceit" and provide for damages under California law. Cal. Civ. Code §§ 1709 and 1710.[19] Plaintiffs contend that these statutes "do[] not provide for or displace the common law elements for fraud or misrepresentation claims." Pl's Opp'n at 10. In its opening brief, Siemens argues that, because "[t]hese statutory schemes displace Georgia common law, . . . the laws of the *Brnich*/*Cates* plaintiffs' home states apply to their claims." Def.'s Am. Mot. at 8. However, in its reply brief, Siemens changes course and argues that "[t]here is no requirement that other state statutes *displace* or *preempt* common law," and that "Siemens has identified statutes in each of

[19] California Civil Code § 1710 defines deceit as:

> 1. The suggestion, as a fact, of that which is not true, by one who does not believe it to be true;
> 2. The assertion, as a fact, of that which is not true, by one who has no reasonable ground for believing it to be true;
> 3. The suppression of a fact, by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact; or,
> 4. A promise, made without any intention of performing it.

California Civil Code § 1709 provides: "One who willfully deceives another with intent to induce him to alter his position to his injury or risk, is liable for any damage which he thereby suffers."

plaintiffs' home states that are implicated by (*i.e.*, 'involved' in) plaintiffs' state law claims." Def.'s Reply at 4 (emphasis in original). As noted in its May 18, 2023, Order, the Court does not generally entertain arguments presented for the first time in a reply brief. Int'l Telecomms. Exchange Corp. v. MCI Telecomms. Corp., 892 F. Supp. 1520, 1531 (N.D. Ga. 1995). For this reason, and because Siemens's argument in its reply brief is inconsistent with its argument in its initial brief, the Court deems the argument waived. See In re Egidi, 571 F.3d 1156, 1163 (11th Cir. 2009) ("Arguments not properly presented in a party's initial brief or raised for the first time in the reply brief are deemed waived.").[20]

Accordingly, Georgia law will govern all Brnich/Cates Plaintiffs' fraudulent concealment and negligent misrepresentation claims, except those of Performance Electric and Gordon, unless due process requires otherwise.

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[20] Even if the Court were to entertain Siemens's contention in its reply brief, it would still fail. In arguing that a statute need only be "involved," Siemens cites only to Frank Briscoe Co. However, the court in Frank Briscoe Co. expressly states, "Briscoe admittedly cannot cite an applicable New Jersey statute or case controlling the issues in this case." Frank Briscoe Co., 713 F.2d at 1503 (emphasis added). Here, as in Frank Briscoe Co., Siemens has failed to demonstrate that the California statute defining "deceit" displaces, controls, or directly governs the outcomes of Plaintiffs' common law claims for fraudulent concealment or negligent misrepresentation arising out of their purchase and use of allegedly defective products. Siemens cites no case law holding that, where a foreign statute merely defines a common word such as "deceit," that definition somehow operates to codify all common law causes of action involving misrepresentations.

3. Due Process Considerations

Siemens asserts that applying Georgia common law to Plaintiffs' claims would violate its due process rights because (1) "the only alleged connection to Georgia is Siemens' headquarters in Georgia," and (2) Georgia law does not provide "defenses available to it under other state laws." Def.'s Am. Mot. at 8-9, 11. In response, Plaintiffs argue that "Georgia is both Siemens' place of business and the place where it committed all or a substantial part of the alleged misconduct," and that a difference in laws is not sufficient to constitute a deprivation of Siemens's due process rights. Pls.' Opp'n at 13-14. Plaintiffs argue that Siemens "designs, tests, manufacturers [sic], markets, and distributes AFCIs" in Georgia, that this case "centers on Siemens' manufacture, distribution, and sale of defective AFCIs despite its knowledge, including through testing of its AFCI devices, that they failed to perform the essential functions of an AFCI," and that "[t]his misconduct emanated from Siemens' headquarters in Georgia." Id. at 13.

Where Georgia law "require[s] application of its own common law rules to some claims involving purchases in other states, the law of Georgia could be applied consistent with due process only if the particular transaction had some significant relation to Georgia." Kirkpatrick, 827 F.2d at 725 n.6. Application of Georgia law to Plaintiffs' unjust enrichment, fraudulent concealment, and

negligent misrepresentation claims is consistent with due process if the State of Georgia has "significant contact or significant aggregation of contacts to the claims asserted by each member of the plaintiff class, contacts creating state interests, in order to ensure that the choice of [Georgia] law is not arbitrary or unfair." Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 821-22 (1985) (quotation marks and citation omitted).

Siemens cites Peterson v. Aarons, Inc., No. 1:14-CV-1919-TWT, 2017 WL 364094 (N.D. Ga. Jan. 25, 2017), and Krise v. SEI/Aaron's, Inc., No. 1:14-CV-1209-TWT, 2017 WL 3608189 (N.D. Ga. Aug. 22, 2017), in support of its argument that "the location of Siemens's headquarters 'is not enough to satisfy due process considerations under the circumstances. Def.'s Am. Mot. at 12. Peterson involved a common law claim for invasion of privacy based on the unlawful access of the plaintiffs' computers from a remote location by a franchisee of the defendant. Peterson, 2017 WL 364094, at *1. The district court held that the mere fact that the franchisor was headquartered in Georgia was insufficient to satisfy due process to apply Georgia common law to all claims. Id., at *6. Krise, a companion case, reached the same result based upon similar facts. Krise, 2017 WL 3608189, at *8 (concluding that, where the plaintiffs' only allegations regarding the defendant's contacts with Georgia were that the defendant was a

Georgia corporation with its principal place of business in Georgia and that the defendant had purchased the spyware from its Atlanta office, it would be a violation of due process to apply Georgia common law because the plaintiffs leased the computers which were allegedly illegally accessed in their home state).

In the instant case, Plaintiffs have alleged more contacts with Georgia than either the Peterson or Krise plaintiffs—that "a substantial part of the events and conduct giving rise to the Plaintiffs' claims occurred in [Georgia], specifically, Siemens development, manufacturing, advertising, and sale of its AFCI breakers." Consol. Compl. ¶ 13; see also Bowen v. Porsche Cars, N.A., Inc., 561 F. Supp. 3d 1362, 1373-74 (N.D. Ga. 2021) (distinguishing Krise because, there, the "allegedly tortious conduct itself had no ties to the state of Georgia," and finding that sufficient contacts existed where the plaintiff had alleged that the defendant had "transmitted or authorized the Update which caused the alleged damages from Porsche's Georgia headquarters"); Terrill v. Electrolux Home Prods., Inc., 753 F. Supp. 2d 1272, 1281-82 (S.D. Ga. 2010) (finding sufficient contacts where the defendant's principal place of business was in Georgia and "the corporate decisions surrounding Electrolux's response to the alleged defects were made in Augusta, Georgia").

Instead of refuting Plaintiffs' allegations of these contacts, Siemens contends that the Court should not "assume 'alleged wrongdoing emanated from [Georgia]'" from the fact that Siemens is headquartered in Georgia. Def.'s Reply at 5. As noted above, because this case is before the Court on Siemens's Motion to Dismiss, the court accepts all well-pleaded facts in the Plaintiffs' complaint as true, as well as all reasonable inferences drawn from those facts. McGinley, 361 F.3d at 1330. Plaintiffs' allegations allow for a reasonable inference that Plaintiffs' claims arise from Siemens's actions or omissions in the state of Georgia; namely, that Siemens knew that its AFCIs were defective and concealed or misrepresented their functionality to consumers from its headquarters in Georgia.

Finally, Siemens's argument that due process would be violated because Siemens would be deprived of defenses available to it under other state laws is unavailing. Def.'s Am.Mot. at 9. Siemens does not cite to any case law in support of its argument that a defendant is deprived of due process solely because some defenses may not be available to it under Georgia law.

Accordingly, the Court concludes that Siemens will not be deprived of due process by the application of Georgia law to Plaintiffs' unjust enrichment, fraudulent concealment, and negligent misrepresentation claims. See Monopoli, 2022 WL 409484, at *6-7 (concluding that application of Georgia law was "neither

arbitrary nor fundamentally unfair" where one defendant was headquartered in Georgia, the other German defendant conducted business in Georgia, the offending vehicles were imported into Georgia, and "many of the alleged decisions about the marketing of and response to the defective [product] were made in Georgia").

Based on the foregoing, the Court finds that the law of Plaintiffs' home states governs their breach of warranty claims, Washington law governs the negligent misrepresentation and unjust enrichment claims of Performance Electric and Gordon, and Georgia law governs the remaining Plaintiffs' fraudulent concealment, negligent misrepresentation, and unjust enrichment claims.

V. STATE LAW CLAIMS

The Court turns next to the substantive issues raised in Siemens's Amended Motion to Dismiss. First, the Court will determine whether Plaintiffs have adequately pleaded their breach of express warranty (Count V) and breach of the implied warranty of merchantability (Count VI) claims under the laws of their respective home states. Next, the Court will determine whether Plaintiffs have adequately pleaded their fraudulent concealment (Count II) claims under Georgia law. Finally, the Court will determine whether Plaintiffs have adequately pleaded their negligent misrepresentation (Count III) and unjust enrichment (Count VII)

claims under Washington law (for Gordon and Performance Electric) and Georgia law (for all other Plaintiffs).

A. Breach of Express Warranty (Count V)[21]

Siemens contends that Plaintiffs' breach of express warranty claims fail as a matter of law because (1) the express warranty "covers only defects in materials or workmanship—not design defects," whereas Plaintiffs only allege design defects; and (2) Plaintiffs failed to allege that they followed the steps required by the terms of the express warranty; namely, that they sought and were denied repairs during the warranty period. Def.'s Am. Mot. at 12-14. In response, Plaintiffs contend that, because they alleged facts that could either point to a manufacturing or design defect, and because discovery is required to determine the exact cause of the

[21] Although Siemens offered as an exhibit to its original motion to dismiss a copy of a Standard Limited Warranty, published in 2019 by Siemens [Doc. 43-2], Plaintiffs appear to dispute the relevance of this document because Siemens has failed to demonstrate that this version of the warranty was "the operative one" when Plaintiffs purchased their AFCIs. Pls.' Opp'n at 19. "[T]he court may consider a document attached to a motion to dismiss without converting the motion into one for summary judgment if the attached document is (1) central to the plaintiff's claim and (2) undisputed. In this context, undisputed means that the authenticity of the document is not challenged." Day v. Taylor, 400 F.3d 1272, 1276 (11th Cir. 2005) (citations and quotations omitted). Because the applicability of the attached warranty and the contents of the varying warranties Siemens may have provided are disputed, the Court declines to consider it in ruling on Siemens's Amended Motion to Dismiss.

defect, dismissal is inappropriate. Pls.' Opp'n at 15-16. As to Siemens's argument regarding repairs, Plaintiffs counter that Siemens's "strict temporal limitation" is unconscionable and should not apply. Id. at 16-18.

Each of Plaintiffs' home states model their applicable statutes after U.C.C. § 2-313:

> (1) Express warranties by the seller are created as follows:
>
> > (a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.
> >
> > (b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.
> >
> > (c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.
>
> (2) It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.

U.C.C. § 2-313.[22]

[22] Cal. Comm. Code § 2313; Me. Stat. tit. 11, § 2-313; Neb. U.C.C. § 2-313; N.H. Rev. Stat. Ann. § 382-A:2-313; N.C. Gen. Stat. § 25-2-313; Ohio Rev. Code Ann. § 1302.26; Or. Rev. Stat. § 72.3130; Wash. Rev. Code § 62A.2-313.

1. Design Defect vs. Manufacturing Defect

Plaintiffs argue that they "do not allege whether the defect is a design defect or a manufacturing defect because, absent discovery, Plaintiffs cannot be expected to definitively categorize the nature of the defect." Pls.' Opp'n at 15. Plaintiffs further argue that they alleged defects relating to the "arc detection algorithm," rather than to the design of the AFCIs, and that courts treat "[t]hose types of software calibration issues" as manufacturing defects at the pleading stage. Id. at 15-16.

Case law "reflects the understanding that defects in materials and workmanship generally refers to departures from a product's intended design while design defects refer to the inadequacy of the design itself." Reese v. Deere & Co., No. 4:21-CV-3282, 2021 WL 11728994, at *2 (D. Neb. Dec. 27, 2021); see also Gertz v. Toyota Motor Corp., No. CV 10-1089 PSG (VBKx), 2011 WL 3681647, at *3 (C.D. Cal. Aug. 22, 2011) ("Unlike defects in materials or workmanship, a design defect is manufactured in accordance with the product's intended specifications.") (quoting Brothers v. Hewlett–Packard Co., No. C–06–02254 RMW, 2007 WL 485979, at *4 (N.D. Cal. Feb.12, 2007)). "At the pleading stage, where the distinction between defect in design and defect in materials or workmanship is a matter of semantics, and sufficient facts are alleged to assert

both, the defendant's characterization of the nature of the claim pre-discovery should not control whether the complaint survives." Reese, 2021 WL 11728994, at *3 (quoting Alin v. Am. Honda Motor Co., No. 2:08-cv-4825, 2010 WL 1372308, at *6 (D.N.J. Mar. 31, 2010)); see also Rice v. Electrolux Home Prod., Inc., No. 4:15-CV-00371, 2015 WL 4545520, at *6 (M.D. Pa. July 28, 2015) (holding that, "[a]lthough the Complaint primarily alleges facts consistent with a design defect rather than a defect in materials," the facts were not sufficiently developed at the motion to dismiss stage for the court to reach a definitive conclusion, and that "[d]iscovery is necessary to determine whether the defects in the Microwave go beyond a design defect and enter the ambit of a defect in materials"); Browning v. Am. Honda Motor Co., Inc., No. 20-cv-05417-BLF, 2022 WL 824106, at *9 (N.D. Cal. Mar. 18, 2022) (acknowledging that discovery may lead to a finding that the alleged software calibration defects in fact performed pursuant to the intended specifications, but declining to dismiss the plaintiffs' express warranty claims at the motion to dismiss stage because the plaintiffs had alleged "improper design and/or calibration of the software in control of the [T]ransmission").

Here, Plaintiffs allege that Siemens represented that its AFCI breaker, in fact, works as intended when it trips in the presence of harmless arcs. Consol. Compl. ¶ 85 ("Siemens publicly claims that nuisance tripping is a 'myth' or,

alternatively, that it is a good thing – a safety feature."). Plaintiffs further allege that AFCIs are "designed to identify and distinguish between harmless and dangerous electrical arcs," but that Siemens AFCIs' algorithms, circuitry, sensitivity, or design fail to do just that, and Siemens has failed to update its AFCIs even after manufacturers "have had to adjust and update the design of their AFCIs to prevent nuisance tripping." Id. ¶¶ 41, 68, 71. These facts favor a finding that the AFCIs are functioning as Siemens intended, and that the defect is one in Siemens's design of its AFCIs.

On the other hand, Plaintiffs allege that Siemens advertises that its AFCIs are "designed only to trip in the presence of arc faults," while recognizing that the costs associated with "downtime" and with "operating inefficient or unsafe systems" are high "in terms of both lost productivity and equipment replacement." Id. ¶¶ 6, 93. According to Plaintiffs, Siemens also represents in its advertising that its products and services reduce or limit the risks of downtime caused by "improper arc fault management." Id. ¶¶ 61-63. These allegations point to a finding that Siemens did not design its AFCIs to nuisance trip, and that such frequent occurrences of nuisance tripping result from some deviation from the intended design, i.e., a defect in manufacturing or workmanship.

Because Plaintiffs' references to the alleged defects in Siemens AFCIs are reasonably attributable to either defects in material or defects in design, the determination of whether the alleged defects meet the product's intended specifications may only be determined after discovery. Consequently, dismissal of Plaintiffs' claims at the motion to dismiss stage would be premature. Chiulli v. Am. Honda Motor Co., No. 22-CV-06225-MMC, 2023 WL 5763053, at *8 (N.D. Cal. Sept. 6, 2023) ("In sum, whether a programming or calibration defect is part of the specifications or constitutes a deviation from the specifications is what distinguishes a design defect from a manufacturing defect.").[23] Thus, the Court

[23] Siemens cites Nauman v. General Motors LLC, in which the court dismissed the plaintiffs' breach of express warranty claim upon a finding that they only alleged design defects and that the warranty did not cover such defects. Nauman, No. C21-5150 BHS, 2021 WL 4502666, at *2-3 (W.D. Wash. Oct. 1, 2021). In Nauman, as in the other cases cited by Siemens, Def.'s Am. Mot. at 13 n.16, the plaintiff alleged solely that the design of the subject products was defective. Id.; see also Cent. Me. Power Co. v. Foster Wheeler Corp., 116 F.R.D. 339, 342 n.1 (D. Me. 1987) (noting that the plaintiffs conceded that product failure did not occur because of defects in materials or workmanship); Animal Hosp. of Nashua, Inc. v. Antech Diagnostics, No. 11–cv–448–LM, 2014 WL 1976624, at *11-12 (D.N.H. May 15, 2014) (declining to rule on the defendant's motion for summary judgment on this issue and ordering additional briefing regarding whether the allegations supported a finding that the defects were in design, workmanship, or material); Martell v. General Motors LLC, 492 F. Supp. 3d 1131, 1141 (D. Or. 2020) (declining to address whether the limited warranty at issue covered the defects alleged by the plaintiffs because the plaintiffs "ha[d] not explicitly alleged or argued it").

finds that, at this stage, Plaintiffs have plausibly alleged that the defects in Siemens AFCIs are manufacturing defects—i.e., some deviation from the AFCIs' intended specifications. See Chiulli, 2023 WL 5763053, at *8.[24] Discovery may yield evidence demonstrating that Siemens AFCIs, in fact, were manufactured and function as designed, in which case Plaintiffs' express warranty claims would fail as a matter of law. For now, with a limited record and only Plaintiffs' allegations taken as true, the Court concludes that Plaintiffs have pleaded sufficient facts to survive a motion to dismiss on this ground.

2. The Warranty Limitations

Siemens next contends that, because Plaintiffs failed to allege that they sought and were denied repairs within the warranty period (one year), Plaintiffs' breach of warranty claims fail as a matter of law. Def.'s Am. Mot. at 12-14. In response, Plaintiffs contend that, while some Plaintiffs did seek repairs during the

[24] Although Siemens contends that Plaintiffs have alleged that the defect in design "affect[s] the *entire product line*," Siemens's citations to the Amended Complaint do not support its contention. Def.'s Am. Mot. at 12-13 (citing Consol. Compl. ¶ 113). Further, courts addressing this issue have rejected similar arguments that just because "all" products are affected, the defect must be in the design. See, e.g., Huffman v. Electrolux N. Am., Inc., 961 F. Supp. 2d 875, 883-84 (N.D. Ohio 2013) (noting that "a large number of bad machines does not, *ipso facto*, preclude a manufacturing defect theory," and that "[i]t is not implausible that discovery or expert analysis could reveal that an individual on an assembly line used improper parts or technique in manufacturing a large number of washing machines").

warranty period, the "one-year warranty's strict temporal limitation does not apply because it is both substantively and procedurally unconscionable." Pls.' Opp'n at 17. The crux of Plaintiffs' unconscionability argument rests on allegations that Siemens knew of and concealed a defect. Id.

a. Unconscionability

Each of Plaintiffs' home states have adopted the U.C.C.'s provision regarding unconscionable contracts or clauses, which provides:

> (A) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.
>
> (B) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose, and effect to aid the court in making the determination.

U.C.C. § 2-302.[25]

Courts in California, New Hampshire, North Carolina, Ohio, and Pennsylvania require a showing of both procedural and substantive

[25] Cal. Civ. Code § 1670.5; Me. Stat. tit. 11, § 2-302; Neb. U.C.C. § 2-302; N.H. Rev. Stat. Ann. § 382-A:2-302; N.C. Gen. Stat. § 25-2-302; Ohio Rev. Code Ann. § 1302.15; Or. Rev. Stat. § 72.3020; 13 Pa. Cons. Stat. § 2302; Wash. Rev. Code § 62A.2-302.

unconscionability before a Court will disregard the terms of a warranty. Armendariz v. Found. Health Psychcare Servs., Inc., 6 P.3d 669, 690 (Cal. 2000); Begley v. Windsor Surry Co., No. 17–cv–317–LM, 2018 WL 1401796, at *5 (D.N.H. Mar. 19, 2018); Bussian v. DaimlerChrysler Corp., 411 F. Supp. 2d 614, 622-23 (M.D.N.C. 2006); Traxler v. PPG Indus., Inc., 158 F. Supp. 3d 607, 616 (N.D. Ohio 2016); Harbison v. Louisiana-Pac. Corp., 602 F. App'x 884, 886 (3d Cir. 2015). While courts in Nebraska and Oregon consider both procedural and substantive prongs of unconscionability, a plaintiff need only allege substantive unconscionability, at least in the context of consumer transactions. Myers v. Neb. Inv. Council, 724 N.W.2d 776, 798-99 (Neb. 2006); Libby v. Keystone RV Co., No. 1:19-cv-00642-CL, 2019 WL 5541237, at *2 (D. Or. Oct. 25, 2019). In Washington and Maine, a party seeking to void a contract as unconscionable need only show either substantive or procedural unconscionability. Tadych v. Noble Ridge Constr., Inc., 519 P.3d 199, 202 (Wash. 2022) (en banc); Kourembanas v. InterCoast Colls., 373 F. Supp. 3d 303, 318-21 (citing Blanchard v. Blanchard, 148 A.3d 277, 282 (Me. 2016) (considering unconscionability in the premarital agreement context)).

Generally, the procedural element of unconscionability focuses on "oppression" or "surprise" due to "unequal bargaining power," while the

substantive element looks to the terms of the warranty and whether they are overly harsh or one-sided. Armendariz, 6 P.3d at 690 (quoting A & M Produce Co. v. FMC Corp., 135 Cal. Rptr. 114, 121 (Cal. Ct. App. 1982)); see also Adams v. Am. Cyanamid Co., 498 N.W.2d 577, 590 (Neb. Ct. App. 1992) (citation and quotation omitted) (holding that procedural unconscionability is determined "in light of all the surrounding circumstances, including (1) the manner in which the parties entered into the contract, (2) whether the parties had a reasonable opportunity to understand the terms of the contract, and (3) whether the important terms were hidden in a maze of fine print"); Begley, 2018 WL 1401796, at *5 ("absence of meaningful choice" and "contract terms which are unreasonably favorable to the other party"); Hart v. Louisiana-Pac. Corp., 641 F. App'x 222, 227-228 (4th Cir. 2016) (defining procedural unconscionability as "'bargaining naughtiness' in the form of unfair surprise, lack of meaningful choice, and an inequality of bargaining power," and substantive unconscionability as "harsh, one-sided, and oppressive contract terms") (quoting Tillman v. Com. Credit Loans, Inc., 655 S.E.2d 362, 370 (N.C. 2008)); Traxler, 158 F. Supp. 3d at 616 (describing procedural element as oppression and surprise and the substantive element as turning on reasonableness); Libby, 2019 WL 5541237, at *2 (considering conditions of contract formation, including oppression and surprise, in determining procedural unconscionability,

and the terms of the contract in determining substantive unconscionability); Harbison, 602 F. App'x at 886-87 (same); Tadych, 519 P.3d at 202 (same); Blanchard, 148 A.3d at 283 (describing procedural unconscionability as unequal bargaining power, and substantive unconscionability as "so one-sided as to shock the conscience").

In evaluating substantive unconscionability of the terms of the warranty, the Court first notes that Plaintiffs have not supplied the terms of any express warranty, other than to state that Siemens "agreed to repair or replace the defective AFCIs for one year from the initial operation of the goods but not more than eighteen months from Siemens' shipment of the goods." Consol. Compl. ¶ 246. Accordingly, the only warranty term alleged by Plaintiffs contains a temporal limitation of one year. The Court does not find that such a limitation of one year is so "one-sided or overly harsh" so as to be "shocking to the conscience, monstrously harsh, or exceedingly calloused." Tadych, 519 P.3d at 202; see also Marchante v. Sony Corp., Inc., 801 F. Supp. 2d 1013, 1023 (S.D. Cal. 2011) (finding that a warranty period of one year did not shock the conscience and was not substantively unconscionable); Hart, 641 F. App'x at 228 (finding that warranty terms were not substantively unconscionable "solely because one party conceals certain information during the bargaining process"); Waters v. Electrolux

Home Prods., Inc., 154 F. Supp. 3d 340, 349 (N.D. W.Va. 2015) (applying Ohio law, concluding that the plaintiffs had failed to allege substantive unconscionability where the defendant's "limited warranty obligated it to repair or replace its washer's defective parts within one year of purchase," and holding that "prior knowledge [of a defect] alone does not make a limited warranty unconscionable"). Moreover, Plaintiffs' conclusory allegation that the warranty terms "unreasonably favored Siemens," Consol. Compl. ¶ 250, is insufficient for this Court to find that there are sufficient facts pleaded which, if taken as true, would establish that the warranty was substantively unconscionable under the laws of any of Plaintiffs' home states.

Plaintiffs have also failed to adequately allege procedural unconscionability. Plaintiffs allege that the disclaimers and limitations contained in the express warranty are both substantively and procedurally unconscionable because Siemens "knowingly sold a defective product without informing consumers about the defect." Consol. Compl. ¶ 249. Plaintiffs also allege that the time limitation contained in the warranty is unconscionable because Plaintiffs "had no meaningful choice in determining these time limitations[,] the terms of which unreasonably favored Siemens," because "[a] gross disparity in bargaining power existed between Siemens and Plaintiffs and the Class Members," and because "Siemens

knew or should have known that the AFCIs were defective at the time of sale and would fail well before their useful lives." Id. ¶ 250. However, aside from these conclusory allegations, Plaintiffs offer no factual allegations with respect to whether Plaintiffs had any meaningful choice, or what the nature of the "gross disparity in bargaining power" was. Iqbal, 556 U.S. at 678 ("A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.' Nor does a complaint suffice if it tenders 'naked assertions' devoid of 'further factual enhancement.'") (quoting Twombly, 550 U.S. at 555, 557). Finally, no named Plaintiff alleges that there were no meaningful alternatives to purchasing or installing Siemens AFCIs. See, e.g., Dean Witter Reynolds, Inc. v. Super. Ct., 259 Cal. Rptr. 789, 797 (Cal. Ct. App. 1989) ("[T]he existence of 'meaningful' alternatives available to such contracting party in the form of other sources of supply tends to defeat any claim of unconscionability as to the contract in issue.").

Accordingly, the Court rejects Plaintiffs' argument that the terms of the warranty are unconscionable under the laws of Plaintiffs' home states because Plaintiffs have failed to allege the existence of either substantive or procedural unconscionability. See Streiner v. Baker Residential, LLC, No. 1253 EDA 2015, 2016 WL 3198162, at *4 (Pa. Super. Ct. June 9, 2016) (rejecting the appellant's

argument that a disclaimer of warranties was unconscionable because the disclaimer contained "no unusual or unexpected terms or conditions that would prove difficult to understand," while the accompanying warranty supplied to the appellants "afforded her substantive protections against various malfunctions and defects" during the warranty period).

b. Obligation to Seek Repairs or Replacement

Siemens contends that, under the terms of the express warranty, Plaintiffs were required to seek repairs within the warranty period, and that Plaintiffs' failure to do so forecloses their breach of express warranty claims. Def.'s Am. Mot. at 13-14. Plaintiffs do not dispute that they were required to seek repairs under the terms of the warranty, see Pls.' Opp'n at 16-17, but state that "some Plaintiffs did just that [sought repairs]," and rely on their unconscionability argument, which the Court has rejected.

i. Butakis

Plaintiffs' argument that "some Plaintiffs" sought repairs from Siemens within the one-year period is supported by only one paragraph of the Consolidated Complaint describing Butakis's experience with the AFCIs. Pls.' Opp'n at 17. Plaintiffs allege that Butakis contacted Siemens and requested that his defective AFCIs be replaced at no charge and, although Siemens previously replaced five of

his fifteen defective AFCIs, Siemens allegedly refused to replace the remaining ten, contending that they were not defective. Consol. Compl. ¶ 164. Although the Consolidated Complaint contains no allegations regarding when Butakis notified Siemens of the defect and whether it was within the limitations period, it is reasonable to infer from the allegations that Butakis, who moved into his new home in July 2021, contacted Siemens within one year of May 13, 2022, the date of the filing of the original lawsuit in which Butakis was a Plaintiff. See Patrick Cates, Bryan Butakis, and Nels Gordon v. Siemens Indus., Inc., No. 1:22-CV-1914-MHC (N.D. Ga. May 13, 2022), Compl. [Doc. 1] ¶¶ 21, 23 (alleging that Butakis had contacted Siemens to obtain replacement AFCIs but, "[t]o date, only 5 AFCIs have been replaced in his home").

Plaintiffs have sufficiently alleged that Butakis sought replacements within the warranty period, and that Siemens denied some of his requests. Because Siemens does not contest Plaintiffs' allegations regarding Butakis's attempts to obtain replacement AFCIs, nor does Siemens seek dismissal of Plaintiffs' breach of express warranty claims on any grounds outside of those already addressed, Siemens's Motion to Dismiss Butakis's express warranty claim is **DENIED**.

ii. The Remaining Plaintiffs

Plaintiffs do not allege that any other Plaintiff sought repairs or replacement AFCIs during the warranty period. Although Plaintiffs allege that Performance Electric "contacted Siemens about the [nuisance tripping] issue," Plaintiffs do not allege when such contact occurred and whether Performance Electric requested repairs or replacements or just contacted Siemens to troubleshoot the issues. Consol. Compl. ¶ 110. Furthermore, Plaintiffs allege that Cates contacted his home builder after moving into his home in October 2021 to request replacement AFCIs, but they do not allege whether Cates contacted Siemens directly or what relationship, if any, Cates's home builder had to Siemens. Id. ¶ 158.

As to the remaining Plaintiffs, the Consolidated Complaint makes no mention of any notification to Siemens requesting repairs or replacements. Plaintiffs allege that they "provided written notice to Siemens of its breach of express warranties on May 11, 2022 and again on July 1, 2022," id. ¶ 251, meaning that such notice was provided after the NSSS and Brnich complaints were filed (April 19, 2021, and Mar. 29, 2022, respectively), and only two days before the Cates complaint was filed (May 13, 2022). Accordingly, because it is well-settled that a party cannot seek recovery for breach of a contract where the party did not satisfy the conditions precedent to the right to recover, the Court finds that

Siemens cannot have breached any express warranty absent Plaintiffs' compliance with the warranty's terms, and the breach of express warranty claims of all Plaintiffs, except Butakis, fail as a matter of law. See, e.g., In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Pracs. & Prods. Liab. Litig., 754 F. Supp. 2d 1145, 1179 (C.D. Cal. 2010) ("Plaintiffs who neither sought repairs pursuant to the recalls nor sought repairs for [defect]-related issues may not pursue a claim for breach of express warranty based on the written warranty."); Melcher v. Boesch Motor Co., 198 N.W.2d 57, 61 (Neb. 1972) ("The burden of proof is on the party relying on a breach of warranty to show performance of conditions as to which the right to assert the warranty depends, or waiver thereof, or excuse for nonperformance."); Lilley v. Manning Motor Co., 137 S.E.2d 847, 850 (N.C. 1964) ("A failure by the purchaser to comply with the conditions of the warranty is fatal to a recovery for breach of the warranty in an action thereon."); Sinnerard v. Ford Motor Co., No. 95-2708, 1996 WL 363932, at *4 (E.D. Pa. June 20, 1996), aff'd, 116 F.3d 469 (3d Cir. 1997) (dismissing the plaintiffs' breach of express warranty claim where the plaintiffs failed to allege that they sought repairs "because Ford therefore neither had the opportunity to repair the alleged defects nor refused to make those repairs, there has been no breach of warranty"); Risner v. Regal Marine Indus., Inc., 8 F. Supp. 3d 959, 990 (S.D. Ohio 2014) ("By

refusing to contact [the defendant's authorized dealership] to repair the fuel gage, plaintiff did not allow [the defendant] a reasonable opportunity to cure the defect."). Siemens's Motion to Dismiss the breach of warranty claims asserted by all Plaintiffs other than Butakis is **GRANTED**.

B. Breach of the Implied Warranty of Merchantability (Count IV)

Plaintiffs allege that Siemens "represented that its AFCI breakers were fit for use in residential homes," but that those sold to Plaintiffs and Class members "were not of average quality, were not fit for their ordinary purpose, were not within the variation of quality permitted, and did not conform to Siemens' representations." Consol. Compl. ¶¶ 239-40. Siemens seeks dismissal of Plaintiffs' implied warranty claims, arguing that (1) the claims are barred by lack of privity in California, North Carolina, Ohio, Oregon, and Washington; (2) Siemens effectively disclaimed the implied warranty; (3) state statutes of limitations bar recovery for some Plaintiffs, and (4) Plaintiffs have failed to allege unmerchantability. Def.'s Am. Mot. at 14-19.

1. Privity

a. California

In California,

> The elements of the claim of breach of implied warranty of merchantability are (1) the plaintiff bought a consumer good (i.e., a

> good used primarily for personal, family or household purposes) manufactured or distributed by the defendant; (2) the defendant was in the business of manufacturing or distributing the particular consumer good to retail buyers; and (3) the consumer good (a) was not of the same quality as those generally acceptable in the trade; or (b) was not fit for the ordinary purposes for which such goods are used; or (c) was not adequately contained, packed and labeled; or (d) did not measure up to the promises or facts stated on the container or label.

Moradian v. Mercedes-Benz USA, LLC, No. 2:21-CV-09979-MEMF (AFMx), 2022 WL 4596650, at *5 (C.D. Cal. Mar. 17, 2022) (citation omitted).

California law requires that "a plaintiff asserting breach of warranty claims must stand in vertical contractual privity with the defendant." Clemens v. DaimlerChrysler Corp., 534 F.3d 1017, 1023 (9th Cir. 2008) (explaining that a "buyer and seller stand in privity if they are in adjoining links of the distribution chain"); see also Ehrlich v. BMW of N. Am., LLC, 801 F. Supp. 2d 908, 921 (C.D. Cal. 2010) (noting that, although the Song-Beverly Act does not impose a vertical privity requirement to bring a claim for breach of implied warranties, a plaintiff asserting breach of implied warranties under the California Commercial Code Section 2314 must demonstrate vertical privity). Plaintiffs contend that these states, including California, "recognize exceptions to the privity requirement where, as here, the manufacturer provides a warranty that runs to the ultimate customer." Pls.' Opp'n at 21.

California recognizes some exceptions to the privity rule, including "when the plaintiff relies on written labels or advertisements of a manufacturer," and in special cases involving "foodstuffs, pesticides, and pharmaceuticals, and where the end user is an employee of the purchaser." Clemens, 534 F.3d at 1023. An additional exception may exist for third-party beneficiaries. See, e.g., In re Nexus 6P Prod. Liab. Litig., 293 F. Supp. 3d 888, 925 (N.D. Cal. 2018); Burr v. Sherwin Williams Co., 268 P.2d 1041, 1049 (Cal. 1954). But to succeed on a third-party beneficiary theory, the plaintiff "must plead a contract which was made expressly for his [or her] benefit and one in which it clearly appears that he [or she] was a beneficiary." In re Nexus 6P, 293 F. Supp. 3d at 292.[26] Notably, district courts in the Ninth Circuit are split on recognizing the third-party exception to privity because "no published decision of a California court has applied [the third-party beneficiary] doctrine in the context of a consumer claim against a product

[26] The court in In re Nexus 6P noted that the laws of California, Illinois, New York, North Carolina, and Washington, appeared to recognize the third-party beneficiary exception to the privity rule. However, contrary to Plaintiffs' assertion, the court chose to apply California law because the parties had not identified any material differences among the laws of the different states. In re Nexus 6P, 293 F. Supp. 3d at 922. Further, Plaintiffs appear to mischaracterize the court's holding. The exception was grounded on the plaintiffs' status as third-party beneficiaries, not on the fact that the warranty "runs to the ultimate consumer." Compare id., with Pls.' Opp'n at 21.

manufacturer." Obertman v. Electrolux Home Care Prods, Inc., 482 F. Supp. 3d 1017, 1029 (E.D. Cal. 2020).

> We decline this invitation to create a new exception that would permit [the plaintiff's] action to proceed. . . . California courts have painstakingly established the scope of the privity requirement under California Commercial section 2314, and a federal court sitting in diversity is not free to create new exceptions to it.

Clemens, 534 F.3d at 1023-24 (citations omitted). Following Clemens and Obertman, the Court declines to hold that California law recognizes a third-party beneficiary exception where Plaintiffs have pointed to no California case law recognizing the same in the context of the claims in this case.

But even if the Court were to analyze the claims of Electrocalifornia and Cates under this exception, their argument would still fail. The Consolidated Complaint is devoid of any specific allegations that the Limited Warranty was made expressly for Plaintiffs' benefit. Although Plaintiffs plead the existence of an express warranty, they fail to allege facts regarding whether the retailers from whom Plaintiffs purchased the AFCIs entered into warranty agreements with Siemens that "were designed for and intended to benefit the end-users." In re Nexus 6P, 293 F. Supp. 3d at 923. Indeed, courts have applied the third-party beneficiary exception to the privity requirement where Plaintiffs specifically allege that they were the intended consumers. See, e.g., Cartwright v. Viking Indus., Inc.,

249 F.R.D. 351, 356 (E.D. Cal. 2008) (holding that the plaintiffs sufficiently alleged they were third-party beneficiaries where the defendant was alleged to have sold the products to distributors "who were not intended to be the ultimate consumer[s]," and that the agreements between the defendant and the distributors "were intended to benefit the homeowners, including plaintiffs"). Such specific allegations are absent in Plaintiffs' Consolidated Complaint.

Further, insofar as Plaintiffs argue that they fall within the "written labels or advertisements" exception to the privity rule, the Supreme Court of California has held that such exception is "applicable only to express warranties." Burr, 268 P.2d at 1049. "Plaintiffs do not cite—and the Court did not find—any California authority finding that the written labels or advertisements exception to privity applies to implied warranty claims under California Commercial Code section 2314." Goldstein v. Gen. Motors LLC, No. 19CV1778-LL-AHG, 2022 WL 484995, at *9 (S.D. Cal. Feb. 16, 2022) (citing Clemens, 534 F.3d at 1024). Accordingly, the Court concludes that Plaintiffs fail to allege any facts indicating that either Cates or Electrocalifornia are in privity of contract with Siemens as required by California law or that they fall within any recognized exception to the privity requirement. Siemens's Motion to Dismiss the implied warranty of merchantability claims of Electrocalifornia and Cates is **GRANTED**.

b. North Carolina

To state a claim for breach of implied warranty under North Carolina law, a plaintiff must allege: "(1) that the goods in question were subject to an implied warranty of merchantability; (2) that the goods were defective at the time of the sale and as such did not comply with the warranty; (3) that the resulting injury was due to the defective nature of the goods; and (4) that damages were suffered." Presnell v. Snap-On Securecorp, Inc., 583 F. Supp. 3d 702, 712 (M.D.N.C. 2022) (quoting Williams v. O'Charley's Inc., 728 S.E.2d 19, 21 (N.C. Ct. App. 2012)).

"Privity via a contractual relationship between the plaintiff and the seller or manufacturer of an allegedly defective product is required to maintain a suit for breach of implied warranty, 'except where the barrier of privity has been legislatively or judicially removed.'" Nicholson v. Am. Safety Util. Corp., 476 S.E.2d 672, 678 (N.C. Ct. App. 1996) (quoting Crews v. W.A. Brown & Son, 416 S.E.2d 924, 929 (N.C. Ct. App. 1992)). Although the North Carolina Products Liability Act, codified at N.C. Gen. Stat. § 99B-1 et seq., "eliminated the privity requirement against manufacturers," Atl. Coast Mech., Inc. v. Arcadis, Geraghty, & Miller of N.C., Inc., 623 S.E.2d 334, 339 (N.C. Ct. App. 2006), this exception only applies to product liability actions, which is defined by North Carolina law as an "action brought for or on account of personal injury, death or property damage

caused by or resulting from the manufacture . . . of any product." AT&T Corp. v. Med. Rev. of N.C., Inc., 876 F. Supp. 91, 94-95 (E.D.N.C. 1995) (quoting N.C. Gen. Stat. § 99B-1(3)); see also Atl. Coast Mech., 623 S.E.2d at 338 ("Privity is still required in an action for breach of implied warranties that seeks recovery for economic loss."). Accordingly, because Plaintiffs do not dispute the lack of privity, and because they point to no North Carolina precedent that establishes a relevant exception, Vodicka's breach of the implied warranty of merchantability claim fails, and Siemens's Motion to Dismiss Vodicka's claim for breach of implied warranty of merchantability is **GRANTED**.

c. Oregon

The implied warranty of merchantability is governed by Oregon Revised Statutes section 72.8020, which provides that, "[e]xcept if the manufacturer disclaims the warranty . . . , the manufacturer of a consumer good to be sold at retail in this state gives, on sale or consignment for sale, the manufacturer's implied warranty of merchantability." Under Oregon law, "privity of contract is essential before a purchaser can recover economic loss from a manufacturer for breach of implied warranty." Davis v. Homasote Co., 574 P.2d 1116, 1117 (Or. 1978) (en banc). Although Oregon courts distinguish warranty claims based on whether the claims allege purely economic loss, personal injuries, or property

damages, it is clear that purely economic losses cannot be the basis of a breach of implied warranty of merchantability claim where there is no privity between the parties. See Nguyen v. Cree, Inc., No. 3:18-cv-022097-SB, 2019 WL 7879879, at *7 (D. Or. Nov. 6, 2019) (rejecting the plaintiff's claim where he conceded that the defective product did not damage any other property); see also Smith v. Ethicon Inc., No. 3:20-cv-00851-AC, 2021 WL 3578681, at *7-8 (D. Or. May 13, 2021).

Though Plaintiffs rely on Ethicon to support their argument that Oregon recognizes an exception that applies to Oakley, Pls.' Opp'n at 21, the court there held that privity existed for the plaintiff's breach of express and implied warranty claims where the plaintiff had alleged that the product caused her "constant urinary problems and vaginal pain"—i.e., physical injuries. Ethicon, 2021 WL 3578681, at *1, *8. Plaintiffs have not alleged that Oakley has suffered any physical injury or property damage outside of the defective AFCIs. Accordingly, Oakley's breach of implied warranty of merchantability claim fails as a matter of law, and Siemens's Motion to Dismiss this claim is **GRANTED**.

d. Washington

Under Washington law, a plaintiff seeking to recover for breach of the implied warranty of merchantability must show:

> (1) the seller is a merchant with respect to goods of the kind sold; (2) the goods were not merchantable because either (a) they would not pass

> without objection in the trade under the contract description; (b) they are not of fair average quality within the description; (c) they are not fit for the ordinary purpose for which such goods are used; or (d) they are not of even kind and quality among units, among other reasons; (3) damages proximately caused by the defective nature of the good; and (4) that the seller was given notice of the injury.

Superwood Co. v. Slam Brands, Inc., No. C12-1109JLR, 2013 WL 6008489, at *14 (W.D. Wash. Nov. 13, 2013). "Washington state law requires individual consumers to establish vertical privity with the manufacturer to state a claim for breach of an implied warranty." Short v. Hyundai Motor Co., 444 F. Supp. 3d 1267, 1286 (W.D. Wash. 2020). Washington recognizes the third-party beneficiary exception to the privity requirement. Id. "Plaintiffs can demonstrate they are third-party beneficiaries where a manufacturer knew a purchaser's identity, knew the purchaser's purpose for purchasing the manufacturer's product, knew a purchaser's requirements for the product, delivered the product, and/or attempted repairs of the product in question." Id. (quoting Lohr v. Nissan N. Am., Inc., No. C16-1023RSM, 2017 WL 1037555, at *7 (W.D. Wash. Mar. 17, 2017)). The inquiry comes down to whether the manufacturer was "sufficiently involved in the transaction (including post-sale) . . . to warrant enforcement of an implied warranty." Id. (internal punctuation omitted) (quoting Lohr, 2017 WL 1037555, at *7).

Although Plaintiffs have alleged that Performance Electric contacted Siemens about the defective AFCIs, Consol. Compl. ¶ 110, the "sum of the interaction" shows minimal discourse between Siemens and Performance Electric. Short, 444 F. Supp. 3d at 1286-87. Plaintiffs do not allege that Siemens delivered any products to Performance Electric, or that Siemens attempted repairs of any products purchased by Performance Electric. Plaintiffs also allege no facts suggesting any interaction between Siemens and Gordon. Because neither Gordon nor Performance Electric allege the existence of privity with Siemens and have failed to allege sufficient facts supporting the application of an exception, their breach of the implied warranty of merchantability claims must fail, and Siemens's Motion to Dismiss these claims is **GRANTED**.

e. Ohio

Ohio law recognizes implied warranty claims under both contract law and tort law. Risner v. Regal Marine Indus., Inc., 8 F. Supp. 3d 959, 993 (S.D. Ohio). "A contract claim for breach of implied warranty is governed by Ohio Rev. Code § 1302.27," which provides that "a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind." Id. (quoting Ohio Rev. Code § 1302.27(A)).

Ohio law also requires privity between the parties for a plaintiff to bring a breach of the implied warranty of merchantability claim. Traxler, 158 F. Supp. 3d at 620. Plaintiffs' vague argument—that Ohio recognizes an exception to the privity requirement where the manufacturer provided a warranty that "runs to the ultimate consumer," Pls.' Opp'n at 21—could fall under either of two exceptions that have been discussed by Ohio courts. Ohio courts have found that "privity will lie between a manufacturer and an ultimate consumer if either the manufacturer is so involved in the sales transaction that the distributor merely becomes the manufacturer's agent or if the consumer is an intended third-party beneficiary to a contract." Norcold, Inc. v. Gateway Supply Co., 798 N.E.2d 618, 628 (Ohio Ct. App. 2003). However, Plaintiffs have failed to allege facts in the Consolidated Complaint that Siemens was involved in the sales transactions that occurred between NSSS and the distributor from which NSSS purchased its AFCIs. In addition, Ohio courts have rejected the third-party beneficiary exception to the privity requirement in implied warranty claims. "[L]ongstanding Ohio jurisprudence provides that purchasers . . . may assert a contract claim for breach of implied warranty only against parties with whom they are in privity." Traxler, 158 F. Supp. 3d at 624-25 (quoting Savett v. Whirlpool Corp., No. 12 CV 310, 2012 WK 3780451, at *10 (N.D. Ohio Aug. 31, 2012)).

Plaintiffs have failed to allege any facts showing that NSSS was in privity with Siemens, or that any exception should apply. Accordingly, NSSS's implied warranty of merchantability claim fails, and Siemens's Motion to Dismiss NSSS's implied warranty of merchantability claim is **GRANTED**.

For the sake of clarity, the Court now outlines the breach of implied warranty claims that remain. The Court has dismissed the claims of Electrocalifornia and Cates (California), Vodicka (North Carolina), NSSS (Ohio), Oakley (Oregon), and Performance Electric and Gordon (Washington) based on the absence of privity. The Court will now address Siemens's remaining arguments as to Brnich, Artistic Electric, and Butakis (Pennsylvania), Bolt Electric (Maine), Keyser (Nebraska), and Barrette (New Hampshire).

2. Disclaimer of Warranty

Siemens contends that, pursuant to its warranty, it "effectively disclaimed any implied warranty of merchantability." Def.'s Am. Mot. at 17. Siemens provides the following text of the warranty in its Motion to Dismiss:

> SIEMENS INDUSTRY, INC. HEREBY DISCLAIMS ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, EXCEPT THAT OF TITLE. SPECIFICALLY, IT DISCLAIMS THE IMPLIED WARRANTY[Y] OF MERCHANTABILITY . . . .

Id. Siemens also argues that "[a]pplicable state laws permit manufacturers to disclaim U.C.C. implied warranties, so long as the disclaimer is in writing, is conspicuous, and mentions merchantability." Id.

Plaintiffs contend that, because Siemens has "made no showing that any Plaintiff (or other customer) ever received the warranty before purchase[,] . . . it does not bind Plaintiffs." Pls.' Opp'n at 22. Plaintiffs also argue that Siemens has failed to show that "the disclaimer it provides was the operative [version] when Plaintiffs purchased their AFCIs." Id. at 23. Plaintiffs direct the Court to two other warranties purportedly offered by Siemens,[27] but Plaintiffs do not state whether or how these warranties apply to them. Id. Finally, Plaintiffs argue that the disclaimer is substantively invalid because (1) Maine and New Hampshire

[27] The first, the "Siemens Standard Extended Warranty for Residential Products," can be found at: https://images.homedepot-static.com/catalog/pdfImages/46/465f49de-7abf-4289-8737-3d7403f7c3d5.pdf (last visited Feb. 2, 2024).

The second, the "Circuit Breaker and Surge Protective Device Limit Warranty," can be found at: https://assets.new.siemens.com/siemens/assets/api/uuid:08c56a96-ab25-4252-a18f-368a32298285/sie-fl-cirbreakerspd-warranty.pdf (last visited Feb. 2, 2024).

prohibit disclaimers of implied warranties in the sale of consumer goods;[28] and (2) the disclaimer conflicts with Siemens's express warranties.

The laws of each of the remaining Plaintiffs' home states requires that, for a disclaimer of the implied warranty of merchantability to be effective, it generally must mention merchantability and be conspicuous. J.S. McCarthy Co. v. Bruausse Diecutting & Converting Equipment, Inc., 340 F. Supp. 2d 54, 57 (D. Me. 2004) (holding that the disclaimer must be in writing, conspicuous, and expressly mention the term "merchantability"); Materials Handling Enters., Inc. v. Atlanta Techs., LLC, 563 F. Supp. 3d 387, 396 (W.D. Pa. 2021) (disclaimer must mention merchantability "and in the case of a writing must be conspicuous") (quoting 13 Pa. Con. Stat. Ann. § 2316(b)); see also Neb. U.C.C. § 2-316(2); N.H. Rev. Stat. Ann. § 382-A:2-316(2).

Nebraska, Maine, and Pennsylvania also require that, for a disclaimer of warranty to be valid, it must be received before or at the time of the sale. Jelinek v. Land O'Lakes, Inc., 797 N.W.2d 289, 299 (Neb. Ct. App. 2011) ("[D]isclaimers of warranty made on or after delivery of the goods by means of an invoice, receipt, or

[28] Plaintiffs also argue that such disclaimers are prohibited under Washington law, but the Court need not reach this issue because the lack of privity bars the implied warranty claim of Performance Electric and Gordon. See Section V(B)(1)(d), supra.

similar note are ineffectual unless the buyer assents or is charged with knowledge as to the transaction.") (quoting Pfizer Genetics, Inc. v. Williams Mgmt. Co., 281 N.W.2d 536, 539 (Neb. 1979)); McLaughlin v. Denharco, Inc., 129 F. Supp. 2d 32, 37, 39 (D. Me. 2001) (denying the defendant's motion for summary judgment where the plaintiff could not recall ever receiving the disclaimer or warranty, thus raising an issue of material fact, because "if a buyer did not receive the disclaimer, the disclaimer was ineffective"); Allen-Myland, Inc. v. Garmin Int'l, Inc., 140 A.3d 677, 684 (Pa. 2016) (holding that, because the implied warranty arises at the time of contracting, a seller cannot unilaterally modify or disclaim it at any time after the parties have "completed the bargaining process and arrived at a final binding agreement").[29]

The Court finds that Siemens's arguments regarding effective disclaimer of the implied warranty of merchantability raise issues of fact that cannot be resolved at this stage of the litigation. Although Siemens provides the language of a warranty it purports was provided to all Plaintiffs, Siemens fails to provide any

[29] The New Hampshire case cited by Plaintiffs is inapplicable here, and the Court is unable to find any New Hampshire cases that hold that a disclaimer must be provided pre-sale to be effective. See Pls.' Opp'n at 22 n.13 (citing Collella v. Beranger Volkswagen, Inc., 386 A.2d 1283, 1284 (N.H. 1978) (holding that a manufacturer's disclaimer of warranty did not apply to the car dealer)).

additional information regarding when and where the disclaimer was provided to purchasers or to which purchasers such disclaimer was provided. Indeed, the Court is unable to rule on whether a disclaimer of the warranty of merchantability is conspicuous where there is no information before the Court as to where the warranty and its limitations were provided. Although discovery may lead to evidence that Plaintiffs received the warranty at the appropriate times, or that Plaintiffs received a different warranty not containing the disclaimer at issue, the record before the Court does not lead to a conclusion that, as a matter of law, Plaintiffs cannot recover on their implied warranty claims based on a disclaimer of warranty, especially where, as discussed below, Plaintiffs have adequately pleaded unmerchantability of the AFCIs.

3. Statutes of Limitations

Siemens argues that certain Plaintiffs' implied warranty claims are untimely under Georgia's statute of limitations. Def.'s Am. Mot. at 18. Plaintiffs do not explicitly respond to Siemens's argument regarding what state's statute of limitations apply, but they argue that, "in each of Plaintiffs' home states, the statute of limitations may be tolled where the defendant fraudulently concealed the defect at issue and the plaintiff had no reasonable means of discovering it." Pls.' Opp'n at 24.

"[I]n a diversity case, the district court applies the forum state's choice-of-law rules. Under Georgia law, and the rule of *lex fori*, 'procedural or remedial questions are governed by the law of the forum, and statutes of limitations are considered procedural." McCabe v. Daimler AG, 948 F. Supp. 2d 1347, 1361 (N.D. Ga. 2013). Accordingly, "Georgia's statutes of limitations, and attendant tolling provisions, apply" to those Plaintiffs who originally filed their suit in the Northern District of Georgia. Blacklick Hotspot Corp. v. Mansfield Oil Co. of Gainesville, Inc., No. 2:21-CV-214-RWS, 2023 WL 6375984, at *8 (N.D. Ga. Aug. 14, 2023).

However, this rule does not appear to apply to those Plaintiffs who initially filed their Complaint in the District of Columbia. See Taylor v. Murray, 231 Ga. 852, 853 (1974) ("[I]t is well settled that the Statute of Limitations of the country, or state, where the action is brought and the remedy is sought to be enforced, controls, in the event of the conflict of laws."). The Court already has held that District of Columbia choice of law rules govern the NSSS Plaintiffs' claims because those Plaintiffs initially brought suit in the District of Columbia and transferred the case to this Court under 28 U.S.C. § 1404(a). See October 13, 2023, Order. Accordingly, the Court must consider whether, under District of

Columbia choice of law, the breach of implied warranty claims of NSSS, Electrocalifornia, Keyser, and Barrette are barred by the statute of limitations.

District of Columbia choice of law rules also consider statutes of limitations to be procedural, and not substantive; as such, they are "governed by the law of the filing forum." Reeves v. Eli Lilly & Co., 368 F. Supp. 2d 11, 25 (D.D.C. 2005) (alteration accepted) (quoting Kaplan v. Manhattan Life Ins. Co., 109 F.2d 463, 465-66 (D.C. Cir. 1939)). Thus, the District of Columbia's statute of limitations applies to the NSSS Plaintiffs' breach of implied warranty claims.

a. D.C. Statute of Limitations

Under District of Columbia law, the statute of limitations for breach of the implied warranty of merchantability is four years. Reese v. Loew's Madison Hotel Corp., 65 F. Supp. 3d 235, 249 (D.D.C. 2014) (citing D.C. Code § 28:2-725). The statute of limitations generally accrues "when the plaintiff has knowledge of (or by the exercise of reasonable diligence should have knowledge of) (1) the existence of the injury, (2) its cause in fact, and (3) some evidence of wrongdoing." Vox Media, Inc. v. Mansfield, 322 F. Supp. 3d 19, 24 (D.D.C. 2018) (quoting Firestone v. Firestone, 76 F.3d 1205, 1209 (D.C. Cir. 1996)). "[B]ecause statute of limitations issues often depend on contested questions of fact, dismissal is appropriate only if the complaint on its face is conclusively time-barred."

Firestone, 76 F.3d at 1209; see also Mouzon v. Radiancy, Inc., 200 F. Supp. 3d 83, 89-90 (D.D.C. 2016) ("Put another way, a defendant is entitled to succeed on a Rule 12(b)(6) motion to dismiss brought on statutes of limitations grounds only if the facts that give rise to this affirmative defense are clear on the face of the plaintiff's complaint.") (quoting Lattisaw v. District of Columbia, 118 F. Supp. 3d 142, 153 (D.D.C. 2015)).

Because the breach of implied warranty claims of NSSS and Electrocalifornia are barred by lack of privity, the Court need only address the statute of limitations argument as to the remaining NSSS Plaintiffs—Keyser and Barrette. The Court finds that their claims are not time-barred under D.C. law. As discussed above, the NSSS Plaintiffs' complaint was filed on April 19, 2021. See Nat'l Sentry Sec. Sys., Inc., et al v. Siemens Corp., Inc., No. 1:21-cv-1072-CJN (D.D.C. Apr. 19, 2021). Keyser purchased Siemens AFCIs to install into his new home in 2019 or 2020, which was well within the four-year period. Consol. Compl. ¶¶ 172, 174. And Barrette purchased his home which contained Siemens AFCIs in 2020, also within the four-year period.

b. Georgia Statute of Limitations

Georgia law provides a statute of limitations period of four years for breach of implied warranty claims. McCabe, 948 F. Supp. 2d at 1361.

> A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered.

O.C.G.A. § 11-2-725(2). "[A]s the Eleventh Circuit has made clear, 'a Rule 12(b)(6) dismissal on statute of limitations grounds is appropriate only if it is apparent from the face of the complaint' that the claim is time-barred.'" Turk v. Morris, Manning & Martin, LLP, 593 F. Supp. 3d 1258, 1291 (N.D. Ga. 2022) (quoting La Grasta v. First Union Sec., Inc., 358 F.3d 840, 845 (11th Cir. 2004)).

The only Plaintiff from the Cates lawsuit whose breach of implied warranty claim is not barred for lack of privity (Butakis) filed his Complaint on May 13, 2022. See Cates, et al. v. Siemens Indus., Inc., No. 1:22-CV-1914-MHC (N.D. Ga. May 13, 2022). Plaintiffs allege that Butakis moved into his home around July 2021. Consol. Compl. ¶¶ 163. Because his claim was "made within four years of the breach, it is timely." Paws Holdings, LLC v. Daikin Applied Ams. Inc., No. CV 116-058, 2018 WL 475013, at *4 (S.D. Ga. Jan. 18, 2018).

Turning to the Brnich Plaintiffs whose claims are not barred by lack of privity (Brnich, Bolt Electric, and Artistic Electric), their initial Complaint was filed on March 29, 2022. See generally Compl. [Doc. 1]. Plaintiffs allege that

Brnich, Bolt Electric, and Artistic Electric all purchased and installed Siemens AFCIs within a year of the date of the complaint, including breakers that have experienced nuisance tripping. Consol. Compl. ¶¶ 98, 118, 126. However, Plaintiffs' allegations regarding when their causes of action accrued is otherwise scant. Plaintiffs allege that Brnich has been an electrician for twenty-five years and has purchased and installed Siemens AFCIs during this time. Id. ¶ 97. However, the Consolidated Complaint contains no additional allegations regarding when Bolt Electric or Artistic Electric purchased allegedly defective Siemens AFCIs. See id. ¶¶ 117-32.

Accordingly, the breach of implied warranty claims of Brnich, Bolt Electric, and Artistic Electric appear to be time-barred to the extent that they purchased their breakers before March 29, 2018, unless Plaintiffs have sufficiently alleged fraudulent concealment to toll the statute of limitations. Under Georgia law, "[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." O.C.G.A. § 9-3-96. "This Code section has been strictly construed to require '(1) actual fraud involving moral turpitude, or (2) a fraudulent breach of a duty to

disclose that exists because of a relationship of trust and confidence.'" Goldston v. Bank of Am. Corp., 259 Ga. App. 690, 693 (2003).

To establish fraudulent concealment sufficient to toll the statute of limitations, "a plaintiff must show (1) the defendant committed actual fraud involving moral turpitude; (2) the fraud concealed the cause of action from the plaintiff; (3) plaintiff exercised reasonable diligence to discover the fraud." Moore v. Meeks, 225 Ga. App. 287, 287 (1997). Georgia courts have held that "fraud that gives rise to a cause of action does not necessarily establish the fraud necessary to toll the statute of limitation." Allen v. Columbus Bank & Tr. Co., 244 Ga. App. 271, 273 (2000). Thus, "[e]ven when a confidential relationship between the parties exists, the fraud itself—the defendant's intention to conceal or deceive—still must be established, as must the deterrence of a plaintiff from bringing suit." Id. (footnote omitted).

The parties dispute whether the fraudulent concealment exception should apply to Plaintiffs' breach of implied warranty claims. Pls.' Opp'n at 24-25; Defs.' Reply at 13-15. The Court declines to resolve this issue at the motion to dismiss stage because "a Rule 12(b)(6) dismissal on statute of limitations grounds is appropriate only if it is 'apparent from the face of the complaint' that the claim is time-barred." La Grasta v. First Union Sec., Inc., 358 F.3d 840, 845 (11th Cir.

2004) (quoting Omar v. Lindsey, 334 F.3d 1246, 1251 (11th Cir. 2003)); see also Sec'y of Lab. v. Labbe, 319 F. App'x 761, 764 (11th Cir. 2008) (declining to dismiss complaint on statute of limitations grounds because "as to those violations that may be time-barred" the court could not "conclude beyond a doubt that the Secretary can prove no set of facts that toll the statute"); Elder, 563 F. Supp. 3d at 1234. The Court agrees with the Eleventh Circuit's reasoning in the cases cited above and declines to dismiss Plaintiffs' implied warranty claims based upon a violation of the statute of limitations because it cannot at this stage "conclude beyond a doubt" that their claims are time-barred. Elder, 563 F. Supp. 3d at 1235.

4. Unmerchantability

The U.C.C. as adopted by each of the remaining Plaintiffs' home states provides that "a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind." 13 Pa. Cons. Stat. Ann. § 2314(a); Me. Stat. tit. 11, § 2-314(a); Neb. U.C.C. § 2-314(a); N.H. Rev. Stat. § 382-A:2-314(a). The parties do not dispute that Siemens is a merchant with respect to AFCIs but, instead, dispute whether Plaintiffs have properly alleged that the AFCIs were "unmerchantable." Def.'s Am. Mot. at 14-16; Pls.' Opp'n 18-21. Siemens argues that Plaintiffs' failure to "plausibly allege that Siemens' AFCIs were not of the quality generally accepted

in the trade, that they fail to trip in the presence of potentially dangerous arcs, or that they do not meet the UL 1699 standard" necessitates dismissal of their implied warranty claims. Def.'s Am. Mot. at 15.

Addressing first Siemens's argument that Plaintiffs have failed to allege that Siemens AFCIs do not meet the UL 1699 standard, Siemens cites no case law to support its argument that a plaintiff must allege that a product does not meet industry standards to show unmerchantability. Indeed, the U.C.C., as adopted by Maine, Nebraska, New Hampshire, and Pennsylvania, does not define merchantability in terms of industry standards, but rather to the quality, packaging, and fitness for ordinary purposes of the goods. 13 Pa. Cons. Stat. Ann. § 2314(b); Me. Stat. tit. 11, § 2-314(b); Neb. U.C.C. § 2-314(b); N.H. Rev. Stat. § 382-A:2-314(b). Accordingly, this argument fails.

Plaintiffs have alleged that the ordinary purpose of a properly functioning AFCI is to trip the circuit in the presence of dangerous arcs, cutting off power to the offending appliance or area to prevent risks of fire, while allowing the flow of electricity in the absence of harmful arcs. Consol. Compl. ¶¶ 44-45. To this end, AFCIs must "identify and distinguish between harmless and dangerous electrical arcs so that the circuit breaker trips only upon identifying a dangerous electric arc." Id. ¶ 41. Plaintiffs have alleged that the National Electric Manufacturers

Association ("NEMA")[30] and the National Electrical Code ("NEC")[31] have both emphasized that nuisance tripping should be kept to a minimum, and even that it "should not occur." Id. ¶¶ 51, 57. When AFCIs nuisance trip, according to Plaintiffs, they "not only fail at their essential purpose of accurately detecting an arc," but also heightens safety risks and causes inconvenience to the user, unnecessary interruption of power, and financial loss. Id. ¶ 56.

Plaintiffs further allege that Siemens AFCIs frequently nuisance trip, thereby failing to perform their ordinary function of distinguishing the harmless arcs that occur when household appliances are in use from dangerous arcs that can cause fires. Id. ¶ 84. Plaintiffs allege that such nuisance tripping renders Siemens AFCIs "effectively unusable in residential panel boxes," and that the only solution has been to replace the Siemens AFCIs. Id. ¶ 241.

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[30] NEMA is a standards development organization accredited by the American National Standards Institute and "made up of business leaders, electrical experts, engineers, scientists, and technicians." Consol. Compl. ¶ 51.

[31] The NEC is a set of electrical safety standards for "residential, housing and other occupancies" and has been adopted in many states across the country. Consol. Compl. ¶ 40. The NEC first began recommending AFCI installation for use in "dwelling unit bedroom circuits" in 1999. Id. ¶ 46. Since 2017, the NEC has "required that AFCIs be installed in all new residential construction and in practically every room of the home." Id. ¶ 48.

Plaintiffs allege that Brnich, Artistic Electric, and Bolt Electric experienced repeated and unnecessary tripping, which cost them time and money in investigating the causes or replacing the allegedly defective AFCIs. Id. ¶¶ 100-01, 122-24, 129-131. Plaintiffs also allege that Butakis experienced nuisance tripping "[f]rom the time [he] moved into his new home onward," and that the tripping had "no identifiable cause." Id. ¶ 164.

Under the laws of Maine (applied to Bolt Electric) and Pennsylvania (applied to Brnich, Artistic Electric, and Butakis), Plaintiffs have sufficiently pleaded that the AFCIs were not fit for their ordinary purpose. Faulkingham v. Seacoast Subaru, Inc., 577 A.2d 772, 773-74 (Me. 1990) (finding that a used car "proved to be unreliable transportation as a commuter vehicle or for other ordinary travel use by the Plaintiff," where the three-year-old car presented problems such as a squeaky fan belt, coolant problems, overheating, battery issues, and "spewing water out of the engine" because the car "failed to perform up to the level reasonably expected of a car of its age, mileage and purchase price."); Holtec Int'l v. ARC Machines, Inc., 492 F. Supp. 3d 430, 445 (W.D. Pa. 2020) (finding that the plaintiff had sufficiently pled its implied warranty claim where it "alleges that the equipment malfunctioned from the date of installation, that it was used as intended, and that no other apparent reasons were the cause for malfunction."); Barton v.

Lowe's Home Ctrs., Inc., 124 A.3d 349, 358 (Pa. Super. Ct. 2015) (noting that, [i]mplicit in [the ordinary purpose standard] is that a good 'performs in the way that goods of that kind should perform' and is 'of reasonable quality.'") (quoting Gall by Gall v. Allegheny Cnty. Health Dept., 555 A.2d 786, 789 (Pa. 1989)).

Plaintiffs allege that Keyser, a trained and certified electrician, performed the electrical work throughout his new home. Consol. Compl. ¶ 172. "[U]pon installation," Siemens AFCIs would frequently and unexpectedly trip. Id. ¶ 175. Plaintiffs allege that Keyser "ensured his house complied with Nebraska's electrical code," and that he "investigated potential causes for the unexpected tripping" but "could find no explanation for the nuisance tripping." Id. ¶¶ 172, 175. Only after replacing his Siemens AFCIs with AFCIs made by a different manufacturer did the nuisance tripping abate. Id. ¶ 176. Under Nebraska law, Plaintiffs have sufficiently pleaded a breach of the implied warranty of merchantability claim as to Keyser. Legal Aid of Neb., Inc. v. Chaina Wholesale, Inc., No. 4:19-CV-3103, 2020 WL 42471, at *5 (D. Neb. Jan. 3, 2020) (denying the defendant's motion to dismiss where the plaintiffs alleged that a space heater

"under normal use causes a fire," which the court concluded was "not a good fit for the ordinary purposes for which it would be used.").[32]

Plaintiffs allege that Barrette purchased a new home containing a new Siemens electrical panel and Siemens AFCIs. Consol. Compl. ¶ 179. "Almost immediately after moving into his new home," the Siemens AFCIs began frequently nuisance tripping. Id. ¶ 180. Barrette hired an electrician, who investigated the potential cause of the nuisance tripping, switched out his breakers with "brand-new Siemens AFCI breakers," and ultimately installed AFCIs manufactured by a competitor. Id. ¶ 181-82. Only after replacing the AFCIs with the competitor's AFCIs did the nuisance tripping abate. Id. Siemens points to no applicable New Hampshire case law that would require this Court to dismiss Barrette's claim at this stage where Plaintiffs have sufficiently alleged the ordinary purpose of AFCIs, and that Siemens AFCIs were "not of average quality" or "fit for the ordinary purpose" for which an AFCI is used where they could not distinguish between dangerous and harmless arc faults and instead frequently

[32] The Nebraska case cited by Siemens is irrelevant. See Def.'s Am. Mot. at 14 n. 18 (citing Sherman v. Sunson Am., Inc., 485 F. Supp. 2d 1070, 1086-87 (D. Neb. 2007)). There, the court considered whether dismissal of the plaintiff's breach of implied warranty claim was appropriate where it would merge with the plaintiff's strict liability claim. Sherman, 485 F. Supp. 2d at 1086-87.

nuisance tripped. See Welch v. Fitzgerald-Hicks Dodge, Inc., 430 A.2d 144, 148 (N.H. 1981) (holding that the jury could have found that a car that "shimmied" when driven and required repairs "was not of average quality or fit for the ordinary purpose for which an automobile is used.").[33]

Accordingly, Siemens's Motion to Dismiss the implied warranty of merchantability claims of Brnich, Artistic Electric, Butakis, Bolt Electric, Keyser, and Barrette is **DENIED**.

C. Fraudulent Concealment (Count II)

Plaintiffs allege that they would not have purchased or used Siemens AFCIs had they known, and had "Siemens not omitted, that Siemens' AFCIs contained an algorithm incapable of distinguishing dangerous and harmless arcs." Consol. Compl. ¶¶ 103, 113, 122, 133. Siemens seeks to dismiss this claim on the grounds that: (1) the Consolidated Complaint fails to satisfy Federal Rule of Civil Procedure 9(b); (2) Plaintiffs have failed to allege that Siemens had pre-sale

[33] The court in Roy v. Quality Pro Auto, LLC, 132 A.3d 418 (N.H. 2016), cited by Siemens, held that the plaintiff failed to show that the seller of a used vehicle breached the implied warranty of merchantability where the seller explicitly described the vehicle as "one that will not pass a New Hampshire inspection, is unsafe for operation, and cannot be driven on the ways of this state." Id. at 421. Plaintiffs have not alleged, and Siemens does not argue, that Siemens described its AFCI as one that would frequently nuisance trip in the presence of harmless arcs or due to the use of common appliances.

knowledge; and (3) Plaintiffs failed to allege that Siemens had a duty to disclose. Def.'s Am. Mot. at 19-21, 23-27.

Under Georgia law, "[i]n a claim for fraudulent concealment, a plaintiff must prove the same five elements of a fraud claim." Amin v. Mercedes-Benz USA, LLC, 301 F. Supp. 3d 1277, 1296 (N.D. Ga. 2018) (quoting Coleman v. H2S Holdings, LLC, 230 F. Supp. 3d 1313, 1321 (N.D. Ga. 2017)).

> [T]he tort of fraud has five elements: (1) a false representation or omission of a material fact; (2) scienter; (3) intention to induce the party claiming fraud to act or refrain from acting; (4) justifiable reliance; and (5) damages. In the context of fraudulent-concealment claims, the scienter element requires that the alleged defrauder had actual, not merely constructive, knowledge of the fact concealed. In addition, only the suppression of a material fact which a party is under an obligation to communicate can support such a claim.

Id. (internal punctuation and citations omitted, alterations accepted) (quoting McCabe, 948 F. Supp. 2d at 1368).

1. Rule 9(b)

Siemens first argues that Plaintiffs' fraudulent concealment claims fail because Plaintiffs did not specifically allege the "who, what, when, where, and how of any alleged misrepresentation," or that any Plaintiff relied on the misrepresentations or omissions. Def.'s Am. Mot. at 20-21. In response, Plaintiffs contend that the "particularity requirement is not as stringent when applied to

fraudulent concealment claims premised on an omission," but that they have nevertheless satisfied Rule 9(b) in pleading their claims. Pls.' Opp'n at 26-30.

Rule 9 of the Federal Rules of Civil Procedure provides that, where fraud or mistake is alleged, the plaintiff "must state with particularity the circumstances constituting fraud or mistake," but "[m]alice, intent, knowledge and other conditions of a person's mind may be alleged generally." FED. R. CIV. P. 9(b). The Eleventh Circuit has held that Rule 9(b) is satisfied if the plaintiff alleges the following:

> (1) precisely what statements were made in what documents or oral representations or what omissions were made, and
>
> (2) the time and place of each such statement and the person responsible for making (or, in the case of omissions, not making) same, and
>
> (3) the content of such statements and the manner in which they misled the plaintiff, and
>
> (4) what the defendants "obtained as a consequence of the fraud."

Brooks v. Blue Cross & Blue Shield of Fla., Inc., 116 F.3d 1364, 1371 (11th Cir. 1997) (quoting Fitch v. Radnor Indus, Ltd., No. 90–2084, 1990 WL 150110, at *2 (E.D. Pa. Sept. 27, 1990)). "[U]nder Rule 9(b), it is sufficient to plead the who, what, when, where, and how of the allegedly false statements and then allege generally that those statements were made with the requisite intent." Mizzaro, 544 F.3d at 1237.

The Court finds that Plaintiffs have sufficiently pleaded the "who," "what," "where," "how," and, to a certain extent, the "when" of their fraudulent concealment claim. Plaintiffs have alleged that Siemens, through their representatives and employees, made representations that its AFCIs functioned properly while omitting the fact that nuisance tripping was caused by an alleged defect in Siemens AFCIs. See Consol. Compl. ¶ 85 (alleging that, in May 2017, a Siemens employee gave an interview to Electrical Contractor magazine, in which she stated that "[p]eople believe that certain arc fault breakers are defective because they frequently trip," but that nuisance tripping is just a "safety alert"). Plaintiffs also have alleged that Siemens concealed information regarding defects by issuing a troubleshooting guide in 2018 that omitted mention of any possible defects, by offering tools to help investigate causes of nuisance tripping that further omitted the possibility of defects, and by omitting information on labels and brochures that would alert a consumer to the possibility of defects.

2. Justifiable Reliance

Plaintiffs contend that Rule 9(b)'s particularly requirement as to reliance is not applied so stringently when a fraudulent concealment claim is premised on an omission, rather than affirmative misrepresentations. Pls.' Opp'n at 26. In support of this argument, Plaintiffs rely on Monopoli. There, the court dismissed the

plaintiffs' fraudulent misrepresentation claim, reasoning that, although the plaintiffs' complaint contained sufficient allegations concerning the representations made by the defendant of the proper functionality of its products, the plaintiffs had failed to specifically allege "'when, where, or through what medium [the plaintiffs] heard or read' representations that the [product] was not defective." Monopoli, 2022 WL 409484, at *11 (quoting Callen v. Daimler AG, No. 1:19-CV-1411-TWT, 2020 WL 10090879, at *17 (N.D. Ga. June 17, 2020)). Because the plaintiffs failed to allege that any of them had read the materials, the fraudulent misrepresentation claims failed. Id. ("General reliance on [the defendant]'s reputation for safety is insufficient.").

On the other hand, the court in Monopoli allowed the plaintiffs' fraudulent concealment claim to proceed. Id. at *11.

> [A]llegations sufficient to show justifiable reliance on an *omission* differ from those sufficient to show reliance on a *misrepresentation*. By the very nature of fraudulent concealment, plaintiffs cannot be expected to point to the time, place, and precise substance of what should have been disclosed. Rather, it is enough for plaintiffs to allege that a fact was material and that it could have, and should have, been disclosed prior to the time plaintiffs acted upon the omission. See McCabe, 948 F. Supp. at 1368 (Plaintiffs alleged "that they expected to receive vehicles free from design or manufacturing defects and that they would not have purchased their vehicles had they known of the defect. Thus, they have plausibly alleged justifiable reliance."); Amin, 301 F. Supp. 3d at 1296 (same).

Id. at *10 (emphasis in original); see also Callen, 2020 WL 10090879, at *15 ("Failure to plead affirmative misrepresentations on the part of the Defendants would, of course, warrant dismissal of the Plaintiffs' fraudulent misrepresentation claims. That failure would not, however, warrant dismissal of the Plaintiffs' fraudulent concealment claims, premised as they are on the Defendants' failure to speak.").

The Court finds that the reasoning in Monopoli applies here. Plaintiffs have alleged that Siemens "never disclosed and actively concealed that its AFCIs nuisance tripped" to potential purchasers, and that its "labels and brochures omit any information describing that Siemens AFCI breakers trip when using common household appliances or in the presence of electronic noise." Consol. Compl. ¶ 84. Plaintiffs allege that they paid a premium for Siemens AFCI breakers based on Siemens's omissions. Id. ¶ 223. Plaintiffs also allege that the troubleshooting guide released by Siemens in 2018 contains a multitude of steps homeowners and electricians should take to decrease the incidence of nuisance tripping, but that none of these steps "advises its customers that the problem might be with its AFCI breakers." Id. ¶¶ 89-91. In the same vein, Plaintiffs allege that the LED indicator, which Siemens places on its AFCIs and advertises as a "valuable analysis tool to help electricians pinpoint the type of trip," furthers Siemens's concealment of the

defect by indicating that nuisance tripping is the fault of the homeowner or electrician. Id. ¶¶ 92, 220. From these facts, the Court can reasonably infer that customers would continue to purchase Siemens AFCIs because Siemens did not disclose any inherent issue with its AFCIs.

Plaintiffs further allege that the concealed fact—that Siemens AFCIs are allegedly prone to nuisance trip—was material. Plaintiffs allege that Siemens itself represents that it understands that an AFCI trip costs homeowners time, money, and stress. Id. ¶ 89. Additionally, because AFCIs are required in residential buildings in most states to reduce the risk of fire, Plaintiffs allege that nuisance tripping can cause inconvenience, "unnecessary interruption of power" leading to lost work, data, or information, and financial losses while heightening safety risks. Id. ¶¶ 44, 48, 53, 56.

Like the plaintiffs in McCabe, Plaintiffs have alleged "that they expected to receive [AFCIs] free from design or manufacturing defects and that they would not have purchased their [AFCIs] had they known of the defect." McCabe, 948 F. Supp. 2d at 1347; see also Consol. Compl. ¶ 274 (alleging that Plaintiffs expected Siemens AFCIs "to perform the basic function of an AFCI"); id. ¶ 9 ("Had Siemens disclosed that its AFCIs suffered from frequent and unnecessary nuisance tripping, these Plaintiffs would not have purchased Siemens' AFCIs or installed

them in their customers' homes or would not have had to exhaust time and effort searching for the cause of the nuisance tripping occurring due to Siemens' defective AFCIs.").

Accordingly, insofar as Plaintiffs' fraudulent concealment claims are premised solely on concealment and omissions by Siemens, Plaintiffs have adequately pleaded their claims to satisfy the particularity requirement of Rule 9(b).

3. Pre-Sale Knowledge

Siemens contends that Plaintiffs' allegations that Siemens was put on notice from customer complaints on third-party websites are insufficient to show that Siemens had "knowledge" of the defects for purposes of surviving this 12(b)(6) motion. Def.'s Am. Mot. at 23-24. Siemens also argues that Plaintiffs' allegations regarding testing are conclusory, and that their allegations regarding NEMA standards are insufficient. Id. at 25.

Under Rule 9(b), knowledge may be alleged generally—it does not have to be pleaded with the same specificity as that required for the other elements of fraud. FED. R. CIV. P. 9(b). However, a claim for fraudulent concealment still requires allegations showing that the defendant "knew about the alleged defect prior to Plaintiffs' purchases." Monopoli, 2022 WL 409484, at *8 (citing McCabe,

948 F. Supp. 2d at 1368). "There must be some evidence of the silent party's actual knowledge that the defect exists at the time of the sale from which his moral guilt in concealing it can be inferred." ReMax, 244 Ga. App. at 894 (quoting Webb v. Rushing, 194 Ga. App. 732, 733 (1990)).

> Proof of fraud is seldom if ever susceptible of direct proof, thus recourse to circumstantial evidence usually is required. Moreover, it is peculiarly the province of the jury to pass on these circumstances showing fraud. Except in plain and indisputable cases, scienter in actions based on fraud is an issue of fact for jury determination.

Brown v. Mann, 237 Ga. App. 247, 249 (1999) (quoting Lloyd v. Kramer, 233 Ga. App. 372, 373 (1998)).

The Court agrees with Siemens that the customer complaints on third-party websites "in and of themselves" do not rise above mere speculation. Def.'s Am. Mot. at 24 (quoting Wilson v. Hewlett-Packard Co., 668 F.3d 1136, 1147 (9th. Cir. 2012)). However, the Court also agrees with the court in Monopoli: "[A]lthough each individual piece of information that Plaintiffs rely upon may not, standing alone, demonstrate that Defendants knew of the issues with the [defect] before Plaintiffs purchased their [AFCIs], the Court finds that they do so collectively." Monopoli, 2022 WL 409484, at *10 (quoting Pinon v. Daimler AG, No. 1:18-CV-3984-MHC, 2019 WL 11648560, at *24 (N.D. Ga. Nov. 4, 2019)).

Here, Plaintiffs allege that Siemens received direct complaints as well as those posted on third-party websites. Consol. Compl. ¶¶ 75, 82. At least two of the public complaints were posted in 2017, and one complaint posted in 2017 states, "The Siemens rep claims there wasn't anything wrong." Consol. Compl. ¶ 77. Further, Plaintiffs allege that Performance Electric directly contacted Siemens regarding the issue, and that the representative "admitted to some issues with prior versions of its AFCIs but maintained that its breakers made after 2015 should have no problems."

From these allegations, it is plausible that Siemens knew about the defect by at least 2015. Additionally, Plaintiffs have alleged that Siemens conducted testing on "hundreds of breakers returned as defective" and found that its AFCIs trip in the absence of dangerous arcs. Consol. Compl. ¶ 83. Plaintiffs allege that, in 2017, during an interview with Electrical Contractor magazine, a Siemens employee stated, "People believe that certain arc fault breakers are defective because they frequently trip. People need to think of these not as 'nuisance tripping' but rather as 'safety alerts.'" Id. ¶ 85. Similarly, Plaintiffs allege that Siemens released a troubleshooting guide in 2018 to assist users in determining the cause of "unwanted tripping." Id. ¶¶ 89-90. Plaintiffs' allegations regarding the employee's statements and the troubleshooting guide, if true, permit the Court to

draw the reasonable inference that Siemens knew that "people" were complaining about nuisance tripping but represented that it was a safety feature or an issue traceable to the homeowner or electrician. Finally, Plaintiffs allege that a Siemens employee gave a presentation titled "Debunking the Myths of AFCI" in 2018 that addresses "typical arc fault circuit concerns," which includes nuisance tripping and excessive troubleshooting times."[34] The references to NEMA and the NEC in the Siemens presentation indicates that Siemens was aware of the association, the code, and the attendant guidelines and requirements set forth by each.[35]

Accordingly, based on Plaintiffs' allegations of customer complaints, Siemens's own testing and publications, and the guidelines set forth by NEMA and

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[34] 2018 Webinar Series, "Debunking the Myths of AFCI," presented by Ashley Bryant, Sr. Prod. Mgr., Siemens, slides available at: https://slidetodoc.com/debunking-the-myths-of-afci-presented-by-ashley/ ("Siemens Presentation") (last visited Feb. 2, 2024). Because neither party has disputed the authenticity of the presentation as provided by Plaintiffs, the Court will consider it in ruling on the instant motion to dismiss. See Day, 400 F.3d at 1276.

[35] Siemens argues that such "statements about industry research and general knowledge are insufficient to allege a defendant knew about any specific defect" and provides the unsupported contention that "[t]hey are particularly insufficient here where the industry standard recognizes 'nuisance tripping,' *i.e.*, unintended trips, in *proper* AFCI operation." Def.'s Am. Mot. at 25-26. However, Siemens's arguments regarding industry standards raise a factual dispute, the resolution of which is improper at the pleadings stage.

the NEC, Plaintiffs have sufficiently pleaded pre-sale knowledge. See Pinon, 2019 WL 11648560, at *19-24; Monopoli, 2022 WL 409484, at *8-10.

4. Duty to Disclose

Siemens argues that Plaintiffs' fraudulent concealment claims fail because they do not allege that Siemens had a duty to disclose the omitted information. Defs.' Am. Mot. at 26. Siemens argues that Plaintiffs' conclusory allegations, that Siemens "'knew or should have known' of a defect and it 'knew of the harm created by defective breakers that suffered repeated nuisance tripping,'" are insufficient to establish such a duty under Georgia law. Id. (quoting Consol. Compl. ¶¶ 93, 216).[36] Plaintiffs, in response, contend that Georgia law imposes a duty to disclose that arises from "the particular circumstances of the case." Pls.' Opp'n at 36 (quoting Amin, 301 F. Supp. 3d at 1296). The Court agrees with Plaintiffs.

"The obligation to communicate may arise from the confidential relations of the parties or from the particular circumstances of the case." McCabe, 948 F. Supp. 2d at 1368 (quoting O.C.G.A. § 23-2-53). Georgia courts have found that

[36] Siemens also contends that, because Plaintiffs have not alleged the existence of a special relationship, bodily harm, or actionable representation under the laws of various Plaintiffs' home states, their claims fail. As discussed above, such arguments are irrelevant here.

the concealment of "intrinsic qualities of the article which the other party by the exercise of ordinary prudence and caution could not discover" is one such particular circumstance giving rise to an obligation to communicate. Rivers v. BMW of N. Am., Inc., 214 Ga. App. 880, 883-84 (1994) (quoting Bill Spreen Toyota v. Jenquin, 163 Ga. App. 855, 861 (1982)). "What one may not do is to turn his head away and blind himself to the truth or falsity of a condition which he recklessly represents to his own advantage. Such refusal to know, like admitted knowledge, involves actual, moral guilt." Id. at 884 (quoting Bill Spreen, 163 Ga. App. at 858).

Here, the Court disagrees with Siemens that Plaintiffs' allegations are conclusory as to Siemens's duty to disclose. Plaintiffs allege that Siemens knew that its AFCIs nuisance trip, frequently causing a loss of power in the absence of dangerous arcs. Consol. Compl. ¶¶ 74-83. Assuming this is true, Siemens failed to disclose this information to potential users. Id. ¶ 84. Despite acknowledging that nuisance tripping was costly, according to the allegations in the Consolidated Complaint, Siemens focused potential responsibility on user errors rather than anything specifically wrong with the Siemens AFCIs. Id. ¶ 85. Plaintiffs also make a variety of allegations about the time and resources they spent to investigate the issue unsuccessfully and that the Siemens AFCIs fail at their essential purpose.

See, e.g., id. ¶¶ 95, 105, 115, 124, 132. Accordingly, the Court finds that Plaintiffs have sufficiently alleged that the defect in the AFCIs were "intrinsic qualities of the article which [Plaintiffs] by the exercise of ordinary prudence and caution could not discover." Rivers, 214 Ga. App. at 883-84.

Having rejected each of Siemens's grounds for dismissing Plaintiffs' fraudulent concealment claims, the Court concludes that Plaintiffs have sufficiently pleaded their fraudulent concealment claims under Georgia law to the extent that Plaintiffs rely solely on omissions and concealment of information for their claims. Accordingly, Siemens's Motion to Dismiss Plaintiffs' fraudulent concealment claims is **DENIED**.

D. Negligent Misrepresentation (Count III)

1. Washington

As stated above, the WPLA applies to Gordon's and Performance Electric's negligent misrepresentation claims. Siemens seeks dismissal of Gordon's and Performance Electric's negligent misrepresentation claims, arguing that these claims are preempted by the WPLA. Def.'s Am. Mot. at 29 (citing March v. Ethicon, Inc., C20-5032 BHS, 2021 WL 719261, at *3 (W.D. Wash. Feb. 24, 2021)). Plaintiffs respond that the WPLA "does not preempt fraud-based claims like negligent misrepresentation." Pls.' Opp'n at 42 n.25 (citing Ochoa v. Indus.

Ventilation, Inc., No. 2:18-cv-0393, 2021 WL 5405203, at *8 (E.D. Wash. Nov. 18, 2021)). However, the court in Ochoa held that WPLA claims and claims for negligent misrepresentation and fraud are not barred by the "independent duty doctrine." Ochoa, 2021 WL 5405203, at *8.

In March v. Ethicon, Inc., the court held that "[t]he WPLA clearly contemplates negligence and negligent misrepresentation within its scope of preemption." 2021 WL 719261, at *3 (citing Wash. Rev. Code § 7.72.010(4) (a product liability claim includes, *inter alia*, any claim based on negligence or misrepresentation, whether negligent or innocent.")). Accordingly, Siemens's Motion to Dismiss Gordon's and Performance Electric's negligent misrepresentation claims is **GRANTED**.

2. Georgia

Under Georgia law, to state a claim for negligent misrepresentation, a plaintiff must allege facts showing that "(1) the defendant negligently provided false information to foreseeable persons, known or unknown, including the plaintiff; (2) the plaintiff reasonably relied on this false information; and (3) the plaintiff's reliance proximately caused an economic injury." Shea v. Best Buy Homes, LLC, 533 F. Supp. 3d 1321, 1340 (N.D. Ga. 2021) (quoting C & C Family

Trust 04/04/05 ex rel. Cox-Ott v. AXA Equitable Life Ins.eq Co., 44 F. Supp. 3d 1247, 1253 n.4 (N.D. Ga. 2014)).

Siemens does not challenge either the first or third element and only argues that Plaintiffs have failed to allege justifiable reliance under the heightened Rule 9(b) standard. Def.'s Am. Mot. at 19-21. Siemens also raises arguments grounded in the laws of Plaintiffs' home states, which are irrelevant here given the Court's choice of law ruling. Plaintiffs contend that the heightened pleading standard of Rule 9(b) does not apply to their negligent misrepresentation claims because "[t]he heightened pleading standard applies only in the context of knowing, intentional fraud," while "negligent misrepresentation claims sound in negligence." Pls.' Opp'n at 27.

"The cases in this Court are inconsistent on whether the heightened pleading standards of Rule 9(b) apply to claims of negligent misrepresentation." Akkad Holdings, LLC v. Trapollo, LLC, No. 1:20-CV-4476-MLB, 2021 WL 5961854, at *6 n.5 (N.D. Ga. Dec. 16, 2021); compare Shea, 533 F. Supp. 3d at 1339 (holding that Rule 9(b) does not apply to negligent misrepresentation claims because "'[n]egligent misrepresentation . . . sounds in tort, and, more specifically, in the law of negligence'") (quoting Baker v. GOSI Enters., Ltd., 351 Ga. App. 484, 488 (2019)), and In re Equifax, Inc., Customer Data Sec. Breach Litig., 371 F. Supp. 3d

1150, 1177 (N.D. Ga. 2019)) (same), with Williams v. St. Jude Med., S.C., Inc., No. 1:16-CV-04437-ELR, 2017 WL 11113322, at *9 (N.D. Ga. Oct. 19, 2017) (holding that Rule 9(b) pleading standards do apply because of the similarity between negligent misrepresentation and fraud claims); Damian v. Montgomery Cnty. Bankshares, Inc., 255 F. Supp. 3d 1265, 1284 (N.D. Ga. 2015) (holding that Rule 9(b) applied to the plaintiffs' negligent misrepresentation claims).

The Court finds the reasoning provided by Judge Brown in Akkad Holdings to be persuasive:

> Georgia law says fraud (which clearly falls within the purview of Rule 9(b)) and negligent misrepresentation are *very* similar: "[T]he only real distinction between negligent misrepresentation and fraud is the absence of the element of knowledge of the falsity of the information disclosed," so courts generally apply the 'same principles . . . to both fraud and negligent misrepresentation cases. Holmes v. Grubman, 691 S.E.2d 196, 200 (Ga. 2010). Additionally, the Eleventh Circuit has implied Rule 9(b) applies to negligent misrepresentation claims under Georgia law. See Smith v. Ocwen Fin., 488 F. App'x 426, 428 (11th Cir. 2012) (per curiam) (affirming this Court's dismissal of a Georgia negligent misrepresentation claim because the plaintiff failed to plead with particularity). Based off Smith, the Court concludes that Rule 9(b)'s heightened pleading requirements apply to negligent misrepresentation claims brought under Georgia law.

Akkad Holdings, 2021 WL 5961854, at *6 n.5. The Court opts to follow this line of reasoning, requiring Plaintiffs to plead with particularity their negligent misrepresentation claims, giving great weight to the fact that: (1) Georgia courts treat negligent misrepresentation and fraud claims similarly, and (2) the Eleventh

Circuit has implicitly approved this Court's application of Rule 9(b) to negligent misrepresentation claims.

"[T]he reasonable reliance that is required to state a negligent misrepresentation claim is equivalent to that needed in the fraud context." Next Century Commc'n Corp. v. Ellis, 318 F.3d 1023, 1029-30 (11th Cir. 2003) (per curiam) (concluding from the appellant's failure to allege justifiable reliance for her fraud claim that her negligent misrepresentation claim failed as well: "This conclusion is equally fatal to appellant's negligent misrepresentation claim as it is to that sounding in fraud."). "To determine whether reliance is justifiable, the court 'will look to the purpose for which the report or representation was made. If it can be shown that the representation was made for the purpose of inducing [reliance], then liability . . . can attach.'" Mitchell v. Thomas, No. 1:18-CV-5808-MLB, 2022 WL 1421770, at *3 (N.D. Ga. May 5, 2022) (quoting Robert & Co. Assocs. v. Rhodes-Haverty P'ship, 250 Ga. 680, 681 (1983)).

While Plaintiffs' fraudulent concealment claims were based solely on omissions and concealment of information, the negligent misrepresentation claims are based on both affirmative representations and omissions. Compare Consol. Compl. ¶¶ 228-29 (Count III for negligent misrepresentation, alleging that "Siemens had a duty not to misrepresent . . . the quality and functionality of its

AFCI breakers," and that Siemens "represented that is breakers functioned normally), with id. ¶¶ 216-217 (Count II for fraudulent concealment, alleging that Siemens had a duty to disclose any defect in its AFCIs, and that Siemens concealed the defects). Accordingly, Plaintiffs cannot rely on the less stringent standard for justifiable reliance as discussed above with regard to claims based on omissions. See Monopoli, 2022 WL 409484, at *11.

The Court finds that the Plaintiffs failed to adequately plead reasonable reliance. The only allegations that could potentially satisfy this element relate to Brnich and Performance Electric. Consol. Compl. ¶ 102 (alleging that Brnich's supplier informed Brnich that "Siemens' AFCIs required a technology update to resolve the nuisance tripping," and that, based on these representations, Brnich continued to purchase Siemens AFCIs expecting the nuisance tripping would stop); id. ¶ 110 (alleging that Performance Electric was advised by a Siemens representative that Siemens would soon release an update to resolve nuisance tripping, that AFCIs "made after 2015 should have no problems," and that Performance Electric continued to purchase Siemens AFCIs based on the expectation that the nuisance tripping would stop). These allegations do not, however, show "more than a sheer possibility that a defendant has acted unlawfully" as required by Rule 8(a)'s pleading standards. Iqbal, 556 U.S. at 678.

Moveover, Plaintiffs fail to allege, as required by Rule 9(b), the people responsible for making the statements they relied upon or when these statements were made. Singleton v. Petland Mall of Ga. LLC, No. 1:19-CV-01477-ELR, 2020 WL 3400194, at *6-7 (N.D. Ga. Mar. 18, 2020); Shea, 533 F. Supp. 3d at 1340 (holding that the plaintiff's negligent misrepresentation claim failed where the plaintiff did not allege that the defendant made any misrepresentations to the plaintiff's broker, on whose representations the plaintiff had relied).

As to the remaining Electrician Plaintiffs, the Consolidated Complaint contains no allegations of how or when any of them read any of the misrepresentations made by Siemens, other than to copy-and-paste allegations regarding the existence and misleading nature of Siemens's troubleshooting guide without alleging that any Plaintiff relied on the guide or ever even saw it. See, e.g., Consol. Compl. ¶ 140 ("As Siemens troubleshooting guide indicates, a trip may have several causes attributable to the wiring or appliance in the circuit. Siemens' guide, however, does not state that the tripping may be due to a defective breaker. NSSS, therefore, spent time needlessly investigating the potential cause of the tripping when the true cause was Siemens' defective breakers."); id. ¶ 105 (same allegation as to Brnich); id. ¶ 115 (same allegation as to Performance Electric); id.

¶ 124 (same allegation as to Bolt Electric); id. ¶ 132 (same allegation as to Artistic Electric); id. ¶ 148 (same allegation as to Electrocalifornia).

As for the Consumer Plaintiffs, the Consolidated Complaint contains no allegation that, before any Plaintiff moved into his home or purchased Siemens AFCIs, they made the decision to purchase the AFCIs because of Siemens's representations or omissions. The Court finds that the Consolidated Complaint fails to sufficiently allege facts to satisfy the heightened pleading standard of Rule 9(b) for negligent misrepresentation claims. Accordingly, Siemens's Motion to Dismiss Plaintiffs' negligent misrepresentation claims are **GRANTED**, and the Court need not address Siemens's other arguments for dismissal of these claims based on the economic loss doctrine or omissions.

E. Unjust Enrichment (Count VII)

1. Washington

As discussed above, Washington law governs Gordon's and Performance Electric's unjust enrichment claims. Siemens seeks dismissal of these claims as preempted by the WPLA. Def.'s Am. Mot. at 30-31. Plaintiffs "concede to the dismissal of the Washington Plaintiffs' unjust enrichment claim due to preemption of that claim under the [WPLA]." Pls.' Opp'n at 3 n.1. Accordingly, Siemens's Motion to Dismiss these claims is **GRANTED**. Blangeres, 725 F. App'x at 514.

2. Georgia

Siemens contends that the remaining Plaintiffs' unjust enrichment claims are "barred by adequate legal remedies as a matter of law" because Plaintiffs have alleged the existence of express warranties and because "the same alleged conduct underlies plaintiffs' warranty, negligence, fraud, and consumer protection claims." Def.'s Am. Mot. at 29-30. In response, Plaintiffs argue that dismissal is improper at this stage because Plaintiffs have pleaded unjust enrichment in the alternative to its other theories of liability. Pls.' Opp'n at 44.

In Georgia, "unjust enrichment is an equitable concept that applies when there is 'no legal contract' but a benefit has been conferred that 'would result in an unjust enrichment unless compensated.'" Elder, 563 F. Supp. 3d at 1232-33 (quoting Cochran v. Ogletree, 244 Ga. App. 537, 538 (2000)). To state a claim for unjust enrichment, a plaintiff must show: "(1) a benefit has been conferred, (2) compensation has not been given for receipt of the benefit, and (3) the failure to so compensate would be unjust." Id. at 1233 (quoting Amin v. Mercedes-Benz USA, LLC, 349 F. Supp. 3d 1338, 1362 (N.D. Ga. 2018)).

Turning first to Siemens's argument that the unjust enrichment claims are barred, Georgia courts allow Plaintiffs to plead equitable claims in the alternative to their legal claims and, indeed, "unjust enrichment must be pled as an alternate

remedy and not . . . as a separate tort." Id. (quoting Collins v. Athens Orthopedic Clinic, 356 Ga. App. 776, 779 n.6 (2020)); see also WESI, LLC v. Compass Env't, Inc., 509 F. Supp. 2d 1353, 1363 (N.D. Ga. 2007) (denying motion for judgment on the pleadings of the counterclaimant's unjust enrichment claim, despite the fact that the counterclaimant had also asserted claims for fraud and breach of contract and noting that, though the counterclaimant could not recover under both breach of contract and unjust enrichment theories, dismissing the equitable count at the pleadings stage was inappropriate).

Plaintiffs are correct that Federal Rule of Civil Procedure 8 "'unquestionably allow[s] plaintiffs to plead their claims in the alternative,'" regardless of whether they are inconsistent. Pls.' Opp'n at 43 (quoting Dinner Bell Café, Inc. v. N. Am. Bancard, LLC, No. 1:15-cv-3058, 2016 WL 4257768, at *5 (N.D. Ga. Aug. 4, 2016)). However, "[w]hile a party may plead equitable claims in the alternative, the party may only do so if one or more of the parties contests the existence of an express contract governing the subject matter of the dispute." Terrill, 753 F. Supp. 2d at 1291 (S.D. Ga. 2010) (quoting Goldstein v. The Home Depot, U.S.A., Inc., 609 F. Supp. 2d 1340, 1347 (N.D. Ga. 2009)).

Here, neither Plaintiffs nor Siemens dispute the existence of a valid contract (an express warranty). Indeed, Plaintiffs' "breach of express warranty claim is

predicated on the enforceability of this warranty." In re Atlas Roofing Corp. Chalet Shingle Prods. Liab. Litig., No. 1:13-CV-2196-TWT, 2014 WL 3360233, at *3 (N.D. Ga. July 9, 2014) (footnote omitted). Plaintiffs only argue that they plead unjust enrichment as an alternative to other theories of liability, and that dismissal would be improper, "especially where Siemens contends the warranty claims should be dismissed." Pls.' Opp'n at 44. But Plaintiffs are mistaken—they "may only prevail on an unjust enrichment claim in the absence of a contract, not just in the absence of a successful contract *claim*." In re Atlas Roofing, 2014 WL 3360233, at *3. The parties' disagreement regarding the unconscionability of certain terms or limitations contained in the warranty, what the terms or limitations are, and what the warranty covers, is not, *ipso facto*, a disagreement as to the existence of the warranty itself.

> If Plaintiffs are unable to recover on their warranty claims, it will be because they are not entitled to recover under the written contracts, or because Plaintiffs did not satisfy their duties under state warranty law. Plaintiffs will not lose their warranty claims because the warranties are not valid or do not exist as a matter of fact.

Terrill, 753 F. Supp. 2d at 1291.

Accordingly, because Plaintiffs allege, and it is undisputed, that there were express warranties associated with the AFCIs, the Court concludes that Plaintiffs' unjust enrichment claims are subject to dismissal for failure to state a claim upon

which relief can be granted. See Callen, 2020 WL 10090879, at *10, *13-14 (dismissing the plaintiffs' unjust enrichment claims because the existence of a valid warranty was not in dispute, even after rejecting the plaintiffs' arguments that the warranty limitations were unconscionable and dismissing the plaintiffs' express warranty claims for failure to plausibly allege that defects manifested during the warranty period). Siemens's Motion to Dismiss Plaintiffs' unjust enrichment claims is **GRANTED**.

VI. CONCLUSION

For the foregoing reasons, it is hereby **ORDERED** that Defendant Siemens Industry, Inc.'s Amended Motion to Dismiss [Doc. 52] is **GRANTED IN PART AND DENIED IN PART**.

The Motion is **GRANTED** as to the following Counts and/or claims:

- Count III;
- Count IV as to Plaintiffs National Sentry Security Services, Inc., Electrocalifornia, Performance Electric, Inc., Charles Vodicka, Clifford Oakley, Patrick Cates, and Nels Gordon;
- Count V as to all Plaintiffs except Bryan Butakis; and
- Count VII.

The Motion is otherwise **DENIED**.

The following claims remain in this lawsuit:

(1) Fraudulent Concealment (Count II) as to all Plaintiffs;

(2) Breach of the Implied Warranty of Merchantability (Count IV) as to Plaintiffs Kevin Brnich, LLC; Artistic Electric Inc.; Bryan Butakis; Bolt Electric LLC; Rick Keyser; Tyler Barrette; and the Pennsylvania, Maine, Nebraska, and New Hampshire Subclasses;

(3) Breach of Express Warranty (Count V) as to Plaintiff Bryan Butakis;

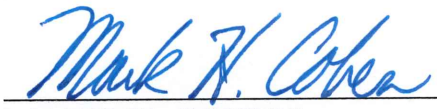
(4) Violation of the Song-Beverly Act (Count XI) as to Plaintiffs Electrocalifornia, Patrick Cates, and the California Subclass;

(5) Violation of the California Consumer Legal Remedies Act (Count XII) as to Plaintiffs Electrocalifornia, Patrick Cates, and the California Subclass; and

(6) Violation of the California Business and Professional Code § 17200, et seq., (Count XIII) as to Plaintiffs Electrocalifornia, Patrick Cates, and the California Subclass.

It is further **ORDERED** that the parties shall file their Joint Preliminary Report and Discovery Plan no later than fourteen (14) days from the date of this Order. See LR 16.2, NDGa.

IT IS SO ORDERED this 2nd day of February, 2024.



MARK H. COHEN
United States District Judge