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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES—GENERAL

Case No.	**EDCV 18-1877 JGB (KKx)**	Date	February 7, 2022
Title	***Steve Zuehlsdorf v. FCA US LLC***		

Present: The Honorable	JESUS G. BERNAL, UNITED STATES DISTRICT JUDGE

MAYNOR GALVEZ	Not Reported
Deputy Clerk	Court Reporter

Attorney(s) Present for Plaintiff(s):	Attorney(s) Present for Defendant(s):
None Present	None Present

Proceedings: **Order (1) GRANTING IN PART AND DENYING IN PART Defendant's Motion to Strike the Expert Testimony of Michael Stapleford (Dkt. No. 101); (2) GRANTING Defendant's Motion to Strike the Expert Testimony of Stephen B. Boyles (Dkt. No. 102); (3) GRANTING Defendants' Motion for Summary Judgment (Dkt. No. 89); (4) DENYING Plaintiff's Ex Parte Application to Supplement Opposition to Defendant's Motion for Summary Judgment (Dkt. No. 97); (5) GRANTING Plaintiff's Motion to File Opposition Under Seal (Dkt. No. 90); and (6) VACATING the February 14, 2022 Hearing (IN CHAMBERS)**

Before the Court are Defendant FCA US LLC's ("Defendant" or "FCA") (1) motion for summary judgment ("MSJ," Dkt. No. 89), (2) motion to strike the expert testimony of Michael Stapleford ("MTS 1," Dkt. No. 101), and (3) motion to strike the expert testimony of Stephen B. Boyles ("MTS 2," Dkt. No. 102). Also before the Court is Plaintiff's motion to file opposition under seal (Dkt. No. 90) and ex parte application to supplement expert reports. ("Ex Parte Application," Dkt. No. 97.) The Court finds these matters appropriate for resolution without a hearing. See Fed. R. Civ. P. 78; L.R. 7-15. After considering the papers filed in support of and in opposition to the motions, the Court GRANTS IN PART and DENIES IN PART MTS 1, GRANTS MTS 2, GRANTS the MSJ, GRANTS Plaintiff's motion to file opposition under seal, and DENIES Plaintiff's Ex Parte Application. The February 14, 2022 hearing is vacated.

I. BACKGROUND

A. Procedural Background

The background to this case is described in greater detail in the Court's prior orders. (See "August 2019 Order," Dkt. No. 52.) Briefly, on August 31, 2018, Plaintiff Steve Zuehlsdorf ("Plaintiff" or "Mr. Zuehlsdorf") filed this action, individually and on behalf of a class, against FCA. ("Complaint," Dkt. No. 1.) Mr. Zuehlsdorf filed an amended complaint as of right on November 2, 2018 ("FAC," Dkt. No. 24). He filed a second amended complaint on November 21, 2018. ("SAC," Dkt. No. 27.)

On December 14, 2018, FCA moved to dismiss the SAC. (Dkt. No. 30.) The Court granted-in-part and denied-in-part the motion to dismiss with leave to amend. ("April 2019 Order," Dkt. No. 40.) Mr. Zuehlsdorf filed a third and operative complaint on May 13, 2019. ("TAC," Dkt. No. 43.)

The TAC contains four causes of action: 1) violations of California's Consumers Legal Remedies Act ("CLRA"), Cal. Civ. Code § 1750, et seq.; 2) violation of Cal. Bus. & Prof. Code § 17200, et seq. ("UCL"); 3) breach of implied warranty in violation of the Song-Beverly Consumer Warranty Act ("Song-Beverly Act"), Cal. Civ. Code §§ 1792 and 1791.1, et seq.; and 4) breach of implied warranty in violation of Magnuson-Moss Warranty Act ("MMWA"), 15 U.S.C. § 2303 et seq. (Id.) Plaintiff brings the putative class action "on behalf of all persons in the United States who purchased or leased any vehicle with a Jatco JF011E Continuously Variable Transmission [("CVT")] ("Class Vehicles") designed, manufactured, marketed, distributed, sold, warranted, and/or serviced by" Defendant. (TAC ¶ 1.) This Court has subject matter jurisdiction over this action pursuant to the Class Action Fairness Act of 2005 ("CAFA"), 28 U.S.C. § 1332(d)(2).

On June 6, 2019, Defendant filed a motion to dismiss, arguing that Plaintiff's claims for breach of implied warranty under the Song-Beverly Act and MMWA and the class allegations should be dismissed for failure to plead defect symptoms with specificity and for lack of jurisdiction. (Dkt. No. 30.) On June 28, 2019, Plaintiff opposed. ("Opp.," Dkt. No. 50.) Defendant replied on July 12, 2019. ("Reply," Dkt. No. 51.) The Court denied Defendant's motion. (See August 2019 Order.)

B. Motions to Strike

1. Motion to Strike 1

On September 29, 2021, Defendant moved to strike the report of Plaintiff's expert Michael Stapleford. ("MTS 1," Dkt. No. 101.) Defendant filed the following in support of the motion:

- Declaration of Thomas L. Azar, Jr., ("Azar Declaration," Dkt. No. 101-1);

- Excerpts from Deposition of Michael Stapleford, Part 1 ("Stapleford Depo. 1," Dkt. No. 101-2);
- Excerpts from Deposition of Michael Stapleford, Part 2 ("Stapleford Depo. 2," Dkt. No. 101-3);
- Excerpts from Deposition of Michael Stapleford, Part 3 ("Stapleford Depo. 3," Dkt. No. 101-4); and
- Excerpts from Deposition of Stephen B. Boyles, ("Defendant's Boyles Depo. Excerpts," Dkt. No. 101-5, Ex. B.)

Plaintiff opposed on October 15, 2021. ("Opp. to MTS 1," Dkt. No. 105.) Defendant replied on October 22, 2021. ("MTS 1 Reply," Dkt. No. 108.)

2. Motion to Strike 2

On September 29, 2021, Defendant also filed a motion to strike the report of Plaintiff's expert Steven B. Boyles. ("MTS 2," Dkt. No. 102.) Defendant filed the following documents in support of the motion:

- Declaration of Thomas L. Azar, Jr., ("Azar Declaration," Dkt. No. 102-1);
- Excerpts from Deposition of Steven B. Boyles, ("Defendant's Boyle Depo. Excerpts," Dkt. No. 102-2, Ex. A); and
- Excerpts from Deposition of Michael Stapleford, ("Defendant's Stapleford Depo. Excerpts," Dkt. No. 102-3, Ex. B.)

Plaintiff opposed on October 15, 2021. ("Opp. to MTS 2," Dkt. No. 106.) Defendant replied on October 22, 2021. ("MTS 2 Reply," Dkt. No. 109.)

C. Motion for Summary Judgment

On July 2, 2021, Defendant moved for summary judgment. ("MSJ," Dkt. No. 89.) In support of the MSJ, Defendant filed the following:

- Defendant's statement of undisputed facts and conclusions of law ("DSUF," Dkt. No. 89-1);
- Declaration of Ronald Kruger ("Kruger MSJ Declaration," Dkt. No. 89-2);
- Declaration of Thomas L. Azar ("Azar MSJ Declaration," Dkt. No. 89-7);
- "MSJ Exhibit 1," Dkt. No. 89-3;
- "MSJ Exhibit 2," Dkt. No. 89-4;
- "MSJ Exhibit 3," Dkt. No. 89-5;
- "MSJ Exhibit 4," Dkt. No. 89-6; and
- Plaintiff Deposition Excerpts and Exhibits ("Plaintiff Depo.," Dkt. No. 89-8.)

On August 16, 2021, Plaintiff opposed the MSJ. ("MSJ Opp.," Dkt. No. 92.) Plaintiff also submitted an ex parte application to file its MSJ Opp. under seal. (Dkt. No. 90.) In support of the MSJ Opposition, Plaintiff filed a "Statement of Genuine Disputes of Material Fact" ("PSF," Dkt. No. 92-1), the declaration of Tarek Zohdy ("Zohdy MSJ Declaration," Dkt. No. 92-2), Plaintiff's evidentiary objections ("Plaintiff's Ev. Objs.," Dkt. No. 92-9), and six exhibits ("MSJ Exhibits A-F," Dkt. Nos. 92-3–8).

On September 28, 2021, Plaintiff filed an ex parte application to supplement Plaintiff's Opposition to Defendant's Motion for Summary Judgment with supplemental expert reports of Michael Stapleford and Steven Boyles. ("Ex Parte," Dkt. No. 97.) In support of the application, Plaintiff filed the following documents:

- Declaration of Laura E. Goolsby, ("Goolsby Declaration," Dkt. No. 97-1);
- Email exchange between counsel regarding the 30(b)(6) deposition, ("30(b)(6) Emails," Dkt. No. 97-2);
- CVT Oil Level Check Procedure, ("Oil Level Check Procedure," Dkt. No. 97-3);
- Supplemental Expert Report of Michael Stapleford, ("Stapleford Supp. Report," Dkt. No. 97-4);
- Supplemental Expert Report of Stephen Boyles, ("Boyles Supp. Report," Dkt. No. 97-5); and
- Ex Parte Notice, (Dkt. No. 97-6), and five exhibits ("Ex Parte Exhibits A-E," Dkt. Nos. 97-2–6).

Defendant opposed on September 29, 2021. ("Opp. to Ex Parte," Dkt. No. 99.) Plaintiff replied on September 29, 2021. ("Ex Parte Reply," Dkt. No. 103.) In support of the reply, Plaintiff filed the following documents:

- Declaration of Laura E. Goolsby, ("Goolsby Reply Decl.," Dkt. No. 103-1);
- Excerpts from Deposition of Steven Boyles, ("Boyles Depo. Excerpts," Dkt. No. 103-2, Ex. A); and
- Excerpts from Deposition of Michael Stapleford, ("Stapleford Depo. Excerpts," Dkt. No. 103-3, Ex. B.)

On September 29, 2021, Defendant replied to the MSJ. ("MSJ Reply," Dkt. No. 100.) In support of the MSJ Reply, Defendant filed the following documents:

- Supplemental Declaration of Thomas L. Azar ("Supplemental Azar Declaration," Dkt. No. 100-1);
- Supplemental Declaration of Ronald Kruger ("Supplemental Kruger Declaration," Dkt. No. 100-2);
- Defendant's Evidentiary Objections to Plaintiff's Summary Judgment Evidence ("Def.'s Ev. Objs.," Dkt. No. 100-3); and

- Response to Plaintiff's Statement of Genuine Disputes of Material Facts (Dkt. No. 100-4).

Plaintiff replied in support of its ex parte application on September 29, 2021, (Dkt. No. 103), along with a declaration of Laura E. Goolsby ("Goolsby Declaration in Support of Plaintiff's Ex Parte Reply," Dkt. No. 103-1) and two exhibits. ("Ex Parte Reply Exhibits A and B," Dkt. Nos. 103-2, 3.)

D. Undisputed Facts

On October 27, 2012, Mr. Zuehlsdorf purchased a 2012 Jeep Compass vehicle from Redlands Chrysler Jeep Dodge Ram. (Defendant's Statement of Undisputed Facts, "DSUF," Dkt. No. 89-1, ¶¶ 1-2.) He selected the vehicle for its aesthetic appeal, a $2,500 rebate, and the new car warranty. (Id. ¶ 3.) Before purchasing the vehicle, Mr. Zuehlsdorf remembered having reviewed only the Jeep website and the vehicle's window sticker. (Id. ¶ 3.) The vehicle's User's Guide and Owner's Manual for model-year 2012 Jeep Compass vehicles were available on the Jeep website throughout 2012. (Id. ¶ 100.) Plaintiff received copies of the User's Guide and Owner's Manual for his vehicle at the time of purchase. (Id. ¶¶ 96-97.) The User's Guide for Mr. Zuehlsdorf's vehicle states:

> AUTOMATIC TRANSMISSION OVERHEATING
>
> - During sustained high-speed driving or trailer towing up long grades on hot days, the automatic transmission oil may become too hot.
> - When the transmission over-heat warning light [] turns on, you will experience reduced performance until the automatic transmission cools down. Once the transmission has cooled down and the light turns off, you may continue to drive normally. If the high speed is maintained, the overheating will continue to occur.
> - If the overheating continues, it may become necessary to stop the vehicle and run the engine at idle with the transmission in NEUTRAL until the light turns off.

(Id. ¶ 103.)

> The Owner's Manual for Plaintiff's vehicle states:
>
> "During sustained high-speed driving or trailer towing up long grades on hot days, the automatic transmission oil may become too hot. If this happens, the transmission overheat indicator light will come on, and the vehicle will slow slightly until the transmission cools down enough to allow a return to the requested speed. This is

> done to prevent transmission damage due to overheating. If the high speed is maintained, the overheating may reoccur, as before, in a cyclic fashion."

(Id. ¶ 103.)

Since the vehicle purchase, Mr. Zuehlsdorf read "a lot of stuff" in the User's Guide and has consulted it periodically. (Id. ¶¶ 101-02.) When he purchased the vehicle, he understood that vehicle components wear out over time and sometimes require repair or replacement. (Id. ¶ 9.)

The subject vehicle has been Mr. Zuehlsdorf's primary mode of transportation since he purchased it; he drives it between four to six days a week. (Id. ¶¶ 77-80.)

Mr. Zuehlsdorf's vehicle has "always" exhibited a lack of acceleration since the car was purchased in 2012. (Id. ¶¶ 63, 66.) He believes he noticed the lack of acceleration the first time he merged onto a freeway or passed another vehicle. (Id. ¶ 64.) The "lag" or lack of acceleration has not changed since the vehicle purchase. Mr. Zuehlsdorf patroned the Redlands dealership on several occasions from 2012 to 2017 for oil changes, car washes, and other maintenance upkeep. (Id. ¶¶ 68-74.) Mr. Zuehlsdorf has never complained about the lag or lack of acceleration in the vehicle to the Redlands dealership, or to any other dealership or mechanic. (Id. ¶ 75.) He has never sought any diagnosis or repair from the lag or lack of acceleration either. (Id. ¶ 76.)

Mr. Zuehlsdorf's vehicle transmission has overheated twice since he purchased the car. (Id. ¶ 11.) The first overheating incident occurred in late August 2014 on the I-15 en route to Las Vegas while traveling at least 65 miles per hour. (Id. ¶¶ 12, 14-15.) He has driven to Las Vegas about four to six times per year. (Id. ¶ 81.) On this occasion, he was traveling for an extended time in very hot weather, approximately 100 degrees, going uphill on a long grade. (Id. ¶¶ 16-18.) His vehicle started to slow, the temperature gauge elevated, and the indicator light turned red. (Id. ¶ 20.) He exited the highway and allowed the vehicle to cool for approximately 30 minutes before he resumed travel to Las Vegas without incident. (Id. ¶¶ 21-23.) His car had approximately 20,000 miles on it at the time. (Id. ¶ 13.)

Once he returned from Las Vegas, he made an appointment at the Redlands dealership. (Id. ¶ 24.) On September 16, 2014, the Redlands dealership replaced the cooler bypass valve and adjusted the level of the transmission fluid in the vehicle. (Id. ¶ 25.) Defendant paid for the repair. (Id. ¶¶ 27-28.) There were no overheating incidents again until June 2018. (Id. ¶ 34.)

Mr. Zuehlsdorf's vehicle overheated again in 2018, on the same highway (I-15) headed to Las Vegas. (Id. ¶ 36.) He was again traveling at least 65 miles per hour, in about 100-degree weather, going uphill on a long grade. (Id. ¶¶ 37-40.) The transmission overheat light illuminated red and the vehicle speed slowed. (Id. ¶ 41.) This time, Mr. Zuehlsdorf heard a

"loud whining sound." (Id. ¶ 42.) Although he was able to complete his drive to Las Vegas after letting the vehicle cool down for a while, the whining sound continued. (Id. ¶ 44.)

As he headed home from his trip, he stopped at Sahara Dodge in Las Vegas. (Id. ¶ 45.) The Sahara dealership did not service, diagnose, or investigate Mr. Zuehlsdorf's vehicle—the interaction was limited to a conversation between Mr. Zuehlsdorf and an unnamed service manager. (Id. ¶¶ 46-47.) The service manager told him that the vehicle's transmission was a "closed system." (Id. ¶ 48.) Mr. Zuehlsdorf understood that "closed system" to mean that the vehicle "can't be worked on, period." (Id. ¶ 49.)

On the return trip home to Los Angeles, the vehicle displayed no issues. (Id. ¶ 50.) Mr. Zuehlsdorf did not contact the Redlands dealership, or any other dealership, about the transmission overheating incident in 2018. (Id. ¶ 51.)

After filing the instant case, Mr. Zuehlsdorf's vehicle started to shudder. (Id. ¶ 58.) The shuddering is intermittent and occurs only when the vehicle's brakes are applied. (Id. ¶ 60.) He has never reported any shuddering to any mechanic or dealership or sought any diagnosis or repair of it. (Id. ¶ 61.) His vehicle has never exhibited any transmission jerking. (Id. ¶ 57.)

E. Evidentiary Objections

"A trial court can only consider admissible evidence in ruling on a motion for summary judgment." Orr v. Bank of America, NT & SA, 285 F.3d 764, 773 (9th Cir. 2002); see Fed. R. Civ. P. 56(e). At the summary judgment stage, district courts consider evidence with content that would be admissible at trial, even if the form of the evidence would not be admissible at trial. See, e.g., Fraser v. Goodale, 342 F.3d 1032, 1036 (9th Cir. 2003).

Defendant and Plaintiff object to numerous paragraphs in each party's statement of undisputed facts on the grounds that the evidence is incomplete, misleading, or irrelevant. (See Plaintiffs' Ev. Objs., Dkt. No. 92-9; Def.'s Ev. Objs., Dkt. No. 100-3). The Court need not consider "redundant" objections, such as "objections to evidence on the ground that it is irrelevant, speculative, and/or argumentative, or that it constitutes an improper legal conclusion [which] are all duplicative of the summary judgment standard itself." Burch v. Regents of Univ. of Cal., 433 F. Supp. 2d 1110, 1119 (E.D. Cal. 2006). Thus, the Court does not consider any objections on the ground that the evidence is irrelevant or speculative. These objections are challenges to the characterization of the evidence and are improper on a motion for summary judgment. The Court OVERRULES these objections.

Defendant objects to portions of Mr. Stapleford's expert testimony as improper testimony by an expert witness. (Def.'s Ev. Objs. at 1-5.) The Court discusses the admissibility of Mr. Stapleford's testimony below.

II. LEGAL STANDARD

A. Rule 56

Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). The moving party has the initial burden of identifying the portions of the pleadings and record that it believes demonstrate the absence of an issue of material fact. See Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Where the non-moving party bears the burden of proof at trial, the moving party need not produce evidence negating or disproving every essential element of the non-moving party's case. Id. at 325. Instead, the moving party need only prove there is an absence of evidence to support the nonmoving party's case. Id.; In re Oracle Corp. Sec. Litig., 627 F.3d 376, 387 (9th Cir. 2010). The moving party must show that "under the governing law, there can be but one reasonable conclusion as to the verdict." Anderson v. Liberty Lobbt, 477 U.S. 242, 250 (1986).

If the moving party has sustained its burden, the non-moving party must then show that there is a genuine issue of material fact that must be resolved at trial. Celotex, 477 U.S. at 324. The non-moving party must make an affirmative showing on all matters placed at issue by the motion as to which it has the burden of proof at trial. Celotex, 477 U.S. at 322; Anderson, 477 U.S. at 252. A genuine issue of material fact exists "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." Anderson, 477 U.S. at 248. "This burden is not a light one. The non-moving party must show more than the mere existence of a scintilla of evidence." In re Oracle, 627 F.3d at 387 (citing Anderson, 477 U.S. at 252).

Critically, a trial court "may only consider admissible evidence when reviewing a motion for summary judgment." Weil v. Citizens Telecom Servs. Co., LLC, 922 F.3d 993, 998 (9th Cir. 2019) (citing Orr v. Bank of America, NT & SA, 285 F.3d 764, 773 (9th Cir. 2002)); see Fed. R. Civ. Proc. 56(e). At the summary judgment stage, district courts consider evidence with content that would be admissible at trial, even if the form of the evidence would not be admissible at trial. See Fraser v. Goodale, 342 F.3d 1032, 1036 (9th Cir. 2003); Block v. City of Los Angeles, 253 F.3d 410, 418–19 (9th Cir. 2001).

When deciding a motion for summary judgment, the court construes the evidence in the light most favorable to the non-moving party. Barlow v. Ground, 943 F.2d 1132, 1135 (9th Cir. 1991). Thus, summary judgment for the moving party is proper when a "rational trier of fact" would not be able to find for the non-moving party based on the record taken as a whole. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

B. Fed. R. Evid. 702

Rule 702 provides that a qualified expert may testify if:

> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702. In Daubert v. Merrell Dow Pharmaceutical Inc., 509 U.S. 579, 589 (1993), the Supreme Court held that Rule 702 requires the district court to act as a gatekeeper to "ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." In Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 147 (1999), this "basic gatekeeping obligation" was extended to all expert testimony.

Determination of reliability is flexible. Id. at 153. "[W]hether Daubert's specific factors are, or are not, reasonable measures of reliability in a particular case is a matter that the law grants the trial judge broad latitude to determine." Id. If an expert's methodology is sound and his opinions satisfy the requirements of Rule 702, underlying factual disputes and questions concerning how much weight to give that expert's testimony are reserved for the jury. Primiano v. Cook, 598 F.3d 558, 565 (9th Cir. 2010).

III. EX PARTE APPLICATION AND MOTIONS TO STRIKE

A. Ex Parte Application

Mr. Zuehlsdorf filed an ex parte application to supplement his Opposition to FCA's motion for summary judgment with supplemental expert reports of both Michael Stapleford ("Mr. Stapleford") and Steven Boyle ("Mr. Boyle"). (See Ex Parte.) Mr. Zuehlsdorf claims that ex parte relief is necessary to avoid prejudice because it was not feasible for him to submit supplemental reports earlier. (Id.) He did not file supplemental reports until September 28, 2021. (See "Stapleford Supplemental Expert Report," Dkt. No. 97-4; "Boyles Supplemental Expert Report," Dkt. No. 97-5.)

Mr. Zuehlsdorf contends that Mr. Stapleford was not privy to critical information that FCA "deliberately" withheld. (Ex Parte at 7.) FCA allegedly withheld the information by its denial of the 30(b)(6) deposition before the initial expert designation deadline. FCA's delay denied Mr. Stapleford the opportunity to amend his expert report at an earlier time. Since Mr. Boyle's expert report is based on Stapleford's report, Mr. Boyle's report also could not have been amended earlier.

On June 4, 2021, Mr. Zuehlsdorf offered an ultimatum to FCA: either stipulate to continue the case deadlines, or Mr. Zuehlsdorf would seek leave of court, including a motion to compel the 30(b)(6) deposition. (30(b)(6) Emails, p. 23-24.) Mr. Zuehlsdorf's request for deposition dates in June was for "the first two weeks of June knowing that the parties have expert

disclosures due on the 22nd." (Id. at 24.) On June 9, 2021, Mr. Zuehlsdorf sent an email which appears to memorialize a suitable arrangement with FCA:

> You provided an additional compromise to stay all current deadlines while we brief Defendant's anticipated MSJ, and resetting a schedule after the Court has issued its opinion on MSJ. As I informed you this morning, we are amenable to that compromise with the caveat that we would still conduct the deposition of Defendant's designee as planned [on July 1, 2021] so that we get the discovery we need to oppose the MSJ.

(Id. at 5.) The joint stipulation filed on June 24, 2021 reflects this compromise. (Dkt. No. 89.)

Mr. Zuehlsdorf's ex parte application is unpersuasive. Even if FCA scheduled the 30(b)(6) deposition after the initial expert report deadline, Mr. Zuehlsdorf's experts had over a month to review the deposition testimony and amend their reports before his Opposition was due.[1] Mr. Zuehlsdorf knew FCA would move for summary judgment. He agreed to the June 24, 2021 joint stipulation which set a July 3, 2021 deadline for FCA to file an MSJ. (Dkt. No. 89.) Moreover, counsel's emails show that he explicitly negotiated the stipulated compromise with this exact scenario in mind—that he would obtain the 30(b)(6) testimony necessary for his MSJ Opposition.

As a result, the basis of Mr. Zuehlsdorf's ex parte application is questionable. Mr. Zuehlsdorf provides no credible reason as to why he had to wait until over a month after he filed the MSJ Opposition, let alone after FCA deposed *his* expert, to file an amended report. Mr. Zuehlsdorf presumably retained possession of its 30(b)(6) deposition transcript. Mr. Zuehlsdorf's explanation, however, implies that Mr. Stapleford learned the contents of the 30(b)(6) testimony **for the first time** during his deposition on September 13, 2021. (MTS 2 Opp. at 4.) That is squarely Mr. Zuehlsdorf's error.

For the reasons above, the Court DENIES Mr. Zuehlsdorf's Ex Parte Application to supplement his opposition to the MSJ.

B. Motion to Strike 1: Expert Testimony of Plaintiff's Expert Michael Stapleford

FCA moves to strike or exclude Plaintiff's Expert Michael Stapleford's testimony on two grounds: he is (1) unqualified and (2) his opinions and methodology are unreliable. (See MTS 1.) Mr. Stapleford is offered as an expert to testify on two different alleged defects: (1) the CVT "auxiliary cooler" defect and (2) the "fluid level specifications" defect. The Court agrees with

[1] Given that Mr. Stapleford amended his report a week after his deposition, a period of over a month was ample time to amend his expert report. (Ex Parte at 2; Goolsby Decl. ¶ 11, Ex. C.)

FCA that Mr. Stapleford's opinion as to the first defect should be stricken but not as to the second.

1. Qualifications

FCA maintains that Mr. Stapleford does not possess the qualifications to render opinions in this case. Specifically, FCA claims that Mr. Stapleford lacks training, education, and experience in in designing CVTs or any transmission components, and should not be able to testify about appropriate fluid specifications or cooling requirements. (MTS 1 at 14.)

According to his curriculum vitae, Mr. Stapleford possesses the following relevant qualifications: a Bachelor of Science degree in Mechanical Engineering from Cal Poly San Luis Obispo, (Dkt. No. 92-3, at p. 13) and is a registered professional engineer in California and Washington. (Id. at 14). He is also a member of multiple professional organizations. (Id. at 15.)

Mr. Stapleford represents that he has more than 15 years of experience in the fields of investigation, analysis and testimony in cases involving accident reconstruction, product defect and mechanical failure analysis. (Id. at 13.) As relevant here, he was a staff engineer for Vollmer-Gray Engineering Laboratories, Inc. for seven years. (Id.) His experience in that position includes "product safety analysis[,] accident reconstruction, commercial vehicle accident reconstruction – airbrake, powertrain," and "vehicle inspection and systems analysis." (Id.)

FCA asserts that Mr. Stapleford's generalized background does not qualify him to opine on CVTs in general, appropriate fluid specifications in CVTs, or cooling requirements in CVTs. (MTS 1 at 14.) Mr. Stapleford, however, is ASE certified in automatic transmission repair and has over 20 years of experience reviewing transmission repairs. (Stapleford Depo. 54:1-5.) Although his lack of CVT specialization is cause for concern, Mr. Stapleford's experience in transmission failures qualifies him as an expert in this case.

2. Reliability

FCA asserts that Mr. Stapleford's opinions are unreliable and must be excluded for the following reasons: (1) he has not examined Mr. Zuehlsdorf's vehicle and (2) he did not conduct testing or review data on fluid levels.

In Daubert, the Supreme Court articulated the following factors which bear on the reliability inquiry: (1) whether the expert's theory or technique can be and has been empirically tested; (2) whether the theory or technique has been subjected to peer review; (3) whether the known or potential error rate is acceptable; and (4) whether the theory or technique is generally accepted by the scientific community. Daubert, 509 U.S. at 592-93. These factors, however, are illustrative rather than exhaustive, and "may or may not be pertinent in assessing reliability, depending on the nature of the issue, the expert's particular expertise, and the subject of his testimony." Kumho Tire, 526 U.S. at 150 (quoting Daubert, 509 U.S. at 594.)

Mr. Zuehlsdorf cites Linares v. Crown Equipment Corp., 2017 WL 10403454, *11 (C.D. Cal. Sept. 13, 2017) to support his argument that Mr. Stapleford's training would make him competent to read available reports and provide an opinion, even if he did not conduct the experiments himself. Linares is inapplicable here. In Linares, the product at issue was a defective workplace forklift. (Id. at *1.) The Court found that the expert was properly qualified to opine on the safety of forklifts because he had extensive experience in safety engineering. (Id. at *10.) Thus, his experience with safety hazards related to the design and operation of forklifts provided the basis for him to draw an expert opinion from reading available reports. (Id. at *11.)

Material differences exist here that render Linares inapplicable in part. Mr. Stapleford states that he obtained a 2010 Dodge Caliber with a reported malfunctioning CVT transmission for test purposes. He noted a variety of issues that mirrored Mr. Zuehlsdorf's alleged vehicle issues but did not confirm whether the two vehicles had the same CVT transmissions. (Stapleford Decl. ¶¶ 12-15, Dkt. No. 92-3.) He also used this vehicle to conduct tests of fluid level specifications to develop his opinion on the fluid level defect.

Mr. Stapleford's decision to not conduct an examination of Mr. Zuehlsdorf's vehicle is fatal to his testimony regarding the first defect, the auxiliary cooler. His expert opinion concludes "Class Vehicles designed and sold with the 'auxiliary cooler' were defective, because they did not have the capacity to provide adequate cooling of the transmission in order to operate reliability without overheating." (Id. ¶ 27.) It appears as though Mr. Stapleford drew this conclusion from Mr. Zuehlsdorf's deposition, in which Mr. Zuehlsdorf recalls being advised that his vehicle "was equipped with only 'an auxiliary cooler.'" (Id. ¶ 23.) To resolve the alleged defect, Mr. Stapleford recommended the installation of an "external Condenser and Transmission Cooler" or "Cooler Bypass Valve" fix the Overheating problem. (Stapleford Depo. Excerpts 3, at 246:18 – 249:17.) In his deposition, Mr. Stapleford learned that Mr. Zuehlsdorf's vehicle already had the proposed condenser and bypass valve installed. (Id.) The Court considers this issue to ultimately bear on the relevancy determination rather than that of reliability.

FCA raises valid criticisms of Mr. Stapleford's expert opinion on the fluid level defect. Most of the challenges are directed at Mr. Stapleford's lack of testing or familiarity with the vehicle's specific fluid levels based on temperature. Although the Court partially shares this concern, FCA does not challenge the substance of Mr. Stapleford's fluid level theory.

While it is true that Mr. Stapleford's theory here does not satisfy the Daubert factors described above, the Court does not find these factors pertinent to the reliability of his testimony. His fluid level defect opinion is based on analysis of data and experience as an engineer working with automobile transmissions. White v. Ford Motor Co., 312 F.3d 998, 1007 (9th Cir. 2002) ("Although [the expert witness] had not done any experiments himself, his training would make him competent to read the [available] reports, and those reports supported the opinion he gave.")

3. Relevance

The Court determines that Mr. Stapleford's expert report and testimony as to the "auxiliary cooler defect" or defective cooling system (the first defect) should be excluded because it is irrelevant. His opinion was based on his understanding that the vehicle did not have an external cooler or a bypass system and his recommendation to fix the defect was to install both those items. Since Mr. Zuehlsdorf's vehicle does have those items, Mr. Stapleford's testimony is irrelevant.

As to Mr. Stapleford's testimony on the fluid level defect, the Court concludes that challenges are appropriately directed at the weight of his testimony, not its admissibility. The Supreme Court has emphasized that "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." Daubert, 509 U.S. at 596.

For the reasons stated above, the Court finds Mr. Stapleford's testimony regarding the fluid level defect meets, if barely, the standards of Rule 702.

C. Motion to Strike 2: Expert Testimony of Plaintiff's Expert Stephen B. Boyle

FCA moves to strike or exclude Plaintiff's Expert Steve Boyle's report and testimony on the grounds that he is unqualified, his methodology is unreliable, and the report and testimony are irrelevant. (See MTS 2.) The Court does not find it necessary to engage in a complete analysis of Mr. Boyle's qualifications and methodology since both parties agree that his report is predicated on Mr. Stapleford's testimony. (MTS 2 Opp. at 3-4.) The Court agrees that the report and testimony are irrelevant to the extent that they rely on Mr. Stapleford's now excluded testimony on the "auxiliary cooler defect" or cooling defect.

Mr. Boyle's report includes a formula to determine the "benefit of the bargain" cost theory. As Mr. Zuehlsdorf notes, the Ninth Circuit has deemed this model an appropriate expert method to determine damages in an automotive defect case. See Nguyen v. Nissan N. Am. Inc., 932 F.3d 811, 817 (9th Cir. 2019). The reliability of Mr. Boyle's methodology is not a matter of immediate concern. The Court finds other issues with his testimony.

Mr. Boyle concedes that he has not been engaged to independently generate the variables within the formula and wholly relies on Mr. Stapleford's testimony on the auxiliary cooler defect to determine variable values. ("Boyle Depo.," Dkt. No. 102-2, at 77:5-8.) Plaintiff acknowledges Mr. Boyle's reliance. (MTS 2 Opp. at 3-4.) Mr. Boyle's formula is entirely based on Mr. Stapleford's testimony about the "auxiliary cooler defect" or "cooling defect." ("Boyle Expert Report," Dkt. No. 92-4, at p. 35.) The report does not include expert testimony related to damages incurred by repair of the "fluid level defect."

Mr. Boyle's expert report and testimony are excluded to the extent that the report or testimony involve variables related to Mr. Stapleford's expert report or testimony on the

"auxiliary cooler defect" or cooling defect. Thus, the Court GRANTS FCA's Motion to Strike Plaintiff's Expert Report by Steven Boyle.

IV. MOTION FOR SUMMARY JUDGMENT

FCA moves the Court to enter summary judgment on all of Plaintiffs' claims. (See MSJ.) FCA points to an absence of evidence of damages from the alleged transmission defects, a required element of each of Plaintiff's claims; Plaintiff thus bears the burden of production to establish damages as a result of FCA's alleged conduct. In re Brazier Forest Prod., Inc., 921 F.2d 221, 223 (9th Cir. 1990) ("[I]f the nonmoving party bears the burden of proof on an issue at trial, the moving party need not produce affirmative evidence of an absence of fact to satisfy its burden. The moving party may simply point to the absence of evidence to support the nonmoving party's case. The nonmoving party must then make a sufficient showing to establish the existence of all elements essential to their case on which they will bear the burden of proof at trial.") (internal citations omitted) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)).

Because Plaintiff's sole evidence of damages was predicated on the now-stricken testimony of Mr. Boyle (MSJ Opp. at 10), the Court finds no triable issue of fact as to damages. The Court thus GRANTS the MSJ and DISMISSES the Complaint WITH PREJUDICE.

V. CONCLUSION

For the reasons described above, the Court DENIES Plaintiff's ex parte application to supplement expert reports, GRANTS IN PART and DENIES IN PART Defendant's MTS 1 (motion to strike the expert testimony of Michael Stapleford), GRANTS Defendant's MTS 2 (motion to strike the expert testimony of Stephen B. Boyle), GRANTS the MSJ, and DISMISSES the Complaint WITH PREJUDICE. The February 14, 2022 hearing is VACATED.

The Clerk is directed to close the case.

IT IS SO ORDERED.