United States District Court
for the
Southern District of Florida

Brandy Varner and others, Plaintiffs,	)	
v.	)	Civil Action No. 16-22482-Civ-Scola
Dometic Corporation, Defendant.	)	

Sealed Order on the Defendant's Motion for Summary Judgment and the Plaintiffs' Motion for Class Certification

Brandy Varner and nine other individuals bring this class action suit against Dometic Corporation ("Dometic") for manufacturing allegedly defective refrigerators. Currently pending before the Court are the Plaintiffs' Motion for Class Certification (ECF No. 135) and Dometic's Motion for Summary Judgment (ECF No. 171). Dometic has raised a challenge to the Plaintiffs' standing in both its Motion for Summary Judgment and its Opposition to Plaintiffs' Motion for Class Certification (ECF No. 150). Because the Court finds that the Plaintiffs do not have standing, the Court dismisses this action.

1. Background

The operative complaint is the Plaintiffs' Second Amended Class Action Complaint (the "Complaint") (ECF No. 89). According to the Complaint, Dometic manufactures gas absorption refrigerators designed for use in recreational vehicles ("RVs"). (*Id.* ¶ 81.) The Plaintiffs allege that each of ten models of Dometic refrigerators have a cooling unit that shares an "identical, inherent, and dangerous design defect." (*Id.* ¶¶ 1, 3.) The Plaintiffs allege that the boiler tube assembly in the base of the cooling unit prematurely corrodes and develops fatigue cracks that release highly flammable hydrogen and ammonia which may leak and ignite, causing dangerous fires. (*Id.* ¶ 3.) Even if the leak does not ignite a fire, the Plaintiffs allege that the occurrence of a leak ruins the cooling unit. (*Id.*)

In 2006 and 2008, Dometic initiated two National Highway Traffic Safety Administration ("NHTSA") product safety recalls, which covered a small portion of the refrigerators manufactured by Dometic. (*Id.* ¶ 5.) The recall notices allegedly stated that the cooling units have the propensity to leak. (*Id.* ¶ 6.) Dometic characterized the problem as a "limited defect" and offered a recall kit that the Plaintiffs allege "was nothing more than a cheap and ineffective attempt to prevent the boiler tube assembly's heat source from igniting

escaping hydrogen and ammonia." (*Id.* ¶¶ 6-7.) The Plaintiffs allege that the recall kit does not cure the underlying defect in the cooling unit and is not effective at preventing fires. (*Id.* ¶ 7.)

Importantly, the Plaintiffs do not allege that that they have experienced fires as a result of the alleged defect or that they have incurred any expenses in repairing or replacing their refrigerators. (*Id.* ¶¶ 2, 20-75.) Only Plaintiffs Acosta, Field, and Foster allege that they have experienced a leak that has rendered their refrigerators inoperable. (*Id.* ¶¶ 48-49; Pl.'s Resp. to Def.'s Statement of Material Facts ¶ 58, ECF No. 204.)

The Plaintiffs seek to represent a "proposed class of hundreds of thousands of consumers who purchased and currently own refrigerators manufactured and sold by" Dometic. (*Id.* ¶ 1.) The Plaintiffs seek to have Dometic replace the allegedly defective cooling units and extend expired warranties. (*Id.* ¶ 2.) In support of this remedy, the Plaintiffs allege that they have not received the benefit of their bargain because they overpaid for the refrigerators due to the inherent defect. (*Id.* ¶¶ 26, 33, 40, 47, 54, 61, 68, 75.) They allege that the "price premium" is equal to the amount that the Plaintiffs must spend to replace the cooling units. (*Id.*) The Complaint asserts claims for violations of the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301, *et seq.*, breaches of implied warranty, unjust enrichment, and various state laws.

2. Legal Standard

A plaintiff has standing to bring a claim if the following three elements are met: (1) the plaintiff has suffered an injury in fact; (2) there is a causal connection between the injury and the conduct complained of; and (3) it is likely that the injury will be redressed by a favorable decision. *Lujan v. Def.'s of Wildlife*, 504 U.S. 555, 560 (1992) (citations omitted). An injury in fact is "an invasion of a legally protected interest which is (1) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560 (internal quotations and citations omitted). "For an injury to be particularized, it must affect the plaintiff in a personal and individual way." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016) (internal quotations and citations omitted). For an injury to be concrete, the "injury must be 'de facto'; that is, it must actually exist." *Id.* An injury need not be tangible in order to be concrete. *Id.* at 1549.

Since these three elements "are an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Lujan*, 504 U.S. at 561 (citations omitted). Thus, at the summary judgment stage, the plaintiff "must set forth by affidavit or other evidence specific facts, which for purposes

of the summary judgment motion will be taken to be true." *Lujan*, 504 U.S. at 561 (internal quotations and citations omitted).

"[A] dismissal for lack of standing has the same effect as a dismissal for lack of subject matter jurisdiction under Fed.R.Civ.P. 12(b)(1)." *Stalley ex rel. U.S. v. Orlando Reg'l Healthcare Sys., Inc.*, 524 F.3d 1229, 1232 (11th Cir. 2008) (citing *Cone Corp. v. Fla. Dep't of Transp.*, 921 F.2d 1190, 1203 n. 42 (11th Cir. 1991)). As such, it is not a judgment on the merits and is entered without prejudice. *Id.* at 1232 (citations omitted).

3. Analysis

This is not the first time that the Court has had cause to address whether the Plaintiffs have standing in this matter. The Defendant first challenged the Plaintiffs' standing in its Motion to Dismiss Plaintiffs' Amended Class Action Complaint (ECF No. 32). In ruling on the motion to dismiss, the Court observed that the Plaintiffs purported to assert two separate injuries: (1) that their refrigerators had an increased risk of fire; and (2) that they were denied the benefit of their bargain because the alleged defect in the boiler tube assembly was present at the moment of purchase. (Order on Def.'s Mot. to Dismiss at 7, ECF No. 86.) The Court held that the alleged increased risk of fire was insufficient to confer standing on the Plaintiffs, noting that numerous courts have found that allegations of possible future injury, including possible product failure, are insufficient to confer standing. (*Id.* at 6-7.) However, relying primarily on *In re Zurn Pex Plumbing Products Liability Litigation*, 644 F.3d 604 (8th Cir. 2011), the Court held that the Plaintiffs' benefit of the bargain theory was sufficient to confer standing on the Plaintiffs because they alleged that "the boiler tubes will be begin to corrode in all of the defective refrigerators from normal use immediately after purchase and will all eventually leak gas, whether or not a fire ever occurs." (Order at 7-8.)

Now, at the summary judgment stage, Dometic argues that the Plaintiffs have failed to adequately support their allegation that inevitable leaks will manifest in all cooling units as a result of cracking or corrosion. (Mot. for Summ. J. at 28, ECF No. 171.) In response, the Plaintiffs dispute that "inevitability" is the correct standard. (Pl.'s Resp. in Opp. at 21, ECF No. 205.) Rather, they argue that "to establish standing to recover their economic losses based on a risk of harm, they must demonstrate that Dometic's gas absorption cooling units carried a dangerous defect that was inherent at the point of sale. In the absence of a risk of harm, they must show that the defective cooling units had a propensity to fail because of an inherent defect." (*Id.*) The Plaintiffs cite no case law to support the application of this standard. Nevertheless, the Plaintiffs assert that they "have standing to bring claims to recover the lost

benefit of their bargain based on these risks, which arise from a defect that manifested at the point of sale." (*Id.*)

To the extent that the Plaintiffs are again attempting to rely on an increased risk of harm to establish standing, they have provided no case law that would persuade the Court to re-visit its earlier ruling. The Plaintiffs rely heavily on *In re Takata Airbags Products Liability Litigation*, 193 F.Supp.3d 1324, 1335 (S.D. Fla. 2016) (Moreno, J.), to support their argument that "they should not have to wait to see if their cooling units release noxious fumes or ignite in order to recover the economic losses they incurred at the point of sale." (Resp. in Opp. at 23, ECF No. 205.) In *In re Takata*, Judge Moreno held that the plaintiffs' allegations of a uniform defect in the airbags in their cars were sufficient to confer standing, even though the plaintiffs' airbags had performed satisfactorily. 193 F.Supp.3d at 1335. However, Judge Moreno specifically cautioned that his analysis was "limited to the motion to dismiss stage, taking as true Plaintiffs' allegations of a uniform defect . . ." and noted that the defendants' allegations that other causes and factors could contribute to the alleged airbag malfunctions were properly considered at the summary judgment stage. *Id.* Thus, this case does not support an argument that a plaintiff can establish standing based solely on a risk of harm, absent any allegation of a uniform defect.

With respect to the Plaintiffs' benefit of the bargain theory, it is necessary to re-visit the case law on which the Court relied in its Order on the Defendant's Motion to Dismiss, as well as additional case law, in light of the parties' dispute over the correct standard to apply.

In *In re Zurn*, the plaintiffs alleged that the brass fittings used in the defendant's plumbing systems were inherently defective. 644 F.3d at 608, 609. The *In re Zurn* Court stated that "[i]n asserting a warranty claim, it is not enough for a plaintiff to allege that a product line contains a defect or that a product is at risk for manifesting this defect; rather, the plaintiffs must allege that their product actually exhibited the alleged defect." *Id.* at 616 (citing *O'Neil v. Simplicity, Inc.*, 574 F.3d 501, 503 (8th Cir. 2009) (internal quotations omitted). Thus, the court focused primarily on whether the plaintiffs had sufficiently alleged that their products had actually exhibited the alleged defect. The court noted that the plaintiffs did not allege that the brass fittings in the plumbing systems merely risked developing stress corrosion cracking; rather, they alleged that stress corrosion cracking "afflicts all of the fittings upon use, regardless of water conditions or installation practices," and that stress corrosion cracking was already manifest in all of the plumbing systems. *Id.* The plaintiffs supported these allegations with expert testimony since the case was at the class certification stage. *See id.* Therefore, the court held that the plaintiffs "were not 'no injury' parties simply because their plumbing systems

had not yet leaked." *Id.*; *see also*, *Sanchez-Knutson v. Ford Motor Co.*, 310 F.R.d. 529, 535 (S.D. Fla. 2015) (Dimitrouleas, J.) (holding that the plaintiff had standing at the class certification stage because she had "provided sufficient direct evidence" that her car "may be found to share the same defect as all others in its product line."). In its analysis of the plaintiffs' standing, the *In re Zurn* court did not address whether the plaintiffs had alleged any economic losses.

Other courts have analyzed both whether plaintiffs allege that a defect is manifested in their product and whether they allege economic losses. For example, in *Hall, et. al. v. Omega Flex, Inc.*, No. 13-61213, 2014 WL 12496551, at *1 (S.D. Fla. Jan. 17, 2014) (Dimitrouleas, J.), the plaintiffs alleged that the piping used to transport gas in their homes could cause fires when exposed to direct or nearby lightning strikes. In his standing analysis, Judge Dimitrouleas noted that the plaintiffs did not allege that they had actually experienced any fires and did not allege that they had incurred any costs to repair or replace the piping. *Id.* at *3. Therefore, the court held that the plaintiffs had not sufficiently shown that they had suffered an injury-in-fact because the purported injury was more speculative than imminent. *Id.* at *3-4; *see also Cole, et. al. v. General Motors Corp.*, 484 F.3d 717, 721-23 (5th Cir. 2007) (holding that plaintiffs whose allegedly defective air bags had not actually deployed improperly had standing because they alleged that each plaintiff suffered economic injuries at the moment they purchased the car because each air bag was defective at the moment of purchase).

Still other courts have held that, regardless of whether an alleged defect was manifest at the time of purchase, a plaintiff has standing if he sufficiently alleges economic harm. *See, e.g.*, *Melton, et. al. v. Century Arms, Inc.*, No. 16-21008, 2017 WL 1063449, at *2 (S.D. Fla. Mar. 20, 2017) (Moreno, J.) (holding that, despite the defendant's argument that the plaintiffs had not alleged that the defect had manifested itself in each plaintiff's product, the plaintiffs had standing at the motion to dismiss stage because they alleged economic harm due to the cost of repair, replacement, or modification of the allegedly defective product); *In re Toyota Motor Corp. Unintended Acceleration Marketing, Sales Practices, and Products Liability Litigation*, 754 F.Supp.2d 1145, 1164 (C.D. Cal. 2010) (disagreeing that standing cannot be established absent a manifested defect and holding that as long as plaintiffs allege a legally cognizable loss under the "benefit of the bargain" or some other legal theory, they have standing).

Here, the Court need not decide whether the Plaintiffs must establish that there is an inherent defect that is already manifest in each cooling unit or that they have suffered actual economic loss, or both, because the Plaintiffs have established neither. The Court will first address the Plaintiffs' allegations

that the cooling units have an inherent defect and will then address their allegations that they suffered economic losses at the moment of purchase.

A. The Plaintiffs' Allegations of an Inherent Defect

The Complaint alleges that an "inherent defect will cause inevitable leaks to manifest during the cooling unit's normal operation . . . ." (Second Am. Compl. ¶ 106.) However, it is difficult to discern from the Complaint precisely what the Plaintiffs allege the inherent defect to be. The Complaint initially describes the defect as follows: "The boiler tube assembly in the base of the cooling unit prematurely corrodes and develops fatigue cracks that release highly flammable hydrogen and ammonia which may leak and ignite." (*Id.* ¶ 3.) Thus, it appears that the Plaintiffs assert that the inherent defect is *both* the development of corrosion and fatigue cracking in the boiler tube assembly. Indeed, the Plaintiffs state at one point in the Complaint that "Regardless if the cause is corrosion or fatigue cracking, or a combination of both, the inevitable cracks allow highly flammable hydrogen and ammonia to flow into the area surrounding the back of the refrigerator where it can ignite when in contact with an ignition source." (*Id.* ¶ 103.) However, the Plaintiffs also allege in the Complaint that "[t]he propensity of the cooling unit to leak and release flammable material is the defect." (*Id.* ¶ 127.) This seemingly contradicts the Plaintiffs' allegations that leaks are inevitable.

It is also difficult to discern from the Complaint precisely what the Plaintiffs allege causes the premature corrosion and fatigue cracks. At various points in the Complaint, the Plaintiffs allege that, (1) the cycles of heating and cooling produces fatigue cracks (*Id.* ¶¶ 100, 102); (2) corrosion develops "through the corrosive effect of the ammonia, which causes the interior wall of the boiler tube to rust" (*Id.* ¶¶ 100, 102); and (3) "Dometic caused this common defect in the cooling unit by its choice to produce the cooling units with cost saving thin walled, plain carbon steel tubing for the boiler tube assembly, and a cooling solution made of highly corrosive ammonia and water." (*Id.* ¶ 105.)

At this stage in the litigation, the Plaintiffs must support their allegations of an inherent defect that is manifest at the point of sale with affidavits or other evidence. *See Lujan*, 504 U.S. at 561 (internal quotations and citations omitted). To meet their burden, the Plaintiffs rely primarily on the opinions of their expert, Dr. Paul Eason.[1] Dr. Eason opined in his report that Dometic's

[1] The Defendant has filed a motion to exclude the opinions of two of the Plaintiffs' experts, Dr. Paul Eason and Jonathan A. Cunitz, pursuant to Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). (Mot. to Exclude, ECF No. 153.) The motion is currently pending before Magistrate Judge Otazo-Reyes. Since the Court finds that the Plaintiffs have not established that they have standing even with the testimony of Dr. Eason and Mr. Cunitz, the Court need not wait for a ruling from Judge Otazo-Reyes on the

cooling units "exhibit a common failure mode across all models that is demonstrative of a product defect. This failure manifests as a breach of the boiler tube and the release of the noxious, flammable contents." (Eason Rep. ¶ 7(a), ECF No. 135-19.) Dr. Eason opined that the defect "is a product of both the design and manufacture of the unit, specifically the materials selection of steel tubing for the boiler and the process of welding to join that tubing to adjacent heat sources, in the operational presence of a highly corrosive working fluid." (*Id.*)

Upon close review of Dr. Eason's report, his opinions do not support the Plaintiffs' allegations that there is a defect that is manifest in all cooling units at the time of sale. Dr. Eason elaborates in his report that:

> At issue in this matter is the formation of leaks in the closed loop of the cooling unit. Since there are no moving parts in the closed loop of the units, there are very few mechanisms for failure. The primary failure mode of the cooling unit loop requires a compromise in the integrity of the loop . . . Any breach of the tubing will result in the release of the ammonia solution working fluid.

(*Id.* ¶ 15.) Dr. Eason's report describes three factors that can cause a breach of the tubing. (*Id.* ¶¶ 15-18.) The Court will review each factor in turn to determine whether the "primary failure mode" is inherent at the time of purchase.

1. Corrosion

The first potential cause of a breach that Dr. Eason identified is corrosion. (*Id.* ¶ 16.) Dr. Eason provided the following opinion about corrosion in Dometic's cooling units:

> Steel naturally corrodes in the atmosphere, resulting in the formation of rust. This corrosion can be exacerbated if steel is exposed to water or other liquid chemicals. The gas absorption technology requires the use of water to properly function due to the properties of ammonia. This means that the metal tube that houses the cooling solution is subject to corrosion over time. Dometic is aware of the corrosive effect of the cooling solution, and uses sodium chromate as a corrosion inhibitor to passivate the interior surface of the tube, and prevent the natural corrosion that would occur otherwise . . . Higher temperature operation, boiler

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motion to exclude since the Plaintiffs certainly cannot establish that they have standing without their testimony.

> overheating from improper operation, thermal expansion and cracking in the wall of the boiler tubing all serve as mechanisms to defeat the effect of the sodium chromate, ultimately rendering it ineffective.

(*Id.*)

With respect to his reference to higher temperature operation, Dr. Eason clarified at his deposition that he was referring not to the temperature at which the boiler assembly must operate, but to a temperature "beyond the specification. If it stays there for a long time or if it deviates because of a misorientation or a plug somewhere." (Eason Dep. Tr. 164:14-21, ECF No. 153-2.) He clarified that his reference to the boiler overheating from improper operation was a reference to improper operation by the user. (*Id.* 165:12-15.) Finally, with respect to his reference to cracking in the wall of the boiler tubing, he explained that such cracking does not occur in all cooling units, and that while thermal expansion does occur in all cooling units, it does not necessarily defeat the effect of the sodium chromate. (*Id.* 166:19 – 167:4.)

Thus, although the sodium chromate can be rendered ineffective by a variety of factors, according to Dr. Eason, these factors are neither manifest at the time of purchase nor inevitable during the normal operation of the cooling unit.

2. Cracking Due to Cyclic Stresses

The second potential cause of a breach that Dr. Eason identified is fatigue cracking. (Eason Rep. ¶ 17.) Dr. Eason opined that,

> Cracking is a consequence of thermally induced cyclic stresses together with stress concentrations caused by the welding technique and tube design. On its own, this mechanism of cycling expansion and contraction can lead to the initiation of cracks, called fatigue cracks in the areas of highest stress. Variations in the welding process can produce varying levels of susceptibility to these flaws.

(*Id.* ¶ 17.) Importantly, Dr. Eason did not opine that the natural operation of the refrigerator *will* lead to the initiation of cracks; rather, he opined that the natural operation *can* lead to the initiation of cracks.

In addition, his observation that variations in the welding process can produce varying levels of susceptibility to cracking contradicts the Plaintiffs' allegations of a defect that is manifest at the moment of purchase. Dr. Eason clarified at his deposition that, while "getting rid of welding gets rid of the potential for [a welding anomaly] to cause a failure mode," and that sensitivity

to a welding anomaly presents a risk in Dometic's cooling units, it was not his opinion that a welding anomaly was something that all of Dometic's cooling units do exhibit or will exhibit. (Eason Dep. Tr. 144:1 – 145:8.)

3. Stress Corrosion Cracking

The third potential cause of a breach that Dr. Eason identified is stress corrosion cracking. (*Id.* ¶ 18.) Dr. Eason explained that,

> [T]he heat affected zone in the tubing, which is adjacent to the weld, is physically weakened by the process of welding and chemically becomes more susceptible to corrosion as a result of the microscopic chemical variations resulting from the extreme high temperatures adjacent to the melt pool. While any of the individual failure mechanisms detailed above can lead to the breach of the tubing of the closed loop, these phenomena work together to make the failure mode occur at an accelerated rate at the heat affected zone. Expansion and cracking from the heat can result in spalling of the chromate passivating layer . . . Cracking that initiates can lead to infiltration of the working fluid into the crack itself which worsens corrosion in the crack on each successive thermal cycle, resulting in a phenomenon called stress corrosion cracking.

(*Id.*) Although Dr. Eason opined that stress corrosion cracking *can* occur; he did not opine that it is manifest in all cooling units at the time of sale or that it initiates immediately upon use of the refrigerator.

Dr. Eason concluded that each of the mechanisms he described (corrosion, cracking due to cyclic stresses, and stress corrosion cracking) "assists the other in the ultimate formation of a leak . . . ." (*Id.* ¶ 18.) However, the explanations in Dr. Eason's report and his deposition testimony reveal that his use of the term "common failure mode" is not a synonym for "inherent defect." Rather, the term indicates that there are a variety of factors that may come together to result in a leak. To this end, Dr. Eason testified that "[y]ou see a variety of failures in this case and a variety of conditions under which they fail." (*Id.* 45:17-20.) He further testified that his opinion is that Dometic cooling units are defective because they exhibit a common failure mode, but he unequivocally testified that not all Dometic cooling units will experience that common failure mode. (*Id.* at 178:13 – 179:21.)

Thus, unlike *In re Zurn*, in which the plaintiffs alleged that stress corrosion cracking "afflicts all of the fittings upon use," and that stress corrosion cracking was already manifest in all systems, 644 F.3d at 616, the Plaintiffs have presented no opinions from Dr. Eason, or any other expert, that the "common failure mode" is manifest at the moment of purchase or initiates

immediately upon use of the refrigerators. There is no question that the Plaintiffs have established that there is a risk that their refrigerators will develop leaks and/or fires. However, they have not sustained their burden of establishing that there is a uniform defect in the refrigerators that is manifest at the moment of purchase. The complex interaction of variables required for a leak to develop in a Dometic cooling unit demonstrates that the injury of which the Plaintiffs complain is speculative, not imminent.

B. The Plaintiffs' Allegations of Economic Loss

"[U]nder a 'benefit of the bargain' theory, Plaintiffs must allege 'overpayment, loss in value, or loss of usefulness.'" *In re Toyota Motor Corp. Unintended Acceleration Marketing, Sales Practices, and Prod.'s Liability Litigation*, 754 F.Supp.2d 1145, 1165 (C.D. Cal. 2010). In their opposition to the Defendant's Motion for Summary Judgment, the Plaintiffs argue that they have sufficiently alleged "lost resale value as a result of a dangerous defect." (Pl.'s Resp. in Opp. at 22, ECF No. 205.) They also argue that the alleged defect "diminishes the value of the cooling unit purchased; thus, consumers suffer an economic loss at the point of sale." (*Id.* at 24.) The Court will first address the alleged losses of the Plaintiffs whose refrigerators function properly and will then address the alleged losses of the Plaintiffs who allege that their refrigerators do not function.

1. Plaintiffs With Operational Refrigerators

The Plaintiffs acknowledge that "Plaintiffs Varner, Dunlap, Link, Don and Bobbi Shepherd, and Klinck have refrigerators that operate to keep food cool . . . ." (Pl.'s Resp. to Def.'s Statement of Material Facts ¶ 53, ECF No. 204.) Plaintiff Dunlap's refrigerator did have a leak, but Dometic replaced the unit, and Plaintiff Dunlap testified at her deposition that she incurred no expense as a result of the service and that she has not experienced any problems with the refrigerator since it was replaced in 2013. (Dunlap Dep. Tr. 60:2 – 61:13, 79:1-7, ECF No. 204-77.)

In their response to the Defendant's Motion for Summary Judgment, the Plaintiffs only point to two pieces of evidence in support of their allegations of economic loss. (Pl.'s Resp. in Opp. at 22-23.) First, the Plaintiffs cite to the testimony of Plaintiff Foster. (*Id.* at 22.) Foster testified that her brother tried to sell an RV that had a Dometic refrigerator in it, but that he had to install a new cooling unit in order to sell it. (*Id.* at 22-23.) However, Foster's brother is not a named plaintiff in this lawsuit. Thus, his experience is insufficient to demonstrate that Foster herself has suffered an economic loss. *See In re Toyota*, 754 F.Supp.2d at 1167 ("In a class action, the lead plaintiffs must show that they personally have been injured.")

Second, the Plaintiffs cite to the testimony of Lockard Koval, a corporate from Marshall's RV Centers, Inc. (Pl.'s Resp. in Opp. at 23.) During Koval's deposition, he testified as follows:

> Q: Do you believe that if you told consumers that there was – that Dometic gas absorption refrigerators were susceptible to have leaks and fires that it would negatively affect the price?
>
> . . .
>
> A: It wouldn't matter if it was Dometic or Norcold. It would not only affect price. You wouldn't sell anything because you're – you're putting the idea of the person not to buy the product.

(Koval Dep. Tr. 183:12-22, ECF No. 204-62.) However, this was a purely hypothetical question. Koval did not testify that he has actually had problems selling RV's with Dometic refrigerators, or that RV's with Dometic refrigerators have actually lost value as a result of the alleged defect.

The Plaintiffs, citing to *In re Toyota Motor Corp. Unintended Acceleration Marketing, Sales Practices, and Prod.'s Liability Litigation*, argue that the alleged loss in resale value "stands to logic: it makes sense that consumers would be less willing to buy or use RVs with Dometic refrigerators and risk a potentially dangerous leak or fire." (Resp. in Opp. at 23.) However, in *In re Toyota*, the plaintiffs alleged that the vehicles at issue had actually dropped in value due to the alleged defect. 754 F.Supp.2d at 1162. As the case was at the motion to dismiss stage, the plaintiffs were not required to support their allegations with affidavits or other evidence. Furthermore, the *In re Toyota* Court held that those plaintiffs that alleged that they had actually sold or traded in their cars at a loss due to the alleged defect had standing under a benefit of the bargain theory, but those plaintiffs that only generally alleged that they did not receive the benefit of their bargain did not have standing because they had not shown that they were personally injured. *Id.* at 1166-67.

Here, the Plaintiffs have put forward no evidence that Dometic refrigerators have actually dropped in value as a result of the alleged defect. To the contrary, the Plaintiffs allege in the Complaint that consumers are unaware of the alleged defect in Dometic's refrigerators. Specifically, the Complaint alleges that "millions of RV owners remain unaware of the significant and dangerous safety risks posed by the Defective Cooling Unit contained within the refrigerators in their RV" and "[r]easonable consumers, acting diligently, cannot discover the defect at issue." (Compl. ¶¶ 10, 170.) Thus, the Plaintiffs own allegations contradict their argument that "it makes sense that consumers would be less willing to buy or use RVs with Dometic refrigerators."

In their Response to Dometic's Statement of Material Facts, the Plaintiffs assert that they have provided evidence that "damages amount to the cost to

restore Plaintiffs the benefit of their bargain, that is, the cost to replace the defective cooling units with a non-defective cooling unit." (Pl.'s Resp. to Def.'s Statement of Facts ¶ 67.) The Plaintiffs cite to the expert report of Jonathan Cunitz. (*Id.*) Cunitz's report, however, simply calculates "the average installment cost of a non-defective cooling unit." (Cunitz Rep. at 2, ECF No. 204-83.) This calculation does not establish that the Plaintiffs overpaid for their refrigerators, that their refrigerators have lost value, or that their refrigerators have lost usefulness. Since there is no evidence that the Plaintiffs with operational refrigerators have experienced a manifestation of the alleged defect or have incurred expenses in replacing or repairing their refrigerators, Cunitz's report is irrelevant to the question of standing.

Thus, the Plaintiffs with operational refrigerators have failed to support their allegations that they overpaid for their Dometic refrigerators and/or that their refrigerators have lost value as a result of the alleged defect.

2. Plaintiffs Acosta and Field

The Complaint alleges that Plaintiffs Acosta and Field purchased an RV with a Dometic refrigerator. (Compl. ¶ 48.) They had a recall kit installed, but the cooling unit allegedly leaked despite the installation of the recall kit and rendered the refrigerator inoperable. (*Id.* ¶ 49.) Acosta and Field allege that they cannot afford to purchase a new cooling unit or refrigerator, and therefore have been without refrigeration in their RV for several years. (*Id.*) The Defendant argues that Plaintiffs Acosta and Field do not have standing because, while they have a conditional sales agreement to purchase the RV, they do not yet own it. (Mot. for Summ. J. at 24-25.) As explained below, Plaintiffs Acosta and Field have not established a causal connection between their injury and the alleged defect, and therefore the Court does not need to reach the issue of their ownership of the RV.

While the alleged loss of usefulness of the refrigerator may establish an injury in fact, Plaintiffs Acosta and Field must also establish that there is a causal connection between their injury and the conduct complained of. *Lujan*, 504 U.S. at 560 (citations omitted). In order to establish causation, a plaintiff "must demonstrate its alleged injury is fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court." *Kawa Orthodontics, LLP v. Sec'y, U.S. Dep't of the Treasury*, 773 F.3d 243, 247 (11th Cir. 2014) (citing *Lujan*, 504 U.S. at 560) (internal quotations omitted).

The Plaintiffs' Motion for Class Certification generally asserts that "[d]ue to the inherent defect, the Acostas' cooling unit leaked rendering it inoperable." (Pl.'s Mot. for Class Certification at 18, ECF No. 135.) However, the Plaintiffs provided no citation to any evidence in support of this statement, and Plaintiff

Field's deposition testimony contradicts this assertion. Field testified that her refrigerator worked until a technician came out to install the recall kit on the cooling unit. (Field Dep. Tr. 74:5-11, ECF No. 169-17.) Approximately six to eight hours after the recall kit was installed, the refrigerator stopped working. (*Id.*) Field testified that the refrigerator was under warranty at that time, but that Dometic refused to come out to look at the refrigerator. (*Id.* 73:21-25.) Field testified that "I think what happened is when [the technician] was told by Dometic to cut that gas line off because that was part of their instructions to put the recall kit in, I think it leaked out. I think the ammonia leaked out of the fridge." (*Id.* at 74:12-23.) She specifically testified that she thought the problem occurred when the technician was installing the recall kit and cut the gas line. (*Id.* at 75:2-7.)

Thus, Plaintiff Field's testimony indicates that the problems with the refrigerator were caused by the technician who installed the recall kit, not the defect alleged in the Complaint. While Plaintiffs Field and Acosta may be able to sustain a different cause of action against Dometic, they have not established that they have standing to assert the claims in the Complaint.

3. Plaintiff Foster

Although the Complaint does not allege that Plaintiff Foster's refrigerator does not work, the Plaintiffs' Response to Dometic's Statement of Material Facts alleges that Foster owns a Dometic refrigerator that leaked. (Pl.'s Resp. to Def.'s Statement of Material Facts ¶ 58.) As support for this statement, the Plaintiffs cite to Foster's deposition testimony, which was attached as an exhibit. (*Id.*) However, the cited portion of the transcript does not include any testimony that Foster's refrigerator leaked. (*See* Foster Dep. Tr. 50:1-15, ECF No. 204-60.) In a portion of the deposition not cited by the Plaintiffs, Foster testified that her refrigerator has been "out" since 2012. (*Id.* at 32:11-15.) However, Foster does not mention a leak, and the Plaintiffs have not directed the Court to any other evidence in support of their allegation that Foster's refrigerator does not function as a result of the alleged defect. Therefore, similar to Acosta and Field, Foster does not have standing because she has not established that there is a causal connection between her injury and the alleged defect.

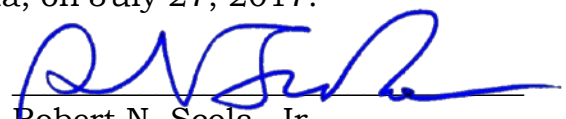
4. Conclusion

At this stage in the litigation, the Plaintiffs have failed to adequately support their allegations that there is an inherent defect that is manifest in all Dometic cooling units and that they have suffered economic harm as a result of the defect. Based on the evidence before the Court, the Plaintiffs' purported

injuries are more speculative than imminent. Thus, the Plaintiffs do not have standing to pursue the claims asserted in the Complaint.

Accordingly, the Court **dismisses** this case without prejudice and directs the Clerk to **close** this case. Any pending motions are denied as moot. In light of the Stipulated Confidentiality and Protective Order (ECF No. 18) and the Court's previous orders granting the parties' motions to seal documents containing confidential information and/or trade secrets, the Court has filed this Order under seal. However, it does not appear to the Court that this Order contains any confidential information or trade secrets. Therefore, this Order will be unsealed in 30 days unless the parties file a proposed redacted version of the Order to be publicly filed on the docket.

Done and ordered, at Miami, Florida, on July 27, 2017.



Robert N. Scola, Jr.
United States District Judge