TENTATIVE RULINGS: CIVIL LAW & MOTION **UPDATE 1**

Friday, April 19, 2024 at **8:30 a.m.**
Courtroom 18 –Hon. Christopher M. Honigsberg
Civil and Family Law Courthouse
3055 Cleveland Avenue
Santa Rosa, California 95403

The Court's Official Court Reporters are "not available" within the meaning of California Rules of Court, Rule 2.956, for court reporting of civil cases.

CourtCall is not permitted for this calendar.

If the tentative ruling does not require appearances, and is accepted, no appearance is necessary.

Any party who wishes to be heard in response or opposition to the Court's tentative ruling **MUST NOTIFY** the Court's Judicial Assistant by telephone at **(707) 521-6723** and **MUST NOTIFY all other parties of their intent to appear, the issue(s) to be addressed or argued and whether the appearance will be in person or by Zoom**. Notifications must be completed no later than 4:00 p.m. on the court (business) day immediately before the day of the hearing.

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Unless notification of an appearance has been given as provided above, the tentative ruling shall become the ruling of the Court the day of the hearing at the beginning of the calendar.

1-2. 23CV01904, Zomouse v. General Motors, LLC

This matter is on calendar for Defendant's demurrer to the fourth cause of action (fraud) and the fifth cause of action (unfair competition), and their motion to strike the prayer for punitive damages. No opposition has been filed to either motion.

Defendant's request for judicial notice is GRANTED. The demurrer is SUSTAINED WITH LEAVE TO AMEND. The motion to strike is DENIED without prejudice. If Plaintiff amends the complaint and Defendant brings another demurrer to the amended complaint, Defendant may also bring another motion to strike. Defendant's counsel shall submit a written order consistent with this tentative ruling and in compliance with Rule 3.1312.

Background

Plaintiffs purchased a new Chevrolet Bolt ("Vehicle"), an all-electric passenger car, from Defendant Roseville Chevrolet on January 13, 2020. The Vehicle was manufactured by Defendant

General Motors ("GM"). It came with a warranty, which included an 8-year, 100,000-mile warranty on the battery. In 2021, GM issued a recall notice for the Vehicle. The notice indicated that there was a danger of fire when the Vehicle's battery was charged to over 90% capacity or when it had less than 70 miles of range remaining, and that the Vehicle should not be parked indoors overnight.

Plaintiffs allege three causes of action against GM under the Song-Beverly Consumer Warranty Act, plus two others: the fourth, for common-law fraud, including affirmative misrepresentation of the Vehicle's range and safety and fraudulent concealment of known issues with the battery overheating and causing fires; and the fifth, for violation of Bus. & Prof. Code §§ 17200 et seq., the Unfair Competition Law ("UCL"). All of these causes of action are based on the allegation that the Vehicle is defective because its battery cannot safely be fully charged or used until it is fully discharged, and that, therefore, the Vehicle's range – that is, the distance it can be driven on a single charge – is less than what GM advertised it to be. There is also a sixth cause of action for negligent repair against defendant Roseville Chevrolet.

In the two instant motions, Defendant demurs to the fourth (fraud) and fifth (UCL) causes of action and moves to strike the prayer for punitive damages from Plaintiffs' complaint.

I. Motion for judicial notice

Defendant asks the Court to take judicial notice of a web page published by the EPA that lists fuel range figures for the 2020, 2021, and 2022 models of the Chevrolet Bolt. The motion is GRANTED to the extent that the Court takes judicial notice of the web page's existence and content. The Court notes that judicial notice is unnecessary here because a copy of the same web page, which Defendant's counsel declares to be true and correct, is attached to counsel's declaration.

II. Governing law

A. Standard on demurrer

A demurrer tests whether the complaint sufficiently states a valid cause of action. (*Hahn v. Merda* (2007) 147 Cal.App.4th 740, 747.) A demurrer may only challenge defects that appear on the face of the pleading under attack or from matters outside the pleading that are judicially noticeable. (CCP § 430.30(a).) In the event a demurrer is sustained, leave to amend should be granted where the complaint's defect can be cured by amendment. (*The Swahn Group, Inc. v. Segal* (2010) 183 Cal.App.4th 831, 852.)

Complaints are read as a whole, in context, and are liberally construed. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318; *Stevens v. Superior Court* (1999) 75 Cal.App.4th 594, 601.) In reviewing the sufficiency of a complaint, courts accept as true all material facts properly pleaded and matters that may be judicially noticed, but not contentions, deductions, or conclusions of fact or law, or the construction of instruments pleaded, or facts impossible in law. (*Serrano v. Priest* (1971) 5 Cal.3d 584, 591; *Rakestraw v. California Physicians' Service* (2000) 81 Cal.App.4th 39, 43; see also *South Shore Land Co. v.*

Petersen (1964) 226 Cal.App.2d 725, 732.) Opinions, speculation, or allegations contrary to law or judicially noticed facts are also disregarded. (*Coshow v. City of Escondido* (2005) 132 Cal.App.4th 687, 702.)

Generally, the pleadings "must allege the ultimate facts necessary to the statement of an actionable claim. It is both improper and insufficient for a plaintiff to simply plead the evidence by which he hopes to prove such ultimate facts." (*Careau & Co. v. Security Pac. Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1390; *FPI Development v. Nakashima* (1991) 231 Cal.App.3d 367, 384.) Each evidentiary fact that might eventually form part of a party's proof does not need to be alleged. (*C.A. v. William S. Hart Union High School Dist*. (2012) 53 Cal.4th 861, 872.) Conclusory pleadings are permissible and appropriate where supported by properly pleaded facts. (*Perkins v. Superior Court* (1981) 117 Cal.App.3d 1, 6.)

B. Motion to strike

1. Generally

A motion to strike lies where a pleading contains "irrelevant, false, or improper matter[s]" or is "not drawn or filed in conformity with the laws of this state, a court rule, or an order of the court." (CCP § 436(b).) However, "falsity" must be demonstrated by reference to the pleading itself or judicially noticeable matters, not extraneous facts. (*See* CCP § 437.)

2. Punitive damages

A motion to strike is also properly directed to unauthorized claims for damages, i.e. damages that are not allowable as a matter of law. (*See, e.g. Commodore Home Systems, Inc. v. Sup. Ct.* (1982) 32 Cal.3d 211, 214.)

Punitive damages are available in noncontract cases "where the defendant has been guilty of oppression, fraud, or malice . . . ." (Civ. Code § 3294.) "Malice" means conduct that is intended by the defendant to cause injury to the plaintiff or despicable conduct carried on by the defendant with a willful and conscious disregard of the rights or safety of others. "Oppression" means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights. "Fraud" means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury. (*Ibid.*) A conscious disregard for the safety of others may constitute malice. (*G. D. Searle & Co. v. Superior Court* (1975) 49 Cal.App.3d 22, 28.) Punitive damages may be stricken where the facts alleged do not rise to the level of "malice, fraud or oppression." (See, e.g., *Turman v. Turning Point of Central Calif., Inc.* (2010) 191 Cal.App.4th 53, 63.)

For an employer to be liable for punitive damages for the actions of an employee, it must be shown that "the employer had advance knowledge of the unfitness of the employee and employed him or

her with a conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice." (Civ. Code § 3294(b).) "With respect to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation." (*Ibid*.) Where punitive damages are alleged against an employer under Civil Code § 3294(b), the knowledge on the part of the employer stands as their equivalent of oppression, fraud or malice otherwise required under Civ. Code § 3294 (a); no oppression, fraud or malice on the part of the employer need be shown. (*Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1154.) Plaintiff must plead facts sufficient to show either knowledge or ratification by an officer, otherwise claims for punitive damages are inadequately pled. (*Hart v. National Mortgage & Land Co.* (1987) 189 Cal.App.3d 1420, 1433.)

C. Fraud

1. Elements

"The elements of fraud, which give rise to the tort action for deceit, are (a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or 'scienter'); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage." (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638; see also Civ. Code §§ 1571-1574.*)* Suppression of a fact by one who is bound to disclose it may constitute fraud. (Civ. Code § 1710(3).) "(T)he elements of an action for fraud and deceit based on concealment are: (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." (*Marketing West, Inc. v. Sanyo Fisher (USA) Corp.* (1992) 6 Cal.App.4th 603, 612–613.) "A failure to disclose a fact can constitute actionable fraud or deceit in four circumstances: (1) when the defendant is the plaintiff's fiduciary; (2) when the defendant has exclusive knowledge of material facts not known or reasonably accessible to the plaintiff; (3) when the defendant actively conceals a material fact from the plaintiff; and (4) when the defendant makes partial representations that are misleading because some other material fact has not been disclosed." (*Collins v. eMachines, Inc.* (2011) 202 Cal.App.4th 249, 255.)

2. Pleading requirements

"In California, fraud must be pled specifically; general and conclusory allegations do not suffice. Thus, the policy of liberal construction of the pleadings . . . will not ordinarily be invoked to sustain a pleading defective in any material respect. This particularity requirement necessitates pleading *facts*

which show how, when, where, to whom, and by what means the representations were tendered." *(Lazar v. Superior Court* (1996) 12 Cal.4th 631, 645, internal citations and quotation marks omitted; *see Daniels v. Select Portfolio Servicing, Inc.* (2016) 246 Cal.App.4th 1150, 1166-1167.)

"Intent . . . is a fact. Hence, the averment that the representation was made with the intent to deceive the plaintiff, or any other general allegation with similar purport, is sufficient." (5 Witkin, *California Procedure* § 725; see also *Beckwith v. Dahl* (2012) 205 Cal.App.4th 1039, 1060 [in pleading promissory fraud, general allegation that the promise was made without intent to perform was sufficient].)

To establish reliance on fraud, reliance upon the truth of the fraudulent misrepresentation does not have to be a predominant factor in the plaintiff's subsequent conduct, but it must be a substantial factor. (*OCM Principal Opportunities Fund, L.P. v. CIBC World Markets Corp.* (2007) 157 Cal.App.4th 835, 864.) Plaintiffs in fraud-by-concealment claims must show that if the information had not been omitted, the plaintiff would have been aware of it and therefore would have behaved differently. (*Ibid.*) The pleading must be adequately specific to show actual reliance on the omission, and that the damages causally resulted therefrom. (*Ibid*.) California law "requires a plaintiff to allege specific facts not only showing he or she actually and justifiably relied on the defendant's misrepresentations, but also how the actions he or she took in reliance on the defendant's misrepresentations caused the alleged damages." (*Rossberg v. Bank of America, N.A.* (2013) 219 Cal.App.4th 1481, 1499.)

III. Demurrer

A. Fourth cause of action: fraud

Defendant demurs to the fourth cause of action for fraud on five grounds: that the cause of action is not pled with adequate specificity; that it fails to allege that GM knew of the issues with the Vehicle before purchase; that GM did not misrepresent the vehicle's range; that Plaintiff's losses are unrecoverable under the economic loss rule; and that the complaint fails to allege a relationship between Defendant and Plaintiffs giving rise to a duty to disclose. Each basis is discussed below.

1. Sufficiency of allegations of fraud

Defendant argues that the complaint fails to comply with the special specific-pleading requirements applicable to fraud actions "because Plaintiffs failed to allege (i) the identity of the individuals at GM who purportedly concealed material facts or made untrue representations about their Colorado (ii) their authority to speak and act on behalf of GM, (iii) GM's knowledge about alleged defects in Plaintiffs' Colorado at the time of purchase, (iv) any interactions with GM before or during the purchase of their Colorado, or (v) GM's intent to induce reliance by Plaintiffs to purchase the specific Colorado at issue."

To begin with, Defendant's emphasis on "*their* Colorado" throughout that passage suggests that Defendant's position is that even if GM knew that the particular model of Colorado Plaintiffs purchased

had multiple reported problems with, for example, its transmission, they were not obliged to disclose that to Plaintiffs unless they also knew that the specific vehicle Plaintiffs were purchasing had those problems. If that is Defendant's position, the Court disagrees. Plaintiffs allege that if GM had disclosed the known issues with the type of transmission used in their vehicle, they would not have purchased it. (Complaint ¶ 49.) Therefore, the character of the information that GM allegedly concealed was not "your particular Colorado is going to have transmission problems"; it was "a great many vehicles with transmission just like the one in yours have had transmission problems."

The Court agrees with points (i), (ii), and (iv), with the proviso that references to GM are deemed to include GM's agents. Plaintiffs do not need to provide names of individuals whose names they do not know if those names are likely to be known to GM or its agent. (*Bradley v. Hartford Acc. & Indem. Co.* (1973) 30 Cal.App.3d 818, 825.) But the complaint should allege who concealed material information from Plaintiffs – that is, who, in their view, was in a position to disclose the history of problems with the eight-speed transmission used in their model of Colorado but failed to do so – in enough detail that Defendant can identify the individuals so described.

Regarding point (iii), the Court finds that the complaint adequately pleads that GM knew about defects in the particular model of Colorado that Plaintiffs purchased in advance of the purchase. (See, e.g., Complaint ¶¶ 47, 48, 50, 51, 52, 55.) If Defendant's rationale for point (iii) turns on GM's knowledge of specific facts about the exact vehicle that Plaintiffs purchased, the Court disagrees for the reasons set forth above.

As to point (v), the Court agrees that while Plaintiffs have pleaded that they "relied on Defendant GM's advertising materials which did not disclose the defect," they did not plead that GM intended to induce them to rely on those materials by concealing the defect. Since intent to induce reliance is an element of fraud, that is a fatal defect in the complaint. However, in light of the principle that a general allegation of intent is sufficient (*Beckwith, supra,* 205 Cal.App.4th at p. 1060), the Court finds that the defect can be cured by amendment.

2. Allegations of GM's knowledge of the defect

Defendant argues that the complaint does not allege facts supporting the conclusion that GM knew about the problems with the Vehicle's battery prior to Plaintiffs' purchase of it. Defendant notes that the bulk of Plaintiffs' allegations refer to Bolts manufactured in different model years from the Vehicle, and asserts that "[t]he mere fact that fires occurred in a minuscule number of Bolts, GM issued a recall notice, and NHTSA opened an investigation is not enough to plausibly allege that GM knew of and intentionally misrepresented or concealed any material facts from Plaintiff at the time Plaintiff purchased the vehicle."

However, the plausibility of Plaintiffs' allegations is not at issue at this stage; the only issue in the context of a demurrer is whether the complaint makes sufficient allegations to state a cause of action. The

complaint directly alleges that "All of the aforementioned events . . . informed GENERAL MOTORS of the significant defects with the vehicle's battery prior to Plaintiffs's [sic] September 6, 2020 acquisition of the subject vehicle." (Complaint ¶ 26.) *Writing here.*

3. Allegations of GM's fraudulent advertising

In multiple paragraphs of the complaint, Plaintiffs allege that GM falsely inflated the Vehicle's battery range in its advertising. (Complaint ¶¶ 15 ["over 200 miles"], 17 ["marketed as a 'long range' . . . vehicle"], 26 [marketed as long range], 35 ["marketing strategy that advertises a competitive mileage capacity"], 40 [marketing material suggests that vehicle is long-range], 80 [GM marketed Vehicle as having long range capability], 83 [GM's range advertisements], 84 [marketed as having long-range capability], 85 [GM "touted its specific mileage range"], 90 ["Defendant's advertising which stresses the long range of each vehicle"], 91 [representations regarding range "communicated through the Defendant's marketing material"].)

By way of both a motion for judicial notice and a declaration, Defendant draws the Court's attention to an EPA web page that gives the mileage range for the 2000, 2001, and 2002 models of the Chevrolet Bolt as 259 miles. Defendant then claims that Plaintiffs "assert that GM marketed the subject vehicle as having long range capability – i.e., 259 miles on a full charge." Therefore, Defendant argues, the advertisements to which the complaint alludes merely quoted EPA estimates, and car manufacturers are allowed to do that: "[n]o misrepresentation occurs when a manufacturer merely advertises EPA estimates." (*Gray v. Toyota Motor Sales* (9th Cir. 2014) 554 Fed. Appx. 608, 609.) And therefore, Defendant concludes, there can be no fraud based on misrepresentation because there *was* no misrepresentation.

In the first place, contrary to Defendant's assertion, the complaint never mentions the 259 mile figure. The complaint does say that GM predicted in 2016 that Bolts would have a range greater than 200 miles (Complaint ¶ 15), but that is the only mention of a specific mileage. With respect to the Vehicle's range, the gravamen of the complaint is not that it has some particular numerical range as distinct from some other particular numerical range; it is that the Vehicle effectively has less range than it was advertised to have because the battery cannot be either fully charged or fully discharged without the risk of fire.

More importantly, even if the complaint said something like "GM advertised that the vehicle had a range of 259 miles but in fact its range is only 175 miles" – which, again, it does not – that would not compel the conclusion that GM was advertising an EPA estimate. GM could have simply said "you should buy this Bolt because it gets 259 miles on a single charge" with no reference to the EPA, which would be an assertion that it gets 259 miles on a charge, not an assertion that the EPA says it gets 259 miles on a charge. Such a marketing claim would not be excused by the *Gray* rule. Indeed, the complaint

directly alleges that GM's 2016 claim that Bolts would have a battery range over 200 miles "was made absent any reference to the EPA estimated mileage range." (Complaint ¶ 15.)

The Court finds that Plaintiffs have adequately alleged that GM misrepresented the Vehicle's range – again, in the sense that the range was not as big as it would have been if the battery could safely take a 100% charge and be driven until the battery was fully discharged. Of course, Plaintiffs will need to prove this at trial by entering actual advertisements, marketing material, or statements by GM representatives into evidence. If those advertisements say no more than "EPA-estimated 259 miles on a charge," as Defendant apparently thinks they will, Defendant may object to them on that basis.

4. Economic loss rule

Defendant argues that "Plaintiff's prayer for purely economic losses based on alleged fraudulent concealment is barred by the economic loss rule." That rule provides that "[i]n general, there is no recovery in tort for negligently inflicted 'purely economic losses,' meaning financial harm unaccompanied by physical or property damage." (*Sheen v. Wells Fargo Bank* (2022) 12 Cal.5th 905, 922.) Defendant's point is that since fraud is a tort, the remedy cannot include the value of the Vehicle because that is a purely economic loss. Defendant cites *Robinson Helicopter v. Dana Corp.* (2004) 34 Cal.4th 979, 988 for this proposition.

A recent opinion by the First District Court of Appeal takes the opposite position. In *Dhital v. Nissan North America* (2022) 84 Cal.App.5th 828, the trial court sustained Nissan's demurrer to a fraud cause of action based on their alleged intentional concealment of known problems with a vehicle's transmission. The First District disagreed, holding that "under California law, the economic loss rule does not bar plaintiffs' claim here for fraudulent inducement by concealment. Fraudulent inducement claims fall within an exception to the economic loss rule recognized by our Supreme Court [citation], and plaintiffs allege fraudulent conduct that is independent of Nissan's alleged warranty breaches. The trial court erred by sustaining Nissan's demurrer to plaintiffs' fraud claim on the ground it was barred by the economic loss rule." *(Id.* at p. 843.) *Dhital* discusses *Robinson* extensively and distinguishes it on the basis that the fraud claims presented there involved conduct by the defendant "that occurred *during the performance* of a contract," as distinct from conduct that induced the plaintiff to enter into the contract in the first place. (*Id.* at p. 839, original emphasis.) Indeed, *Dhital* notes that "the *Robinson* court affirmed that tort damages *are* available in contract cases where the contract was fraudulently induced." (*Ibid.*, citing *Robinson, supra,* 34 Cal.4th at pp. 989-990.)

Dhital is currently under California Supreme Court review on this exact point: the Supreme Court's website notes that the issue is "are claims for fraudulent concealment exempted from the economic loss rule?" Therefore, it is not binding precedent and may be cited only as persuasive authority.

(Cal. Rules of Court, rule 8.1115(e)(1).) That said, the Court finds the holding persuasive, and will therefore not sustain the demurrer on the basis of the economic loss rule.

5. Transactional relationship between the parties

Defendant argues that it does not matter whether Defendant concealed material information from Plaintiffs because Plaintiffs did not buy the vehicle directly from Defendant, and therefore Defendant had no duty to disclose anything to Plaintiffs. This issue was also addressed by *Dhital, supra*:

> "Nissan argues plaintiffs did not adequately plead the existence of a buyer-seller relationship between the parties, because plaintiffs bought the car from a Nissan dealership (not from Nissan itself). At the pleading stage . . . , we conclude plaintiffs' allegations are sufficient. Plaintiffs alleged that they bought the car from a Nissan dealership, that Nissan backed the car with an express warranty, and that Nissan's authorized dealerships are its agents for purposes of the sale of Nissan vehicles to consumers. In light of these allegations, we decline to hold plaintiffs' claim is barred on the ground there was no relationship requiring Nissan to disclose known defects."

(*Dhital, supra,* 84 Cal.App.5th at p. 844.) Plaintiffs have alleged that they bought the Vehicle "from Silveira Chevrolet, an authorized dealer and agent of GENERAL MOTORS," that "[a]s part of the transaction, GENERAL MOTORS issued an express warranty," and that "[t]he dealership is an agent of GENERAL MOTORS for purposes of the [sale] transaction." (Complaint ¶ 6.) That puts the instant case directly in line with the foregoing passage from *Dhital.* Again, *Dhital* is persuasive authority, not mandatory, because it is under California Supreme Court review. (Cal. Rules of Court, rule 8.1115(e)(1).) Again, the Court finds the analysis persuasive.

Defendant cites to *Bigler-Engler v. Breg* (2017) 7 Cal.App.5th 276 for the proposition that a transaction giving rise to a cause of action for fraudulent concealment "must necessarily arise from direct dealings between the plaintiff and defendant; it cannot arise between the defendant and the public at large." *Bigler-Engler* is distinguishable for two related reasons. First, the plaintiff there purchased the medical device at issue in the litigation from a distributor whose relationship with the defendant manufacturer was not necessarily identical to that between an auto manufacturer and its authorized dealership. Second, *Bigler-Engler* was an appeal following a jury trial, and therefore the Court of Appeal had clear factual findings regarding the relationship between the plaintiff, distributor, and defendant, whereas here the case has not advanced beyond the pleading stage.

B. Fifth cause of action: Unfair Competition Law

As relevant here, the Unfair Competition Law prohibits businesses from engaging in "any unlawful, unfair, or fraudulent business act or practice." (Bus. & Prof Code § 17200. Defendant challenges the fifth cause of action on the basis that none of these three "prongs" has been adequately pleaded. Regarding the

"fraudulent" prong, Defendant incorporates its argument regarding the fraud cause of action, which the Court addressed in the previous section. As noted there, the Court will allow Plaintiffs to amend the complaint to address the deficiencies in the fourth cause of action, and such amendment may also justify the fifth cause of action under the "fraudulent" prong.

1. "Unlawful" prong

Defendant correctly notes that the only statutory violation alleged in connection with the "unlawful" prong of the UCL analysis is deceptive or misleading advertising in violation of Bus. & Prof. Code § 17500. Defendant argues that "such claims fail for the reasons discussed in Section IV, *supra*." Section IV of Defendant's memorandum is headed "ARGUMENT," encompasses eight pages, and has four subsections, so Defendant's point is not entirely clear. However, the Court assumes that Defendant refers to Section IV(C) of the memorandum, which contains Defendant's argument, discussed above, that GM cannot be liable for false or misleading advertising regarding the Vehicle's range when all it did was quote EPA estimates.

Again, the notion that the advertisements to which Plaintiffs refer merely quoted EPA estimates is Defendant's speculation; it is not apparent from the face of the complaint. (CCP §430.30.) The only reference to the EPA in the complaint is "The mileage representation was made absent any reference to the EPA estimated mileage range." (Complaint ¶ 15.) Defendant can make this argument after conducting discovery and determining exactly what advertisements Plaintiffs are referring to, but at this stage, Plaintiffs have adequately pleaded that GM misrepresented the Vehicle's range. Such misrepresentation, if proved, would violate Bus. & Prof. Code § 17500.

Of course, the operative phrase there is "if proved." If Defendant's speculation is correct, and if the advertised range figures were in fact qualified by something like "EPA-estimated," then Defendant's objection based on the rule set forth in *Gray, supra,* will be well taken. If Plaintiffs wish, they may amend the UCL cause of action to allege a violation of one or more different or additional statutes.

2. "Unfair" prong

Defendant cites to *McKell v. Washington Mutual* (2006) 142 Cal.App.4th 1457, 1473 for the proposition that "[a] business practice is unfair within the meaning of the UCL if it violates established public policy or if it is immoral, unethical, oppressive or unscrupulous and causes injury to consumers which outweighs its benefits." Defendant then submits that Plaintiffs "do not reference any established public policy that GM's actions have violated," which is true, but they do not need to because, under the quoted holding, "violates established public policy" is one of two disjunctively phrased definitions.

The other definition requires Plaintiffs to allege (at this point) and prove (ultimately) two things: that GM's business practices at issue here were immoral, unethical, oppressive, or unscrupulous; and that the injuries these practices caused outweighed their benefits. The latter requirement is also set forth in

Camacho v. Auto Club of Southern California (2006) 142 Cal.App.4th 1394, 1403, which Plaintiffs cite in their complaint at ¶ 98. Plaintiffs have unquestionably made sufficient allegations to meet that requirement. (See, e.g., Complaint ¶¶ 99-105.) Defendant does not argue otherwise.

Defendant does argue, however, that Plaintiffs "do not . . . claim that [GM's] conduct is immoral, unethical, oppressive, or unscrupulous." The Court agrees. Plaintiffs make numerous allegations of conduct on GM's part that could reasonably be described by one or more of those adjectives; for example, paragraph 24 of the complaint alleges that a GM spokesperson publicly stated that Chevrolet Bolt batteries could safely be charged to 100% capacity even though GM knew at that time that doing so caused a risk of fire. But as noted above, pleadings must allege ultimate facts, not simply "the evidence by which [the plaintiff] hopes to prove such ultimate facts." (*Careau, supra,* 222 Cal.App.3d at p. 1390.) The "unfair" section of the fifth cause of action is inadequately pleaded for that reason. However, the Court believes that this deficiency can be cured by amendment.

IV. Motion to strike

Defendant moves to strike the prayer for punitive damages from the complaint. (Prayer, ¶ f.) Defendant correctly points out that punitive damages are not available under either the Song-Beverly Act or the Unfair Competition Law. Defendant's primary argument regarding the only cause of action that does support punitive damages, the fourth, is that that cause of action fails for the reasons addressed above in the context of Defendant's demurrer to it, and that, in consequence, there is no cause of action in the complaint that justifies punitive damages. As stated above, the Court agrees that the fourth cause of action is improperly pled as it currently stands but will grant Plaintiffs leave to amend it. Therefore, the Court will not strike the punitive damages prayer on the basis that no cause of action supports it.

Defendant also notes that proving the type of fraud that supports punitive damages pursuant to Civ. Code § 3294 involves more than simply proving common-law fraud: it requires proof of an "intention on the part of the defendant of . . . depriving a person of property or legal rights or otherwise causing injury." (Civ. Code § 3294(c)(3).) That is true, although Defendant fails to mention that punitive damages are also available upon a showing of malice, "conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others," or oppression, "despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights." (Civ. Code § 3294(c)(1) and (2).) In any event, the Court disagrees with Defendant's assertion that "Plaintiff has not pled the required showing here." The Court finds that paragraph 82 of the complaint, which alleges that "Defendant GENERAL MOTORS knew the representations were false and intended Plaintiffs to rely on them," is sufficient, at the pleading stage, to justify the prayer for punitive damages. Whether Plaintiffs will be able to prove the elements of Civ. Code § 3294 at trial is, of course, a different question. But the

Court will permit Plaintiffs to pray for punitive damages so long as the complaint contains a cause of action for fraud.

V. Conclusion

The demurrer is SUSTAINED WITH LEAVE TO AMEND. The motion to strike is DENIED. Defendant's counsel shall submit a written order consistent with this tentative ruling and in compliance with Rule 3.1312.