UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

MORGAN TIRE OF SACRAMENTO, INC., PLAINTIFF, v. THE GOODYEAR TIRE & RUBBER COMPANY, ET AL., DEFENDANTS.	)	CASE NO. 5:15-CV-2134 JUDGE SARA LIOI

REPLY IN SUPPORT OF DEFENDANTS'
MOTION TO DISMISS AMENDED COMPLAINT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

OTHER AUTHORITIES

I. INTRODUCTION

Morgan Tire's opposition is at war with the allegations in its amended complaint. After embracing the alleged terms of its former contracts with Goodyear in its amended complaint, Morgan Tire has reverted to the tactics it used to evade the forum selection clause in those contracts. It now argues its allegations respecting the contracts do not mean what they say. This is not allowed. Morgan Tire should be held to its allegations in the amended complaint.

Morgan Tire also may not rely on "facts" outside its pleadings to support its claims.[1] In applying *Twombly* and *Iqbal*, only the factual allegations *in the complaint* matter. "Because a motion to dismiss tests the sufficiency of the pleadings, courts do not consider 'after-the-fact allegations' raised in briefs to determine the sufficiency of a pleading." *GE Co. v. S&S Sales Co.*, No. 11-CV-837, 2012 WL 2921566, at *4 (N.D. Ohio 2012) (quoting *Frederico v. Home Depot*, 507 F.3d 188, 201 (3d Cir. 2007)); *Moss v. Mercy St. Anne Hosp.*, No. 12-cv-1840, 2014 WL 172530, at *1 (N.D. Ohio 2014). Curiously, after pointing the finger at defendants, it is Morgan Tire that "repeatedly substitute[es its] arguments for the facts as actually alleged" in the amended complaint. ECF 57 at 2. This is not allowed either, and those arguments should be ignored.

This case should now end where it began: with the contracts. The express terms of those contracts, as alleged in the amended complaint, gave Goodyear the right to terminate them, with or without cause. That is all this lawsuit is about. After more than two years of litigation, this lawsuit, and all of Morgan Tire's claims, should be dismissed with prejudice, once and for all.

II. ARGUMENT

A. The Amended Complaint and Law of the Case Mandate Application of Ohio Law

Morgan Tire concedes ("agrees") that Ohio law governs its claims that "relate squarely" to the New Tire and Retread Agreements. ECF 57 at 3. This much is correct and consistent with

[1] *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

the choice-of-law provision found in the New Tire Agreement and expressly incorporated into the Retread Agreement by its terms, as Morgan Tire alleged, ECF 54 ¶¶ 9, 16-17, 59, *see also* ECF 54-1, ECF 54-2, ECF 54-3, and as defendants explained, ECF 56-1 at 6-7.

But Morgan Tire's assertion that Ohio law does not apply to its other claims, ECF 57 at 3, should be disregarded. It flatly contradicts the allegations and the exhibit on which they are based. Ex. C, ECF 54-3. It requires no "misconstru[ction]" or inference, ECF 57 at 3, to see the amended complaint alleges, "[i]n agreeing to Goodyear's conditions, Morgan Tire entered into a subcontract with Goodyear," ECF 54 ¶ 27, and those conditions included "compliance with the [Retread] contract." ECF 54-3 at 2; ECF 54 ¶¶ 26-27; ECF 56-1 at 6-7. That is what the amended complaint *says*. And on this motion, those allegations control, not Morgan Tire's after-the-fact, contradictory arguments. *GE Co.*, 2012 WL 2921566, at *4; *Moss*, 2014 WL 172530, at *1.

Nor are there grounds to argue that law of the case does not determine choice of law here. Judge Mueller twice ruled, "'[a]ll of plaintiff's claims arise out of the contractual relation in this case.'" ECF 25 at 8. Judge Mueller found that "contractual relation" included the New Tire and Retread Agreements *and* the County Subcontract, *id.* at 3, and then applied the forum selection clause—found in the same provision as the choice of law clause, *id.* at 2—to all the claims, *id.* at 10. It makes no sense to say the very provision Judge Mueller found to apply to, and require transfer of, all of Morgan Tire's claims would not also apply to require application of the parties' choice of law to those claims. Nor are there "extraordinary circumstances," *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 817 (1988), or "convincing reasons," *Gillig v. Advanced Cardiovascular Sys.*, 67 F.3d 586, 590 (6th Cir. 1995), to depart from Judge Mueller's ruling.

Consistent with Sixth Circuit precedent and its own, the Court should apply Ohio law to all of Morgan Tire's claims, as they all arise from the parties' contracts. *See* ECF 56-1 at 6-7.

B. Morgan Tire Has Alleged No Breach of the County Subcontract

To defend its claim for breach of the County Subcontract, Morgan Tire argues the amended complaint and Exhibit C also do not mean what they say. ECF 57 at 5-9. This is not true. Both say Goodyear expressly conditioned its support of Morgan Tire's bid for the County Contract on Morgan Tire's "compliance" with the Retread Agreement, and Morgan Tire agreed to that condition. ECF 54-3 at 2; ECF 54 ¶¶ 26-27; *see also* ECF 56-1 at 4-6, 8-9. No inference or interpretation of the County Contract, as it is alleged, is required to reach this conclusion.

This is also why, even if California law applied (it does not), *Drennan v. Star Paving Co.*, 333 P.2d 757 (Cal. 1958), is no help to Morgan Tire. True, *Drennan* did find a binding, *oral* subcontract based on a contractor's submission of a successful bid in reliance on pricing offered by a subcontractor for the bid. *Id.* at 760. But, critically, it rejected the subcontractor's defense that its offer had been revocable (and revoked) because the subcontractor *failed to impose* that condition on its offer. *Id*. at 759. Here, Morgan Tire alleges that Goodyear *did impose* (and Morgan Tire agreed to) express, written conditions on its offer. ECF 54-3 at 2; ECF 54, ¶¶ 26-27.

The Court should reject Morgan Tire's speculation that Goodyear proposed to apply only part of the Retread Agreement to the County Subcontract or to exclude the County Subcontract from the Retread Agreement's requirements. ECF 57 at 6-7. Not only is it unsupported and not in the complaint, neither scenario is plausible in light of all the conditions the Retread Agreement imposes to protect Goodyear's quality, brand, intellectual property, etc. *See* ECF 56-1 at 2-3; ECF 54-2. *See RehabCare Group E. v. Plus Mgmt. Servs.*, No. 15-cv-01399, 2015 WL 8527412, at *1 (N.D. Ohio 2015); *GE Co.*, 2012 WL 2921566, at *4; *Moss*, 2014 WL 172530, at *1.

Nor does it matter, as Morgan Tire also speculates, that Exhibit C might not "represent the entirety of the County Subcontracts but merely . . . a summary of two of their terms." ECF 57 at 6 (emphasis deleted). Those specific terms are dispositive here. ECF 56-1 at 8-9.

C. Morgan Tire Has Alleged No Breach of the New Tire or Retread Agreements

Morgan Tire concedes Ohio law applies to its second claim for breach of the New Tire and Retread Agreements. ECF 57 at 3. And it too should be dismissed. *See* ECF 56-1 at 9-10.

The Court should also reject Morgan Tire's incorrect claim that Goodyear "conceded" the amended complaint "properly alleged" breach. ECF 57 at 9. To the contrary, Goodyear argued that Morgan Tire failed to allege any facts to plausibly support its claim that Goodyear breached the agreements (after terminating them) "by preventing [Morgan Tire] from selling its remaining inventory." ECF 56-1 at 9-10. Such facts are exactly what *Twombly* and *Iqbal* require. *Twombly*, 550 U.S. at 557; *Iqbal*, 556 U.S. at 678. And, Morgan Tire cannot supplement its allegations now through its brief. *GE Co.*, 2012 WL 2921566, at *4; *Moss*, 2014 WL 172530, at *1.[2]

D. Morgan Tire's Promissory Estoppel Claim Fails for the Same Reasons as Its Claim for Breach of the County Subcontract

Morgan Tire's defense of its promissory estoppel claim underscores why this claim is no different from its claim for breach of the County Subcontract, and should be dismissed for the same reasons. *See* § II.B, *supra*; ECF 56-1 at 10-11. Nor can Morgan Tire avoid dismissal by trying to obscure its allegations to manufacture a factual dispute over the terms of the alleged contracts. ECF 57 at 11-12.[3] This is a motion to dismiss, not for summary judgment, and the allegations in the amended complaint control. *GE Co.*, 2012 WL 2921566, at *4. Those allegations and their meaning are clear, *see* §§ II.A-B, *supra*; this claim should be dismissed.

E. Morgan Tire's Claim for Intentional Interference with Contract Remains Deficient

Ohio law applies to Morgan Tire's intentional interference with contract claim, and it should be dismissed. ECF 56-1 at 11-15. Indeed, Morgan Tire does not dispute (and so concedes)

[2] Defendants address Morgan Tire's bad faith termination arguments in section II.G, *infra*.

[3] The cases Morgan Tire cites do not say otherwise. *New Line Prods. v. Little Caesar Enter.*, 9 F. App'x 658 (9th Cir. 2001) (unpublished), held that a factual dispute barred summary judgment on plaintiff's promissory estoppel claim. *Errico v. Pac. Capital Bank*, 753 F. Supp. 2d 1034 (N.D. Cal. 2010), declined to dismiss claims based on the specific allegations in the complaint in that case. Neither stands for any broader proposition applicable here.

there is no claim for tortious interference under Ohio law when the contract subject to the alleged interference (here, the County Contract) is terminable at will. *Id.* at 14 (citing cases).

As for Morgan Tire's two other, incorrect points: First, Goodyear's lead argument, to be clear, is "[i]f 'a breach of contract does not create a tort claim,' *a fortiori* no tort claim can be created by terminating a contract pursuant to its own terms." ECF 56-1 at 11 (quoting *Textron Fin. Corp. v. Nationwide Mut. Ins. Co.*, 684 N.E.2d 1261, 1270 (Ohio Ct. App. 1996)). That is the rule under Ohio law, no matter Goodyear's motive (good or bad) for terminating the contracts, ECF 56-1 at 12 (citing cases), *see also* § II.G, *infra*, and no matter the impact on Morgan Tire, *id.* (citing *Ed Schory & Sons, Inc. v. Francis*, 662 N.E.2d 1074, 1082 (Ohio 1996) ("Firms that have negotiated contracts are entitled to enforce them to the letter, even to the great discomfort of their trading partners.")). Any other rule would allow a party to unilaterally rewrite the terms of bargained-for agreements, as Morgan Tire seeks to do here.[4]

Second, Morgan Tire cannot side-step this rule by making speculative claims that "Goodyear and/or Wingfoot" said unspecified things, on an uncertain date, to some of Morgan Tire's customers. Not only are the alleged statements too speculative to support an independent claim, ECF 56-1 at 12,[5] it is implausible that such statements could have affected Morgan Tire's

[4] Nor would California law, if applicable (it is not), require a different result. *See Erlich v. Menezes*, 981 P.2d 978, 983 (Cal. 1999) ("[C]onduct amounting to a breach of contract becomes tortious only when it also violates a duty independent of the contract arising from principles of tort law."); *BNSF Ry. Co. v. San Joaquin Valley R.R. Co.*, No. 08-CV-01086, 2011 WL 3328398, at *5 (E.D. Cal. 2011) ("Providing tort remedies in connection with a breach of contract is particularly inappropriate when the sole injury to the plaintiff is economic."); *see also* note 8, *infra*.

Morgan Tire cites *Erlich*, ECF 57 at 14, because it acknowledges a cause of action for tortious breach of contract when "one party intentionally breaches the contract intending or knowing that such a breach will cause severe, unmitigable harm in the form of mental anguish, personal hardship, or substantial consequential damages." 981 P.2d at 984. However, defendants are aware of no case applying that rule to claims between commercial parties, and only one case ever applying the rule at all. That case, *Bea v. Sw. Airlines Co.*, No. C 04-4937, 2005 WL 646074, at *4 (N.D. Cal. 2005), involved claims of racial and sexual harassment and is not relevant here. This is also consistent with the "California Supreme Court ha[ving] 'strongly suggested' that, in the absence of the violation of a duty arising under tort law independently of the breach of contract itself, lower courts should limit tort recovery in breach of contract actions to the insurance area." *Aqua Connect v. Code Rebel, LLC*, No. 11-CV-5764, 2013 WL 3820544, at *4 (C.D. Cal. 2013) (quoting *BNSF Ry.*, 2011 WL 3328398, at *6).

[5] Morgan Tire's claim, ECF 57 at 14 n.4, that Rule 9(b)'s heightened pleading standard does *not* apply to its false-statement allegations is wrong. *See Smith v. Bank of Am. Corp.*, 485 F. App'x 749, 752 (6th Cir. 2012). The

ability to supply Goodyear's products to customers—*after* Goodyear terminated Morgan Tire, as alleged. ECF 56-1 at 15. Indeed, Morgan Tire specifically alleges that Goodyear's termination of the contracts was the "direct and proximate" cause of Morgan Tire's failure to fulfill the County Contracts, ECF 54 ¶ 40, and that Goodyear made the claimed statements only *after* the termination. *Id.* ¶¶ 41-42, 44, 76. Morgan Tire's assertion that these vaguely pled comments constitute interference or caused any injury is thus both implausible and inconsistent with its allegations. *Mehta v. Target Corp.*, 74 F. Supp. 3d 858, 860 (N.D. Ohio 2015) ("The standard articulated in *Iqbal* and *Twombly* is designed to screen out more than 'little green men' cases; the standard is designed to screen out cases that, while not utterly impossible, are implausible.") (quoting *Courie v. Alcoa Wheel & Forged Prods.*, 577 F.3d 625, 629 (6th Cir. 2009)).

F. Morgan Tire's Latest Claim for Intentional Interference with Prospective Business Advantage Is Not Alleged in the Amended Complaint

Morgan Tire's overhaul of its claim for intentional interference with prospective business advantage also fails. ECF 57 at 15-16. Morgan Tire no longer asserts (as its amended complaint does, ECF 54 ¶¶ 81-88) that defendants' alleged statements interfered with its sale of *Goodyear's* products. (That claim fails for the reasons in defendants' motion, ECF 56-1 at 15-16.) Morgan Tire now claims defendants' "disparagement of Morgan Tire" and *unspecified* "other tortious interference"—occurring *after* (and not based on) Goodyear's termination of the dealer contracts, ECF 57 at 4-5—delayed it from being able to sell "*different* brands of new and retread tires" to the Local Governments and "several of Goodyear's former National Accounts." *Id.* at 15-16 (emphasis added). Morgan Tire's brand-new take on this claim fares no better than its last.

---

case Morgan Tire cites, *Schumacher v. State Auto. Mut. Ins. Co.*, 47 F. Supp. 3d 618, 628 (S.D. Ohio 2014), involved *negligent*, not intentional, misrepresentations and is inapposite. Nor can Morgan Tire avoid Rule 9(b) by denying its allegations sound in fraud here, but characterizing them as fraud for its § 17200 claim. ECF 57 at 19.

Morgan Tire also cannot avoid Rule 9(b) by claiming "details of the[] conversations . . . are in the possession of Defendants and will be the subject of discovery." ECF 57 at 14, n.4. That is exactly the "fishing expedition" Rule 9(b) is designed to prevent. *See Republic Bank & Tr. Co. v. Bear Stearns & Co.*, 683 F.3d 239, 248 (6th Cir. 2012).

First, there are no allegations in the amended complaint to support this claim, and Morgan Tire cannot amend its complaint with its brief. *GE Co.*, 2012 WL 2921566, at *4; *Moss*, 2014 WL 172530, at *1. This new claim should be dismissed for that reason alone.

Second, even if California law applied, as Morgan Tire incorrectly argues, ECF 57 at 3-5, Morgan Tire pleads no independently tortious conduct to support it, as California law requires. *Della Penna v. Toyota Motor Sales, U.S.A., Inc.*, 902 P.2d 740, 751 (Cal. 1995). This new claim ("win back," ECF 57 at 16) rings of competition. And business competition is not actionable. *Korea Supply Co. v. Lockheed Martin Corp.*, 63 P.3d 937, 954-55 (Cal. 2003).[6] Nor does Morgan Tire plead any facts to show causation or damage. Rather, Morgan Tire claims it "succeeded" in winning back business, adding only the conclusory assertion that it "would have had more and earlier . . . success[] if not for Defendants' interference." ECF 57 at 16. This is not enough. *Twombly*, 550 U.S. at 555; *Gritton v. Disponett*, 332 F. App'x 232, 236 (6th Cir. 2009).

G. Morgan Tire's Claim for Breach of the Implied Covenant of Good Faith and Fair Dealing Fails on the Terms of the Contracts Alleged in the Amended Complaint

Morgan Tire rests its claim for breach of the covenant of good faith and fair dealing on a misreading of cases cited in defendants' motion and a pair of cases that are no longer good law, if they ever were. ECF 57 at 16-18. As before, it should be dismissed. ECF 56-1 at 16-17.

Defendants' cases do not "speak merely to the inability to maintain a claim for breach of the implied duty of good faith and fair dealing when one has not asserted a claim for breach of contract." ECF 57 at 16. Rather, they say a breach-of-the-covenant claim "cannot stand alone as a separate *cause of action*"; "a claim for breach of contract subsumes [an] accompanying claim

[6] Indeed, the only "disparagement" in which Wingfoot is now alleged to have engaged is providing pricing information to customers to which Morgan Tire now says it was competing to sell other tire brands' products. That is the very definition of non-actionable competition. *Della Pena*, 901 P.2d at 740. So even if this new claim is credited (and it should not be), it should be dismissed against Wingfoot.

The same rule applies under Ohio law. *E.g.*, *Hoyt, Inc. v. Gordon & Assocs., Inc.*, 662 N.E.2d 1088, 1096-97 (Ohio Ct. App. 1995); *Havensure, L.L.C. v. Prudential Ins. Co. of Am.*, 595 F.3d 312, 316-17 (6th Cir. 2010).

for breach of the duty of good faith and fair dealing." *Krukrubo v. Fifth Third Bank*, 2007-Ohio-7007, ¶ 19 (emphasis added); *Ireton v. JTD Realty Inv.*, 944 N.E.2d 1238, 1255 (Ohio Com. Pl. 2010). For that reason, the Supreme Court of Ohio holds, "[t]here can be no implied covenants in a contract in relation to any matter specifically covered by the written terms of the contract itself," *e.g.*, the termination provisions in Morgan Tire's alleged Goodyear contracts. *Hamilton Ins. Servs. v. Nationwide Ins. Cos.*, 714 N.E.2d 898, 901 (Ohio 1999); *see* ECF 56-1 at 16-17.

Nor, as Morgan Tire contends, does Ohio law limit the exercise of at-will termination provisions based on motive (good or bad). To the contrary, "[t]he case law in Ohio supports the proposition that, where," as in this case, "termination of a contract may be done by either party for any reason whatsoever, there will be *no inquiry into the motive for termination as it is irrelevant*." *Midwestern Indem. Co. v. Luft & Assocs. Ins. Agency*, No. 87-AP-541, 1987 WL 31285, at *2 (Ohio Ct. App. 1987) (emphasis added); *see also* ECF 56-1 at 12 (citing cases).[7]

Neither of the 40-year-old cases Morgan Tire cites, ECF 57 at 17, says otherwise. *Kezdi v. Nationwide Ins. Co.*, No. 35683, 1977 WL 201250 (Ohio Ct. App. 1977), does not rule on the issue; it says, in dictum, that "[s]ome courts have held that such a contract may not be terminated in bad faith," *id.* at *4, but identifies only *Randolph v. New England Mut. Life Ins. Co.*, 526 F.2d 1383, 1385-86 (6th Cir. 1975), the other case cited by Morgan Tire. Yet *Randolph* does not help Morgan Tire, either. In that case, the Sixth Circuit tried to predict how Ohio courts might later

[7] *See also Hamilton*, 714 N.E.2d at 901 ("[T]o infer that termination may be based only upon just cause would directly contradict the express terms of the [contract]."); *Ed Schory*, 662 N.E.2d at 1082 ("Although courts often refer to the obligation of good faith that exists in every contractual relation, . . . this is not an invitation to the court to decide whether one party ought to have exercised privileges expressly reserved in the document."); *Myers v. Evergreen Land Dev. Ltd.*, No. 07 MA 123, 2008 WL 650774, at *5 (Ohio Ct. App. 2008) ("Thus, the duty is not imposed when a matter is specifically covered by the written terms of a contract."); *DavCo Acquisition Holding v. Wendy's Int'l*, No. 07-CV-1064, 2008 WL 755283, at *7 (S.D. Ohio 2008) ("In addition, the implied covenant of good faith and fair dealing does not apply where a party to the contract has the absolute and exclusive authority to make the decision at issue."); *Saad v. GE HFS Holdings*, No. 03-CV-2557, 2006 WL 2711797, at *8 (N.D. Ohio 2006) ("[T]his court is drawn to the inescapable conclusion that when a party exercises its rights according to the written terms of a contract, it cannot be said to be acting in bad faith and any alleged promises that contradict those terms cannot be taken into consideration."), *aff'd*, 366 F. App'x 593 (6th Cir. 2010).

rule on "bad faith" termination claims. *Id.* at 1386-87. It guessed wrong. As explained in *Nw. Fin. Agency v. Transamerica Occid'l Life Ins. Co.*, 773 F. Supp. 75, 80 (S.D. Ohio 1991):

> *Randolph* was [decided] at a time when the case law was less clear. However, since that time, several courts, both state and federal, have criticized, distinguished and narrowed *Randolph*. It is apparent . . . that the State of Ohio has not embraced the plaintiff's request for an exception to the at will doctrine based upon bad faith termination.

Id. at 80-81; *see also GM Corp. v. Mahoning Valley Sanitary Dist.*, 1985 WL 13944, at *5, 780 F.2d 1021 (6th Cir. 1985) (table) (criticizing *Randolph* as wrongly decided); note 7, *supra*.[8]

The cases reflecting actual Ohio also law devastate Morgan Tire's arguments—made with no citation, ECF 57 at 18—that the covenant overrides the express terms of the parties' alleged dealer contracts either to allow Morgan Tire to recover lost investments resulting from the termination (which the contracts expressly prohibit, ECF 56-1 at 5, 8-9) or to impose an inventory buy-back requirement nowhere found in the contracts (which the integration clauses in the contracts prohibit, *id.* at 5). Such after-the-fact amendments to allegedly "valid and enforceable" contracts are clearly *prohibited* by Ohio law. *Id.* at 8.

H. Morgan Tire's Latest § 17200 Claim Is Not Alleged in the Amended Complaint

Morgan Tire does not dispute (and so concedes) that, if Ohio law applies to its § 17200 claim (it does, *see* § II.A), the claim must be dismissed, and that, even if California law applies (it does not, *id.*), it failed to state a § 17200 claim based on "unfair" conduct. ECF 56-1 at 17-20. That is the only type of § 17200 claim Morgan Tire alleged,[9] and so the claim must be dismissed.

Ignoring its allegations in the amended complaint, Morgan Tire now argues its § 17200 claim is based on "unlawful" or "fraudulent," not "unfair," conduct. This fails for two reasons:

[8] California law, not applicable here, is in accord. *See Applied Equip. Corp. v. Litton Saudi Arabia Ltd.*, 869 P.2d 454, 461 (Cal. 1994) ("[T]he law generally does not distinguish between good and bad motives for breaching a contract. . . . In any case, motivation is irrelevant."); *JRS Prods., Inc. v. Matsushita Elec. Corp. of Am.*, 8 Cal. Rptr. 3d 840, 852 (Ct. App. 2004) (same); *see also Symbolic Aviation, Inc. v. PNCEF, LLC*, No. 10-CV-1228, 2010 WL 3584509, at *5 (S.D. Cal. 2010) (finding Ohio and California law on this issue to be the same).

[9] *See, e.g.*, ECF 54 ¶ 96 (Morgan Tire terminated for "not ceas[ing] negotiations with Continental"), ¶ 101 (Goodyear "did not want Continental retread operations gaining a foothold"); *see also* ¶¶ 97, 102-104.

First, the amended complaint alleges no "unlawful conduct." The only conduct Morgan Tire identifies is defendants' alleged interference. ECF 57 at 18-19. But that claimed conduct is not unlawful (*see* §§ II.E-F, *supra*; ECF 56-1 at 11-16), and so cannot provide the "predicate unlawful act" this new, brief-based claim requires. *Snyder v. Nationstar Mortg. LLC*, No. 15-CV-3049, 2015 WL 7075622, at *10 (N.D. Cal. 2015).

Second, the amended complaint alleges no "fraudulent conduct." Its allegations regarding defendants' claimed statements fail to plead a predicate claim for fraud with particularity as Rule 9(b) requires. *See* § II.E, *supra*; *see also* ECF 56-1 at 12; *Horen v. Bd. of Educ. of Toledo Pub. Sch. Dist.*, 948 F. Supp. 2d 793, 816 (N.D. Ohio 2013) ("'[A]t a minimum Rule 9(b) requires that the plaintiff specify the "who, what, when, where, and how" of the alleged fraud.'" (quoting *Sanderson v. HCA-The Healthcare Co.*, 447 F.3d 873, 877 (6th Cir. 2006)).

Yet even if they did, this new claim would still fail. The California Supreme Court has made clear that fraud-based § 17200 claims must plead "actual reliance" *by the plaintiff* on the allegedly false statement. *In re Tobacco II Cases*, 207 P.3d 20, 39 (Cal. 2009) (plaintiff must show "defendant's misrepresentation is an '*immediate cause*' of the *plaintiff's* conduct" (emphasis added, citation omitted)). Because Morgan Tire alleges the defendants' statements were made to Morgan Tire's customers, not to Morgan Tire, it has no claim.[10]

III. CONCLUSION

For all these reasons, and those stated in defendants' opening brief, defendants respectfully request that the Court dismiss the amended complaint in its entirety with prejudice.

[10] This is the majority rule. *See, e.g.*, *L.A. Taxi Coop. v. Uber Techs., Inc.*, No. 15-CV-01257, 2015 WL 4397706, at *9 (N.D. Cal. 2015). *VP Racing Fuels v. Gen. Petroleum Corp.*, No. 09-CV-02067, 2010 WL 1611398 (E.D. Cal. 2010), cited by Morgan Tire, appears to be the only case not to follow the ruling in the *Tobacco II Cases*. The claims in the other case Morgan Tire cites, *Heartland Payment Sys. v. Mercury Payment Sys.*, No. C 14-0437, 2015 WL 3377662 (N.D. Cal. 2015), alleged misrepresentations to *both the plaintiff competitor and its customers*, *id.* at *7, so the case is consistent with the majority rule and does not support Morgan Tire's claim.

Dated: February 5, 2016

Respectfully submitted,

/s/ Emmett E. Robinson
Tracy K. Stratford (0069457)
Brian K. Grube (0068846)
Emmett E. Robinson (0088537)
JONES DAY
North Point
901 Lakeside Avenue
Cleveland, OH 44114.1190
Telephone: 216.586.3939
Facsimile: 216.579.0212

Attorneys for Defendants The Goodyear Tire & Rubber Company and Wingfoot Commercial Tire Systems, LLC

LOCAL RULE 7.1 CERTIFICATION

Pursuant to the Court's Initial Standing Order, ECF 46 at 3, the page limitation for this Reply is 10 pages. I certify that the foregoing Reply adheres to this limitation and is a total of 10 pages in length.

Dated: February 5, 2016

/s/ Emmett E. Robinson
One of the Attorneys for Defendants The Goodyear Tire & Rubber Company and Wingfoot Commercial Tire Systems, LLC

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on February 5, 2016, a true and correct copy of the foregoing Reply in Support of Defendants' Motion to Dismiss Amended Complaint was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. All other parties will be served by regular U.S. mail. Parties may access this filing through the Court's system.

Dated: February 5, 2016

/s/ Emmett E. Robinson
One of the Attorneys for Defendants The Goodyear Tire & Rubber Company and Wingfoot Commercial Tire Systems, LLC