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UNITED STATES DISTRICT COURT
Northern District of California

DON LAU,

No. C 11-01940 MEJ

Plaintiff,

**ORDER RE DEFENDANT'S MOTION
TO DISMISS [Dkt. No. 62]**

v.

MERCEDES-BENZ USA LLC,

Defendant.

I. INTRODUCTION

Pending before the Court is Defendant Mercedes-Benz USA, LLC's motion to dismiss this lawsuit on the grounds that the subject vehicle at issue in this case (the 2007 Mercedes-Benz SL55) is neither a "consumer good" as defined by California Civil Code section 1791(a), nor (2) a "new motor vehicle" as defined by Civil Code section 1793.22(e)(2). Dkt. No. 62 at 4. After thoroughly reviewing the parties' briefs and the controlling statutes, the Court **DENIES** Defendant's motion.

II. DISCUSSION

A. Controlling Authorities

As an initial matter, in the pretrial statement, Plaintiff indicated that he seeks a repurchase of the subject vehicle in accordance with section 1793.2(d)(2). Dkt. No. 51. Because this section deals with "new motor vehicle," the Court focuses its analysis on this phrase; Defendant's argument regarding whether the vehicle qualifies as a "consumer good," is thus inapplicable.¹

Section 1793.2(d)(2) of the Song-Beverly Consumer Warranty Act provides:

If the manufacturer or its representative in this state is unable to service or repair a new motor vehicle, as that term is defined in paragraph (2) of subdivision (e) of Section 1793.22, to conform to the applicable express warranties after a reasonable number of attempts, the manufacturer shall either promptly replace the new motor

¹ In any event, the same analysis regarding the first definition of "new motor vehicle" based on personal use would apply to Defendant's "consumer good" argument.

1 vehicle in accordance with subparagraph (A) or promptly make restitution to the buyer
2 in accordance with subparagraph (B). However, the buyer shall be free to elect
3 restitution in lieu of replacement, and in no event shall the buyer be required by the
4 manufacturer to accept a replacement vehicle.

5 Defendant seeks to dismiss this case on the grounds that Plaintiff cannot establish that the
6 2007 Mercedes-Benz SL55 at issue qualifies as a “consumer good” or “new motor vehicle” under the
7 Song-Beverly Act. According to Defendant, because Plaintiff cannot make that showing, he cannot
8 recover under the Song-Beverly Act and the case must be dismissed.

9 The phrase “new motor vehicle” is defined, in pertinent part, in section 1793.22(e)(2) as:

10 [A] new motor vehicle that is bought or used primarily for personal, family, or
11 household purposes. “New motor vehicle” also means a new motor vehicle with a
12 gross vehicle weight under 10,000 pounds that is bought or used primarily for business
13 purposes by a person, including a partnership, limited liability company, corporation,
14 association, or any other legal entity, to which not more than five motor vehicles are
15 registered in this state.

16 Thus, pursuant to section 1793.22(e)(2), a vehicle qualifies as a “new motor vehicle” if it was either
17 purchased or used primarily for “personal, family, or household purposes,” *or* if it was bought or used
18 primarily for “business purposes.” By including the term “primarily,” the definition envisions
19 scenarios where a vehicle may be used for both personal and business purposes. However, by
20 focusing on the “primary” use or reason for purchase, that term is also mutually exclusive: a vehicle
21 can either be primarily for personal use *or* primarily for business use, it cannot be both. Here,
22 Plaintiff asserts that he purchased and used the vehicle for personal use. Thus, the question is
23 whether Plaintiff has sufficient evidence to establish this element to sustain his claim under the Song-
24 Beverly Act.

25 **B. Overview of the Parties’ Arguments**

26 In its motion, Defendant argues that the subject vehicle does not meet the first definition of
27 “new motor vehicle” under the Song-Beverly Act because it was not purchased or used primarily for
28 personal use. In support, Defendant proffers that the vehicle is registered to Floormasters and/or DT
Floormasters, Inc. According to Defendant, “[t]his fact alone suggests that the vehicle was not
primarily for personal use, but for business purposes, as there would be no other reason to have the

1 vehicle purchased and owned by a corporate entity.” Mot. at 6. Defendant further points out that DT
2 Floormasters, Inc. took the tax depreciation on the vehicle. Thus, Defendant argues that “[h]aving
3 deducted from its taxes the tax depreciation of the subject vehicle, Plaintiff, by and through ‘DT
4 Floormasters, Inc.’ has represented under oath to the Internal Revenue Service and the United States
5 government (as well as California’s Franchise Tax Board) that the subject vehicle was used
6 predominately for business purposes.” *Id.* at 7.

7 Next, Defendant argues that assuming Plaintiff’s vehicle was used primarily for business
8 purposes, the vehicle does not meet the criteria for a “new motor vehicle” because DT Floormasters
9 and/or Floormasters, Inc. has owned or has registered more than five motor vehicles. *Id.* at 8.
10 Defendant argues that, according to Plaintiff’s responses to its Special Interrogatories, Set Two, at the
11 time the vehicle was purchased and for several years after, DT Floormasters, Inc. had registered to it
12 six motor vehicles in California, thereby disqualifying it for protection under the Song-Beverly Act.
13 *Id.*

14 In response, Plaintiff argues that Defendant’s challenges fail to refute his contention that the
15 vehicle was both purchased and used primarily for personal use. In support, Plaintiff argues that he
16 and his wife have testified that they used the vehicle for personal purposes. Pl. Opp., Dkt. No. 64 at
17 4-5; Pl. Supp. Br., Dkt. No. 73 at 6. He also points to the fact that *he* executed the purchase contract
18 and that *he* – not DT Floormasters, Inc. or Floormasters, Inc. – is identified as the buyer in the
19 contract. Pl. Opp. at 5. Plaintiff further points out that in the section of the contract entitled “Primary
20 Use For Which Purchased,” he checked the box indicating “personal, family or household.” *Id.*
21 Additionally, Plaintiff argues that the subject vehicle is a high-end luxury convertible, not a heavy-
22 duty truck designed for towing or otherwise transporting flooring materials. *Id.* at 4. He thus argues
23 that the type of vehicle is inconsistent with it being a business-use vehicle.

24 With respect to the vehicle registration and the tax depreciation claimed, Plaintiff argues that
25 neither fact goes to how the vehicle was used nor establishes that the vehicle was used predominately
26 for business purposes. He argues that in using the word “primarily,” the legislature envisioned a
27 “dual-use” vehicle that may, sometimes, be used for business purposes, while also serving as personal
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1 transportation. *Id.* Plaintiff further proffers that the tax filings that took the depreciation of the
2 vehicle for DT Floormasters were done in error and that he is in the process of amending those tax
3 returns. Pl. Suppl. Br. at 8.

4 Finally, Plaintiff argues that even assuming that the vehicle was misconstrued as a “business
5 use” vehicle, it still qualifies as a “new motor vehicle” because there were not more than five vehicles
6 registered to DT Floormasters. Pl. Opp. at 5-6.²

7 **C. Analysis**

8 The Court has considered the parties’ arguments and the controlling statutes and rules as
9 follows. Plaintiff’s position is that the vehicle was both purchased and used primarily for personal
10 purposes and not primarily for business use. Pl. Opp. at 2, 5. As the foregoing discussion indicates,
11 there is both testimonial and documentary evidence in the record supporting Plaintiff’s position.
12 However, Defendant has also pointed out evidence suggesting that the vehicle may have been
13 purchased and used primarily for business purposes. The parties’ competing evidence raises factual
14 disputes – including issues of credibility – which the Court cannot resolve. Accordingly, the Court
15 **DENIES** Defendant’s motion to dismiss. **This case shall proceed to trial on Plaintiff’s theory that**
16 **the vehicle was purchased and used primarily for personal purposes. As Plaintiff has**
17 **consistently represented throughout the course of briefing that the vehicle was for personal use,**
18 **Plaintiff shall be limited to that theory at trial (i.e., Plaintiff shall be precluded from arguing**
19 **that, in the alternative, the vehicle was primarily for business use and thus still protected under**
20 **the Song-Beverly Act).** Defendant may present evidence to refute Plaintiff’s position and arguing
21 that the vehicle was, in fact, purchased and used primarily for business purposes.

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² Defendant disputes this, arguing that the Department of Motor Vehicle records Plaintiff has provided are incomplete and actually prove that Plaintiff’s companies had more than five vehicles registered in California during the relevant period. Def. Suppl. Br., Dkt. No. 79 at 2-3.

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III. CONCLUSION

For the reasons set forth above, the Court **DENIES** Defendant's motion to dismiss (Dkt. No. 62).

By separate order, the Court will set a trial date and pre-trial conference in this matter.

IT IS SO ORDERED.

Dated: March 27, 2013



Maria-Elena James
United States Magistrate Judge