Gunner Concrete, Inc. et al. v. ProAll International Manufacturing, Inc. et al.
8:23-cv-02212-JVS-JDE

TENTATIVE Order Regarding Motion for Summary Judgment [87]

Defendants ProAll International Manufacturing, Inc. ("ProAll"), Steven Bond ("Bond"), and Gerald Gaubert ("Gaubert," collectively "Defendants") move for summary judgment. (Mot., Dkt. No. 89.)[1] Plaintiffs Douglas Scott Milne, II, Geneve Milne (the "Milnes"), and Gunner Concrete, Inc. ("Gunner Concrete," collectively "Plaintiffs") oppose the motion. (Opp'n, Dkt. No. 93.) Defendants replied. (Reply, Dkt. No. 97.)

For the following reasons, the Court **GRANTS in part** Defendants motion for summary judgment on the claim of fraud for the limited issue of three specific mixers purchased on October 20, 2022. The Court **DENIES in part** the remainder of the motion on all claims.

I. BACKGROUND

In his case, Plaintiffs, upon entering an arrangement with Defendants to purchase P-85 volumetric concrete mixers, discovered that their business could not legally operate at the expected efficiency in light of federal and state weight law regulations. Plaintiffs bring four claims: Fraud, breach of implied warranty of fitness for a particular purpose, California Unfair Competition Law, and declaratory relief.

The following background comes from the parties' respective statements of uncontroverted facts. Unless otherwise mentioned, the factual recitation below contains no genuine dispute of material fact.

A. The Parties

Defendant ProAll has been in the business of volumetric concrete mixer

[1] Defendants memorandum of points and authorities is found at Dkt. No. 89. The Court's citations to the motion refer to the memorandum of points and authorities and not the notice of motion at Dkt. No. 87.

production for over fifty years and is based in Alberta, Canada. (Defs.' Statement of Uncontroverted Facts ("Defs.' SUF"), Dkt. No. 99, ¶ 1.) Volumetric mixers are a type of concrete truck that contain separate compartments for the ingredient materials for concrete. (Id. ¶ 2.) A volumetric mixer allows the operator to "batch measure, mix, and dispense concrete for the exact amount ordered on site," as opposed to a "Ready Mix" truck that can only carry a pre-mixed concrete in fixed quantity. (Id.)

Steve Bond and Jerry Gaubert are two former employees for ProAll. (Id. ¶ 5.) Bond has over forty years of experience in the concrete industry and Gaubert has over thirty years. (Pls.' Statement of Uncontroverted Facts ("Pls.' SUF"), Dkt. No. 98, ¶¶ 2–3.) Until 2022, ProAll operated a business consulting division called Concrete Business Solutions ("CBS"), which employed Bond and Gaubert. (Defs.' SUF ¶¶ 4–5.)

Prior to meeting Defendants, Plaintiff Scott Milne II was a project manager a company called Nobest, Inc. (Id. ¶ 11.) Nobest is owned by Mr. Milne's uncles and specializes in building sidewalks, curbs, and gutters in Southern California. (Id. ¶ 14.) The Milnes intend to purchase Nobest when Mr. Milne's uncles retire. (Id. ¶ 18.)

In 2018, the Milnes (Scott and Geneva) formed MadMak Trucking. (Id. ¶ 20.) MadMak Trucking, which operated four Super 10 trucks, predated Gunner Concrete, Inc. and was formed to service Nobest for hauling services to and from job sites. (Id. ¶¶ 21–25.) In 2019, the Milnes formed Gunner Concrete, Inc. (Id. ¶ 31.) The Milnes formed Gunner Concrete for the purpose of supplying concrete to Nobest. (Id. ¶ 32.)[2]

B. Plaintiffs and Defendants Begin Conducting Business

In June 2021, the Milnes met ProAll sales representatives at the World of Concrete convention ("WOC"). (Id. ¶ 33.) The Milnes received tickets through a vendor for Nobest, leading to early correspondence suggesting that Nobest, rather

[2] Plaintiffs dispute this fact. The Court finds that there is no genuine dispute where Gunner Concrete expressly concedes that "[w]e bought the mixers to service Nobest. That was the whole point." (Defs.' Ex. G (Gunner Concrete 30(b)(6) Dep.) at 148:20–21.)

than Gunner Concrete, was the party working with ProAll. (Pls.' SUF ¶ 4.)

On June 14, 2021, following the meeting at the WOC, Bond provided Plaintiffs with a "Consulting Engagement Proposal." (Defs.' SUF ¶ 34.) This proposal was amended on June 18, 2021. (Id. ¶ 35.) The Consulting Engagement Proposal specified that ProAll would provide a Business Report-Market Analysis" to Plaintiffs, analyzing the strengths, weaknesses, opportunities, and threats to Gunner Concrete's business. (Pls.' Ex. 18.)[3] By June 22, 2021, Defendants had already sent Plaintiffs an initial quote to purchase three volumetric mixers. (Defs.' SUF ¶ 36.) In late August 2021, Bond and Gaubert provided Plaintiffs with a "Business Report-Market Analysis." (Id. ¶ 38.) The market analysis addressed "the economic backdrop of California, the concrete market specifically, federal infrastructure funding, and state and local infrastructure issues," noting that "other local county and city specifications" may apply in the Los Angeles area. (Pls.' SUF ¶ 12.) The market analysis did not mention federal or state weight laws or regulations. (Id. ¶ 13.)

In August or September of 2021, Bond and Gaubert, along with ProAll Regional Sales Manager Sarah Morton, had a meeting with Scott and Geneva Milne regarding the market analysis. (Defs.' SUF ¶ 38.) The parties heavily dispute to what extent the parties discussed "weight issues" at this meeting, but the Milnes concede that they had "some general discussion on weight." (Id. ¶ 39.)

On September 16, 2021, ProAll provided Plaintiffs with revised quotes for different volumetric mixer configurations. (Id. ¶ 41; Defs.' Ex. M at 4.)[4] Again,

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[3] The Court notes that Plaintiffs' mandatory chambers copies are disorganized and burdensome. Plaintiffs provide the Court with four volumes of binders, each containing tabbed exhibit numbers that do not correspond with the exhibits they purport to represent. The binders also fail to include Exhibits 1–5 and 32–45. As noted by Defendants and addressed in Plaintiffs' two-page Errata, Exhibits 43–45 were not filed but are rather "part of the existing record as Exhibits 17 and part of 18." (Dkt. No. 100 at 2.) Naturally, Exhibits 17 and 18 are tabbed by Plaintiffs as Exhibits 35 and 36 in the binders. Such disorganization only hinders the Court's ability to judiciously and efficiently resolve the dispute at hand.

[4] Plaintiffs dispute that the quote provided "revised quotes for different volumetric mixers." Specifically, they contend that the Exhibit only shows an invoice for a "silo." Upon reviewing Exhibit M, the Court finds that this document supports Defendants description. The first page of the quote shows an invoice for a "silo," but the remaining pages all show quotes for

in November 2021, Defendants provided quotes for the volumetric mixers and silos provided in September. (Id. ¶ 42.) Each of these invoices had a disclaimer at the bottom in the same font and text that "[c]ompliance with local axle weight & load weight restrictions is the responsibility of the purchaser." (Defs.' Exs. M, N, O.) The parties do not specify nor agree about the dates that the P85 volumetric mixers were purchased, but they both agree that Gunner Concrete purchased a total of seventeen P85 volumetric mixers from ProAll. (Pls.' SUF ¶ 27.) The ProAll P85 volumetric mixer trucks were a combination of a trucks chassis and a mixer. (Id. ¶ 28.) The chassis was a Freightliner 114SD, 195" Cab-Axle, Detroit Diesel 13 (450 HP). (Id.) The mixer was a ProAll Commander P85 Concrete 10 Cubic Yard Mixer. (Id.)

C. Gunner Concrete Violates State and Federal Law

In January 2022, Gunner Concrete began selling concrete. (Defs.' SUF ¶ 64.) Defendants contend that Plaintiffs continued to purchase volumetric mixers after they began selling concrete. (Id. ¶¶ 65–70 (disputed).)[5]

On August 16, 2022, the Fullerton Police Department pulled over a Gunner Concrete truck for operating 11,650 pounds overweight. (Id. ¶ 71.) On September 29, 2022, the Fullerton Police Department again pulled over Gunner Concrete for operating 22,700 pounds overweight. (Id. ¶ 72.) On October 12, 2022, the Fullerton Police Department again pulled over Gunner Concrete for operating 12,590 pounds overweight. (Id. ¶ 73.) Plaintiffs dispute whether a citation was issued at any of these incidents, but do not dispute the underlying fact that they were pulled over. Plaintiffs concede that eventually the District Attorney filed a criminal case due to multiple events. (Id. ¶¶ 71–73 (Pls.' responses).)

In autumn 2023, Scott and Geneve Milne began the process of winding down Gunner Concrete's operations. (Id. ¶ 76.) After shutting down its business, Plaintiffs sold the 17 volumetric mixers purchased from ProAll to other

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Chassis and Mixers.

[5] Plaintiffs consistently maintain that the continued purchases are "part of a series of ongoing invoices for CBS services, silos, and related equipment." (Id.) As such, Plaintiffs maintain that the date of purchase was July 12, 2021 and everything following this date is merely an extension of that purchase.

construction companies, some of which are located in California. (Id. ¶¶ 82–83.)

II. LEGAL STANDARD

Summary judgment is appropriate where the record, read in the light most favorable to the nonmovant, indicates "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); see also Celotex Corp. v. Catrett, 477 U.S. 317, 322–23 (1986). Summary adjudication, or partial summary judgment "upon all or any part of [a] claim," is appropriate where there is no genuine dispute as to any material fact regarding that portion of the claim. Fed. R. Civ. P. 56(a); see also Lies v. Farrell Lines, Inc., 641 F.2d 765, 769 n.3 (9th Cir. 1981) ("Rule 56 authorizes a summary adjudication that will often fall short of a final determination, even of a single claim . . . ." (citation omitted)).

Facts are "material" if they are necessary to the proof or defense of a claim, and are determined by referring to substantive law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). To determine if a dispute about a material fact is "genuine," the trial court must not weigh the evidence and instead must draw all reasonable inferences in the nonmoving party's favor. Tolan v. Cotton, 572 U.S. 650, 655–59 (2014) (per curiam). The nonmoving party cannot manufacture a "genuine dispute" by relying on allegations in the pleadings. Anderson, 477 U.S. at 251; Oracle Am., Inc. v. Hewlett Packard Enter. Co., 971 F.3d 1042, 1049 (9th Cir. 2020).

A trial court may not resolve issues of credibility to determine whether a fact is "genuinely disputed." See Tolan, 572 U.S. at 658–59. To do so is to improperly weigh the evidence. Id. A court may discount uncorroborated, self-serving testimony where "it states only conclusions and not facts." Nigro v. Sears, Roebuck & Co., 784 F.3d 495, 497–98 (9th Cir. 2015). However, a court may not discount "self-serving" testimony that includes contrary factual assertions and requires the observation of a witness's demeanor to assess credibility. See Manley v. Rowley, 847 F.3d 705, 711 (9th Cir. 2017). Furthermore, an undisputed fact may support several reasonable inferences, but a trial judge must resolve those differing inferences in favor of the nonmoving party. See Tolan, 572 U.S. at 660. In deciding a motion for summary judgment, "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor."

Anderson, 477 U.S. at 255.[6]

The moving party has the initial burden of establishing the absence of a material fact for trial. Id. at 256. "If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact . . ., the court may . . . consider the fact undisputed." Fed. R. Civ. P. 56(e)(2). Furthermore, "Rule 56[(a)][7] mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp., 477 U.S. at 322. To defeat summary judgment, the nonmoving party who bears the burden at trial must present more than a "mere scintilla" of "affirmative evidence." Galen v. Cnty. of L.A., 477 F.3d 652, 658 (9th Cir. 2007) (citations omitted). Furthermore, the nonmoving party "must direct [the court's] attention to specific, triable facts. General references without pages or line numbers are not sufficiently specific." S. Cal. Gas Co. v. City of Santa Ana, 336 F.3d 885, 889 (9th Cir. 2003) (citations omitted).[8] Therefore, if the nonmovant does not make a sufficient showing to establish the elements of its claims, the Court must grant the motion.

III. DISCUSSION

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[6] "In determining any motion for summary judgment or partial summary judgment, the Court may assume that the material facts as claimed and adequately supported by the moving party are admitted to exist without controversy except to the extent that such material facts are (a) included in the 'Statement of Genuine Disputes' and (b) controverted by declaration or other written evidence filed in opposition to the motion." L.R. 56-4.

[7] Rule 56 was amended in 2010. Subdivision (a), as amended, "carries forward the summary-judgment standard expressed in former subdivision (c), changing only one word — genuine 'issue' becomes genuine 'dispute.'" Fed. R. Civ. P. 56, Notes of Advisory Committee on 2010 amendments.

[8] Each fact in the Statement of Uncontroverted Facts, the Statement of Genuine Disputes, and the Response to Statement of Genuine Dispute of Material Fact "must be numbered and must be supported by pinpoint citations (including page and line numbers, if available) to evidence in the record." L.R. 56-1, 2, 3. "The Court is not obligated to look any further in the record for supporting evidence other than what is actually and specifically referenced in the Statement of Uncontroverted Facts, the Statement of Genuine Disputes, and the Response to Statement of Genuine Disputes." L.R. 56-4.

Defendants move for summary judgment on all four claims in the Second Amended Complaint ("SAC"): (1) fraud, (2) breach of implied warranty of fitness for a particular purpose, (3) California's Unfair Competition Law, and (4) declaratory relief. The Court will take each in turn.

A. Claim 1: Fraud

"[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." Boschma v. Home Loan Ctr., Inc., 198 Cal. App. 4th 230, 248 (2011). These elements are congruent with the typical elements of fraud in California. See Lazar v. Superior Court, 12 Cal. 4th 631, 638 (1996) (setting out the five elements of fraud under California law).

1. Misrepresentation by Concealment

To show misrepresentation by concealment, a plaintiff must show that the defendant "concealed or suppressed a material fact." Boschma, 198 Cal. App. 4th at 248.

Here, Plaintiffs do not present a clear or consistent argument for misrepresentation.[9] On the one hand, Plaintiffs state with conviction that their fraud claim "does *not* hinge on whether Defendants 'concealed' publicly available statutory language" (i.e., state and federal vehicle weight law). (Mot. at 6 (emphasis added).) However, in the same breath, Plaintiffs claim that the material omission was Defendants' failure to inform Plaintiffs that "there were no legal impediments that would prevent them from pursuing the business plan Defendants developed." (Id. at 7.) The briefs and SAC are, indeed, suffused with allegations that Defendants failed to inform Plaintiffs about vehicle weight laws before their

[9] Understandably, Defendants interpret the concealment at issue to be that Defendants failed to inform Plaintiffs about California's law regarding weight limitations.

purchase. (See, e.g., SAC ¶ 2 ("Defendants induced Plaintiffs into forming and operating a startup California corporation, Gunner Concrete, Inc. by concealing and misrepresenting federal and state highway weight laws.") Perhaps the nuance escapes the Court, but these allegations appear to be the same concealment as that framed by Defendants—namely, that Defendants failed to inform Plaintiffs about the laws regarding state and federal weight limitations before they sold Plaintiffs the P-85 mixers.

Notwithstanding this theory of concealment, which makes up the bulk of Plaintiffs' argument, Plaintiffs also state in the SUF that "Defendants did not inform Plaintiffs of the P85's fully loaded weight prior to purchase." (Pls.' SUF ¶ 23.) Contrary to Plaintiffs' other argument, this allegation would seem to be predicated on a claim that Defendants failed to accurately provide information about the *true* weight of the vehicles when the P-85 mixer, at 100% capacity, is attached onto a specific chassis.[10]

Because Plaintiffs specifically disavow (and thus forfeit) any argument that the concealment is premised on their lack of knowledge about the publicly available statutory language, the Court will not analyze whether Defendants concealed or misrepresented state and federal weight law. Rather, the Court will only analyze the motion for summary judgment under the "true weight" concealment theory.[11]

Read in a light most favorable to the Plaintiffs, there is a genuine issue of material fact about whether Defendants fully disclosed the true weight of the trucks.

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[10] The lack of specificity in the briefs regarding such key details as the actual weight of the P85 mixer at various capacities and the weight of the chassis conspicuous. It is insufficient to merely tell the Court to compare two unexplained diagrams of trucks that, at face value, do not provide a clear or conspicuous answer to such an important question as: what did Defendants purport that the P85 mixers (with or without chassis) would actually weigh at 100% capacity? What did the Trucks actually weigh? How (specifically) did this break the law? When did Plaintiffs learn about the difference in weight?

[11] Because the Court finds a genuine dispute of material fact with respect to the "true weight" theory, the Court does not analyze the other briefly mentioned theory that ProAll concealed the fact that Corbell Communications—another ProAll client—was having law enforcement trouble because of the weight of the P85 mixer. (See Opp'n at 2–3.)

One of the most hotly disputed material facts in this case is whether the Defendants ever "informed Plaintiffs [that] the mixers could not be legally driven with full loads." (See Pls.' SUF ¶ 20.) Indeed, the concealment of this fact appears to provide the basis for the entire fraud claim. Plaintiffs point to the deposition of Mr. Milne, who claims that he does not recall discussing weight restrictions for the vehicles that Gunner purchased from ProAll. (Pls.' SUF ¶ 20; Pls.' Ex. 7 at 64:11–19.) At other times, it appears Plaintiffs and Defendants may have discussed some weight-related issues, but only with respect to bridges. (Defs.' SUF ¶ 39 (Pls.' response).) On a motion for summary judgment, the trial court may not resolve issues of credibility to determine whether a fact is genuinely disputed. See Tolan, 572 U.S. at 658–59. Moreover, Mr. Milne's deposition testimony, while self-serving, is a contrary *factual* assertion that requires the observation of a witness's demeanor. See Manley, 847 F.3d at 711.

Defendants point to several pieces of evidence to dispute Milne's assertion that Defendants concealed the weight issue from Plaintiffs. For instance, Defendants point to evidence that Mr. Milne received a diagram via email showing the weight of the volumetric mixers. (Defs.' SUF ¶ 50 (disputed); Defs.' Ex. S.) Plaintiffs, however, respond that this diagram omitted "the companion tare weight diagram of the chassis," which is "part of the intentional concealment." (Defs.' SUF ¶ 50 (Pls.' Response).) Plaintiffs argue that it was not until April 2023 that ProAll would send a diagram showing the true weight of the P85 mixer loaded at full capacity with the Freightliner chassis. (See Pls.' Ex. 9.)

To determine if a dispute about a material fact is "genuine," the Court must not weigh the evidence and instead must draw all reasonable inferences in the nonmoving party's favor. Tolan, 572 U.S. at 655–59. Accordingly, there is a genuine dispute of material fact as to concealment.

2. Duty to Disclose

The next element of fraudulent concealment requires that the defendant have had a duty to disclose the material fact to the plaintiff. Boschma v. Home Loan Ctr., Inc., 198 Cal. App. 4th 230, 248 (2011). This duty can arise from fiduciary or confidential relationships. Terra Ins. Co. v. New York Life Inv. Mgmt. LLC, 717 F. Supp. 2d 883, 894 (N.D. Cal. 2010). Indeed, "when a party possesses or holds itself out as possessing superior knowledge or special information or expertise regarding the subject matter and a plaintiff is so situated

that it may reasonably rely on such supposed knowledge, information, or expertise, the defendant's representation may be treated as one of material fact." Id. (citing Neu-Visions Sports, Inc. v. Soren/McAdam/Bartells, 86 Cal. App. 4th 303, 307 (2000)).

Plaintiffs argue that there was a fiduciary or confidential relationship between themselves and Defendants. "[T]he existence of a fiduciary relation is a question of fact which properly should be resolved by looking to the particular facts and circumstances of the relationship at issue." In re Daisy Sys. Corp., 97 F.3d 1171, 1178 (9th Cir. 1996); Kudokas v. Balkus, 26 Cal. App. 3d 744, 750 (1972). To support this contention, Plaintiffs point to their lack of experience in the concrete industry and Defendants role as consultants for the Plaintiffs' business. In viewing the evidence in a light most favorable to Plaintiffs, the Court finds that there is a genuine dispute of material fact regarding duty.

First, there is a genuine dispute of material fact regarding Plaintiffs' experience in the concrete industry. Plaintiffs contend that they have no experience or skill in the industry. (Pls.' SUF ¶ 14; Pls.' Ex. 39 ("[W]hich is what I told Steve [Bond] at The World of Concrete, is that we wouldn't have any interest in building a concrete company. Neither Scott [Milne II] nor I had any experience at all.").) Defendants respond that Plaintiffs have significant experience because they have "interacted with projects involving concrete and concrete suppliers, including ordering concrete." (Defs.' SUF ¶ 17 (undisputed).) The extent to which Plaintiffs are experienced with concrete directly bears on the question of whether a confidential relationship exists. See Persson v. Smart Inventions, Inc., 125 Cal. App. 4th 1141, 1161 (2005).

Second, read in a light most favorable to the Plaintiffs, a reasonable jury could find that the Consulting Engagement Proposal created a confidential or fiduciary relationship. Defendants agreed to operate as consultants for Plaintiffs' business. (Defs.' Exs. J, K.) The Consulting Engagement Proposal specified that ProAll would provide a Business Report-Market Analysis" to Plaintiffs, analyzing the strengths, weaknesses, opportunities, and threats to Gunner Concrete's business. (Pls.' Ex. 18.) To be sure, Defendants correctly note that the agreement did not contain contractual terms that required Defendants to advise Plaintiffs on weight laws. (Defs.' Exs. J, K.) Nonetheless, given the fact that Plaintiffs specifically hired Defendants to provide general advice about their business, a reasonable jury could find that Defendants owed a duty to disclose important

details such as the true weight of their vehicles and any potential legal impediments for operating such vehicles. See Terra Ins. Co., 717 F. Supp. 2d at 891.

Put together, Plaintiffs have satisfied their evidentiary burden of showing a genuine dispute of material fact regarding duty. Read in a light most favorable to Plaintiffs, a reasonable jury could find that Plaintiffs lack of experience and Defendants' consultant role could establish a fiduciary relationship.

3. Actual and Justifiable Reliance

i. Justifiable Reliance

"The reasonableness of reliance is a question of fact[.]" Medallion Film LLC v. Loeb & Loeb LLP, 100 Cal. App. 5th 1272, 1296 (2024). As a general rule, fraud "cannot be predicated upon misrepresentations of law or misrepresentations as to matters of law." Miller v. Yokohama Tire Corp., 358 F.3d 616, 621 (2004). Nevertheless, a person may reasonably rely on a non-lawyers advice about domestic laws if the misrepresenting party has superior knowledge, a fiduciary duty or position of trust, secured the confidence of the recipient, or has another special reason to expect recipients reliance on the opinion. See id. (listing exceptions to the general rule that fraud cannot be predicated upon a misrepresentation of the law).

As an initial matter, the Court again notes the inconsistent theories of misrepresentation presented by Plaintiffs. Here, Plaintiffs primary argument for reasonable reliance is that "Defendants, not attorneys, were best positioned to inform Plaintiffs of applicable weight limits." (Opp'n at 10.) Indeed, Plaintiffs legal position for reasonable reliance is that "a plaintiff may reasonably rely on *misrepresentations regarding the law* made by non-attorneys." (Id. at 9 (emphasis added).) As discussed, Plaintiffs have expressly disclaimed the misrepresentation of law theory.[12]

[12] Accordingly, the Court is not persuaded by Plaintiffs' arguments that the disclaimer only applied to "local" governments—opposed to state or federal governments—or that the disclaimers were otherwise deficient in alerting Plaintiffs to their necessity to comply with state and federal weight laws.

With respect to the true weight theory, the Court finds that there is a genuine dispute of material fact regarding reasonable reliance. Defendants argue that there can be no reasonable reliance where Defendants expressly disclaimed that: "Compliance with local axle weight and load weight is the responsibility of the purchaser." (Defs.' Exs. L, O, P.) However, these disclosures do not put Plaintiff on notice that the factory tare (empty vehicle) weights and laden weight would cause the P85 mixers to weigh more than Plaintiffs expected. Instead, a reasonable jury could conclude that Plaintiffs reasonably relied on Defendants' Consultant Engagement Proposal and Business Report-Market Analysis to be assuaged that the mixers could legally operate on California roads. Thus, there is a genuine dispute of material fact as to reasonable reliance.

ii. Actual Reliance

"California courts have always required plaintiffs in actions for deceit to plead and prove the common law element of actual reliance." Mirkin v. Wasserman, 5 Cal. 4th 1082, 1092 (1993). Indeed, a plaintiff "must have been unaware of the [concealed] fact" and would "not have acted as he did if he had known[.]" Boschma, 198 Cal. App. 4th at 248.

Defendants argue that even if the reliance was justifiable, Plaintiffs cannot demonstrate actual reliance because they continued to purchase the illegal vehicles *after* receiving citations by law enforcement for excessive weight. The Court finds that even when viewing the evidence a light most favorable to the Plaintiffs, Plaintiffs cannot show actual reliance for the three mixers received after August 16, 2022.

Defendants contend that Plaintiffs purchased volumetric mixers on the following days: December 9, 2021 (4 mixers), January 6, 2022 (1 mixer), May 25, 2022 (1 mixer), June 3, 2022 (1 mixer), June 7, 2022 (2 mixers), June 16, 2022 (1 mixer), July 13, 2022 (4 mixers), October 20, 2022 (3 mixers). (Defs.' Ex. O.) Plaintiffs respond that these invoices are part of the "a series of ongoing invoices" that commenced on July 12, 2021. (Defs.' SUF ¶¶ 65–70 (Pls.' responses).) Thus, Plaintiffs argue, the Court should treat the invoices as one purchase on July 12, 2021.

The Court disagrees and finds that each invoice is a distinct purchase. Tellingly, Plaintiffs can point to no contract on July 12, 2021 that purports to lay

out the purchase of 17 volumetric mixers. The closest Plaintiffs can come to showing this contract is Exhibit 18, which to the Court's best reading shows the purchase of just three volumetric mixers. (See Pls.' Ex. 18.) Furthermore, as Plaintiffs concede in the SAC, they had the ability to reject new quotes and Defendants would send a revised quote with new terms. (See SAC ¶¶ 76–78.)

On August 16, 2022, the Fullerton Police Department pulled over a Gunner Concrete truck for operating 11,650 pounds overweight. (Defs.' SUF ¶ 71.) On September 29, 2022, the Fullerton Police Department again pulled over Gunner Concrete for operating 22,700 pounds overweight. (Id. ¶ 72.) On October 12, 2022, the Fullerton Police Department again pulled over Gunner Concrete for operating 12,590 pounds overweight. (Id. ¶ 73.) Whether or not Plaintiffs were actually issued a citation at any of these stops, this conduct is sufficient to put Plaintiffs on actual notice that they were deceived about the true weight of the trucks and that there was, indeed, a major legal impediment to their business operations. Yet, despite these incidents, Plaintiffs purchased three more volumetric mixers on October 20, 2022.[13] (Defs.' Ex. O.) Therefore, with respect to these three mixers, it cannot be said that Plaintiffs were unaware of the concealed fact nor that they would not have acted had they known. Plaintiffs knew and still acted.

Accordingly, the Court **GRANTS in part** Defendants motion for summary judgment with respect to the three mixers purchased on October 20, 2022 for the claim of Fraud. The Court finds a genuine dispute of material fact with respect to the remaining mixers.

4. Defendants' Intent

"[I]ntent to defraud is a question of fact to be determined from all the facts and circumstances of the case." Buck v. Superior Ct., 232 Cal. App. 2d 153, 161 (1965). Intent "may be, and usually must be, inferred circumstantially." Id.

Plaintiffs argue that intent can be inferred based on Defendants superior knowledge, awareness of other customers citations for weight violations, and the

[13] At a minimum, Plaintiffs did not dispute or reject the new order of three volumetric mixers.

failure to inform the Plaintiffs about weight laws. (Opp'n at 11.) Plaintiffs also present two pieces of evidence to show intent: Exhibit 12 and Exhibit 21. Read in a light most favorable to the Plaintiffs, there is narrowly a genuine dispute of material fact regarding intent to defraud.

Exhibit 12 is described by the Plaintiffs as evidence of "a multi-month effort" by a ProAll client "Corbel" to defend itself against police investigations in 2021. (Opp'n at 3.) Specifically, this ProAll client had allegedly been having issues with certain weight laws after using ProAll's P85 mixers. (Id. (citing Pls.' Ex. 12).) Plaintiffs contend that if Defendants knew that one customer was having issues with weight limitations in 2021, that the concealment of this fact shows an intent to deceive. (Opp'n at 7.) For several reasons, the Court disagrees.

Exhibit 12 does not appear to be what Plaintiffs purport it to be. Without any context from the Plaintiffs to help guide the Court's reading of this Exhibit, Exhibit 12 appears to be a rather mundane exchange of emails between ProAll employees discussing various weights of different trucks with different mixers and at different capacities. (Pls.' Ex. 12.) At no point do the ProAll employees discuss any legal impediments or police encounters involving Corbel. (Id.) In fact, the entire email thread appears to be hypothetical. (Id. ("He would love it if we could do a test on the above chassis with P95 (25) I believe.").) Exhibit 12 provides no support to Plaintiffs' intent argument.

While Exhibit 12 is of no value to Plaintiffs, the same cannot be said of Exhibit 21. As described by Plaintiffs, Exhibit 21 "reveals a damning text exchange" between Regional Sales Manager Sarah Morton and General Manager Andrew Coates. (Opp'n at 3.) Sarah Morton worked closely with Plaintiffs to finalize the deal to purchase mixers. (Defs.' SUF ¶ 49.) In a July 2021 text exchange, Morton tells Coates that "I talked to billy . . . And he told me that the mixer I just quoted this customer would not be compliant with California and he's having the same issues with Korbel [sic] as they are continually getting fines for not being compliant." (Pls.' Ex. 12 at 4.) Morton then suggests that she could quote the P85 with a trailer mounted. (Id.) Coates responds, "[s]ounds like they are having issues with local state laws. If you're going to quote a trailer I would just quote the P95. I'm not sure why quoting a P85 on a trailer would help anything." (Id. at 5.) Morton nevertheless continued to quote and sell the P85 mixers to Plaintiffs.

Plaintiffs are correct that this Exhibit suggests some level of intent to defraud. Morton, a sales associate for Defendants who worked directly with Plaintiffs, suggested a P85 mixer despite knowing that it wouldn't be in compliance with California law and that another California customer was having similar legal issues. The Court finds that Plaintiffs have narrowly met their evidentiary burden of showing a genuine issue for trial.

5. Resulting Damages

Finally, Defendants contend that Plaintiffs cannot show resulting damages where Gunner Concrete was never profitable as a business. Specifically, Defendants argue that because other California businesses purchased the same volumetric mixers after Gunner Concrete "shutter[ed]," it proves that Gunner Concrete's losses were self-inflicted rather than the result of Defendants' conduct. Plaintiffs do not respond to the issue of resulting damages.

The Court finds that there is a triable issue on resulting damages. There appears to be a genuine dispute about whether Gunner Concrete was ever going to succeed financially, such as by reducing the cubic yards of carrying materials or operating in another manner. Indeed, while Plaintiffs provide no rebuttal to this argument, Defendants likewise give no real evidence (expert or not) that Plaintiffs were doomed to be unprofitable regardless of concealment. The only "evidence" presented by Defendants is a common sense assumption that it would be "illogical" for other California companies to purchase the P85 mixers if they were illegal and could not be profitable in some way. Such evidence is insufficient to dispute resulting damages at this stage.

Because the Court finds that there is a genuine dispute of material fact with respect to each element of fraudulent concealment, the Court **DENIES** the motion regarding the claim of fraud.

B. Claim 2: Breach of Implied Warranty of Fitness for a Particular Purpose

"Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the section an implied warranty that the goods shall be

fit for such purpose." Cal. Com. Code. § 2315. The Song-Beverly Consumer Warranty Act makes this implied warranty applicable to retailers, distributors, and manufacturers. Cal. Civ. Code § 1791.1(b); Keith v. Buchanan, 173 Cal. App. 3d 13, 25 (1985).

In order to establish a breach of implied warranty of fitness for a particular purpose, the plaintiff must show that: (1) the purchaser at the time of contracting intended to use the goods for a particular purpose and that the seller at the time of contracting had reason to know of this particular purpose; and (2) the buyer relied on the seller's skill or judgment to select or furnish goods suitable for the particular purpose, and the seller at the time of contracting had reason to know that the buyer was relying on such skill and judgment. Keith, 173 Cal. App. 3d at 25 (citing Metowski v. Traid Corp., 28 Cal. App. 3d 332, 341 (1972)).

1. Particular Purpose

"A 'particular purpose' differs from the ordinary purpose for which the goods are used in that it envisages a specific use by the buyer which is peculiar to the nature of his business whereas the ordinary purposes for which goods are used are those envisages in the concept of merchantability." Am. Suzuki Motor Corp. v. Super. Ct., 37 Cal. 4th 1291, 1295 (1995).

Plaintiffs provide a highly instructive comment from the Commercial Code:

> [S]hoes are generally used for the purpose of walking upon ordinary ground, but a seller may know that a particular pair was selected to be used for climbing mountains.

Cal. Com. Code § 2315, cmt. 2.

The usual purpose of a volumetric concrete mixer is to store "ingredient materials for concrete, allowing the operator to batch, measure, mix, and dispense concrete for the exact amount ordered." (Defs.' SUF ¶2 (undisputed).) It logically follows that, when attached to a truck, the usual purpose is to be able to move the vehicle (i.e., transport the goods).

Plaintiffs state in the SAC that the trucks were purchased "for the particular purpose of transporting a 10 cubic yard "full load." (SAC ¶ 126.) The Court

agrees that read in a light most favorable to the Plaintiff, they have adequately demonstrated a particular use or at least created a triable issue. Plaintiffs do not merely seek a concrete mixer. Plaintiffs do not merely a seek a volumetric concrete mixer. Plaintiffs contracted with Defendants for the purchase of a specific combination of a P85 volumetric concrete mixer capable of holding 10 cubic yards (a full load). Further underscoring the particular purpose of Plaintiffs order, Defendants had to mix and match (so to speak) different chassis for different mixers. Plaintiffs' particular request is the logical equivalent of telling the shoe shop owner that you're using your boots for hiking.

To be sure, the Court agrees with Defendants that had Plaintiffs' particular use been to "make profit," such purpose would not be particular. See Goldmith v. Allergan, Inc., 2010 WL 11463630, at *3 (C.D. Cal. Feb. 24, 2010) ("If building a profitable business was a particular purpose, every business endevour would be for purpose[.]") (quotations omitted). But this is not Plaintiffs' particular purpose. A reading of the facts in a light most favorable to the Plaintiff shows that Plaintiffs sought Defendants to purchase a specific type of mixer that could be used in California to transport 10 cubic yards of material.

Moreover, Plaintiffs have met their burden at this stage to show that ProAll had knowledge of this particular purpose. (See Defs.' Exs. L, O, P (showing invoices for the P85 10 yd mixer); Defs.' Ex. N (detailing the production capacity and other features of the P85 mixer).)

2. Reliance

Both parties recognize that reliance is the most important question for determining implied warranty of fitness for a particular purpose. (See Mot. at 14; Opp'n at 12.) "The major question in determining the existence of an implied warranty of fitness for a particular purpose is the reliance by the buyer upon the skill and judgment of the seller to select an article suitable for his needs." Keith, 173 Cal. App. 3d at 25. To prove reliance, the plaintiff must show that they actually relied on the defendant's skill or judgment and that the seller had reason to know that the buyer was relying on such skill and judgment. Id. A plaintiff may still rely on the skill or judgment of seller where their claim for implied breach of warranty is based on failure to disclose. See Bagley v. Int'l Harvester Co., 91 Cal. App. 2d 922 (1949) (affirming the dismissal of an implied breach of

warranty for particular purpose claim, in part, on the basis that it was not properly alleged that buyer relied upon the skill and judgment of the concealing seller).

Defendant argues that no reasonable jury could find that Plaintiffs relied on ProAll's skill and judgment about state and federal weight restrictions. (Mot. at 15.) Specifically, Defendants point to the invoices, which expressly state that "[c]ompliance with local axle weight & load weight restrictions is the responsibility of the purchaser." (Defs.' Ex. O.) Further, Defendants argue that Plaintiffs had discretion in selecting the specific mixers they desired to purchase and thus could not have exclusively relied on Defendants skill and judgment. (See Defs.' SUF ¶ 45; Defs.' Ex. C at 115:16–116:1; Defs.' Ex. J (Steve Bond stating that Plaintiffs could "pick and choose" from different plans based on the "programs that best fit [their] situation").) For the same reasons, Defendants aver that ProAll had no reason to know that Plaintiffs were relying on their skill and judgment when, at the time of contracting, they disclaimed such responsibility and Plaintiffs had options to choose from.

Plaintiffs respond that they had no experience in the cement mixing and delivery industry, and accepted all of ProAll's recommendations. (Opp'n at 12 (citing Pls. SUF ¶ 14; Pls.' Ex. 39).) Moreover, Plaintiffs aver that the disclaimer was insufficient where it only mentioned "local" restrictions instead of federal and state weight laws, and did not use expressions like "as is" or "with all faults." (Id. at 13 (citing Defs.' Exs. O, P).)

The Court finds that there is a genuine dispute of material fact as to reliance—specifically, whether Plaintiffs are experienced in the concrete industry. Plaintiffs contend that they have no experience or skill in the industry. (Pls.' SUF ¶ 14; Pls.' Ex. 39 ("[W]hich is what I told Steve [Bond] at The World of Concrete, is that we wouldn't have any interest in building a concrete company. Neither Scott [Milne II] nor I had any experience at all.").) Defendants respond that Plaintiffs have "significant experience" and have worked with concrete suppliers in connection with Nobest. (Defs.' SUF ¶ 17.) The determination of whether Plaintiffs were experienced will largely rely on evidence of credibility and a balancing of the facts establishing experience—neither of which is an appropriate determination to be made at the summary judgment stage. See Tolan, 572 U.S. at 658–59.

Without being able to determine the Plaintiffs' experience in the concrete industry, the Court cannot properly ascertain whether it was reasonable to rely on the skill and judgment of ProAll at the moment of deception. See Keith, 173 Cal. App. 3d at 25–26 (finding that a party's "extensive experience" with sailboats meant that they did not rely on the skill and judgment of the seller in the selection of vehicle); Punian v. Gillette Co., 2015 WL 4967535, at *8 (N.D. Cal. Aug. 20, 2015) (finding sufficient allegations to support reasonable reliance on concealed misrepresentations because inexperienced consumers were more readily deceived at the point of sale). Because there is a genuine dispute of material fact in this crucial element, the Court **DENIES** the motion with respect to implied warranty of fitness for a particular purpose.

3. Improper Use Defense

Defendants briefly argue that Plaintiffs improperly used the P85 mixer and therefore cannot succeed in a breach of implied warranty claim. Defendants cite several inapposite cases and provide no other case law to support this defense. For instance, Defendants cite American Suzuki, where the court mentioned in a footnote that the parties failed to state a "legally cognizable 'particular purpose'." American Suzuki, 37 Cal. App. 4th 1291, 1295 n.2. The Court disagrees with Defendants interpretation that "legally cognizable" means that the particular purpose must be "legal." Rather, in this context, the court appeared to merely be referencing the legal standard for a Rule 12(b)(6) motion that requires a party to state a claim that is legally cognizable.

Even so, the Court finds that the illegal use in this case is not an improper use such that it cannot support an implied breach of warranty claim. The gravamen of Plaintiffs implied breach of warranty claim is that they intended to operate the P85 mixers legally but, because of the concealment of material facts such as the true weight of the mixers and trucks, they could not. This is unlike DMT S.A. v. Enercon Indus. Corp., 2008 WL 1869033, at *5 (E.D. Wisc. Apr. 24, 2008), where the Court found that the defendants "improper handling or use of equipment" precluded the breach of implied warranty claim. Thus, the Court does not find that any improper use defense applies in this case.

C. Claim 3: California Unfair Competition Law (UCL)

California's UCL protects consumers and businesses from "any unlawful, unfair, or fraudulent business act or practice and unfair, deceptive, untrue, or misleading advertising[.]" Cal. Bus. & Prof. Code § 17200. "Each of these three adjectives captures 'a separate and distinct theory of liability.'" Rubio v. Cap. One Bank, 613 F.3d 1195, 1203 (9th Cir. 2010) (quoting Kearns v. Ford Motor Co., 567 F.3d 1120, 1127 (9th Cir. 2009)).

While not specified in the opposition brief, it appears that Plaintiffs bring this UCL claim under the "unlawful" prong. (SAC ¶ 140.) The "unlawful" prong of the UCL treats violations of other federal, state, regulatory, or court-made law as unlawful business practices independently actionable under state law. Nat'l Rural Telecomms. Co-Op v. DIRECTIV, Inc., 319 F. Supp. 2d 1059, 1074 (C.D. Cal. 2003) (citation omitted).

Plaintiffs argue that ProAll unlawfully passed a 12% federal excise tax on to Plaintiffs. (Opp'n at 17.) Specifically, Plaintiffs contend that ProAll, as the importer and first retail seller of the volumetric mixers, was obligated to pay the federal excise tax. (Id. (citing 26 U.S.C. § 4051(a)(1); 26 C.F.R. § 48.4052-1(d)).) Defendants respond that the applicable tax law and the parties' contractual agreements show that Plaintiffs "bore the responsibility" for the excise tax on the mixers. (Mot. at 19.) For the following reasons, the Court finds that there is a genuine dispute of material fact as to whether the excise tax was unlawfully passed to Plaintiffs.

26 U.S.C. § 4051(a)(1) imposes a 12% tax "on the first retail sale" of, among other things, an automobile truck, trailer truck, or semitrailer chassis or body.[14] For the purposes of the statute, "first retail sale" is defined as "the first sale, for a purpose other than for resale or leasing in a long-term lease, after production, manufacture, or importation." 26 U.S.C. § 4052(a)(1). It is the first retail sale that triggers the excise tax. See CenTra, Inc. v. United States, 953 F.2d 1051, 1053–54 (6th Cir. 1992). Additionally, the "use" of a taxable article before the first retail sale will be treated as if such article were sold or retailed. 26 U.S.C. § 4052(a)(3)(A). "An 'importer' of a taxable article is any person who brings such

[14] While concrete mixers are expressly exempt from this tax, see 26 U.S.C. § 4053(5), the truck and chassis that hold the mixer are still subject to the tax.

an article into the United States from a source outside the United States . . . ." 26 C.F.R. § 48.0-2(a)(4)(i).

Defendants argue that Plaintiffs imported the trucks into the United States for use and, therefore, are the taxable party. Namely, Defendants point to two declarations purportedly signed by a person named Randy DeLong that lists Nobest, Inc. under "name of importer." (Defs.' Exs. Q, R.) As an initial matter, Plaintiffs argue that these unauthenticated customs declarations are inadmissible hearsay and lack authentication.[15] Evidentiary objections aside, Plaintiffs claim that Randy is not, in fact, one of Plaintiffs employees but rather an employee of ProAll who listed Nobest as the importer. (Pls.' Ex. 43 (showing Randy Delong's email address as "rdelong@proallinc.com").) Moreover, Plaintiffs point to evidence that ProAll claimed to be the importer when filing paperwork with the Department of Homeland Security. (See Pls. Ex. 26.) The Court finds that Plaintiffs have raised a triable question as to whether Plaintiffs or Defendants are the importer of goods.

Defendants argue that even if they were the responsible party to pay the tax, Plaintiffs agreed to assume liability for the excise tax. Defendants are correct that the IRS allows importers to pass the excise tax on to the buyer. (Defs.' Ex. CC.) Defendants point to several examples of invoices that expressly state that "any applicable Federal, Excise, State/Provincial taxes not included on this quote, license & registration are the responsibility of the purchaser." (See e.g., Defs.' Exs. N, O, P.) Yet, Plaintiffs persuasively rebut these allegations by showing clearly inconsistent disclaimers on several other quotes. (See Pls.' Ex. 18 ("Any applicable federal, excise, state/provincial taxes *included* on this quote, license and registration are the responsibility of the purchaser.") (emphasis added).) Moreover, Plaintiffs correctly note that aside from Defendants' few inconsistent disclaimers, there is no evidence that Defendants disclaimed their obligation to pay the excise tax in a clear and conspicuous manner.

Ultimately, the question to be decided is whether the disclaimers, which Plaintiffs contend were inconsistent and lack specificity by saying "local" instead of "state and federal," are sufficient to pass tax liability on to Plaintiffs. Because

[15] The Court sustains Plaintiffs objections to hearsay without evidence authenticating that these are, indeed, business records or public records.

both parties raise contradictory stories and dispute the other sides interpretation of the disclaimers, the Court finds a genuine dispute of material fact. Because the UCL claim requires a finding of which party bore the tax burden, the Court **DENIES** the motion.

D. Declaratory Relief for UCL Claim

Declaratory relief "is a remedy and not a cause of action." Bhandari v. Cap. One N.A., 2013 WL 1736789, at *9 (N.D. Cal. Apr. 22, 2013). The Court has denied the motion for summary judgment on the UCL claim because there is a genuine dispute of material fact. Accordingly, declaratory relief for the UCL claim cannot be granted.

IV. CONCLUSION

For the foregoing reasons, the Court **GRANTS in part** Defendants motion for summary judgment on the claim of fraud for the limited issue of three specific mixers purchased on October 20, 2022. The Court **DENIES in part** the remainder of the motion on all claims.

IT IS SO ORDERED.