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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**

8 Gabriel Barrio, et al.,

9 Plaintiffs,

10 vs.

11 Gisa Investments LLC, et al.,

12 Defendants.
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No. CV-20-00991-PHX-SPL

ORDER

15 Before the Court is Defendants’ Motion to Dismiss (Doc. 20) filed pursuant to
16 Federal Rule of Civil Procedure (“Rule”) 12(b)(6). The Motion is fully briefed and ready
17 for consideration. (Docs. 20, 23, 28) For the following reasons, the Motion will be granted
18 in part.

19 **I. BACKGROUND**

20 This case arises out of an agreement between Plaintiff Gabriel Barrio, a resident of
21 Washington, and Defendant Tophat U.S., LLC (“Tophat”), a car importing and
22 refurbishing company located in Arizona. (Doc. 18 at ¶¶2–4) Mr. Barrio and a Tophat
23 representative signed an agreement on April 5, 2016, stating that Tophat would custom-
24 build a Land Rover Defender 110 for Mr. Barrio, and that Mr. Barrio would pay \$120,000
25 for the vehicle, with a \$36,000 deposit. (Doc. 20-1) The agreement included the
26 specifications to which the vehicle would be built. (Doc. 20-1) It also included a warranty
27 for materials incorporated into the car and a one-year unlimited mileage warranty on the
28 engine and transmission. (Doc. 20-1)

1 Plaintiffs first brought this cause of action on May 21, 2020 against Tophat and
2 Defendant Gisa Investments, LLC (“Gisa”). (Doc. 1) Plaintiffs filed a First Amended
3 Complaint (“FAC”) on July 17, 2020, (Doc. 18) asserting the following claims: (1) a
4 violation of the Arizona Consumer Fraud Act (“ACFA”), (2) common law fraud, (3) breach
5 of implied warranty, (4) additional breach of warranty claims under the Magnuson-Moss
6 Warranty Act (“MMWA”), (5) breach of contract, (6) aiding and abetting, (7) negligent
7 misrepresentation, and (8) rescission. Plaintiffs assert the vehicle was not built to their
8 satisfaction nor did it satisfy the terms of the agreement. (Doc. 18 at ¶¶18–19, 27)

9 Defendants filed a Motion to Dismiss on August 7, 2020 for failure to state a claim
10 under Rule 12(b)(6). (Doc. 20) Defendants seek to dismiss the claims for (1) common law
11 fraud, (2) negligent misrepresentation, (3) violation of the ACFA, and (4) aiding and
12 abetting. (Doc. 20 at 2) Defendants also seek to dismiss all claims against Gisa because
13 Gisa was not party to the contract giving rise to the claims. (Doc. 20 at 2) The Court will
14 now consider the Motion.

15 **II. LEGAL STANDARDS**

16 To survive a motion to dismiss, a complaint must contain “a short and plain
17 statement of the claim showing that the pleader is entitled to relief” so that the defendant
18 is given fair notice of the claim and the grounds upon which it rests. *Bell Atl. Corp. v.*
19 *Twombly*, 550 U.S. 544, 555 (2007) (quoting Fed. R. Civ. P. 8(a)(2)). A court may dismiss
20 a complaint for failure to state a claim under Rule 12(b)(6) for two reasons: (1) lack of a
21 cognizable legal theory, or (2) insufficient facts alleged under a cognizable legal theory.
22 *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990). When deciding a
23 motion to dismiss, all allegations of material fact in the complaint are taken as true and
24 construed in the light most favorable to the nonmoving party. *Cousins v. Lockyer*, 568 F.3d
25 1063, 1067 (9th Cir. 2009).

26 **III. DISCUSSION**

27 The Court will address each cause of action individually.

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1 **A. Fraud**

2 Common law fraud is a tort claim. *See CIT Fin. LLC v. Treon, Aguirre, Newman &*
3 *Norris PA*, No. CV-14-00800-PHX-JAT, 2016 WL 6610604, at *5 (D. Ariz. Nov. 9, 2016).
4 Sometimes, tort claims arising out of breach of contract actions are barred by the Economic
5 Loss Rule (“ELR”). The ELR “limits a contracting party to contractual remedies for the
6 recovery of economic losses unaccompanied by physical injury to persons or other
7 property.” *Firetrace USA, LLC v. Jesclard*, 800 F. Supp. 2d 1042, 1050 (D. Ariz. 2010)
8 citing *Flagstaff Affordable Hous. Ltd. P’ship v. Design Alliance, Inc.*, 223 Ariz. 320 (2010).
9 Here, Defendants allege that a number of Plaintiffs’ claims are barred under the ELR,
10 though Plaintiffs argue it does not apply in this case. (Doc. 20 at 4; Doc. 23 at 5–6)
11 Plaintiffs argue that the ELR 1) does not apply to fraud and misrepresentation claims, and
12 2) does not apply to non-economic harm such as emotional damages, the travel time to buy
13 the vehicle and repair it, and their inability to obtain insurance for the vehicle. (Doc. 23 at
14 6, 8–9)

15 Plaintiffs rely on old case law for the proposition that the ELR does not apply to
16 fraud and misrepresentation claims; more recently this Court and Arizona state courts have
17 found it *does* apply in that context. *See, e.g., CIT Fin. LLC*, 2016 WL 6610604, at *5 (fraud
18 and negligent misrepresentation claims dismissed because ELR applies when a contract
19 governs); *Del Mar Land Partners, LLC v. Stanley Consultants, Inc.*, No. CV-11-8013-
20 PCT-PGR, 2012 WL 1019066, at *2 (D. Ariz. Mar. 26, 2012) (fraud claim dismissed
21 because ELR applies); *Sherman v. PremierGarage Sys., LLC*, No. CV 10-0269-PHX-
22 MHM, 2010 WL 3023320, at *4 (D. Ariz. July 30, 2010) (ELR applies to fraud, intentional
23 misrepresentation, and negligent misrepresentation claims); *Cook v. Orkin Exterminating*
24 *Co.*, 227 Ariz. 331, 335 (Ariz. Ct. App. 2011) (fraud, negligence and misrepresentation
25 claims are barred by ELR unless contract otherwise provides). Another case this Court
26 finds compelling is *Van Go LLC v. Potts*, No. CV-16-00054-PHX-JJT, 2016 WL 4974968
27 (D. Ariz. June 7, 2016). In that case, this Court declined to apply the ELR to a fraud claim
28 involving a car sale, however, the sale of the car was under much different circumstances.

1 *Id.* at *4. There, the vehicle at issue was sold at auction, without negotiation or discussion
2 between the buyer and seller. *Id.* The buyer later alleged the vehicle’s history and certificate
3 of authenticity were falsified, bringing, among others, a fraud claim. *Id.* at *1–2. The Court
4 determined that the auction setting made the ELR inapplicable. *Id.* at *4. The parties in
5 *Van Go* did not “bargain, define remedies, or plan for contingencies like in other contract
6 negotiations.” *Id.* This Court noted, citing *Firetrace*, that the purpose of the ELR is to
7 “encourage private ordering of economic relationships and to uphold the expectations of
8 the parties by limiting a plaintiff to contractual remedies for the loss of the benefits of the
9 bargain.” *Id.* citing 800 F.Supp 2d at 1050. In the instant case, the parties bargained over
10 the price of the vehicle, then signed a contract that defined remedies, listed warranties, and
11 planned for contingencies. (Doc. 18 at ¶¶9, 28–30; Doc. 20-1 at 2–4) In a situation where
12 there is a contract providing remedies, it makes sense for a court to hold the parties to that
13 contract. Therefore, the ELR does bar Plaintiffs’ fraud claims to the extent that their harm
14 is economic.

15 As to Plaintiffs’ alleged noneconomic damages, Plaintiffs did not assert their
16 inability to find insurance for the vehicle until their Response. (Doc. 23 at 9) As such, it
17 will not be considered. *See Andasola v. Capital One Bank NA*, No. CV 12-02467-PHX-
18 JAT, 2013 WL 1149663, at *4 (D. Ariz. Mar. 19, 2013) (Court would not consider new
19 allegations asserted in plaintiff’s response to a motion to dismiss, except to consider
20 granting leave to amend). Furthermore, time spent obtaining the vehicle and repairing it is
21 not separable from the economic harms. Finally, the emotional harms asserted in the FAC
22 are not cognizable damages. The damages recoverable in a fraud case are usually “limited
23 to the actual pecuniary loss sustained.” *Arce-Mendez v. Eagle Produce P’ship Inc.*, No. CV
24 05-3857-PHX-JAT, 2008 WL 659812, at *3 (D. Ariz. Mar. 6, 2008). When plaintiff’s
25 interests are “purely economic” there is no recovery for emotional distress. *Morrow v.*
26 *Temple*, No. CV190202TUCJASBGM, 2020 WL 1065868, at *4 (D. Ariz. Mar. 5, 2020)
27 (internal citations omitted). This Court considers mental or emotional damages for fraud
28 “special damages.” *Arce-Mendez*, 2008 WL 659812, at *3. Plaintiffs alleging special

1 damages must plead them with specificity under Rule 9(g). *Id.* Plaintiffs mentioned “stress,
2 humiliation, and frustration,” in their FAC but only very briefly in their general allegations
3 section. (Doc. 18 at ¶31) They did not plead with specificity, as is required to support a
4 claim for emotional damage. *Holly v. Alta Newport Hosp., Inc.*, No.
5 219CV07496ODWMRWX, 2020 WL 1853308, at *6 (C.D. Cal. Apr. 10, 2020) (The court
6 dismissed claims for emotional harm and distress when plaintiff did not claim specifically
7 any genuine injury. “[V]ague and conclusory allegations regarding damages are
8 insufficient to survive a motion to dismiss.”). To the extent Plaintiffs elaborate on their
9 emotional distress in their responsive briefing, alleging “more emotional stress and fears
10 relating to dangerous conditions,” (Doc. 23 at 3) it is (1) too late to make further allegations
11 that should have been included in the FAC and (2) these allegations are still not specific
12 enough to pass Rule 9(g) muster. Therefore, Plaintiffs’ fraud claim is dismissed in its
13 entirety.

14 **B. Negligent misrepresentation**

15 To the extent Plaintiffs assert negligent misrepresentation claims, the ELR rule
16 applies. *See supra* III.A for analysis. *See also Sherman*, 2010 WL 3023320 at *4.
17 Furthermore, Plaintiffs again failed to plead their non-economic damages with the
18 specificity required by Rule 9(g), for the same reasons listed above. Thus, the negligent
19 misrepresentation claim is dismissed in its entirety.

20 **C. Violation of the ACFA**

21 Private actions under the ACFA have a statute of limitations of one year under
22 A.R.S. § 12-541(5). The statute of limitations begins to run when the consumer discovers
23 or “with reasonable diligence should have discovered both the ‘who’ and the ‘what’ of her
24 claim.” *Cheatham v. ADT Corp.*, 161 F. Supp. 3d 815, 826 (D. Ariz. 2016) (internal
25 quotations omitted). Specifically, it begins when the consumer knows “whose products
26 were involved and that the products were not performing as expected.” *Id.* (internal
27 quotations omitted). As Defendants argue and Plaintiffs write in their own First Amended
28 Complaint, Plaintiffs knew within one day of possessing the Range Rover that it was not

1 performing as promised in the agreement. (Doc. 20 at 12, Doc. 18 at ¶16) Plaintiffs received
2 the Land Rover from Defendant Tophat on June 22, 2018. (Doc. 20 at 12) Therefore, the
3 statute of limitations on the ACFA claim would have run on June 22, 2019. This case was
4 brought on May 21, 2020. Thus, the ACFA claim is time-barred.

5 **D. Aiding and abetting**

6 Aiding and abetting is a derivative claim. *Merritt v. Arizona*, 425 F. Supp. 3d 1201,
7 1233 (D. Ariz. 2019) (internal citations omitted) (“aiding and abetting is a derivative tort
8 for which a plaintiff may recover only if he establishes an independent primary tort”). It
9 requires three elements: “(1) the primary tortfeasor must commit a tort that causes injury
10 to the plaintiff; (2) the defendant must know the primary tortfeasor’s conduct constitutes a
11 breach of duty; and (3) the defendant must substantially assist or encourage the primary
12 tortfeasor in the achievement of the breach.” *Id.* When the underlying tort that serves as the
13 basis for the aiding and abetting claim fails, the claim of aiding and abetting that tort also
14 fails. *Id.* Therefore, since the tort claims (fraud, negligent misrepresentation, ACFA claim)
15 upon which the aiding and abetting claim is based have failed, the aiding and abetting claim
16 also fails.

17 **E. Punitive damages**

18 Because the Court dismissed the tort claims under the economic loss rule, it follows
19 that this case is now based in contract law. It is well-established under Arizona law that
20 punitive damages are not available in contract cases. *See Jones v. Gen. Motors Corp.*, No.
21 CV-08-2099-PHX-GMS, 2009 WL 648613, at *2 (D. Ariz. Mar. 11, 2009). Therefore, to
22 the extent Plaintiffs assert punitive damages, they are not available to them.¹

23 **F. Claims against Gisa**

24 Gisa is not a party to the contract signed by Mr. Barrio. (Doc. 21-1) Plaintiffs allege in

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26 ¹ The Court notes that while the MMWA allows punitive damages where the
27 governing state law allows, Arizona does not allow punitive damages because they are
28 unavailable in breach of warranty claims. “In Arizona, the law of which forms the basis of
Plaintiff’s non-federal claims, punitive damages are not ordinarily available as a remedy in
breach of warranty actions because such actions are contract claims.” *Jones* 2009 WL
648613, at *2.

1 their FAC that Gisa is an agent of Tophat and that an employee of Gisa acted as an agent
2 of Tophat. (Doc. 18 at ¶¶1, 5) Defendants accept this allegation as true. (Doc. 20 at 6, Doc.
3 28 at 5–6) Principles of agency law dictate that when the ELR bars tort recovery against a
4 contracting party, it also bars tort recovery against an agent of that party. *See Gilbert*
5 *Unified Sch. Dist. No. 41 v. CrossPointe, LLC*, No. CV 11-00510-PHX-NVW, 2012 WL
6 1564660, at *4 (D. Ariz. May 2, 2012) (explaining that when the ELR bars tort recovery
7 against a corporation based on a contract it also bars tort recovery against an officer of that
8 corporation). Furthermore, when a principal enters a contract, that contract may dictate the
9 actions of an agent, but it does not create liability for the agent under the contract. *Sayles*
10 *v. Knight Transportation Co. Inc.*, No. CV-16-04235-PHX-JAT, 2017 WL 3051144, at *2
11 (D. Ariz. Mar. 16, 2017) (agents of parties to the contract may not be held liable for breach
12 of contract because they are not themselves parties to the contract). Under these principles,
13 the tort claims that are barred against Tophat must also be barred against Gisa, because the
14 alleged tortious conduct of both parties was governed by the contract. Furthermore, while
15 Gisa may have been bound by the contract Tophat signed to undertake certain actions on
16 behalf of Tophat, Gisa is not liable on the contract as a mere agent because no
17 representatives of Gisa signed the contract. There is no contractual privity. This means
18 Gisa is not liable for the breach of contract, rescission, or breach of warranty claims.
19 Therefore, there are no cognizable claims against Gisa.

20 **IV. CONCLUSION**

21 The claims for fraud and negligent representation are barred by the ELR. The statute of
22 limitations has long run on the ACFA claim. The claim for aiding and abetting is barred as
23 a derivative claim. The remaining claims against Gisa may not proceed, because mere
24 status as an agent of Tophat does not make Gisa a party to the contract.

25 Accordingly,

26 **IT IS ORDERED** that Defendants’ Motion to Dismiss (Doc. 20) is **granted in part**
27 and Plaintiffs’ claims for fraud and negligent misrepresentation, their claim arising out of
28 the ACFA, and their claim for aiding and abetting are dismissed pursuant to Rule 12(b)(6).

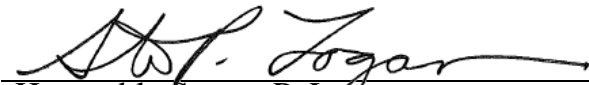
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IT IS FURTHER ORDERED that Defendant Gisa Investments, LLC is dismissed.

IT IS FURTHER ORDERED that Defendants’ Motion (Doc. 20) is **denied without prejudice** to the extent that they request attorneys’ fees.²

IT IS FURTHER ORDERED that the Clerk of Court shall enter judgment accordingly as to Defendant Gisa Investments, LLC and **terminate** them from this action.

Dated this 14th day of October, 2020.



Honorable Steven P. Logan
United States District Judge

² Tophat’s request for attorneys’ fees pursuant to A.R.S. § 12-341.01 is premature. They are not yet the “successful party” in an action “arising out of a contract” because all contractual claims in the case remain. Defense counsel may file a separate motion for attorneys’ fees as to Gisa, but should be sure to include the basis for the fees requested.