UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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PETER A. VASILAS, SCOTT DIAMOND, and ROBERT KASINDORF, individually, and on behalf of all others similarly situated,

Plaintiffs,

-against-

SUBARU OF AMERICA, INC. and SUBARU AUTO LEASING LTD.,

Defendants.

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MEMORANDUM DECISION AND ORDER
07 CV 2374 (GBD)

GEORGE B. DANIELS, District Judge:

Plaintiffs bring this purported class action against defendants Subaru of America, Inc. ("Subaru") and Subaru's wholly owned subsidiary, Subaru Auto Leasing ("SAL"), for violations of the Federal Odometer Act ("Odometer Act" or "Act"), 49 U.S.C. §§ 32701-32711, and related state law causes of action. Plaintiffs allege they purchased and/or leased new automobiles that were manufactured by Subaru with defective odometers that deliberately overstated the vehicles' mileage. Such claimed misconduct allegedly harmed plaintiffs by, among other things, shortening the life span of the vehicles' warranty coverage, decreasing the resale value of their automobiles, and penalizing plaintiffs with unwarranted "excessive mileage" charges on leased automobiles. Defendants move, pursuant to Fed.R.Civ.P. 12(b)(6), to dismiss the amended complaint for failure to state a claim upon which relief may be granted. Defendants maintain that the Odometer Act is inapplicable to original factory-installed odometers which, regardless of their inaccuracy, are performing consistent with the manner that they were designed and manufactured to operate. Dismissal on the grounds that there can be no cause of action under the Odometer Act, is denied.

According to the amended complaint, "[t]he Subaru odometers determine the mileage to be displayed on the dashboard by the use of an external device that recognizes the electronic impulses generated by the vehicle's transmission, and converts the impulses to a mileage figure." (Am. Compl. ¶ 25). Plaintiffs allege that "[t]he mileage displayed on the dashboard odometer can be biased by varying or modifying the device." (Id.). Plaintiffs claim that the Subaru odometers are capable of accurately recording actual mileage, within the instruments' tolerance range. They allege that "[t]he source of the odometer inflation in the Subaru odometers is that ... Subaru knowingly and purposefully (a) used, (b) installed or (c) had installed into the vehicle a device that biased, altered and inflated the mileage recorded on the vehicle's odometer from the actual mileage traveled by the vehicle." (Id. ¶ 24). Through the purported "modifications to the odometer" by the installation of "additional devices" in the vehicles, the odometers became bias, outside the designed tolerance established by the odometer manufacturer." (Id. ¶¶ 27, 47). Plaintiffs further allege that Subaru conspired with the odometer manufacturer "to utilize the device in its vehicles." (Id. ¶ 24).

Several Subaru customers allegedly began to suspect that their vehicles' odometers were overstating mileage. Plaintiffs contend that, "[i]n responding to these customer inquiries, Subaru expressly, but falsely, represented to its customers that its odometers accurately recorded the actual mileage, subject only to such fluctuation due to measurement tolerance that would naturally be distributed around the actual mileage." (Id. ¶ 33). Subaru allegedly indicated that the established tolerance range for Subaru odometers was ±4%. Plaintiffs allege that the excessive rate, in which the odometers register mileage, is beyond the established +4% designed tolerance range.

Plaintiffs contend that Subaru used the alleged inflated mileage readings to deny consumers' legitimate warranty claims on the grounds that they were beyond the warranted mileage coverage. Plaintiffs further allege that consumers, who leased their vehicles, are improperly being penalized with "excess mileage" charges for driving beyond the annual mileage allowance specified in their lease agreements. Subaru is alleged to have profited millions of dollars from reduced warranty payments and unearned excess mileage penalty charges. In addition to seeking monetary damages and the disgorgement of excessive lease fees, plaintiffs also " request that Subaru correct or replace all defective odometers, and install working, accurate odometers". (Id. ¶ 60)

**STANDARD FOR RULE 12(b)(6) DISMISSAL**

For purposes of a 12(b)(6) motion, the Court is to liberally construe the complaint, accepting the factual allegations as true, and drawing all reasonable inferences in plaintiffs' favor. Burch v. Pioneer Credit Recovery, Inc., 551 F.3d 122, 124 (2d Cir. 2008). In addition to the factual allegations pled in the complaint, the Court should also consider documents attached to the complaint as exhibits or incorporated into the complaint by reference. Falso v. Churchville Chili Cent. Sch., 2009 WL 1762804, at *1 (2d Cir. June 23, 2009). To survive a Rule 12(b)(6) motion to dismiss, the complaint must plead "enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). "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." Ashcroft v. Iqbal, - - U.S. - -, 129 S.Ct. 1937, 1949 (May 18, 2009). Additionally, a private plaintiff suing for

violations of the Odometer Act must adequately plead that defendant acted with an intent to defraud. See, 49 U.S.C. § 32710(a). Allegations of fraud must be stated with particularity in order to satisfy the heightened pleading requirements of Fed.R.Civ.P. 9(b).

## THE FEDERAL ODOMETER ACT

Congress recognized that the odometer plays a key role in the selection of an automobile. Congress specifically found that: consumers "rely heavily on the odometer reading as an index of the condition and value of a vehicle;" that they "are entitled to rely on the odometer reading as an accurate indication of the mileage of the vehicle"; and "an accurate indication of the mileage assists a buyer in deciding on the safety and reliability of the vehicle". 49 U.S.C. § 32701(a)(1-3). The Odometer Act was enacted for the expressed purposes of "prohibit[ing] tampering with motor vehicle odometers" and "to provide safeguards to protect purchasers in the sale of motor vehicles with altered or reset odometers." 49 U.S.C. § 32701(b)(1-2). "Congress effectuated these purposes by outlawing actions that would cause discrepancies between a vehicle's actual mileage and its odometer reading." Bodine v. Graco, Inc., 533 F.3d 1145, 1149 (9th Cir. 2008).

The Act is a consumer protection statute which is remedial in nature, and it should therefore, for purposes of a civil proceeding, be liberally construed to effectuate its purpose. See, Owens v. Samkle Auto. Inc., 425 F.3d 1318, 1322 (11th Cir. 2005); Ryan v. Edwards, 592 F.2d 756, 760 (4th Cir. 1979) (construing predecessor statute). Merely because the Odometer Act also provides criminal sanctions does not, as defendants contend, require that the civil provisions be as narrowly construed as their criminal counterparts. See e.g., Mourning v. Family Publ'ns Serv., Inc., 411 U.S. 356, 375 (1973). ("We cannot agree, however, that every section of

an act establishing a broad regulatory scheme must be construed as a 'penal' provision, .... merely because two sections of the Act provide for civil and criminal penalties. Penal statutes are construed narrowly to insure that no individual is convicted unless 'a fair warning (has first been) given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed.' ") (*quoting* McBoyle v. United States, 283 U.S. 25, 27 (1931)).

In a single cause of action, plaintiffs have pled three separate violations of the Odometer Act, *to wit*, subdivisions (1), (2) and (4) of 49 U.S.C.§ 32703, which provide:

> A person may not - -
> (1) . . . use, install, or have installed, a device that makes an odometer of a motor vehicle register a mileage different from the mileage the vehicle was driven, as registered by the odometer within the designed tolerance of the manufacturer of the odometer;
> (2) . . . alter . . . an odometer of a motor vehicle intending to change the mileage registered by the odometer; [or]
> (4) conspire to violate this section . . .

49 U.S.C. § 32703 (1-2), (4).

The Act defines an "odometer," in pertinent part, as "an instrument for measuring and recording the distance a motor vehicle is driven". 49 U.S.C. § 32702(5). No odometer can register mileage with absolute accuracy because there are a number of recognized variables that effect the instrument's reliability. To account for this margin of operational error, the Act measures the purported accuracy of an odometer's registered mileage by incorporating an allowance for tolerance.

Defendants argue that the amended complaint fails to plead a violation of § 32703 in any fashion, much less with the specificity required by Fed.R.Civ.P. 9(b). Specifically, defendants argues that the alleged misconduct does not violate § 32703 because: (1) manufacturers are

authorized to set the designed tolerance by which the accuracy of the odometer is to be measured; and (2) an odometer, which includes all of its component parts, cannot constitute a "device" that either - (a) makes the odometer itself register a different mileage than it was manufactured to do; or (b) alters the odometer intending to change the mileage registered.[1] Defendants claim that the prohibitions set forth in the Odometer Act are limited exclusively to post-manufacture tampering and altering of existing odometers, that is, fraudulent attempts to defeat the manufacturer's already-designed, manufactured and installed odometer. Defendants stress that "Congress passed the Odometer Act with the explicit and sole intent of preventing post manufacture tampering". (Defs.' Mem. at 4). Defendants accordingly maintain that, consistent with the intent of Congress, both the odometer and automobile must be manufactured and assembled before a violation of § 32703 can occur.

Simply because Congress, in enacting the Odometer Act, may not have specifically contemplated that consumers could potentially fall victim to, and suffer damages from, pre-assembly tampering to understate mileage, does not render the Act inapplicable. In determining

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[1] The United States District Court for the Eastern District of Texas has ruled against defendants' position. See, Womack v. Nissan N. Am., Inc., 550 F.Supp.2d 630 (E.D.Tx. 2007); Vaughn v. Am. Honda Motor Co., Inc., No. 04-142 (E.D.Tx. March 31, 2005). In Baxter v. Kawasaki Motors Corp., No. 07-6745 (N.D.Ill. July 17, 2008), the United States District Court for the Northern District of Illinois found that purposefully designing and manufacturing odometers to overstate mileage within its designed tolerance range is essentially a design defect which is outside the scope of the Odometer Act. That court further found that an unlawful alteration, under § 32703(2), requires a change from the odometer's original condition. The court, therefore, concluded that where an "odometer was manufactured in a way, that allowed a mileage reading deviation" within its designed tolerance range, "[w]hether or not such a deviation can be considered as proof of a defective odometer, it does not state a violation of § 32703(1)." Baxter, No. 07-6745, slip op. at 13. Baxter does not, however, stand for the proposition, as defendants argue, that a manufacturer can never violate § 32703 by altering an odometer or installing a device to overstate, beyond its designed tolerance, the actual mileage driven.

the Act's scope, it is not a determinative factor whether Congress specifically anticipated the Act would be violated by manufacturers. See e.g., Food and Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 147 (2000). The United States Supreme Court has recognized that, "in the context of statutory interpretation, legislation 'often [goes] beyond the principal evil [at which the statute was aimed] to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.'" Van Orden v. Perry, 545 U.S. 677, 731-32 (2005) (*quoting* Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79 (1998)) (bracketed material in original). "[T]he fact that a statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth." Pennsylvania Dep't of Corr. v. Yeskey, 524 U.S. 206, 212 (1998) (citation and internal quotation marks omitted).

Subdivision (1) of § 32703 prohibits a person from using or installing a device that causes an odometer to register a mileage outside the odometer manufacturer's designed tolerance range. Under subdivision (2), a person is prohibited from altering an odometer intending to change the mileage registered by the odometer. The Odometer Act does not limit by definition the terms "use," "install," "device," "designed," "tolerance," or "alter." Since those terms are not statutorily defined, they should be interpreted in accordance with their ordinary meaning. See, United States v. Santos, - - U.S. - -, 128 S.Ct. 2020, 2024 (June 2, 2008). None of the meanings applied would exclude the conduct alleged by plaintiffs' complaint.

The common meaning of the word "tolerance," as used in the statute, is "the allowable deviation from a standard; *esp*: the range of variation permitted in maintaining a specified dimension in machining a piece." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 1241 (10th

ed. 1999). The term "design" ordinarily means "to devise for a specific function or end." Id. at 313. Thus, based on the language employed by Congress, an odometer's "designed tolerance" is the range of accuracy that the designed instrument is expected to be capable of achieving. Plaintiffs allege that Subaru has represented that the designed tolerance, for the odometers installed in its automobiles, is ±4%. Plaintiffs further allege that the inflated mileage registered by the odometers is beyond the established ±4% designed tolerance. Additionally, they allege that the excessive speed in which their vehicles' odometers clock mileage is not attributable to random fluctuation, but is because the odometers' tolerances are intentionally biased and not properly calibrated. Plaintiffs claim that the odometers, which were capable of accurately registering and recording mileage within their designed tolerance, were intentionally manipulated by device or alteration in order to make them overstate mileage beyond that design tolerance. Such pleadings, accepted as true, are sufficient to allege that the defendants engaged in the statute's prohibited acts to make the odometers register a reading different from the mileage driven, outside the tolerance as designed by the odometer manufacturer.[2]

Defendants further argue that an odometer itself, as originally manufactured, cannot constitute a "device," for purposes of § 32703(1). That section prohibits "install[ing] a device that makes an odometer ... register a mileage different from the mileage the vehicle was driven,

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[2] Defendants' principle argument is that odometers, deliberately designed and manufactured to falsely overstate mileage, do not fall within the ambit of the Odometer Act because they are performing within the manufacturers' designed tolerance. Deliberately manufacturing odometers to inaccurately register mileage beyond the design tolerance, in order to defraud consumers as to the distance traveled by their motor vehicles would, however, violate the Act. Any disagreement over this issue appears to be purely a matter of semantics. An odometer that is made to deliberately not work for its specific capable purpose is not designed improperly; it is manufactured improperly.

as registered by the odometer within the [manufacturer's] designed tolerance". 49 U.S.C. § 32703(1). Defendants contend that the prohibited device cannot be the original factory installed odometer, but rather must be a device that causes the manufacturer's odometer to register something other that it was designed to register. Defendants maintain that the device must be separate from, and external to, the entire odometer system, including all its component parts. To conclude otherwise, defendants argue, would lead to the absurd result that an odometer can tamper or alter itself.

Although not statutorily defined, the term "device" is commonly defined as "a piece of equipment or mechanism designed to serve a special purpose or perform a special function." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 317 (10th ed. 1999). The term "install" ordinarily means "to set up for use or service." Id. at 606. Thus, § 32703(1) minimally prohibits the placement or use of a contrivance (be it mechanical, electronic or digital)[3] that would affect the odometer's ability to properly register mileage within the range of accuracy that it is inherently capable of performing. The statute places no restrictions on the location or the manner of use of the installed device. Nor does it otherwise require that the device must be either separate from or outside the odometer itself. Thus, a component part of an odometer, that is rigged to cause the instrument to register mileage outside of its capable accuracy range, may constitute a "device," for purposes of § 32703(1).

Defendants further argue that a violation of subdivision (2) of the statute requires that there be a physical change to an existing odometer, after design and assembly by the

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[3] The defense acknowledges that it is not arguing "that the Act reaches only mechanical, as opposed to digital or electronic, manipulation." (Defs.' Reply Mem. at 4, n.3).

manufacturer. They assert that, since the subject odometers were allegedly designed to overstate mileage and were not altered after they left the manufacturer, the claimed misconduct falls outside of scope of § 32703(2).

"Alter" means "to make different without changing into something else." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 34 (10th ed. 1999); see also, BLACK'S LAW DICTIONARY 71 (5th ed. 1979) ("Alter" means "[t]o make a change in; to modify; to vary in some degree; to change some of the elements or ingredients or details without substituting an entirely new thing or destroying the identity of the thing affected. To change partially. To change in one or more respects, but without destruction of existence or identity of the thing changed; to increase or diminish."). Unlawful altering is not limited solely to changes made to an odometer after it becomes a completed product. See e.g., United States v. Forty Barrels & Twenty Kegs of Coca Cola, 241 U.S. 265, 279-80 (1916) (finding that adulteration statute would be rendered absurd if construed to apply only to finished products because it would allow manufacturers to add injurious components to the product, provided they are part of the formula.). An odometer has been prohibitively altered where it would have been capable, subject only to normal fluctuations, to accurately register mileage had it not been intentionally changed to make the instrument register mileage differently. Such prohibited alternation may be accomplished even prior to complete assembly. If it is deliberately manufactured so as not to meet the design specifications of a properly functioning odometer, liability may be established under the Federal Odometer Act.

Finally, plaintiffs' allegations, that Subaru conspired with its odometer manufacturer to utilize additional devices to alter the odometer's ability to register mileage within its designed tolerance range, are sufficient to state a claim under subdivision (4) of the statute, which

prohibits a person from conspiring to violate § 32703.

Accordingly, the cause of action for violations of the Odometer Act is supported by sufficient particularized factual allegations at this stage of the proceedings to withstand defendants' Rule 12(b)(6) challenge.[4]

## THE STATE LAW CLAIMS

The amended complaint also asserts two causes of action for breach of warranty against Subaru; one premised on defective odometers and the other premised on the failure to cover warranted repairs. Both defendants are also charged with breach of contract, and an unjust enrichment cause of action is pled solely against defendant SAL.[5] Defendants argue that all the state law claims must be dismissed because none of the plaintiffs have alleged that anyone personally sustained any actionable damages. Specifically, defendants note that none of the plaintiffs allege that they themselves: (1) were denied warranty service based on the odometer reading; (2) incurred premature charges in performing maintenance service required by the

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[4] The pleadings in the amended complaint meet the heightened pleading standard of Fed.R.Civ.P. 9(b), which requires that "the circumstances constituting fraud ... be stated with particularity." See e.g., Womack, 550 F.Supp.2d at 638 (finding the requirements of Rule 9(b) were satisfied where plaintiffs alleged that defendant installed a device, in the automobiles it manufactures, which altered the odometer's performance so that the mileage driven was continuously and systematically misrepresented and that consumers relied upon the misrepresented mileage to their detriment by paying more than they otherwise would for the vehicles due to the shortened warranty coverage, diminished resale value, and/or deprivation of the full value of leases.).

[5] The state law claims are governed by either the laws of Massachusetts or New York. For purposes of defendants' motion, there is no appreciable difference between the applicable laws of those jurisdictions.

warranties; (3) sold their vehicles at an artificially depressed price that reflected inflated mileage recorded by the odometers; or (4) incurred "excessive mileage" charges for leased automobiles.

The sustained injuries, plaintiffs are alleged to have suffered, are not limited to the four types of compensable injuries identified by defendants. Plaintiffs also seek restitution with regard to the deprivation of the full value of the warranties they paid for, as part of the purchasing price of their automobiles. Plaintiffs are also demanding that their vehicles' factory-installed odometers be replaced with working, accurate odometers, as required by the terms of the warranties, or they be compensated in monetary damages sufficient to have them repaired. Finally, nominal damages are recoverable for breach of contract. Kronos, Inc. v. AVX Corp., 612 N.E.2d 289, 292 (N.Y. 1993); Fall River Sav. Bank v. Callahan, 463 N.E.2d 555, 560 (Mass.App.Ct. 1984). Since all the individually named plaintiffs are seeking damages for the injuries each purportedly sustain as a result of defendants' alleged misconduct, they each have standing to pursue this action. The fact that the named plaintiffs may not have suffered the full extent of the damages, allegedly sustained by other prospective class members, does not warrant the dismissal of the action. See, Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 566 (2d Cir. 1968). Even if the relief sought is inappropriate, a complaint which states a claim upon which relief may be granted is not subject to dismissal under Rule 12(b)(6). Terry v. UNUM Life Ins. Co. of Am., 394 F.3d 108, 110 (2d Cir. 2005); Norwalk CORE v. Norwalk Redevelopment Agency, 395 F.2d 920, 925-26 (2d Cir. 1968).

Similarly lacking in merit is defendants' argument that the breach of warranty cause of action, for defective odometers, is incognizable because the warranty only covers defects in material and workmanship, not design defects. The theory of plaintiffs' case is not that a flaw, in

the designing of an instrument to register mileage in a reasonably accurate manner, caused the odometers to be defective. Plaintiffs allege that the odometers are capable of accurate measurement, but were changed in a manner that would deliberately register mileage higher than the accurate mileage. The pleadings are, therefore, sufficient to state a claim for breach of warranty.

Defendant further claim that the breach of contract claim is untimely. Under governing Massachusetts law, the applicable Statute of limitations is four years. Mass. Gen. Laws c. 106, § 2A-506(1). This action was commenced more than four years after the lease agreement was entered into and less than four years after the expiration of the agreement. "The general rule is that a contract action accrues at the time the contract is breached." Berkshire Mut. Ins. Co. v. Burbank, 664 N.E.2d 1188, 1189 (Mass. 1996). However, breach of a contract calling for the payment of money in separate installments is subject to a "rolling statute of limitations," enabling the claim to accrue anew upon each installment period. Callender v. Suffolk County, 783 N.E.2d 470, 473 (Mass.App.Ct. 2003). Plaintiffs argue that defendants breached the lease agreement throughout the lease term because the mileage allowance was exhausted prematurely. Since the allegations pled in the amended complaint do not show that the relief is barred by the applicable statute of limitations, the complaint is not subject to dismissal. See, Jones v. Bock, 549 U.S. 199, 215 (2007).

Defendants additionally argue that the unjust enrichment claim must be dismissed because plaintiffs have also pled a breach of contract cause of action. An unjust enrichment claim is generally precluded where there exists a valid contract between the parties that governs the subject matter in dispute. See, Clark-Fitzpatrick, Inc. v. Long Island R.R. Co., 516 N.E.2d

190, 193 (N.Y. 1987); Boswell v. Zephyr Lines, Inc., 606 N.E.2d 1336, 1342 (Mass. 1993). If the validity or enforceability of a contract is in dispute, both causes of action may be pled in the alternative. See e.g., MacPhee v. Verizon Commc'ns Inc., 2008 WL 162899, at *6 (S.D.N.Y. Jan. 15, 2008); Moore v. La-Z-Boy, Inc., 2008 WL 2247146, at *3, n.6 (D.Mass. May 30, 2008). Since no such dispute exists in the case at bar, plaintiffs are precluded from maintaining their unjust enrichment claim.

Finally, defendants are seeking the partial dismissals of certain specified causes of actions to the extent they relate to a particular named plaintiff. Such a piecemeal attack does not serve as grounds supporting defendants' Rule 12(b)(6) motion to dismiss for failure to state a claim. The legal viability of a cause of action is not affected by whether or not any single member of the purported putative class can recover in his or her own right under the state law applicable to that particular plaintiff. Defendants' challenges are more appropriated addressed in the context of class certification. See generally, Cent. States Se. & Sw. Areas Health & Welfare Fund v. Merck-Medco Managed Care, L.L.C., 504 F.3d 229, 241 (2d Cir. 2007).

**CONCLUSION**

Accordingly, defendants' motion, pursuant to Fed.R.Civ.P. 12(b)(6), to dismiss the federal claim under the Odometer Act is denied. Defendants' motion to dismiss the state law claims is granted only to the extent that the cause of action for unjust enrichment is dismissed. The motion is denied in all other respects.

Dated: New York, New York
August 4, 2009

SO ORDERED:

George B Daniels

GEORGE B. DANIELS
United States District Judge