Gunner Concrete, Inc. et al. v. ProAll Int'l Mfr., Inc. et al.
8:23-cv-02212-JVS-JDE

TENTATIVE Order Regarding Motion to Dismiss [29]

Defendants ProAll International Manufacturing, Inc. ("ProAll"), Steve Bond ("Bond"), and Gerald Gaubert ("Gaubert") (collectively, "Defendants") move to dismiss. (Mot., Dkt. No. 29.) Plaintiffs Douglas Scott Milne II, Geneva Milne (collectively, the "Milnes"), and Gunner Concrete, Inc. ("Gunner Concrete") (collectively, "Plaintiffs") opposed. (Opp'n, Dkt. No. 33.) Defendants replied. (Reply, Dkt. No. 34.)

For the following reasons, the Court **GRANTS in part** the motion with respect to the breach of contract and Unfair Competition Law claims and **DENIES in part** the motion with respect to the breach of implied warranty and fraudulent inducement claims. Plaintiffs shall have twenty-one days leave to amend.

I. BACKGROUND

The following factual allegations come from the Complaint.

In June 2021, the Milnes attended a World of Concrete convention and met a ProAll sales representative, who promoted "ProAll 'P85 Volumetric Concrete Mixers' for use in California to distribute mobile concrete mixtures to California customers." (Compl. ¶¶ 32–33, Dkt. No. 1.) Plaintiffs did not have prior experience in the volumetric concrete trucking business, but they sought to invest in a new business. (Id. ¶ 33.) In August 2021, Plaintiffs retained ProAll's business consulting division, Concrete Business Solutions by ProAll ("CBS"), to provide a Business Report-Market Analysis ("Market Analysis") and consulting services regarding the viability of a Southern California volumetric mobile concrete business. (Id. ¶¶ 26, 39.) ProAll/CBS quoted Plaintiffs $9,800 for the service, and Plaintiffs ultimately paid over $67,000 for consulting. (Id. ¶ 41.) Plaintiffs received the Market Analysis on August 31, 2021. (Id. ¶ 45.) The report did not reveal the following information:

[T]he Federal Bridge Formula and the California highway weight laws

> rendered the proposed ProAll "2022 International 195 inch HV 607 Cab to Axles with Cummins L9" and/or the actual trucks delivered, seventeen (17) "2023 Freightliner 195 inch Cab-Axle Detroit Diesels," to be illegally heavy when the attached "2021 ProAll Commander P85 Mobile Concrete Mixer with 10yd Mixer" was fully loaded with the advertised 10 cubic yard capacity.

(Id. ¶ 48.) The Complaint continues, "[Defendants] knew the represented 10 cubic yard load could never be transported legally on state or federal highways." (Id.) Specifically, Defendants knew "that the typical five axle Freightliner chassis, burdened with a ProAll P85 volumetric mixer, would have a 'dry weight' of 35,000 pounds" and "that it would reach the applicable 5 axle/25 foot axle span maximum California weight limit of 58,500 pounds when loaded with approximately 5 cubic yards of concrete, i.e. 20,000 to 25,000 pounds." (Id. ¶ 49.)

ProAll uses a software program developed by Truck Science that allows ProAll to "calculate axle weights, dimensions, center of gravity and maximum payload to deliver safe, legal and efficient trucks" and "design truck chassis mixer combinations to comply with federal and state laws." (Id. ¶ 21.) ProAll's "Weight Distribution Estimate" prepared for a different customer and dated March 10, 2021, shows that "when 'unladened,' the selected Freightliner chassis when configured with the selectd ProAll mixer would weigh 33,340 lbs." (Id. ¶ 51.) On the diagram showing this information, there is a module that displays the "'permissible' federal limits of 20,000 pounds per single axle/34,000 pounds per tandem axle," but it may be configured to show California law in relation to the exact truck and ProAll mixer to demonstrate "weight law violations with each load variable plugged in." (Id.) The Weight Distribution Estimate diagram was not provided to Plaintiffs until after it had purchased seventeen trucks. (Id. ¶ 50.)

The Market Analysis "misrepresented as part of the analysis that Plaintiffs could run legally at 10 cubic yard full loads." (Id. ¶ 54.) The Complaint breaks down the calculations as follows:

> Basic concrete weighs 4,000 pounds per cubic yard. The ProAll mixer trucks selected and configured by ProAll weighed approximately 35,000 pounds before any concrete load was added. When burdened with their intended capacity of 10 cubic yards, the trucks were at least 16,000

> pounds overweight, and depending on how they were loaded, could easily exceed 20,000 pounds overweight. Weight distribution varies with how the raw materials are loaded into the P85, and thus fully loaded P85 mixers can vary in actual axle weight loads, rendering it risky for any operator to knowingly load more than 5 cubic yards of concrete.

(Id. ¶ 52.) ProAll/CBS provided a 24-month "proforma" on or around September 21, 2021, which showed that "all profit margins were premised on selling and delivering daily as many as full 10 cubic yard loads as possible." (Id. ¶ 55.) Plaintiffs relied on the proforma in their decision to invest approximately $10,000,000 that they have now lost. (Id.) Neither the Market Analysis nor the proforma referenced federal or state weight laws. (Id. ¶ 56.)

Based on the Market Study and proforma, Plaintiffs started Gunner Concrete and related businesses, acquired a building in which to operate the business, and provided transportation of raw materials. (Id. ¶ 75.) On September 1, 2021, ProAll began providing consulting services, including "mix designs, concrete technology training, driver training, software salesforce training, and detailed advice on setting up operations while the trucks were being manufactured." (Id. ¶ 78.)

On September 13, 2021, ProAll provided Plaintiffs with a quote for the purchase of four ProAll P85 Volumetric Concrete Mixers (the "Quote"), which is attached to the Complaint. (Compl., Ex. 4, Dkt. No. 1-4.) Under the heading "TERMS AND CONDITIONS OF SALE," the paragraph titled "[a]xle loading disclaimer" states, "Compliance with local axle weight and load weight is the responsibility of the purchaser. Any applicable federal, excise, state/provincial taxes included on this quote, license and registration are the responsibility of the purchaser."[1] (Id. at 7.) The next paragraph states, "A non-refundable deposit is required at the time of execution of this agreement. This deposit amount will be deducted from the final invoice." (Id.) Plaintiffs then "sen[t] a $35,000 deposit to ProAll on September 21, 2021, and ultimately purchase[d] 17 of the exact same heavy mixer trucks, wasting over five million dollars on trucks that are useless for

[1] Similar language also appears on page 4 of the Quote under the "Terms" heading and above the payment total. (Compl., Ex. 4, at 4, Dkt. No. 1-4.)

achieving the ProAll scripted business plan/24-month proforma." (Compl. ¶ 77.)

Plaintiffs filed their Complaint on November 27, 2023, alleging the following claims: (1) "common law deceit, fraud in the inducement from conceal material facts, and misrepresentation of facts against all defendants"; (2) breach of contract against ProAll; (3) breach of implied warranty of fitness for a particular purpose/Song-Beverly Consumer Warranty Act claim against ProAll; and (4) violation of unfair competition laws/federal excise tax laws against ProAll. (See generally Compl.)

II. LEGAL STANDARD

Under Rule 12(b)(6), a defendant may move to dismiss for failure to state a claim upon which relief can be granted. A plaintiff must state "enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). A claim has "facial plausibility" if the plaintiff pleads facts that "allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).

In resolving a 12(b)(6) motion under Twombly, the Court must follow a two-pronged approach. First, the Court must accept all well-pleaded factual allegations as true, but "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Iqbal, 556 U.S. at 678. Nor must the Court "'accept as true a legal conclusion couched as a factual allegation.'" Id. at 678-80 (quoting Twombly, 550 U.S. at 555). Second, assuming the veracity of well-pleaded factual allegations, the Court must "determine whether they plausibly give rise to an entitlement to relief." Id. at 679. This determination is context-specific, requiring the Court to draw on its experience and common sense, but there is no plausibility "where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct." Id.

Under Federal Rule of Procedure 9(b), a plaintiff must plead each element of a fraud claim with particularity, i.e., the plaintiff "must set forth more than the neutral facts necessary to identify the transaction." Cooper v. Pickett, 137 F.3d 616, 625 (9th Cir. 1997) (quoting Decker v. GlenFed, Inc. (In re GlenFed, Inc. Sec. Litig.), 42 F.3d 1541, 1548 (9th Cir. 1994)). A fraud claim must be

accompanied by "the who, what, when, where, and how" of the fraudulent conduct charged. Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1106 (9th Cir. 2003) (quoting Cooper, 137 F.3d at 627). "A pleading is sufficient under rule 9(b) if it identifies the circumstances constituting fraud so that a defendant can prepare an adequate answer from the allegations." Moore v. Kayport Package Express, Inc., 885 F.2d 531, 540 (9th Cir. 1989). Statements of the time, place, and nature of the alleged fraudulent activities are sufficient, but mere conclusory allegations of fraud are not. Id. Furthermore, though allegations based on information and belief are usually insufficient, in circumstances of corporate fraud, this rule may be relaxed as to matters within the opposing party's knowledge. Id. In cases of a corporate defendant, "the plaintiff must allege the names of the persons who made the representations, their authority to speak on behalf of the corporation, to whom they spoke, what they said or wrote, and when the representation was made." Orcilla v. Big Sur, Inc., 244 Cal. App. 4th 982, 1008 (2016) (quoting West v. JPMorgan Chase Bank, N.A., 214 Cal. App. 4th 780, 793 (2013)).

III. DISCUSSION

A. Fraudulent Inducement

"Under California law, the elements for a fraudulent inducement claim are, as follows: (1) a misrepresentation, false representation, concealment, or nondisclosure; (2) knowledge of falsity; (3) intent to defraud or induce plaintiff to enter into a contract; (4) justifiable reliance; and (5) resulting damage." White v. FCA US LLC, No. 22-CV-00954-BLF, 2022 WL 3370791, at *5 (N.D. Cal. Aug. 16, 2022) (citing Lazar v. Superior Ct., 12 Cal. 4th 631, 638 (1996)). "A promise to do something necessarily implies the intention to perform; hence, where a promise is made without such intention, there is an implied misrepresentation of fact that may be actionable fraud." Lazar, 12 Cal. 4th at 638.

Defendants argue that Plaintiffs "cannot be justified in relying on Defendants' purported representations of the applicable California public laws related to weight and axle limits" because they "are not lawyers, and did not and could not provide legal advice." (Mot. at 8.) Defendants also assert that "Plaintiffs agreed that they were responsible for complying with all local laws." (Id. at 9.) If Plaintiffs' claim were construed as a fraudulent concealment claim, Defendants argue that it fails because, absent a fiduciary relationship, "Defendants

did not possess any material facts not equally available to Plaintiffs" that would give rise to a duty to disclose. (Id. at 9–10.) Defendants also contend that Bond and Gaubert may not be sued in their personal capacity because they acted "wholly within the scope of their professional role when interacting with Plaintiffs and when providing them with business advice." (Id. at 10.)

Plaintiffs respond that the fact that Bond and Gaubert are not lawyers does not disprove reliance allegations because "it is specifically alleged that Defendants knew of the weight limitation laws yet withheld and/or misrepresented those facts." (Opp'n at 5 (citing Compl. ¶¶ 23, 37, 48–49, 53, 67, 78–79).) Plaintiffs argue that they adequately alleged reliance because Defendants "held themselves out to be experts, whereas Plaintiffs had no knowledge or experience in the industry." (Id. at 10–11.) Plaintiffs contend that the question of whether reliance is justifiable or reasonable is a question of fact not appropriate for a motion to dismiss under Rule 12(b)(6). (Id. 9–10.) Plaintiffs also argue that Bond and Gaubert may be sued in their personal capacity because "agents are responsible for their own independent torts and breaches of contract in connection with acts in the course of their agency." (Id. at 11 (citing Kurtin v. Elieff, 215 Cal. App. 4th 455, 480 (2013)).)

It is clear from the Complaint that four of the fraudulent inducement elements are sufficiently pled with the particularity demanded by Rule 9(b): concealment, knowledge, intent, and damage. The Complaint spells out allegations that ProAll knowingly concealed that the fully-loaded mixer and truck could not be transported legally, and they intended to do so to induce consulting fees and truck sales. (See Compl. ¶¶ 48, 59–60.) Plaintiffs also allege damage because ProAll "defrauded Plaintiffs into purchasing 17 ProAll mixer trucks and forming multiple corporations, spending millions on operating Gunner Concrete, and proximately causing Plaintiffs to suffer economic damages of over ten million dollars ($10,000,000)." (Id. ¶ 96.)

The dispute over the fraudulent inducement claim ultimately focuses on the justifiable reliance element. Plaintiffs lay out the high bar that must be met to find a lack of reasonable reliance as a matter of law. "Except in the rare case where the undisputed facts leave no room for a reasonable difference of opinion, the question of whether a plaintiff's reliance is reasonable is a question of fact." Dias v. Nationwide Life Ins. Co., 700 F. Supp. 2d 1204, 1216 (2010) (citing Alliance

Mortgage Co. v. Rothwell, 10 Cal. 4th 1226, 1239 (1995)). "Reasonable reliance 'may be decided as a matter of law if reasonable minds can come to only one conclusion based on the facts.'" Id. (citing Alliance, 10 Cal. 4th at 1239).

Although Defendants cite cases to support their argument that relying on "a laypersons' alleged representations of the law" is unreasonable as a matter of law, (Reply at 15), they do not state the law in full. The Ninth Circuit has held "as a general rule, that 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) (citing Am. Jur. 2d of Fraud & Deceit § 97 (2001)). The court goes on, "Statements of domestic law are normally regarded as expressions of opinion which are generally not actionable in fraud even if they are false." Id. There are, however, exceptions. The court adopted the four exceptions laid out in the Restatement that justify reliance on a misrepresentation of law: the misrepresenting party (1) has special knowledge of the party making the misrepresentation, (2) has a fiduciary or similar relation of trust and confidence, (3) secured the confidence of the recipient, or (4) has another special reason to expect the recipient's reliance on the opinion. Id. (citing Restatement (Second) of Torts § 545 (Am. L. Inst. 1977)). A comment to the Restatement even addresses the very circumstances presented here: "It is not necessary, however, that the person making the fraudulent misrepresentation of law be a lawyer. It is enough that he purports to have superior information that will enable him to form an accurate opinion." Restatement (Second) of Torts § 545 cmt. d (Am. L. Inst. 1977).

Plaintiffs allege that they had "no prior experience in the volumetric concrete trucking business" and, having been told that Bond and Gaubert "have over 50 years of combined construction materials industry experience focused on the Volumetric Mixer space," relied "completely upon the professed experience, skill, judgment, and expertise of ProAll/Bond/Gaubert" when starting their new business. (Compl. ¶¶ 33–34, 120.) In other words, Plaintiffs allege reliance on experienced businesspeople to provide a paid-for business plan, specific to Southern California, to start a business that can lawfully operate in the State of California. This is not manifestly unreasonable, especially in light of ProAll's representations of Bond and Gaubert's experience and the alleged trust Plaintiffs put in them.

The existence of the Quote introduces a complicating factor, as it states, "Compliance with local axle weight and load weight is the responsibility of the purchaser." Plaintiffs point out, though, that they were presented with the Quote after engaging ProAll's services. To the extent that the fraud claim is based Plaintiffs having "been induced to form the subject business and the consulting contract had been agreed to by both sides," (Compl. ¶ 68), the Quote does not foreclose justifiable reliance.

Defendants' argument that Bond and Gaubert may not be sued in their personal capacities also fails. "One who assumes to act as an agent is responsible to third persons as a principal for his acts in the course of his agency . . . when his acts are wrongful in their nature." Cal. Civ. Code § 2343. Courts have interpreted the statute to mean that agents may be individually liable for tortious conduct whether or not the conduct is within the scope of employment. Bock v. Hansen, 225 Cal. App. 4th 215, 304 (2014); see also Celestino v. JPMorgan Chase Bank, N.A., No. 22-cv-04723-JST, 2023 WL 3607285, at *2 (N.D. Cal. March 31, 2023) ("California law expressly provides that an agent may be held individually liable for tortious conduct, regardless of whether that conduct occurs within the scope of employment."). The Complaint's allegations are directed primarily at the actions of Bond and Gaubert in their roles providing services to Plaintiffs on behalf of ProAll. (See Compl. ¶¶ 23, 37, 48–49, 53, 67, 78–79.)

At this stage, there are no undisputed facts on which to come to the conclusion that as a matter of law, reliance was not justified. Thus, Defendants have not shown that reliance was not justified as a matter of law such that Plaintiffs fail to state a claim.

B. Breach of Contract

In California, "the elements of a cause of action for breach of contract are (1) the existence of the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to the plaintiff." Oasis West Realty, LLC v. Goldman, 51 Cal. 4th 811, 821 (2011).

Defendants argue that Plaintiffs fail to state a claim for breach of contract because ProAll did not breach the contract. (Mot. at 10.) Defendants contend that "ProAll contracted to provide a business plan with competitive position analysis,

strategic planning, and financial scenarios," but it "never contracted to review weight laws or to ensure compliance with weight laws." (Id. at 11.) Defendants add that Plaintiffs made no allegations "that Bond or Gaubert represented to Plaintiffs that they were lawyers and that any business plan would include legal advice." (Id. at 12.) Defendants also argue that "Plaintiffs cannot plausibly claim that a Canadian business was to provide them with legal advice regarding intricate California laws." (Id.) Defendants argue that the quote for the purchase of volumetric mixers to Plaintiffs stated "[c]ompliance with local axle weight & load weight restrictions is the responsibility of the purchaser," and Plaintiffs "knowingly assumed that responsibility." (Id. at 12–13.)

Plaintiffs respond that, because "compliance with legal regulations is a requirement for any business, and as Defendants unquestionably knew that the proposed business venture would take place in California, Defendants did in fact contract to disclose and analyze how Plaintiffs would be able, or not be able to comply with California's weight laws." (Opp'n at 12–13.) Plaintiffs point to a list of factors influencing the concrete market in the Market Analysis that includes "[l]egal, regulatory, and environmental influences," but "the only factor not outlined in the Market Analysis is the fact that the mixers would not have been able to legally run at full capacity." (Id. at 13 (citing Compl., Ex. 1, at 4, Dkt. No. 1-1).) Plaintiffs argue that Defendants "thus utterly failed to provide a viable business plan to Plaintiffs, which is what they were contracted to do." (Id.) Plaintiffs contend that Defendants had a responsibility to disclose the market barrier of vehicle weight laws because ProAll was the director of the business plan and had a "multi-faceted duty to analyze all aspects of the southern California market." (Id.) Moreover, Plaintiffs argue that the Quote is not a contract signed by plaintiffs and incorporated into the parties' actual contract, and it "does not erase the complaint's contract claims which arise out of the Exhibit '1' Market Analysis, the Exhibit '3' Contract, and the course of conduct where Defendants acted as 'directors of the plan' and guided Plaintiff through 17 truck purchases." (Id. at 14.)

Plaintiffs rely on a series of inferences to state their claim for breach of contract, but none are grounded in the contracts for consulting services or the purchase of mixers. Nowhere does the Complaint allege contract terms that require Defendants to state the applicable weight law and apply it to the business plan. Plaintiffs seek to disregard the Quote, with its explicit terms that

"[c]ompliance with local axle weight & load weight restrictions is the responsibility of the purchaser," by arguing that it does not constitute a contract. Plaintiffs essentially make a statute of frauds argument, citing California Civil Code § 1624(a). But according to the Complaint, Plaintiffs responded to the Quote eight days later with a deposit—without varying the terms of the Quote—and later completing the sale of seventeen mixers. These facts describe the formation of a contract consistent with California Commercial Code § 2201(3)(c), which sets forth that a contract for the sale of goods for $500 or more without a signed contract by the party against whom enforcement is sought is nevertheless enforceable "with respect to goods for which payment has been made and accepted or which have been received and accepted." Plaintiffs do not claim that they did not accept the goods under California Commercial Code § 2606. Thus, by the very terms of the contract Plaintiffs allege to have been breached, Plaintiffs assumed responsibility for axle weight and load weight compliance.

To the extent that the breach is alleged with respect to the consulting contract and Market Analysis, that too fails. Plaintiffs cite no language in the contract that guarantees success of the business plan to sustain their theory of breach that Defendants did not provide a "viable" business plan. (See Compl., Ex. 3, Dkt. No. 1-3.) Moreover, the Market Analysis states that the Infrastructure Bill, H.R. 3684, would "probably be one of the nation's great infrastructure programs" and have "a very positive influence on boosting California's economy." (Compl., Ex. 1, at 46.) There remains too great an inference necessary to conclude that because the Market Analysis mentions law in any capacity, it gives rise to a contractual duty to perform a complete legal analysis.

Accordingly, the Court finds that the Complaint fails to state a claim for breach of contract.

C. Song-Beverly/Breach of Implied Warranty

Defendants argue that Plaintiffs' Song-Beverly/Breach of Implied Warranty of Fitness for a Particular Purpose claim fails because "the mixers here are not a consumer good," but instead "bought for business reasons by a consumer company not a consumer." (Mot. at 13–14.) Additionally, Defendants assert that the mixers were "fit for their particular purpose of adequately delivering and mixing concrete." (Id. at 15.)

Plaintiffs respond that whether the volumetric mixers are consumer goods is a question of fact that should go to a jury. (Opp'n at 15.) Plaintiffs argue that the Complaint's reference to Song-Beverly supplements the California Uniform Commercial Code, rather than supsersedes it. (Id.) Plaintiffs also contend that the Complaint states a claim for breach of implied warranty of fitness for a particular purpose because Defendants represented "that the trucks would uniquely support Plaintiffs' business plan" and "the particular use was to drive them on California highways where driving with 10 [cubic yards] was a crime." (Id. at 16.)

"The implied warranty of fitness for a particular purpose is a warranty implied by law when a seller has reason to know that a buyer wishes goods for a particular purpose and is relying on the seller's skill and judgment to furnish those goods." Martinez v. Metabolife Int'l, Inc. 113 Cal.App.4th 181, 189 (2003). "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 envisaged in the concept of merchantability." Am. Suzuki Motor Corp. v. Super. Ct., 37 Cal. App. 4th 1291, 1295 (1995).

According to the Complaint, a volumetric mobile concrete mixer is a "niche product designed to provide a variety of concrete mixtures to target a specific segment of concrete customers." (Compl. ¶ 32.) In other words, the mixer's ordinary purpose is to deliver concrete. See e.g., Smith v. LG Elecs. U.S.A., Inc., 2014 WL 989742, at *8 (N.D. Cal. Mar. 11, 2014) ("As for the claim for breach of the implied warranty of fitness for a particular purpose, plaintiff has identified no 'particular purpose' for which she purchased the washing machine. She purchased it to wash her laundry, which is the 'ordinary' purpose of a washing machine."); see also Mathison v. Bumbo, 2008 WL 8797937, at *11 (C.D. Cal. Aug. 18, 2008) ("There is nothing peculiar about using a baby seat to secure infants and toddlers.").

What makes the purpose particular here is the requisite load capacity and transportation on California roads. The Complaint alleges that ProAll's business plan depended on delivering concrete with the mixers loaded at a capacity of 10 cubic yards. As discussed *supra*, Plaintiffs allege their reliance on ProAll's skill and expertise to craft the plan, and Plaintiffs then purchased seventeen mixers to carry out that plan. Having developed the plan, ProAll knew of this particular

purpose, yet it furnished mixers not fit for that purpose. While the mixers are not functionally defective, they cannot legally transport 10 cubic yards in California in accordance with the plan.

The question of whether the mixers are consumer goods under Song-Beverly does not foreclose the implied warranty claim. California Civil Code § 1791 does not support a finding that the mixers are consumer goods as defined by the statute: "any new product or part thereof that is used, bought, or leased primarily for personal, family, or household purposes, except for clothing and consumables." The Act "broadens a buyer's remedies to include costs, attorney's fees, and civil penalties. It supplements, rather than supersedes, the provisions of the California Uniform Commercial Code." Jensen v. Ford Motor Co., 198 Cal. App. 4th 1478, 1486 (2011). Even if the claim fails with respect to Song-Beverly, the Complaint sufficiently states a claim for breach of implied warranty of fitness for a particular purpose.

D. Unfair Competition Law/Federal Excise Tax Law

Defendants argue that Plaintiffs fail to state a claim under the California Unfair Competition Law because, although Plaintiffs bring their claim under the "unlawful" prong of the unfair competition law, "Plaintiffs have not alleged a violation of any underlying law, and cannot allege any such violation as there are no laws prohibiting ProAll from passing on [the federal excise] tax to the buyer." (Mot. at 17.) Defendants also argue that their motion is supported by "the strong public policy in favor of parties' freedom to contract," and their allegation that "Plaintiffs here were sophisticated actors who accepted ProAll's term that required the purchaser to pay the excise taxes." (Id. at 18.) Defendants contend that Plaintiffs did not suffer damages to sustain the claim because they "do not allege that they ever actually paid this tax." (Id.)

Plaintiffs respond that they sufficiently allege an unlawful business practice because, pursuant to "26 U.S.C. § 4051, a 12% tax is imposed on the seller for the first retail sale of any automobile truck body, trailer, chassis, or related tractor," and Defendants failed to pay the tax on the sale of the mixers. (Opp'n at 17.) Plaintiffs argue that Defendants could not pass the obligation to pay the taxes onto Plaintiffs because (1) the Quote is unenforceable, (2) no other document signed by Plaintiffs expresses an agreement to pay the tax, and (3) the question is ultimately

one of fact. (Id.) Plaintiffs argue that Defendants did not incorporate the tax into the purchase price, Plaintiffs did not agree to pay the taxes, and the IRS now seeks the payments from Plaintiffs. (Id. at 18.) Citing Gurley v. Rhoden, 421 U.S. 200, 205 (1975), Plaintiffs assert that "when a producer does not pay its statutory taxes, they are generally not recoverable against the consumer." (Id.)

The UCL prohibits "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising." Cal. Bus. & Profs. Code § 17200. An act can be alleged to violate any or all of the three prongs of the UCL—unlawful, unfair, or fraudulent. Under the unlawful prong, the UCL "borrows violations of other laws and treats them as unlawful practices that the unfair competition law makes independently actionable." Aryeh v. Canon Bus. Sols., Inc., 55 Cal. 4th 1185, 1196 (2013) (quoting Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co., 20 Cal. 4th 163, 180 (1999)) (internal quotation marks omitted). For corporations or persons to bring an action under the UCL, they must have "suffered injury in act and ha[ve] lost money or property as a result of the unfair competition." Cal. Bus. & Prof. Code § 17204.

In California, Proposition 64 imposed a heightened threshold for standing under the UCL that requires an economic injury, beyond simply an injury in fact. See Kwikset Corp. v. Super. Ct., 51 Cal. 4th 310, 323 (2011). "To satisfy the narrower standing requirements imposed by Proposition 64, a party must now (1) establish a loss or deprivation of money or property sufficient to qualify as injury in fact, i.e., economic injury, and (2) show that that economic injury was the result of, i.e., caused by, the unfair business practice or false advertising that is the gravamen of the claim." Id. at 322. "If a party has alleged or proven a personal, individualized loss of money or property in any nontrivial amount, he or she has also alleged or proven injury in fact. Because the lost money or property requirement is more difficult to satisfy than that of injury in fact, for courts to first consider whether lost money or property has been sufficiently alleged or proven will often make sense. If it has not been, standing is absent and the inquiry is complete." Id. at 325.

In Sarun v. Dignity Health, 232 Cal. App. 4th 1159, 1168 (2014), a plaintiff received a $14,000 hospital bill and paid $500 before brining UCL claims. The court distinguished between an enforceable obligation such as a hospitable bill, which suffices for an injury in fact, and paying a portion of the bill, which

amounts to an economic injury. Id. at 1167–68; see also Moran v. Prime Healthcare Mgmt., Inc., 3 Cal. App. 5th 1131, 1143 (2016) (finding that because a plaintiff not only received a bill, but paid "a portion" of it, he suffered the requisite economic injury).

In the Complaint, Plaintiffs allege that they "received an IRS demand for the unpaid tax." (Compl. ¶ 143.) But Plaintiffs do not allege an economic injury. The Complaint states no facts that Plaintiffs lost money or property because Defendants did not pay the federal excise tax, such as paying any amount of money to the IRS in response to its demand. While the demand itself might suffice for an injury in fact, it does not amount to an economic injury so as to confer standing upon Plaintiffs to bring their unlawful business practice claim. Because the Complaint fails to allege an economic injury, the inquiry ends here, and the Court declines to reach the question of whether Defendants passed on the excise tax to Plaintiffs.

Accordingly, the Court finds that the Complaint fails to state a claim for unlawful business practices under the UCL.

IV. CONCLUSION

For the foregoing reasons, the Court **GRANTS** in part the motion with respect to the breach of contract and Unfair Competition Law claims and **DENIES** in part the motion with respect to the breach of implied warranty and fraudulent inducement claims. Plaintiffs shall have twenty-one days leave to amend.

IT IS SO ORDERED.

The Court **VACATES** the April 15, 2024, hearing. Any party may file a request for hearing of no more than five pages no later than 5:00 p.m. on Tuesday, April 16, 2024, stating why oral argument is necessary. If no request is submitted, the matter will be deemed submitted on the papers and the tentative will become the order of the Court. If the request is granted, the Court will advise the parties when and how the hearing will be conducted.