In Re: Kia Hyundai Vehicle Theft Litigation
8:22-ml-03052-JVS-KES

TENTATIVE Order Regarding Motion to Dismiss (*City of Lorain*) [427]

Before the Court is Defendants Hyundai Motor America ("HMA") and Kia America, Inc.'s ("KA") (collectively, "Defendants") Motion to Dismiss. (Mot., Dkt. No. 427.) Plaintiff City of Lorain ("Lorain") opposed. (Opp'n, Dkt. No. 497.) Defendants replied. (Reply, Dkt. No. 526.)

For the following reasons, the Court **DENIES** the motion.

I. BACKGROUND

The parties are familiar with the facts of this multidistrict litigation ("MDL"), so the Court recites them here only as necessary to resolve this Motion. (See Governmental Entity ("GE") Plaintiffs Order, Dkt. No. 270.) Lorain makes substantively the same factual allegations in its First Amended Complaint ("FAC") as the GE Plaintiffs did in their Complaint.[1] (See GE Plaintiffs Compl., Dkt. No. 175.) Lorain alleges that "[f]or most model years between 2011 and 2022," Defendants "designed, manufactured, and distributed the following automobile models without engine immobilizers or other reasonable anti-theft technology." (FAC ¶ 3.) "As a result," Lorain alleges that online videos spread the ease of which thieves could steal Defendants' vehicles, resulting in "a dangerous rash of thefts" and a "vehicular crime wave [that] has had a significant impact on law enforcement operations, emergency services, and public safety." (Id. ¶ 4.)

On December 13, 2022, the Judicial Panel on Multidistrict Litigation ("JPML") issued an order transferring related actions from fourteen District Courts to this Court for consolidation and pretrial coordination. (Leadership Decl. ¶ 15.)

[1] The municipalities that comprise the Governmental Entity Plaintiffs include Milwaukee, Wisconsin; Madison, Wisconsin; Green Bay, Wisconsin; Columbus, Ohio; Cleveland, Ohio; Cincinnati, Ohio; Parma, Ohio; Baltimore, Maryland; Seattle, Washington; St. Louis, Missouri; Kansas City, Missouri; Buffalo, New York; Rochester, New York; New York, New York; Yonkers, New York; Tonawanda, New York; and Indianapolis, Indiana.

Shortly after the MDL was established, the JPML conditionally transferred related cases filed by the cities of Seattle, Washington, and Columbus, Ohio, alleging public nuisance caused by the Theft Prone Defect. Additional actions on behalf of the cities of Cincinnati, Ohio, Cleveland, Ohio, Buffalo, New York, and Madison, Wisconsin, among others, have also been filed. (See JPML Dkt. Nos. 142, 154, 159.)

On July 28, 2023, the GE Plaintiffs filed their Complaint alleging seventeen causes of action: public nuisance and negligence under Wisconsin law; common law absolute public nuisance, common law qualified public nuisance, negligence, statutory public nuisance, and civil liability under Ohio law; public nuisance under Maryland law; statutory public nuisance under Washington law; public nuisance, negligence, and unjust enrichment under Missouri law; violation of Kansas City consumer protection ordinance Article IX; public nuisance and negligence under New York law; and public nuisance and negligence under Indiana law. (See GE Plaintiffs Compl.) On November 17, 2023, the Court granted in part Defendants' Motion to Dismiss, (Dkt. No. 222), with respect to the Kansas City Article IX Ordinance claim and denied in part the motion with respect to all other claims. (See GE Plaintiffs Order.)

Here, Lorain brings claims for common law absolute public nuisance, common law qualified public nuisance, and negligence under Ohio law. (Compl.)

II. LEGAL STANDARD

Under Rule 12(b)(6), a defendant may move to dismiss for failure to state a claim upon which relief can be granted. A plaintiff must state "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). A claim has "facial plausibility" if the plaintiff pleads facts that "allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).

In resolving a Rule 12(b)(6) motion under Twombly, the Court must follow a two-pronged approach. First, the Court must accept "all well-pleaded" factual allegations as true, and construe such allegations "in the light most favorable to the non-moving party." Daniels-Hall v. Nat'l Educ. Ass'n, 629 F.3d 992, 998 (9th Cir. 2010) (citation omitted). However, "[t]hreadbare recitals of the elements of a

cause of action, supported by mere conclusory statements, do not suffice." Iqbal, 556 U.S. at 678 (citing Twombly, 550 U.S. at 555). Moreover, courts "are not bound to accept as true a legal conclusion couched as a factual allegation." Id. (quoting Twombly, 550 U.S. at 555). Second, assuming the veracity of well-pleaded factual allegations, the Court must "determine whether they plausibly give rise to an entitlement to relief." Id. at 679. This determination is context-specific, requiring the Court to draw on its experience and common sense, but there is no plausibility "where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct." Id.

III. DISCUSSION

A. Request for Judicial Notice

Defendants filed a Request for Judicial Notice ("RJN") in support of their Motion. (RJN, Dkt. No. 428.) Lorain opposed the RJN. (Opp'n to RJN, Dkt. No. 498.) Defendants replied. (Reply to RJN, Dkt. No. 527.) Specifically, Defendants seeks judicial notice of the following:

1. April 20, 2023 Letter from Attorneys General to Ann Carlson, Acting Administrator of the National Highway Traffic Safety Administration ("NHTSA")

2. July 13, 2023 Certificate of Authenticity issued by NHTSA, and the accompanying June 5, 2023 letter from NHTSA to Attorney General of California Rob Bonta

3. G. Rosalsky, *Someone stole my truck. I got a crash course on the wild black market for stolen cars*, NPR (Aug. 23, 2022)

4. C. DiLella & A. Day, *TikTok challenge spurs rise in thefts of Kia, Hyundai cars*, CNBC (Sept. 9, 2022)

5. NHTSA Laboratory Test Procedure for Federal Motor Vehicle Safety Standard ("FMVSS") 114 (Jul. 28, 2010)

6. J. Roman & G. Farrell, *Cost-Benefit Analysis for Crime Prevention:*

Opportunity Costs, Routine Savings and Crime Externalities, 14 Crime Prevention Stud. 53–92 (Jan. 2002)

Because factual challenges have no bearing under Rule 12(b)(6), generally, the Court may not consider material beyond the pleadings in ruling on a motion to dismiss. Lee v. City of Los Angeles, 250 F.3d 668, 688 (9th Cir. 2001), overruled on other grounds, Galbraith v. Cnty. of Santa Clara, 307 F. 3d 1119, 1125 (9th Cir. 2002). There are, however, three exceptions to this rule that do not demand converting the motion to dismiss into one for summary judgment. Lee, 250 F.3d at 688. First, pursuant to Federal Rule of Evidence 201, the Court may take judicial notice of matters of public record, but it "cannot take judicial notice of disputed facts contained in such public records." Khoja v. Orexigen Therapeutics, Inc., 899 F.3d 988, 999 (9th Cir. 2018), cert. denied sub nom. Hagan v. Khoja, 139 S. Ct. 2615 (2019) (citing Lee, 250 F.3d at 689); see Fed. R. Evid. 201(b). Courts frequently take judicial notice of government records and documents, including NHTSA documents. See, e.g., Smith v. L.A. Unified Sch. Dist., 830 F.3d 843, 851 n.10 (9th Cir. 2016) ("[C]ourts routinely take judicial notice of letters published by the government . . . as well as records and reports of administrative bodies." (internal quotation marks and citation omitted)); In re ZF-TRW Airbag Control Units Prod. Liab. Litig., 601 F. Supp. 3d 625, 689 (C.D. Cal. 2022) (taking judicial notice of NHTSA document); In re Toyota Motor Corp. Hybrid Brake Mktg., Sales, Pracs. & Prod. Liab. Litig., 890 F. Supp. 2d 1210, 1216 n.5 (C.D. Cal. 2011) (taking judicial notice of quarterly reports to NHTSA).

The Court **GRANTS** Defendants' request to take judicial notice of all six exhibits. However, Lorain disputes the facts contained in Exhibits 2 and 5. (Opp'n to RJN, at 2.) Thus, the Court's judicial notice of exhibits 2 and 5 only extends to the existence of the documents, and not the truth of the matters asserted therein. See Lee, 250 F.3d at 689–90; Khoja, 899 F.3d at 999 ("Just because [a] document itself is susceptible to judicial notice does not mean that every assertion of fact within that document is judicially noticeable for its truth.").

B. Preemption

Defendants argue that Lorain's claims are preempted because they frustrate the flexibility of Federal Motor Vehicle Safety Standard ("FMVSS") 114 by imposing too narrow of a requirement. (Mot. at 4–5.) The Court addressed this

very argument in its GE Plaintiffs Order, and the conclusion applies with equal force here.

> Defendants mischaracterize the scope of the claims. Throughout the Complaint, GE Plaintiffs use broad language to describe what would have been permissible conduct by Defendants, such as "standard anti-theft technology," "common anti-theft technology," and "industry-standard anti-theft measures." Even when the Complaint discusses engine immobilizers, it often couches the reference as one permissible option available to Defendants: "had [Defendants] followed industry-wide standards and installed immobilizer devices, or an equivalent anti-theft device, in all their vehicles."
>
> The claims do not impose a narrow engine-immobilizer requirement as alleged by Defendants. The Complaint's references to "anti-theft technology" is consistent with the broad standard for required devices under FMVSS 114. Therefore, the Complaint does not even raise a question of preemption, and the Court need not reach the full preemption analysis.

(GE Plaintiffs Order at 6 (cleaned up).) Lorain also refers to anti-theft technology broadly, rather than solely immobilizers, in its FAC. Accordingly, the Court finds that Lorain's claims are not preempted by federal law.

C. Pleading Standard

Defendants argue that "[Lorain's] vague and formulaic references to 'other reasonable anti-theft technology' cannot serve as the basis for its claims against Defendants because such allegations fail to identify any defect and thus do not satisfy federal pleading standards." (Mot. at 6.)

Lorain argues that "[p]ublic nuisance and negligence claims are not subject to the same heightened pleading standards as product liability claims." (Opp'n at 10.) Lorain cites In re National Prescription Opiate Litigation, 589 F. Supp. 3d 790 (N.D. Ohio 2022), in which Ohio municipalities brought public nuisance claims against an opioid manufacturer. The court found that the claims are not product liability claims because they "do not arise from a defective aspect of

prescription opioids. . . . Plaintiffs' claims do not stem from the products themselves, but from the manner in which Defendants dispensed the products – that is, Defendants' failure to provide effective controls to detect "red flags" and prevent diversion." Id. at 813.

Defendants' argument mirrors the argument they made in their Motion to Dismiss the City of Chicago's Second Amended Complaint ("SAC"). (Dkt. No. 431.) The Court's response reflects this similarity.

While Defendants argue that the FAC is too specific in its prescription, Defendants simultaneously make the converse argument that the FAC's prescription is not specific enough to put it on notice for a product liability claim. Notwithstanding the inconsistency, the argument is unavailing. Lorain does not bring a products liability claim. "Anti-theft technology" is specific enough to sustain the claims Lorain brings here.

D. Ohio Products Liability Act

Defendants argue that the Ohio Products Liability Act ("OPLA") forecloses Lorain's public nuisance claims because it "abrogate[s] all common law product liability claims or causes of action." (Mot. at 8 (citing Ohio Rev. Code § 2307.71(B); Stiner v. Amazon.com, Inc. 164 N.E.3d 394, 401 (Ohio 2020)).)

The GE Order states:

> Defendants also argue the Ohio Product Liability Act ("OPLA") and the Washington Product Liability Act ("WPLA") preempts public nuisance claims based on products liability. (Id. at 40.) GE Plaintiffs contend that Ohio and Washington law do not abrogate the public nuisance claims.
>
> Defendants assert that the OPLA abrogates GE Plaintiffs' claims because the statute "abrogate[s] all common law product liability claims or causes of action." Ohio Rev. Code § 2307.71(B). The statute further states, "'Product liability claim' also includes any public nuisance claim or cause of action at common law in which it is alleged that the design, manufacture, supply, marketing, distribution, promotion, advertising,

> labeling, or sale of a product unreasonably interferes with a right common to the general public." Id. § 2307.71(A)(13).
>
> The Ohio statute's abrogation of GE Plaintiffs' claims is not as straightforward as Defendants make it out to be. The Sixth Circuit has certified a question to the Ohio Supreme Court that is directly on point: "Whether the Ohio Product Liability Act, Ohio Revised Code § 2307.71 *et seq.*, as amended in 2005 and 2007, abrogates a common law claim of absolute public nuisance resulting from the sale of a product in commerce in which the plaintiffs seek equitable abatement, including both monetary and injunctive remedies?" In re Opiate Litig., Nos. 22-3750/3751/3753/3841/3843/3844, 2023 WL 5844325 (6th Cir. Sept. 11, 2023). The Ohio Supreme Court has not yet answered. Abrogation is not immediately clear to the Court, and dismissal as the Ohio Supreme Court weighs this very question would be premature.

(GE Plaintiffs Order at 13–14.) Shortly after the Court issued the GE Plaintiffs Order, the Ohio Supreme Court accepted review. In re Opiate Litig., 172 Ohio St. 3d 1417 (2023). Defendants acknowledge that the court has not yet weighed in, but "move for abrogation and dismissal under the OPLA to preserve their rights." (Mot. at 8.) Just as it was at the time the Court issued the GE Plaintiffs Order, dismissal on the basis of this question is still premature.

E. Superseding Third-Party Criminal Acts

The Court stated in the GE Plaintiffs Order:

> Theft is the very foreseeable conduct that *anti-theft devices* specifically protect against. The cases that Defendants cite to support the proposition that the acts of car thieves are an unforeseeable severance of the causal chain do not directly implicate the prevention of theft the way it is here. Defendants' cases involve a car thief's breaking of the causal chain between a *vehicle owner* and a third party's injury.

(GE Plaintiffs Order at 10.)

Defendants take a slightly different approach here, arguing that "[w]hile this Court previously held that theft is a foreseeable consequence of allegedly faulty anti-theft systems, Ohio law squarely holds that post-theft reckless and criminal conduct is not foreseeable as a matter of law." (Mot. at 9–10 (cleaned up).) This, however, is not as clear-cut as Defendants convey. Lorain distinguishes Defendants' cases as those where "a victim injured by a thief sued the vehicle owner." (Opp'n at 13.) Lorain points out that Fox v. Kia America, Inc., No. 1:23CV1881, 2024 WL 1328730 (N.D. Ohio Mar. 28, 2024) is solely a product liability case, and the court itself distinguishes this MDL proceeding's orders regarding the Subrogation Plaintiffs and GE Plaintiffs, id. at *14–15 n.4. Lorain notes that Lawton v. Hyundai Motor America, Inc. et al., No. 24-cv-00097-CV-W-BP, 2024 WL 2318623 (W.D. Mo. May 20, 2024), is also distinguishable because it involves "unique issues" including a shooting. (Id. at 14.) Lorain also reasserts that "[u]nlike the product liability and negligence claims at issue in the cases Defendants cite, public nuisance claims in Ohio are subject to a different causal standard." (Id. (citing In re Nat'l Prescription Opiate Litig., 589 F. Supp. 3d at 786–87).)

In their Reply, Defendants cite cases relied upon by Fox as "relevant" to the issue here. (Reply at 7–9.) For example, Defendants cite Ross v. Nutt, 203 N.E.2d 118, 121 (Ohio 1964) for the Ohio Supreme Court's finding that "[i]t would be beyond the realm of reason to attach liability to an owner for acts of a nonpermissive user, a thief." But this statement evinces the very distinction this Court previously made: "Defendants' cases involve a car thief's breaking of the causal chain between a *vehicle owner* and a third party's injury." (GE Plaintiffs Order at 10.) Another case cited in Fox, Pendrey v. Barnes, 479 N.E.2d 283 (Ohio 1985), is distinguishable for the same reason: the case involves an individual vehicle owner and physical injury resulting from the negligent operation of a thief [at argument, be prepared to address whether this distinction is sufficient].

Once more, the Court's GE Plaintiffs Order finds application: "Novelty does not impair or preclude that advancement of the law. The facts alleged in the Complaint concern a very particular set of circumstances—vehicle manufacturers' decision not to install anti-theft technology and the harms to municipalities caused by the vehicles' vulnerability to theft." (GE Plaintiffs Order at 9.) Assuming arguendo that the thefts are themselves foreseeable, the question turns to whether

the harm that follows is foreseeable enough to maintain the causal chain. In other words, the question may best be stated as the following: is it foreseeable that the decision to not install anti-theft technology in several models of vehicles would not just lead to thefts, but also to thieves hastily driving those vehicles away and causing harm? At oral argument, the Court invites the parties to cite cases that more directly address this, admittedly novel set of circumstances.

F. Duty

The Restatement (Second) of Torts § 324A states:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if
>
> (a) his failure to exercise reasonable care increases the risk of such harm[.]

Restatement (Second) of Torts § 324A (Am. L. Inst. 1965).

Defendants argue that they "owe no duty to protect local governments from harm caused by criminal third-party conduct." (Mot. at 14.) "[B]ecause qualified public nuisance claims are by definition premised on negligent conduct," Defendants assert, "negligence must be averred and proven to warrant a recovery." (Id. at 15 (quoting Taylor v. Cincinnati, 55 N.E.2d 724, 731 (Ohio 1944)).) Defendants contend that Lorain "must identify a special relationship in order to impose a duty here," but Lorain "only alleges that its injuries were foreseeable." (Id. at 15–16.)

As Lorain notes, the GE Order discusses this very issue:

> It is difficult to envision a product more "public" than the automobile. Consumers do not regularly store their other valuable possessions in public places, but cars line city streets, parking lots, and driveways across America. Whether it is through the theft of a car, the fleeing of

suspects, or the collision with other vehicles, property, or persons, perhaps no other product impacts public safety or engages law enforcement and municipal governments to a greater extent than automobiles. It is foreseeable, then, that the lengths a manufacturer will go—or not go—to design their cars with protections against theft will determine the burden others will bear to respond to such theft. Given the public nature of automobiles, the burden of theft does not fall on vehicle owners alone, but their municipalities as well.

Defendants discuss Goodwin v. Yeakle's Sports Bar & Grill, Inc., 62 N.E.3d 384 (Ind. 2016) as an analogous illustration of "a lack of foreseeability prelud[ing] duty," but it provides more useful guidance as a distinction. In that case, the Indiana Supreme Court found that there was no duty of a neighborhood bar owner to search customers for weapons because "a shooting inside a bar" was not foreseeable. Goodwin, 62 N.E.3d at 393. Defendants argue that "[j]ust as bar owners do not 'routinely contemplate that one bar patron might suddenly shoot another,' no car company would contemplate that the sale of federally compliant vehicles would result in unanticipated fiscal harm to local governments." (Opp'n at 32 (quoting Goodwin, 62 N.E.3d at 394).) But they most certainly would. To state otherwise is to feign unfamiliarity with one of the basic duties of local law enforcement and highway patrol. When a car is stolen, and especially when cars are driven recklessly, victims call on law enforcement. While "a shooting inside a neighborhood bar is not foreseeable as a matter of law," id. at 393–94, the theft of an unprotected vehicle in a public place is entirely foreseeable, as is the subsequent reliance on municipal services to respond to the theft.

As noted above, the federal regulation regarding anti-theft technology is broad and permissive of innovation. The regulation implicitly acknowledges that no two anti-theft devices are alike and allows manufacturers to install different devices of ostensibly different efficacy in preventing theft. 49 C.F.R. § 571.114 S5.1.1. The Complaint alleges that Defendants knew of and installed effective engine immobilizers in some of their vehicles, but decided to not use this technology in the Susceptible Vehicles. (Compl. ¶ 79–80, 82.) The foreseeability of the

> harm to local governments as a result of this decision is repeatedly stated in the Complaint. (See, e.g., id. ¶¶ 92–98, 212, 278, 286, 336, 354, 433.)
>
> Were the Court to endorse GE Plaintiffs' theory of negligence, Defendants warn of "'unlimited liability to an indeterminate class of persons,' requiring product manufacturers to insure any amounts spent by any government in the country to provide public services allegedly necessitated by some product defect." (Mot. at 33 (quoting Hamilton v. Beretta U.S.A. Corp., 750 N.E.2d 1055, 1101 (N.Y. 2001)).) But this warning is misplaced. As Defendants reiterate throughout their motion, the claims here are novel. (See Mot. at 28, 31, 33.) Novelty does not impair or preclude that advancement of the law. The facts alleged in the Complaint concern a very particular set of circumstances—vehicle manufacturers' decision not to install anti-theft technology and the harms to municipalities caused by the vehicles' vulnerability to theft—that are unlikely to result in a slippery slope of product manufacturers' "unlimited liability" to governments. GE Plaintiffs' public policy argument in favor of a duty is more availing. GE Plaintiffs argue that Defendants' past conduct of installing engine immobilizers in all vehicles sold in Europe and Canada, the gravity of the harm of "rampant vehicle thefts," the imposition on GE Plaintiffs to pay "the ultimate price" of "countless hours" responding to thefts and distributing wheel locks, and the "relatively slight" burden on Defendants to install reasonable anti-theft measures all counsel in favor of a duty. (Mot. at 41.) That duty, according to GE Plaintiffs, is to "(1) exercise reasonable care in the design and manufacture of Defendants' vehicles and (2) guard against the intentional and/or criminal conduct of third parties." (Id.) Accordingly, the Court finds that the Complaint sufficiently states a duty to sustain the negligence claims.

(GE Order at 8–9.)

On January 29, 2023, this Court certified interlocutory appeal with respect to the following question under Ohio law: "whether a tort duty to protect against third-party criminal conduct can be based solely on the foreseeability of harms—even in the absence of a special relationship." (Dkt. No. 298) A full-scale analysis of the

foreseeability of "post-theft reckless and criminal conduct" and whether it gives rise to a duty here is premature where the question is pending appellate review.

G. Intentional Creation of Nuisance

Defendants argue that because "absolute nuisance, or nuisance per se, is based on intentional conduct or an abnormally dangerous condition that cannot be maintained without injury to property," and Lorain has not alleged such a condition, Lorain must allege intentional conduct. (Mot.at 16 (citing Nottke v. Norfolk S. Ry. Co., 264 F. Supp. 3d 859, 862 (N.D. Ohio 2017)).) Specifically, Defendants contend that the FAC does not allege Defendants' intent to create "rampant car thefts" and a "substantial[] interfere[nce] with the public's right to safe and reasonable access to public thoroughfares." (Id. at 17 (quoting FAC ¶¶ 52, 119).) Defendants also assert that there is no factual support for the FAC's conclusion that Defendants conduct was "substantially certain to result in an increase in vehicle theft that would interfere with public safety." (Id. (quoting FAC ¶ 124).)

While Defendants are correct that absolute nuisance here requires intentional conduct, they impose too high of a standard for intent. It is not so that Lorain must allege that Defendants intended to bring about the nuisance itself. Lorain also cites Nottke, but for the opposition conclusion from the one reached by Defendants—and the one directly supported by the court. "Intentional, in this context, means not that a wrong or the existence of a nuisance was intended but that the creator of it intended to bring about the conditions which are in fact found to be a nuisance." Nottke, 264 F. Supp. 3d at 863. The FAC is rife with allegations that Defendants intended to forgo installation of immobilizers or other anti-theft technology. (See, e.g., FAC ¶ 115 ("Defendants, created, contributed to, and maintained a public nuisance when they intentionally, consciously, knowingly, and purposefully (a) designed, manufactured, marketed, sold, and distributed unsafe vehicles that were statistically more vulnerable to theft without an engine immobilizer or other reasonable anti-theft technology."); id. ¶ 118 ("Defendants knowingly and intentionally decided not to use vehicle immobilizers or other reasonable anti-theft technology in the Susceptible Vehicles. Defendants are aware that their conduct has caused an increase in vehicle theft and thus has had, and will continue to have, a detrimental effect on the public welfare, safety,

peace, comfort, and convenience of the City of Lorain and its residents.").) Accordingly, the Court finds that Lorain has sufficiently alleged intent.

IV. CONCLUSION

For the foregoing reasons, the Court **DENIES** the motion.

IT IS SO ORDERED.