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8 **United States District Court**
9 **Central District of California**
10 **Western Division**
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12 MANAN BHATT, *et al.*,

CV 16-03171 TJH (RAOx)

13 Plaintiffs,

14 v.

Order

15 Mercedes-Benz USA, LLC, *et al.*,

16 Defendants.
17

18 The Court has considered the motions to strike and dismiss the first amended
19 complaint filed by Defendants Mercedes-Benz USA, LLC [“MBUSA”] [Dkt # 57] and
20 Daimler AG [“Daimler”] [Dkt # 74], together with the moving and opposing papers.

21 The first amended complaint asserted claims on behalf of Plaintiffs, and others
22 similarly situated, for (1) Violations of California’s Consumer Legal Remedies Act,
23 Cal. Civ. Code § 1750 [“CRLA”]; (2) Violations of California’s Unfair Competition
24 Law, Cal. Bus. & Prof. Code § 17200, *et seq.*; (3) Breaches of express warranty under
25 the Song-Beverly Consumer Warranty Act, Cal. Civ. Code § 1792, *et seq.* [“Song-
26 Beverly”]; (4) Breaches of express warranty under California common law; (5)
27 Breaches of express warranty under the Magnuson-Moss Warranty Act, 15 U.S.C. §
28 2301, *et. seq.* [“Magnuson Moss”]; (6) Breaches of implied warranty under Song-

1 Beverly; (7) Breaches of implied warranty under California common law; (8) Breaches
2 of implied warranty under Magnuson-Moss; (9) Fraud by concealment; and (10) Unjust
3 enrichment.

4 MBUSA and Daimler, now, move to dismiss the common law implied warranty
5 claims and all of the express warranty claims, as well as to strike all amendments to the
6 complaint. Daimler, also, moves to strike the claim for damages under the CLRA.

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8 **MOTION TO STRIKE**

9 The amended complaint added: (1) Blasco as a plaintiff; (2) Daimler as a
10 defendant; (3) A claim for breach of express warranty under California common law;
11 (4) A claim for breach of express warranty under Song-Beverly; and (5) An expanded
12 class definition. Because of the procedural posture of this case at the time Bhatt filed
13 the amended complaint, it could have been filed “only with the opposing party’s written
14 consent or the court’s leave.” Fed. R. Civ. P. 15(a)(2). The stipulation stated that
15 “Plaintiffs intend [to] file an amended complaint to address the deficiencies identified
16 by the Court in its March 9, 2017 order.” The stipulation, however, did not expressly
17 limit the scope of the amended complaint.

18 Had Bhatt sought to amend by way of a motion for leave to amend, the Court
19 most likely would have permitted the amendments because leave to amend is, generally,
20 freely granted. *See Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1051 (9th
21 Cir. 2003). Further, amendments to a complaint are, ordinarily, permitted unless there
22 would be undue prejudice to the opposing party. *Howey v. United States*, 481 F.2d
23 1187, 1190 (9th Cir. 1973).

24 Daimler and MBUSA bear the burden of showing that the amendments were
25 unduly prejudicial. *See DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 187 (9th Cir.
26 1987). Because the Court will set the discovery cut-off date at the final pre-trial
27 conference, which has not yet been scheduled, any additionally required discovery
28 would not be unduly prejudicial. *See DCD Programs, Ltd.*, 833 F.2d at 188. Further,

1 the added Song-Beverly and California common law express warranty claims arose
2 from the same operative facts as the previously alleged Magnuson-Moss express
3 warranty claim. *See Hurn v. Ret. Fund Tr. of Plumbing, Heating & Piping Indus. of*
4 *S. California*, 648 F.2d 1252, 1254 (9th Cir. 1981). Finally, the expansion of the
5 putative class does not cause undue prejudice because the legal theories remain the
6 same, and any costs incurred by the expanded class would be “dwarfed by the cost of
7 [the additional class members] litigating on an individual basis.” *See Spann v. J.C.*
8 *Penney Corp.*, 314 F.R.D. 312, 319–27 (C.D. Cal. 2016).

9 Accordingly, the amendments were not unduly prejudicial.

11 MOTION TO DISMISS

12 Dismissal under Fed. R. Civ. P. 12(b)(6) is proper when a complaint exhibits
13 either a “lack of a cognizable legal theory or the absence of sufficient facts alleged
14 under a cognizable legal theory.” *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696,
15 699 (9th Cir. 1988). To sufficiently state a claim, a plaintiff must allege “enough facts
16 to state a claim for relief that is plausible on its face,” *Bell Atlantic Corp. v. Twombly*,
17 550 U.S. 544, 570 (2007), so that the defendant receives “fair notice of what the . . .
18 claim is and the grounds upon which it rests.” *Twombly*, 550 U.S. at 555. Further,
19 all inferences must be drawn in favor of the plaintiff, and the Court must accept all
20 allegations in the complaint as true. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

22 CLRA Damages Claim Against Daimler

23 Motions to preclude a claim for damages are more appropriate as a motion to
24 dismiss. *Whittlestone, Inc. v. Handi-Craft Co.*, 618 F.3d 970, 974–75 (9th Cir. 2010).
25 Therefore, preliminarily, the Court will deem Daimler’s motion to strike the CLRA
26 damages claim a motion to dismiss.

27 Thirty days before filing a CLRA claim for damages, a consumer must notify the
28 party who committed the alleged violations and demand, in writing, that the particular

1 wrong be remedied. Cal. Civ. Code § 1782. Notice is not required for a CLRA claim
2 seeking injunctive relief. Cal. Civ. Code § 1782. Here, it is undisputed that Daimler
3 did not receive CLRA notice prior to being added as a defendant. It is, also, undisputed
4 that MBUSA received CLRA pre-suit notice. Hence, Bhatt and Blasco argue that
5 MBUSA acted as Daimler’s agent, such that notice to MBUSA was, also, notice to
6 Daimler.

7 “Generally a corporation which owns and controls another is not responsible for
8 the liabilities of the latter”. *G. E. J. Corp. v. Uranium Aire, Inc.*, 311 F.2d 749, 756
9 (9th Cir. 1962). One exception to this rule, and argued by Plaintiffs, is “ where the
10 subsidiary acts as the general agent of the parent.” *Harris Rutsky & Co. Ins. Servs. v.*
11 *Bell & Clements Ltd.*, 328 F.3d 1122, 1134 (9th Cir. 2003). “To satisfy the agency
12 test, the plaintiff must make a *prima facie* showing that the subsidiary represents the
13 parent corporation by performing services . . . that, but for the existence of the
14 subsidiary, the parent would have to undertake itself.” *Harris Rutsky & Co. Ins.*
15 *Servs.*, 328 F.3d at 1135. Accepting the allegations as true, Bhatt and Blasco
16 sufficiently alleged that MBUSA was Daimler’s agent for distribution and warranties.

17 Therefore, the allegation that MBUSA was Daimler’s agent is sufficient to
18 establish, for purposes of this motion, that Daimler, also, received CLRA pre-suit
19 notice.

20 21 **Implied Warranty Claims**

22 **a. California common law implied warranty claims**

23 To sufficiently state an implied warranty claim under California common law
24 against MBUSA, Bhatt and Blasco must allege, *inter alia*, that they were in privity of
25 contract with MBUSA. *See Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017, 1023
26 (9th. Cir. 2008). “A buyer and a seller stand in privity [of contract] if they are in
27 adjoining links of the distribution chain.” *Osborne v. Subaru of Am. Inc.*, 198 Cal.
28 App. 3d 646, 656 n.6 (1988). Bhatt and Blasco purchased their cars from authorized

1 dealers, and thus, are not in “adjoining links” of the distribution chain with Daimler or
2 MBUSA. *See Osborne*, 198 Cal. App. 3d at n.6. Therefore, Bhatt and Blasco are not
3 in privity of contract with MBUSA and Daimler.

4 Bhatt and Blasco argue the applicability of two exceptions to the privity
5 requirement – the advertising exception and the third-party beneficiary exception. The
6 California Supreme Court has specifically held that the advertising exception is “only
7 applicable to express warranties.” *Burr v. Sherwin Williams Co.*, 42 Cal. 2d 682, 696
8 (1954). Accordingly, it is not applicable to Bhatt’s and Blasco’s implied warranty
9 claim. *See Burr*, 42 Cal. 2d at 696.

10 While Bhatt and Blasco argue that they were third-party beneficiaries because
11 their car purchases were the directly intended result of MBUSA’s contractual
12 relationship with its authorized dealers, it is not clear whether the third-party
13 beneficiary exception is applicable to consumer warranty cases. Under Cal. Civ. Code
14 § 1559, a contract made “expressly for the benefit of a third person” may be enforced
15 by that third party. For example, a property owner who hires a contractor may assert
16 a California common law implied warranty claim against a subcontractor even though
17 the property owner was not in direct privity with the subcontractor. *Gilbert Fin. Corp.*
18 *v. Steelform Contracting Co.*, 82 Cal. App. 3d 65, 69, 145 Cal. Rptr. 448, 450 (Ct.
19 App. 1978). However, no California appellate court has, as of yet, extended *Gilbert*
20 to a consumer implied warranty case.

21 In *Clemens*, the Ninth Circuit, in a diversity case, dismissed an implied warranty
22 claim where there was no privity and declined to permit new privity exceptions created
23 by the District Court. *Clemens*, 534 F.3d at 1023. The Ninth Circuit went on to list
24 the existing privity exceptions to be “when the plaintiff relies on written labels or
25 advertisements of a manufacturer . . . , special cases involving foodstuffs, pesticides,
26 and pharmaceuticals, and where the end user is an employee of the purchaser.”
27 *Clemens*, 534 F.3d at 1023.

28 District Courts are split on whether *Clemens* foreclosed the application of the

1 third-party beneficiary exception to consumer warranty cases. Some courts have
2 declined to recognize the third-party beneficiary exception because *Clemens* did not
3 expressly recognize it and refused to create any new exceptions to privity. *See Long*
4 *v. Graco Children's Prod. Inc.*, No. CV 13-01257 WHO, 2013 WL 4655763, at *12
5 (N.D. Cal. Aug. 26, 2013). Other courts, however, have held that *Clemens* did not
6 address the third-party beneficiary exception at all, and that *Gilbert* is controlling
7 because there was no material distinction between a construction case and a consumer
8 warranty case. *See In re MyFord Touch Consumer Litig.*, 46 F. Supp. 3d 936, 984
9 (N.D. Cal. 2014). However, the reasoning in *In re MyFord* is unpersuasive because
10 there is a possible material distinction between those two types of cases. A
11 subcontractor knows who it will be working for when it enters into a contract with the
12 prime contractor, unlike in consumer warranty cases where the contract between the
13 manufacturer and retailer is formed before the retailer sells the manufacturer's product
14 to specific customers. *See In re Seagate Tech. LLC Litig.*, 233 F. Supp. 3d 776, 787
15 (N.D. Cal. 2017).

16 The Ninth Circuit clearly stated that "California courts have painstakingly
17 established the scope of the privity requirement under California Commercial Code [§]
18 2314, and a federal court sitting in diversity is not free to create new exceptions to it."
19 *Clemens*, 534 F.3d 1017, 1024. Accordingly, this Court will not allow Bhatt and
20 Blasco to proceed with their California common law implied warranty claims under a
21 third-party beneficiary exception to the privity requirement.

22 **b. Blasco's Magnuson-Moss implied warranty class claim**

23 Magnuson-Moss, for the most part, adopts the relevant state's rules regarding
24 implied warranties. 15 U.S.C.A. § 2301(7). However, class actions brought under
25 Magnuson-Moss are subject to certain notice requirements. *Nadler v. Nature's Way*
26 *Prod., LLC*, No. CV 13-100 TJH(OPx), 2014 WL 12601567, at *3 (C.D. Cal. Mar.
27 27, 2014). Magnuson-Moss requires each named plaintiff to give the warrantor a
28 reasonable opportunity to cure any failure to comply with the express or implied terms

1 of the warranty. 15 U.S.C. § 2310(e). After this reasonable opportunity is afforded,
2 each plaintiff must, then, notify the warrantor that the plaintiff is going to initiate a suit
3 on behalf of a class. 15 U.S.C. § 2310(e). This Court dealt with the same issue in
4 *Nadler*, where it dismissed a purported class action because the complaint did not allege
5 that the pre-suit notice to the manufacturer stated that the plaintiff was acting on behalf
6 of a class. *Nadler*, LLC, No. CV 13-100 TJH(OPx), 2014 WL 12601567, at *3.

7 Here, like in *Nadler*, Blasco failed to allege that her pre-suit notice stated that she
8 was acting on behalf of a class. Thus, Blasco cannot proceed as a named representative
9 for the Magnuson-Moss implied warranty class claim. If Blasco, indeed, gave the
10 appropriate pre-suit notice, then she should seek leave to amend. However, if Blasco
11 did not give the appropriate pre-suit notice, then, as in *Nadler*, amendment would be
12 futile because the time to give the required pre-suit notice has passed. *See Nadler*,
13 LLC, No. CV 13-100 TJH(OPx), 2014 WL 12601567, at *3. Of course, Bhatt
14 remains as a potential named representative for the putative class for the Magnuson-
15 Moss implied warranty claim.

16

17 **Express Warranty Claims**

18 **a. State law warranty claims**

19 Generally, under California law, an express warranty that covers only "materials
20 and workmanship" excludes design defects. *See Troup v. Toyota Motor Corp.*, 545
21 Fed. App'x 668, 669 (9th Cir. 2013). However, an express warranty that covers
22 "materials and workmanship" can, also, cover design defects when the terms of the
23 warranty are ambiguous. *See Daniel v. Ford Motor Co.*, 806 F.3d 1217, 1224-25 (9th
24 Cir. 2015). A contractual term is ambiguous when "it is capable of two or more
25 constructions, both of which are reasonable." *Delgado v. Heritage Life Ins. Co.*, 157
26 Cal. App. 3d 262, 271 (1984). "When contractual language is ambiguous, it must be
27 construed against the drafter." *Neal v. State Farm Ins. Cos.*, 188 Cal. App. 2d 690
28 (1961). Contractual ambiguity is a question of law for the Court to determine.

1 *Producers Dairy Delivery Co. v. Sentry Ins. Co.*, 41 Cal. 3d 903, 912 (1986).

2 Here, Bhatt and Blasco alleged that one part of MBUSA's express warranty states
3 that "materials and workmanship" are covered, while another part states that MBUSA
4 will "repair, without charge to you, anything that goes wrong with your vehicle during
5 the warranty period which is our fault." Because this language is conflicting and,
6 therefore, ambiguous, it must be construed against the Defendants as the drafters of the
7 warranty.

8 Further, a manufacturer is required to replace, or pay for the replacement of,
9 warranted goods only after "a reasonable number of attempts" to service or repair the
10 nonconforming item. Cal. Civ. Code § 1793.2(d). "The reasonableness of the number
11 of repair attempts is a question of fact to be determined in light of the circumstances."
12 *Robertson v. Fleetwood Travel Trailers of Cal., Inc.*, 144 Cal. App. 4th 785, 799, 50
13 Cal. Rptr. 3d 731, 741 (2006). However, as a matter of law, one opportunity to repair
14 is never enough. *Silvio v. Ford Motor Co.*, 109 Cal. App. 4th 1205, 1209, 135 Cal.
15 Rptr. 2d 846, 848 (2003), as modified (June 19, 2003). Blasco alleged that she took
16 her car in twice to be serviced by an authorized Mercedes dealer for the same HVAC
17 issue. However, MBUSA contends that Blasco's earlier problem had been remedied,
18 and that her most recent trip to the dealer was the first trip for a new problem. Because
19 the Court must accept Blasco's allegations as true, for the purposes of this motion, she
20 gave sufficient opportunities for MBUSA and Daimler to repair the defect.

21 Finally, for California state law express warranty claims, pre-suit notice is
22 generally required. *Greenman v. Yuba Power Prods., Inc.*, 59 Cal. 2d 57, 61(1963).
23 However, notice need not be given to a product's manufacturer if the consumer never
24 dealt with the manufacturer. *Greenman*, 59 Cal. 2d at 61. Because Blasco dealt with
25 an authorized dealer, and not with MBUSA or Daimler, Blasco was not obligated to
26 provide pre-suit notice to MBUSA or Daimler. *See Greenman*, 59 Cal. 2d at 61.

27 Accordingly, Bhatt and Blasco have sufficiently stated their state law express
28 warranty claims.

