United States District Court
Central District of California
Western Division

BARRY BRAVERMAN, *et al.*,

Plaintiffs,

v.

BMW OF NORTH AMERICA, LLC, *et al.*,

Defendants.

SACV 16-00966 TJH (SSx)

Order

The Court has considered Plaintiffs' partial renewed motion for class certification [dkt # 194], together with the moving and opposing papers.

Plaintiffs filed this putative class action alleging that model years 2014 to 2016 of the BMW i3 REx electric car equipped with the "Range Extender" option ["Class Car"] contain a design defect which, *inter alia*, causes the Class Cars to suddenly decelerate when its battery's charge drops to a certain level, and that Defendants hid that defect from consumers. Plaintiffs alleged claims for breach of implied warranty, breach of express warranty, consumer protection, and fraudulent concealment under California, Colorado, Florida, Georgia, Illinois, Michigan, Ohio, Tennessee, Texas, Utah, Washington, and federal law.

On March 29, 2019, Plaintiffs moved for class certification on their breach of

implied warranty, consumer protection, and fraudulent concealment claims only for Class Cars leased or purchased in California, Florida, Illinois, Michigan, Ohio, Tennessee, Texas, Utah, and Washington. Plaintiffs sought to uniformly apply California law, including, *inter alia*, California's Song-Beverly Consumer Warranty Act, Cal. Civ. Code §§ 1790, *et seq.* ["Song-Beverly"], to their breach of warranty claim, along with a derivative federal implied warranty claim under the Magnuson-Moss Warranty Federal Trade Commission Improvement Act, 15 U.S.C. §§ 2301, *et seq*. ["Magnuson-Moss], to all putative class members.

On May 19, 2020, the Court denied Plaintiffs' motion because: (1) Plaintiffs failed to establish that California law could be uniformly applied to all putative class members and all Class Cars; (2) Plaintiffs failed to engage in any analysis as to whether the class should be certified under the other states' laws; and (3) Individual issues predominated over Plaintiffs' consumer protection and fraudulent concealment claims under California law. However, the Court found that certification was proper for Plaintiffs' Song-Beverly claims for Class Cars acquired in California, and for Plaintiffs' derivative Magnuson-Moss claim for Class Cars acquired in California. Nevertheless, the Court recognized that "if the Court were to certify only those two claims for California-acquired Class Cars, the scope of Plaintiffs' case would be drastically changed," and left it to Plaintiffs to decide whether to reduce the scope of their case.

Plaintiffs Barry Braverman, Hakop Demirchyan, Joel Green, Dr. Glynda Robertson, Edo Tsoar, and Peter Weinstein, who purchased their respective Class Cars in California ["California Plaintiffs"], now, move for class certification as to their Song-Beverly and Magnuson-Moss claims for Class Cars acquired in California. The California Plaintiffs seek to certify a class of all persons or entities who purchased or leased a new Class Car from an authorized BMW dealer in California on or before May 16, 2016.

Six days after the California Plaintiffs filed their renewed motion for class certification, the Ninth Circuit held in *Floyd v. Am. Honda Motor Co., Inc.*, 966 F.3d

1027 (9th Cir. 2020), that a Magnuson-Moss class claim may not be certified with fewer than 100 putative class members. Because the California Plaintiffs seek to certify a class of fewer than 100 putative class members, they have withdrawn their request to certify their Magnuson-Moss claim.

To certify a putative class, the California Plaintiffs bear the burden of establishing that this case and the proposed subclasses satisfy all four threshold requirements of Fed. R. Civ. P. 23(a): (1) Numerosity of proposed class members; (2) Commonality of issues of fact and law; (3) Typicality of the named representatives' claims; and (4) Adequacy of the named representatives and class counsel to fairly and adequately pursue the action. *See Sueoka v. United States*, 101 F. App'x. 649, 652 (9th Cir. 2004). The California Plaintiffs, also, bear the burden of establishing at least one of the requirements of Fed. R. Civ. P. 23(b). Here, the California Plaintiffs seek to certify this case as a Fed. R. Civ. P. 23(b)(3) class action – that common questions of law or fact predominate over individualized issues, thereby, making class adjudication the superior method of adjudicating this controversy.

The Court previously held that Fed. R. Civ. P. 23(a) was satisfied with regard to Plaintiffs' Song-Beverly claim. However, Defendants argued that commonality and the stricter requirement of predominance have not been established. Defendants do not significantly dispute that the other requirements of Fed. R. Civ. P. 23(a) and (b) have been satisfied.

Defendants argued that Plaintiffs cannot establish commonality and predominance because "there is no common proof that [the Class Cars] are unfit for the ordinary purpose for which [they] are used" because it is "undisputed [that the Class Cars] experienced no power reduction when running only on battery power . . . while driving in megacities . . . with the Rex on and battery charge above 1.9%." Essentially, Defendants argued that the class should not be certified because there is proof that the Class Cars were merchantable and that the only reason the California Plaintiffs were experiencing any issues with the Class Cars is because they were "put[ting] themselves

in the situation" of causing the Class Cars to experience the symptoms of the alleged defect. Defendants' argument is misplaced.

The overarching question, here, is whether an alleged defect rendered the Class Cars unmerchantable. The answer that this question generates will resolve every putative class member's claim. *See Wright v. Renzenberger, Inc.*, 656 F. App'x. 835, 837 (9th Cir. 2016). That Defendants have evidence that the Class Cars are merchantable and failed to perform in limited situations goes only to the merits of the California Plaintiffs' claim. Whether the class could actually prevail on the merits of their claims is not a proper inquiry in determining whether common questions exist or predominate. *See Stockwell v. City and Cty. Of S.F.*, 749 F.3d 1107, 1111-1112 (9th Cir. 2014).

Defendants, also, argued that the California Plaintiffs were required to prove commonality via an expert report, pursuant to *Grodzitsky v. American Honda Motor Co., Inc.*, 957 F.3d 979 (9th Cir. 2020). Defendants read *Grodzitsky* too narrowly. The plaintiffs in *Grodzitsky* relied solely on an expert's opinion to establish commonality. When the expert's opinions were excluded, the District Court held "that the exclusion of [the expert's] testimony was fatal to Plaintiffs' motion for class certification because without [that] testimony Plaintiffs were unable to meet the requirement of Rule 23." The Ninth Circuit agreed, holding that "in the absence of the report, the Plaintiffs failed to demonstrate commonality." *Grodzitsky* does not require an expert report to establish commonality – it merely found that in the factual scenario before it, the Plaintiffs failed to establish commonality without the expert's opinions. That is not the case, here.

As the Court previously held, the requirements of Fed. R. Civ. P. 232(a) and (b) are satisfied as to the California Plaintiffs' Song-Beverly claim for Class Cars acquired in California. *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998).

However, the Court notes that the California Plaintiffs' proposed class definition is overly broad. Song-Beverly applies only to buyers, as defined by Cal. Civ. Code

§ 1791(b). *See* Cal. Civ. Code § 1794. A buyer is defined as any individual who buys consumer goods. Cal. Civ. Code § 1791(b). However, the California Court of Appeal has held that other substantive changes to Song-Beverly have, necessarily, broadened the definition of buyer to include "some corporate purchasers of new motor vehicles for business use" – specifically those businesses that do not have more than five motor vehicles registered in California. *See Park City Servs., Inc. v. Ford Motor Co., Inc.*, 144 Cal. App. 4th 295, 306 (2006).

Accordingly,

It is Ordered that the motion to certify the class claim be, and hereby is, **Granted**.

It is further Ordered that the class shall be defined as:

> All entities, that do not have more than five motor vehicles registered in California, and all individuals who purchased or leased a new model year 2014, 2015 or 2016 BMW i3 REx electric car equipped with the "Range Extender" option from an authorized BMW dealer in California on or before May 16, 2016.

Date: September 30, 2020

Terry J. Hatter, Jr.
Terry J. Hatter, Jr.
Senior United States District Judge