UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

PHILLIP JOHNSON, JIMMY ALDRIDGE, RANDY VANDERMOLEN, and MATTHEW WEYUKER, individually and on behalf of all others similarly situated, Plaintiffs, v. HARLEY-DAVIDSON MOTOR COMPANY GROUP, LLC, HARLEY-DAVIDSON, INC., WHICH WILL DO BUSINESS IN CALIFORNIA AS: (WISCONSIN) HARLEY-DAVIDSON, INC., HARLEY-DAVIDSON MOTOR COMPANY, INC. and DOES 1-50, Defendants.	Case No. 2:10-CV-02443 JAM-EFB ORDER DENYING IN PART AND GRANTING IN PART DEFENDANT'S MOTION TO DISMISS

This matter comes before the Court on Defendant Harley-Davidson Motor Company Group, LLC, Harley-Davidson Inc.'s ("Defendant") Motion to Dismiss (Doc. #40) the Third Amended Complaint ("TAC")(Doc. #34) filed by Plaintiffs Phillip Johnson, Jimmy Aldridge, Randy Vandermolen, and Matthew Weyuker,

collectively "Plaintiffs." Plaintiffs oppose the motion (Doc. #42).[1]

I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs allege that Defendant, the largest manufacturer of heavy-weight motorcycles in the world based on market share, produced defective Twin Cam 88 and Twin Cam 96 motors. Plaintiffs aver two defect claims: 1) since model year 1999, Defendant's Twin Cam motorcycle engines have produced dangerously excessive heat during normal operations and the engine cooling systems designed by Defendant are inadequate to safely cool the engines and 2) since model year 2006, the six-speed transmissions and other related systems suffer premature wear and failure. Plaintiffs allege that Defendant has known about the excessive heat defect since approximately 1999 and has known about the transmission defect since approximately 2006. Plaintiffs also aver that Defendant is aware of reasonable alternative designs for motorcycle engines and cooling systems, including those used by its competitors and those used by Defendant itself in V-Rod models beginning in the 2002 model year. Finally, Plaintiffs allege that Defendant is aware of reasonable alternative designs for transmissions, including those used by its competitors and those used by Defendant itself in C.V.O. models.

The TAC includes the individual claims of each named plaintiff. In short, each named plaintiff claims that he owns a

[1] This motion was determined to be suitable for decision without oral argument. E.D. Cal. L.R. 230(g). The hearing was scheduled for July 20, 2011.

motorcycle with a defective engine and/or transmission and has suffered economic injuries due to having the defective engine and/or transmission repaired and replaced between one and five times. Additionally, after Plaintiffs discovered the overheating problem, Defendant's agents and representatives allegedly induced Plaintiffs to purchase plastic "heat shields" claiming that they would resolve the overheating issue.

Plaintiffs also allege physical injuries in the form of burns on their legs. They aver that the economic and physical injuries are a result of the defective engine and/or transmission in Defendant's motorcycles.

Plaintiff Philip Johnson commenced this action on September 10, 2010. On October 1, 2010, Plaintiff filed a First Amended Complaint joining Jimmy Aldridge and Randy Vandermolen as plaintiffs and bringing claims on behalf of a class of similarly situated Harley-Davidson owners. On December 10, 2010, pursuant to a stipulation of the parties, Plaintiffs filed a Second Amended Complaint joining Matthew Weyuker as a plaintiff. On April 29, 2011, pursuant to a stipulation of the parties, Plaintiffs filed a Third Amended Complaint, naming the correct Harley Davidson entity as defendant. It is this Third Amended Complaint that is the subject of Defendant's instant motion to dismiss.

Plaintiffs bring this suit as a class action alleging six causes of action: 1) Strict products liability; 2) Violations of California Business and Professional Code §§ 17200 ("UCL") for committing unfair, unlawful, and fraudulent business practices; 3) Violations of the breach of express and implied warranty;

4) Negligence; 5) Unjust enrichment; and 6) Violations of the Consumers Legal Remedies Act, California Civil Code §§ 1750 et seq. ("CLRA"). This Court has original jurisdiction over this action pursuant to 28 U.S.C. § 1332(a)(1) and independent jurisdiction over this action pursuant to 28 U.S.C. § 1332(d).

II. OPINION

A. Legal Standard

1. Motion to Dismiss

A party may move to dismiss an action for failure to state a claim upon which relief can be granted pursuant to Federal Rules of Civil Procedure 12(b)(6). In considering a motion to dismiss, the court must accept the allegations in the complaint as true and draw all reasonable inferences in favor of the plaintiff. Scheuer v. Rhodes, 416 U.S. 232, 236 (1975), overruled on other grounds by Davis v. Scherer, 468 U.S. 183 (1984); Cruz v. Beto, 405 U.S. 319, 322 (1972). Assertions that are mere "legal conclusions," however, are not entitled to the assumption of truth. Ashcroft v. Iqbal, 129 S.Ct. 1937, 1950 (2009), citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007). To survive a motion to dismiss, a plaintiff needs to plead "enough facts to state a claim to relief that is plausible on its face." Twombly, 550 U.S. at 570. Dismissal is appropriate where the plaintiff fails to state a claim supportable by a cognizable legal theory. Balistreri v. Pacifica Police Department, 901 F.2d 696, 699 (9th Cir. 1990).

Upon granting a motion to dismiss for failure to state a claim, the court has discretion to allow leave to amend the

complaint pursuant to Federal Rules of Civil Procedure 15(a). "Dismissal with prejudice and without leave to amend is not appropriate unless it is clear . . . that the complaint could not be saved by amendment." Eminence Capital, L.L.C. v. Aspeon, Inc., 316 F.3d 1048, 1052 (9th Cir. 2003).

B. Claims for Relief

1. UCL Pleading

Defendant argues that Plaintiffs' UCL claims (Claim 2) fail to satisfy federal pleading requirements under Federal Rules of Civil Procedure 8(a) and 9(b) because they are plain recitations of the elements and they fall short of the specificity required under Rule 9(b). Plaintiffs respond that as long as they plead facts sufficient to support either their lawful, unfair, or fraudulent theories of liability under the UCL, their Complaint should survive a motion to dismiss. They also argue that the TAC recites the material facts necessary to support allegations that Defendant's conduct is unlawful and unfair under the UCL.

Each prong of the UCL is a separate and distinct theory of liability. Kearns v. Ford Motor Co., 567 F.3d 1120, 1127 (9th Cir. 2009). Rule 9(b)'s heightened pleading requirements apply to claims for violations of the UCL. Id. at 1125.

> While fraud is not a necessary element of a claim under the . . . UCL, a plaintiff may nonetheless allege that the defendant engaged in fraudulent conduct. A plaintiff may allege a unified course of fraudulent conduct and rely entirely on that course of conduct as the basis of that claim. In that event, the claim is said to be 'grounded in fraud' or to 'sound in fraud,' and the pleading ... as a whole must satisfy the particularity requirement of Rule 9(b). Id. (internal citations omitted).

Because all of Plaintiffs' UCL allegations are based on

Defendant' alleged failure to disclose known defects and that it misrepresented the dangers of the motorcycles to Plaintiffs, the UCL claims sound in fraud and must meet Rule 9(b)'s heightened pleading standard.

Plaintiffs' allegations that Defendant committed fraudulent and unfair business practices are sufficient. The gravamen of Plaintiffs' factual allegations is that Defendant defectively designed and manufactured motorcycles – the engines produced excessive heat and the transmissions prematurely failed – and then marketed and sold those motorcycles to Plaintiffs and the class. Plaintiffs claim Defendant knew about these defects and injuries since approximately 1999 and rather than correct the defects and/or warn consumers of them, Defendant continued to produce the defective motorcycles knowing about the overheating and transmission defects and failing to inform consumers of such material defects and actively concealing such defects. Plaintiffs allege that the defectively designed motorcycles caused both economic and physical injuries, including burns, to Plaintiffs and the class.

While it would have been preferable for Plaintiffs to provide more details concerning the identity of the people who made the misrepresentations, the time and place of the misrepresentations, and the method by which the misrepresentations were communicated, Plaintiffs "set forth more than the neutral facts necessary to identify the transaction." Cooper v. Pickett, 137 F.3d 616, 625 (9th Cir. 1997). Plaintiffs provide enough facts for their unfair and fraudulent business practice claims "to give defendants notice of the

particular misconduct . . . so that they can defend against the charge and not just deny that they have done anything wrong." Bly-Magee v. California, 236 F.3d 1014, 1019 (9th Cir. 2001) (internal quotations omitted); see also Kearns, 567 F.3d at 1125 (One of the purposes of Rule 9(b) is "to provide defendants with adequate notice to allow them to defend the charge . . .").

Plaintiffs' unlawful conduct claim, however, requires amendment. "An 'unlawful' business activity includes anything that can properly be called a business practice and that at the same time is forbidden by law." Smith v. State Farm Mutual Automobile Insurance Co., 93 Cal.App.4th 700, 718 (Cal.App.Ct.2d 2001) (internal citations omitted). The TAC is unclear which laws are relied upon by Plaintiffs. Plaintiffs merely allege that Defendant violates California statutory and common law. TAC ¶ 68(a).

Accordingly, Defendant's Motion to Dismiss Plaintiffs' UCL claims is DENIED for the unfair and fraudulent business practices claims and is GRANTED WITH LEAVE TO AMEND concerning the unlawful conduct claim.

2. CLRA Claim

Defendant argues that Plaintiffs' CLRA claim (Claim 6) fails because it does not satisfy the heightened pleading requirements. Defendant additionally contends that Phillip Johnson ("Johnson"), Jimmy Aldridge ("Aldridge"), and Randy Vandermolen's ("Vandermolen") CLRA claims are time-barred due to the three-year statute of limitations. Plaintiffs respond that they have pled enough facts demonstrating that Defendant failed to disclose a material defect in violation of the CLRA and that

the statute of limitations period began to run when Plaintiffs Johnson, Aldridge, and Vandermolen knew or should have known of the violation.

a. CLRA Pleading

The CLRA prohibits "unfair methods of competition and unfair or deceptive acts or practices undertaken by any person in a transaction intended to result or which results in the sale . . . of goods or services to any consumer." Cal. Civ. Code § 1770(a). Rule 9(b)'s heightened pleading standards apply to claims for violations of the CLRA. Kearns, 567 F.3d at 1125.

As discussed supra, Plaintiffs' TAC has been pled with sufficient specificity to meet the Rule 9(b) pleading requirements.

In their Opposition, Plaintiffs rely on Falk v. General Motors Corp., 496 F.Supp.2d 1088 ((N.D. Cal. 2007) to support their argument that they sufficiently state a claim under the CLRA because Defendant failed to disclose a material defect and that Defendant was obliged to disclose the defect. See Falk, 496 F.Supp.2d at 1094. A failure to disclose can constitute actionable fraud in four circumstances:

> (1) when the defendant is in a fiduciary relationship with the plaintiff; (2) when the defendant had exclusive knowledge of material facts not known to the plaintiff; (3) when the defendant actively conceals a material fact from the plaintiff; and (4) when the defendant makes partial representations but also suppresses some material fact.

Id. at 1094-95, quoting LiMandri v. Judkins, 52 Cal.App.4th 326, 337 (Cal.App.Ct.4d 1997).

Plaintiffs base their CLRA claim on the allegation that the

engine defect is material and that Defendant had a duty to disclose that defect. Plaintiffs sufficiently allege that the engine defect is material because a reasonable consumer would change his behavior if he knew that the engine heat can cause burns and that the transmission would require numerous repairs or replacements. See Id. at 1095 ("[F]or non-disclosed information to be material, a plaintiff must show that had the omitted information been disclosed, one would have been aware of it and behaved differently.") (internal citations omitted).

Plaintiffs also adequately allege that Defendant had exclusive knowledge of the alleged defect or that it actively concealed the material defects. A duty to disclose exists "when the defendant had exclusive knowledge of material facts not known to the plaintiff." Id. at 1096. In Falk, the plaintiffs alleged that General Motors ("GM") had exclusive knowledge of the defect because "only GM had access to the aggregate data from its dealers, only GM had access to pre-release testing data, and only GM had access to the numerous complaints from its customers." Id. Though Plaintiffs lack the specific allegations proffered in Falk, Plaintiffs allege enough facts to survive the instant motion. Plaintiffs claim that Defendant knew of the excessive engine heat defect as early as 1999 and of the transmission defect as early as 2006. Plaintiffs discovered the excessive heat and transmission defects after purchasing the motorcycles. Since Defendant was in a superior position to know of its defective engines, Plaintiffs properly allege that Defendant had exclusive knowledge of material facts not known to Plaintiffs.

Similarly, Plaintiffs' active concealment argument is sufficient. To state a claim for active concealment, a plaintiff must plead the following five elements:

> (1) the defendant must have concealed or suppressed a material fact, (2) the defendant must have been under a duty to disclose the fact to the plaintiff, (3) the defendant must have intentionally concealed or suppressed the fact with the intent to defraud the plaintiff, (4) the plaintiff must have been unaware of the fact and would not have acted as he did if he had known of the concealed or suppressed fact, and (5) as a result of the concealment or suppression of the fact, the plaintiff must have sustained damage.

Falk, at 1097, quoting Lovejoy v. AT&T Corp., 119 Cal.App.4th 151, 157 (Cal.App.Ct.3d 2004).

The plaintiffs in Falk alleged active concealment by averring that GM had received numerous customer complaints, yet did not notify other customers or effect a recall and that when GM replaced defective speedometers, they used equally defective speedometers to create the illusion that the broken ones were unique cases. Id. Here, Plaintiffs allege that Defendant knew of the defects and that at least two of the Plaintiffs complained of the overheating issue. Plaintiffs allege that Defendant's agents recommended that Plaintiffs purchase additional parts, including plastic "heat shields" and different exhaust pipes, based on misrepresentations that the additional parts would alleviate the excessive engine heat defect. Like in Falk, Plaintiffs allege that when Plaintiffs brought their motorcycles in for repair, replacement, or rebuilding of prematurely failing transmissions, Defendant replaced the defective parts with equally defective parts, such that the defect was not corrected, even though Defendant and its agents

represented to Plaintiffs that it was corrected. Plaintiffs claim that this resulted in two of the Plaintiffs having their transmissions repaired, replaced, or rebuilt four and five times respectively. Thus, Plaintiffs properly allege their CLRA claim and Defendant's Motion to Dismiss Plaintiffs' CLRA claim for failure to satisfy federal pleading requirements is DENIED.

b. Time-Bar

Defendant argues that Plaintiffs Johnson, Aldridge and Vandermelon's CLRA claims are premised upon Defendant's alleged misrepresentations during the time of sale. Plaintiff Johnson alleges that he purchased his motorcycle in or around August of 2007 and Plaintiffs Aldridge and Vandermolen allege they purchased their motorcycles in or around 2007. Plaintiff Johnson filed the lawsuit on September 10, 2010; Plaintiffs Aldridge and Vandermolen joined the lawsuit on October 1, 2010. Defendant argues that Plaintiffs failed to file their lawsuit within the CLRA's three year statute of limitations and that the Court should not apply the delayed discovery exception to Plaintiffs' CLRA claims. Plaintiffs counter that the CLRA's statute of limitations runs from the time Plaintiffs knew or should have known about the alleged defects. Plaintiffs argue that since they could not have discovered facts that would put them on notice of the defective transmission until they had to have the transmission repaired, rebuilt, or replaced, Plaintiffs could not have been aware of the defective transmission at the time of sale and could not have filed a suit about unknown defects on the day they bought their motorcycles.

The CLRA provides that actions "shall be commenced not more

than three years from the date of the commission of such method, act or practice" made unlawful by the act. Cal. Civ. Code § 1783. This statute of limitations runs "from the time a reasonable person would have discovered the basis for a claim." Chamberlan v. Ford Motor Co., 369 F.Supp.2d 1138, 1148 (N.D. Cal. 2005), quoting Mass. Mutual Life Insurance Co. v. Superior Court, 97 Cal.App.4th 1282, 1295 (Cal.App.Ct.4d 2002).

Defendant's argument concerning the application of the "delayed discovery rule" is not persuasive. Defendant relies on Purdum v. Holmes, 187 Cal.App.4th 916, 924 (Cal.Ct.App.2d 2010) in which the California Court of Appeal held that the plaintiff's claim was time-barred. Purdam, however, is not applicable. The Purdam court held that the action before it was time-barred under a statute not relevant to this case. Furthermore, it does not invalidate the reasonable person standard set out in Chamberlan, 369 F.Supp.2d at 1148. The Purdam court merely opines that it is unsettled whether the Chamberlan standard applies to UCL claims.

This Court will apply the Chamberlan standard in the case at bar. Here, Plaintiffs Johnson, Aldridge and Vandermelon allege that they did not discover, and could not have been reasonably expected to discover, facts that would put them on notice of the excessive engine heat until, at the earliest, sometime after the initial purchase when they began experiencing the excessive heat as a result of the defect. Given that Plaintiffs Johnson, Aldridge, and Vandermelon allege they purchased their motorcycles in 2007, and that Johnson filed suit in September 2010 and Aldridge and Vandermelon joined the

lawsuit in October 2010, it is unclear whether their claims fall within the three year statute of limitations period.

Plaintiffs must amend their Complaint to provide more specificity concerning when they discovered the purported defects. Plaintiffs must specifically plead facts which show (1) the time and manner of discovery and (2) the inability to have made earlier discovery despite reasonable diligence. Yumul v. Smart Balance, Inc., 733 F.Supp.2d 1117, 1130-31 (C.D. Cal. 2010) (internal citations omitted). Accordingly, Defendant's Motion to Dismiss Plaintiffs Johnson, Aldridge, and Vandermolen's CLRA claims is GRANTED WITH LEAVE TO AMEND.

3. Unjust Enrichment

Defendant argues that unjust enrichment (Claim 5) is not an independent cause of action and fails as a matter of law. Plaintiffs respond that unjust enrichment is a proper alternative theory of recovery to contract claims. Plaintiffs admit that unjust enrichment depends upon the viability of their other claims, but argue that since they successfully pled claims for strict products liability, unfair competition, negligent design, breach of warranty, and violations of the CLRA, their unjust enrichment claim should survive as an alternative theory of recovery.

To plead a claim for unjust enrichment, a plaintiff must allege a receipt of a benefit and unjust retention of the benefit at the expense of another." Sanders v. Apple, Inc., 672 F.Supp.2d 978, 989 (N.D. Cal. 2009). Plaintiffs properly allege that "Defendants' retention of some or all of the monies they gained through their wrongful acts and practices would be

unjust." TAC ¶ 92.

Unjust enrichment, however, is not a separate cause of action, but depends upon the viability of the other claims. Sanders, 673 F.Supp.2d at 989. Since Plaintiffs plead viable claims for strict products liability, unfair business practices, fraudulent business practices, negligent design, breach of warranty, and violations of the CLRA, the unjust enrichment claim survives as an alternative theory of recovery. Accordingly, Defendant' Motion to Dismiss the unjust enrichment claim is DENIED.

III. ORDER

For the reasons set forth above,

Defendant's Motion to Dismiss Plaintiffs' Second Claim for Relief alleging fraudulent and unfair business practices under the UCL is DENIED.

Defendant's Motion to Dismiss Plaintiffs' Second Claim for Relief alleging unlawful business practices under the UCL is GRANTED WITH LEAVE TO AMEND.

Defendant's Motion to Dismiss Plaintiffs' Sixth Claim for Relief alleging violations of the CLRA based on failure to state a claim is DENIED.

Defendant's Motion to Dismiss Plaintiffs Johnson, Aldridge, and Vandermolen's CLRA claims based on the statute of limitations is GRANTED WITH LEAVE TO AMEND.

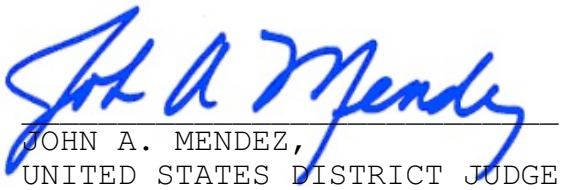
Defendant' Motion to Dismiss Plaintiffs' Fifth Claim for Relief alleging unjust enrichment is DENIED.

Plaintiffs shall file their Fourth Amended Complaint within

twenty (20) days of the date of this Order.

IT IS SO ORDERED.

Dated: July 21, 2011



JOHN A. MENDEZ,
UNITED STATES DISTRICT JUDGE