FOR PUBLICATION

E-FILED
CNMI SUPERIOR COURT
E-filed: Jun 4 2010 3:27PM
Clerk Review: N/A
Filing ID: 31456539
Case Number: 09-0467-CV
N/A

IN THE SUPERIOR COURT OF THE

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

RABBY F. SYED, JOSE P. KOYOSHI, and FELIPE Q. ATALIT, individually, and on behalf of others similarly situated, **Plaintiffs,** **v.** **MOBIL OIL MARIANA ISLANDS, INC., and MARIANA ACQUISITION CORPORATION, d.b.a. SHELL MARIANAS,** **Defendants.**	**CIVIL ACTION NO. 09-0467** **ORDER GRANTING DEFENDANTS' MOTION TO DISMISS CLASS ACTION COMPLAINT WITH LEAVE TO AMEND COUNT I**

THIS MATTER was heard on April 5, 2010 at 9:00 a.m. Ramon K. Quichocho appeared on behalf of plaintiffs Rabby F. Syed, Jose P. Kiyoshi, and Felipe Q. Atalig, individually, and on behalf of others similarly situated (collectively, "Plaintiffs"). Julian Brew appeared on behalf of defendant Mobil Oil Mariana Islands, Inc. ("Mobil"). G. Patrick Civille appeared on behalf of defendant Mariana Acquisition Corporation, dba Shell Marianas ("Shell").

I. FACTUAL AND PROCEDURAL BACKGROUND

Mobil and Shell are the only suppliers of regular, unleaded gasoline in the Commonwealth of the Northern Mariana Islands ("CNMI"). Plaintiffs have filed this class action alleging that Mobil and Shell have "colluded with each other to keep the price of unleaded fuel artificially high[,]" and "deceived, misled, and confused the consumers of the Commonwealth with a pricing scheme that unfairly rounds up sales prices to their advantage." (Complaint ¶¶ 2-3.) Plaintiffs assert four causes

of action against Mobil and Shell. Counts I, II and III are based on alleged violations of the Consumer Protection Act, 4 CMC §§ 5101 *et seq*. In Count I, Plaintiffs allege Mobil and Shell engaged in price fixing in violation of 4 CMC § 5105(t). In Count II, Plaintiffs allege Mobil and Shell engaged in false advertising in violation of 4 CMC § 5109. In Count III, Plaintiffs allege Mobil and Shell engaged in unfair or deceptive business practices in violation of 4 CMC §§ 5105 (l) and (m). Count IV is an action for fraud. Mobil and Shell move to dismiss the Complaint for failure to state a claim upon which relief can be granted.

II. MOTION TO DISMISS PURSUANT TO COM. R. CIV. P. 12(b)(6)

A. Standard

Under Com. R. Civ. P. 12(b)(6), a complaint is subject to dismissal where it fails to state a claim upon which relief can be granted. On a motion to dismiss pursuant to Com. R. Civ. P. 12(b)(6), the court's inquiry is directed to whether the complaint satisfies the pleading requirements of Com. R. Civ. P. 8(a) – i.e., whether the allegations constitute a short and plain statement of the claim showing that the pleader is entitled to relief. *Cepeda v. Hefner*, 3 N.M.I. 121, 126 (1992). A complaint fails to satisfy the pleading requirements of Com. R. Civ. P. 8(a) where it lacks a cognizable legal theory or fails to allege facts constituting a cognizable legal theory. *Bolalin v. Guam Publications, Inc.*, 4 N.M.I. 176 (1994). In determining whether a complaint should be dismissed, the court must assume the truth of the factual allegations in the complaint and construe them in the light most favorable to the non-moving party. *Cepeda*, 3 N.M.I. at 127-28; *Govendo v. Marianas Pub. Land Corp*., 2 N.M.I. 482, 490 (1992). Furthermore, the court must draw all reasonable inferences from the allegations. *See In re Adoption of Magofna*, 1 N.M.I. 449 (1990). The court need not strain to find inferences favorable to the non-moving party, however. *Id*. Moreover, the court need not accept legal conclusions couched as factual statements as true. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)).[1] "[T]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim for relief that is plausible on its face.'" *Ada*

[1] Because the Commonwealth Rules of Civil Procedure are modeled after the Federal Rules of Civil Procedure, federal cases interpreting the counterpart Federal Rules are helpful in interpreting the Commonwealth Rules of Civil Procedure. *Ada v. Sadhwani's Inc.*, 3 N.M.I. 303 (1992).

v. Nakamoto, Civ. No. 08-0029 (N.M.I. Super. Ct. 12/31/2009) (Order Granting Motion to Dismiss By Defendants Kawasho Real Estate Corporation, Shimizu Corporation, and All Nippon Airways, Co., Ltd.) (quoting *Twombly*, 550 U.S. at 570). A claim is plausible on its face 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*, 129 S. Ct. 1937 (2009) (citing *Twombly*, 550 U.S. at 556). A mere formulaic recitation of the elements of a cause of action will not do. *Twombly*, 550 U.S. at 555 (citing *Papasan*, 478 U.S. at 286).

B. Discussion

1. *Price Fixing (Count I)*

The Consumer Protection Act makes it unlawful to engage in "price fixing which bears no reasonable relationship to the cost of the merchandise" in the conduct of any trade or commerce. 4 CMC § 5105(t). There are, therefore, two elements to a cause of action under 4 CMC § 5105(t). First, Plaintiffs must sufficiently allege that Mobil and Shell engaged in price fixing. Second, Plaintiffs must sufficiently allege that the prices bare no reasonable relationship to the cost of the merchandise – in this case, regular, unleaded gasoline.

a. *Plaintiffs Must Show an Agreement Between Mobil and Shell to Fix the Prices of Regular, Unleaded Gasoline in the CNMI.*

"Price fixing" is a term of art that is not defined by the Consumer Protection Act, 4 CMC §§ 5101 *et seq*. A basic rule of statutory construction is that words should be given their plain meaning. *Commonwealth v. Jong Hun Lee*, 2005 MP 19 ¶ 12 (citing *Commonwealth v. Itibus*, 1997 MP 10 ¶ 6; *Commonwealth v. Nethon*, 1 N.M.I. 458, 461 (1990)). When statutory language is taken directly from the common law and uses common law terms of art that are not otherwise defined, however, "then we presume that the legislature knows and has adopted 'the cluster of ideas that were attached to each borrowed word in the body of the learning from which it was taken.'" *Id.* (citing *Morissette v. United States*, 342 U.S. 246, 263 (1952)); *Commonwealth v. Li*, Crim. No. 09-0011D (N.M.I. Super. Ct. Dec. 21, 2009) (Order Granting Defendant's Motion for Judgment of Acquittal).

The common law meaning of "price fixing" is well established in antitrust cases and refers to agreements among competitors to fix the price of goods. *See United States v. Socony-Vacuum Oil Co.*,

310 U.S. 150, 213 (1940) ("The aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition. The power to fix prices . . . involves power to control the market and to fix arbitrary and unreasonable prices." (citations omitted)); *see also Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 7-8 (1979) (noting that agreements among competitors to fix prices on their individual goods or services are considered *per se* violations of the Sherman Act); *United States v. Alston*, 974 F.2d 1206 (9th Cir. Ariz. 1992) (jury instruction characterizing price fixing as involving "'an agreement of two or more persons . . . .'" correctly stated the Government's burden). Thus, with regard to the price fixing element, Plaintiffs must allege a factual basis sufficient to show it is plausible that Mobil and Shell entered into an agreement to fix the prices of regular, unleaded gasoline in the CNMI.

b. Plaintiffs Have Not Alleged a Sufficient Factual Basis to Support Their Conclusory Allegations that Mobil and Shell Engaged in Price Fixing.

Plaintiffs have not alleged a sufficient factual basis to support their conclusory allegations that Mobil and Shell engaged in price fixing. The Complaint contains the following allegations related to price fixing agreements between Mobil and Shell:

> ¶ 45. On information and belief, Defendants Mobil Oil Mariana and Shell Marianas have an agreement where one would source out its regular unleaded gasoline from the other Defendant.
>
> ¶ 46. On information and belief, during the class period, each Defendant did, in fact, source out its regular unleaded gasoline from the other Defendant pursuant to their agreement.
>
> ¶ 47. On information and belief, Defendants have an agreement to fix uniform price (sic) for regular unleaded gasoline.
>
> ¶ 48. On information and belief, during the class period, Defendants did, in fact, set a uniform price for its regular unleaded gasoline, and charged consumers with such price, without regard to the prevailing market conditions, their respective cost of products acquisition, and independent market forces
>
> ¶ 49. On information and belief, Defendants Mobil Oil and Shell Marianas have an agreement to adopt a uniform formula for the computation of the selling price of regular unleaded gasoline.
>
> ¶ 50. On information and belief, during the class period, Defendants did, in fact, adopt a uniform formula in computing the selling prices of regular unleaded gasoline.
>
> ¶ 51. On information and belief, Defendants Mobil Oil and Shell

> Marianas have an agreement to fix uniform freight charges, quantity discounts, or other differentials which affect the actual selling price of regular unleaded gasoline to consumers.
>
> ¶ 52. On information and belief, during the class period, Defendants did, in fact, fix uniform freight charges, quantity discounts, or other differentials which affected the actual selling price of regular unleaded gasoline to consumers.
>
> ¶ 53. Defendants Mobil Oil and Shell Marianas, during the class period, and until now continue the practice of changing prices of regular unleaded gasoline at the same time, or almost the same time, or within hours of each other at supposedly competing locations that sell supposedly competing brand[s] of motor fuel and petroleum products.
>
> ¶ 54. Defendants Mobil Oil and Shell Marianas, dictating upon their respective franchisees, sell motor fuel and other petroleum products at Mobil and Shell gasoline service stations at the same price up to the tenth of a penny, and whenever they change prices, Defendants, in complete harmony, change to exactly the same pre-agreed price at the same time, or almost at the same time.

(Complaint ¶¶ 45-54.) In paragraphs 45, 47, 49 and 51, Plaintiffs allege four distinct agreements related to price fixing. The allegations in those paragraphs are merely conclusory, however. For example, there are no factual allegations concerning the who, what, where, when, or how of any of the alleged agreements. Although the Court must assume the truth of all factual allegations in the Complaint and construe them in the light most favorable to Plaintiffs, the Court need not accept conclusory allegations as true. *See Iqbal*, 129 S. Ct. at 1949 (citing *Twombly*, 550 U.S. at 555). Alone, the allegations in paragraphs 45, 47, 49 and 51 are akin to a mere recitation of the first element of a cause of action under 4 CMC § 5105(t). As such, they do not show a plausible agreement between Mobil and Shell to fix the prices of regular, unleaded gasoline in the CNMI.

Although the Court need not accept conclusory allegations as true, it may nevertheless consider such allegations insofar as they help frame factual allegations elsewhere in the Complaint. *See Iqbal*, 129 S. Ct. at 1950. Thus, the Court must determine whether other allegations in the Complaint provide a factual basis for the alleged price fixing agreements. Paragraphs 46, 48, 50 and 52 are offered as proof of the agreements alleged in the paragraphs that precede them. For example, paragraph 47 contains a conclusory allegation that Mobil and Shell "have an agreement to fix uniform price[s] for regular unleaded gasoline." Paragraph 48 purports to support this allegation by further alleging that

Mobil and Shell "did, in fact, set a uniform price for regular unleaded gasoline." Paragraphs 46, 48, 50 and 52 only masquerade as factual allegations, however, because they are only based on "information and belief." As such, they do not provide the requisite factual basis for the alleged agreements. *See Ada v. Nakamoto*, Civ. No. 08-0029 (N.M.I. Super. Ct. 12/31/2009) (Order Granting Motion to Dismiss By Defendants Kawasho Real Estate Corporation, Shimizu Corporation, and All Nippon Airways, Co., Ltd.) (citing *United States ex rel. Willard v. Humana Health Plan of Texas, Inc.*, 336 F.3d 375, 385 (5th Cir. 2003) (holding that even though fraud may be plead based on "information and belief" under FED. R. CIV. P. 9(b), the complaint must also "set forth a factual basis for such belief"); *Baumel v. Syrian Arab Republic*, 2009 WL 3583510, *7 (D.C. Cir. 2009) (treating allegations based on "information and belief" as "rank speculation")).

The only well-pleaded factual allegations purporting to show that Mobil and Shell engaged in price fixing are the allegations of parallel conduct in paragraphs 53 and 54 of the Complaint. Specifically, Plaintiffs allege that Mobil and Shell change their prices of regular, unleaded gasoline at the same time, or almost the same time, and that their prices track each other closely. (*See* Complaint ¶¶ 53-54.) *Twombly* is particularly instructive with regard to showing a plausible agreement through allegations of parallel conduct. *Twombly*, 550 U.S. 544. In *Twombly*, the plaintiffs were subscribers to local telephone and/or high speed Internet services that sued various telecommunications carriers for violating § 1 of the Sherman Act. *Id.* at 550. Section 1 of the Sherman Act prohibits unreasonable restraints of trade "effected by a contract, combination, or conspiracy." *Id.* at 553 (citing *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 775 (1984). The plaintiffs alleged an illegal conspiracy in restraint of trade. *Id.* at 551. Showing an agreement was an essential element of the plaintiffs' conspiracy claim. *Id.* at 548-49. The plaintiffs attempted to show this agreement through allegations of parallel conduct. *Id.* at 551. For example, the plaintiffs alleged that the defendants engaged in similar conduct to inhibit the growth of competitors and that each defendant avoided competing in any of the other defendants' service areas. *Id.* at 550-551.

The United States District Court for the Southern District of New York dismissed the complaint for failure to state a claim upon which relief could be granted. *Id.* at 552. It ruled that the plaintiffs failed to "allege additional facts that 'tend to exclude independent self-interested conduct as an

explanation for [the] defendant's parallel behavior.'" *Id.* (citing 313 F. Supp. 2d 174, 179 (S.D.N.Y. 2003)). The Second Circuit reversed, finding that the plaintiffs were not required to plead such "additional facts." *Id.* at 553. The Second Circuit said "'to rule that allegations of parallel anticompetitive conduct fail to support a plausible conspiracy claim, a court would have to conclude that there is no set of facts that would permit a plaintiff to demonstrate that the particular parallelism asserted was the product of collusion rather than coincidence.'" *Id.* at 553 (citing 425 F.3d 99, 114 (2005)). The Second Circuit found there were facts upon which it could conceivably conclude that the parallel conduct alleged was the result of collusion. *See id.*

On certiorari, the United States Supreme Court rejected the "no set of facts" standard used by the Second Circuit. *Id.* at 563. Instead, the Court held that, to survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim for relief that is plausible on its face." *Id.* at 570. Applying this standard, the Court found the allegations of parallel conduct were insufficient to show an agreement among the defendants. To show an agreement, the Court ruled that allegations of parallel conduct "must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action." *Id.* at 557. The Court found the defendants' alleged attempts to inhibit the growth of competitors did not indicate anything more than the natural, unilateral reaction of each defendant to protect its regional dominance. *Id.* at 566. It further found that the defendants' decisions to refrain from competing in each others' service areas may have only been the result of each defendant's independent decision that to do so would not have been profitable. *Id.* The Court therefore reversed the Second Circuit's decision and remanded the case. *Id.* at 566, 570. It explained that "[t]he inadequacy of showing parallel conduct or interdependence, without more, mirrors the ambiguity of the behavior: consistent with conspiracy, but just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market." *Id.* at 554.

Similarly, in this case, Plaintiffs' allegations of parallel conduct are ambiguous. Plaintiffs' allegations that Mobil and Shell change their prices at almost exactly the same time and that their prices follow each other closely could be the result of natural, unilateral decisions not to be underpriced and not to lose out on better profit margins. Alone, Plaintiffs' allegations of parallel conduct fail to move

Plaintiffs' claim of an illegal price fixing agreement across the line between possibility and plausibility. Nevertheless, the Court's finding should not be misconstrued to mean that allegations of parallel conduct are always insufficient to show an agreement. As stated in *Twombly*, to show an agreement through allegations of parallel conduct, the allegations "must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action." *Id.* at 557; *see also Starr v. Sony BMG Music Entm't*, 592 F.3d 314 (2d Cir. N.Y. 2010). Here, Plaintiffs have failed to provide a context sufficient to raise the suggestion of a preceding agreement between Mobil and Shell.

c. *Plaintiffs Have Not Provided a Factual Basis to Support Their Allegation that the Gasoline Prices Bore No Reasonable Relationship to the Cost of Bringing Gasoline to Market.*

Even if Plaintiffs had sufficiently alleged a price fixing agreement between Mobil and Shell, they have not provided a factual basis to support the second element of their 4 CMC § 5105(t) claim. Specifically, Plaintiffs have not alleged a factual basis to support their allegation that the gasoline prices Mobil and Shell charged consumers bore no reasonable relationship to the cost of bringing gasoline to market in the CNMI during the relevant time period. (*See* Complaint ¶¶ 48, 72(b).) In fact, there are no well-pleaded factual allegations in the Complaint purporting to show the costs associated with selling regular, unleaded gasoline in the CNMI at all. Without some understanding of these costs, Plaintiffs' conclusory allegation that there is no reasonable relationship between the costs and the prices rings hollow. Plaintiffs' allegations are akin to a mere recitation of the second element under 4 CMC § 5105(t), which "will not do." *See Twombly*, 550 U.S. at 555 (citing *Papasan*, 478 U.S. at 286).

2. <u>*Counts II and III Fail as a Matter of Law*</u>.

Counts II and III are causes of action based on the practice of pricing gasoline in 9/10 of a cent and rounding the final price to the nearest whole cent. For example, Plaintiffs claim that "the current advertised price of regular unleaded gasoline is '$3.479 per gallon.'" (*Id.* ¶ 63.) Yet, Plaintiffs remark, "[w]hen one carefully pumps exactly one gallon up to the third decimal point, i.e., 1.000, the gas pump report for the gallon of gasoline purchased would be not $3.479, but $3.48." (*Id.*) Plaintiffs allege that this practice constitutes false advertising and unfair or deceptive business practices in violation of 4 CMC §§ 5109 and 5105 (l) and (m), respectively. Plaintiffs' causes of action in Counts II and III fail as a matter of law, however, because gasoline is pumped in a continuous stream, which almost always

requires the final price to be rounded to a whole cent, and Mobil and Shell follow the CNMI's rules and regulations for rounding their prices. Furthermore, as will be discussed more fully below, the specific statutory and regulatory framework authorizing the rounding methods employed by Mobil and Shell are not controlled or nullified by the more general provisions of the Consumer Protection Act.

a. Mobil and Shell Must Round the Prices Charged to Consumers for Gasoline that is Pumped in a Continuous Stream.

First, the fact that Mobil and Shell price regular, unleaded gasoline in 9/10 of a cent is irrelevant to whether the final price is rounded. Even if Mobil and Shell priced gasoline in whole cents per gallon, the final price would frequently include fractions of a cent because consumers may pump and purchase any fraction of a gallon. Gasoline is distributed in the CNMI, as elsewhere, via pumps that dispense gasoline in a continuous stream. Consumers may stop pumping at their discretion, even if the final price includes a fraction of a cent. Because the lowest denomination of U.S. currency is one cent, some form of rounding is almost always required. The only exception is when a consumer carefully pumps an amount of gasoline for which the final price does not include a fraction of a cent. Such a consumer would avoid rounding altogether and pay exactly the advertised price. For Mobil and Shell to avoid rounding in all situations, however, they would have to change the way gasoline is dispensed so that it is only sold in specifically measured quantities that avoid fractions of a cent. The practicability of such a change is beyond the scope of this Order. Suffice it to say, however, that some form of rounding is necessary when gasoline is pumped in a continuous stream, regardless of gasoline prices.

b. Handbook 44 Requires Mobil and Shell to Round Their Prices to the Nearest Cent.

The CNMI has adopted the national standard for rounding the prices of commercially sold liquid products that are dispensed in a continuous stream. The National Institute of Standards Technology ("NIST") is an organization created under federal law to promote uniformity in weights and measures practices employed in the United States. *See* 15 U.S.C. § 272(b)(10). To promote uniformity, NIST publishes Handbook 44, which sets standards for weights and measures and suggests model laws that "are recommended [] for official promulgation in and use by the States in exercising their control of commercial weighing and measuring apparatus." SPECIFICATIONS, TOLERANCES, AND OTHER TECHNICAL REQUIREMENTS FOR WEIGHING AND MEASURING DEVICES (Tina Butcher et al. eds., 2009

Edition) ("Handbook 44"), *available at* http://ts.nist.gov/WeightsAndMeasures/h44-07.cfm. The CNMI has adopted Handbook 44 to govern weighing and measuring devices. *See* 4 CMC §§ 5412, 5414; NMIAC § 20–90-005(a). Furthermore, the CNMI Governor is required to annually inspect and certify all commercial measuring devices in the CNMI, including gasoline pumps, to ensure they comply with Handbook 44. *See* 4 CMC 5423(a). In fact, Mobil and Shell would be subject to penalties for using any measuring device that has not been certified by the Governor to comply with the requirements of Handbook 44. *See* 4 CMC § 5432.

Section 3.30 of Handbook 44 applies to "devices used for the measurement of liquids, including liquid fuels and lubricants . . . ." Section 3.30 therefore applies to gasoline pumps. Sections 3.30, S.1.6.5.2 and G.S.5.5 provide that, for liquid measuring devices that use digital money-value indications, prices must be rounded to the nearest one cent of money value. Thus, Handbook 44 recognizes that gasoline will often be sold in quantities where the price will need to be rounded to a payable amount. Appendix A, § 10.2 of Handbook 44 provides the rules that must be used for rounding the prices of liquid fuels and lubricants. It requires that, if the price is above .5 of a cent, the price must be rounded up to the next highest whole cent. If the price is below .5 of a cent, the price must be rounded down to the next lowest whole cent. If the price contains exactly .5 cents, the price will be rounded up if the preceding digit is odd, and rounded down if the preceding digit is even. It is undisputed that Mobil and Shell employ this rounding method at their service stations.

c. *Rounding the Price of Regular, Unleaded Gasoline in Compliance with Handbook 44 Does Not Violate the Consumer Protection Act*.

Under CNMI law, "one statutory provision should not be construed to make another provision [either] inconsistent or meaningless . . . ." *In re Estate of Rofag*, 2. N.M.I. 18, 29 (1991) (citing *Island Aviation, Inc. v. Mariana Islands Airport Authority*, 1 CR 353 (D.N.M.I. 1983). Mobil and Shell must use a rounding method to sell gasoline that is dispensed in a continuous stream, and both use the statutorily adopted rounding method described in Handbook 44. Construing the Consumer Protection Act in a way that prohibits rounding prices in compliance with Handbook 44 would render the statutory and regulatory framework adopting Handbook 44 "inconsistent" and "meaningless." Thus, the Court is loathe to do so. "Where [statutes] 'are capable of co-existence, it is the duty of the courts . . . to regard each as effective.'" *Estate of Faisao v. Tenorio*, 4 N.M.I. 260, n. 14 (1995) (citing *Radzanower*

v. Touche Ross & Co., 426 U.S. 148, 155 (1976)).

When statutes appear to conflict, as in this case, it is appropriate to consider the legislature's intent, guided by the principal that "[w]here there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment." *Id.*, n. 15 (citing *Radzanower*, 426 U.S. at 153); *see also Estate of Taisacan*, 2008 MP 6 ¶ 13. Here, the statutory and regulatory framework adopting Handbook 44 authorizes specific price rounding rules for use with liquid measuring devices that use digital money-value indications, such as gasoline pumps. In contrast, the Consumer Protection Act is a sweeping piece of legislation designed to generally protect consumers from "abuses in commerce" that "create an unhealthy climate for business and restrict the economic growth of the Commonwealth." 4 CMC § 5102(a). As stated above, rounding prices is necessary because gasoline is pumped in a continuous stream. Mobil and Shell follow the CNMI's rules and regulations for rounding the prices charged to consumers for gasoline dispensed from a pump. The prices are rounded down half the time and rounded up half the time, as specified by Handbook 44. Compliance with Handbook 44 is a fair practice, not an abuse in commerce. Thus, the Consumer Protection Act was not designed to address the type of conduct upon which Plaintiffs base their claims. As there is no indication that the legislature intended to otherwise, the general provisions of the Consumer Protection Act do not control or nullify the more specific statutory and regulatory framework permitting Mobil and Shell to round their gasoline prices pursuant to Handbook 44.

This case is similar to *Alvarez v. Chevron Corp.*, 2009 U.S. Dist. LEXIS 94377, Case No. CV 09-3343-GHK (D.D. Cal., September 30, 2009). In *Alvarez*, the plaintiffs were consumers who sued sellers of gasoline for, *inter alia*, violations of California's consumer protection laws. The plaintiffs complained that the sellers used single hose pumps that did not drain between purchases, which resulted in overpayment in certain situations. *Id.* at *4. For example, a consumer who purchased premium gasoline after a consumer who purchased regular gasoline would unknowingly pay premium prices for the residual regular fuel left in the hose. *Id.* The United States District Court for the Central District of California held that the practice did not violate California's consumer protection laws because other, more specific laws, including provisions of Handbook 44, required the use of single hose pumps that did not drain. *Id.* at *17-20. Accordingly, the Court found that the specific legislation expressly authorizing the sellers' conduct created a "safe harbor" defense to the more general consumer

protection laws. *Id.* The same principles are at work in this case. Where gasoline is pumped in a continuous stream, the practice of rounding the final price in compliance with Handbook 44 does not violate the CNMI's Consumer Protection Act because the more specific statutory and regulatory framework adopting Handbook 44 authorizes such rounding.

Plaintiffs argue that this case is distinguishable from *Alvarez* because, in *Alvarez*, the Court's decision turned on the fact that the offending conduct was required by California law. (Pls.' Opp. at 17.) Plaintiffs argue that "there is no law or regulation [in the CNMI] that mandates that gasoline be priced at 9/10 of a fraction of a penny." (*Id.* at 18.) As explained above, however, the 9/10 of a cent pricing scheme is irrelevant to whether the prices Mobil and Shell charge must be rounded. Rounding is necessary because gasoline is pumped in a continuous stream. More importantly, Plaintiffs' argument does not address the fact that the CNMI legislature created a specific statutory and regulatory framework expressly adopting Handbook 44. Plaintiffs have not persuaded the Court that this statutory and regulatory framework should be rendered meaningless in light of the more general prohibitions of the Consumer Protection Act.

3. *Plaintiffs Have Not Sufficiently Alleged the Elements of Fraud.*

Plaintiffs have also not sufficiently alleged the elements of fraud. Com. R. Civ. P. 9(b) states that "in all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." The elements of fraud are: (1) misrepresentation, (2) knowledge of falsity (scienter), (3) for the purpose of inducing another to act based upon the misrepresentation, (4) justifiable reliance, and (5) resulting damage. RESTATEMENT (SECOND) OF TORTS § 525 (1977). As pleaded in the Complaint, the elements of a misrepresentation and justifiable reliance are particularly deficient.

a. *Plaintiffs Have Not Alleged an Actionable Misrepresentation.*

Plaintiffs have failed to allege any actionable misrepresentation. Plaintiffs assert that Mobil and Shell "represented to Plaintiff[s], including the class members, that regular unleaded gasoline was being sold at thousandths of a cent when, in fact, the prices are unfairly rounded up." (Complaint ¶ 101.) Plaintiffs contend that the representations were false. (*Id.* ¶ 102.) While class members may have paid a different price than advertised as a result of price rounding, again, the CNMI's statutory and regulatory framework adopting Handbook 44 expressly authorizes Mobil and Shell to employ the

rounding methods described in Handbook 44. Furthermore, Plaintiffs do not allege that Mobil and Shell represented that they use a different rounding method than the authorized method described in Handbook 44. Plaintiffs also do not allege that the advertised prices are not the prices used in the rounding formula employed by Mobil and Shell. Finally, Plaintiffs do not allege that Mobil and Shell represented that they do not use rounding to arrive at a payable price when selling gasoline dispensed in a continuous stream.

b. *Plaintiffs Have Not Sufficiently Alleged the Element of Justifiable Reliance*.

Plaintiffs have also not sufficiently alleged the element of justifiable reliance. Plaintiffs merely state that "Plaintiffs, including the class members, relied on the representation." (*Id.* ¶ 105.) Common sense dictates that when gasoline is priced at 9/10 of a cent and is pumped in a continuous stream, some form of rounding must be employed to arrive at a payable price. Notably, Plaintiffs do not contend that consumers bought gasoline believing the final price would not be rounded. Instead, Plaintiffs allege that "Defendants use a rounding scheme that rounds up more often than it rounds down, when Defendants have the ability to use, and could use a rounding scheme that fairly rounds to the next whole cent." (*Id.* ¶ 64.) A careful reading of the rounding rules in Handbook 44 show that prices are rounded up and down with equal frequency. More to the point, however, Plaintiffs' allegation in paragraph 64 of the Complaint concedes that some form of rounding must be used. Plaintiffs have therefore not sufficiently alleged how or why relying on the advertised price of gasoline, expressed in 9/10 of a cent, is justifiable.

4. *Plaintiffs' Claims Are Limited by Statutes of Limitations.*

Lastly, Plaintiffs' claims are limited by statutes of limitations. Plaintiffs allege that the putative class includes "persons who purchased regular unleaded gasoline from one or more of the Defendants beginning from November 2000 to the date on which the Complaint is filed . . . ." (Complaint ¶ 5.) The Complaint was filed on November 12, 2009. The statute of limitations for the Consumer Protection Act is four years, however. *See* 4 CMC § 5110. Thus, insofar as Plaintiffs seek recovery under the Consumer Protection Act for claims that accrued before November 12, 2005, Plaintiffs' claims are barred. The statute of limitations for fraud is six years. *See* 7 CMC § 2505. Thus, insofar as Plaintiffs seek recovery on a fraud theory for sales that occurred before November 12, 2003, Plaintiffs' claims are barred.

Plaintiffs argue that their causes of action are not barred by the applicable statutes of limitations because their causes of action have not yet accrued. In 2005, Plaintiffs assert that the CNMI Attorney General began investigating whether there was any credible evidence of gasoline price fixing in the CNMI. They contend that their causes of action will only accrue after the Attorney General makes an investigation report available to the public. As of the date of Plaintiffs' Opposition memorandum, Plaintiffs assert that a report was not yet available.

The appropriate test for determining when a cause of action accrues, thereby triggering the running of the statute of limitations, is the following:

> A cause of action "accrues" as soon as the right to maintain a legal action arises. The true test to determine when an action "accrues" is when the plaintiff could have first filed and prosecuted his or her action to successful conclusion. See Kansas Public Employees Retirement System v. Kroger Associates, Inc., 936 P.2d 714, 719 (Kan. 1997). "Ordinarily, a cause of action accrues at the time of the act giving rise to the alleged injury or damage." See v. Hartley, 896 P.2d 1049, 1054 (Kan. 1995).

Zhang v. Commonwealth, Civ. No. 99-0163 (N.M.I. Super. Ct. September 30, 1999) (Order Granting Motion to Dismiss), *affirmed Zhang v. Commonwealth*, 2001 MP 18. The acts giving rise to the alleged injuries or damage to Plaintiffs are the alleged misrepresentations and sales of regular, unleaded gasoline in the CNMI. Absent some exception, Plaintiffs' causes of action therefore accrued upon each individual sale. Plaintiffs have not offered any authoritative support for their argument that their causes of action will only accrue upon the release of the Attorney General's investigation report. Furthermore, despite not having the report, Plaintiffs filed the Complaint and are presently attempting to litigate their causes of action to a successful conclusion. Plaintiffs' argument that the statute of limitations should be tolled because the alleged violations are of a continuing nature is similarly unsupported.

III. CONCLUSION

For the foregoing reasons, the Court hereby GRANTS the Motion to Dismiss by Mobil and Shell. Plaintiffs may amend the Complaint with respect to their price fixing cause of action stated in Count I, and shall have twenty (20) days to do so. Plaintiffs' request to amend the Complaint with respect to Counts II, III and IV is denied as futile.

So ORDERED this 4th day of June, 2010.

/s/
PERRY B. INOS
Associate Judge