

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION**

IN RE: SMITTY’S/CAM2 303 TRACTOR)	
HYDRAULIC FLUID MARKETING, SALES)	MDL No. 2936
PRACTICES, AND PRODUCTS LIABILITY)	
LITIGATION)	Master Case No. 4:20-MD-02936-SRB

ORDER

Before the Court is Defendants Smitty’s Supply, Inc. (“Smitty’s”) and CAM2 International, LLC (“CAM2”) (collectively, “Defendants”) Motion for Summary Judgment on the Claims of Plaintiff Jack Kimmich. ([Doc. #804.](#)) For the reasons discussed below, the motion is DENIED.

I. BACKGROUND

This MDL arises from Defendant’s manufacture, sale, and marketing of tractor hydraulic fluid (“THF”), a multifunctional lubricant designed to offer certain protective benefits when used in tractors and heavy equipment as a hydraulic fluid, transmission fluid, and gear oil. Plaintiffs represent a putative class of consumers who purchased at least one of four allegedly defective products at issue in this case: Smitty’s Super S Super Trac 303 Tractor Hydraulic Fluid (“Smitty’s Super Trac 303”), Smitty’s Super S 303 Tractor Hydraulic Fluid (“Smitty’s Super S 303”), Cam2’s Promax 303 Tractor Hydraulic Oil (“Cam 2 Promax 303”), and Cam2’s 303 Tractor Hydraulic Oil (“Cam2 303”) (collectively, the “303 THF Products”). Defendants Smitty’s and CAM2 manufactured the 303 THF Products, which were sold nationwide by multiple retailers under various label names.

A. Plaintiff Jack Kimmich

Plaintiff Jack Kimmich (“Kimmich”) is a California resident who purchased Smitty’s 303 THF Products in California. Kimmich and his wife own and operate Soils To Grow, LLC

(“Soils to Grow”). Soils to Grow owns, and uses in the operation of its business, a Kubota backhoe and Volvo L50 B mobile loader (“the Equipment”).

Kimmich’s Class Membership Form represents that he purchased 83 buckets of Super Trac 303 and Super S 303 from July 2014 to November 2018. Kimmich does not have receipts for his purchases, and testified that he, his wife, and Soils to Grow may have made some of these purchases. Records produced by Tractor Supply show that Kimmich purchased 17 buckets of Smitty’s 303 THF Products. When shown the Super S 303 label at his deposition, Kimmich testified that he did not recognize it:

Q: As we sit here today, do you believe that you ever purchased Super S 303 with the label that you have in front of you as Kimmich Exhibit 25? . . .

[A:] I actually have pictures of the barrels, and there’s something – this is not the same label. This is missing Allison. . . .

Q: Okay. And I’m – I’m gonna hand you a picture of what I believe you’re referring to as a document that was represented to use was produced by you in this case.

(Exhibit 26 previously marked for identification.)

So, Kimmich Exhibit 36, do you recognize that as the Super S Supertrac 303 bucket that you purchased from Tractor Supply?

A. Yes.

Q: Okay. And, obviously, these are two different labels. You purchased the label you see in Kimmich Exhibit 36, correct?

A: Yes.

Q: Okay. And I take it you don’t know one way or the other whether you purchased the label reflected in Kimmich Exhibit 35; is that correct?

A: That’s a totally different label. . . . I’d have to verify against the buckets that I have left.

(Doc. #922-1, p. 15); (Doc. #1002-4, p. 14.)

B. Kimmich’s Bankruptcies

In October 2012, Kimmich filed for bankruptcy in the United States Bankruptcy Court for the Central District of California (“the Individual Bankruptcy”). Kimmich did not disclose

any interest in Soils to Grow or the Equipment. The Individual Bankruptcy was dismissed in January 2013 because Kimmich failed to appear at a meeting of creditors.

In January 2014, Kimmich and his wife filed for bankruptcy in the United States District Court for the Northern District of California (“the Joint Bankruptcy”). Kimmich disclosed an interest in Soils to Grow of \$150,000, but did not disclose any interest in the Equipment. In February 2015, Kimmich amended his personal property declaration, lowering his interest in Soils to Grow from \$150,000 to \$54,000. The Northern District of California confirmed a Chapter 12 plan in June 2015, which did not include any claims related to Kimmich’s purchase of the 303 THF Products. Kimmich made all required payments to creditors, and the Northern District of California discharged Kimmich and his wife from bankruptcy in October 2020.

C. The Instant Action

Plaintiffs initiated suit against Defendants in multiple federal district courts where the 303 THF products were sold. On February 11, 2020, Defendants requested all pending actions be consolidated and transferred pursuant to [28 U.S.C. § 1407](#). On June 2, 2020, the J.P.M.L. consolidated and transferred the eight then-pending actions to the Western District of Missouri.¹ *See In re: Smitty’s/CAM2 303 Tractor Hydraulic Fluid Mktg., Sales Practices & Prod. Liab. Litig.*, No. 2936, [2020 WL 2848377](#), at *1 (J.M.P.L. June 2, 2020). Following the creation of this MDL, Plaintiffs filed another lawsuit, *Feldkamp v. Smitty’s Supply, Inc.*, No. 20-cv-02177, in the U.S. District Court for the Central District of Illinois, which was subsequently transferred to this Court. Pursuant to this Court’s order dated August 3, 2020, Plaintiffs were permitted to file a Consolidated Amended Complaint that would serve to supersede all prior pleadings in the

¹ The pending actions consolidated before the undersigned are as follows: *Buford v. Smitty’s Supply Inc.*, No. 19-cv-00082 (E. D. Ark.); *Fosdick v. Smitty’s Supply Inc.*, No. 19-cv-01850 (N. D. Iowa); *Blackmore v. Smitty’s Supply Inc.*, No. 19-cv-04052 (N.D. Iowa); *Zornes v. Smitty’s Supply, Inc.*, No. 19-cv-0257 (D. Kan.); *Wurth v. Smitty’s Supply Inc.*, No. 19-cv-00092 (W.D. Ky.); *Mabie v. Smitty’s Supply, Inc.*, No. 19-cv-3008 (S.D. Tx.); *Klingenberg v. Smitty’s Supply, Inc.*, No. 19-cv-2684 (D. Minn.); and *Graves v. Smitty’s Supply, Inc.*, No. 19-cv-5089 (W.D. Mo.).

individual cases that were consolidated. Further, this Court's August 3, 2020 Order permitted direct joinder of new claims through the Consolidated Amended Complaint.

On September 24, 2021, Plaintiffs filed the Fourth Amended Consolidated Complaint ("FACC"). On September 24, 2021, Plaintiffs filed the Fourth Amended Consolidated Complaint ("FACC"). On October 25, 2021, Defendants filed a motion to dismiss the FACC, which the Court granted in part and denied in part on March 9, 2022. *See* ([Doc. #451](#)).² On April 21, 2023, Plaintiffs filed a Fifth Amended Consolidated Complaint ("5ACC").³ On July 14, 2023, the Court granted CAM2's motion for summary judgment and dismissed Kimmich's claims against CAM2. *See* ([Doc. #985](#).)

Kimmich seeks to represent a class of California purchasers and asserts the following claims against Smitty's: Count I, negligence; Count II, breach of express warranty; Count V, unjust enrichment, Count VI, fraudulent misrepresentation; Count VII, negligent misrepresentation; Count IX, California Unfair Competition Law, Cal. Bus. Prof. Code § 17200; (7) Count X, California False and Misleading Advertising, Cal. Bus. Prof. Code § 17500; and (8) Count XI, California Consumer Legal Remedies Act, Cal. Civ. Code. § 1770.

On March 17, 2023, Defendants filed the instant motion for summary judgment on Kimmich's remaining claims pursuant to [Federal Rule of Civil Procedure 56](#). Kimmich opposes the motion.

² Relevant to this motion, the Court dismissed Kimmich's Count III, breach of implied warranty of merchantability, and Count IV, breach of implied warranty of fitness for a particular purpose.

³ The instant motion was filed before the 5ACC. Although an amended complaint supersedes the original complaint, the Court finds that the amended complaint did not affect the substance of this motion and treats the instant motion for summary judgment as a motion for summary judgment on the 5ACC. *See Cartier v. Wells Fargo Bank, N.A.*, [547 Fed. Appx. 800, 804](#) (8th Cir. 2013) (finding a district court did not abuse its discretion in treating a motion to dismiss an original complaint as a motion to dismiss an amended complaint).

II. LEGAL STANDARD

Under Rule 56, summary judgment is warranted “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). The moving party has the burden of identifying “the basis for its motion, and must identify those portions of the record which it believes demonstrate the absence of a genuine issue of material fact.” *Torgerson v. City of Rochester*, 643 F.3d 1031, 1042 (8th Cir. 2011) (en banc) (cleaned up). If the moving party makes this showing, “the nonmovant must respond by submitting evidentiary materials that set out specific facts showing that there is a genuine issue for trial.” *Id.* (quotation marks omitted). “Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge.” *Id.* (quotation marks omitted).

III. DISCUSSION

Defendants argue that they are entitled to summary judgment on Kimmich’s remaining claims because (1) Kimmich’s claims are barred by judicial estoppel; and (2) Kimmich did not purchase Smitty’s Super S 303.⁴ Kimmich disagrees. The Court will address each argument separately below.

A. Judicial Estoppel

Defendants argue that Kimmich’s claims are judicially estopped because “[t]he law required Kimmich to disclose causes of action that arose during the course of his bankruptcy[.]” (Doc. #805, p. 12.) Kimmich disagrees, arguing judicial estoppel is not applicable because his claims against Defendants accrued after the confirmation of his bankruptcy plan. Here, the parties do not dispute that Kimmich did not disclose a claim against Defendants in his

⁴ Defendants also argue that they are entitled to summary judgment because Kimmich is not the real party in interest. However, the Court allowed Plaintiffs to amend their complaint, as discussed earlier. (Doc. #834.) The 5ACC added Soils to Grow, LLC as a party in this case. Thus, Defendants’ argument is rejected.

bankruptcy proceedings. Kimmich argues he had no duty to disclose his claims against Defendants because his Chapter 12 bankruptcy plan confirmation occurred in 2015, which is “long before the late 2018 date on which Mr. Kimmich first learned from a Volvo mechanic that Defendants’ 303 THF was the cause of his equipment failures, . . . and also long before the 2019 original filing date of Mr. Kimmich’s class claims.” ([Doc. #922, p. 33.](#))

“Under the judicial estoppel doctrine, where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter . . . assume a contrary position[.]” *New Hampshire v. Maine*, [532 U.S. 742, 742](#) (2001) (citation omitted). “In the bankruptcy context, a party is judicially estopped from asserting a cause of action not raised in a reorganization plan or otherwise mentioned in the debtor’s schedules or disclosure statements.” *Hamilton v. State Farm Fire & Cas. Co.*, [270 F.3d 778, 783](#) (9th Cir. 2001).

In California, courts consider five factors in determining whether to apply judicial estoppel: The doctrine [most appropriately] applies when (1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake.

Gottlieb v. Kest, [141 Cal.App.4th 110, 131, 46 Cal.Rptr.3d 7, 19](#) (Cal. App. 2006) (citations and quotations omitted) (alteration in original). “Judicial estoppel is an extraordinary remedy that should be applied with caution.” *Kelsey v. Waste Mgmt. of Alameda Cty.*, [76 Cal.App.4th 590, 598](#) (Cal. App. 1999) (citation omitted). The burden lies on Defendants “to adduce admissible evidence establishing each element underlying the [judicial estoppel] doctrine.” *Id.* at 589. The Court finds that the first four factors are satisfied.

Smitty’s argues that the fifth factor is satisfied “[b]ecause Kimmich’s bankruptcy plan involved partial payment, . . . he had a motive to withhold information that could cause his bankruptcy plan to be revised upward and increase his liability.” ([Doc. #1002, p. 27.](#)) Kimmich

disagrees, arguing his omission of the claim against Smitty's was a good faith mistake. The Court agrees with Kimmich. Here, drawing all reasonable inferences in favor of Kimmich, the Court finds that Defendants have failed to conclusively establish that Kimmich failed to disclose his claim out of ignorance or mistake.

Defendants put forth evidence that Kimmich became aware of damage to his equipment caused by the 303 THF Products in 2018. However, this falls short of establishing Kimmich knew of the value of his claims before the plan was confirmed in 2015. *See Kelsey*, [76 Cal.App.4th at 599](#) (“[N]o evidence shows that [the plaintiff] placed a value on his claim against [the defendant] before he filed the instant action, or before the bankruptcy court confirmed his chapter 13 plan.”). Further, Defendants have put forth no evidence indicating Kimmich intentionally omitted his claim to gain an unfair advantage. *See Farrar v. Burlington Northern Santa Fe Ry. Co.*, No. C053059, [2007 WL 4157760](#), at *6 (Cal. App. Nov. 26, 2007) (“The mere fact that there has been a nondisclosure in bankruptcy proceedings is not enough . . . to impose judicial estoppel. . . . Both [federal and California law] require intentional contradictory positions before judicial estoppel will apply.”) (collecting cases). Accordingly, Defendants’ argument is rejected.

B. Failure to Purchase Super S 303

Defendants argue that “Kimmich’s claims related to Super S 303 tractor hydraulic fluid labels must be summarily dismissed” because Kimmich “admits that he (or Soils To Grow) did not purchase Super S 303.” ([Doc. #805, p. 14.](#)) Kimmich disagrees, arguing that there are genuine disputes of material fact that preclude summary judgment.

The Court agrees with Defendants that a plaintiff may not assert claims against a defendant for a faulty product if he did not purchase a product from that defendant.⁵ However, the Court finds that fact issues exist as to whether Kimmich purchased Super S 303. Kimmich's Class Membership Form dated August 9, 2022, lists that Kimmich purchased 57 five-gallon buckets of Smitty's Supertrac 303 and 16 five-gallon buckets of Super S 303 between 2014 and 2018. Kimmich's deposition testimony is contrary to this assertion. When presented with images of Smitty's Supertrac 303 and Super S 303 labels, Kimmich testified that he would not have purchased Super S 303. Due to conflicting evidence in the record creating a genuine dispute of material fact, summary judgment is not appropriate here.⁶

IV. CONCLUSION

Accordingly, Defendants Partial Motion for Summary Judgment on the Claims of Plaintiff Jack Kimmich ([Doc. #804](#)) is DENIED.

IT IS SO ORDERED.

/s/ Stephen R. Bough
STEPHEN R. BOUGH
UNITED STATES DISTRICT JUDGE

Dated: July 28, 2023

⁵ *O'Neil v. Crane Co.*, [53 Cal.4th 335, 362, 266 P.3d 987, 1005](#) (Cal. 2012) (requiring proof "[t]hat the defendant manufactured, sold, or supplied the injury-causing product") (negligence); *Moncada v. Allstate Ins. Co.*, [471 F.Supp.2d 987, 997](#) (N.D. Cal. 2006) (requiring the defendant to have issued the warranty) (express warranty); *Tindell v. Murphy*, [22 Cal. App. 5th 1239, 1254](#) (Cal. 2018) (holding that the defendant must have retained a benefit conferred by the plaintiff) (unjust enrichment); *Sanchez v. Stryker Corp.*, No. 2:10-CV-08831-ODW, [2012 WL 1570569](#), at *6 (C.D. Cal. May 2, 2012) (requiring a plaintiff to show that his or her injury was by caused by the defendant and based on the defendant's misrepresentation) (fraudulent and negligent misrepresentation); *Wilson v. Frito-Lay North Am., Inc.*, [260 F.Supp.3d 1202, 1208](#) (N.D. Cal. 2017) (citation omitted) (holding that a plaintiff bringing a claim under Cal. Bus. Prof. Code § 17200, Cal. Bus. Prof. Code § 17500, and [Cal. Civ. Code § 1770](#) must show that "the defendant's misrepresentation is an immediate cause of the plaintiff's conduct").

⁶ As the Court finds a genuine dispute of material fact as to whether Kimmich purchased Smitty's Super S 303, the Court need not address the parties' discussion regarding whether Super S 303 and Supertrac 303 are the same product.