
PARTIES/ATTORNEYS

Case No. 23CV04673

Plaintiff	Jeannie Zoppo Enrique Ochoa Sanchez	Tionna Grace Carvalho Daniel Law Jacob Lister Strategic Legal Practices
Defendant	Ford Motor Co. Jim Vreeland Ford	Michael D. Mortenson Craig A. Taggart David M. Keithly Chen Fei Liu Mortenson Taggart Adams LLP

Case No. 24CV00013

Plaintiff	Jeannie Zoppo Enrique Ochoa Sanchez	Tionna Grace Carvalho Daniel Law Jacob Lister Strategic Legal Practices
Defendant	Ford Motor Co. Jim Vreeland Ford	Michael D. Mortenson Craig A. Taggart David M. Keithly Chen Fei Liu Mortenson Taggart Adams LLP

TENTATIVE RULING

The demurrer is overruled. Defendant is ordered to answer the first amended complaint within 20 days.

The court directs the parties to refrain from filing motions that are unlikely to advance these cases in any substantive way.

History of Case No. 23CV04673

According to the complaint, plaintiffs Jeannie Zoppo and Enrique Ochoa Sanchez (plaintiffs) purchased a new 2020 Ford Expedition on February 19, 2021. They allege it suffered from a transmission defect and that they delivered the vehicle to Jim Vreeland Ford for repair on at least one occasion. The court sustained a demurrer to the original complaint and the amended complaint was filed on February 26, 2024. It alleges the following causes of action against defendant Ford

Motor Company: (1) violation of Song-Beverly Consumer Warranty Act (Song Beverly Act) [breach of express warranty]; (2) violation of Song-Beverly Act [failure to commence repairs in a reasonable time]; (3) violation of Song-Beverly Act [failure to make available to authorized service and repair facilities sufficient service literature and replacement parts to effect repairs during the express warranty period]; (4) violation of implied warranty of merchantability; and (5) fraudulent inducement-concealment.

Defendant Ford Motor Company filed its demurrer to the fifth cause of action on March 18, 2024. Opposition was timely filed on April 11, 2024. On April 24, 2024, the court overruled the demurrer. Answer to the first amended complaint was filed on April 29, 2024.

History of Case No. 24CV00013

According to the amended complaint, plaintiffs Jeannie Zoppo and Enrique Ochoa Sanchez (plaintiffs) purchased a 2019 Ford Expedition on January 2, 2020. They allege it suffered from transmission defects, and that they delivered the vehicle to for repair on at least three occasions.

The amended complaint was filed on March 13, 2024. Plaintiffs allege the following causes of action against defendant Ford Motor Company: (1) violation of Song-Beverly Consumer Warranty Act (Song Beverly Act) [breach of express warranty]; (2) violation of Song-Beverly Act [failure to commence repairs in a reasonable time]; (3) violation of Song-Beverly Act [failure to make available to authorized service and repair facilities sufficient service literature and replacement parts to effect repairs during the express warranty period]; (4) violation of implied warranty of merchantability; (5) negligent repair against Jim Vreeland; (6) Violation of the Magnuson-Moss Warranty Act; and (7) fraudulent inducement-concealment.

On April 17, 2024, Ford demurred to the 5th (negligent repair) and 7th (fraudulent inducement) causes of action. Opposition and reply have been filed. At the hearing on demurrer, the court (Judge Rigali) reassigned the case to this court and continued the demurrer to 7/09/2024 at 8:30 a.m. Judge Rigali further ordered: "Plaintiff's Counsel shall file a Notice of Related Cases." Plaintiff's counsel did not do so.

On July 9, 2024, both parties failed to make an appearance. The court ordered Case Nos. 23CV04673 and 24CV00013 related and continued the demurrer hearing in Case No. 24CV00013 to September 24, 2024. The hearing was further continued by court to September 25, 2024 and October 1, 2024. On October 1, 2024, the parties appeared and plaintiff's counsel indicated that she was unaware a

demurrer had been continued to that date. The matter was continued to November 6, 2024, with the directive that this tentative ruling be reposted for that date.

Legal Standards

A demurrer tests the legal sufficiency of a complaint. (*Donabedian v. Mercury Ins. Co.* (2004) 116 Cal.App.4th 968, 994.) Code of Civil Procedure §430.10(e) provides for a demurrer on the ground that a complaint fails to state a cause of action. A demurrer admits, provisionally for purposes of testing the pleading, all material facts properly pleaded. (*Tindell v. Murphy* (2018) 22 Cal.App.5th 1239, 1247.)

Pleadings and Demurrer

The court notes that plaintiffs in both Case No. 23CV04673 and this matter are identical, and they are represented by the same attorneys. The vehicles at issue are both Ford Expeditions, which were both purchased from Jim Vreeland Ford. The defects alleged appear to be the same. Defendant is represented by the same attorney in both cases. The demurrer to each complaint raises the same issues with fundamentally the same arguments, as are the arguments raised in opposition.

The court heard demurrers to both the initial complaint and to the first amended complaint in Case No. 23CV04673. The parties are thus both well-aware of the likely outcome of this demurrer.

The court directs the parties to refrain from filing motions that are unlikely to advance these cases in any substantive way.

5th (Fraudulent Inducement-Concealment) Cause of Action

(a) Economic Loss Rule

Ford argues that plaintiff's claim is barred by the economic loss rule. This argument was raised in related Case No. 23CV04673 by demurrer to the complaint and again by demurrer to the First Amended Complaint. It was rejected both times. (See Notice of Ruling dated 1/31/24; Minute Order 4/24/24.) The court likewise rejects it here and notes that after the filing of this demurrer, the California Supreme Court resolved the issue as follows:

“Under California law, may a plaintiff assert a tort claim for fraudulent concealment arising from or related to the performance of a contract? [] The answer to the question is a qualified yes. A plaintiff may assert a fraudulent concealment cause of action based on conduct occurring in the course of a contractual relationship if the elements of the claim can be established

independently of the parties' contractual rights and obligations, and the tortious conduct exposes the plaintiff to a risk of harm beyond the reasonable contemplation of the parties when they entered into the contract.”

(*Rattagan v. Uber Technologies, Inc.* (Aug. 22, 2024, No. S272113) ___ Cal.5th ___ [2024 WL 3894629, at *1].)

“[T]hat independence is present in the case of fraudulent inducement (whether it is achieved by intentional concealment or by intentional affirmative misrepresentations), because a defendant's conduct in fraudulently inducing someone to enter a contract is separate from the defendant's later breach of the contract or warranty provisions that were agreed to.” (*Dhital v. Nissan North America* (2022) 84 Cal.App.5th 828, 843, review granted February 1, 2023, S277568, request for depublication denied.)¹

The demurrer based on the economic loss rule is denied.

(b) Failure to Plead Sufficient Facts

In order to state a claim for concealment (a form of deceit, which in turn is a subspecies of fraud), plaintiff must allege specific facts to support the following elements: (1) defendant concealed or suppressed a material fact; (2) defendant had a duty to disclose the fact to plaintiff; (3) defendant intentionally concealed or suppressed the fact with the intent to defraud plaintiff; (4) plaintiff was unaware of the fact and would not have acted as they did had they known of the concealed or suppressed fact; and (5) plaintiff was damaged as a result of the concealment. (*Marketing West, Inc. v. Sanyo Fisher (USA) Corp.* (1992) 6 Cal.App.4th 603, 12–613; CACI No. 1901.) Every element of a fraud cause of action must be alleged both factually and specifically. (*Cooper v. Equity General Insurance* (1990) 219 Cal.App.3d 1252, 1262.) Defendant challenges whether plaintiffs adequately alleged concealment or defendant’s duty to disclose.

These arguments were raised jot for jot against the original complaint in related Case No. 23CV04673. The court once again overrules these arguments.

i. Concealment

Ford asserts that plaintiff failed to plead the defect that was allegedly concealed. The Complaint identifies the defect as a “Transmission Defect.” (FAC, ¶ 47.) It alleges a history of known transmission issues related to 10R80 transmissions (FAC, ¶ 50-58); that a 10R80 transmission was installed in Plaintiff’s

¹ On February 1, 2023, the Cal. Supreme Court granted the petition for review in the *Dhital* case, deferred further action pending consideration and disposition in *Rattagan*, and denied the request for depublication of the opinion. No further action has been taken on the *Dhital* appeal since the *Rattagan* opinion was filed.

vehicle (FAC ¶¶ 50, 54); and that “vehicles equipped with a 10R80 automatic transmission may exhibit a harsh engagement/harsh shift/delayed shift...This may be due to incompatibility of the adaptive calibration to adapt to hardware wear-in over time.” (FAC, ¶ 54.) The FAC also states that on December 28, 2021, plaintiffs took the vehicle in for repair with complaints that “the transmission clunks when downshifting from 4th to 3rd” (FAC, ¶ 43); that on February 28, 2022, plaintiffs took the vehicle in for repair with complaints that of transmission problems downshifting from 4th to 3rd and from 3rd to 2nd (FAC, ¶ 44); and on March 17, 2023 with complaints that the transmission kicked when shifting gears. (FAC, ¶ 45.)

Defendants argue that “[n]one of these allegations state what the defect is, let alone the defect in the subject vehicle at issue in this case.” The court disagrees. Defendants cite one California case in support of their argument: *Santana v. FCA US LLC* (2020) 56 Cal.App.5th 334, 345. In that case, the court held that “‘The very existence of a warranty presupposes that some defects may occur. Thus, the occurrence of a few defects that . . . mostly involved vehicles Santana did not own, is not enough to demonstrate an intent to conceal a defect . . .’” This case was appealed after trial on the basis there was no substantial evidence of fraud. It was not a pleading case and is therefore of no value to determine whether the complaint has been properly alleged.

The remaining cases cited are federal district court cases. The federal district courts are governed by different rules when it comes to review of a pleading for sufficient particularity than are California courts. “[W]hile a federal court will examine state law to determine whether the elements of fraud have been pled sufficiently to state a cause of action, the Rule 9(b) requirement that the circumstances of the fraud must be stated with particularity is a federally imposed rule.” (*Vess v. Ciba-Geigy Corp. USA* (9th Cir. 2003) 317 F.3d 1097, 1103; see also *Newberry v. Silverman* (6th Cir. 2015) 789 F.3d 636, 645; *Arnold & Assocs., Inc. v. Misys Healthcare Systems* (D AZ 2003) 275 F.Supp.2d 1013, 1028.) Moreover, unpublished federal district court cases are not binding on this court, although they may be of persuasive value. (*Balsam v. Trancos, Inc.* (2012) 203 Cal.App.4th 1083, 1100—“While not binding on us, a nonpublished federal district court case can be citable as persuasive authority.”)

The court is not persuaded that the federal district court cases adequately describe the requirements for specific factual pleading in California, at least in this context. One purpose of the specificity requirement is to ‘furnish the defendant with certain definite charges which can be intelligently met.’” (*Committee on Children's Television, Inc. v. General Foods Corp.* (1985) 35 Cal.3d 197, 216.) California authority provides that the specificity requirement is relaxed “when it appears from the nature of the allegations that the defendant must necessarily possess full information,” or “when the facts lie more in the knowledge of the opposing parties.” (*Alfaro v. Community Housing Improvement System & Planning Assn., Inc.* (2009)

171 Cal.App.4th 1356, 1384-85, internal quotations omitted; *Tarmann v. State Farm Mutual Auto-Mobile Ins. Co.* (1992) 2 Cal.App.4th 153, 158.) The details are properly the subject of discovery. (*Alfaro* at 1385.) The court notes that Ford is the party with superior knowledge about the inner workings of the 10R80 transmission and therefore the cause of any alleged transmission defect. Plaintiff's allegations are sufficient at the pleading stage to give notice about the defect under the authority of *Committee on Children's Television, Inc.*, and progeny. In fact, nothing in the federal district court authority relied upon by defendant addresses California's gloss on the specificity pleading requirement.

Ford argues that plaintiff failed to adequately allege where the omitted information should or could have been revealed by Ford and failed to identify the requisite representative samples of advertisements, offers, or other representations by Ford that plaintiff relied upon to make his purchase. This requirement is, again, taken from federal district court cases. (*In re Ford Motor Co. DPS6 Powershift Transmission Products Liability Lit.* (C.D. Cal., 2019) 2019 WL 3000646, at *7; *Tapia v. Davol, Inc.* (S.D. Cal. 2015) 116 F. Supp. 3d 1149, 1163; *Erickson v. Boston Scientific Corp.* (C.D. Cal. 2011) 846 F.Supp.2d 1085, 1092.) The earliest case in which this requirement is stated is *Marolda v. Symantec Corp.* (N.D. Cal. 2009) 672 F.Supp.2d 992, 1002. The *Marolda* court cites no authority in support of this proposition from either federal or state law.

As these requirements developed in the federal district court under its own procedural requirement for particularity rather than in California state court, it is not dispositively relevant. California courts acknowledge that the particularity requirement is more directly suited to affirmative misrepresentations. “‘How does one show ‘how’ and ‘by what means’ something didn't happen, or ‘when’ it never happened, or ‘where’ it never happened?” (*Alfaro v. Community Housing Improvement System & Planning Assn., Inc.* (2009) 171 Cal.App.4th 1356, 1384.) Plaintiff's allegations are sufficient at the pleading stage under existing California precedent.

ii. Duty to Disclose

“There are ‘four circumstances in which nondisclosure or concealment may constitute actionable fraud: (1) when the defendant is in a fiduciary relationship with the plaintiffs; (2) when the defendant had exclusive knowledge of material facts not known to the plaintiffs; (3) when the defendant actively conceals a material fact from the plaintiffs; and (4) when the defendant makes partial representations but also suppresses some material facts.’” (*LiMandri v. Judkins* (1997) 52 Cal.App.4th 326, 336 [citation omitted]; *Bigler-Engler v. Breg, Inc.* (2017) 7 Cal.App.5th 276, 310–311[.]

Where, as here, a fiduciary relationship does not exist between the parties, only the latter three circumstances may apply. These three circumstances, however,

“presuppose[] the existence of some other relationship between the plaintiff and defendant in which a duty to disclose can arise.” (*Bigler-Engler v. Breg, Inc.*, *supra*, 7 Cal.App.5th at 311 at pp. 336–337.) “A duty to disclose facts arises only when the parties are in a relationship that gives rise to the duty, such as ‘seller and buyer, employer and prospective employee, doctor and patient, or parties entering into any kind of contractual arrangement.’” (*Shin v. Kong* (2000) 80 Cal.App.4th 498, 509, 95 Cal.Rptr.2d 304.)

A duty to disclose may arise as a result of a transaction between the parties. However, the transaction “must necessarily arise from direct dealings between the plaintiff and the defendant; it cannot arise between the defendant and the public at large.” (*Bigler-Engler* at 312 [manufacturing defendant sold medical devices to the doctor defendant several years before the plaintiff rented one of the manufacturer's devices from the doctor's office; manufacturing defendant had no contact with the plaintiff, did not know plaintiff was a potential user of their products or used the device, and did not derive any direct monetary benefit from the plaintiff's rental of the device].)

Ford argues that plaintiff has failed to allege a transactional relationship. The *Dhital* court, however, concluded that the allegations that plaintiffs bought the car from a Nissan dealership, that Nissan backed the car with an express warranty, and that Nissan's authorized dealerships were the manufacturer's agents for the purpose of sale were sufficient to support the existence of a buyer-seller relationship between the parties. (*Dhital v. Nissan North America, Inc.*, *supra*, 84 Cal.App.5th at 845.)² In light of those allegations, the court “decline[d] to hold that plaintiffs' claim was barred on the ground there was no relationship requiring Nissan to disclose known defects.” (*Id.*) Plaintiffs allege: “The Subject Vehicle was purchased from Jim Vreeland Ford, Defendant FMC's authorized dealership, where it was a dealer-owned demonstrator.” (FAC, ¶ 27.) It also alleges that the vehicle is backed by an express warranty (¶ 28), and that the dealership is Ford's authorized retail dealership. (¶ 27.) Thus, a transactional relationship is adequately alleged.

The demurrer based on the failure to plead sufficient facts is overruled.

² Federal district courts agree: *Wieg v. General Motors LLC* (N.D. Cal., 2023) 2023 WL 7393017, at *5 [“The Court finds that dismissal as a matter of law would be inappropriate at this stage. The relationship between the ‘authorized dealer’ from whom plaintiffs bought the Bolt and GM is a factual matter, and all inferences must be drawn in favor of plaintiffs.”]; *Scherer v. FCA US, LLC* (S.D. Cal. 2021) 565 F.Supp.3d 1184, 1194 [“The Plaintiffs do present a contractual relationship with Defendant, because they entered into a warranty agreement. Accordingly, this contractual relationship or transaction gives rise to a duty to disclose.”]; see also *In re Ford Motor Co. DPS6 Powershift Transmission Products Liability Lit.* (C.D. Cal., 2019) 2019 WL 3000646, at *6 [“Here, the Quintero and Pedante Complaints allege that Ford directly markets its vehicles to consumers and communicates with consumers through the authorized dealerships from whom Plaintiffs did purchase their vehicles. See, e.g., Pedante Compl. ¶¶ 70-71. Although these allegations are thin, the Court finds that they plausibly establish, at this stage, a sufficient threshold relationship from which a duty can arise.”].

6th (Negligent Repair) Cause of Action

Defendant argues plaintiffs' cause of action for negligent repair fails to plead sufficient facts to state a claim because (1) it is barred by the economic loss rule and (2) fails to sufficiently plead damages. In Case No. 23CV04673, the court sustained a demurrer to an identical negligent repair cause of action, finding the cause of action to be barred by the economic loss rule. (See Case No. 23CV04673, Minute Order dated 1/17/23.) The opposition to this demurrer raises no new arguments. There is no reason for the court to revisit its earlier ruling.

The demurrer to this cause of action is overruled.

Defendant is ordered to answer the first amended complaint within 20 days.