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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

JAMES WILSON, an individual,
and JACK WHITE and RITA
WHITE, a married couple,
on behalf of themselves
and all others similarly
situated,

NO. CIV. S-12-0568 LKK/GGH

Plaintiffs,

v.

O R D E R

METALS USA, INC., a Delaware
Corporation; R. ALLAN REID,
an individual and DOES 1-100,
inclusive,

Defendants.

_____ /

Jack Wilson, Jack White, and Rita White are the named
plaintiffs in this putative consumer class action, which seeks
damages for defective home roofing tiles.¹ Their First Amended
Complaint ("FAC") alleges five causes of action: (1) fraudulent
concealment/non-disclosure, (2) breach of express warranties,

¹ No class certification hearing has been held yet.

1 (3) breach of written warranties under the federal Magnuson-Moss
2 Warranty Act, (4) violations of California's Consumer Legal
3 Remedies Act, and (5) violations of Cal. Bus. & Prof. Code § 17200.

4 Defendant R. Allan Reid moves to dismiss the FAC under Fed.
5 R. Civ. P. 12(b)(2). Defendant Metals USA, Inc. moves to dismiss
6 the FAC under Fed. R. Civ. P. 12(b)(6). The motions came on for
7 hearing on October 1, 2012. Having considered the matter, for the
8 reasons set forth below, (i) as to Reid's motion, the court seeks
9 additional briefing on two point of law, and (ii) as to Metals
10 USA's motion, the court will grant defendant's motion to dismiss
11 without prejudice, while permitting plaintiffs to conduct limited
12 discovery as described below.

13 **I. FACTS**

14 **A. Dura-Loc and the Tiles**

15 In 1992, Dura-Loc Roofing Systems Limited ("Dura-Loc") began
16 selling roofing products to consumers in the United States,
17 including California.² (FAC 8.) This lawsuit concerns alleged
18 defects in several product lines of stone-coated steel roof
19 shingles sold by Dura-Loc ("Tiles"). (FAC 1.)

20 Plaintiffs allege on information and belief that the Tiles
21 were coated with "Colorquartz"-brand granules manufactured by 3M
22 Corporation. (FAC 8, 14.) Plaintiffs allege on information and
23

24 ² Plaintiffs do not identify the jurisdiction in which Dura-
25 Loc was organized, but as they allege that its successor entity,
26 604471 Ontario Inc., has since sought bankruptcy protection in
Ontario, Canada, the court infers that Dura-Loc was a Canadian
corporation.

1 belief that, no later than January 1993, 3M had warned Dura-Loc
2 that Colorquartz granules were translucent, would allow ultraviolet
3 ("UV") rays to penetrate to the surface of roofing tiles, and due
4 to their translucent qualities, should not be used as a surfacing
5 coating on roofing products. (FAC 8, 9, 14.)

6 These warnings were reiterated in a technical bulletin
7 released by 3M, dated January 1995, which stated that Colorquartz
8 "is not suitable for applications that require protection of a
9 substrate material from ultraviolet exposure." (FAC 15.)

10 Plaintiffs allege on information and belief that, despite 3M's
11 warning, Dura-Loc manufactured and sold Tiles covered with
12 Colorquartz surface coating granules. (FAC 8, 13.)

13 Plaintiffs allege on information and belief that Dura-Loc's
14 use of Colorquartz granules allows UV rays to penetrate to the
15 surface of the Tiles, which in turn causes the bonding material
16 that binds the surface coating to the Tiles to deteriorate,
17 degrade, and separate from the Tiles. As a result, the Tiles lose
18 their coating and their granular texture, and are left with a
19 discolored appearance. (FAC 14.)

20 Plaintiffs allege on information and belief that Dura-Loc
21 advertised, marketed, sold, and warranted the Tiles in California
22 from 1992 to 2006. (FAC 2, 8.)

23 Dura-Loc represented that, for a period of 25 years after
24 installation, the Tiles would be UV-resistant and free of
25 manufacturing defects. (FAC 15.)

26 ////

1 **B. Named plaintiffs**

2 On or about June 2004, plaintiff James Wilson, a resident of
3 Roseville, California, and plaintiffs Jack and Rita White,
4 residents of Orangevale, California, purchased Tiles through All
5 American Roofing, Inc., a reseller of the Tiles. All American
6 Roofing provided Wilson and the Whites with sales materials that
7 were written, approved, and distributed by Dura-Loc in order to
8 market, advertise, and sell the Tiles. These sales materials
9 represented that, for a period of 25 years after installation, the
10 Tiles would be UV-resistant and that their appearance would not
11 deteriorate so as to substantially affect roof appearance. (FAC 5-
12 7, 13.)

13 Both Wilson and the Whites purchased the Tiles in reliance on
14 these representations. (FAC 6, 8.)

15 On or about April 2009, the Whites noticed for the first time
16 that the Tiles they had purchased for their roof were
17 deteriorating. Specifically, the Tiles were losing their stone
18 coating, granular texture, and aggregate and acrylic coating. As
19 of the time of the filing of the FAC, the Whites' tiles had lost
20 most of their original color, coating, and texture. (FAC 7.)

21 On or about June 2011, Wilson noticed for the first time that
22 the Tiles he had purchased for his roof were deteriorating, losing
23 their stone coating, granular texture, and aggregate and acrylic
24 coating. As of the time of the filing of the FAC, Wilson's tiles
25 had lost most of their original color, coating, and texture. (FAC
26 6.)

1 Dura-Loc at no time disclosed to plaintiffs or the putative
2 class that the Tiles were not UV-resistant and that they contained
3 an inherent defect. (FAC 15.)

4 **C. Metals USA's purchase of Dura-Loc assets**

5 Plaintiffs allege on information and belief that, on or about
6 2005, Dura-Loc became "acutely aware" that the Tiles' inherent
7 defect was beginning to manifest, as Dura-Loc received (i) an
8 unusually large number of warranty claims to repair or replace
9 Tiles, and (ii) numerous complaints regarding separation of surface
10 granules from the Tiles and discoloration of the Tiles. (FAC 9.)

11 On or about May 2006, Defendant Metals USA, Inc. ("Metals
12 USA"), a Delaware corporation, purchased all of Dura-Loc's assets
13 for \$9.4 million. (FAC 8.)

14 The purchase price was nearly \$2 million less than Dura-Loc's
15 sales for the previous fiscal year, which totaled \$11.3 million.³
16 (FAC 3.)

17 In its Form 10-Q filed with the U.S. Securities and Exchange
18 Commission for the quarterly period ending August 15, 2011, Metals
19 USA stated that its Building Products group "recorded a gain of
20

21 ³ Plaintiffs allege this fact without qualification on page
22 3 of the FAC, and then allege it on information and belief on page
23 9, so that the court is unable to determine the actual state of
24 plaintiffs' knowledge as to this fact.

25 Adding to the court's confusion is the fact that the entire
26 FAC is pleaded on information and belief. The court is willing to
infer that this wholesale pleading on information and belief was
an error, given that many individual allegations are also so
pleaded. But any future complaint filed in this action should
comply with federal pleading standards governing allegations made
on information and belief, particularly when alleging fraud.

1 approximately [\$700,000] resulting from a settlement with the
2 previous owners of the Dura-Loc...to cover pre-acquisition warranty
3 claims." (FAC 4.)

4 Plaintiffs allege on information and belief that under the
5 purchase agreement, Metals USA did not expressly assume any of the
6 warranty obligations or liabilities of Dura-Loc. (FAC 9.)

7 On or about July 1, 2007, Metals USA created a wholly-owned
8 subsidiary known as Metals USA Building Products Canada, Inc.,
9 which does business as Allmet Roofing Products. (FAC 8.)

10 **D. Formation of 604471 Ontario, Inc.**

11 After the sale, Dura-Loc ceased manufacturing, marketing, and
12 selling the Tiles, and changed its name to 604471 Ontario, Inc.
13 (FAC 8, 9.) Plaintiffs allege on information and belief that 604471
14 Ontario, Inc. maintains the same owners, board of directors, and
15 executives as Dura-Loc, but is now a non-operating company that
16 currently exists for the sole purpose of receiving, evaluating, ad
17 paying warranty claims on the Tiles. (FAC 9.)

18 Plaintiffs allege on information and belief that 604471
19 Ontario was inadequately capitalized: specifically, that it was
20 formed with, and maintained, insufficient funds to honor its
21 warranty obligations. (FAC 11.)

22 On or about April 2012, 604471 Ontario, Inc. filed for
23 bankruptcy in the province of Ontario. In its bankruptcy filing,
24 the corporation represented that it had assets totaling \$56,265 and
25 liabilities totaling approximately \$2,000,000. (FAC 9.)

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1 **E. Defendant Reid**

2 Plaintiffs allege on information and belief that defendant
3 Reid was the founder, owner, president, and majority shareholder
4 of both Dura-Loc and Metals USA. (FAC 10.)

5 Plaintiffs allege on information and belief that Reid
6 "exercised significant individual control over the design,
7 engineering, development, manufacture, marketing, and selling of
8 the Tiles." (FAC 10.)

9 Reid approved or directed Dura-Loc to engage in a scheme to
10 induce consumers to purchase the Tiles by omitting the fact that
11 the Tiles were manufactured with an inherent defect. (FAC 11.) At
12 all relevant times, Reid knew of the omission in Dura-Loc's
13 advertising, and knew it was unlawful for Dura-Loc to represent
14 that the Tiles were UV-resistant and free from defects. (FAC 11.)

15 Plaintiffs allege on information and belief that Reid
16 maintains sole authority with respect to the business decisions of
17 604471 Ontario, Inc., including whether to pay or deny warranty
18 claims on the Tiles. (FAC 10.)

19 **F. Further allegations**

20 Plaintiffs do not allege any fraudulent conduct on the part
21 of Metals USA, except for one statement, alleged on information and
22 belief, that "Dura-Loc and Defendant Metals USA entered into this
23 purchase transaction with the intent to escape Dura-Loc's liability
24 and warranty obligations for the Tiles which is evidenced by...."
25 (FAC 4, 9.)

26 Plaintiffs do not allege that Metals USA continued to

1 advertise, market, sell, or warrant the Tiles after purchasing
2 Dura-Loc's assets.

3 Plaintiffs do not allege that the defects in the Tiles caused
4 damage to any property other than the Tiles themselves.

5 Plaintiffs do not allege that the defects in the Tiles caused
6 injury to any person.

7 **II. MOTION TO DISMISS UNDER FED. R. CIV. P. 12(b)(2)**

8 Reid moves to dismiss the FAC under Fed. R. Civ. P. 12(b)(2)⁴
9 on the grounds that the court lacks personal jurisdiction over him
10 in this matter.

11 **A. Standard**

12 When a defendant challenges the sufficiency of personal
13 jurisdiction under Rule 12(b)(2), the plaintiff bears the burden
14 of establishing that the exercise of jurisdiction is proper.
15 Sinatra v. National Enquirer, Inc., 854 F.2d 1191, 1194 (9th Cir.
16 1988).

17 Analysis of the appropriateness of the court's personal
18 jurisdiction over a defendant in a case in which the court
19 exercises diversity jurisdiction is resolved under California's
20 long arm statute. Aanestad v. Beech Aircraft Corp., 521 F.2d 1298,
21 1300 (9th Cir. 1974). The statute authorizes the court to exercise
22 personal jurisdiction on any basis consistent with the due process
23 clause of the United States Constitution. Cal. Code Civ. Proc. §
24 410.10; Rocke v. Canadian Auto Sport Club, 660 F.2d 395, 398 (9th

25
26 ⁴ Hereinafter, the term "Rule" refers to the applicable
Federal Rule of Civil Procedure.

1 Cir. 1981).

2 Consistent with the due process clause, the court may exercise
3 personal jurisdiction over a defendant when the defendant has
4 certain minimum contacts with the forum state such that the
5 maintenance of the suit does not offend traditional notions of fair
6 play and substantial justice. International Shoe Co. v. Washington,
7 326 U.S. 310, 316 (1945). If the defendant's activities there are
8 "substantial," or "continuous and systematic," a federal court can
9 exercise general personal jurisdiction as to any cause of action
10 involving the defendant, even if unrelated to the defendant's
11 activities within the state. Perkins v. Benquet Consolidated Mining
12 Co., 342 U.S. 437 (1952); Data Disc, Inc. v. Systems Technology
13 Assoc., Inc., 557 F.2d 1280, 1287 (9th Cir. 1977).

14 If a non-resident defendant's contacts with California are not
15 sufficiently continuous or systematic to give rise to general
16 personal jurisdiction, the defendant may still be subject to
17 specific personal jurisdiction on claims arising out of defendant's
18 contacts with the forum state. Burger King Corp. v. Rudzewicz, 471
19 U.S. 462, 477-78 (1985); Haisten v. Grass Valley Medical
20 Reimbursement Fund, Ltd., 784 F.2d 1392, 1397 (9th Cir. 1986). The
21 court employs a three-part test to determine whether the exercise
22 of specific jurisdiction comports with constitutional principles
23 of due process. Gray & Co. v. Firstenberg Machinery Co., 913 F.2d
24 758 (9th Cir. 1990); Haisten, 784 F.2d at 1397; Data Disc, 557 F.2d
25 at 1287. First, the defendant must "purposefully avail" himself of
26 the privilege of conducting activities in the forum, thereby

1 invoking the benefits and protections of its laws.⁵ Second, the
2 claim must arise out of the defendant's forum-related activities,
3 and third, the exercise of jurisdiction must be reasonable.
4 Haisten, 784 F.2d at 1397. The plaintiff bears the burden of
5 satisfying the first two prongs; if it does so, the burden shifts
6 to the defendant to set forth a "compelling case" that the exercise
7 of jurisdiction would not be reasonable. Sher v. Johnson, 911 F.2d
8 1357, 1361 (9th Cir. 1990); Burqer King, 471 U.S. at 477-78.

9 In determining whether the claim arises out of the defendant's
10 forum-related activities, the Ninth Circuit applies a
11 "but for" test: if plaintiff's injury would not have occurred but
12 for defendant's forum-related activities, the claim arises out of
13 those activities. Ballard v. Savage, 65 F.3d 1495, 1500 (9th Cir.
14 1995). However, where defendant only has isolated contact with the
15 forum state, a high degree of relationship must be shown, i.e. the
16 cause of action must arise out of that particular purposeful
17 contact. Lake v. Lake, 817 F.2d 1416, 1421 (9th Cir. 1987).

18 If a nonresident has purposefully availed himself of the
19 privilege of doing business in California, thus invoking the
20 benefits and protections of its laws, the burden is on the
21

22 ⁵ The Ninth Circuit views the Supreme Court's recent decision
23 in J. McIntyre Machinery, Ltd., v. Nicastro, __ U.S. __, 131 S.Ct.
24 2780 (2011) (refusing to uphold personal jurisdiction over foreign
25 manufacturer that delivered products generally to the U.S. without
26 directly targeting the forum state through local distributors or
activities) as consistent with the line of cases finding specific
jurisdiction when there has been purposeful direction of products
or activities to the forum state. See Mavrix Photo, Inc. v. Brand
Technologies, Inc., 647 F.3d 1218, 1227-1228 (9th Cir. 2011).

1 defendant to show that exercise of jurisdiction does not comport
2 with "fair play and substantial justice," and is therefore
3 unreasonable. Burger King, 471 U.S. at 476. To determine whether
4 the exercise of specific personal jurisdiction over a defendant
5 would be "reasonable", the court examines seven factors: 1) the
6 extent of defendant's purposeful interjection into the forum;⁶ 2)
7 the burden of defending the suit in the forum; 3) the extent of
8 conflict with the sovereignty of the defendant's state; 4) the
9 forum state's interest in the dispute; 5) the most efficient forum
10 for judicial resolution of the dispute; 6) the importance of the
11 chosen forum to the plaintiff's interest in convenient and
12 effective relief; and 7) the existence of an alternative forum.
13 Gray & Co., 913 F.2d at 761.

14 The unique burdens on a foreign national defendant of
15 defending itself in the local forum "should have significant
16 weight" in assessing the reasonableness of personal jurisdiction.
17 Asahi Metal Industry Co., Ltd. v. Superior Court, 480 U.S. 102
18 (1987). In addition, litigation against an alien defendant creates
19 a higher jurisdictional bar due to concerns of conflict with the
20 sovereignty of the foreign state. Id. at 115. However, "the factor
21 of conflict with the sovereignty of the defendant's state 'is not
22 dispositive, because if given controlling weight, it would always
23

24 ⁶ The Ninth Circuit gives this factor no weight once it is
25 established that the defendant purposefully availed itself of the
26 privilege of conducting business of the state, thereby invoking the
benefits and protections of its laws. Sinatra v. National Enquirer,
Inc., 854 F.2d 1191, 1199 (9th Cir. 1988).

1 prevent suit against a foreign national in a United States court.'"
2 Sinatra, 854 F.2d at 1199 (quoting Gates Learjet Co. v. Jensen, 743
3 F.2d 1325, 1333 (9th Cir. 1984), cert. denied, 471 U.S. 1066
4 (1985)).

5 **B. Analysis**

6 **1. Can the court exercise personal jurisdiction over Reid as**
7 **an individual defendant?**

8 Defendant Reid moves to dismiss under Rule 12(b)(2), arguing
9 that he is not subject to the court's personal jurisdiction.
10 Although Reid is the moving party, plaintiffs are the parties who
11 invoked the court's jurisdiction and therefore bear the burden of
12 proof on the necessary jurisdictional facts. Rio Properties, Inc.
13 v. Rio Int'l Interlink, 284 F.3d 1007, 1019 (9th Cir. 2002).

14 As no evidentiary hearing has been held on these facts,
15 plaintiffs "need only make a prima facie showing of jurisdiction
16 to avoid [Reid's] motion to dismiss." Harris Rutsky & Co. Ins.
17 Services, Inc. v. Bell & Clements Ltd. (9th Cir. 2003) 328 F3d
18 1122, 1129. A "prima facie" showing must demonstrate facts that,
19 if true, would support jurisdiction over the defendant. Id.
20 Ordinarily, the plaintiffs' version of the facts is taken as true,
21 and conflicts between sworn affidavits are resolved in the
22 plaintiffs' favor. Id.

23 Here, while Reid has submitted a declaration in support of his
24 motion (Docket no. 22-1), plaintiffs rely solely on the unverified
25 FAC in their opposition. The court cannot assume the truth of
26 allegations in a pleading, such as the FAC, that are contradicted

1 by a sworn declaration. "If only one side of the conflict [over
2 personal jurisdiction] was supported by affidavit, our task would
3 be relatively easy, for we may not assume the truth of allegations
4 in a pleading which are contradicted by affidavit." Data Disc, Inc.
5 v. Systems Technology Assocs., Inc., 557 F.2d 1280, 1284.
6 Similarly, the court "need not consider merely conclusory claims,
7 or legal conclusions in the complaint as establishing
8 jurisdiction." NuCal Foods, Inc. v. Quality Egg LLC, __ F.Supp.2d
9 __, 2012 WL 3528162 (E.D.Cal. 2012) (Mueller, J.) (citations
10 omitted). Therefore, the court will consider well-pleaded facts in
11 the FAC in determining whether plaintiffs have made a prima facie
12 showing of jurisdiction. But where the facts in Reid's declaration
13 directly contradict those pleaded in the FAC, the court must accept
14 the truth of Reid's declaration.

15 On the facts presented, the court cannot exercise personal
16 jurisdiction over Reid on the grounds of physical presence,
17 domicile, or consent. Reid was not personally served with process
18 in California. (Reid Dec., Docket no. 22-1, ¶ 4.) He has never
19 resided in California, and there is no evidence to suggest he
20 intends to in the future. (Id. ¶ 4.) Finally, there is no evidence
21 to suggest that Reid has consented, contractually or otherwise, to
22 the court's jurisdiction.

23 The court also cannot exercise general personal jurisdiction
24 over Reid. Such an exercise of jurisdiction would require that Reid
25 have conducted "substantial" or "continuous and systematic"
26 activities in the state. Data Disc, 557 F.2d at 1287. Reid's

1 declaration provides that he is a Canadian citizen and a lifelong
2 resident of the Province of Ontario, and that he has never been a
3 California resident. (Reid Dec., Docket no. 22-1, ¶¶ 2, 7.) He has
4 never filed a California state income tax return, nor does he own,
5 lease, or maintain any property in the state. (Reid Dec., Docket
6 no. 22-1, ¶¶ 9, 10.) Reid's only contacts with the state have been
7 (i) approximately three business trips per year when he was Dura-
8 Loc's president, and (ii) for personal vacations. Therefore, absent
9 an affidavit to the contrary by plaintiff, Reid's contacts with the
10 state can be presumed neither "substantial" nor "continuous and
11 systematic." (Reid Dec., Docket no. 22-1, ¶ 4.) The court cannot
12 establish general personal jurisdiction over Reid.

13 The question then becomes whether the court can assert
14 specific personal jurisdiction over Reid on claims arising out of
15 his contacts with California. Plaintiffs begin by alleging that
16 Dura-Loc is subject to personal jurisdiction in California.
17 (Plaintiff's Opp., Docket no. 23, at 6-7.) Dura-Loc advertised,
18 marketed, sold, and warranted the Tiles to California residents –
19 despite knowing that the Tiles were defective. In so doing,
20 plaintiffs claim, Dura-Loc "purposefully availed" itself of the
21 privilege of conducting business in California, thereby invoking
22 the benefits and protections of California's laws, and satisfying
23 the first prong of the specific jurisdiction test. Haisten, 784
24 F.2d at 1397. Moreover, plaintiffs' claims arise out of these
25 forum-related activities, satisfying the second prong. Id.
26 Defendants, in turn, do not argue that exercise of personal

1 jurisdiction over Dura-Loc would be unreasonable, thereby
2 satisfying the third prong. Id.

3 Plaintiffs conclude by arguing that, since Dura-Loc is subject
4 to the court's jurisdiction, Reid, as Dura-Loc's alter ego, is as
5 well. The parties then address most of their briefing to the
6 question of whether plaintiffs have made out a case for alter ego
7 liability.

8 The court is concerned, however, that neither Dura-Loc nor
9 604471 Ontario is a defendant in this action, and therefore seeks
10 further briefing from the parties on the following questions:

11 1. Can the court exercise personal jurisdiction over an
12 individual shareholder and officer of a corporation (Reid) under
13 an alter ego theory if the corporation itself (Dura-Loc, and later,
14 604471 Ontario) is not a party to the action?

15 2. If the corporation is in fact a necessary party, may Dura-
16 Loc's actions be imputed to 604471 Ontario for purposes of the
17 exercise of personal jurisdiction?

18 A briefing schedule for the parties is set forth at the end
19 of this order. To be clear, no additional briefing is sought as to
20 (i) the choice-of-law or applicable standard for alter ego
21 liability or (ii) whether plaintiffs have properly pleaded Reid's
22 alter ego liability under such a standard. The parties' briefing
23 is to focus on the questions raised above.

24 **III. MOTION TO DISMISS UNDER FED R. CIV. P. 12(b)(6)**

25 **A. Standard**

26 A dismissal motion under Rule 12(b)(6) challenges a

1 complaint's compliance with the federal pleading requirements.
2 Under Rule 8(a)(2), a pleading must contain a "short and plain
3 statement of the claim showing that the pleader is entitled to
4 relief." The complaint must give the defendant "'fair notice of
5 what the ... claim is and the grounds upon which it rests.'" Bell
6 Atlantic v. Twombly, 550 U.S. 544, 555 (2007), quoting Conley v.
7 Gibson, 355 U.S. 41, 47 (1957).

8 To meet this requirement, the complaint must be supported by
9 factual allegations. Ashcroft v. Iqbal, 556 U.S. 662, 678, 129
10 S.Ct. 1937 (2009). Moreover, this court "must accept as true all
11 of the factual allegations contained in the complaint." Erickson
12 v. Pardus, 551 U.S. 89, 94 (2007).⁷

13 "While legal conclusions can provide the framework of a
14 complaint," neither legal conclusions nor conclusory statements are
15 themselves sufficient, and such statements are not entitled to a
16 presumption of truth. Iqbal, 556 U.S. at 678. Iqbal and Twombly
17 therefore prescribe a two-step process for evaluation of motions
18 to dismiss. The court first identifies the non-conclusory factual
19 allegations, and then determines whether these allegations, taken
20 as true and construed in the light most favorable to the plaintiff,
21 "plausibly give rise to an entitlement to relief." Iqbal, 556 U.S.

23 ⁷ Citing Twombly, 556 U.S. at 555-56, Neitzke v. Williams, 490
24 U.S. 319, 327 (1989) ("[w]hat Rule 12(b)(6) does not countenance
25 are dismissals based on a judge's disbelief of a complaint's
26 factual allegations"), and Scheuer v. Rhodes, 416 U.S. 232, 236
(1974) ("it may appear on the face of the pleadings that a recovery
is very remote and unlikely but that is not the test" under
Rule 12(b)(6)).

1 at 664.

2 "Plausibility," as it is used in Twombly and Iqbal, does not
3 refer to the likelihood that a pleader will succeed in proving the
4 allegations. Instead, it refers to whether the non-conclusory
5 factual allegations, when assumed to be true, "allow[] the court
6 to draw the reasonable inference that the defendant is liable for
7 the misconduct alleged." Iqbal, 556 U.S. at 663, 129 S. Ct. at
8 1949. "The plausibility standard is not akin to a 'probability
9 requirement,' but it asks for more than a sheer possibility that
10 a defendant has acted unlawfully." Id. (quoting Twombly, 550 U.S.
11 at 557).⁸ A complaint may fail to show a right to relief either by
12 lacking a cognizable legal theory or by lacking sufficient facts
13 alleged under a cognizable legal theory. Balistreri v. Pacifica
14 Police Dep't, 901 F.2d 696, 699 (9th Cir. 1990).

15 **B. Analysis**

16
17 ⁸ Twombly imposed an apparently-new "plausibility" gloss on
18 the previously well-known Rule 8(a) standard, and retired the
19 long-established "no set of facts" standard of Conley v. Gibson,
20 355 U.S. 41 (1957), although it did not overrule that case
21 outright. See Moss v. U.S. Secret Service, 572 F.3d 962, 968 (9th
22 Cir. 2009) (the Twombly Court "cautioned that it was not outright
23 overruling Conley . . .," although it was retiring the "no set of
24 facts" language from Conley). The Ninth Circuit has acknowledged
25 the difficulty of applying the resulting standard, given the
26 "perplexing" mix of standards the Supreme Court has applied in
recent cases. See Starr v. Baca, 652 F.3d 1202, 1215 (9th
Cir. 2011) (comparing the Court's application of the "original,
more lenient version of Rule 8(a)" in Swierkiewicz v. Sorema N.A.,
534 U.S. 506 (2002) and Erickson v. Pardus, 551 U.S. 89 (2007) (per
curiam), with the seemingly "higher pleading standard" in Dura
Pharmaceuticals, Inc. v. Broudo, 544 U.S. 336 (2005), Twombly and
Iqbal), rehearing en banc denied, 659 F.3d 850 (October 5, 2011).
See also Cook v. Brewer, 637 F.3d 1002, 1004 (9th Cir. 2011)
(applying the "no set of facts" standard to a Section 1983 case).

1 **1. Have Plaintiffs pleaded sufficient facts to proceed**
2 **against Metals USA under a theory of successor liability?**

3 Metals USA moves to dismiss the FAC under Rule 12(b)(6),
4 arguing that it cannot be held liable under a theory of successor
5 liability.

6 When the court sits in diversity, it must apply the
7 substantive law of the forum in which it is located. Erie R.R. Co.
8 v. Tompkins, 304 U.S. 64, 78 (1938). California substantive law
9 governs the issue of successor liability for the purposes of this
10 motion, and both plaintiffs and Metals USA have briefed the issue
11 with reference to California law.

12 **a. What is the legal standard for successor liability?**

13 Under California's rule of successor liability, a corporation
14 purchasing the principal assets of another corporation does not
15 assume the predecessor corporation's liabilities unless one of the
16 following exceptions applies:

17 (1) there is an express or implied agreement of assumption;

18 (2) the transaction amounts to a consolidation or merger of
19 the two corporations;

20 (3) the purchasing corporation is a mere continuation of the
21 seller;

22 (4) the transfer of assets to the purchaser is for the
23 fraudulent purpose of escaping liability for the seller's debts;

24 or

25 (5) the seller, had it remained a going concern, would have
26 been liable under the doctrine of strict products liability.

1 Ray v. Alad Corp., 19 Cal.3d 22, 28, 34 (1977).⁹

2 The question of whether to impose successor liability involves
3 "broad equitable considerations." Rosales v. Thermex-Thermatron,
4 Inc., 67 Cal.App.4th 187, 196 (1998) (internal citations omitted).
5 The question whether it is fair to impose successor liability is
6 exclusively for the trial court. Id.

7 Plaintiffs argue for the imposition of successor liability
8 under the fourth Ray exception: that Dura-Loc fraudulently conveyed
9 assets to Metals USA in order to avoid liability for the failing
10 Tiles.

11 At this juncture, one point of law must be clarified. The line
12 of cases culminating in Ray, 19 Cal.3d at 22, and its progeny
13 articulate an equitable, common-law theory for establishing
14 successor liability. This body of law is distinct from California's
15 codification of the Uniform Fraudulent Transfer Act ("UFTA") at
16 California Civil Code sections 3439-3439.12. While both address
17 fraudulent transfers of assets, the Ray doctrine merely allows
18 courts to determine successor liability based on such a transfer.
19 The UFTA is far more comprehensive, providing as it does an
20 independent cause of action for fraudulent transfer, and remedies
21 such as the attachment of assets or injunctive relief against

22
23 ⁹ While Ray is a products liability case, California courts
24 apply the same rule in assessing successor liability in non-tort
25 cases. See, e.g., McClellan v. Northridge Park Townhome Owners
26 Ass'n, Inc., 89 Cal.App.4th 746 (2001) (applying Ray to hold that,
where plaintiff contractor had obtained judgment against homeowners
association for amount due under contract, successor homeowners
association was merely a continuation of predecessor, and could
therefore be added as judgment debtor).

1 disposition of assets. Cal. Civ. Code § 3439.07(a).

2 As such, both parties' attempts to import UFTA principles into
3 their arguments are unavailing. Plaintiffs argue in their
4 opposition that they have pleaded facts satisfying the standards
5 for finding a fraudulent transfer under Cal. Civ. Code section
6 3439.04. (Plaintiff's Opp., Docket no. 23, at 7-13.) Metals USA
7 disputes this claim, but then goes on to argue that, if UFTA
8 principles are to apply in determining successor liability, so too
9 must the UFTA's statute of limitations, which would bar plaintiffs'
10 claims against them. (Metals USA Reply, Docket no. 25, at 6-7.)
11 Metals USA also argues that the UFTA's protections for good faith
12 transferees who take assets for value, Cal. Civ. Code § 3439.08,
13 exempt it from liability. (Metals USA Reply, Docket no. 25, at 6.)

14 Neither side is correct. Research has failed to unearth a
15 single federal or California case that applies section 3439.04 to
16 assess whether a fraudulent transfer occurred under Ray. See also
17 Kim v. Interfirst Capital Corp., No. G030719, 2003 WL 21214268 at
18 *3 (Cal.Ct.App. May 27, 2003) (finding no authority for applying
19 section 3439.04 to the question of successor liability due to
20 fraudulent transfer).¹⁰ The court therefore also declines to import
21 the UFTA's statute of limitations and its protections for good
22 faith transferees into the successor liability inquiry.

23
24 ¹⁰ While the court is not bound by unpublished state
25 decisions, it may consider them in its decision-making. See, e.g.,
26 Roe ex rel Callahan v. Gustine Unified School Dist. 678 F.Supp.2d
1008, 1042-43 (E.D.Cal. 2009) (Wanger, J.) (citing two unpublished
California appellate decisions - and several published opinions -
in support of the court's interpretation of a California statute).

1 The court will turn to common-law principles in deciding
2 whether plaintiffs have properly pleaded a case for successor
3 liability.

4 **b. Can Metals USA be held liable under plaintiffs'**
5 **theory of successor liability?**

6 The fact pattern presented in Plaintiffs' complaint is
7 admittedly unique. In nearly every case finding successor liability
8 due to a fraudulent transfer, the successor entity is tied to the
9 fraud in some way. See, e.g., Bradford v. Winter, No. B216235, 2010
10 WL 3260011 (Cal.Ct.App. 2010) (predecessor and successor entities
11 had common shareholders); Schultz v. Bradshaw, No. D057471, 2011
12 WL 1991662 (Cal.Ct.App. 2011) (predecessor and successor entities
13 had same principal shareholder); Phillips, Spallas & Angstadt, LLP
14 v. Fotouhi, 197 Cal.App.4th 1132 (2011) (predecessor and successor
15 law firms both employed the attorney who perpetrated fraud).

16 By contrast, plaintiffs do not allege that Metals USA
17 participated in the alleged fraudulent transfer. Instead,
18 plaintiffs allege:

- 19 1. "Plaintiffs are informed and believe...that in or around
20 2005, Dura-Loc became acutely aware that the inherent
21 defect was beginning to manifest on the Tiles as
22 Dura-Loc received an unusually large amount of warranty
23 claims to repair or replace its consumers' Tiles and
24 received numerous complaints regarding the separation of
25 the granules from the Tiles and the discolored
26 appearance of the Tiles." (FAC ¶ 39.)

- 1 2. "Plaintiffs are informed and believe...that in 2005
2 Dura-Loc's sales for the Tiles were approximately \$11.3
3 million." (FAC ¶ 40.)
- 4 3. "Despite the fact that Dura-Loc had more than doubled
5 its amount of sales from 1997 to 2005, in or around May
6 2006, Dura-Loc sold all of its assets to Defendant
7 Metals USA for \$9.4 million - nearly two million dollars
8 (\$2,000,000.00) less than its total sales for the
9 previous fiscal year." (FAC ¶ 41.)
- 10 4. "Under the purchase agreement, Plaintiffs are informed
11 and believe...that Defendant Metals USA did not
12 expressly assume any of the warranty obligations or
13 liabilities of Dura-Loc." (FAC ¶ 41.)
- 14 5. "Plaintiffs are informed and believe...that Dura-Loc and
15 Defendant Metals USA entered into this purchase
16 transaction with the intent to escape Dura-Loc's
17 liability and warranty obligations for the Tiles which
18 is evidenced by, among others: (i) the substantial
19 number of warranty claims and owner complaints that were
20 received by Dura-Loc with respect to the Tiles in the
21 years preceding the purchase by Metals USA; (ii) that
22 Dura-Loc sold all of its assets to Metals USA for nearly
23 two million dollars (\$2,000,000.00) less than its total
24 sales for the previous fiscal year; and (iii) that
25 Defendant Metals USA reported in its FORM 10-Q for the
26 quarterly period ended August 15, 2011, that its

1 Building Products group 'recorded a gain of
2 approximately \$0.7 [\$700,000.00] resulting from a
3 settlement with the previous owners of the Dura-Loc...to
4 cover pre-acquisition warranty claims.'" (FAC ¶ 43.)

5 6. " After its sale to Defendant Metals USA[], Dura-Loc
6 ceased its manufacturing, marketing, and selling of the
7 Tiles, and changed its name to 604471 Ontario, Inc."
8 (FAC ¶ 44.)

9 In short, plaintiffs allege that as warranty claims mounted, Dura-
10 Loc sought to escape liability by selling its assets to Metals USA
11 for a below-market price and ceasing operations. Later, Dura-Loc
12 paid Metals USA \$700,000.00 to cover pre-acquisition warranty
13 claims.

14 One California case presents facts analogous to the present
15 matter. In Kim, 2003 WL 21214268 at *1, the plaintiffs alleged that
16 they were sold "unsuitable stock" by Gallagher & Co., a brokerage
17 firm. Interfirst Capital Corp. later purchased Gallagher's assets.
18 The plaintiffs eventually sued Interfirst on a theory of successor
19 liability. Their complaint alleged significant fraud by Gallagher,
20 but none by Interfirst. Instead, plaintiffs alleged that Interfirst
21 purchased Gallagher for significantly below market value. The trial
22 court allowed the matter to proceed on the issue of "whether the
23 purchase price in any way evidenced a fraudulent intent on the part
24 of the purchaser." Id. After a bench trial, the court found that
25 Interfirst's purchase was for adequate consideration, relieving it
26 of successor liability.

1 Given Kim, it appears that California law will support a
2 theory of successor liability due to fraudulent transfer, even
3 where allegations of fraud are based solely on inadequate
4 consideration.

5 Determinations of successor liability are highly fact-
6 specific, and it would be inappropriate for the court to rule on
7 the substantive merits of plaintiffs' case for successor liability
8 at the pleadings stage. "Each successor liability 'case must be
9 determined on its own facts' including looking at the 'totality of
10 the unusual circumstances.'" See CenterPoint Energy, Inc. v.
11 Superior Court, 157 Cal.App.4th 1101, 1115 (quoting Rego v. ARC
12 Water Treatment Co. of Pa., 181 F.3d 396, 403 (3d Cir. 1999)).
13 Nevertheless, plaintiffs must still meet the pleading standards set
14 forth in the Federal Rules of Civil Procedure. And it is here that
15 plaintiffs come up short.

16 **c. Have plaintiffs pleaded adequate facts to**
17 **support their theory of successor liability?**

18 Metals USA argues that plaintiffs have failed to plead its
19 involvement in the alleged fraudulent transfer with the
20 particularity required under Rule 9(b), which provides: "In
21 alleging fraud or mistake, a party must state with particularity
22 the circumstances constituting fraud or mistake. Malice, intent,
23 knowledge, and other conditions of a person's mind may be alleged
24 generally." "Particularity" means that the allegations specify
25 facts such as "times, dates, places, benefits received, and other
26 details of the alleged fraudulent activity." Neubronner v. Milken,

1 6 F.3d 666, 672 (9th Cir. 1993).

2 Plaintiffs counter that, as they have alleged no fraud on
3 Metals USA's part, they need not plead its fraudulent conduct with
4 particularity.

5 The court is inclined to agree with plaintiffs. As stated in
6 Charles Alan Wright & Arthur R. Miller, Federal Practice and
7 Procedure § 1297 (3d ed. 2012):

8 [T]he pleading of the circumstances of the alleged fraud
9 with a certain amount of precision...serves
10 the federal rule's purpose by apprising [the defendant]
11 of the nature of the claim and the acts or statements or
12 failures...constituting the fraud being charged against
13 [the defendant]....

14 [T]he reasons for the particularity rule are not present
15 when the fraud alleged is that of someone who is not a
16 party to the action, and it has been held that in such
17 a case the circumstances of the fraud or mistake need
18 not be pleaded by the plaintiff with any special degree
19 of particularity.

20 Two recent unpublished opinions of district courts in the Ninth
21 Circuit echo this view.

22 In Pacific Rollforming, LLC v. Trakloc Int'l, LLC, No. CV
23 07-1897, 2008 WL 4183916 (S.D.Cal. Sept. 8, 2008) (Lorenz, J.),
24 plaintiff sought to assert liability over successor entities for
25 fraud allegedly perpetrated by a predecessor-in-interest. The
26 successors moved to dismiss for plaintiff's failure to allege their
liability with particularity under Rule 9(b). The court refused to
so, finding that Rule 8(a)(2) governed pleading of the successor-
in-interest allegations.

In Monaco v. Bear Stearns Companies, Inc., No. CV 09-05438,
2011 WL 4059801 (C.D.Cal. Sept. 12, 2011) (Otero, J.), plaintiffs

1 claimed that defendant JPMorgan Chase & Co. ("JPMorgan") was liable
2 under a successor theory for fraudulent omissions by its
3 predecessor-in-interest. JPMorgan moved to dismiss, arguing that
4 plaintiffs had failed to plead sufficient facts to support a theory
5 of successor liability. The court quoted Pacific Rollforming, 2008
6 WL 4183916 at *3, approvingly for the proposition that "the liberal
7 requirements of Rule 8(a)(2) apply to...successor-in-interest
8 allegations concerning [d]efendants," and denied JPMorgan's motion.
9 Monaco, 2011 WL 4059801 at *19.

10 But there remains the question of whether plaintiffs have met
11 Iqbal's pleading requirements with respect to Dura-Loc's alleged
12 fraud. The court finds that it did not.

13 Plaintiffs plead several critical facts on information and
14 belief without providing any factual basis for their belief: first,
15 that Dura-Loc became aware of its mounting liabilities around 2005
16 (FAC ¶ 39); second, that Dura-Loc's sales for the Tiles were
17 approximately \$11.3 million (FAC ¶ 40); and third, that Defendant
18 Metals USA did not expressly assume any of the warranty obligations
19 or liabilities of Dura-Loc (FAC ¶ 41). Plaintiffs have failed to
20 state any factual basis for their belief in these allegations.

21 Under Rule 9(b), plaintiffs are permitted to plead allegations
22 of fraud on information and belief, but must still state the
23 factual basis for their belief. Neubronner, 6 F.3d at 672. While
24 the court, per Wright & Miller, recognizes that Dura-Loc is not a
25 party to this action and therefore need not be "appris[ed] of the
26 nature of the claim and [its] acts or statements or failures,"

1 Federal Practice and Procedure at § 1297, the absence of any facts
2 supporting plaintiffs' beliefs means that their allegations are
3 closer to the realm of "possibility" than the realm of
4 "probability." See Iqbal, 556 U.S. at 663. Simply put, the court
5 has no way of knowing whether the allegations in question are
6 derived from some source, no matter how remote, or conceived of to
7 support plaintiffs' claims. As such, the complaint lacks sufficient
8 well-pleaded facts to allege a cognizable legal theory for
9 successor liability. Balistreri, 901 F.2d at 699.

10 The court accordingly finds that plaintiffs have failed to
11 state a claim for successor liability against defendant Metals USA,
12 and will grant Metals USA's motion to dismiss.

13 That said, this appears to be an instance in which discovery
14 into the relevant facts is merited. Under Rule 26(b)(1), "For good
15 cause, the court may order discovery of any matter relevant to the
16 subject matter involved in the action...." Further, under Rule
17 26(d)(1), the court has the power to authorize such discovery
18 before the mandatory Rule 26(f) conference. Good cause lies in this
19 instance because plaintiffs have pleaded facts - an apparently-low
20 purchase price, Dura-Loc's \$700,000 payment to settle warranty
21 claims - that raise concerns about fraudulent transfer, but all of
22 the relevant evidence is in defendant Metals USA's possession.

23 As stated in Jones v. AIG Risk Management, Inc. 726 F.Supp.2d
24 1049, 1055-56 (N.D.Cal. 2010) (Chen, J.) (cited with approval for
25 this point in Arthur R. Miller, From Conley to Twombly to Iqbal:
26 A Double Play on the Federal Rules of Civil Procedure, 60 Duke L.J.

1 1, 107 n.411 (2010)):

2 The Court has the ability to permit such discovery even
3 in the face of dismissal for failure to satisfy Iqbal
4 and Twombly where, as here, relevant evidence is solely
5 within the province of Defendants, leaving open the
6 possibility of further amendment. Cf. Santiago v. Walls,
7 599 F.3d 749, 758-59 (7th Cir.2010) (improper to discuss
8 complaint where lack of specificity is due to facts
9 plaintiff cannot know for certain without discovery);
10 Arocho v. Nafziger, 367 Fed.Appx. 942, 954-55 (10th
11 Cir.2010) (where facts known only by defendants,
12 plaintiff should be afforded opportunity to amend
13 pleadings); Morgan v. Hubert, 335 Fed.Appx. 466, 472
14 (5th Cir.2009) (plaintiff cannot be requested to plead
15 facts peculiarly within the knowledge of defendants);
16 Tompkins v. LaSalle Bank Corp., 2009 WL 4349532
17 (N.D.Ill. Nov. 24, 2009) (plaintiff should be afforded
18 opportunity to conduct discovery into liability of
19 parent corporation before summary judgment).

20 Therefore, the court will allow plaintiffs to conduct limited,
21 reasonable, tailored discovery into the course of dealings between
22 Metals USA (and any subsidiary), on the one hand, and Dura-Loc and
23 604471 Ontario, on the other, in support of its allegations of
24 successor liability. Plaintiffs' discovery requests may be directed
25 solely to Metals USA.

26 **IV. CONCLUSION**

The court hereby orders as follows:

[1] As to Defendant R. Allan Reid's motion to dismiss
plaintiffs' First Amended Complaint, plaintiffs and
defendant Reid SHALL PROVIDE further briefing on the
following questions:

[a] Can the court exercise personal jurisdiction
over an individual shareholder and officer of a
corporation under an alter ego theory if the

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corporation itself is not a party to the action?

[b] If the corporation is a necessary party, may Dura-Loc's actions be imputed to 604471 Ontario for purposes of the exercise of personal jurisdiction?


Plaintiffs' brief is due within fourteen (14) days of the effective date of this order. Defendant Reid's brief, if any, is due within twenty-eight (28) days of the effective date of this order. The parties' briefs are to be no longer than ten (10) pages each.

[2] Defendant Metals USA, Inc.'s motion to dismiss plaintiffs' First Amended Complaint for failure to state a claim is GRANTED without prejudice.

[3] Plaintiffs are granted leave to conduct discovery under the terms outlined above, to be supervised by the Magistrate Judge. Plaintiffs must file any amended complaint no later than ninety (90) days after entry of this order, but only if discovery provides a basis for well-pleaded allegations of successor liability against Metals USA.

IT IS SO ORDERED.

DATED: October 12, 2012.


LAWRENCE K. KARLTON
SENIOR JUDGE
UNITED STATES DISTRICT COURT