STATE OF MICHIGAN
IN THE SUPREME COURT

DANA NESSEL, Attorney General of the State of Michigan, *ex rel.* the People of the State of Michigan,

Plaintiff/Appellant,

v

ELI LILLY AND COMPANY,

Defendant/Appellee.

SC: 165961
COA: 362272
Ingham County CC: 2022-000058-CZ

APPENDIX TO DEFENDANT-APPELLEE'S SUPPLEMENTAL BRIEF IN RESPONSE TO THIS COURT'S ORDER OF JANUARY 24, 2025

(Exhibits 20 - 24; Appx. 312b – 355b)

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<u>APPENDIX TO DEFENDANT-APPELLEE'S SUPPLEMENTAL BRIEF IN RESPONSE TO THIS COURT'S ORDER OF JANUARY 24, 2025</u>

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Ex. No.	Description	Appx Nos.
20	*Volkswagen AG v. iman365-usa*, 2020 WL 977969 (N.D. Ill. Feb. 28, 2020)	312b-320b
21	*U.S. Auto Club v. U.S. Motor Club Corp.*, 1979 WL 25082 (E.D. La. Apr. 2, 1979)	321b-325b
22	*Collins v. A1 Motors, LLC*, 2017 WL 1190932 (Mich. App. March 28, 2017)	326b-334b
23	*Gilpin v. Marcus*, 1999 WL 33437810 (Mich. App. Aug. 13, 1999)	335b-342b
24	*Shain v. Advanced Techs. Grp., LLC*, 2017 WL 768929 (E.D. Mich. Feb. 28, 2017)	343b-355b

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2020 WL 977969
Only the Westlaw citation is currently available.
United States District Court, N.D. Illinois, Eastern Division.

VOLKSWAGEN AG, Volkswagen Group of America, Inc., and Audi AG, Plaintiff,
v.
IMAN365-USA, Defendant.

No. 18-cv-06611
|
Signed 02/28/2020

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MEMORANDUM OPINION AND ORDER

Honorable Edmond E. Chang, United States District Judge

***1** Volkswagen AG, Volkswagen Group of America, Inc., and Audi AG brought this trademark-infringement lawsuit against various individuals and business entities, alleging violations of the Lanham Act, 15 U.S.C. §§ 1114, 1125, and the Illinois Uniform Deceptive Trade Practices Act, 815 ILCS 510, *et seq.* [1] The Plaintiffs (who will be referred to as Audi for convenience's sake) now move for summary judgment, seeking statutory damages, a permanent injunction, and attorney's fees and costs against an online retailer known as "iman365-usa." R. 84, Mot. Summ. J. [2] For the reasons stated below, Audi wins summary judgment on liability and statutory damages (though not as much as they asked for), as well as on entry of a permanent injunction. The request for attorney's fees and costs also is granted, subject to the procedures in Local Rule 54.3.

I. Background

In deciding Audi's motion for summary judgment, the Court views the evidence in the light most favorable to the Defendant, the non-movant. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). But because the Defendant entirely failed to respond to Audi's Local Rule 56.1 Statement of Facts, the Court "credits [Audi's] uncontroverted version of the facts to the extent that it is supported by evidence in the record." *Keeton v. Morningstar, Inc.*, 667 F.3d 877, 880 (7th Cir. 2012).

Volkswagen AG is the parent company of Audi AG and Volkswagen Group of America, Inc. R. 86, PSOF ¶ 1; R. 87, Cizmadia Decl. ¶ 3. Audi makes and sells cars and related products through a network of licensed dealerships. PSOF ¶ 10; Cizmadia Decl. ¶ 5. It also operates websites "through which consumers can purchase genuine Audi parts, automotive accessories, and personal goods and accessories directly from Audi." PSOF ¶ 11; Cizmadia Decl. ¶ 6. Volkswagen Group of America "polices and enforces Plaintiff Audi AG's trademarks in the United States." PSOF ¶ 2. These include the following federally registered trademarks (the "AUDI Trademarks"):

Registration Number	Trademark	Registration Date	Goods and Services
2,083,439	Audi	July 29, 1997	For: automobiles and structural parts therefor in international class 12.
5,093,264	AUDI	December 6, 2016	For: Lighting apparatus for vehicles; lighting apparatus, namely, lighting fixtures and lighting installations in international class 11.

Figure 1

Id. ¶ 16; Cizmadia Decl. ¶ 11.

Audi has won various awards for its cars. In 2018, for example, the Audi Q7 was named as one of *Car and Driver's* "10 Best Mid-Size Luxury Trucks and SUVs"; the Audi A4 was named "Luxury Car of the Year" by Cars.com; and the Audi Q5 and Q6 were named "2018 Best Cars for Families" in their respective classes by *U.S. News & World Report.* PSOF ¶ 15; Cizmadia Decl. ¶ 10. In Audi's 2017 *Annual Financial Report*, the company valued its Audi "brand" at around $520 million and its distribution costs for 2017 totaled about $6 billion (all dollar figures in this Opinion are in U.S. dollars). PSOF ¶ 14; Cizmadia Decl. ¶ 9, Exh. 1. The distribution-costs figure is the combination of "labour and material costs for marketing and sales promotion, advertising, public relations activities and outward freight, as well as depreciation attributable to sales organization." PSOF ¶ 14.

***2** Defendant iman365-usa is an eBay store owned and operated since July 2017 by Jiajun Yan from the People's Republic of China. PSOF ¶ 5; R. 88-5, Martin Decl. No. 1, Exh. 5; R. 87-4, Cizmadia Decl., Exh. 4. From February 22 to October 19, 2018, the Defendant sold products to Illinois customers at least 95 times, and to the larger U.S. market at least 2,117 times. PSOF ¶ 37; R. 102-1, Martin Decl. No. 2 ¶ 3, Exh. 2. Specifically, iman365-usa advertised and sold a car-door laser light which when activated, "projects an image of the AUDI Trademarks." PSOF ¶¶ 22, 24; Cizmadia Decl. ¶¶ 15, 17. The projected image looked like this:

Figure 2

PSOF ¶ 24. The Defendant also used the Audi word mark in the item title when listing the product: "2 LED Blue Logo Door Light Courtesy Laser Light for AUDI Q2 Q3 Q5 Q7 R8 Quattro." PSOF ¶ 21; Cizmadia Decl. ¶ 16. The product listing looked like this:

Figure 1 – iman365-usa Product eBay Store Listing

Figure 1

PSOF ¶ 21. The Defendant sold the laser-light product for $15.99 and accepted payments via PayPal. PSOF ¶ 23; Cizmadia Decl. ¶ 16. The Defendant also sells a variety of other car accessory products, which Audi asserts "appear to be counterfeits of other automobile company trademarks." R. 102, Pls.' Reply at 6; *see also* R. 102-2, Martin Decl. No. 2 at Exh. 1. A spreadsheet of the Defendant's PayPal account shows a "total amount received" of $137,966.23, R. 88-7, Martin Decl. No. 1, Exh. 7, but it is unclear whether that represents the total revenue for the entire history of the account, or over a more limited time period.

It is undisputed that the Defendant's product is not a genuine Audi product, that Audi has not licensed or authorized the Defendant to use the AUDI Trademarks, and that the Defendant is not an authorized retailer of genuine Audi products. PSOF ¶¶ 28-29; Cizmadia Decl. ¶¶ 19, 20. In fact, the Defendant's "only identified procedure for determining whether a supplier or manufacturer is licensed or authorized to sell branded products is a statement that Defendant 'just found the goods through 1688, [3] and then contacted the seller to deliver [the goods].' Defendant indicated that ... goods are shipped from a warehouse." PSOF ¶ 42; Martin Decl. No. 1 ¶ 13, Exh. 5.

Audi filed this suit in September 2018, alleging that the Defendant engaged in trademark infringement and counterfeiting under 15 U.S.C. § 1114 (Count 1), false designation of origin under 15 U.S.C. § 1125(a) (Count 2), and violations of the Illinois Uniform Deceptive Trade Practices Act, 815 ILCS 510, *et seq.* (Count 3). *See* R. 10, Am. Compl. The Court entered a Temporary Restraining Order against the Defendant on October 11, 2018, R. 27, which was extended on October 25, R. 33, and converted to a Preliminary Injunction on November 8, R. 44. The Defendant's PayPal account currently has a total restrained balance of $50,492.18. PSOF ¶ 44.

II. Legal Standard

Summary judgment must be granted "if the movant shows 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). A genuine issue of material fact exists if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In evaluating summary judgment motions, courts must view the facts and draw reasonable inferences in the light most favorable to the non-moving party. *Scott v. Harris*, 550 U.S. 372, 378 (2007). The Court may not weigh conflicting evidence or make credibility determinations, *Omnicare, Inc. v. UnitedHealth Grp., Inc.*, 629 F.3d 697, 704 (7th Cir. 2011), and must consider only evidence that can "be presented in a form that would be admissible in evidence." Fed. R. Civ. P. 56(c)(2). The party seeking summary judgment has the initial burden of showing that there is no genuine dispute and that they are entitled to judgment as a matter of law. *Carmichael v. Vill. of Palatine*, 605 F.3d 451, 460 (7th Cir. 2010); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Wheeler v. Lawson*, 539 F.3d 629, 634 (7th Cir. 2008). If this burden is met, the adverse party must then "set forth specific facts showing that there is a genuine issue for trial." *Anderson*, 477 U.S. at 256.

III. Analysis

A. Personal Jurisdiction

***3** As a threshold matter, this Opinion first addresses the Defendant's argument that the Court lacks personal jurisdiction. R. 101, Def.'s Resp. Br. at 10-11.[4] Absent an evidentiary hearing (the Defendant did not ask for one, nor did the Defendant validly challenge any underlying facts), Audi "need only make out a *prima facie* case of personal jurisdiction." *Purdue Research Found. v. Sanofi-Sythelabo, S.A.*, 338 F.3d 773, 782 (7th Cir. 2003). Personal jurisdiction requires a defendant to have made "certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (cleaned up).[5] Personal jurisdiction can be either general or specific. The Court may exercise general jurisdiction if the defendant's contacts with the forum state are "so continuous and systemic as to render them essentially at home" there, *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011) (cleaned up), even if the lawsuit has no relationship to the defendant's contacts to that state. Here, because the Defendant is an internet store operating from China, it most certainly is not "at home" in Illinois (nor does Audi contend that it is). Instead, the question is whether the Court may exercise *specific* personal jurisdiction, which applies when a defendant has directed its activities at the forum state, and when the cause of action relates to those activities. *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985). The defendant's conduct must be purposefully directed at the forum state, such that the defendant would anticipate being haled into court here. *Walden v. Fiore*, 571 U.S. 277, 284-85 (2014).

In this case, the Defendant's conduct was "purposefully directed" at Illinois. The Defendant's argument that "the Court lacks personal jurisdiction over them [because] sellers on eBay cannot target individuals in any state and have no control over who wins the eBay auction[,]" Def.'s Resp. Br. at 11, omits key facts that, under Seventh Circuit law,[6] dictate a finding of purposeful availment. Specifically, this argument "ignores several of [the Defendant's] own actions that led up to and followed the sales[ ]"—namely, that the Defendant operated a commercial, interactive online store through which U.S. customers could purchase its products, thus holding itself out as open to do business with every state, including Illinois. *See Ill. v. Hemi Grp. LLC*, 622 F.3d 754, 758 (7th Cir. 2010) (finding that online purchases were not unilateral actions by customers—which generally would not satisfy the "minimum contact" requirement—where the defendant operated a commercial website open to business with the forum state). It is true that the Seventh Circuit has cautioned courts to "be careful in resolving questions about personal jurisdiction involving online contacts to ensure that a defendant is not haled into court simply because the defendant owns or operates an interactive website ... accessible in the forum state." *Matlin v. Spin Master Corp.*, 921 F.3d 701, 706 (7th Cir. 2019) (cleaned up). Here, however, Audi also provided evidence of *95* transactions between the Defendant and Illinois customers over a period of around eight months. PSOF ¶ 37; Martin Decl. No. 2 ¶ 3, Exh. 2. At least one of these transactions involved shipping a counterfeit Audi product to Illinois. Cizmadia Decl. ¶¶ 16-17; *see also id.* at Exh. 4. In shipping its products to Illinois customers, the Defendant was the one "reaching out to residents of Illinois, and not the residents reaching back, [which] creates the sufficient minimum contacts with Illinois that justify exercising personal jurisdiction ...." *Hemi*, 622 F.3d at 758.

***4** Second, Audi's case-specific claims of trademark infringement stem from the Defendant's activities directed at Illinois. "Even where a defendant's conduct is purposefully directed at the forum state, the plaintiff must also show that his injury arises out of or relates to the conduct that comprises the defendant's contacts." *Felland v. Clifton*, 682 F.3d 665, 676 (7th Cir. 2012) (cleaned up). There is a split among circuit courts as to whether the defendant's contacts in the forum state must be the but-for cause or the proximate cause of the plaintiff's injuries (or both). *Id.* at 676-77. The Court does not need to decide take sides here, because the record "is sufficient even under the strictest understanding of the 'arising out of' requirement." *Id.* at 677 (cleaned up). It is undisputed that in August 2018

—*before* this litigation began—the Defendant sold at least one product with the Audi trademark to an Illinois address used by Audi's investigator here in Illinois. Cizmadia Decl. ¶¶ 16-17; *id.* at Exh. 4. *Cf. Matlin*, 921 F.3d at 707 (finding no personal jurisdiction where (1) the dispute arose from an out-of-state defendant's refusal to pay royalties on *nationwide* sales, and (2) the plaintiff "attempted to salvage personal jurisdiction" *after* litigation had already begun by "luring [the defendant] into shipping a product into Illinois."). So Audi's claims that the Defendant infringed on Audi's trademarks by selling counterfeit products cover one pre-suit example of the Defendant sending the product right into Illinois.

Finally, exercising personal jurisdiction over the Defendant does not offend "traditional notions of fair play and substantial justice." *Burger King*, 471 U.S. at 472. In evaluating this element, the Court considers "the burden on the defendant, the forum State's interest in adjudicating the dispute, the plaintiff's interest in obtaining convenient and effective relief, the interstate judicial system's interest in obtaining the most efficient resolution of the underlying dispute, and the shared interest of the several States in furthering fundamental substantive social policies." *Hemi*, 622 F.3d at 759. Illinois has a strong interest in providing a forum to resolve a dispute involving the State itself—specifically, an injury in Illinois caused by an out-of-state actor. *See id.* at 760. The Defendant does not even contend that defending a lawsuit in Illinois would be an undue burden, arguing only that it had insufficient contacts with the state. *See* Def.'s Resp. Br. at 6, 10-11. But the Defendant cannot "have its cake and eat it, too" by getting "the benefit of a nationwide business model with none of the exposure." *Hemi*, 622 F.3d at 760. Because the Defendant's commercial transactions with Illinois customers established the requisite minimum contacts, the Defendant should have expected to defend that conduct in Illinois. For these reasons, there is "nothing constitutionally unfair about allowing Illinois, a state with which [the Defendant] has had minimum contacts, to exercise personal jurisdiction" over the Defendant. *Id.*

B. Likelihood of Confusion

Moving on to the merits of Audi's summary judgment motion, Audi argues that it is entitled to judgment as a matter of law on the trademark-infringement and false-designation-of-origin claims, under both federal and state law. The Seventh Circuit has assumed that the same liability standard applies to both the federal and Illinois claims. *See Neuros Co. v. KTurbo, Inc.*, 698 F.3d 514, 523 (7th Cir. 2012); *Muzikowski v. Paramount Pictures Corp.*, 477 F.3d 899, 907 (7th Cir. 2007). *Cf. also Tarin v. Pellonari*, 625 N.E.2d 739, 745-46 (Ill. App. Ct. 1993). To succeed on these claims, Audi must establish that (1) its marks are protectable and (2) the Defendant's use of the marks is likely to cause confusion among consumers. *CAE, Inc. v. Clean Air Eng'g, Inc.*, 267 F.3d 660, 673-74 (7th Cir. 2001). In this case, the parties only dispute whether the Defendant's use of the Audi trademarks caused a likelihood of confusion. *See* Def.'s Resp. Br. at 6, 8.

In assessing the likelihood of confusion, the Court considers seven relevant factors: "(1) similarity between the marks in appearance and suggestion; (2) similarity of the products; (3) the area and manner of concurrent use; (4) the degree of care likely to be exercised by consumers; (5) the strength of the plaintiff's mark; (6) whether actual confusion exists; and (7) whether the defendant intended to 'palm off' his product as that of the plaintiff." *CAE*, 267 F.3d at 677-78. "No single factor is dispositive and courts may assign varying weights to each of the factors depending on the facts presented." *Id.* at 678. Here, four of the factors are particularly relevant: the similarity of the marks, the degree of care likely to be exercised by consumers, the strength of Audi's mark, and the Defendant's intent.

1. Similarity of the Marks

***5** On the issue of similarity, the mark displayed by the Defendant's laser-light product is indistinguishable from Audi's trademark. *Compare supra* Figure 1, *with* Figure 2. Not only does the Defendant use the same interlocking-circles graphic, but also the same font for the word "Audi," including the unique, italicized letter "d." *Id.* The Defendant also uses a similar Audi word mark in its product listing. *Compare supra* Figure 1, *with* Figure 3. Although the Defendant's mark is not capitalized like Audi's, the salient portion of the mark—the word "Audi" itself—is identical. *See Ty, Inc. v. Jones Grp., Inc.*, 237 F.3d 891, 898 (7th Cir. 2001) ("[I]f one word or feature of a composite trademark is the salient portion of the mark, it may be given greater weight than the surrounding elements ...." (cleaned up)). Even viewed in the Defendant's favor, the evidence shows that the marks are identical and this weighs strongly in favor of a finding of confusion. *See CAE*, 267 F.3d at 678.

2. The Degree of Care

On how careful the typical consumer is, the Defendant asserts that the average consumer of its product possesses such a level of mechanical skill that they would "understand that these products have no affiliation with Audi." Def.'s Resp. Br. at 10. Yet the Defendant offers no evidence suggesting that its $15.99 product requires unique mechanical skill of any kind, nor does the Defendant explain why mechanical skill would even translate into being able to discern the lack of affiliation with Audi. In fact, "[t]he more widely accessible and inexpensive the products and services, the more likely that consumers will exercise a lesser degree of care and discrimination in their purchases." *CAE*, 267 F.3d at 683. Even if Audi does not offer a similar product, as the Defendant asserts, Def.'s Resp. Br. at 6, there is still a likelihood of confusion that consumers will think that Audi is indeed the maker of the product. There simply is nothing to suggest that a consumer who buys a laser-light product would carefully investigate whether the product is genuinely made by Audi. [7]

This applies too to potential consumers who see the laser-light display being used by someone who has bought the counterfeit product. That is, there is a likelihood of *post*-sale confusion, which occurs when "a *potential* customer sees a product bearing the infringing label used by others and mistakenly attributes the product to the brand owner, thereby influencing his buying decision, either positively or negatively[,]" R. 85, Pls.' Br. at 9 (emphasis added). *See CAE*, 267 F.3d at 683 ("[T]he Lanham Act's protections also extend to post-sale confusion of potential customers."). Considering that the Defendant's mark is identical to Audi's, post-sale confusion is likely too. The lack of care in buying this type of product points in favor of Audi as to likelihood of confusion.

3. The Strength of the Mark

Next, on this record (and with no competing Rule 56.1 Statement) a reasonable jury would have to conclude that the AUDI Trademarks are strong. "The stronger the mark, the more likely it is that encroachment on it will produce confusion." *AutoZone, Inc. v. Strick,* 543 F.3d 923, 933 (7th Cir. 2008) (cleaned up). First, the Plaintiffs' AUDI Trademarks are inherently distinctive. The image of the four interlocking circles is a fanciful design that uniquely identifies Audi, while the word "Audi" itself is an arbitrary mark that "neither describes nor suggests [Audi's] product or service[,]" *Tisch Hotels, Inc. v. Americana Inn, Inc.*, 350 F.2d 609, 611 n.2 (7th Cir. 1965), which means even the word itself is a strong mark. *See also CAE*, 267 F.3d at 684 (explaining that arbitrary marks are generally afforded broader trademark protection); *Bliss Salon Day Spa v. Bliss World LLC*, 268 F.3d 494, 496-97 (7th Cir. 2001) (suggestive, arbitrary, and fanciful marks are collectively "distinctive in the sense that secondary meaning is likely to develop, as a result of which any duplicate use of the name is likely to breed confusion about the product's source."). In fact, Audi mark No. 2,083,439—which includes both the circle design and the word "Audi"—has been in use for a long time, since 1997. Cizmadia Decl. ¶ 11; *see CAE*, 267 F.3d at 684-85 (finding that the plaintiff's mark was strong where the plaintiff had used it for decades, spent thousands of dollars on marketing, and earned millions of dollars in sales each year).

***6** Audi also offered evidence of the economic and marketing power wielded by the AUDI trademarks. *See AutoZone*, 543 F.3d at 933. For example, in Audi's 2017 Annual Financial Report, Audi's brand names were valued at $520 million. R. 87-1, Cizmadia Decl., Exh. 1 at 184. Audi AG expends billions of dollars in distribution costs each year, which includes marketing and sales promotion, advertising, and public relations activities. *Id.* These efforts have translated into widespread popularity and consumer recognition, evidenced by the variety of automotive awards that Audi has won. *See* R. 87-2, Cizmadia Decl., Exh. 2. All in all, Audi has demonstrated that it has "built, and continues to build, a reputation for the quality of its products and services." *CAE*, 267 F.3d at 685. The strength-of-the-mark factor weighs in Audi's favor; no reasonable jury could say otherwise.

4. Intent

Another factor that is particularly relevant in this case is the Defendant's intent—that is, whether the Defendant intended to "palm off" their laser-light product as that of Audi's. The Defendant's argument relies on the preposition "for" in the product listing, but that reliance is misplaced. Remember that the product listing said, "2 LED Blue Logo Door Light Courtesy Laser Light *for* AUDI Q2 Q3 Q5 Q7 R8 Quattro." PSOF ¶ 21 (emphasis added). To the Defendant's way of thinking, the word "for" in the listing only meant to "describe the *compatibility* of the door light" with Audi products. *See* Def.'s Resp. Br. at 10 (emphasis added). If by "compatible" the Defendant means physically compatible and able to be affixed to an Audi Quattro, then that thinking makes little sense. Why would selling a laser light that is merely physically "compatible" with an Audi Quattro have to display the Audi trademark? Put another way, if a customer asked the Defendant, "Do you sell a laser light *for* the Audi Quattro?" and in response the Defendant offered the customer a light that displayed the Coca-Cola logo, the customer would be quite puzzled. In any event, the Defendant failed to offer any evidence of its good faith, whether by affidavit or anything else. Considering the similarity of the marks, as well as the strength of the AUDI Trademarks, a jury may reasonably infer that the Defendant's appropriation of the AUDI Trademarks was intentional. *See AutoZone*, 543 F.3d at 934 ("[A]n intent to confuse may be reasonably inferred from the similarity of the marks where the senior mark has attained great notoriety."). This factor weighs heavily in the Plaintiffs' favor.

In sum, based on the relevant factors, a reasonable jury has no choice but to conclude that consumers are likely to be confused about the origin of the Defendant's product. *See AutoZone*, 543 F.3d at 929. So Audi is entitled to a judgment as a matter of law on liability as to their federal and state law claims.

C. Statutory Damages

Having established the Defendant's liability, Audi is entitled to statutory damages. The Lanham Act provides for statutory damages in cases "involving the use of a counterfeit mark ... in connection with the sale, offering for sale, or distribution of goods or services." 15 U.S.C. § 1117(c). Plaintiffs may recover "not less than $1,000 or more than $200,000 per counterfeit mark ...." or, if the defendant's conduct was willful, up to $2,000,000 per counterfeit mark. *Id.* at § 1117(c)(1)-(2). Aside from these guidelines, the amount of the statutory damages award is largely within the Court's discretion. *See id.*; *Entm't One UK Ltd. v. 2012Shiliang*, 384 F. Supp. 3d 941, 953 (N.D. Ill. 2019) (analogizing statutory damages in trademark infringement cases to those in copyright infringement cases, where "courts enjoy wide discretion ... and are not required to follow any rigid formula." (cleaned up)). In setting the amount of statutory damages, the Court considers factors like "the difficulty or impossibility of proving actual damages, the circumstances of the infringement, and the efficacy of the damages as a deterrent to future ... infringement." *Entm't One*, 384 F. Supp. 3d at 953 (quoting *Chi-Boy Music v. Charlie Club, Inc.*, 930 F.2d 1224, 1229 (7th Cir. 1991)).

***7** In this case, although Audi is entitled to statutory damages, the request of $100,000 ($50,000 per counterfeit mark) is too high. *See* Pls.' Br. at 10. The low price of the Defendant's product ($15.99) and the Defendant's relatively short time in business (a little over two years) are mitigating factors. *See Luxottica USA LLC v. The P'ships and Unincorporated Ass'ns Identified on Schedule "A"*, 2015 WL 3818622, at *2 (N.D. Ill. June 18, 2015) ("[S]tatutory damages must bear some relation to actual damages[.]" (cleaned up)). What's more, although the Defendant's "discovery disclosures were half-hearted, [the Defendant's] willful infringement is somewhat mitigated by the fact that they chose to respond to this action rather than defaulting." *Entm't One*, 384 F. Supp. 3d at 954.

On the other hand, several aggravating factors are at play. For one, the Defendant's business is not a small-scale, personal-hobby operation. Audi presented evidence that the Defendant's PayPal account has received $137,966.23 in total payments. Martin Decl. No. 1 at Exh. 7. It is true that the time period for these receipts is not clear. Nor is it known how much of that total can be attributed to the counterfeit product. But even if it took the entire two years of the Defendant's existence to bring in that revenue, still that is a substantial sum. It is also relevant that the Defendant's conduct was willful, *see supra* Section III(B)(4), because "the statutory damages award may be designed to penalize the infringer and to deter future violations[,]" *Entm't One*, 384 F. Supp. 3d at 953 (citing *Chi-Boy Music*, 930 F.2d at 1229-30). Here, not only is there a need to deter trademark infringement generally, but there is also a heightened need to deter future violations by this Defendant, who "continues to offer for sale 'logo lights' that appear to be counterfeits of other automobile company trademarks[,]" Pls.' Reply at 6. Weighing in favor of a high statutory damages award is also Audi's "efforts to protect, promote, and enhance" the Audi brand's value. *See Entm't One*, 384 F. Supp. 3d at 953. Audi has "a worldwide anti-counterfeiting program," and has actively enforced its trademark rights by filing multiple trademark infringement lawsuits. PSOF ¶ 20. Audi also expends millions of dollars every year to market Audi products. PSOF ¶ 14; Cizmadia Decl. ¶ 9, Exh. 1.

On balance, the Court finds that a statutory damages award in the amount of $75,000 ($37,500 per counterfeit mark) is sufficient to fulfill the goal of statutory damages under 15 U.S.C. § 1117(c).

D. Permanent Injunction

Audi also seeks a permanent injunction "enjoining Defendant from advertising, offering for sale, and/or selling Counterfeit Audi Products or otherwise violating Plaintiffs' rights in the AUDI Trademarks." Pls.' Br. at 17. "A plaintiff seeking a permanent injunction must show that: (1) it has suffered an irreparable injury; (2) legal remedies, such as monetary damages, cannot adequately compensate for that injury; (3) the balance of hardships between the parties warrants an equitable remedy; and (4) a permanent injunction would not harm the public interest." *Entm't One*, 384 F. Supp. 3d at 955 (citing *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006)). "The first two requirements, irreparable harm and inadequate remedy at law, are presumed in trademark infringement cases." *Id.* (citing *Eli Lilly & Co. v. Nat. Answers, Inc.*, 233 F.3d 456, 469 (7th Cir. 2000); *MetroPCS v. Devor*, 215 F. Supp. 3d 626, 639 (N.D. Ill. 2016)). *See also Re/Max North Cent., Inc. v. Cook*, 272 F.3d 424, 432 (7th Cir. 2001); *Abbott Labs. v. Mead Johnson & Co.*, 971 F.2d 6, 16 (7th Cir. 1992). The Defendant has made no meaningful attempt to rebut this presumption. *See* Def.'s Resp. Br. at 12-13.

***8** Turning to the first element at issue, the balance of hardships tips in favor of Audi. The Defendant asserts, without providing any supporting evidence, that it has "ceased all sales of the disputed products upon receipt of notice of this lawsuit." Def.'s Resp. Br. at 13. This suggests that the Defendant no longer relies on sales of the counterfeit product and is not at risk of losing any money or business as a result of a permanent injunction. *See Black & Decker Inc. v. Robert Bosch Tool Corp.*, 2006 WL 3446144, at *5 (N.D. Ill. Nov. 29, 2006). Not to mention, enjoining the Defendant from violating the law cannot, by its very nature, cause the Defendant any harm. *See Miyano Machinery USA, Inc. v. MiyanoHitec Machinery, Inc.*, 576 F. Supp. 2d 868, 888 (N.D. Ill. 2008) ("In assessing any irreparable harm [the defendant] may suffer, this Court excludes any burden it voluntarily assumed by proceeding in the face of a known risk." (cleaned up)); *see also Coach, Inc. v. 3D Designers Inspirations*, 70 F. Supp. 3d 942, 950 (C.D. Ill. 2014) (finding that the balance of hardships weighed in favor of granting a permanent injunction because the infringing party "never had a legal right to profit from such counterfeiting" in the first place).

Finally, the public interest would actually be served by a permanent injunction because "enforcement of the trademark laws prevents consumer confusion." *Eli Lilly*, 233 F.3d at 469. This is particularly important where the Defendant fails to offer any evidence of reform, and instead continues to sell " 'logo lights' that appear to be counterfeits of other automobile company trademarks[,]" Pls.' Reply at 6. *See also* R. 102-4, Martin Decl. No 2. at Exh. 3; *Weigand v. Vill. of Tinley Park*, 129 F. Supp. 2d 1170, 1172 (N.D. Ill. 2001) ("[I]t is the duty of the courts to beware of efforts to defeat injunctive relief by protestations of repentance and reform, especially when abandonment seems timed to anticipate suit, and there is probability of resumption." (cleaned up)). Accordingly, the Court permanently enjoins the Defendant from advertising, offering for sale, or selling products using the AUDI Trademarks.

E. Attorney's Fees

The Lanham Act provides for reasonable attorney's fees and costs to prevailing parties who prevail in counterfeit-trademark infringement cases, unless the Court finds "extenuating circumstances." 15 U.S.C. § 1117(b). Here, the Defendant fails to proffer any persuasive mitigating circumstances that would weigh against fee-shifting. So, having raised the inference that the Defendant willfully infringed on their AUDI Trademarks, Audi is entitled to reasonable attorney's fees and costs under the Lanham Act. The parties shall follow Local Rule 54.3 in litigating the amount of fees and costs.

IV. Conclusion

For the reasons discussed, Audi's motion for summary judgment is granted against the Defendant on all claims—federal trademark infringement and counterfeiting (Count 1), false designation of origin (Count 2), and violation of the Illinois Uniform Deceptive Trade Practices Act (Count 3). Audi is also awarded statutory damages in the total amount of $75,000 pursuant to 15 U.S.C. § 1117(c), and a permanent injunction against the Defendant as described earlier. The Plaintiffs are also entitled to reasonable attorney's fees and costs, and may file a petition for such fees after complying with the requirements of Local Rule 54.3. The status hearing of March 27, 2020 is vacated. Final judgment shall be entered.

All Citations

Not Reported in Fed. Supp., 2020 WL 977969

Footnotes

1 The Court has federal question jurisdiction over this case under 28 U.S.C. § 1331, and supplemental jurisdiction over the state-law claim under 28 U.S.C. § 1367(a).

2 Citations to the record are noted as "R." followed by the docket number. The acronym "PSOF" stands for Plaintiffs' Statement of Facts, which is docket entry R. 86.

3 "1688" appears to be a reference to 1688.com, a Chinese website that sells products wholesale. *See Alibaba Group Corporate Overview* (Aug. 2015), available at https://alibabagroup.com/assets2/pdf/Alibaba_Group_Corporate_Overview_Eng.pdf.

4 The Defendant's argument against personal jurisdiction is not timely. On December 13, 2018, the Court set a deadline of January 11, 2019 for an amended answer or Rule 12 dismissal motion. R. 80. Although the Defendant did assert a lack of personal jurisdiction in its amended answer on January 11, R. 79, the Defendant had already waived the defense by engaging in discovery; specifically, the Defendant served the Plaintiffs with Mandatory Initial Discovery disclosures on December 27, 2018, R. 76, and with responses to Plaintiffs' first set of interrogatories and production requests on January 10, 2019, Martin Decl. No. 1, Exh. 5. *See Hedeen Int'l, LLC v. Zing Toys, Inc.*, 811 F.3d 904, 906 (7th Cir. 2016) ("[A] personal jurisdiction defense may be waived if a defendant gives a plaintiff reasonable expectation that he will defend the suit on the merits or where he causes the court to go to some effort that would be wasted if personal jurisdiction is subsequently found lacking."); *Cont'l Bank, N.A. v. Meyer*, 10 F.3d 1293, 1296-97 (7th Cir. 1993) ("The defendants did raise the defense in their answer, and therefore the waiver provided for by Rule 12(h) did not occur. However, the privileged defenses referred to in Rule 12(h)(1) may be waived by formal submission in a cause, or by submission through conduct." (cleaned up)). In any event, because Audi did not assert waiver, the Court will address this issue on the merits.

5 This opinion uses (cleaned up) to indicate that internal quotation marks, alterations, and citations have been omitted from quotations. *See* Jack Metzler, *Cleaning Up Quotations*, 18 Journal of Appellate Practice and Process 143 (2017).

6 The Defendant cites non-Seventh Circuit cases (and indeed cites only cases *not* decided by the Seventh Circuit) to argue against personal jurisdiction, but those cases do not bind this Court. R. 101 at 10-11.

7 Even if, hypothetically, the Defendant's customers realize the true source of the goods before they complete their purchase, there is still a likelihood of initial-interest confusion. Initial-interest confusion "occurs when a customer is lured to a product by the similarity of the mark, even if the customer realizes the true source of the goods before the sale is consummated." *Promatek Indus., Ltd. v. Equitrac Corp.*, 300 F.3d 808, 812 (7th Cir. 2002). It inflicts harm by misappropriating the trademark owner's goodwill. *Id.* at 812-13. Considering that the marks used by the Defendant are identical to the AUDI Trademarks, initial-interest confusion is likely.

End of Document

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1979 WL 25082
United States District Court, E.D. Louisiana.

United States Auto Club, Inc.
v.
United States Motor Club Corporation

No. 78-1654.
|
Decided Apr. 2, 1979.

Attorneys and Law Firms

J.E. Hyland, and Jenkins, Coffey & Hyland, both of Indianapolis, Ind., and C. Emmett Pugh, New Orleans, La., for plaintiff.

Gilbert E. Stampley, Wilfert McKee, and Harris, Stampley, McKee & Broussard, all of New Orleans, Louisiana, for defendant.

Opinion

Heebe, Chief Judge.

***1** Before the merits of this case can be addressed, some disposition of the defendant's motion to dismiss must be made.

On the day of trial, United States Motor Club Corporation urged that since the United States Auto Club was the owner and not the licensee of the disputed mark, it was not the proper party plaintiff to institute this action and that the plaintiff had failed to join an indispensable party by not bringing in USAC Motoring Division, its licensee. The defendant's motion is without merit.

Without exception, the owner of a patent or trademark is considered an indispensable party. However, the licensee, even an exclusive one of a patent or trademark is not considered an indispensable party, as his rights can only be incidentally affected.

> "And in a suit for infringement on a patent or copyright brought by a simple licensee of the owner, the owner is an indispensable party, since the legal title that will be in dispute is in him. Conversely the owner can himself bring actions for infringement without joining a licensee." 3A, Moore's Federal Practice, §19.14, p. 19-276, 1977; Rawlings v. National Molasses Company, 394 F.2d 645, 158 USPQ 14 (9th Circuit 1968); Cold Metal Processing Company v. Aluminum Co. of America, 200 F.Supp. 407, 132 USPQ 598 (E.D. Tenn. 1961)
>
> Accordingly,

It is the order of the court that the defendant's motion to dismiss is *denied.*

FINDINGS OF FACT

1. Plaintiff, United States Auto Club, Inc., is an Indiana non-profit corporation with its principal place of business in Speedway, Indiana, which was incorporated in 1955.

2. Since its incorporation, plaintiff has been in the business of organizing, promoting and sanctioning numerous auto racing events, including the Indianapolis 500 Mile Race. In connection with these events, plaintiff publishes a variety of publications such as USAC NEWS, a year-book, racing schedules and bulletins, which are distributed throughout the country. Each publication bears one or more of the plaintiff's registered marks.

3. As previously mentioned, United States Auto Club sanctions the Indianapolis 500, which is attended by approximately 340,000 people. The race is broadcast live by radio throughout the United States and in several foreign nations. Additionally, it is shown by delayed telecast throughout the country. USAC also sanctions 145 racing events yearly. At all of the aforementioned events, it is publicized that they are USAC sanctioned and they also portray one of USAC's marks in some form of advertisement.

4. As a result of the notariety that USAC has gained in auto racing, it has expanded its field of endeavor to product testing and certification of services for others. Products which pass specific evaluations and tests conducted by USAC are permitted to use its seal of approval. By allowing the use of its seal, the plaintiff certifies the results of performance tests for the particular product. USAC has performed the above services for clients such as Sears Roebuck, Ford, Chrysler, GM, Champion Spark Plugs, National Car Rental and Goodyear.

***2** 5. Advertisements by these companies, make specific mention of the fact that their product tests are certified as genuine by United States Auto Club and in conjunction therewith, they display one or more of the shield designs of USAC. These advertisements, those which bear the USAC seal or make reference to it, have appeared on national television (for example, the Sears "Die Hard" battery) and in national publications such as TIME, SPORTS ILLUSTRATED, and THE WALL STREET JOURNAL.

6. In conjunction with all of the above related activities, the plaintiff has extensively and conspicuously used its marks, United States Auto Club, its shield designs, and USAC throughout the United States and several foreign countries.

7. In June 1971, USAC entered into an agreement with its wholly owned subsidiary, USAC Properties, Inc., an Indiana corporation, which provided that USAC Properties had the sole right to grant licenses to use plaintiff's mark in services other than auto racing.

8. USAC Properties later entered into an agreement in June of 1971 with Associates Service Club of North America, Inc., which agreement provided that Associates would have the exclusive right to use the name and marks of United States Auto Club, accompanied with the words "Motoring Division," in the promotion, advertisement and operation of a motoring club. Accordingly, Associates changed its corporate name to United States Auto Club, Motoring Division, Inc.

9. USAC, Motoring Division, Inc., under license from the plaintiff, has continuously operated and performed automobile club services since November of 1971 and continues to do business in that name and mark in all fifty states.

10. USAC, Motoring Division, advertises and solicits members in a number of ways including sale through finance companies, automobile dealerships and direct mailing through credit card companies such as Visa and Bankamericard. In all of the above solicitations, the mark of USAC is prominently displayed accompanied by its shield design.

12. USAC, Motoring Division, boasts of some 98,000 households as members, with some 3,000 in Louisiana alone.

13. Considerable advertising and promotional expenditures have been made involving the plaintiff's mark. In the last five years the Motoring Division alone, as opposed to USAC, Inc., and USAC Properties, has spent in excess of $1,500,000 in advertising and promotional costs under the mark USAC, Motoring Division, and shield designs as shown in registration number 957,098. These advertisements have appeared in such nationally distributed magazines as CHANGING TIMES, BETTER HOMES AND GARDENS and GOOD HOUSEKEEPING.

14. Plaintiff owns numerous service marks and collective membership marks registered on the Principal Register in the United States Patent and Trademark Office under the Trademark Act of 1946 (15 U.S.C. 1051, et seq.), including:

REGISTRATION No.	REGISTRATION DAY
957,098	April 10, 1973
929,307	February 15, 1972
925,312	December 7, 1971
925,311	December 7, 1971
812,682	August 9, 1966
796,936	September 28, 1965
680,175	June 9, 1959
671,326	December 16, 1958

***3** Plaintiff has complied with the provisions of §15 of the Act (15 U.S.C. 1065), with respect to each of those registrations. Plaintiff also owns registration number 1,095,553, registered July 4, 1978.

15. By virtue of its long and extensive use and advertising of its marks, the plaintiff's name and mark enjoy wide public recognition throughout the country. As a result, plaintiff's name and mark have become assets of substantial value as a symbol of plaintiff and its goodwill.

16. With respect to its registered marks, plaintiff and its licensees have displayed the marks in an advertising and promotional material in association with an "R" enclosed with a circle pursuant to §29 of the Act. (15 U.S.C. 1111)

17. The defendant, United States Motor Club Corporation, is a Louisiana Corporation which has been incorporated since 1975 and has its principal place of business in New Orleans, Louisiana. The defendant, like United States Auto Club Motoring Division, is a motor club which also offers a variety of services including towing, bail bonds and various other services. The defendant boasts of some 5,000 members in some three or four states.

18. Since August of 1975 the defendant has been using the name and mark United States Motor Club and a shield design that is amazingly similar to that of USAC, Motoring Division.

19. The mark, United States Motor Club and shield design appear in the Yellow Pages of the New Orleans telephone directory. Both also appear and have appeared in the Times-Picayune newspaper as well as upon brochures printed by the defendant.

20. The name and mark used by the defendant was selected and used without any search for marks registered in the United States Patent and Trademark Office.

21. By a letter dated December 16, 1977, addressed to and received by Mr. Ciervo, defendant was formally advised of plaintiff's marks and claims of infringement and claims of unfair competition and was requested to cease using United States Motor Club and its shield design.

22. Despite the plaintiff's protestations of infringement and of unfair competition, the defendant has persisted in using the mark, United States Motor Club and shield design, and has, during the pendency of this suit, sought to expand its trade areas.

23. Both parties are selling automobile club memberships which offer identical services in the same geographical area, by the same methods, and for the same price.

24. Taken as a whole, the marks being used by the parties are strikingly similar in sight, sound and meaning. The overall impression or mental impact created by the marks is essentially the same. In this regard, it is interesting to note that counsel for both plaintiff and defendant referred to one mark when intending to refer to another on four separate occasions during the course of this trial. It seems a foregone conclusion that the name and mark used by the defendant is a colorable imitation of plaintiff's marks and has caused actual confusion, as was evidenced by the defendant's own admission. The use by the defendant of the mark, United States Motor Club, and shield design is likely to continue to cause confusion.

***4** 25. The defendant has infringed upon the plaintiff's exclusive right of use of its mark. Plaintiff has no adequate remedy at law.

CONCLUSIONS OF LAW

1. The Court has jurisdiction over the parties and subject matter of this action by virtue of 15 U.S.C. 1121; 28 U.S.C. 1338; 28 U.S.C. 1331 & 1332. Venue is proper in this district. 28 U.S.C. 1391(c).
2. By virtue of plaintiff's compliance with 15 U.S.C. 1115(b), their registration of the aforementioned marks has become incontestable under §1065 of Title 15, United States Code, and it is their exclusive right to use these marks in commerce.

3. Defendant is foreclosed in this action from raising any defense or defect which is not enumerated in §33(b) of the Act. 15 U.S.C. 1115(b); John R. Thompson v. Holloway, 366 F.2d 108, 150 USPQ 728 (5th Cir. 1966); Jockey International, Inc. v. Burkard, 185 USPQ 201, 206 (S.D.Cal. 1975).
4. The defendant's reliance on a grant of a corporate charter by the State of Louisiana is of no moment as a defense to an act of infringement of the aforementioned trademarks. Seaboard Finance Co. v. Martin, 244 F.2d 329, 331, 332, 113 USPQ 362, 363-365 (5th Cir. 1957); Hulburt Oil and Grease Co. v. Hulburt Oil & Grease Co., 371 F.2d 251, 254, 152 USPQ 87, 89 (7th Cir. 1966); American Kennel Club v. American Kennel Club of Louisiana, Inc., 216 F.Supp. 267, 268, 137 USPQ 852, 852-853 (E.D.La. 1963); Armstrong Cork Co. v. World Carpets, Inc., 199 USPQ 30, 35 (N.D.Ga. 1978); Christian Dior, S.A.R.L. v. Miss Dior of Flatbush, Inc., 173 USPQ 416, 418 (E.D.N.Y. 1972); Magic Pan, Inc. v. Magic Pan, Inc., 192 USPQ 321, 322 (S.D.Ind. 1976); Gilson, Trademark Protection and Practice, §2.14, p. 2-139, 19.

5. The principal inquiry in an infringement suit is whether the alleged infringer's use of a particular mark "is likely to cause confusion, or to cause mistake, or to deceive * * *." Lanham Act, 15 U.S.C.A. §1114(1)(a); World Carpets, Inc. v. Dick Littrells New World Carpets, 438 F.2d 482, 168 USPQ 609 (5th Cir. 1971); Continental Motors Corp. v. Continental Aviation Corp., 375 F.2d 857, 861, 153 USPQ 313, 315-316

(5th Cir. 1967); Abramson v. Coro, Inc., 240 F.2d 854, 112 USPQ 307 (5th Cir. 1957).

***5** 6. In Roto-Rooter Corp. v. O'Neill, 513 F.2d 44, 45, 186 USPQ 73, 74-75 (5th Cir. 1975), the Fifth Circuit set out a number of factors to be considered in determining the likelihood of confusion. They are:

a) the type of trademark at issue;

b) similarity of designs;

c) similarity of product;
d) identity of retail outlets and purchasers;

e) identity of advertising media utilized;

f) defendant's intent; and

g) actual confusion.

7. Both plaintiff and defendant employ a shield design for their mark with red and white stripes running vertically with a blue bar across the top. Both offer motoring club services that are virtually identical with only a few exceptions. Both employ similar retailing techniques and the president of defendant United States Motor Club Corporation testified to at least one case of actual confusion. Insofar as the defendant's intent is concerned, this Court is hard pressed to fathom the defendant's contention that any similarity between the defendant's mark and the plaintiff's, along with all the other similarities, are a mere happenstance.
8. In considering the likelihood of confusion, this Court has considered the capacity for confusion from the intelligent and experienced, to the ignorant, inexperienced, naive and gullible. Tisch Hotels, Inc. v. American Inn, Inc., 350 F.2d 609, 146 USPQ 566 (7th Cir. 1965); Armstrong Cork Co. v. World Carpets, Inc., 199 USPQ 30, 35 (N.D.Ga. 1978).

9. While it is not dependent upon a party in a trademark infringement case to prove that its marks have acquired secondary meaning, such a showing has been made by the plaintiff. Roto-Rooter Corp. v. O'Neill, supra. Accordingly, United States Auto Club Motoring Division is entitled to protect its marks and name from infringement. Defendant has been and continues to infringe upon the plaintiff's marks.

10. Defendant's use of "United States Motor Club" and a shield design, in conjunction with the operation, advertising and sale of automobile club services, is the use of a false designation of origin or a false representation in violation of 15 U.S.C. 1125(a).

11. Defendant's use of United States Motor Club and a shield design in conjunction with the operation, advertising and sale of automobile club services, is likely to cause confusion and constitutes unfair competition.

12. Accordingly, *it is the order of the court* that defendant be, and it is hereby, *enjoined* from further use of the name United States Motor Club and the shield design it presently uses.

It is the further order of the court that the defendant *bear* all costs of these proceedings.

All Citations

Not Reported in F.Supp., 1979 WL 25082, 205 U.S.P.Q. 150

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2017 WL 1190932
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

Gary COLLINS, Plaintiff–Appellant,
v.
A1 MOTORS, LLC, Defendant–Appellee,
and
Dan Taylor, Defendant.

Nos. 330004; 330839
|
March 28, 2017

Monroe Circuit Court, LC No. 14–036074–NZ

Before: M. J. Kelly, P.J., and Murphy and Ronayne Krause, JJ.

Opinion

Per Curiam.

***1** In Docket No. 330004, plaintiff Gary Collins appeals the trial court's order granting summary disposition in favor of defendant A1 Motors, LLC (A1), under MCR 2.116(C)(10), and generally awarding sanctions to A1. In Docket No. 330839, plaintiff appeals the trial court's order providing that A1 was entitled to $17,657 in sanctions. This Court consolidated these appeals "to advance the efficient administration of the appellate process."[1] We affirm the summary dismissal of plaintiff's complaint but vacate the award of sanctions.

This case arises out of A1's sale of a 2001 BMW to plaintiff and his wife on April 16, 2012. A1 is a used car dealer, and defendant Dan Taylor was the A1 salesman involved in the BMW transaction at issue. An Odometer Disclosure Statement (ODS) executed by Taylor on behalf of A1 at the time of the sale indicated that, "to the best of [A1's] knowledge," the car's "actual mileage" was 105,091. We note that A1 was not statutorily required under Michigan law to provide a written disclosure of the odometer mileage, given that the BMW was "10 years old, or older." MCL 257.233a(5)(c). As alleged in plaintiff's complaint, there were "significant and recurring mechanical problems with the vehicle" following the sale. There was testimony that the BMW has sat idle for the last couple of years, needing costly repairs. Plaintiff alleged counts sounding in (1) intentional misrepresentation, (2) negligent or innocent misrepresentation, and (3) violation of the Michigan Consumer Protection Act (MCPA), MCL 445.901 *et seq.* The primary focus of plaintiff's complaint as to the three causes of action was on the ODS. Indeed, the common-law misrepresentation counts solely concerned the ODS.

As reflected in service records submitted below, a previous individual owner of the BMW had it serviced in January 2011 at BMW of Annapolis in the state of Maryland and the mileage was listed at 235,126. That same owner had it serviced again at BMW of Annapolis in April 2011, at which time the service records indicated that the BMW had been driven 240,362 miles according to the odometer. Documents subpoenaed from Manheim, a company that operates vehicle auctions, showed that on September 29, 2011, the BMW was sold at auction by Lifestyle Auto Broker to Five Stars Auto Collision for $5,295 and that the BMW's odometer now read that the vehicle had 105,061 miles on it. Lifestyle Auto Broker certified that this was the BMW's actual mileage to the best of its knowledge. The title also showed the BMW with 105,061 miles at the time of transfer. The Manheim documents further noted that the BMW's check-engine light was on. Additional documentation revealed that on December 13, 2011, Five Stars Auto Collision sold the BMW, through auctioneer ABC Atlanta, to Persichetti Motorsports, Inc, for $5,450, with the odometer reading 105,091 miles. The ABC Atlanta auction document memorializing the transfer stated the mileage amount in an ODS section, which contained three boxes that could potentially be checked. The first box was a certification that the odometer reading reflected "the amount of mileage in excess of [the vehicle's] mechanical limits," the second box was a certification that the odometer reading was not the actual mileage, and the third box was to be checked if there was an exemption from reporting requirements. If the seller was simply certifying that the odometer reading was accurate to the best of the seller's knowledge, there was no box to check, just a space for a signature applicable to the entire ODS section. Five Stars Auto Collision did not check any of the boxes, but it also did not sign the ODS section, at least in the document submitted below.[2] The title itself stated that the transfer was exempt from having to disclose the odometer mileage. A post-sale inspection checklist on ABC Atlanta's letterhead indicated that the check-engine light remained on, that the BMW's engine was misfiring, that the mass flow sensor was showing low input, and that there was a problem with the throttle pedal sensor.

***2** A little over a month later, on January 17, 2012, Persichetti Motorsports, Inc., sold the BMW to A1 for $7,100 at auction via ABC Atlanta, and the odometer remained at 105,091 miles according to auction documents, although the title declared that the transfer was exempt from mileage disclosure requirements. As with the previous transfer by Five Stars Auto Collision, Persichetti Motorsports, Inc., did not check any of the three boxes in the auction document's ODS section, nor was it signed. With respect to the ODS section, plaintiff makes the same argument as referenced in footnote 2 of this opinion. One of A1's two members or owners, Stanley Kaufman, testified in his deposition that the BMW was purchased "as is" by A1 from Persichetti Motorsports, Inc., at the auction online, not in person, and that there was no post-sale inspection done on the car.[3] He further stated that the BMW was specifically purchased for the sister of A1's other owner, Jason Katz; however, because there were mechanical problems with the car, it was not presented to her. Kaufman additionally testified that A1 had several repairs made on the BMW and that there were "issues with the engine." Some of the repairs entailed purchasing an ignition coil sensor housing, a fuel injector, spark plugs, and a valve repair kit. Kaufman indicated that there were problems with the BMW's timing. He acknowledged the following language in a service work order pertaining to repairs made on the BMW before its sale to plaintiff and his wife:[4]

> "Engine is out of time. Removed broken valve cover. Found engine 15 degrees out of camshaft timing and 10 degrees out of VANOS gear timing. Removed per BMW repair manuals and with BMW special tools. While removing valve cover found cover broken, also found bottom valve cover bolt missing. Attempted to fix using OEM bolt, but the bore had been stripped. Used epoxy to reattach the broken bolt. Vehicle's now running."

When asked "[h]ow often do you have to work on the timing of a hundred thousand mile vehicle[ ]?", Kaufman responded, "Not often."

On April 16, 2012, three months after A1 had purchased the BMW at auction, plaintiff and his wife bought the car. The sales price was $13,802, without considering such items as fees, taxes, an extended service contract, $500 due on delivery, a trade-in, and the interest to ultimately be paid on the amount financed, which, if considered, would make the final tally over $25,000. After mechanical problems developed, plaintiff obtained a CARFAX vehicle history report for the BMW. The report noted the mileage amounts in excess of 200,000 relative to the BMW when it was serviced in January and April 2011 at BMW of Annapolis, along with noting the subsequent odometer reading of 105,061 miles when it was sold at auction in September 2011. Because of the discrepancy, the CARFAX report warned, "There are signs of potential odometer rollback here, so verify the mileage with the seller."

Neither the testimony of A1's Kaufman or Katz revealed that they were aware of the January and April 2011 service records from BMW of Annapolis or the CARFAX report showing that the BMW had over 200,000 miles on its odometer at one time. Additionally, Katz testified as follows at his deposition in regard to AutoCheck, which is another company that provides vehicle history reports:

> In this instance, if a vehicle was noncompliant pursuant to AutoCheck, it means it's non-financeable. This particular vehicle [BMW] was compliant in accordance with AutoCheck, therefore, financed through Credit Acceptance. Had it not been compliant or had an odometer discrepancy or a rollback, it would not be financeable.
>
> * * *
>
> We can pull a report .... [A]ll of the time when a vehicle is financed through Credit Acceptance, Credit Acceptance has criteria, and one of the criterias to financing through them is that there are no—there isn't any previous frame damage, the vehicle has not been rebuilt or salvaged, and there are no other taints to the title such as odometer rollbacks or the like.
>
> ***3**
>
> * * *
>
> Credit Acceptance uses AutoCheck in doing a vehicle history on the particular unit or vehicle and will then advise us as the dealer whether or not it's compliant with their program.
>
> * * *
>
> Credit Acceptance will state a reason of its noncompliance should it be noncompliant. In this case, the vehicle was a hundred percent compliant.

Plaintiff testified in his deposition that the BMW had been purchased "as is," that he did not have personal knowledge regarding whether the 200,000–plus mileage readings on the January and April 2011 service records from BMW of Annapolis were accurate, that, contrary to an allegation in the complaint, A1 had not indicated that it had reviewed a CARFAX report prior to the sale, that plaintiff did not know whether the odometer had actually been rolled back, that he did not have any information indicating that A1 had been aware of any odometer discrepancy or rollback, and that he did not believe that any one from A1 had made an untrue statement concerning the BMW. When asked what A1 did that was wrong, plaintiff testified:

> It's my opinion that some wrongdoing happened between the time they got the vehicle and the time that I purchased the vehicle, and that opinion is formed by speaking with the mechanic and him saying that these kind of repairs shouldn't be needed on a car, especially a BMW, with this amount of miles on it.

The lower court record has two versions of the purchase agreement for the BMW. One is signed by plaintiff and his wife with no handwritten language indicating that the BMW was being sold "as is," although the document contained a typed general disclaimer of all warranties by A1, subject to any service contracts sold on A1's own behalf. The second version of the purchase agreement contained the same signatures by plaintiff and his wife as found on the earlier version, but the second version was now also signed by an A1 representative and it contained a handwritten scribbling indicating that the BMW was being "sold as is." In affidavits executed by plaintiff and his wife, they both averred that "the hand-written 'as is' language was not included when [they] signed" the purchase agreement. An application for Michigan title and registration noted in type that the BMW was "SOLD AS IS."

In the proceedings below, the trial court granted summary disposition in favor of A1 with respect to all three of plaintiff's causes of action. The trial court found, as a matter of law, that the BMW was purchased "as is," that there effectively were no representations or guarantees by A1 in light of the "as is" transaction, and that A1 did not engage in any wrongdoing. The trial court subsequently granted A1's motion for sanctions that was brought pursuant to MCR 2.114, MCR 2.625, and MCL 600.2591. The trial court essentially ruled that all three counts lacked evidentiary support, chiefly because the sale constituted an "as is" transaction. At a later evidentiary hearing regarding the amount of the sanctions, the trial court stated that it could not find that plaintiff's complaint had been frivolous at the inception of the case. However, the trial court did conclude that A1 was entitled to sanctions for attorney fees and costs incurred after April 20, 2015, which was the date A1's attorney sent a letter to plaintiff's counsel requesting voluntary dismissal of the case on the basis that plaintiff had testified at his deposition that the BMW was purchased "as is" and that he did not have any information that A1 had made misrepresentations. The trial court awarded A1 $17,657 in sanctions. Plaintiff appeals as of right.

***4** We review de novo a trial court's ruling on a motion for summary disposition. *Grange Ins. Co. of Mich. v. Lawrence*, 494 Mich.475, 489; 835 N.W.2d 363 (2013). With respect to a motion for summary disposition brought pursuant to MCR 2.116(C)(10), this Court in *Pioneer State Mut. Ins. Co. v. Dells*, 301 Mich. App. 368, 377; 836 N.W.2d 257 (2013), set forth the governing principles:

> In general, MCR 2.116(C)(10) provides for summary disposition when there is no genuine issue regarding any material fact and the moving party is entitled to judgment or partial judgment as a matter of law. A motion brought under MCR 2.116(C)(10) tests the factual support for a party's claim. A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the pleadings, affidavits, and other documentary evidence, when viewed in a light most favorable to the nonmovant, show that there is no genuine issue with respect to any material fact. A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ. The trial court is not permitted to assess credibility, weigh the evidence, or resolve factual

> disputes, and if material evidence conflicts, it is not appropriate to grant a motion for summary disposition under MCR 2.116(C)(10). A court may only consider substantively admissible evidence actually proffered relative to a motion for summary disposition under MCR 2.116(C)(10). [Citations and quotation marks omitted.]

We initially speak to the issue regarding whether the BMW was sold "as is," which matter played an integral role in the trial court's rulings, and which issue the parties devote significant time and attention. There was evidence that the BMW was sold "as is," including plaintiff's deposition testimony. We do note that plaintiff and his wife purchased an extended warranty on the BMW, which evidently was inadequate to cover or did not encompass all of the necessary repairs as claimed by plaintiff.[5] Regardless, A1, the trial court, and even plaintiff seemed to misapprehend that "as is" clauses or agreements with respect to a sale of personal or real property do not provide an avenue to escape liability when fraud is actually committed. *Lenawee Co. Bd. of Health v. Messerly*, 417 Mich.17, 32–33 n 16; 331 N.W.2d 203 (1982) ("An 'as is' clause does not preclude a purchaser from alleging fraud or misrepresentation as a basis for rescission."); *Popielarski v. Jacobson*, 336 Mich.672, 686–687; 59 N.W.2d 45 (1953) ("as is" clause is "ineffective against fraud"); *Bergen v. Baker*, 264 Mich. App. 376, 390 n 5; 691 N.W.2d 770 (2004) (" 'as is' clauses do not insulate a seller from liability where the seller makes fraudulent representations"); *M & D, Inc. v. McConkey*, 231 Mich. App. 22, 32; 585 N.W.2d 33 (1998) (It is a "well-established rule that if a seller makes fraudulent representations before a purchaser signs a binding agreement, then an 'as is' clause may be ineffective."); *Lorenzo v. Noel*, 206 Mich. App. 682, 687; 522 N.W.2d 724 (1994) (rejecting the defendant's argument that an "as is" clause barred the plaintiff's action for fraud and misrepresentation by nondisclosure); *Clemens v. Lesnek*, 200 Mich. App. 456, 460–461; 505 N.W.2d 283 (1993) ("as is" clause does not preclude action for damages for fraudulent concealment of defects). The trial court's singular reliance on the determination that the BMW was sold "as is" in summarily dismissing plaintiff's fraud and misrepresentation claims was in error.

***5** Nevertheless, plaintiff's lawsuit cannot survive, and A1 is entitled to an order granting its motion for summary disposition. The misrepresentation claims, whether intentional, negligent, or innocent, required evidence of a false representation. *Lawrence M. Clarke, Inc. v. Richco Constr., Inc.*, 489 Mich.265, 284; 803 N.W.2d 151 (2011) (reciting the elements of intentional misrepresentation); *Unibar Maintenance Servs, Inc. v. Saigh*, 283 Mich. App. 609, 621; 769 N.W.2d 911 (2009) (discussing innocent and negligent misrepresentation). With respect to the ODS, if the representation was merely that the BMW had 105,091 miles on it, there would exist, in our view, a genuine issue of material fact whether that representation was false, considering the service records from BMW of Annapolis and the CARFAX report, which documents indicated that the car had well over 200,000 miles on it in early 2011.[6] However, the representation was couched in terms of the BMW's mileage being 105,091 *to the best of A1's knowledge*. Therefore, there could only be a true misrepresentation if (1) the BMW did not have 105,091 miles on it and (2) A1 had knowledge that the odometer reading was inaccurate.[7]

We agree with plaintiff that fraud can be established by circumstantial evidence and can be inferred from the evidence. *Foodland Distributors v. Al–Naimi*, 220 Mich. App. 453, 458; 559 N.W.2d 379 (1996) ("In other words, fraudulent or wrongful conduct may be inferred from other evidence."). There was no evidence that A1, at or before the time of the sale, was aware of the service records from BMW of Annapolis or the CARFAX history report, which documents indicated that the BMW had well over 200,000 miles on it at one time. And there is no basis to infer from the evidence that A1 had knowledge of the service records or the CARFAX report. We also note co-owner Katz's testimony that an AutoCheck history report would have been done by Credit Acceptance in financing the sale and that, because plaintiff and his wife obtained financing, no issue regarding the odometer mileage had been discovered. This testimony was not contradicted, nor did plaintiff present evidence that an AutoCheck report, as opposed to a CARFAX report, would have revealed the odometer discrepancy. The only evidence that might conceivably support plaintiff's misrepresentation claims was Kaufman's testimony that the timing repairs done on the BMW at A1's direction are "[n]ot often" seen in vehicles with 100,000 miles. We conclude that this evidence is just too tenuous to create a genuine issue of fact with respect to whether A1 had knowledge of an odometer inaccuracy or rollback. We reject plaintiff's reliance on the evidence that the BMW needed extensive repairs, that it had to be towed to the repair facility, that documents from the repair facility showed 105,222 miles instead of 105,091 miles on the BMW, that the car had a history of mechanical problems, as reflected in part by the notations of the service-engine light being on, that "as is" language was improperly added to the purchase agreement after plaintiff and his wife executed it, that A1 knew that the BMW was previously exempt from mileage reporting, and that A1 was aware that prior owners had not checked boxes affirming the accuracy of the odometer readings on auction documents. We simply do not see how this evidence, even taken together, gives rise to a reasonable inference that A1 knew that the ODS was inaccurate, such that a genuine issue of material fact exists on the issue. [8] In sum, all of plaintiff's claims predicated on a misrepresentation in the ODS, which encompass both common-law misrepresentation counts in full and some of the MCPA allegations, fail as a matter of law.

***6** With respect to the remaining MCPA claims, citing MCL 445.903(1)(z), [9] plaintiff first argues that A1 charged him and his wife a grossly excessive price for the BMW. Plaintiff, however, did not make this allegation in his complaint, and therefore, we reject it. Moreover, plaintiff failed to adequately support this claim with pertinent documentary evidence on BMW pricing, relying solely on the prior auction sales in comparison to the price paid by plaintiff and his wife. Citing MCL 445.903(1)(bb), [10] plaintiff next argues that A1 made a material misrepresentation of fact by telling plaintiff that the BMW was "special," as it had been purchased for Katz's sister. The comment about the BMW being "special" was not a statement or representation *of fact*, and the assertion that A1 bought the BMW at auction for Katz's sister was never disputed. Accordingly, this claim fails as a matter of law.

Citing MCL 445.903(1)(s) and (cc), [11] plaintiff contends that A1 failed to disclose certain material facts. Plaintiff points to A1's silence regarding: prior owners not checking the boxes certifying the accuracy of the odometer readings in auction documents; the indications in the title that the BMW was exempt relative to disclosing the vehicle's mileage; the timing repair work performed on the car, which was not typical of a vehicle driven 100,000 miles; the service-engine light being on in the past; and the fact that the BMW was not operational when A1 first obtained it. With respect to the odometer disclosure exemptions stated on the back of the title in relation to some of the earlier transactions, plaintiff and his wife at the time of the sale signed the back of the title as transferees. Therefore, those exemptions were observable by and effectively disclosed to plaintiff and his wife, and they proceeded in finalizing the sale. In regard to the ODS boxes in the auction documents, as noted earlier, there were no boxes dedicated to a certification that the odometer reading was accurate. To the extent that plaintiff means to allude to the lack of a signature in the ODS section of the auction documents, his argument still fails. First, with respect to the Manheim auction transaction in which Lifestyle Auto Broker sold the BMW, wherein the odometer discrepancy first appeared, Lifestyle Auto Broker *did certify* that the odometer reading was accurate. Regardless, plaintiff did not submit any evidence indicating that disclosure would have impacted the sale, thereby failing to create an issue of fact regarding materiality. See *Zine v. Chrysler Corp.*, 236 Mich. App. 261, 283; 600 N.W.2d 384 (1999) ("[A] material fact for purposes of the MCPA would ... be one that is important to the transaction or affects the consumer's decision to enter into the transaction."). And having signed the back of the title that showed the odometer disclosure exemptions, which reflected a lack of assurance concerning the BMW's mileage, plaintiff is in no position to genuinely claim that disclosure of the unsigned ODS sections in the auction documents would have affected the decision to enter into the transaction.

***7** Finally, with respect to the BMW's poor condition when it first came into A1's possession and the repairs that A1 made on the vehicle, we initially note, again, that A1 is a *used* car dealer, so it should not come as any surprise that it regularly conducts, to varying degrees, maintenance and repairs on vehicles prior to sale, which is consistent with the deposition testimony of Katz and Kaufman. Also, the BMW was over 10 years old. Therefore, we have trouble concluding that the claimed omissions tended to mislead or deceive plaintiff and his wife. And neither plaintiff nor his wife testified or averred that these particular omissions would have affected the decision to enter into the transaction, creating, once again, a materiality problem. Further, it is proper to construe the provisions of the MCPA with reference to the tort of fraud under the common law, *Zine*, 236 Mich. App. at 282–283, and "in order to prove a claim of silent fraud, a plaintiff must show that some type of representation that was false or misleading was made," *M & D, Inc.*, 231 Mich. App. at 31. This is consistent with MCL 445.903(1)(cc), which refers to a failure to reveal material transactional facts "in light of representations of fact made in a positive manner." Plaintiff has not directed us to any documentary evidence, sufficient to create a genuine issue of material fact, showing that defendant Taylor or anyone from A1 made some type of representation that was factually false or misleading with regard to the BMW's pre-sale condition and repairs, or showing that plaintiff and his wife even made inquiries into those matters. Plaintiff testified that the salesman, Taylor, stated that the BMW was "a very good vehicle" and that A1 "had some maintenance done to the vehicle." Plaintiff did not indicate that he asked Taylor regarding the nature of the maintenance. Although we believe it to be a somewhat close call, the "very good vehicle" and maintenance-related comments by Taylor did not suffice to trigger an obligation under the MCPA to reveal or disclose the information that the BMW had mechanical problems at one time, had to be towed to the repair facility, and had repairs made to it, including in relation to the BMW's timing. Indeed, the BMW drove just fine when sold and maintenance work had been performed on the car. [12] In sum, plaintiff's MCPA count fails as a matter of law.

With respect to sanctions, the trial court ultimately determined that plaintiff's complaint was not frivolous nor otherwise deserving of sanctions when filed, leaving us to question whether the trial court had any authority to award sanctions under MCR 2.114(D) and (E), MCR 2.625(A)(2), and MCL 600.2591. See *Robert A. Hansen Family Trust v. FGH Indus., LLC*, 279 Mich. App. 468, 486; 760 N.W.2d 526 (2008) (violation of MCR 2.114 is assessed at the time a claim was filed); *In re Costs & Attorney Fees*, 250 Mich. App. 89, 94; 645 N.W.2d 697 (2002) ("To determine whether sanctions are appropriate under MCL 600.2591, it is necessary to evaluate the claims or defenses at issue at the time they were made."). "That the alleged facts are later discovered to be untrue does not invalidate a prior reasonable inquiry." *Jerico Constr., Inc. v. Quadrants, Inc.*, 257 Mich. App. 22, 36; 666 N.W.2d 310 (2003).

Furthermore, the trial court's award of sanctions premised on plaintiff's deposition testimony and defense counsel's associated demand letter for a voluntary dismissal reflected questionable logic. Plaintiff's deposition testimony essentially indicated that he did not have any personal knowledge or information that Taylor or A1 engaged in fraud or made misrepresentations. This did not mean that plaintiff's counsel did not have documentary ammunition to attempt to show, through circumstantial evidence and reasonable inferences that flowed from the evidence, that A1 committed fraud and violated the MCPA.

Finally, while plaintiff's claims were ultimately unsuccessful and his proffered legal analysis rejected, the trial court clearly erred in finding that the litigation was, at any stage, frivolous, as defined in MCL 600.2591(3)(a), or not well grounded in fact or unwarranted by existing law, MCR 2.114(D) and (E). See *Kitchen v. Kitchen*, 465 Mich.654, 661; 641 N.W.2d 245 (2002) (finding that action is or is not frivolous is reviewed for clear error); *Jerico Constr.*, 257 Mich. App. at 36 (not every error in legal analysis is frivolous, and while a claim may be unsuccessful, it does not necessarily mean that it was groundless). The apparent discrepancy of over 100,000 miles in regard to the BMW's mileage, which logically suggested that a rollback had occurred in the past, and the necessary timing repairs made to the vehicle provided adequate evidence to avoid a finding of frivolousness.

Affirmed with respect to summary dismissal of plaintiff's complaint and vacated in regard to the award of sanctions. We do not retain jurisdiction. Neither party having fully prevailed on appeal, we decline to award taxable costs under MCR 7.219.

All Citations

Not Reported in N.W. Rptr., 2017 WL 1190932

Footnotes

1 *Collins v. A1 Motors, LLC*, unpublished order of the Court of Appeals, entered February 4, 2016 (Docket Nos. 330004 and 330839).

2 Plaintiff repeatedly argues that A1 did not reveal to plaintiff and his wife that the box certifying that the odometer reading was accurate had not been checked. There was no such box. Perhaps plaintiff is alluding to the lack of a signature.

3 Kaufman explained that vehicle auction companies orchestrate the sales through a bidding process, either in person and/or online, and that the auction companies, for a fee, will conduct post-sale inspections, which can result in the highest-bid purchaser being permitted to withdraw from the sale if the vehicle does poorly

in the inspection. Kaufman stated that A1 chose not to pay the fee for an inspection in this instance because the BMW was being sold at auction “as is,” which apparently precluded A1 from backing out of the deal even had there been an unsatisfactory inspection.

4 Kaufman testified that paperwork reflected that the BMW had been towed to the location where the repairs were made. Also, he agreed that a document concerning the repairs indicated that the BMW had 105,222 miles on it when received at the repair facility.

5 Plaintiff's wife testified in her deposition that the BMW was purchased “as is,” but then added that they had “purchased a warranty.” She later explained that the warranty, while being offered in the transaction with A1, was issued by a separate company, not A1.

6 A1 argues that many of the documents submitted by plaintiff, including the service records from BMW of Annapolis and the CARFAX report, constitute inadmissible hearsay that cannot be considered for purposes of summary disposition. In *Maiden v. Rozwood*, 461 Mich.109, 123; 597 N.W.2d 817 (1999), our Supreme Court stated that documentary evidence submitted in regard to a motion for summary disposition must be admissible as to “content or substance.” The Court explained that “[t]he evidence need not be in admissible form,” for example, an affidavit. *Id.* at 124 n 6. The pertinent substance or content of the service records and CARFAX report pertained to the BMW showing mileage on its odometer that exceeded 200,000 miles at one time, which evidence would generally be admissible, assuming that the evidence was presented at trial in a proper manner and with a proper foundation. And, given the evidence of a subsequent lower mileage reading, a reasonable inference that can be reached is that the odometer was rolled back by someone.

7 We recognize that given the proper framing of the “misrepresentation” in this particular case, requiring examination of whether A1 had knowledge of the apparent ODS inaccuracy, the “negligent” and “innocent” aspects of count II's misrepresentation claim become meaningless.

8 In speaking in terms of an inaccuracy, we are comparing the mileage in the ODS to the 200,000–plus miles referenced in the 2011 service records and the CARFAX report. In regard to the small mileage discrepancy between the 105,091 amount and the 105,222 amount, plaintiff has not shown that the 131 mile difference was material to the transaction or that he and his wife would not have purchased the car had they known it had 131 more miles on it. *Lawrence M. Clarke*, 489 Mich.at 284 (materiality requirement). Indeed, plaintiff does not even argue that the difference was material. Moreover, it is not even clear from the record that the BMW did not show an odometer reading of 105,222 miles when plaintiff and his wife test drove the vehicle and first took possession.

9 Under MCL 445.903(1)(z), an unfair, unconscionable, or deceptive act or practice includes “[c]harging the consumer a price that is grossly in excess of the price at which similar property or services are sold.”

10 Under MCL 445.903(1)(bb), an unfair, unconscionable, or deceptive act or practice includes “[m]aking a representation of fact or statement of fact material to the transaction such that a person reasonably believes the represented or suggested state of affairs to be other than it actually is.”

11 Under MCL 445.903(1)(s), an unfair, unconscionable, or deceptive act or practice includes a failure “to reveal a material fact, the omission of which tends to mislead or deceive the consumer, and which fact could not reasonably be known by the consumer.” And MCL 445.903(1)(cc) concerns a failure “to reveal facts that are material to the transaction in light of representations of fact made in a positive manner.”

12 Had defendant Taylor stated, for example, that the BMW's spark plugs were replaced without saying anything more, thereby suggesting that this was the only repair, there would be a sound argument that a duty under the MCPA to disclose all of the repairs would arise in order to avoid deceiving or misleading plaintiff and his wife.

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1999 WL 33437810
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Michigan.

Mary Joe GILPIN and John C. Gilpin, Plaintiffs-Appellants/Cross-Appellees,
v.
Manfred MARCUS, M.D., Manfred Marcus, M.D., P.C., and Huron Valley Surgery Associates, P.C., Defendants,
and
Patricia DEPOLI, M.D., and Sisters of Mercy Health Corporation d/b/a St. Joseph Mercy Hospital, Defendants-Appellees/Cross-Appellants.

No. 205792.
|
Aug. 13, 1999.

Before: HOOD, P.J., and FITZGERALD and COLLINS, JJ.

Opinion

PER CURIAM.

***1** Plaintiffs Mary Joe Gilpin and John C. Gilpin appeal as of right a judgment of no cause of action against defendants Patricia DePoli, M.D. and St. Joseph Mercy Hospital in this medical malpractice suit. [1] We affirm.

Plaintiffs' claim arises from the performance of surgery to remove Mary Joe Gilpin's (hereinafter plaintiff) gallbladder in a procedure known as a laparoscopic cholecystectomy. The surgery was performed at St. Joseph Mercy Hospital on August 23, 1993. Plaintiff alleged in a September 27, 1993, complaint that the surgery was performed by former codefendant Manfred Marcus, M.D., a surgical specialist, "with the assistance of defendant DePoli, who was then a second-year surgical resident." Dr. DePoli was an employee of the hospital, and Dr. Marcus was an independent staff physician.

During a laparoscopic cholecystectomy to remove a gallbladder, the abdomen is elevated through the injection of carbon dioxide. A small incision is made in the abdomen through which an instrument known as a trocar is inserted. The trocar has four openings, through one of which a camera device is inserted which sends an image of the inside of the abdomen to an external TV monitor. The various surgical instruments are inserted and manipulated though the other three ports. To remove the gallbladder, the surgeon clips the cystic duct, which connects the gallbladder to the common bile duct, to seal the opening. The cystic duct is then severed.

In 1993, this procedure was performed by two physicians, with additional staff working the camera. According to Drs. Marcus and DePoli, as the procedure began, Dr. DePoli attempted to put a clip on to seal the cystic duct. She was unable to do so, and Dr. Marcus took over. Dr. Marcus applied the clips that served to seal the cystic duct. He then cut what both he and Dr. DePoli believed to be the cystic duct with scissors. Subsequent to surgery, however, plaintiff developed abdominal discomfort that was determined to have been caused by the severing of the common bile duct during surgery. The common bile duct was repaired in a subsequent surgery.

Plaintiffs commenced this medical malpractice action by complaint filed September 27, 1993, against Dr. Marcus, his professional corporations, Dr. DePoli, and St. Joseph Mercy Hospital. Plaintiffs alleged that malpractice occurred during the surgery when plaintiff's common bile duct, rather than the cystic duct, was severed. Plaintiffs also alleged malpractice in the delay in diagnosing and treating the problem after surgery. Plaintiffs sought to hold the hospital vicariously liable for Dr. DePoli's conduct. Plaintiffs also asserted a claim of "negligent credentialing," alleging that the hospital was negligent in granting Dr. Marcus staff privileges to perform laparoscopic cholecystectomies. Plaintiffs also alleged battery by all defendants.

Plaintiffs settled with and dismissed Dr. Marcus and his two professional corporations on November 15, 1995. In a second amended complaint filed November 28, 1995, plaintiffs eliminated Dr. Marcus as a defendant. Plaintiffs also withdrew their allegations of "battery by all defendants." Plaintiffs added a second count entitled "Violation of Michigan Consumer Protection Act by Defendant Hospital." This allegation was premised on alleged misrepresentations by the hospital in the consent form that "both Dr. Marcus and defendant DePoli were credentialed by defendant hospital to perform laparoscopic cholecystectomies and that defendant DePoli would have an 'important part' in plaintiff's surgery and care and 'would contribute to a high quality of patient care." '

***2** On March 8 and April 30, 1996, defendants filed motions for partial summary disposition of the claim under the Michigan Consumer Protection Act (MCPA) and the claim of negligent credentialing. In response, plaintiffs asserted that their MCPA claim was also premised on the theory that it was Dr. DePoli, not Dr. Marcus, who cut the common bile duct. Defendants' motions were initially granted by the trial court on January 2, 1997. In response to plaintiffs' motion for reconsideration, the court agreed to reconsider its ruling and directed the parties to file supplemental briefs.

Before the issuance of the opinion on rehearing, plaintiffs filed a motion on April 1, 1997, for leave to file a third amended complaint. Plaintiffs sought to add a new count of battery and additional factual allegations in support of the MCPA claim. In the proposed battery count, plaintiffs alleged that Dr. DePoli committed a battery by acting as operating surgeon without permission or consent. The allegations of a violation of the MCPA were expanded to include Dr. DePoli's alleged misrepresentation that she had performed "numerous" laparoscopic cholecystectomies.

At a hearing on April 8, 1997, less than three weeks before trial, the trial court denied the motion to amend as untimely. In an opinion and order dated April 15, 1997, the court again granted summary disposition on the MCPA claims. However, the court reversed the prior dismissal of the credentialing claim and allowed that claim to go to trial.

At trial, plaintiffs claimed that it was Dr. DePoli who severed plaintiff's cystic duct. This claim was based on the testimony of plaintiffs' expert witnesses, who testified that Dr. DePoli stood where the operating surgeon usually stands. Defendants presented the testimony of Dr. DePoli, which echoed the testimony of Dr. Marcus that it was Dr. Marcus, and not Dr. DePoli, who inadvertently cut the common bile duct. In response to a special verdict form, the jury found that (1) Dr. DePoli was not negligent, (2) that none of the defendant hospital's other "employees or agents" were negligent, and (3) that St. Joseph Mercy Hospital was not negligent in credentialing Dr. Marcus.

I

A. Plaintiff's proposed special jury instruction

Plaintiffs contend that Michigan case law provides that every surgeon taking part in an operation is liable for his own conduct and also the wrongful acts of other surgeons observed by him without objection to the wrongful act. Thus, plaintiffs contend that the trial court abused its discretion by failing to give the following supplemental jury instruction:

> The fact that Dr. Marcus bears ultimate responsibility for Mrs. Gilpin's care does not relieve Dr. DePoli of liability if you find that she was a member of the operating team. Each physician, operating jointly on a patient, is answerable as a joint tortfeasor for his or her own conduct as well as that of the other which he or she observed or in the exercise of reasonable vigilance, should have noticed.

***3** Plaintiffs rely on three cases in support of their contention. However, none of the cases cited by plaintiffs involved a question of instructing a jury, as a matter of law, that a resident is responsible for any conduct by an attending surgeon that the resident sees or should have noticed.

In *Franklyn v. Peabody,* 249 Mich. 363, 368; 228 NW 681 (1930), Dr. Peabody and Dr. Johnston discussed a certain procedure, agreed it was necessary, and Dr. Peabody told Dr. Johnston to perform the procedure. In this context, the Court reversed a judgment notwithstanding the verdict for Dr. Peabody and remanded for a new trial. Under the evidence presented, the Court held that the physicians were jointly and severally liable: "Dr. Johnston for performing an unauthorized operation, and Dr. Peabody for counseling and advising him to perform the same." However, the Court specifically "confine[d] our opinion, relative to the rights of a patient and the duty and liability of the surgeons, to the particular case before us." Here, in contrast, there is no evidence that Dr. DePoli counseled or advised Dr. Marcus to do anything.

In *Rodgers v. Canfield,* 272 Mich. 562; 262 NW 409 (1935), from which plaintiffs excerpted the language for their instruction, defendant Canfield was the plaintiff's family physician called to repair a fracture. Defendant Dr. VanArk assisted. Dr. Canfield was the physician in attendance, but on two occasions subsequent to the injury Dr. VanArk was called into consultation by Dr. Canfield. At trial, evidence was introduced tending to show acts of malpractice on the part of Dr. Canfield in the absence of Dr. VanArk.

The Supreme Court held that separate verdicts had to be returned because Dr. VanArk could not be held liable for damages for the malpractice of Dr. Canfield in which he was not a participant. It was in this context that the Supreme Court in *Rodgers* noted that for their joint acts of commission or omission both defendants were liable, but any such act by one, in the absence of the other, unless concerted, could not be attributed to the nonparticipant. *Id.* at 564.

There is no suggestion in *Rodgers* that the Court was dealing with the situation of a supervising surgeon and a resident, or with very differing standards of practice. The Court's statements that plaintiffs sought to use here as an instruction to the jury were not made in the course of addressing appropriate jury instruction. Rather, the statement plaintiffs sought to excerpt were made in the course of holding that a single sum verdict against the two defendants was infirm.

In *Barnes v. Mitchell,* 341 Mich. 7; 67 NW2d 208 (1954), a verdict was returned against the defendant physician for negligence by an employee in x-raying the plaintiff's hand. The Court reversed a judgment notwithstanding the verdict, holding that there was sufficient evidence that the nurse was acting within the scope of her employment such that the surgeon would be vicariously liable. Here, in contrast, plaintiffs seek to hold the subordinate vicariously liable for the conduct of the supervising surgeon as a matter of law.

***4** Our research has revealed no authority to support plaintiffs' contention that a resident surgeon taking part in an operation under the supervision of an attending surgeon is liable as a matter of law for the wrongful acts or omissions of the attending surgeon observed by him without objection. Plaintiffs' proposed supplemental jury instruction would essentially impose strict liability on the resident without a factual finding that the resident breached a standard of practice as statutorily required by Michigan law.

B. The standard jury instruction

A plaintiff in a medical malpractice action must prove a breach of the standard of practice by the physician before liability may be imposed. MCL 600.2912a; MSA 27A.2912(1); *Wischmeyer v. Schanz,* 449 Mich. 469, 484; 536 NW2d 760 (1995). Section 2912a provides that:

In an action involving malpractice the plaintiff shall have the burden of proving that in light of the state of the art existing at the time of the alleged malpractice:

(a) the defendant, if a general practitioner, failed to provide the plaintiff the recognized standard of acceptable professional practice in the community in which the defendant practices or in a similar community, and that as a proximate result of defendant failing to provide that standard, the plaintiff suffered an injury.

Residents, as students in training to become specialists, are judged by the local, same, or similar community standard of practice applicable to general practitioners. See *Bahr v. Harper Grace Hosp,* 198 Mich.App 31, 35; 497 NW2d 526 (1993), rev'd in part on other grounds 448 Mich. 135, 141; 528 NW2d 170 (1995).

Consistent with the directive of the statute, the standard jury instruction defining malpractice of a general practitioner, SJI2d 30 .01, was given to the jury:

> When I use the words "professional negligence" or "malpractice" with respect to the conduct of Dr. DePoli and the other hospital employees, I mean the failure to do something which a doctor of ordinary learning, judgment, or skill in this community or a similar one would do. Or doing something which a doctor of ordinary learning, skill or judgment would not do under the circumstances-under the same or similar circumstances that you find to exist in this case.

Clearly, under § 2912a, as implemented by SJI2d 30.01, a physician cannot be held liable for malpractice absent a breach of the standard of practice.

Contrary to plaintiffs' argument, the standard jury instruction given did not suggest to the jury that Dr. DePoli could not be liable for Dr. Marcus' negligence. Rather, the instruction properly advised the jury that Dr. DePoli could not be liable for anyone's conduct unless she herself were found to breach the applicable standard of practice. Here, expert testimony unequivocally established that residents are students in training and are not expected to have the same skills or responsibilities as the surgeon, who acts as the "captain of the ship." The defense witnesses all agreed that a resident with Dr. DePoli's training and in Dr. DePoli's position during this surgery would not be required by the standard of practice to second-guess or interfere with the surgeon. Plaintiffs' experts were equivocal as to whether Dr. DePoli was required by the standard of practice to recognize a problem and tell the surgeon to act differently. Clearly, a question of fact was presented regarding whether Dr. DePoli breached the standard of practice. If the jury believed that the applicable standard of practice required Dr. DePoli to interfere with Dr. Marcus' treatment of the patient if Dr. DePoli observed a wrongful act or omission, the jury could have found that Dr. DePoli breached the standard of practice. By finding that Dr. DePoli did not breach the standard of practice, the jury obviously gave credibility to those witnesses who testified that the applicable standard of practice did not require Dr. DePoli to interfere with Dr. Marcus' treatment of the patient. Plaintiffs' proposed supplemental jury instruction would have resolved this question of fact and imposed strict liability without a finding that Dr. DePoli breached the standard of practice. Because plaintiffs' proposed supplemental jury instruction did not properly inform on the applicable law, and because the instructions as given were appropriate, the trial court did not abuse its discretion in denying plaintiffs' request for the supplemental instruction. *Stoddard v Manufacturer's Nat'l Bank of Grand Rapids,* 234 Mich.App 140, 162; 593 NW2d 630 (1999).

II

***5** Plaintiffs contend that the trial court erred by granting summary disposition of their claim under the Michigan Consumer Protection Act, M.C.L. § 445.901, *et seq.;* MSA 19.418(1), *et seq.,* because questions of fact existed that precluded summary disposition. [2]

According to plaintiff, as she was being wheeled into surgery, Dr. DePoli made the following representation:

> She [Dr. DePoli] introduced herself as Dr. Marcus's assistant. And I immediately said, well, Dr. Marcus is going to be doing the surgery. And she replied, so am I. And I said, how many have you done, and she stated numerous.

Plaintiff alleged that this statement was a misrepresentation under the act because Dr. DePoli, in her deposition, estimated that she had been first assistant on between ten and fifteen laparoscopic cholecystectomies.

Plaintiffs have not identified on appeal what provision of the act is claimed to have been violated. However, in the trial court plaintiffs claimed that the misrepresentation fell under M.C.L. § 445.903(1)(e); MSA 19.418(3)(1)(e). That subsection provides:

(1) Unfair, unconscionable, or deceptive methods, acts or practices in the conduct of trade or commerce are unlawful and are defined as follows.

(e) Representing that goods or services are of a particular standard, quality or grade or that goods of a particular style or model if they are of another.

Plaintiffs argued that the jury should have been permitted to determine whether participation as first assistant in ten to fifteen laparoscopic cholecystectomies was doing "numerous surgeries" and whether this representation was deceptive. The trial court disagreed, and reasoned that:

In response to Mary Joe Gilpin's statement "Dr. Marcus is going to do the surgery," DePoli said, "Yes, and I am too". This statement was accurate since DePoli assisted Dr. Marcus in performing the surgery. In response to plaintiff's inquiry about how many surgeries she had performed, DePoli replied "numerous." DePoli's deposition testimony indicates that she acted as first assistant on "probably between 10 and 15" laparoscopic cholecystectomies. The undisputed facts are that DePoli assisted in surgeries just as she had told plaintiff she had. There are no genuine issues of material fact that could form the basis of Michigan Consumer Protection Act claims.

We agree with the reasoning of the trial court. Dr. DePoli indicated to plaintiffs that she had performed numerous surgeries. The fact that Dr. DePoli later assigned a numerical figure of "10 to 15" to the approximate number of laparoscopic cholecystectomies she had performed neither indicates that Dr. DePoli misrepresented the quality of her services nor creates a genuine issue of material fact whether Dr. DePoli misrepresented the quality of her services. Plaintiffs failed to establish a genuine issue of material fact regarding whether Dr. DePoli's alleged representations regarding her participation in "numerous" surgeries was "unfair, unconscionable," or "deceptive" within the meaning of the MCPA.

III

***6** Plaintiffs argue that the trial court abused its discretion by denying plaintiffs' motion to file a third amended complaint to add a count of battery and additional theories under the MCPA.

A court should freely grant leave to amend a complaint when justice so requires. MCR 2.118)(A)(2); *Weymers v. Khera,* 454 Mich. 639, 658; 563 NW2d 647 (1997); see also M.C.L. § 600.2301; MSA 27A.2301. The rules pertaining to amendment of pleadings are designed to facilitate amendment except when prejudice to the opposing party would result. *Ben P Fyke & Sons v. Gunter Co,* 390 Mich. 649, 659; 213 NW2d 134 (1973).

Reasons that justify denial of leave to amend include undue delay, bad faith or dilatory motive, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the defendant, or futility. *Weymers, supra* at 658. Although delay can cause circumstances that result in prejudice justifying denial of leave to amend, mere delay alone is an insufficient reason to deny leave. *Fyke, supra* at 663-664.

The trial court must specify its reasons for denying leave to amend, and the failure to do so requires reversal unless the amendment would be futile. *Dowerk v. Oxford Twp,* 233 Mich.App 62, 75; 592 NW2d 724 (1998). The addition of allegations which merely restate those already made is futile, as are the addition of allegations which still fail to state a claim. *Lane v Kindercare Learning Centers, Inc,* 231 Mich.App; 689, 697; 588 NW2d 715 (1998).

Prejudice to a defendant that will justify denial of leave to amend is the prejudice that arises when the amendment would prevent the defendant from having a fair trial and stems from the fact that the new allegations are offered late. *Weymers, supra* at 659. Prejudice may result when the moving party seeks to add a new claim or theory of recover on the basis of the same set of facts, after discovery is closed and just before trial, and the opposing party shows that he did not have reasonable notice from any source that the moving party would rely on the new claim or theory at trial. *Id.* at 659-660.

The grant or denial of leave to amend is within the trial court's discretion. *Id.* at 654. This Court will not reverse a trial court's decision regarding leave to amend unless it constituted an abuse of discretion that resulted in injustice. *Phillips v. Deihm,* 213 Mich.App 389, 393; 541 NW2d 566 (1995).

A. The battery count

The motion to amend the complaint to add a battery count was brought and heard by the trial court three weeks before trial. However, in November 1995 plaintiffs had withdrawn a battery count. Thus, discovery proceeded and defenses had been developed with the knowledge that any battery claim had been withdrawn. Under these circumstances, plaintiffs' delay in seeking to reinstate a battery count warranted denial of the motion. See, e.g., *Taylor v. Detroit,* 182 Mich.App 583; 452 NW2d 826 (1989) (affirming denial of request to amend less than a month before a scheduled final settlement conference and nearly twenty-nine months after the initial complaint was filed).

***7** Further, amendment of the complaint would have been futile. Plaintiff consented in writing to participation by any residents in the surgery. Before surgery, plaintiff signed a "Consent to Operation, Anesthetics, and Related Procedures." Through this, plaintiff

> consent[ed] to and authorized Dr. Marcus, his/her associates, residents, consultants and such other assistants as may be assigned to perform the operation/procedure described in this paragraph.

By signing the consent form, plaintiff further acknowledged:

> I understand that St. Joseph Mercy Hospital is a teaching hospital, and that the use of resident physicians and surgeons contribute to a high quality of patient care. I understand that resident physicians and surgeons have an important part in the overall management of patient care, under the supervision and responsibility of my physician.

In an analogous context, the Michigan Supreme Court has held that a plaintiff's signature on a consent form precludes a claim premised on an assertion that the plaintiff did not receive the information in that form. See *Paul v. Lee,* 455 Mich. 204, 216; 568 NW2d 510 (1997). In addition, plaintiff conceded that she never communicated to either the hospital or Dr. DePoli any intent or desire that a resident, or a resident with Dr. DePoli's years of training, not participate in the surgery. Because plaintiff never communicated any limitation on her written consent, the factual predicate for her battery claim is absent. Hence, the motion to amend to add the battery count was properly denied as it was futile.

B. The Michigan Consumer Protection Act count

The claims under the MCPA in plaintiffs' third amended complaint were premised on (1) alleged misrepresentations regarding the competency of Dr. Marcus, which were alleged to be misrepresentations because of negligent credentialing, (2) forcing plaintiff to sign the consent form without reading it, and (3) misrepresenting that Dr. Marcus, not DePoli, would perform the surgery.

With regard to the first claim, the jury determined that there was no negligence by the hospital in credentialing Dr. Marcus. If the credentialing of Dr. Marcus was proper, the hospital made no unfair or deceptive misrepresentation that could form the premise of a claim under the act. Because Dr. DePoli was found to be competent in rendering services to plaintiff, and because the hospital was found not to have been negligent in ensuring Dr. Marcus' competency, the addition of a claim regarding misrepresentations regarding the quality of the services would have been an exercise in futility.

With regard to the second claim regarding Dr. DePoli's alleged role in obtaining plaintiff's signature on the consent form, plaintiff herself testified at trial that the consent form was offered by Dr. Marcus and that only Dr. Marcus made representations regarding the form. Because Dr. DePoli had no role regarding the form, no claim against her or the hospital exists, and addition of the claim would have been futile.

***8** With regard to the third claim that plaintiff was wrongfully informed that Dr. Marcus would perform the surgery, plaintiffs' own proofs at trial negated any claim that Dr. DePoli misrepresented the role she would play in the surgery. In the brief conversation Dr. DePoli had with plaintiff as described by plaintiff herself, Dr. DePoli made no representation that she would or would not do the actual cutting. Further, the consent form signed by plaintiff clearly advised of the participation by residents with no such limitation. Under these circumstances, it would have been futile to add a claim regarding the representations made by Dr. DePoli.[3] Accordingly, the trial court did not abuse its discretion in denying plaintiffs' motion to file third amended complaint.

IV

Plaintiffs have alleged numerous acts of misconduct by defense counsel that they contend prejudiced the jury and deprived them of their right to a fair trial. The majority of the assertions concern statements made by defense counsel during opening statement and during the direct examination of Dr. DePoli.

Only where counsel has engaged in egregious and repetitive conduct designed with the studied purpose of prejudicing the jury is a new trial required. *Wilson v. Stilwill,* 411 Mich. 587, 605; 309 NW2d 898 (1981). Isolated instances of misconduct do not require reversal, and the entire course of counsel's conduct must be examined before a new trial on the basis of misconduct will be granted. *Kewin v. Massachusetts Life Ins,* 79 Mich.App 639, 658; 263 NW2d 258 (1977), modified on other grounds 409 Mich. 401; 295 NW2d 50 (1980). When reviewing an appeal asserting improper conduct of an attorney, the court must first determine whether or not the claimed error was in fact error and, if so, whether it was harmless. If the claimed error was not harmless, the court must then ask if the error was properly preserved by objection and request for an instruction or motion for mistrial.

Here, the alleged improper remarks of defense counsel concerning defendant hospital's religious beginnings, background, and good deeds, were all made within the confines of the parameters set by the trial court's rulings on motions in limine, wherein it was held defense counsel could discuss those things that establish the identity of the defendants. Acting within those parameters, defense counsel's remarks were not improper.

Additionally, plaintiffs fail to address why each of the unobjected-to allegedly improper acts was improper and fails to cite applicable legal authority to support the bare assertion that the acts were improper. Rather, plaintiffs focus their argument on plaintiffs' assumption that a no-cause verdict would not have been possible in the absence of prejudicial comments by defense counsel that created sympathy for Dr. DePoli and the hospital. However, plaintiffs' unfounded belief that defense counsel's conduct was improper cannot sustain a motion for new trial.

***9** Plaintiffs also contend that defense counsel engaged in misconduct by using peremptory challenges to strike two African American jurors during the jury selection process in violation of *Batson v. Kentucky,* 476 U.S. 79; 106 S Ct 1712; 90 L.Ed.2d 69 (1986). If a party opposes a jury strike on the basis of discrimination, it is imperative that at the time of the strike they object on the record and make a prima facie showing of discrimination before the burden shifts to the other party to provide a race-neutral rationale for striking the juror. *Clarke v. K Mart Corp,* 220 Mich.App 381, 383; 559 NW2d 377 (1996). Plaintiffs' counsel did not utilize the proper objection procedure, and indeed affirmatively indicated that defense counsel was satisfied with the jury. Under these circumstances, and in light of the fact that a review of the record does not reveal the racial makeup of the potential jurors, a new trial is not warranted on this ground. Consequently, the trial court did not abuse its discretion in denying plaintiffs' motion for a new trial.

Affirmed.

All Citations

Not Reported in N.W.2d, 1999 WL 33437810

Footnotes

1 Defendants DePoli and St. Joseph Mercy Hospital filed a claim of cross-appeal. However, defendants have failed to properly present their cross-appeal as required by MCR 7.207(C).

2 Defendants contend that the act does not apply to representations made by physicians. In the context of the issues raised by plaintiffs, we need not decide this issue.

3 Further, the proofs at trial demonstrated that there was not a genuine issue of material fact as to who performed the cutting of the duct.

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2017 WL 768929
Only the Westlaw citation is currently available.
United States District Court, E.D.
Michigan, Southern Division.

W. Curtis SHAIN, Scott Irwin, Robert Spillman, Cedric Myles, and Anthony Calabro, on behalf of themselves and all others similarly situated, Plaintiffs,
v.
ADVANCED TECHNOLOGIES GROUP, LLC and SanDisk Corporation, Defendants.

Civil Case No. 16-10367
|
Signed 02/28/2017

Attorneys and Law Firms

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OPINION AND ORDER GRANTING DEFENDANTS' MOTION TO DISMISS UNDER RULE 12(b)(6) AND DENYING AS MOOT DEFENDANTS' MOTION TO DISMISS UNDER RULE 12(b)(1)

LINDA V. PARKER, U.S. DISTRICT JUDGE

***1** This is a putative class action lawsuit filed by released Federal Bureau of Prison ("BOP") inmates on behalf of themselves and current and released BOP inmates who purchased MP3 players and music or other audio files during their incarceration. In a twenty-three count complaint, filed February 2, 2016, Plaintiffs assert claims against Defendants under the Sherman Antitrust Act, 15 U.S.C. §§ 1, 2, as well as various common law and state law claims. Now the Court must address the viability of those claims, as Defendants Advanced Technologies Group, LLC ("ATG") and SanDisk Corporation ("SanDisk") (collectively "Defendants") have filed a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). [1]

I. Standard for Rule 12(b)(6) Motion to Dismiss

A motion to dismiss pursuant to Rule 12(b)(6) tests the legal sufficiency of the complaint. *RMI Titanium Co. v. Westinghouse Elec. Corp.*, 78 F.3d 1125, 1134 (6th Cir. 1996). Under Federal Rule of Civil Procedure 8(a)(2), a pleading must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." To survive a motion to dismiss, a complaint need not contain "detailed factual allegations," but it must contain more than "labels and conclusions" or "a formulaic recitation of the elements of a cause of action...." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). A complaint does not "suffice if it tenders 'naked assertions' devoid of 'further factual enhancement.' " *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 557).

As the Supreme Court provided in *Iqbal* and *Twombly*, "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *Id.* (quoting *Twombly*, 550 U.S. at 570). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556). The plausibility standard "does not impose a probability requirement at the pleading stage; it simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of illegal [conduct]." *Twombly*, 550 U.S. at 556.

In deciding whether the plaintiff has set forth a "plausible" claim, the court must accept the factual allegations in the complaint as true. *Erickson v. Pardus*, 551 U.S. 89, 94 (2007). This presumption, however, is not applicable to legal conclusions. *Iqbal*, 556 U.S. at 668. Therefore, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* (citing *Twombly*, 550 U.S. at 555).

***2** Ordinarily, the court may not consider matters outside the pleadings when deciding a Rule 12(b)(6) motion to dismiss. *Weiner v. Klais & Co., Inc.*, 108 F.3d 86, 88 (6th Cir. 1997) (citing *Hammond v. Baldwin*, 866 F.2d 172, 175 (6th Cir. 1989)). A court that considers such matters must first convert the motion to dismiss to one for summary judgment. *See* Fed. R. Civ. P 12(d). However, "[w]hen a court is presented with a Rule 12(b)(6) motion, it may consider the [c]omplaint and any exhibits attached thereto, public records, items appearing in the record of the case and exhibits attached to [the] defendant's motion to dismiss, so long as they are referred to in the [c]omplaint and are central to the claims contained therein." *Bassett v. Nat'l Collegiate Athletic Ass'n*, 528 F.3d 426, 430 (6th Cir. 2008).

II. Factual Background

The named plaintiffs are former BOP inmates who now reside in Kentucky, Michigan, Ohio, Indiana, or New York. (Compl. ¶¶ 9-13.) While incarcerated, Plaintiffs purchased MP3 players, which are "on the BOP-operated facility's 'Commissary List' of items for sale[.]" (*Id.* ¶ 52.) BOP allows its inmates to purchase MP3 players because it recognizes that music "help[s] inmates deal with issues such as idleness, stress and boredom associated with incarceration." (*Id.* ¶¶ 20, 21, quotation marks omitted.)

As reflected in BOP's Program Statement 4500.11, titled "Trust Fund/Deposit Fund Manual" ("BOP Program Statement 4500.11"), BOP manages and operates the commissaries within its facilities. [2] (*See* Defs.' Mot., Ex. A, ECF No. 19-2). The Warden and designated staff at each BOP facility decides, within the guidelines set forth in BOP Program Statement 4500.11, what items to sell in the facility's commissary. (*Id*. at Ch. 3.3, Pg ID 235.) The guidelines allow for the sale of "the MP3 player identified by the Central Office, Trust Fund Branch" which "may only be ordered from the vendor identified by the Central Office, Trust Fund Branch, to ensure the special security features and interface with TRULINCS [BOP's Trust Fund Limited Inmate Computer System] function correctly." (*Id*. at Ch. 3.3(f)(7), Pg ID 237.) As outlined in BOP Program Statement 4500.11, for security reasons, BOP requires the MP3 players (referred to by Plaintiffs as "Prison-Restricted MP3 Players") sold with certain features disabled, such as the external memory slot and the integrated microphone. (*Id.*; *see also* Compl. ¶ 21.)

***3** In 2012, BOP and ATG signed a $5.15 million contract giving ATG the exclusive right to supply Prison-Restricted MP3 Players and MP3 music and audio files to BOP inmates. (*Id.* ¶ 23.) Around the same time, ATG and SanDisk entered into an agreement for SanDisk to supply exclusively the Prison-Restricted MP3 Players to ATG. (*Id.* ¶ 28.) Pursuant to this agreement, only one brand and model of MP3 music player is available for sale as a Prison-Restricted MP3 Player: SanDisk's Sansa Clip+. [3] (*Id.* ¶ 27.) SanDisk places the "physical and technological locks and restrictions on the MP3 players it supplies, with the specific knowledge and/or intent that those Prison-Restricted MP3 Players are sold by ATG to inmates in BOP facilities." (*Id.* ¶ 28.)

The Prison-Restricted MP3 Players are not connected to the Internet. (Compl. ¶ 21.) Instead, they can be used to download approved music and audio files through TRULINCS. (*Id.*) Music audio files range in price of $.80 to $1.80 per song; the cost of other audio files (e.g. audiobooks) is significantly higher. (Compl. ¶ 31.) Inmates can purchase as many as 1,500 songs to download onto a Prison-Restricted MP3 player through TRULINCS. (*Id.* ¶ 30.) According to BOP's Program Statement 4500.11, "[a]ll music sales are final" and "[a]ll purchased music/media files must be stored on the MP3 player." (Defs.' Mot., Ex. A at Ch. 14.10(g), Pg ID 342.) MP3 player sales are not final, however. (*Id*. at Ch. 3.4(g), Pg ID 244.)

BOP operates TRULINCS. (*Id*. at Ch. 14.2, Pg ID 332.) The Trust Fund Supervisor is responsible for administering, maintaining, and monitoring the system. (*Id.*) Inmates must "accept the Music/Media Terms of Use before accessing the [Music S]ervice" via TRULINCS. (*Id*. at Ch. 14.10(g), Pg ID 342.)

In addition to purchasing and downloading copyrighted audio files, inmates use TRULINCS for many purposes, including: (a) sending and receiving secure electronic messages with BOP employees; (2) processing their trust account transactions; (3) communicating with approved members of the public using a secure electronic messaging interface (monitored by BOP staff); and (4) managing their contacts. (Compl. ¶ 22.) Inmates also use TRULINCS' Music Service to activate MP3 players purchased from the commissary and to re-validate the players. (Defs.' Mot., Ex. A at Ch. 14.10(g), Pg ID 342.) Prison-Restricted MP3 Players must be connected to TRULINCS and re-validated every 14 days or they will stop working. (*Id.*; Compl. ¶ 26.) As a result, when prisoners are released from BOP custody and no longer have access to TRULINCS, their Prison-Restricted MP3 Players soon will become inoperable and the released prisoners ("Released Purchasers") will lose access to the audio files purchased and downloaded to the players (i.e., their "Purchased Music Collections"). (Compl. ¶ 36.) Plaintiffs allege that this consequence is not conveyed to inmates before or at the time they purchase a Prison-Restricted MP3 Player. (*Id.* ¶ 37.)

Plaintiffs also allege in their Complaint that the only way to avoid this consequence is for Released Purchasers to buy a "Post-Release MP3 Player" from ATG. (*Id.* ¶ 36.) SanDisk manufactures and is the exclusive supplier to ATG of this "Post-Release MP3 Player." (*Id.* ¶ 39.) According to Plaintiffs, ATG charges up to $110 for a Post-Release MP3 Player. (*Id.* ¶ 42.) Because "ATG will not restore any content to a third party player" (*id.* ¶ 44), Released Purchasers will lose access to their Purchased Music Collections if they buy any other MP3 player—of which, Plaintiffs allege, there are many in the open market sold by many different manufacturers. (*Id.*) Some of this information is conveyed to purchasers in the SanDisk Sansa Clip+ Manual ("Manual"), which inmates receive with their Prison-Restricted MP3 Players. [4]

***4** The Manual reflects, however, that ATG is not selling Released Purchasers new MP3 Players unless their Prison-Restricted MP3 Players are lost or no longer working *and* out of warranty. Instead, ATG offers to "deinstitutionalize" existing Prison-Restricted MP3 Players. The Manual explains this "Post Release Deinstitutionalization" as follows:

> Within one year of being released from the Bureau of Prison facility, the purchaser may choose to send the player to ATG to deinstitutionalize it. This process removes the device's special security features but preserves the music, audiobooks or other media ("User Data") that the purchaser had purchased during the last incarceration according to the TRULINCS database.

(Defs.' Mot., Ex. B, ECF No. 19-3.) As the Manual further provides, Post Release Deinstitutionalization costs $15.00, plus $10.00 shipping and handling. (*Id.*) If a Prison-Restricted MP3 Player is lost or is not working and not under warranty, ATG offers to provide a replacement device and restore the Released Purchaser's Purchased Music Collection for a charge of $70.00, plus $10.00 shipping and handling. (*Id.*)

Plaintiffs do not allege in their Complaint that any named plaintiff or putative class member purchased a Post-Release MP3 Player. Plaintiffs assert in response to Defendants' motion to dismiss, however, that named plaintiff Anthony Calabro "purchased [this] product." (Pls.' Resp. Br. at 20, ECF No. 23 at Pg ID 425.) At the motion hearing, Plaintiffs' counsel informed the Court that Calabro's Prison-Restricted MP3 Player was working and not lost when he was released. Thus, what he purchased was the device's "deinstitutionalization[.]"

III. Applicable Law and Analysis

A. Plaintiffs' Antitrust Claims (Counts I-XII)

In Counts I-VIII of their Complaint, Plaintiffs allege that Defendants engaged in unlawful tying, or conspiracy to engage in unlawful tying, in violation of Section 1 of the Sherman Antitrust Act. In Counts IX-XII, Plaintiffs allege that Defendants engaged in unlawful monopolization, attempted monopolization, or conspiracy to monopolize in violation of Section 2 of the Sherman Antitrust Act.

With respect to their tying claims, Plaintiffs assert that the purchase of a Post-Release MP3 Player is a prerequisite to a Released Purchaser's ability to retain access to his or her Purchased Music Collection. As such, Plaintiffs allege that Defendants unlawfully tie the purchase of a Prison-Restricted MP3 Player or audio files (i.e. the "tying" products) to the purchase of a Post-Release MP3 Player (i.e., the "tied" product"). With respect to their monopolization claims, Plaintiffs allege that Defendants' conduct has "exclusionary and anti-competitive effects with respect to the market for sales of Post-Release MP3 Players." (*See, e.g.*, Compl. ¶ 210.) As Plaintiffs explain in part:

> ATG utilizes its [contract with BOP to be the exclusive supplier of Prison-Restricted MP3 Players] to impose upon all purchasers of (1) its SanDisk Prison-Restricted MP3 Players and (2) its MP3 music and audio files making up the Purchased Music Collection an unforeseeable restriction of Released Purchasers' ability to retain ownership and possession of their Purchased Music Collection after release from prison unless they purchase a SanDisk Post-Release MP3 Player[ ] from ATG.

(*See, e.g.*, *id.*)

Defendants raise several arguments in support of their motion to dismiss Plaintiffs' antitrust claims. The Court finds it necessary to address only one of those arguments: Defendants' assertion that Plaintiffs lack antitrust standing.

***5** The Supreme Court has articulated several factors relevant to whether a plaintiff has standing to bring an antitrust action. *Associated Gen. Contractors of Calif. v. Calif. State Council of Carpenters*, 459 U.S. 519, 537-45 (1983). The Sixth Circuit subsequently summarized those factors as:

> (1) the causal connection between the antitrust violation and the harm to the plaintiff and the intent by the defendant to cause that harm, with neither factor alone conferring standing; (2) whether the plaintiff's alleged injury is of the type for which the antitrust laws were intended to provide redress; (3) the directness of the injury, which addresses the concerns that liberal application of standing principles might produce speculative claims; (4) the existence of more direct victims of the alleged antitrust violations; and (5) the potential for duplicative recovery or complex apportionment of damages.

Southaven Land Co. v. Malone & Hyde, Inc., 715 F.2d 1079, 1085 (6th Cir. 1983) (citing *Associated Gen. Contractors*, 459 U.S. at 537-45.) All five factors are meant to be balanced. *Indeck Energy Servs., Inc. v. Consumers Energy Co.*, 250 F.3d 972, 976 (6th Cir. 2000). Nevertheless, the Supreme Court has described the second factor—referred to as the "antitrust injury" requirement—as a "necessary, but not always sufficient" component of antitrust standing. *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 484, 489 n.5 (1986). Thus, where a complaint fails to establish an antitrust injury, the court must dismiss it as a matter of law. *NicSand, Inc. v. 3M Co.*, 507 F.3d 442, 450 (6th Cir. 2007) (en banc) (explaining that "antitrust standing is a threshold, pleading-stage inquiry and when a complaint by its terms fails to establish this requirement we must dismiss it as a matter of law—lest the antitrust laws become a treble-damages sword rather than the shield against competition-destroying conduct that Congress meant it to be.").

To establish an antitrust injury, a plaintiff must show an " 'injury causally linked' " to an alleged anti-competitive practice and that the injury is " 'of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful.' " *Cargill*, 479 U.S. at 109 (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977)); *see also NicSand*, 507 F.3d at 450 (quoting *Brunswick Corp.*, 429 U.S. at 489). "[E]ven though a claimant alleges that an injury is 'causally related to an antitrust violation,' it 'will not qualify as 'antitrust injury' unless it is attributable to an anticompetitive aspect of the practice under scrutiny.' " *NicSand*, 507 F.3d at 451 (quoting *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 334 (1990)). Thus, antitrust injury is lacking when the plaintiff's claimed injury results from governmental laws or regulations, rather than the defendant's alleged anticompetitive conduct. *See, e.g., CBC Companies, Inc. v. Equifax, Inc.*, 561 F.3d 569, 573 (6th Cir. 2009) (quoting *RSA Media, Inc. v. AK Media Grp., Inc.*, 260 F.3d 10, 13, 15 (1st Cir. 2001)) ("No cognizable antitrust injury exists where the alleged injury is a 'byproduct of the regulatory scheme' or federal law rather than of the defendant's business practices."); *Standfacts Credit Servs. v. Experian Info. Solutions, Inc.*, 294 Fed.Appx. 271, 272 (9th Cir. 2008) (holding that even where the defendants held "monopoly power in the wholesale market," the plaintiff resellers could not succeed on their antitrust claims where the monopoly power derived from federal requirements and not anticompetitive conduct); *In re Canadian Import Antitrust Litig.*, 470 F.3d 785, 791 (8th Cir. 2006) (finding no antitrust injury to support the plaintiffs' claims that they were injured by increased prices for prescription drugs in the United States due to their inability to import less expensive drugs distributed by Canadian pharmacies where the absence of competition from Canadian sources was due to the prohibition on the importation of prescription drugs from Canada under federal law); *RSA Media*, 260 F.3d at 15 (finding no antitrust injury where the plaintiff's exclusion from the market for outdoor billboards was not a result of the defendant's anticompetitive conduct but a state regulatory scheme preventing new billboards from being built).

***6** Defendants contend that the antitrust injuries Plaintiffs allege—having to purchase Post-Release MP3 players or lose their Purchased Music Collections and the inability to purchase MP3 players manufactured and sold by Defendants' competitors—result from the security restrictions BOP imposes for the MP3 players and audio files sold to inmates rather than Defendants' alleged anticompetitive conduct. Clearly, it is due to BOP policy rather than any anticompetitive conduct by Defendants that only ATG-supplied and SanDisk-manufactured MP3 Players are sold to BOP inmates. According to BOP Program Statement 4500.11, only "the MP3 player identified by the Central Office, Trust Fund Branch is sold in the Commissary" and "may only be ordered from the vendor identified by the Central Office, Trust Fund Branch...." (Defs.' Mot., Ex. A at Ch. 3.3(f)(7), ECF No. 19-2 at Pg ID 237.) BOP places these restrictions on the MP3 Players sold to inmates "to ensure the special security features and interface with TRULINCS function correctly." (*Id.*)

These special security features, including the need to interface periodically with TRULINCS, also are attributable to BOP requirements. In other words, it is because of BOP requirements that the MP3 players sold to inmates contain security features that render them inoperable and impede prisoners from accessing their Purchased Music Collections after their release. (*See id.* at Ch. 3.3(f)(7) and Ch. 14.10(g), ECF No. 19-2 at Pg ID 237, 342.) Specifically, BOP mandates that the MP3 Players sold to its inmates have certain features deactivated and that the "[p]layers must be connected to TRULINCS and re-validated every 14 days or they will stop working." (*Id.*)

At the motion hearing, Plaintiffs' counsel appeared to concede these points. Nevertheless, counsel argued that BOP policies do not control Defendants' conduct after a purchaser of a Prison-Restricted MP3 Player leaves BOP custody. In other words, Plaintiffs' counsel argued, BOP regulations do not prevent Defendants from downloading a released inmate's Purchased Music Collection to a third-party MP3 player.[5] Instead, Plaintiffs argue, Defendants use the technological locks to force released inmates to purchase their Post-Release MP3 Player.

The fact that purchasers of Prison-Restricted MP3 Players will lose access to their Purchased Music Collections if they do nothing after their release results from BOP Policy, however. Defendants could do nothing and Plaintiffs still would suffer the complained of injury. It is *because of* BOP's security requirements that Defendants offer deinstitutionalization or a replacement MP3 player on which it downloads an inmate's Purchased Music Collection.

Plaintiffs contend that Defendants instead could access TRULINCS to transfer a Released Purchaser's music to a third-party MP3 player—an ability not supported by the facts in Plaintiffs' Complaint[6]—or use some more direct way to download the music to a third-party MP3 player—which, at the motion hearing, Plaintiff's counsel speculated must be available. Even if Defendants could offer to download Plaintiffs' Purchased Music Collections to third-party players through either method, this overlooks the essential point that the need to do so *arises from BOP's restrictions* rather than Defendants' anti-competitive conduct. The Court does not understand the Sherman Act as requiring an entity to take action to remedy a barrier to competition created by governmental restrictions.

***7** In short, BOP policy rather than any anti-competitive conduct by Defendants is the more likely basis for any injury Plaintiffs allegedly suffered. Plaintiffs fail to allege facts sufficient to support an antitrust injury.

B. Plaintiffs' Common Law & State Law Claims

1. Common Law Conversion and Michigan Statutory Conversion (Counts XIII and XVIII, Respectively)

Under the common law, conversion is "any distinct act of domain wrongfully exerted over another's personal property in denial of or inconsistent with the rights therein." *Foremost Ins. Co. v. Allstate Ins. Co.*, 486 N.W.2d 600, 606 (Mich. 1992). "Conversion may occur when a party properly in possession of property uses it in an improper way, for an improper purpose, or by delivering it without authorization to a third party." *Dep't of Agric. v. Appletree Mktg. LLC*, 485 Mich. 1, 779 N.W.2d 237, 244-45 (2010).

Michigan's conversion statute provides, in pertinent part:

> (1) A person damaged as a result of either or both of the following may recover 3 times the amount of actual damages sustained, plus costs and reasonable attorneys' fees:
>
> (a) Another person's stealing or embezzling property or converting property to the other person's own use.
>
> (b) Another person's buying, receiving, possessing, concealing, or aiding in the concealment of stolen, embezzled, or converted property when the person buying, receiving, possessing, concealing, or aiding in the concealment of stolen, embezzled, or converted property knew that the property was stolen, embezzled or converted.

Mich. Comp. Laws § 600.2919a. In order to prevail on a claim for statutory conversion, a plaintiff must satisfy the elements of a common law conversion claim, as well as demonstrate that the defendant had "actual knowledge" of the converting activity. *See Echelon Homes, LLC v. Carter Lumber Co.*, 694 N.W.2d 544, 547-48 (Mich. 2005) (holding that under Michigan's conversion statute, "constructive knowledge is not sufficient; a defendant must know that the property was stolen, embezzled, or converted.").

In their Complaint, Plaintiffs allege that Defendants engaged in conversion by exercising dominion and control over their Purchased Music Collections in violation of Plaintiffs' ownership and possessory rights. (*See, e.g.*, Compl. ¶ 253.) Defendants seek dismissal of Plaintiffs' conversion claims, arguing that Plaintiffs fail to allege any affirmative act by Defendants interfering with their Purchased Music Collections and that "mere inaction is not enough." (Defs.' Br. in Supp. of Mot. at 32, ECF No. 19 at Pg ID 182, quoting *Wheeler & Clevenger Oil Co. v. Doan*, No. 2:04-cv-0558, 2005 WL 1210995, at *10 (S.D. Ohio May 20, 2005) and 18 Am. Jur. 2d Conversion § 21.) Plaintiffs respond that Defendants cite only unpublished, non-binding authority to support their argument that an affirmative act is required to prove conversion. Plaintiffs alternatively argue that even if an affirmative act is required, they allege "Defendants erect[ed] a barrier between Plaintiffs and their Purchased Music Collections. Defendants require Plaintiffs to pay money and purchase a San Disk Post-Release MP3 Player in order to access the Purchased Music Collections." (Pls.' Resp. Br. at 34, ECF No. 23 at Pg ID 439.)

***8** "Some affirmative act on the part of the defendant is usually regarded as necessary to constitute conversion." 18 Am. Jur. 2d Conversion § 21 (2d ed. 2016). The plain language used by the Michigan courts to define conversion expresses this requirement: "any *distinct act of dominion* wrongfully *exerted* over another's personal property...." *Aroma Wines & Equip., Inc. v. Columbian Distribution Servs., Inc.*, 871 N.W.2d 136, 144 (Mich. 2015) (emphasis added and internal quotation marks and citations omitted). Contrary to Plaintiffs' assertion in their response brief, the allegations in their Complaint do not establish that *Defendants* "erect[ed] a barrier between Plaintiffs and their Purchased Music Collections." Instead, as discussed in the preceding section, the alleged facts make clear that BOP regulations regarding MP3 players and MP3 audio files create the barrier. Plaintiffs simply want Defendants to take action to remove that barrier. Plaintiffs therefore fail to state viable claims for common law or Michigan statutory conversion.

2. Unconscionability (Count XIV)

Unconscionability is not a basis for affirmative relief, but is a defense to the enforcement of a contract. *See, e.g., Doe v. SexSearch.com*, 551 F.3d 412, 419-20 (6th Cir. 2008);*Knox v. Countrywide Bank*, 4 F. Supp. 3d 499, 513 (E.D.N.Y. 2014) (citing *Ng v. HSBC Mortg. Corp.*, No. 07-CV5434, 2011 WL 3511296, at *8 (E.D.N.Y. Aug. 10, 2011)) ("Under New York law, unconscionability is an affirmative defense to the enforcement of a contract.... A cause of action for unconscionability may not be used to seek affirmative relief.");*Newman v. Roland Machinery Co.*, No. 2:08-cv-185, 2009 WL 3258319, at *10-11 (W.D. Mich. Oct. 8, 2009) (examining decisions of several state and federal courts holding that unconscionability is an affirmative defense and does not give rise to an independent cause of action). As the Sixth Circuit stated in *SexSearch.com*:

> At common law, unconscionability is a defense against enforcement, not a basis for recovering damages. *See, e.g.*, Restatement (Second) of Contracts § 208 (1981) ("If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result."); *Bennett v. Behring Corp.*, 466 F. Supp. 689, 700 (S.D. Fla. 1979) ("[T]he equitable theory of unconscionability has never been utilized to allow for the affirmative recovery of money damages."); *Johnson v. Long Beach Mortg. Loan Trust 2001-4*, 451 F. Supp. 2d 16, 36 (D.D.C. 2006) ("Plaintiff cannot recover compensatory damages under the common law doctrine of unconscionability.").

551 F.3d at 419-20 (6th Cir. 2008). The cases Plaintiffs cite in response to Defendants' motion to dismiss affirm the use of unconscionability only as a defense to the enforcement of a contract.

As such, the Court is dismissing Plaintiffs' unconscionability claim.

3. Breach of the Implied Covenant of Good Faith and Fair Dealing (Count XV)

Breach of the implied covenant of good faith and fair dealing is not an independent cause of action, but is part of a breach of contract claim, in each of the states whose laws could apply in this case. *See, e.g., Frisch v. Nationwide Mut. Ins. Co.*, 553 Fed.Appx. 477, 482 (6th Cir. 2014) (applying Ohio law and affirming dismissal of breach of implied covenant claim); *Sea Carriers Corp. v. Empire Programs, Inc.*, 488 F. Supp. 2d 375, 380 (S.D.N.Y. 2007) (stating New York law); *Peacock v. Damon Corp.*, 458 F. Supp. 2d 411, 419 (W.D. Ky. 2006) (stating Kentucky law); *McLiechey v. Bristol W. Ins. Co.*, 408 F. Supp. 2d 516, 522 (W.D. Mich. 2006) (applying Michigan law). As the Sixth Circuit explained in *Frisch* with respect to Ohio law:

> ***9** Ohio law does not recognize a stand-alone claim for breach of the implied covenant of good faith and fair dealing. *Wendy's Int'l, Inc. v. Saverin*, 337 Fed. Appx. 471, 476 (6th Cir. 2009) ("[T]he duty does not create an independent basis for a cause of action."); *Lakota Local Sch. Dist. Bd. of Educ. v. Brickner*, 108 Ohio App.3d 637, 671 N.E.2d 578, 584 (1996) ("[Our cases do not] stand[ ] for the proposition that a breach of good faith exists as a separate cause of action from a breach of contract claim. Instead, they recognize the fact that good faith is part of a contract claim and does not stand alone."). Although Ohio law does recognize that "every contract contain[s] an implied duty for the parties to act in good faith and to deal fairly with each other," *Littlejohn v. Parrish*, 163 Ohio App.3d 456, 839 N.E.2d 49, 54 (2005), this duty "is part of a [breach of] contract claim and does not stand alone." *Lakota*, 671 N.E.2d at 584.

553 Fed.Appx. at 482. Plaintiffs, however, never identify a contract between themselves and Defendants in their Complaint.

Accordingly, the Court is dismissing this claim.

4. Unjust Enrichment (Count XVI)

Under the doctrine of unjust enrichment, " 'a person who has been unjustly enriched at the expense of another is required to make restitution to the other.' " *Morris Pumps v. Centerline Piping, Inc.*, 729 N.W.2d 898, 904 (Mich. Ct. App. 2006) (quoting *Michigan Educ. Emps. Mut. Ins. Co. v. Morris*, 596 N.W.2d 142 (Mich. 1999)) (brackets and additional quotation marks and citation omitted). However, "not all enrichment is necessarily unjust in nature." *Id.*

In support of their unjust enrichment claim, Plaintiffs allege:

> 267. As set forth above, Defendants have engaged in improper, unlawful, and/or unjust acts, all to the harm and detriment of Plaintiffs and all other members of the Released Purchaser National Class and Incarcerated National Class.
>
> 268. When Plaintiffs and all other members of the Released Purchaser National Class and the Incarcerated National Class paid Defendants, they reasonably believed that they were legally obligated to make such payments based on Defendants' improper, unlawful, and/or unjust acts.
>
> 269. Defendants have been enriched at the expense of Plaintiffs and all other members of the Released Purchaser National Class and the Incarcerated National Class by virtue of the payments made to which Defendants were not entitled, which constitute a benefit that Defendants voluntarily accepted notwithstanding their improper, unlawful, and unjust scheme.
>
> 270. But for Defendants' wrongful conduct, they would not have received and continue to receive payments from Plaintiffs and all other members of the Released Purchaser National Class and the Incarcerated National Class.
>
> 271. Defendants' retention of the payments violates fundamental principles of justice, equity, and good conscience.

Plaintiffs' allegations fail to identify which "payments" are at issue or why it is unjust for Defendants to retain those payments. It is not evident from the factual allegations in the Complaint that Plaintiffs made any payments *to Defendants.*

Nevertheless, even if Plaintiffs made payments to Defendants, Plaintiffs received what they bargained for. The fact that Plaintiffs' Prison-Restricted MP3 Players may have become inoperable or they risked losing (or lost) access to their Purchased Music Collections is not the result of some unjust act of Defendants. Rather, it is a result of BOP's policies requiring security features on the Prison-Restricted MP3 Players that render them inoperable after release, thereby severing a Released Purchaser's access to his or her Purchased Music Collection on the player. It also results from BOP policies requiring that "[a]ll purchased music/media files must be stored on the MP3 player" and restricting the download of files to authorized MP3 players, only.

***10** In short, the allegations in Plaintiffs' Complaint fail to plead a viable unjust enrichment claim.

5. State Consumer Protection Claims (Counts XVII, XIX-XXII)

In their Complaint, Plaintiffs allege violations of the following state consumer protection statutes: (a) the Michigan Consumer Protection Act, Mich. Comp. Laws §§ 445.901 *et seq.* ("MCPA"); (b) the Kentucky Consumer Protection Act, KRS §§ 267.110 *et seq.* ("KCPA"); (c) the Indiana Deceptive Consumer Sales Act, Ind. Code §§ 24-5-0.5-1 *et seq.* ("IDCSA"); (d) the Ohio Consumer Sales Practices Act, Ohio Rev. Code Ann. §§ 1345.01 *et seq.* ("OCSPA"); and (e) New York General Business Law § 349. Defendants argue that all of these claims are subject to dismissal based on Plaintiffs' failure to allege misleading or deceptive conduct in satisfaction of Rule 8 of the Federal Rules of Civil Procedure and because Plaintiffs' allegations are pled "on information and belief". Defendants make additional arguments in support of dismissal that are relevant to some but not all of these consumer protection claims.

In each of their consumer protection law claims, Plaintiffs incorporate their earlier allegations and then assert something to this effect: "Defendants engaged in unfair, false, misleading, or deceptive acts or practices through the unlawful conduct alleged herein."[7] (Compl. ¶¶ 276, 288 (Michigan and Kentucky claims).) As Defendants argue, these allegations are insufficient to satisfy Rule 8. Defendants are left to guess which of their alleged improper acts support these claims.

In response to Defendants' motion, however, Plaintiffs state that the conduct forming the basis for these claims is:

> The Complaint alleges in detail that Defendants do not disclose until after they sell SanDisk Prison-Restricted MP3 Players and music and audio files to inmates the material fact that they will lose access to their Purchased Music Collection unless they purchase SanDisk Post-Release MP3 Players from ATG. Defendants do not provide inmates with the Warranty or Agreements until after they sell SanDisk Prison-Restricted MP3 Players to inmates. Defendants do not disclose to inmates that they will revoke the balance of the one-year warranty, disclaim the manufacturer's warranty altogether, and/or shorten the duration of the implied warranty of merchantability to a period of only sixty (60) days from the date of so-called "deinstitutionalization" until after they sell SanDisk Prison-Restricted MP3 Players to inmates. When Defendants eventually do make such disclosures, to the extent, arguendo, they are not meaningless, the Warranty, Agreements, and Post-Release Terms are single-spaced documents containing impermissibly tiny and ambiguous terms and are wholly inadequate and ineffective for members of the putative Classes. (Compl. ¶¶ 52-81)
>
> ***11** The foregoing material omissions deprive inmates of the opportunity to either decline the transactions at issue or, in the alternative, to manage their music purchases in an informed and prudent manner throughout their incarceration....

(Pls.' Resp. Br. at 39-40, ECF No. 23 at Pg ID 445-46.) While Plaintiffs still fail to link their allegations with the elements of their claims and explain how any purported act or practice violates a particular statute, the Court assumes Plaintiffs could remedy this defect in an amended pleading. Nevertheless, necessary elements to show a violation of the alleged consumer protection laws remain missing.

More specifically, under the Michigan, Indiana, and Ohio consumer protection statutes, a plaintiff alleging a violation based on material misrepresentations or omissions must show reliance. *Temple v. Fleetwood Enters., Inc.*, 133 Fed.Appx. 254, 265 (6th Cir. 2005) ("To make out a prima facie claim under the [Ohio act], a plaintiff must 'show a material misrepresentation, deceptive act or omission' that impacted his decision to purchase the item at issue."); *In re OnStar Contract Litig.*, 278 F.R.D. 352, 378 (E.D. Mich. 2011) (stating that there is "no dispute" that individuals asserting MCPA claims "must establish reliance"); Ind. Code § 24-5-0.5-4 (a person "relying upon [a] deceptive act may bring" an IDCSA claim). Defendants argue that Plaintiffs' claims under these states' laws are subject to dismissal because Plaintiffs fail to allege reliance. For example, to the extent Plaintiffs' claims are based on the failure to disclose limitations of the Prison-Restricted MP3 Players, Plaintiffs do not allege that they were led to believe before the purchases that no such limitations would apply or that they would not have purchased the players had they known of the limitations beforehand. To the extent Plaintiffs' claims are based on the limitations on the warranties or the insufficiency of those disclosures, Plaintiffs were not provided with that documentation until after their purchase and they do not allege that, when purchasing the MP3 players, they had a contrary belief as to what the warranties, disclosures, or terms of service would be.

Plaintiffs have responded to Defendants' reliance argument only as it pertains to Michigan law, and then only to argue that reliance is not a required element rather than to show that they adequately plead facts showing reliance. The Court therefore presumes Plaintiffs concede Defendants' argument with respect to the Indiana and Ohio statutes. *See Mekani v. Homecomings Fin., LLC*, 752 F. Supp. 2d 785, 790 n.2 (E.D. Mich. 2010) (stating that where a plaintiff fails to dispute the arguments a defendants makes for dismissal of a claim, "the Court assumes he concedes this point and abandons the claim");*Bazinski v. JPMorgan Chase Bank, N.A.*, No. 13-14337, 2014 WL 140523, at *2 (E.D. Mich. 2014) ("Claims left to stand undefended against a motion to dismiss are deemed abandoned.").

As to Michigan's statute, Plaintiffs cite to *Dix v. American Bankers Life Assurance Co. of Florida*, 415 N.W.2d 206, 209 (Mich. 1987), to support their contention that reliance is not a required element. In *Dix*, however, the Michigan Supreme Court did not hold that reliance is not a requirement to prove a violation of the MCPA. Instead, the Court held only that in a class action proceeding under the statute, "members of [the] class ... need not *individually* prove reliance on the alleged misrepresentations. It is sufficient if the class can establish that a reasonable person would have relied on the representations." 415 N.W.2d at 209, emphasis added. Thus, while *Dix* holds that "class allegations can be based on what a reasonable person would have relied upon, a named plaintiff bringing a putative class action under the MCPA must still allege actual reliance." *In re Sony Gaming Networks and Customer Data Sec. Breach Litig.*, 996 F. Supp. 2d 942, 997 (S.D. Calif. 2014); *see also, e.g., In re OnStar Contract Litig.*, 278 F.R.D. 352, 378 (E.D. Mich. 2011) (stating that there is "no dispute" that individuals asserting MCPA claims "must establish reliance").

***12** In their Complaint, Plaintiffs fail to allege facts establishing their reliance on any particular material misstatement or omission by Defendants. They do not explain in their response to Defendants' motion how they satisfy the reliance requirement.

Further, courts have construed Indiana's consumer protection act as not applying to omissions. *Hughes v. Chattem, Inc.*, 818 F. Supp. 2d 1112, 1123 (S.D. Ind. 2011) (citing *Lawson v. Hale*, 902 N.W.2d 267, 274 (Ind. Ct. App. 2009)). Similarly, the omission of facts does not constitute a violation of Michigan's consumer protection act absent a duty to disclose certain information to a consumer. *Hendricks v. DSW Shoe Warehouse, Inc.*, 444 F. Supp. 2d 775, 782 (W.D. Mich. 2006); *Zine v. Chrysler Corp.*, 600 N.W.2d 384, 276 (Mich. Ct. App. 1999). Defendants argue that while Plaintiffs refer to "unfair, false, misleading, or deceptive acts or practices" in the Complaint, the only tangible examples Plaintiffs identify in support of their consumer protection act claims are omissions. Plaintiffs' response brief confirms that their state law consumer protection claims are based on omissions by Defendants. Plaintiffs do not allege a basis for imposing a duty on Defendants to disclose the alleged omitted facts. [8]

A consumer protection claim under New York's General Business Law requires a plaintiff to show: "(1) the defendant's deceptive acts were directed at consumers, (2) the acts are misleading in a material way, and (3) the plaintiff has been injured as a result." *Maurizio v. Goldsmith*, 230 F.3d 518, 521 (2d Cir. 2000) (citation omitted). The alleged deception must have occurred in New York. [9] *Goshen v. Mutual Life Ins. Co. of NY*, 774 N.E.2d 1190 (N.Y. 2002). Plaintiffs' allegations fail to explain how they were misled or deceived in a material way by Defendants and suffered injury as a result.

Finally, Defendants contend, and Plaintiffs concede, that Kentucky's consumer protection act generally requires a plaintiff to be in privity of contract with the defendant. [10] (Defs.' Br. in Supp. of Mot. at 46, ECF No. 19 at Pg ID 196, citing *Tallon v. Lloyd & McDaniel*, 497 F. Supp. 2d 847, 854-55 (W.D. Ky. 2007); Pls.' Resp. Br. at 45, ECF No. 23 at Pg ID 450, citing *Naiser v. Unilever United States, Inc.*, 975 F. Supp. 2d 727, 743 (W.D. Ky. 2013).) Relying on their allegation that inmates purchase SanDisk Prison-Restricted MP3 Players from ATG, Plaintiffs argue that they sufficiently allege privity of contract between themselves and Defendants.

***13** These allegations do not establish privity of contract between Plaintiffs and SanDisk, however. Moreover, for the following reasons, the Court finds implausible Plaintiffs' contention that they purchased Prison-Restricted MP3 Players or audio files directly from ATG. Thus, the Court concludes that there is no privity of contract between Plaintiffs and ATG.

In their Complaint, Plaintiffs do allege that they purchased Prison-Restricted MP3 Players and audio files from ATG. (*See, e.g.,* Compl. ¶¶ 2, 30.) In response to Defendants' motion, Plaintiffs contend that this meant the products were purchased "directly from ATG." (Pls.' Resp. Br. at 12, ECF No. 23 at Pg ID 417, emphasis removed). In support of a direct contractual relationship between themselves and ATG, Plaintiffs refer to the additional allegation in their Complaint that, "[a]ccording to data released by ATG, it has sold Prison-Restricted MP3 Players and MP3 audio files to populate those players to approximately forty percent (40%) of all federal inmates." (*Id.*, quoting Compl. ¶ 32.) According to Plaintiffs, further proof that inmates purchase the MP3 players directly from ATG can be found in BOP Policy Statement 4500.11: " 'This MP3 player may only be ordered from the vendor identified by the Central Office, Trust Fund Branch ...' " (*Id.* at 14, quoting Defs.' Mot., Ex. A at Ch. 3.3(f)(7).) Plaintiffs also refer to the description on ATG's website of its "Offender Management Suite" as including "Commissary Operations" and "Canteen Operations" and the BOP TRULINCS webpage directing users to "Troubleshoot Problems" using "Corrlinks Support" for certain issues. A link on the webpage takes the user to www.corrlinks.com, which displays ATG's logo and claims to be the intellectual property of ATG.

When ruling on a motion to dismiss, the court's "plausibility analysis" is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 556 U.S. at 679. Undoubtedly, this Court's judicial experience and common sense informs it that ATG does not sell Prison-Restricted MP3 Players and MP3 audio files directly to inmates. As BOP Policy Statement 4500.11 reflects, every aspect of the prison environment is highly controlled by its operating entity—here BOP. Thus, *BOP* sells MP3 players to its inmates through its commissaries, just at it sells the various other items listed for purchase (e.g., toothpaste, stamps, snacks, pens, and clothing). Plaintiffs in fact acknowledge in their Complaint that the Prison-Restricted MP3 Players are offered for sale to inmates by being included "on the *BOP-operated* facility's 'Commissary List' ..." (Compl. ¶ 52, emphasis added.) While the wording of Plaintiffs' allegation suggests that ATG is responsible for including the MP3 players on that list, [11] common sense dictates that BOP—not ATG or any other outside vendor whose goods are available at the commissary —decides what items are sold to inmates.

With respect to audio files, the allegations in Plaintiffs' Complaint contradict any assertion that Defendants sell those files directly to inmates. Specifically, Plaintiffs allege in the Complaint that audio files are downloaded only "through BOP's secure computer interface known as [TRULINCS]." (Compl. ¶¶ 21, 30.) BOP Program Statement 4500.11 provides that TRULINCS is operated and controlled by BOP. (Defs.' Mot. Ex. A at Chpt.14, ECF NO. 19-2 at Pg ID 332.) ATG may have designed and sold the "Offender Management Suite" software enabling BOP to operate TRULINCS (and thus it may provide technical support when users experience certain issues with the program), but this does not mean that ATG operates, controls, or sells audio files through TRULINCS. [12] But even assuming ATG sells audio files to inmates through TRULINCS, Plaintiffs fail to allege a material misstatement or omission by ATG in connection with those sales.

***14** In short, the facts do not show any privity of contract between Plaintiffs and Defendants to support Plaintiff's claim under Kentucky's consumer protection act.

For these reasons, the Court is dismissing Plaintiff's claims under the consumer protection statutes of Michigan, Kentucky, Indiana, Ohio, and New York.

6. Civil Conspiracy

In their final count, Plaintiffs allege Defendants conspired to commit the common law and state law violations addressed above, except unjust enrichment. A claim alleging civil conspiracy cannot survive in the absence of a valid, underlying cause of action. *Rondigo, LLC v. Twp. of Richmond, Mich.*, 522 Fed.Appx. 283, 287 (6th Cir. 2013). Having concluded that Plaintiffs' common law and state law claims are subject to dismissal, the Court also concludes that Plaintiffs' civil conspiracy claim must be dismissed.

IV. Conclusion

To summarize, any injury Plaintiffs claim in this action is a byproduct of BOP's rules for its MP3 program rather than Defendants' alleged anti-competitive conduct. Plaintiffs were limited to purchasing one brand and model of MP3 player with certain security features because this is what BOP requires. Per BOP policy, Plaintiffs were allowed to access and download audio files to authorized MP3 players only through TRULINCS, which BOP operates and manages. The MP3 players will stop working shortly after a prisoner's release—and thus Released Purchasers will lose access to their Purchased Music Collections—because BOP requires the players to be connected to TRULINCS every two weeks to remain operable. Antitrust injury therefore is lacking to support Plaintiffs' Sherman Act claims against Defendants.

Because BOP policies, rather than any affirmative act by Defendants, create the barrier between released purchasers and their Purchased Music Collections, Plaintiffs conversion and unjust enrichment claims also fail. Plaintiffs' claims alleging unconscionability and breach of the implied covenant of good faith and fair dealing fail to state independent causes of action. Plaintiffs do not allege facts to support the necessary elements of their claims under the Michigan, Indiana, Ohio, Kentucky, and New York consumer protection acts. With the demise of these claims, Plaintiffs' civil conspiracy claim fails as well.

Accordingly,

IT IS ORDERED that Defendants' Motion to Dismiss Under Rule 12(b)(6) is **GRANTED**;

IT IS FURTHER ORDERED that Defendants' Motion to Dismiss Under Rule 12(b)(1) is **DENIED AS MOOT**.

All Citations

Not Reported in Fed. Supp., 2017 WL 768929

Footnotes

1 Defendants also filed a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1) in which they argue that Plaintiffs lack standing to seek injunctive or declaratory relief. That motion, as well as Defendants' Rule 12(b)(6) motion, have been fully briefed. On February 8, 2017, the Court heard oral argument for both motions and a decision on the motions is pending. Because the Court concludes that Defendants' Rule 12(b)(6) motion should be granted and there is no right to relief absent a viable claim, the Court is denying as moot Defendants' Rule 12(b)(1) motion.

2 Without converting a Rule 12(b)(6) motion to dismiss to a motion for summary judgment under Rule 56, a court can take judicial notice of " '[p]ublic records and government documents available from reliable sources on the internet,' such as websites run by governmental agencies." *U.S. ex. rel. Modglin v. DJO Global, Inc.*, 48 F. Supp. 3d 1362, 1381 (C.D. Cal. 2014) (quoting *Hansen Beverage Co. v. Innovation Ventures, LLC*, No. 08-cv-1166, 2009 WL 6597891, at *1 (S.D. Cal. Dec. 23, 2009)); *see also In re Wellburtin SR/Zyban Antitrust Litig.*, 281 F. Supp. 2d 751, 754 n.2 (E.D. Pa. 2003) (citing cases) ("The fact that an agency report is 'published' on the internet does not affect the Court's ability to take judicial notice of the contents of that report," and the Court may consider the information as a matter of public record without converting a motion to dismiss to one for summary judgment.); *see also* Fed. R. Evid. 201. BOP Program Statement 4500.11 is publicly available on BOP's website at https://www.bop.gov/policy/progstate/4500_011.pdf.

3 At the motion hearing, defense counsel informed the Court that the model of the player has been updated over time but remains a SanDisk manufactured player.

4 Plaintiffs refer to the Manual in their Complaint as "ATG's 'Post Release Deinstitutionalization Terms of Service for MP3 Players[.]' " (Compl. ¶ 44.) Defendants attach the Manual to their Rule 12(b)(6) motion to dismiss. As Plaintiffs refer to the Manual in their Complaint and it is central to their claims, the Court may consider it when ruling on Defendants' motion without converting the motion to one for summary judgment. *See In re Omnicare, Inc. Sec. Litig.*, 769 F.3d 455, 466 (6th Cir. 2014).

5 Similarly, Plaintiffs argued in their response to Defendants' motion to dismiss that there is no factual basis to conclude that Defendants "**cannot** provide a Purchased Music Collection to a Released Purchaser by any means other than the 'deinstitutionalization' purchase of a SanDisk Post-Release MP3 Player from

ATG." (Pls.' Resp. Br. at 8, ECF No. 23 at Pg ID 413, emphasis in original.) Plaintiffs maintained that nothing in BOP policies or regulations "prohibit the use of third-party MP3 Players or other devices to access Purchased Music Collections **after** a person is released." (*Id.*, emphasis in original) Plaintiffs asserted that "Defendants have the ability, but refuse, to provide Plaintiffs with their Purchased Music Collections by means other than the purchase of a SanDisk Post-Release MP3 Player from ATG...." (*Id.*)

6 As alleged in the Complaint, and highlighted in BOP Program Statement 4500.11, TRULINCS is "*BOP*'s secure computer interface" and BOP operates and controls TRULINCS. (Compl. ¶¶ 21, 22, 106, emphasis added; *see also* Defs.' Mot., Ex B.)

7 For their claim under Indiana law, Plaintiffs allege, "Defendants engaged in 'deceptive acts' within [the Indiana statute] specifically by making the representations and omissions alleged herein." (Compl. ¶ 293.) For their claim under Ohio law, Plaintiffs allege, "Defendants have engaged in unfair, deceptive, and unconscionable practices by their misconduct alleged herein." (*Id.* ¶ 300.) Finally, for their claim under New York law, Plaintiffs allege, "Defendants have engaged in acts and/or practices that are deceptive or misleading in a material way ..." (*Id.* ¶ 304.)

8 Plaintiffs fail to respond to Defendants' argument that their claims under Indiana's and Michigan's consumer protection statutes also are subject to dismissal on this basis. Thus, this argument also may be deemed conceded. *See supra* p. 24.

9 It is not evident that the deception of any named plaintiff occurred in New York. Plaintiff Anthony Calabro was an inmate for almost a year at a BOP facility in New York; however, he was transferred to a facility in New Jersey for the remainder of his incarceration. (Compl. ¶ 13.) The Complaint neglects to assert the state in which Calabro was incarcerated when he was subjected to Defendants' alleged deceptive acts.

10 As the Kentucky Supreme Court provided: " 'Privity of contract' is '[t]he relationship between parties to a contract, allowing them to sue each other but preventing a third party from doing so.' " *Presnell Const. Managers, Inc. v. EH Const., LLC*, 134 S.W.3d 575, 579 (Ky. 2004) (citing Black's Law Dictionary 1217 (7th ed. 1999)).

11 The full sentence reads, "ATG offers SanDisk Prison-Restricted MP3 Players for sale by including the item on the BOP-operated facility's "Commissary List" of items for sale, which also lists other items available for purchase by inmates such as toothpaste, stamps, snacks, pens, and clothing, among others." (Compl. ¶ 52.)

12 ATG could sell the Post-Release MP3 Players directly to released BOP inmates; but, nowhere in the Complaint do Plaintiffs allege that any named plaintiff (or even putative class member) purchased a Post-Release MP3 Player. Moreover, the conduct forming the basis of Plaintiff's consumer protection law claims relates to the sale of the Prison-Restricted MP3 Players and audio files, not the Post-Release MP3 Players.

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