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6 **UNITED STATES DISTRICT COURT**
7 **NORTHERN DISTRICT OF CALIFORNIA**
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STEVE FERRARI, ET AL., Plaintiffs, vs. **MERCEDES BENZ USA, LLC, ET AL.,** Defendants.	CASE NO. 17-cv-00018-YGR **ORDER GRANTING MOTION OF SMI TO DISMISS FOR LACK OF PERSONAL JURISDICTION; GRANTING IN PART AND DENYING IN PART MOTIONS TO DISMISS FIRST AMENDED COMPLAINT WITHOUT LEAVE TO AMEND** Re: Dkt. Nos. 19, 22, 26, 27

United States District Court
Northern District of California

Plaintiffs Steve Ferrari, Mike Keynejad, Patricia Rubin, Hooshang Jowza, Celso Frazao, Renuka Narayan, Gertrud Frankrone, Ernest Salinas, Kalkhusan Sareen, Hossein Jalali, Ron Wolfe, Sohrab Rahimzadeh, Fred Grant, Ester Grant, Vincent Leung, Ken Wong, Jessica Langridge, Tony Nicolosi, Donald Lyang, Artur Semichev, John Diaz, Harold Fethe, and Raymond Gapasin, bring this action against defendants Autobahn, Inc. dba Autobahn Motors ("Autobahn"), Mercedes-Benz USA, LLC ("MBUSA"); Sonic Automotive, Inc. ("Sonic"); and Speedway Motorsports, Inc. ("SMI"). Plaintiffs bring the action on behalf of a putative class and allege claims for fraud; trespass to chattel; negligent misrepresentation; negligence; violation of California's False Advertising Law ("FAL"), Business & Professions Code section 17500; and violation of California's Unfair Competition Law ("UCL"), Business & Professions Code section 17200.

The action was filed in San Mateo Superior Court on December 20, 2016. MBUSA removed the action to this Court under the Class Action Fairness Act, 28 U.S.C. section 1453 *et seq*. Plaintiffs filed their First Amended Complaint on January 25, 2017, adding an additional claim for relief for "CPO" [certified pre-owned vehicle] fraud. (Dkt. No. 14 ["FAC"].) Because

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the claims in the FAC, aside from the CPO Fraud and trespass to chattel claim, were nearly identical to those alleged a prior action dismissed by this Court, *Ferrari, et al. v. Autobahn, Inc.*, *et al.*, Case No. 4:15-cv-04379-YGR, the instant action was related and reassigned to the undersigned.

Defendants have each filed a motion to dismiss on grounds of failure to state a plausible claim against them. Defendant SMI also moves under Rule 12(b)(1) of the Federal Rules of Civil Procedure on the grounds that the Court lacks personal jurisdiction over it. (Dkt. Nos. 19, 22, 26, 27.)

Having carefully considered the papers submitted[1] and the pleadings in this action, the evidence properly admissible in the context of these motions[2] and the matters judicially

[1] Defendant Autobahn's motion (Dkt. No. 26) and reply (Dkt. No. 42) contain copious footnotes in what appears to be nine-point font or smaller, in violation of Civil Local Rule 3-4(c)(2) [requiring 12-point standard font in all text, including footnotes]. The Court has not considered the material in those footnotes.

[2] In opposition to SMI's motion, plaintiffs submitted the declaration of attorney Herman Frank (Dkt. No. 32), attaching a number of exhibits, including excerpts of depositions and discovery taken in other cases. The vast majority of the exhibits have nothing to do with SMI's contacts with the jurisdiction. Exhibit G, which purports to explain counsel's basis for naming SMI as a defendant, attaches a copy of a printouts from www.zmax.com, indicating SMI is copyright holder for the webpage, and that zMax is "party of the Speedway Motorsports family." (*Id.* at ECF 125, 128.)

Plaintiffs submitted the declaration of John Diaz, captioned as a declaration in opposition to MBUSA's motion, but apparently addressed to SMI's motion. (Dkt. No. 33.) The declaration and exhibits are directed at a variety of topics including distribution of zMax, properties purportedly owned by third party O. Bruton Smith, and a proposed stipulated order in an FTC enforcement action against SMI in the Middle District of North Carolina. (*Id.* at ECF 51 [discussing whether defendants' actions would comply with the stipulated final order "if it is entered"].) The Court finds the Diaz declaration is inadmissible because it is: insufficient to lay a foundation or to authenticate the documents attached; replete with hearsay; and irrelevant to the question of SMI's contacts with this jurisdiction.

Plaintiffs also submitted declarations of Elliott Dan (Dkt. No. 36), Larry Dirksen (Dkt. No. 35), and Paul Grewal (Dkt. No. 34), all former employees of Autobahn. None of these declarations are addressed to the issue of SMI's contacts with this jurisdiction. The extrinsic evidence therein is not properly offered in connection with the 12(b)(6) motions. The Court therefore has not considered them in connection with the motions herein.

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noticeable[3], the pleadings and orders in the prior civil action, and for the reasons set forth below, the Court: (1) **GRANTS** the Motion of SMI to Dismiss on grounds of lack of personal jurisdiction; (2) **GRANTS IN PART AND DENIES IN PART, WITH LEAVE TO AMEND**, the motions of MBUSA, Autobahn and Sonic to dismiss under Rule 12(b)(6).

I. SMI'S MOTION TO DISMISS UNDER RULE 12(B)(1)

Defendant SMI has moved to dismiss the claims against it for lack of personal jurisdiction under Rule 12(b)(1). Federal courts ordinarily follow state law in determining the bounds of their jurisdiction over persons, looking to the state's long arm statute regarding service of summons. *See* Fed. Rule Civ. Proc. 4(k)(1)(A) (service of process effective to establish personal jurisdiction over defendant subject to jurisdiction in the state court where the district is located); *Daimler AG v. Bauman*, 134 S. Ct. 746, 753 (2014) (same). California's long-arm statute, in turn, permits exercise of personal jurisdiction to the fullest extent permitted by federal due process. *Id.* For purposes of federal due process, two types of personal jurisdiction exist: general jurisdiction (sometimes called "all-purpose") and specific jurisdiction (sometimes called "case-linked"). *Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco Cty.*, 137 S. Ct. 1773, 1779–81 (2017). "A court with general jurisdiction may hear *any* claim against that defendant, even if all the incidents underlying the claim occurred in a different State." *Id.* A court with only specific jurisdiction over a defendant is limited to hearing claims deriving from the facts that establish jurisdiction in the forum. *Id.*

A corporation is subject to general jurisdiction only in the states where it is incorporated or has its principal place of business. *Daimler AG*, 134 S.Ct. at 753, 761. Only in an exceptional case will "a corporation's operations in a forum other than its formal place of incorporation or principal place of business [ ] be so substantial and of such a nature as to render the corporation at

[3] Defendant MBUSA seeks judicial notice of orders, transcripts, and complaints filed in the prior federal action and in the state court action, *Maskay Inc. dba Eurotech v. Autobahn Motors, Inc. dba Autobahn Motorsports et al*. in the Superior Court of California for the County of San Mateo, No. CIV52559. (Dkt. No. 20.) Defendant SMI seeks judicial notice of documents filed in the prior federal court action. (Dkt. No. 25.) The requests are **GRANTED**. The Court takes judicial notice of the existence of those documents, but not the truth of the matters stated therein.

home in that State." *Id.* at 761, n.19; *see also Martinez v. Aero Caribbean*, 764 F.3d 1062, 1076 (9th Cir. 2014).

The Ninth Circuit applies a three-part test to determine whether a court has specific personal jurisdiction, taking into account whether: (1) the defendant has performed some act or consummated some transaction within the forum or otherwise purposefully availed himself of the privileges of conducting activities in the forum; (2) the claim arises out of or results from the defendant's forum-related activities; and (3) the exercise of jurisdiction is reasonable. *Bancroft & Masters, Inc. v. Augusta Nat. Inc.*, 223 F.3d 1082, 1086 (9th Cir. 2000). Plaintiffs bear the burden on the first two factors. *Boschetto v. Hansing*, 539 F.3d 1011, 1016 (9th Cir. 2008); *Sher v. Johnson*, 911 F.2d 1357, 1361 (9th Cir. 1990). Agency relationships may be relevant to the existence of specific jurisdiction, and "a corporation can purposefully avail itself of a forum by directing its agents or distributors to take action there." *Daimler AG*, 134 S.Ct. at 759 n.13 (citing *Asahi,* 480 U.S. at 112 (defendant's act of "marketing [a] product through a distributor who has agreed to serve as the sales agent in the forum State" may amount to purposeful availment)). However, if "a parent and a subsidiary are separate and distinct corporate entities, the presence of one . . . in a forum state may not be attributed to the other." *Holland Am. Line Inc. v. Wartsila N. Am., Inc.*, 485 F.3d 450, 459 (9th Cir. 2007) (passive website and advertising presence in a state does not establish personal jurisdiction).

Here, the evidence in the record does not support a finding of either general or specific jurisdiction over SMI in this Court. SMI has its headquarters in North Carolina, and is incorporated in Delaware. (Declaration of William R. Brooks, Dkt. No. 29 at ¶ 2.) SMI does not have any offices or employees in California and does not regularly conduct business in California. (*Id.* ¶ 3.) It is not registered to do business in California and has no agent for the service of process in California. (*Id.* ¶ 4.) SMI does not make, manufacture, or sell any product in California, including zMax, the oil-additive product that is at the center of many of plaintiffs' allegations in this action. (*Id.* at ¶¶ 8-9.) Rather, Oil-Chem Research Corporation ("Oil-Chem"), a wholly owned subsidiary of SMI and a separate legal entity, manufactures and markets zMax.

(*Id.* at ¶¶ 9-10.) The legally separate subsidiary's activities are irrelevant to the Court's jurisdiction over SMI.

Plaintiffs do not dispute these facts, but rather offer other facts which they contend establish personal jurisdiction over SMI. They contend that SMI is "connected" with a California company (MOC) that distributes zMAX; that bottles of zMAX include the statement "recommended by" SMI; and SMI is listed as holder of the copyright on the zmax.com website. None of these contacts is sufficient to find that SMI is subject to this Court's jurisdiction. Plaintiffs' arguments—that zMax is sold in California and regularly used by defendants Autobahn and Sonic in California—do not support specific jurisdiction in the face of evidence that SMI does not make or sell that product. Further, plaintiffs' assertion that SMI's CEO owned or owns property in California likewise does not support general or specific jurisdiction here.

Consequently, the motion of SMI to be dismissed for lack of jurisdiction is **GRANTED WITHOUT LEAVE TO AMEND**. The Court does not reach the additional pleading deficiencies raised by SMI.

II. MOTIONS OF DEFENDANTS MBUSA, AUTOBAHN, AND SONIC TO DISMISS UNDER RULE 12(B)(6)

A. Fraud Claims (First, Third, Fourth, and Fifth Claims for Relief)

Plaintiffs allege the following fraud-based claims for relief: (*i*) "CPO Fraud" or fraud by all defendants in the course of selling Certified Pre-Owned vehicles [First claim for relief]; (*ii*) false representations that genuine Mercedes Benz parts and accessories were used in repairs and service by Autobahn (third claim for relief); and (*iii*) false representations that genuine Mercedes Benz parts are superior to or longer-lasting than non-genuine parts (fourth claim for relief). Plaintiffs also allege a claim for negligent misrepresentation based upon the use of non-genuine parts (fifth claim for relief).

"The elements of a cause of action for fraud in California are: (a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity; (c) intent to defraud; (d) justifiable reliance; and (e) resulting damage." *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1126 (9th Cir. 2009) (internal quotations and citations omitted). "The elements of negligent

misrepresentation are (1) the misrepresentation of a past or existing material fact, (2) without reasonable ground for believing it to be true, (3) with intent to induce another's reliance on the fact misrepresented, (4) justifiable reliance on the misrepresentation, and (5) resulting damage." *Apollo Capital Fund, LLC v. Roth Capital Partners, LLC*, 158 Cal. App. 4th 226, 243 (2007). Federal Rule of Civil Procedure 9(b) requires that "a party must state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b). "Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally." *Id.* While a federal court will examine state law to determine whether the elements of fraud have been pleaded sufficiently to state a cause of action, Rule 9(b)'s specificity requirements apply to the circumstances of the fraud. *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1103 (9th Cir. 2003). Thus, "[a]verments of fraud must be accompanied by the who, what, when, where, and how of the misconduct charged." *Id.* at 1106 (internal quotations and citations omitted).

1. First Claim for Relief: Certified Pre-Owned (CPO) Vehicle Fraud

With respect to the CPO fraud claim, plaintiff Harold Fethe alleges that, in 2009, he purchased a certified pre-owned Mercedes-Benz vehicle from Autobahn, with a warranty covering the period up to September 23, 2011. (FAC ¶ 5.) He thereafter purchased an extended warranty, offered by a third party, which expired in December 2016. (*Id.* ¶ 5.) Fethe alleges that he obtained later obtained information indicating that, at some time prior to his purchase from Autobahn, Autobahn had placed the zMax oil additive in the car. (*Id.*¶ 5.) Fethe alleges that he attempted to obtain warranty repair of the damage done to his vehicle on account of the use of zMax, but that his claim was denied in November 2016 on the grounds that damage caused by oil additives was not covered. (*Id.*¶ 46.) Fethe alleges that, had he known about the use of zMax by Autobahn, he would not have purchased the vehicle from Autobahn. (*Id.*¶¶ 87, 101, 104, 107.) He alleges that he paid $2,000 to $3,000 more for the vehicle than one without a CPO designation, and that the use of zMax placed his warranty "in jeopardy" since damage due to use of non-genuine parts is not covered. (*Id.*¶¶ 87, 109.) Fethe seeks to represent a class of individuals who purchased CPO vehicles from Autobahn "in which zMax was placed, during the period 2004 -

present, and/or purchased [a] pre-owned vehicle from any dealership owned by Sonic Automotive." (*Id.*¶ 6.)

Plaintiffs allege that MBUSA, through its CPO program standards, sets certain inspection criteria, with factory-trained technicians reconditioning used vehicles using genuine Mercedes Benz parts to insure the vehicles perform to MBUSA's standards. Plaintiffs' allegations reference the MBUSA website, an MBUSA YouTube video regarding the CPO program, and an MBUSA CPO program guide setting forth these provisions. (*Id.*¶¶ 74-78, 82-83.) Plaintiffs allege that Autobahn, as an authorized dealership and agent of MBUSA, has intentionally used products not approved by MBUSA in reconditioning vehicles for CPO certification, including an oil additive called zMax, and other non-genuine Mercedes-Benz parts. (*Id.*¶¶ 84, 89.) Plaintiffs further allege that zMax is used in CPO cars conditioned by Autobahn at the direction of Sonic, Autobahn's parent company. (*Id.*¶ 92.) Plaintiffs contend that use of zMax is prohibited by MBUSA, citing this statement allegedly appearing on an MBUSA website:

> Up to now, Daimler AG has not approved any product that is allowed to be introduced or mixed into approve, read-formulated [*sic*] lubricants for engines, transmissions, or major assemblies in Mercedes-Benz vehicles as a special additive! The vehicle owner is solely responsible if special additives are used in lubricants! ***If damage occurs the legal warranty and guarantee claims may be limited.***

(*Id.*¶ 86, emphasis supplied.)[4]

As to Autobahn, plaintiffs contend they used non-genuine parts, contrary to the CPO program rules, and failed to provide customers with certification inspection reports as required by Vehicle Code section 11713.18. (*Id.*¶¶ 100, 102.) Plaintiffs assert that Autobahn deliberately withheld information about use of zMax and misrepresented compliance with the CPO program. (*Id.*¶ 103.) Plaintiffs argue that they reasonably and detrimentally relied on the misrepresentations

[4] Plaintiffs include allegations regarding the use of zMax as part of their CPO Fraud claim and their non-OEM parts claim. (*See* FAC ¶ 38 [there are two classes of victims, customers of Autobahn Motors who received non-OEM parts including zMAX during the repair process, and those who received non-OEM parts during the process of purchasing a CPO automobile].)

by Autobahn and were harmed by paying higher prices for CPO-designated vehicles and jeopardizing their warranties. (*Id.* ¶¶ 107, 108, 109.)

a. Autobahn & Sonic

Autobahn first argues that the CPO fraud claim is time-barred. Autobahn contends Fethe has alleged no basis for delayed accrual of the statute of limitations, such as that he could not have discovered the use of zMax sooner had he acted with diligence. The Court agrees that, with respect to the CPO Fraud claim, the FAC has not alleged when Fethe, the representative plaintiff on this alleged class claim, discovered the use of zMax in his CPO vehicle. *See Creditors Collection Serv. v. Castaldi*, 38 Cal. App. 4th 1039, 1044 (1995) (limitations period commences to run when the aggrieved party could have discovered the basis for the claim with an exercise of reasonable diligence).

The allegations of the FAC are ambiguous as to when he learned, or should have learned that zMax was used in his car and caused damage. While Fethe purchased the vehicle in 2009, he alleges: (1) he obtained a VMI report sometime after that, the VMI report did not indicate use of zMax (*Id.* ¶ 6); (2) some unspecified time later he learned that he needed "desludging" due to use of zMax; and (3) he was denied a warranty repair in December 2016. The motion of Autobahn to dismiss the CPO Fraud claim is **GRANTED WITH LEAVE TO AMEND** on statute of limitations grounds. Plaintiffs are given leave to amend to allege a basis for delayed discovery.

In its scattershot motion, Autobahn has also seeks to dismiss the CPO Fraud (and other fraud claims) on the grounds that the allegations do not meet the particularity requirements of Rule 9(b), are internally inconsistent, and fail to allege reliance, damages, or injury sufficiently. In connection with the CPO Fraud claim, Fethe alleges that his vehicle was damaged by use of a non-genuine/non-OEM product contrary to the CPO program requirements, that he paid more for the vehicle than he otherwise would have paid without the false CPO certification, and that his warranty did not cover the damage resulting from Autobahn's conduct. These allegations are not

conclusory or implausible on their face. The Court concludes that the allegations of the CPO Fraud claim are sufficiently particular,[5] and state a plausible basis for consequent damages.

As to Sonic, plaintiffs allege that it is liable for CPO fraud because it directed the use of zMax in all cars, and thereby aided and abetted the conduct of Autobahn in falsely asserting vehicles were CPO certified. (*Id.* ¶¶ 92, 112.) The allegations are sufficient to state the basis for Sonic's liability on this claim, to the extent plaintiffs can plead around the statute of limitations bar.

b. MBUSA

With respect to MBUSA, plaintiffs allege that since MBUSA chose to appoint Autobahn as its agent to implement the CPO program, it is charged with the knowledge of its agent. That is, MBUSA is charged with knowledge that the products used in reconditioning the cars did not comply with the CPO program's requirements, and was responsible for terminating dealerships that did not comply with those requirements. (FAC ¶¶ 93, 95.) Plaintiffs further contend that MBUSA should have been aware of Autobahn's practice because it should have received vehicle history reports, which would show use of non-approved products. (*Id.* ¶¶ 95, 96.) MBUSA argues that there is no allegation that any plaintiff relied on any MBUSA statement (such as a manual or ad) other than the CPO certification itself, and that all the actions inconsistent with the CPO program are alleged to have been taken by other defendants.

"[A] principal is liable to third parties ... for the frauds or other wrongful acts committed by [its] agent in and as a part of the transaction of" the business of the agency. *Daniels v. Select Portfolio Servicing, Inc.*, 246 Cal. App. 4th 1150, 1172 (2016), *review denied* (July 27, 2016) (quoting *Grigsby v. Hagler,* 25 Cal.App.2d 714, 715(1938).) Here, plaintiffs have alleged a

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[5] Autobahn incorrectly asserts that Rule 9(b) requires every element of a fraud claim, rather than just the circumstances of the fraud, to be pleaded with particularity. *See* Fed. R. Civ. P. 9(b) ("Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally."); *Vess*, 317 F.3d at 1103 (Rule 9(b) applies to allegations of the *circumstances* of the fraud); *Midwest Commerce Banking Co. v. Elkhart City Ctr.*, 4 F.3d 521, 524 (7th Cir. 1993) ("All Rule 9(b) required, however, was that Elkhart set forth the date and content of the statements or omissions that it claimed to be fraudulent. Elkhart was not required to go further and allege the facts necessary to show that the alleged fraud was actionable.")

plausible agency relationship between Autobahn and MBUSA as part of the CPO certification program. The Court further finds no merit to MBUSA's arguments that the fraud allegations are implausible on their face, or that plaintiffs have not alleged reliance or causation sufficiently. MBUSA's motion to dismiss the CPO fraud claim on the grounds stated is **DENIED**.

2. Third and Fifth Claims for Relief: Fraud and Negligent Misrepresentation Regarding Use of Non-Genuine/Non-OEM Parts

In their third and fifth claims for relief, plaintiffs allege that defendant Autobahn published false statements on its website indicating that it used (or, at times, "only used") genuine Mercedes-Benz parts in its services, and suggested in its repair manual that it always used genuine parts, in accordance with Mercedes-Benz manufacturer recommendations. (FAC ¶¶ 156-159.) Autobahn is also alleged to have represented falsely in printed booklets that zMax and "MOC" products are genuine Mercedes-Benz parts. (*Id.* ¶ 165.) Plaintiffs allege this conduct is misleading, violates the CPO guidelines, and violates California Vehicle Code section 11713.18 regarding certified pre-owned cars. Plaintiffs allege that they reasonably relied on that deceptive conduct in purchasing CPO vehicles and bringing vehicles to Autobahn for service.

a. Autobahn & Sonic

Autobahn's argument for dismissal of these claims turns mainly on its contention that use of non-OEM parts, including zMax, did not render any of its alleged statements false. Whether Autobahn's statements on its website (or printed booklets) were false or misleading constitutes a factual issue, not one that can be determined on the face of the pleadings.

Likewise, the Court finds entirely unpersuasive Autobahn's contention that the allegations of damage on account of overpaying for these non-genuine parts are contradicted by other allegations in the complaint regarding the false claims that genuine parts are superior. The allegation that genuine parts are "every bit as good" as the non-genuine parts does not undercut the allegation that plaintiffs were overcharged when they paid for genuine parts, but Autobahn instead used lower-priced non-genuine parts. Regardless of whether the parts actually perform the same, Autobahn's alleged practice of using cheaper parts billed at higher rates would be deceptive.

As to the remainder of Autobahn's arguments for dismissal—insufficiency of the allegations, failure to allege damages, lack of plausibility—the Court finds, as stated above, that Autobahn's arguments do not support dismissal. The allegations are sufficient to the "who, what, when, where, and how" of the misrepresentations, and plaintiffs allege reliance and damage resulting therefrom.

Sonic is again alleged to be liable for aiding and abetting the alleged fraudulent conduct by directing Autobahn to use the non-genuine parts in plaintiffs' and other customers' cars, and by concealing from plaintiffs that zMax and other products alleged are prohibited by MBUSA and not covered under the MBUSA warranty. (*Id.* ¶¶ 166, 167, 175, 182.) These allegations sufficiently state the basis for this claim against Sonic.

The motions of Autobahn and Sonic to dismiss the third and fifth claims for relief are **DENIED**.

b. MBUSA

MBUSA is alleged to be liable for the misrepresentations because it administers the CPO program and Autobahn acts as its agent. (*Id.* ¶¶ 162, 163.) While MBUSA is plausibly alleged to have an agency-principal relationship with Autobahn in connection with the CPO certification program, no such plausible agency relationship is alleged with respect to the non-OEM parts claim. There is no allegation indicating that Autobahn is acting as MBUSA's agent when it engaged in its regular automobile repair business. To the extent there is overlap between the non-genuine/non-OEM parts fraud claim and the CPO claim, plaintiffs have alleged the basis for MBUSA's liability, based on an agency relationship with Autobahn in the CPO program only. The Court reads the FAC as pleading separate, distinct fraud claims based on these two distinct factual scenarios. Plaintiffs have alleged no false statement or deceptive conduct by MBUSA in connection with the alleged OEM-parts fraud. Plaintiffs have not alleged an agency relationship with respect to run-of-the-mill repairs by Autobahn that would support imputing Autobahn's knowledge and actions to MBUSA. Thus, the Court finds that MBUSA's motion to dismiss the third and fifth claims for relief is **GRANTED** on these grounds.

3. *Fourth Claim for Relief: Longevity and Superiority Fraud*

In their fourth claim for relief, plaintiffs allege that MBUSA, Autobahn, and Sonic falsely stated that Mercedes Benz genuine parts have longer life than non-genuine parts. Plaintiffs allege that these claims are made by MBUSA in advertising brochures mailed to customers and on MBUSA's website. (*Id.* ¶ 196.) Plaintiffs allege Autobahn uses the MBUSA-provided content in its direct mailings and email advertising, which are authorized by its parent, Sonic. (*Id.* ¶ 196.)

MBUSA's advertising states that genuine parts provide "measurable differences" and are alleged to have included statements that certain genuine Mercedes-Benz parts: "can last 45% longer;" are "36% more effective;" "last at least 40,000 miles" as compared to others that "might need to be replaced at 12,000 miles;" "can provide up to 800,000 more wiping cycles" than other brands; or are otherwise superior to non-genuine parts. (*Id.* ¶ 197.) Plaintiffs allege these statements are materially false because the parts are made by the same manufacturers as the non-genuine parts, and the non-genuine parts perform as well in every way as the genuine parts. (*Id.* ¶¶ 200, 201.) MBUSA is alleged to know the statements are false, are being made to consumers, and are more than just inactionable puffery, because they include numerical designations supporting the claims of superiority.

MBUSA contends that plaintiffs' allegations as to the element of falsity are too conclusory, and do not provide sufficient facts as to why the statements are false. MBUSA argues the allegation that the same manufacturer makes the genuine and non-genuine parts does not plausibly support a claim that the parts are made to the same standards, or that the superiority statements made by MBUSA are false. MBUSA also argues that the advertising claims alleged are merely non-actionable promotional statements, and do not promise specific longevity or other quantified performance advantages over all competitor parts (or even specific competitor parts).

First, plaintiffs' allegations sufficiently identify the statements they contend are false, who made them, how and when. Second, the Court cannot determine, as a matter of pleading, that the statements are so vague or subjective as to be non-actionable, given that they offer specific numerical measures, even if the claims of superior longevity are slightly qualified by the words "can" or "up to." "Generalized, vague, and unspecified assertions constitute 'mere puffery' upon

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which a reasonable consumer could not rely, and hence are not actionable." *Anunziato v. eMachines, Inc.,* 402 F.Supp.2d 1133, 1139 (C.D.Cal.2005) (quoting *Glen Holly Entertainment, Inc. v. Tektronix Inc.,* 343 F.3d 1000, 1005 (9th Cir. 2003)). "While product superiority claims that are vague or highly subjective often amount to non[-]actionable puffery . . . misdescriptions of specific or absolute characteristics of a product are actionable." *Southland Sod Farms v. Stover Seed Co.,* 108 F.3d 1134, 1145 (9th Cir.1997). By contrast, "[a] specific and measurable advertisement claim of product superiority based on product testing is not puffery." *Id.* Here, MBUSA has couched the alleged misrepresentations in numerical terms. Whether the statements constitute "mere puffery" cannot be determined on the pleadings.

MBUSA further moves to dismiss the longevity and superiority fraud claim on the grounds that plaintiffs have not alleged reliance by any plaintiff that resulted in injury. The allegations of the fourth claim for relief are long on descriptions of the alleged falsity, but short on a statement of any consequent injury caused by plaintiffs' reliance on the statements. While plaintiffs allege that they were charged a higher OEM price when they received non-OEM products, and that non-OEM parts caused damage to their vehicles or their warranty coverage (FAC ¶¶ 203-208), they do not allege that they viewed or relied on the advertising targeted here *itself*, or that such reliance caused them any damage or injury. Consequently, MBUSA's motion to dismiss the fourth claim for relief is **GRANTED WITH LEAVE TO AMEND** to allow plaintiffs to allege, if possible, facts to establish reasonable reliance and resulting injury.

Because the allegations against Autobahn and Sonic on this claim are that Autobahn passed on these alleged longevity representations in its own advertising, at the direction of Sonic, knowing that the statements were false. However, plaintiffs have not alleged reliance on them, the motion to dismiss the claim against Autobahn and Sonic is likewise **GRANTED WITH LEAVE TO AMEND**.

B. Negligence Claim (Sixth Claim for Relief)

Plaintiffs allege a sixth claim for relief based on negligence. The negligence claim incorporates the fraud allegations and adds that defendants negligently concealed the true facts about use of non-OEM products. As to Autobahn and Sonic, they are alleged to have breach their

duty by "negligently and wrongfully marketing, distributing, selling, and placing zMAX into automobiles, knowing that in so doing, the manufacturer's certified pre-owned warranties, or such similar warranties issued by third parties, are thereby rendered void or voidable at the option of the warrantor negligently placed zMax into vehicles knowing the CPO warranties or other warranties would be rendered void or voidable on account of that conduct." (*Id.* ¶ 223.) MBUSA is alleged to be negligent because it knew, through VMI reports it received and the pendency of this litigation, that Sonic and Autobahn were selling zMax in a manner that would render MBUSA or other warranties void or voidable. Plaintiffs allege MBUSA had a duty to correct Sonic and Autobahn's conduct by virtue of their use of the Mercedes-Benz name to market zMax as if it were approved by MBUSA. (*Id.* ¶¶ 224-27.)

First, negligent concealment is not a cognizable claim for relief. *See Pooshs v. Phillip Morris USA, Inc.*, No. C 04-1221 PJH, 2013 WL 2252471, at *9 (N.D. Cal. May 22, 2013) (citing California authorities holding that "[a]bsent a statutory authorization, or a special relationship between the parties creating a duty to disclose, there is no liability for implied representations, or for negligent nondisclosure or concealment").

Second, plaintiffs fail to allege the elements of a negligence claim as to Autobahn, Sonic, and MBUSA. "To prevail on their negligence claim, plaintiffs must show that [each defendant] owed them a legal duty, that it breached the duty, and that the breach was a proximate or legal cause of their injuries." *Merrill v. Navegar, Inc.*, 26 Cal. 4th 465, 476 (2001). Plaintiffs do not allege the duty and breach elements for Autobahn and Sonic distinctly. Nor have plaintiffs alleged a plausible basis for claiming MBUSA had a duty to exercise control over Autobahn's and Sonic's conduct.

Based on the foregoing, as to Autobahn, Sonic, and MBUSA, the motion to dismiss the sixth claim for relief is **GRANTED WITH LEAVE TO AMEND** to allege each of the elements of a cognizable negligence claim against each defendant.

C. Trespass to Chattel Claim (Second Claim for Relief)

Plaintiffs allege a claim for trespass to chattel against Autobahn and Sonic (not MBUSA). Plaintiffs allege that, by repeatedly using non-approved/non-genuine products in repairs and

service, they caused damage to plaintiffs' automobiles because use of products such as zMax and non-approved brake fluid damaged cars and put warranties (including warranties under the CPO program) in jeopardy, as well as resulting in overcharges to plaintiffs for non-genuine parts. (*Id.* ¶¶ 132, 134-39) Trespass to chattel is a tort theory under California law related to the concept of conversion, the elements of which are: plaintiff's possession of the property; defendant's intentional interference with the plaintiff's use of the property; lack of plaintiff's consent; and damages. *Thrifty-Tel, Inc. v. Bezenek*, 46 Cal. App. 4th 1559, 1566-67 (1996). Such a claim is subject to a three-year statute of limitations. Cal. Code Civ. Proc. § 338(c) ("action for taking, detaining, or injuring any goods or chattels").

Autobahn contends this claim must be dismissed for having been filed outside the applicable statute of limitations, as well as for failure to allege a plausible claim or a concrete injury. With respect to the statute of limitations argument, although plaintiffs include allegations regarding the CPO warranty within this claim, the claim more generally alleges that Autobahn placed non-genuine products in plaintiffs' cars without their consent or knowledge, causing them damage. Plaintiffs list a number of different kinds of parts they allege were placed in plaintiffs' vehicles repaired by Autobahn. The use of these parts is alleged to have continued to the present, and is alleged to have been discovered by plaintiffs in mid-2015 at the earliest. (FAC ¶¶ 59-65.) The Court finds these allegations sufficient to state a plausible basis for delayed accrual of the statute of limitations such that the claim is timely.

Autobahn further argues that the claim should be dismissed for failure to allege a plausible claim or a basis for injury in fact. The Court finds the allegations sufficient on both points.

Sonic is alleged to be liable on this claim for aiding and abetting the violation by its direction to Autobahn to use zMax, knowing that zMax and other non-approved products would harm the vehicles. (FAC ¶¶ 138, 143, 144, 148.) These allegations are sufficient to state a basis for Sonic's liability on this claim.

The motion of Autobahn and Sonic to dismiss the second claim for relief is **DENIED**.

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D. UCL and FAL Claims (Seventh and Eighth Claims for Relief)

The FAL and UCL claims both incorporate and are derivative of plaintiffs' fraud claims, alleging that the fraudulent conduct constitutes false and misleading advertising. They seek injunctive relief to prevent defendants from continuing to make false advertisements and to correct past false statements. Because, as stated herein, the motions to dismiss some of the fraud-based claims are granted with leave to amend as to MBUSA, Autobahn, and Sonic, the motions to dismiss the UCL and FAL claims are likewise **GRANTED WITH LEAVE TO AMEND** to permit plaintiffs' to amend the allegations to conform to the other claims from which they derive.

Autobahn also argues that, to the extent plaintiffs are seeking injunctive relief, they have no standing because they can no longer be misled by the alleged false advertising statements. The Court does not find this argument persuasive. To decide that plaintiffs who allege they learned a defendant's advertising statements are false do not have standing to bring a claim for false advertising on behalf of other consumers would undermine the objectives of these California consumer protection statutes. Moreover, when a consumer learns that one representation was false, this does not eliminate the question about whether the defendant will make future, similar misrepresentations to that consumer. *See Ries v. Arizona Beverages USA LLC*, 287 F.R.D. 523, 533 (N.D. Cal. 2012) ("were the Court to accept the suggestion that plaintiffs' mere recognition of the alleged deception operates to defeat standing for an injunction, then injunctive relief would never be available in false advertising cases, a wholly unrealistic result."); *Lilly v. Jamba Juice Co.*, No. 13-CV-02998-JST, 2015 WL 1248027, at *3 (N.D. Cal. Mar. 18, 2015) (collecting cases). The motion to dismiss, to the extent made on those grounds, is **DENIED**.

III. CONCLUSION

Accordingly, the Motion to Dismiss SMI for lack of personal jurisdiction under Rule 12(b)(1) is **GRANTED WITHOUT LEAVE TO AMEND**. Defendant Speedway Motorsports, Inc. is **DISMISSED**.

With respect to the Motions of MBUSA, Autobahn, and Sonic to Dismiss under Rule 12(b)(6), the Court **ORDERS** as follows—

1. MBUSA's motion is **GRANTED IN PART AND DENIED IN PART**:

On the first claim for relief, the motion is **DENIED** on the grounds of failure to allege a false or misleading statement attributable to MBUSA.

On the third and fifth claims, the motion is **GRANTED WITH LEAVE TO AMEND** to allege the basis for liability against MBUSA.

On the fourth claim, the motion is **GRANTED** on the grounds that the claim does not sufficiently allege reliance and injury. However, the plaintiffs have satisfactorily alleged the nature of the misrepresentations and that they are actionable, such that the other grounds argued are **DENIED**.

On the sixth claim, the motion is **GRANTED WITH LEAVE TO AMEND** to permit plaintiffs to allege the elements of cognizable negligence claim, including a basis for claiming MBUSA had a duty to exercise control over Autobahn's and Sonic's conduct.

On the derivative seventh and eighth claims, the motion is **GRANTED WITH LEAVE TO AMEND** to allege the basis for MBUSA's liability, consistent with the fraud-based claims against it.

2. Autobahn's and Sonic's motions are **GRANTED IN PART AND DENIED IN PART**:

On the first claim for relief, the motion is **GRANTED WITH LEAVE TO AMEND** on statute of limitations grounds only, as stated herein. The allegations otherwise are sufficient to state a claim for fraud.

On the second, third, and fifth claims, the motion is **DENIED**.

On the fourth claim, the motion is **GRANTED WITH LEAVE TO AMEND** on the grounds that plaintiffs have not sufficiently alleged reliance or injury.

On the sixth claim, the motion is **GRANTED WITH LEAVE TO AMEND** to permit plaintiffs to allege the elements of cognizable negligence claim, including the basis for claiming duty and breach, as to Autobahn and Sonic.

On the derivative seventh and eighth claims, the motion is **GRANTED WITH LEAVE TO AMEND** to allege the basis for these defendants' liability, consistent with the fraud-based claims

against them. However, the motion is **DENIED** on the additional grounds of lack of standing for prospective relief, raised by Autobahn.

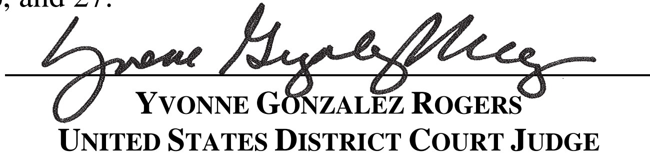
Plaintiffs shall file their amended complaint no later than **August 8, 2017**. Plaintiffs' shall lodge with the Court a redline document comparing the original to the amended complaint at the time of its filing.

Defendants MBUSA, Autobahn, and Sonic shall file their responses 14 days thereafter. Defendants are advised that they may not renew arguments rejected in this Order without a proper basis for so doing.

IT IS SO ORDERED.

This terminates Docket Nos. 19, 22, 26, and 27.

Dated: July 21, 2017



YVONNE GONZALEZ ROGERS
UNITED STATES DISTRICT COURT JUDGE

United States District Court
Northern District of California