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**PARTIES/ATTORNEYS**

Plaintiff	Luis Rivera	Strategic Legal Practices, APC  Tionna Grace Carvalho James L. Carroll
Defendant	General Motors LLC	Erskine Law Group, PC  Mary Arens McBride, Esq. Xylon Quezada, Esq.

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**RECOMMENDATION**

For all the reasons discussed below, the demurrer to the second amended complaint is overruled. The motion to strike is denied.

The parties are instructed to appear at the hearing for oral argument. Defendant is instructed to be prepared to argue why *Anderson v. Ford Motor Co.* (2022) 74 Cal.App.5th 946 is not dispositive of its motion to strike.

Appearance by Zoom Videoconference is optional and does not require the filing of Judicial Council form RA-010, Notice of Remote Appearance. (See Remote Appearance (Zoom) Information | Superior Court of California | County of Santa Barbara.)

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According to the FAC, on September 12, 2020, plaintiff Luis Rivera entered into a warranty contract with defendant General Motors for a Certified Pre-Owned 2017 GMC Sierra. On or about January 5, 2023, plaintiff presented the Subject Vehicle to Defendant's authorized repair facility with various concerns, including transmission (jerking) concerns. Plaintiff has experienced symptoms of the Vehicle's defects. Plaintiff has experienced: 1) the Vehicle shuddering and jerking between 50 – 60 MPH, 2) the grill shutter malfunctioning, 3) the radio screen going black and losing all functionality. On April 3, 2024, plaintiff filed his first amended complaint for: (1) failure to replace the vehicle or make restitution (Civ. Code, § 1793.2, subd. (d)); (2) failure to conform vehicle within 30 days (Civ. Code, § 1793.2, subd. (b)); (3) failure to make available to its authorized service facility sufficient literature and parts to effect repairs during the express warranty period (Civ. Code, §1793.2, subd.

(a)(3)); (4) breach of the implied warranty of merchantability; and (5) fraudulent inducement-concealment.

### Demurrer

GM filed a demurrer on May 15, 2024, to the fifth cause of action for fraudulent inducement-concealment on the basis that it is barred by the applicable statute of limitations, it failed to state sufficient facts to support the claim, and it failed to allege a transactional relationship giving rise to a duty to disclose. On July 16, 2024, the court sustained the demurrer with leave to amend on the basis that plaintiffs failed to sufficiently allege a transactional relationship with defendant, or that the seller had special “reason to expect” that the fraud will be passed onto subsequent purchasers. As such, plaintiffs had not alleged a duty to disclose, a necessary element in a fraudulent concealment cause of action. The court expressly overruled all other bases for the demurrer.

The Second Amended Complaint (SAC) was filed on July 26, 2024. GM demurred on September 13, 2024, asserting all the same arguments against the second amended complaint as were asserted against the first amended complaint. As no new arguments have been asserted in support of the bases that have previously been overruled, the court thus overrules those arguments again and for the same reasons expressed previously. (See 7/16/24 M.O.)

The only remaining issue is whether plaintiffs have adequately pled a transactional relationship with defendant, and the court finds that they have.

GM argues that plaintiff has failed to allege a transactional relationship. The court in *Dhital v. Nissan N. Am., Inc.* (2022) 84 Cal.App.5th 828, 843-44 (review granted) 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.) 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’ similarly allege that they bought the Subject Vehicle was purchased at GMC Diamond Hills in Costa Lake, CA (GM’s authorized dealer) (SAC, ¶ 6); that GM backed the car with an express warranty (SAC, ¶ 80); and that Diamond Hills was GM’s agent for purposes of the sale (SAC, ¶ 80.) A sufficient relationship has been alleged under this authority.

For these reasons, the demurrer to the second cause of for fraudulent inducement-concealment is overruled.

### Motion to Strike

GM argues that the punitive damages claim must be stricken because (1) Plaintiff has not pled a viable fraud claim or any other cause of action that can support a claim for punitive damages; and (2) plaintiff cannot recover both punitive damages and civil penalties under Song-Beverly. The first ground can be easily dealt with, as the court has found the fraud cause of action to be adequately pled.

The Song-Beverly Act provides that, for a willful violation, in addition to actual damages, a buyer may recover “a civil penalty which shall not exceed two times the amount of actual damages ...” (Civ. Code, § 1794, subd. (c).) It further provides: “The remedies provided by this chapter are cumulative and shall not be construed as restricting any remedy that is otherwise available ...” (Civ. Code, § 1790.4.) This suggests that both punitive damages and civil penalties are available.

However, case law holds this is unconstitutional to the extent the statutory penalty penalizes “essentially the same conduct as an award of punitive damages. (*Fassberg Construction Co. v. Housing Authority of City of Los Angeles* (2007) 152 Cal.App.4th 720, 759-760—“if a defendant is liable for a statutory penalty ... the award is punitive in nature, and the award penalizes essentially the same conduct as an award of punitive damages[. t]he plaintiff cannot recover punitive damages in addition to that recovery but must elect its remedy...”.) The key question is thus whether the statutory penalty and the award of punitive damages “penalizes essentially the same conduct ...” (*Fassberg Construction Co. v. Housing Authority of City of Los Angeles*, *supra*, 152 Cal.App.4th at pp. 759-760.)

*Anderson v. Ford Motor Co.* (2022) 74 Cal.App.5th 946 (*Anderson*) considered a similar fact pattern as is alleged here. The court concluded that the statutory penalty and the award of punitive damages did not penalize the same conduct. *Anderson* was a case against Ford arising out of alleged defects in the 6.0L engine. (*Id.* at pp. 950-959.) There, Ford argued that the plaintiffs could not recover both a statutory penalty under the Song-Beverly Act and punitive damages. (*Id.* at pp. 962-963.) The appellate court disagreed because “the punitive damages and statutory penalties were based on different conduct that took place at different times. The punitive damages were based on conduct underlying the fraud ... cause[ ] of action and took place before the sale. The civil penalty was based on defendant's post-sale failure to comply with its Song-Beverly Act obligations to replace the vehicle or make restitution when reasonable attempts to repair had failed.” (*Id.* at p. 966; see also *id.* at p. 971.)

It rejected Ford's argument that “the same conduct” should be defined in terms of the plaintiffs' primary right. (*Anderson*, *supra*, 7 Cal.App.5th at pp. 968-969.) “ ‘The primary right theory has a fairly narrow field of application’ ” — namely the field of *res judicata*. (*Id.* at p. 969.) “ ‘[T]he primary right must also be

distinguished from the remedy sought .... '[M]ultiple remedies may be available to vindicate a single primary right.' [Citation.]" (*Ibid.*) Rather, "the appropriate inquiry should be focused on the underlying conduct." (*Anderson, supra*, at p. 965.) "[T]he recovery of both punitive damages and civil penalties is prohibited when the underlying conduct for both remedies is the same conduct, i.e., identical conduct." (*Id.* at pp. 970-971.)

Finally, it also rejected Ford's argument that the plaintiffs had relied on the same evidence to prove "a pattern and practice of misconduct" constituting both fraud and a Song-Beverly violation. (*Anderson, supra*, 7 Cal.App.5th at pp. 970-973.) "To be sure, the corporate communications were probative of Ford's culpability for its pre-sale conduct, the level of reprehensibility of that conduct, and the amount of punitive damages to be imposed. But the fact some of those communications may have also been probative of the willfulness of Ford's Song-Beverly Act noncompliance does not bar plaintiffs from both an award of punitive damages and civil penalties. [Citation.]" (*Id.* at p. 971.) "Ford simply cannot escape liability for both awards by virtue of the fact that it engaged in a pattern or practice of deceitful misconduct throughout the course of the discrete events and conduct involved here." (*Id.* at p. 973.)

GM cites at length from *Troensegaard v. Silvercrest Industries, Inc.* (1985) 175 Cal.App.3d 218. In that case, plaintiff Gertrude Troensegaard, a widow, 82 years of age, on or about October 25, 1982, purchased a mobilehome manufactured by defendant Silvercrest Industries. The purchase was attended by Silvercrest's express warranty. Soon after moving into the mobilehome, plaintiff noticed an unpleasant odor therein. She began to feel "very sick," and she developed headaches, eye, nose and throat irritation. After complaining to the retailer, Silvercrest employed a qualified engineer to test the home, which found the levels of formaldehyde to be high enough to cause eye and airway irritation. Silvercrest resisted production of the results until it was ordered to do so by the superior court. It was in this context that the appellate court opined that "had the Legislature, by Civil Code sections 3294 (permitting punitive damages) and 1794 (permitting a civil penalty), intended a double recovery of punitive and penal damages for the same willful, oppressive, malicious, and oppressive acts, it would in some appropriate manner have said so." (*Troensegaard, supra*, 175 Cal.App.3d at 228.) It is reasonable to conclude that the court also found the conduct alleged in support of the statutory cause of action and the fraud cause of action to be the same conduct, which it described as "Silvercrest's intentional concealment from plaintiff of the high level of formaldehyde fumes found in the mobilehome, and its failure substantially to comply with its express warranty by taking appropriate corrective action or otherwise making Mrs. Troensegaard whole." (*Troensegaard, supra*, 175 Cal.App.3d at 226.)

The court find that *Anderson* is dispositive of GM's present contention. Unlike in *Troensegaard*, the conduct complained of in this case is capable of being construed based on different conduct that took place at different times. Here, as in *Anderson*, the Song-Beverly claims are related to defendant's ability to replace the Subject Vehicle or make restitution in accordance with the Song-Beverly Act while the cause of action for fraudulent inducement-concealment is based on pre-sale actions of fraudulent concealment which ultimately led to the purchase of the Subject Vehicle.

The motion to strike is denied.