

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW JERSEY**

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| <p>DAVID AFZAL and ANDY<br/>DECHARTIVONG, on behalf of themselves and<br/>all others similarly situated</p> <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">v.</p> <p>BMW OF NORTH AMERICA, LLC, and<br/>BAVARIAN MOTOR WORKS,</p> <p style="text-align: center;">Defendants.</p> | <p>Case No. 2:15-08009 (MCA)(LDW)</p> |
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**REPLY BRIEF IN FURTHER SUPPORT OF DEFENDANT BMW OF NORTH  
AMERICA, LLC'S MOTION TO DISMISS PLAINTIFFS' SECOND AMENDED CLASS  
ACTION COMPLAINT**

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### **PRELIMINARY STATEMENT**

Plaintiffs' Opposition ("Opp.") fails to rebut the arguments in BMW of North America, LLC's ("BMW NA") Opening Brief, seeking to dismiss the fraud claims in Plaintiffs' Second Amended Complaint ("SAC"). Plaintiffs' Opp. attempts to distract the Court from focusing on the deficiencies in their fraud claims by trying to highlight various means by which BMW NA purportedly gained knowledge of the alleged "Rotating Assembly Defect"- in the S65 engine. But most of these allegations are holdovers from Plaintiff Afzal's First Amended Complaint ("FAC"), which the Court already deemed insufficient to support fraud claims against BMW NA. Indeed, Plaintiffs cannot ignore the Court's October 17, 2016 Opinion (DE 27), which clearly sets forth the real factor by which to determine the viability of the fraud claims: the *timing* of BMW NA's knowledge. Notably, the Court found that Plaintiff Afzal failed "to identify ***any specific dates*** by or on which BMW became aware of the [R]otating [A]ssembly Defect..." (See DE 27, pp. 17-18.) Therefore, as previously set forth by this Court and under the well-settled law, Plaintiffs' SAC must adequately plead that *BMW NA* gained the requisite knowledge prior to Plaintiffs' May 2013 and December 2014 purchase dates, respectively. (See SAC, ¶¶ 17-18, 26-27.) Plaintiffs rely upon internet posts on third-party websites in an attempt to satisfy their pleading requirements. (See SAC, ¶¶ 73-86.) But, as demonstrated in BMW NA's Opening Brief and confirmed here, the fraud claims in Plaintiffs' SAC remain deficient and should be dismissed, because hearsay statements posted on third-party websites are insufficient to impute knowledge. Even more significantly, as argued in BMW NA's Opening Brief, which Plaintiffs fail to rebut, the *content* of these internet posts do not sufficiently convey knowledge of the Rotating Assembly Defect to BMW NA.

## **LEGAL ARGUMENT**

### **POINT ONE**

#### **PLAINTIFFS FAIL TO PLEAD FRAUD WITH THE REQUIRED SPECIFICITY.**

Plaintiffs allege that their amended pleading satisfies the heightened standards of Fed. R. Civ. P. 9(b). *See In re Suprema Specialties Inc., Sec. Litig.*, 438 F.3d 256, 276-77 (3d Cir. 2006) (under Fed. R. Civ. P. 9(b), the plaintiff must plead “the who, what, when, where and how of the events at issue”). Plaintiffs are incorrect, because the SAC, like the FAC, is deficient in its pleading of fraud claims and should be dismissed.

#### **A. The Content Of The Internet Posts Do Not Provide The Requisite Knowledge.**

Tellingly, Plaintiffs’ Opposition ignores BMW NA’s Opening Brief argument regarding the insufficient content of the internet posts.<sup>1</sup> It is clear that Plaintiffs would like for the Court to allow their fraud claims to go forward simply by virtue of the dates of the internet posts alone. But it is axiomatic that the internet posts, if deemed by the Court to be an adequate method of conveying knowledge to BMW NA, which they are not, must at least mention the Rotating Assembly Defect. Yet the various new internet posts Plaintiffs rely upon don’t:

- May 2008: Plaintiffs reference an internet post from May 2008, detailing “rattling” and “ticking” noises from the engine in an almost new E92 M3. (*See* SAC, ¶ 74.) Setting aside that Plaintiffs do not claim the Rotating Assembly Defect manifests in almost-new vehicles, a review of the thread reveals that *the dealership* diagnosed the noises as “expansion of the exhaust” and told the customer that the noises were “normal.” (*See* Declaration of Daniel Z. Rivlin (“Rivlin Decl.”), Exhibit A.) The thread does not mention (1) the rotating

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<sup>1</sup> Plaintiffs claim that BMW NA “does not deny the facts in these reports likely because [it] has warranty records of the complaints.” (Opp., p. 12.) While it is unclear what “facts” Plaintiffs believe BMW NA has not denied, Plaintiffs ignore an entire section of BMW NA’s argument in the Opening Brief, which disputes Plaintiffs’ claim the content of the internet posts are sufficient to give BMW NA knowledge or notice. (*See* DE 34, p. 9.) A review of the internet posts, as set forth in detail herein, shows that even if a warranty claim was made by the customer (which Plaintiffs fail to state or allege), none of the posts establish that the BMW dealerships attributed the “noises” to a Rotating Assembly Defect or that BMW NA even knew about them.

assembly, or any alleged defect, and (2) does not mention BMW NA. Even if BMW NA had reviewed this thread, the only information it would have learned is that a dealership diagnosed the vehicle made noises during normal exhaust expansion. Contrary to Plaintiffs' claims, this internet post did not and could not provide BMW NA with notice of anything, let alone the Rotating Assembly Defect, by May 2008.

- June 2008: Plaintiffs cite to a follow-up thread authored by the same customer as the May 2008 thread. (See SAC, ¶ 75.) Plaintiffs make much of the fact that the vehicle's engine was allegedly shipped to Germany for inspection. (*Id.*) The customer mentioned that the vehicle only had 1,200 miles on it before experiencing the noise. (See Rivlin Decl., Exhibit B.) The thread is filled with speculation from *other posters*, with almost no commentary from the original customer who initiated the post.<sup>2</sup> *Id.* Out of seven (7) pages of posts, the customer comments approximately twice, and he never confirms the diagnosis of his vehicle, if any, except to state "they believe there is an issue with the bottom-end of the engine." *Id.* Missing from the thread is a description similar to that of the Rotating Assembly Defect, as set forth in the SAC. *Id.* Moreover, Plaintiffs exaggerate the details in the post – claiming that the engine was taken to Germany and examined. (See SAC, ¶ 76.) In fact, the only detail present in the thread is that Germany asked to inspect the engine – whether or not an inspection happened or what that inspection revealed is unknown.<sup>3</sup> (See Rivlin Decl., Exhibit B.) Such baseless conclusions are not adequate to meet the heightened pleading standard for fraud. Contrary to Plaintiffs' claims, this internet post did not and could not provide BMW NA with notice by June 2008.
- June 2008: Plaintiffs cite to the internet post of another customer who experienced "similar" noises as compared with the customer in the other May 2008/June 2008 thread. (See SAC, ¶ 77.) The customer was told by the dealership that the noise was normal. (See Rivlin Decl., Exhibit C.) The thread does not mention the rotating assembly or rod bearings. *Id.*
- August 2008: Plaintiffs rely on the internet post of a customer who experienced "engine noises" in August 2008. (See Rivlin Decl., Exhibit C.) While the customer indicated that the technician originally believed the noise related to the main bearing, the noise was ultimately attributed to the timing chain, not at all related to the alleged Rotating Assembly Defect. *Id.* Other individuals post in the thread about similar noises were told by the dealership that the noises were normal. *Id.* Other posters who experienced similar noises attributed them to

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<sup>2</sup> Plaintiffs rely upon the same thread at other points in the SAC. (See SAC, ¶¶ 77, 78.) Notably, the thread does not document any diagnosis *by the dealership* of a rod bearing or rotating assembly defect. (See Rivlin Decl., Exhibit B.)

<sup>3</sup> Plaintiffs again inappropriately combine BMW NA with Bayerische Motoren Werke Aktiengesellschaft ("BMW AG"). BMW AG is located in Germany, BMW NA is not and BMW NA and BMW AG are not the same entity.

different sources – such as rod bearings<sup>4</sup> or the cat connector. *Id.* Others indicated that the noise resolved with additional oil. *Id.* There was no discussion of any problem similar to the Rotating Assembly Defect. *Id.* This internet post did not and could not provide BMW NA with notice by August 2008.

- December 2008: In one of the same threads previously relied upon, a customer posted about experiencing a “similar noise,” and was told by his dealership the noises were attributable to exhaust expansion. (*See* Rivlin Decl., Exhibit B.) There was no mention made to a diagnosis similar to that of the Rotating Assembly Defect; in fact, the diagnosis was that the noise was normal. This internet post did not and could not provide BMW NA with notice as of December 2008.
- October 2009: Plaintiffs reference a thread where an owner claimed there was an issue with the main bearings in the 2008 S65 engine, versus the 2009 S65 engine<sup>5</sup>, but the poster admitted that his problems were due to “hard driving,” and went on to state that “I understand the 2009 engines are much better in terms of main bearings and linings.” (*See* Rivlin Decl., Exhibit D.) That poster’s warranty had been voided due to modifications, and many others post on the thread discredited the poster as “mischaracterizing” the situation, and one went on to state that “I’ve NEVER heard of any S65 failure except yours. . .” *Id.* The poster then acknowledged his voided warranty, stated that he “accept[ed] full responsibility for that.” *Id.* Ultimately, the poster’s remarks were discredited by others, and the thread mentions no communications or reports to or from BMW NA. This internet post did not and could not provide BMW NA with notice as of October 2009.
- March 2010: Plaintiffs reference an internet post by a customer who suffered a broken rod and engine failure after only 500 miles due to his failure to abide by the recommended RPM, and the resulting repairs were covered under goodwill. The customer indicated that the computer at the dealership attributed the problem to the RPM. (*See* Rivlin Decl., Exhibit D.) The customer himself referred to the situation as a “rare catastrophic occurrence” and there was no discussion on the thread of any issues similar to those recounted by Plaintiffs when describing the Rotating Assembly Defect. *Id.* This internet post did not and could not provide BMW NA with notice of the Rotating Assembly Defect as of March 2010.

The majority of the internet posts Plaintiffs rely upon related to engine noises occurred

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<sup>4</sup> Plaintiffs rely on this post in the same thread later in the SAC. (*See* SAC, ¶ 79.) There is no other discussion about rod bearings in the post, and the customer does not confirm the diagnosis other than to state what the dealership “seems to think.” (*See* Rivlin Decl., Exhibit C.) The customer also indicates that the dealership was bringing in a specialist to examine his vehicle, but never confirmed that this was done or provided an update as to the final diagnosis or where this “specialist” was from. *Id.*

<sup>5</sup> Plaintiffs’ proposed class includes Model Year 2008 through 2013 BMW M3 vehicles equipped with S65 engines (“Class Vehicles”). (*See* SAC, ¶ 1.)

when the vehicles had less than 2,000 miles of wear, which contrasts with Plaintiffs' vehicles, where the alleged Rotating Assembly Defect manifested at 28,253 and 28,800, respectively. (See SAC, ¶¶ 21, 28.) Even more significantly, these internet posts address a wide range of possible causes for the noises, including diagnoses from the dealerships (as well as speculation or claims from other posters) that the noises were normal. Finally, none of the parties who actually experienced the noises wrote that a BMW dealership, BMW NA, or BMW AG diagnosed the noises as being caused by a failure of the rotating assembly, including the connecting rod bearings and main bearings, let alone that BMW NA knew about the noises at all. These posts provided BMW NA with no "notice" of the Rotating Assembly Defect.

This Court has previously found internet posts insufficient when they fail to allege a specific defect. *See, e.g., Oliver v. Funai Corp.*, 2015 WL 9304541 (D.N.J. Dec. 21, 2015) (noting that many of the anonymous complaints failed to specifically reference the defect, but instead complained of issues related to quality or functionality). Here, Plaintiffs had an opportunity to replead their fraud claims to demonstrate alleged notice to BMW NA before they purchased their vehicles. After presumably searching the entire internet, Plaintiffs produced only a handful of posts about "noises" that Plaintiffs claim are similar to what they experienced. Even if Plaintiffs could credibly claim that BMW NA reviewed these internet posts, *none* of them provide details alleging a Rotating Assembly Defect. Here, as in *Oliver*, Plaintiffs' internet posts should be deemed insufficient and their fraud pleadings should be dismissed.

#### **B. The S85 Internet Posts Are Inapposite.**

Plaintiffs contend that internet posts regarding the S85, including one as early as July 2007, informed BMW NA of defects in the S65 engine. But a review of the July 2007 post shows that the customer was driving his vehicle "pretty hard," the vehicle only had 13,000 miles

on it, and many comments indicate that the post was the first known blowout of an S85 engine on the message board. (See Rivlin Decl., Exhibit E.) No other posters on the thread mentioned experiencing a similar problem. *Id.* The official diagnosis from the dealership was a thrown rod. *Id.* In a separate post from September 2007, the same customer indicated that he had “no idea why the first one blew - ***my revving it up to red line might have had something to do with it*** - lol.” *See id.* The same customer, in a third post from September 2007, further confirmed that he was “not sure exactly what caused this.” *See id.* Contrary to Plaintiffs’ claims, the customer never confirms a diagnosis of “catastrophic engine failure due to premature rod-bearing degradation.” *See id.*; (See SAC, ¶ 85.) There is no way this internet post, which contains no diagnosis with respect to the S85 engine, could have informed BMW NA of a potential Rotating Assembly Defect in the S65 engine. And the other internet posts Plaintiffs reference attribute the problems to the S85’s Vanos system and oil pump. (See Rivlin Decl., Exhibit F.)

Plaintiffs’ internet posts for the S85 are insufficient to demonstrate that BMW NA knew about the alleged Rotating Assembly Defect in the S65. Plaintiffs’ fraud claims should be dismissed.

### **C. Plaintiffs’ “Unity of Ownership” Allegations Are Insufficient.**

Plaintiffs have named BMW NA as a party to this litigation – *not* individual BMW dealerships. The majority of internet posts Plaintiffs reference shows that customers engaged in communications with various BMW dealerships, **not** BMW NA. (See SAC, ¶¶ 73-86.) Attempting to circumvent their specificity pleading requirement -- the requirement that it is BMW NA that must have received notice -- Plaintiffs broadly and baselessly claim that “it is believed and understood that, consistent with BMW NA’s established procedures, any episodes reported to BMW authorized dealers were reported to BMW NA.” (*See* Opp., p. 4.) First, while

Plaintiffs reference the SAC in support of this statement, no such statement appears in the SAC.<sup>6</sup> Therefore, Plaintiffs failed to plead this method of notice. Second, even if Plaintiffs had included such allegations in the SAC, they would have been insufficient. Plaintiffs are subject to a heightened pleading standard for fraud. *See In re Suprema Specialties Inc., Sec. Litig., supra*, 438 F. 3d at 276-77. Vaguely stating that “established procedures” would have required BMW dealerships to make reports to BMW NA is insufficient to meet that standard. For example, as previously discussed, the customers in many of the internet posts stated that the dealerships diagnosed the sounds as normal and attributed them to exhaust expansion. (See Rivlin Decl., Exhibit C.) Plaintiffs would have the Court believe that every BMW dealership in every instance of a car being brought to them reports the status of every single vehicle visit, inspection, repair, and outcome to BMW NA. Not only does such an allegation fail to meet the specificity requirements for fraud, it also lacks credibility. There is no basis in law or fact, let alone alleged with the specificity required for a fraud pleading, that when a dealership determines that something is “normal,” it makes a report to BMW NA or, for that matter, to anyone else.<sup>7</sup>

Plaintiffs also contend that BMW NA and BMW AG, which manufactures BMW brand automobiles, are “in effect, one and the same.”<sup>8</sup> (*See* Opp., p. 6.) Plaintiffs rely on the “unity of ownership” concept to impute knowledge from the BMW dealerships to BMW NA, to BMW AG, and vice versa. (*See id.*, pp. 6-7.) As justification for the sufficiency of these pleadings, Plaintiffs heavily reference *Catalano v. BMW NA*, No. 15-cv-4889, 2016 WL 3406125 (S.D.N.Y. June 16, 2016), a case from the Southern District of New York, and attempt to distinguish *McQueen v. BMW of North America, LLC*, No. 12-6674, 2014 WL 656619 (D.N.J. Feb. 20,

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<sup>6</sup> Plaintiffs referred to ¶ 98 in the SAC, but that paragraph fails to support Plaintiffs’ contention.

<sup>7</sup> Instead, what Plaintiffs’ SAC evidences is that when a dealership reported an actual issue or necessary report, the issue was addressed or repair was made.

<sup>8</sup> BMW AG has not been served and this firm solely represents BMW NA in this action.

2014) which was from the District of New Jersey.<sup>9</sup> First, even if the Court were persuaded by the Southern District of New York's reasoning in *Catalano*, the fact is that Plaintiffs' purported web of interconnecting entities, which adds the BMW dealerships, extends beyond the allegations in *Catalano*.

Second, Plaintiffs fail to adequately distinguish *McQueen*, a decision from this District that is directly on point. Although Plaintiffs cite to purported industry standards, without referencing any supporting authority, to demonstrate that deficiency in design reflects knowledge, the fact remains that BMW NA *did not design* the S65, nor did it design the Model Year 2008 through 2013 BMW M3 vehicles which contain an S65 engine. Based on this "unity of ownership" concept, Plaintiffs are asking the Court to believe the BMW dealerships and BMW NA had knowledge regarding every detail of BMW vehicles' design and manufacturing, and that BMW NA has knowledge regarding every inspection, analysis, and repair performed at every BMW dealership. Not only is this untrue and unfeasible, but it falls well short of the heightened pleading standard for fraud claims. *See In re Suprema Specialties Inc., Sec. Litig.*, *supra*, 438 F.3d at 276-77. Plaintiffs are not pleading facts; they are pleading hypotheses and suppositions and asking the Court to uphold them as truth for the purpose of advancing their fraud claims, which is contrary to well-settled law.

#### **D. The Internet Posts Do Not Demonstrate Knowledge.**

Finally, Plaintiffs seek to rebut BMW NA's assertions that hearsay statements by unknown declarants from third-party websites fail to demonstrate BMW NA's knowledge by

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<sup>9</sup> And, if the Court were inclined to consider *Catalano*, then it should also consider cases in other districts that support BMW NA's position. *See, e.g., Matcantonio v. Dudzinski*, 155 F. Supp. 3d 619, 626-37 (WD Va. 2015) ("In the Fourth Circuit and elsewhere, courts have interpreted *Twombly* and *Iqbal* to mean that generic or general allegations about the conduct of 'defendants,' without more, fail to state a claim").

attempting to distinguish the case law. However, contrary to Plaintiffs' claims, many of the cases cited by BMW NA are directly on point. *See, e.g., Berenblat v. Apple, Inc.*, 2010 BL 79887 (N.D. Cal. Apr. 07, 2010) (the plaintiff argued that internet posts on the defendant's own consumer website provided a date by which the defendant "must have known" of the defect and began actively concealing information, and Court specifically considered whether such allegations satisfied the plaintiff's heightened fraud pleading requirements for a UCL claim). Plaintiffs also argue that *Baba v. Hewlett-Packard Co.*, 2011 WL 317650 (N.D. Cal. Jan. 28, 2011) and *Rait v. Sears, Roebuck & Co.*, 2009 WL 2488155, \*3 (D.N.J. Aug. 11, 2009) are distinguishable because internet posts were the sole sources of knowledge, as opposed to the "variety" of sources Plaintiffs here allege. But this argument is a red herring, as the Court dismissed Plaintiffs' previous fraud claims in the FAC notwithstanding the other alleged sources of knowledge. Thus, the viability of Plaintiffs' fraud claims hinge on the sufficiency of the internet posts, which, based upon a review of them and the case law, are insufficient to impute knowledge to BMW NA. Therefore, Plaintiffs' fraud claims should be dismissed.

## **POINT TWO**

### **PLAINTIFF'S FAL, CLRA and UCL CLAIMS FAIL.**

Plaintiffs' claims for violation of California's Consumer Legal Remedies Act ("CLRA"), Cal. Civ. Code § 1750, et seq., Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code § 17200, and False Advertising Law ("FAL"), Cal. Bus. & Prof. Code § 17500, et. seq. ("FAL") are deficient for the same reasons as their common-law claims. According to the Court's October 17, 2016 Opinion, "[a]lthough these claims arise under state law, Plaintiff's allegations must be pled according to the Federal Rules of Civil Procedure. As a threshold matter, claims sounding in fraud are subject to Fed. R. Civ. P. 9(b)'s heightened pleading standard." (See DE 27, pp. 14-

15.) As with their common-law fraud claims, the Court clearly stated that “[t]he parties only dispute whether Plaintiff alleged that Defendants had knowledge of the defects at the time of the purchase. Under the CLRA, FAL, and UCL, plaintiff must sufficiently allege that a defendant was aware of the defect at the time of sale to survive a motion to dismiss.” (*See id.*, p. 16.) Once again, in dismissing the CLRA, UCL, and FAL claims, the Court took issue with the fact that Plaintiff Afzal failed “to identify any specific dates by or on which BMW became aware of the Rotating Assembly Defect” through the various alleged sources of knowledge that he referenced, and only offered a time frame as early as July 2013, *after* Plaintiff Afzal purchased his vehicle. (*See id.*, pp. 17-18.) Similarly, the Court did not give credence in Plaintiff Afzal’s “vague statements that complaints were made,” and directed Plaintiff to replead with allegations that BMW NA acquired knowledge by May 2013, the month that he purchased his vehicle. (*See id.*, p. 19.) The Court issued clear directives to Plaintiffs, which, as explained above, Plaintiffs have failed to meet in the SAC.

Finally, Plaintiffs argue that they have added an “unlawful” prong claim to their UCL allegations, which would not be foreclosed by deficient fraud pleadings because BMW NA’s knowledge of a defect is immaterial due to an allegation of a manufacturing or design defect. (*See Opp.*, p. 23.) In support, Plaintiff cites various cases, none of which actually discusses the UCL or its unlawful prong, but rather where the courts analyze strict liability claims for design and manufacturing defects. *See, e.g., Anderson v. Owens-Corning Fiberglas Corp.*, 53 Cal. 3d 987, 1003 (Cal. 1991); *Barker v. Lull Engineering Co.*, 20 Cal.3d 413, 429-30 (Cal. 1978); *In re Coordinated Latex Glove Litigation*, 99 Cal. App. 4<sup>th</sup> 594, 611 (App. 4<sup>th</sup> Dist. 2002). None of these cases is relevant to Plaintiffs’ UCL claim, and, in the absence of any support for the

contention that a portion of their UCL claim does not require a pleading of BMW NA's knowledge, this argument should be rejected.<sup>10</sup>

For these reasons, Plaintiffs' California state law claims must be dismissed.

### **CONCLUSION**

For the reasons set forth in BMW NA's Opening Brief and as reinforced above, the Court should dismiss the fraud claims in Plaintiffs' Second Amended Class Action Complaint pursuant to Rule 12(b)(6) for failure to state a claim.

Respectfully submitted,

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<sup>10</sup> Moreover, BMW NA neither manufactures nor designs BMW vehicles, which Plaintiffs are well aware of.