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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

IN RE

No. C-13-3072 EMC

MYFORD TOUCH CONSUMER  
LITIGATION.

**ORDER GRANTING IN PART AND  
DENYING IN PART DEFENDANT’S  
MOTION TO DISMISS**

**(Docket No. 56)**

Plaintiffs are twenty-three persons and one organization residing in fifteen different states. They have filed a class action against Defendant Ford Motor Company, asserting, in essence, that an “infotainment system” – known as MyFord Touch (“MFT”) – used in certain of its vehicles (Ford, Lincoln, and Mercury) is defective and that Ford knew the system was defective at the time it sold the vehicles to Plaintiffs and other putative class members. Plaintiffs have asserted various claims under federal and state law, but the claims can loosely be categorized into (1) fraud claims and (2) breach-of-warranty claims. Ford has challenged the bulk of the claims in the currently pending motion to dismiss.

Having considered the parties’ briefs and accompanying submissions, as well as the oral argument of counsel, the Court hereby **GRANTS** in part and **DENIES** in part Ford’s motion.

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1 **I. FACTUAL & PROCEDURAL BACKGROUND**

2 As a preliminary matter, the Court provides below a chart which lists the name of each  
3 named Plaintiff, the state of Plaintiff's residence, whether Plaintiff purchased or leased the car, the  
4 car that was purchased or leased, and the date of purchase or lease.<sup>1</sup>

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Name	State	Purchase or Lease	Car	Date of Purchase or Lease
Jennifer Whalen	California	Purchase	2013 Ford Explorer XLT	4/2012
Center for Defensive Driving (CDD)	California	Lease	2013 Ford F-150 Lariat	2/22/2013
Grif Rosser	California	Purchase	2013 Ford Focus ST	9/29/2012
Megan Raney-Aarons	California	Lease	2012 Ford Edge	2/2012
Richard Decker Watson	California	Purchase	2011 Lincoln MKX	10/2012
Darcy Thomas-Maskrey	California	Purchase	2013 Ford Flex	7/2012
Angela Battle	Alabama	Purchase	2011 Ford Fusion	5/2011
Joe D'Aguanno	Arizona	Purchase	2013 Ford Explorer Sport	11/2012
James Laurence Sheerin	Colorado	Purchase	2013 Ford Explorer Limited	6/18/2012
Deb Makowski	Connecticut	Purchase	2011 Ford Escape	9/1/2011

26 <sup>1</sup> All Plaintiffs purchased or leased a Ford or Lincoln vehicle – *i.e.*, no Plaintiff purchased or  
27 leased a Mercury vehicle. Plaintiffs concede that the Mercury brand was discontinued in 2011. *See*  
28 FAC at 1 n.1. According to Ford, the MFT system was never used in a Mercury car. *See* Mot. at 1  
n.2 (arguing that “Plaintiffs’ references to ‘MyMercury Touch’ are mistaken” as “[n]o Mercury  
vehicle has been equipped with [the MFT] system”).

**United States District Court**  
 For the Northern District of California

	<b>Name</b>	<b>State</b>	<b>Purchase or Lease</b>	<b>Car</b>	<b>Date of Purchase or Lease</b>
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3	George Oremland	Florida	Purchase	2012 Lincoln MKZ	12/2011
4	Thomas Mitchell	Iowa	Purchase	2011 Lincoln MKX	11/8/2010
5	William Creed	Massachusetts	Purchase	2011 Ford Explorer	3/14/2011
6	Joshua Matlin	New Jersey	Lease	2011 Ford Edge SE	10/28/2010
7	Russ Rizzo	New Jersey	Lease	2012 Ford Explorer XLT 4 Wheel Drive	2/2012
8	Jeffrey Miller	New York	Lease	2013 Ford Fusion Titanium	2/17/2013
9	Nuala Purcell	New York	Lease	2011 Ford Edge	11/2010
10	Daniel Fink	North Carolina	Purchase	2013 Ford Explorer	12/2012
11	Jason Zuchowski	Ohio	Lease	2012 Ford Edge	3/2012
12	Art Avedisian	Pennsylvania	Purchase	2011 Ford Expedition EL	1/31/2011
13	Jose Randy Rodriguez	Texas	Purchase	2012 Ford Focus Titanium	5/17/2011
14	Michael Ervin	Texas	Purchase	2013 Ford C-Max SEL	10/14/2012
15	Jason Connell	Virginia	Purchase	2011 Lincoln MKX	10/2010
16	Henry Miller-Jones	Virginia	Purchase	2013 Ford Fusion Titanium AWD	4/20/2013
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1 In their operative complaint, Plaintiffs allege as follows.

2 The MFT system is

3 a factory-installed, integrated in-vehicle communication, navigation,  
4 and entertainment system that allows users to use a rearview camera,  
5 control vehicle climate, operate adaptive cruise control, receive  
6 navigational direction, make hands-free telephone calls, control music,  
7 and perform other functions with voice and touch commands. [MFT]  
8 also includes 9-1-1 Assist, which automatically contacts emergency  
9 personnel with the vehicle's coordinates in case of an accident. In  
10 addition to touchscreen and voice-based commands, [MFT] also  
11 features a steering wheel control panel.

12 FAC ¶ 232. Pictures of what the MFT system looks like can be found in paragraphs 242-43 and 245  
13 of the complaint. Ford has promoted the MFT system, including in particular its safety,  
14 communication, and entertainment features, in various ways – *e.g.*, on its website, through  
15 advertisements (including print and television), and through dealerships. *See, e.g.*, FAC ¶¶ 22, 49,  
16 66, 251-61.

17 MFT is powered by an operating system known as Ford SYNC. *See* FAC ¶ 3. Ford SYNC  
18 is also the name of the earlier, first generation of the MFT system. *See* FAC ¶ 233. “Ford designed  
19 and developed SYNC with Microsoft and installed the original Sync system in Ford vehicles in  
20 2007.” FAC ¶ 233. “The initial versions of Ford SYNC, however, did not include a touchscreen,  
21 like [MFT].” FAC ¶ 233.

22 “In January 2010, hoping to capitalize on the success of SYNC, Ford announced that it  
23 would be launching a second generation of SYNC called [MFT]. [MFT] was a much more  
24 comprehensive technology which utilized Ford SYNC as the operating system, but included many  
25 more features than had been available with the initial versions of Ford SYNC.” FAC ¶ 235. Ford  
26 aimed to employ MFT in all of its vehicles, not just its higher-end vehicles. *See* FAC ¶ 237. The  
27 rollout of the MFT system began in 2010 (*i.e.*, for 2011 model vehicles). *See* FAC ¶¶ 16, 238.

28 “Currently, more than 5 million Ford vehicles contain [MFT].” FAC ¶ 238. In a June 2013 press  
release, Ford stated that, “combined, Sync and [MFT] systems are sold on 79 percent of new 2013  
Ford vehicles.” FAC ¶ 239.

Ford charges a premium for the MFT system. “As a stand-alone option, Ford’s suggested  
retail price for the [MFT] system is approximately \$1,000. Customers can add further options to

1 their [MFT] system – such as GPS navigation capability – by paying additional fees of several  
2 hundred dollars.” FAC ¶ 241.

3 However, according to Plaintiffs, there are serious problems with the MFT system. Plaintiffs  
4 underscore that “[t]he scope of the problem is wide. In late 2012, Ford reported 400 problems with  
5 the [MFT] system for every 1000 vehicles. That was an improvement over the problems earlier in  
6 2012 when Ford reported a ‘things-gone-wrong’ rate for its [MFT] system of 500 for every 1000  
7 vehicles.” FAC ¶ 10.

8 Plaintiffs have identified various problems with the MFT system, ranging from the entire  
9 system freezing up or crashing (in which case no features connected to MFT are operational,  
10 including the navigation technology, the radio, the rearview camera, and the defroster) to isolated  
11 problems such as random but frequent screen black outs, nonresponsiveness to touch or voice  
12 commands, locking up of the rearview camera, and inaccurate directions on the navigation system.  
13 *See* FAC ¶ 7; *see also* FAC ¶¶ 262-63. Plaintiffs maintain that the problems with the MFT system  
14 actually create safety risks as malfunctions in the system lead to the driver becoming distracted. *See*  
15 FAC ¶ 263. Also, there are more obvious safety risks involved when, *e.g.*, the rearview camera or  
16 defroster breaks down. Plaintiffs maintain that, although there are varying problems with the MFT  
17 system, there is an underlying defect in the system attributable to software and/or hardware. *See*  
18 FAC ¶¶ 268-69.

19 Plaintiffs assert that Ford failed to conduct adequate testing of the MFT system prior to its  
20 release. *See, e.g.*, FAC ¶ 271. Furthermore, soon after the release of the system, customer  
21 complaints began to mount. In response, Ford began to issue Technical Service Bulletins (“TSBs”)  
22 and software updates. “TSBs are recommended repairs issued by the manufacturer and sent to  
23 dealers.” FAC ¶ 274. The first TSB was issued on April 27, 2011. *See* FAC ¶ 275. TSBs  
24 continued to be issued through at least October 3, 2013. *See* FAC ¶ 286. Plaintiffs have identified  
25 at least eight TSBs, as well as multiple software updates. *See generally* FAC ¶¶ 274-87.

26 According to Plaintiffs, in spite of the TSBs and software updates, Ford still has not fixed the  
27 problem with MFT – this in spite of the fact that, at the very least, there is an express limited  
28 warranty on each vehicle. *See* FAC ¶¶ 297-300. A copy of the relevant limited warranty can be

1 found at Exhibit A of Ford’s request for judicial notice. *See* Docket No. 57-2 (RJN, Ex. A) (limited  
2 warranty). The limited warranty provides, in relevant part, as follows:

3 Under your New Vehicle Warranty if:  
4 – your Ford vehicle is properly operated and maintained, and  
5 – was taken to a Ford dealership for a warranted repair during the  
6 warranty period,  
7 then authorized Ford Motor Company dealers will, without charge,  
8 *repair, replace, or adjust* all parts on our vehicle that malfunction or  
9 fail during normal use during the applicable coverage period due to a  
10 manufacturing defect in factory-supplied materials or factory  
11 workmanship.

12 This warranty does not mean that each Ford vehicle is defect free.  
13 Defects may be unintentionally introduced into vehicles during the  
14 design and manufacturing processes and such defects could result in  
15 the need for repairs. For this reason, Ford provides the New Vehicle  
16 Limited Warranty in order to remedy any such defects that result in  
17 vehicle part malfunction or failure during the warranty period.

18 The remedy under this written warranty, and any implied warranty, is  
19 limited to repair, replacement, or adjustment of defective parts. *This*  
20 *exclusive remedy shall not be deemed to have failed its essential*  
21 *purpose so long as Ford, through its authorized dealers, is willing and*  
22 *able to repair, replace, or adjust defective parts in the prescribed*  
23 *manner. Ford’s liability, if any, shall in no event exceed the cost of*  
24 *correcting manufacturing defects as herein provided and upon*  
25 *expiration of this warranty, any such liability shall terminate.*

26 . . . .

27 Nothing in this warranty should be construed as requiring defective  
28 parts to be replaced with parts of a different type of design than the  
original part, so long as the vehicle functions properly with the  
replacement part. Moreover, Ford and its authorized dealers are  
entitled to a reasonable time and a reasonable number of attempts  
within which to diagnose and repair any defect covered by this  
warranty.

Docket No. 57-2 (RJN, Ex. A) (Limited Warranty at 8-9) (emphasis added).

**II. LEGAL STANDARD**

Ford has moved for a dismissal pursuant to Federal Rule of Civil Procedure 12(b)(6). Rule 12(b)(6) allows for dismissal based on a failure to state a claim for relief. A motion to dismiss based on the rule essentially challenges the legal sufficiency of the claims alleged. *See Parks Sch. of Bus. v. Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995). In considering a 12(b)(6) motion, a court must take all allegations of material fact as true and construe them in the light most favorable to the

1 nonmoving party, although “conclusory allegations of law and unwarranted inferences are  
 2 insufficient to avoid a Rule 12(b)(6) dismissal.” *Cousins v. Lockyer*, 568 F.3d 1063, 1067 (9th Cir.  
 3 2009). While “a complaint need not contain detailed factual allegations . . . it must plead ‘enough  
 4 facts to state a claim to relief that is plausible on its face.’” *Id.* “A claim has facial plausibility when  
 5 the plaintiff pleads factual content that allows the court to draw the reasonable inference that the  
 6 defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009); *see*  
 7 *also Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007). “The plausibility standard is not akin to  
 8 a ‘probability requirement,’ but it asks for more than sheer possibility that a defendant acted  
 9 unlawfully.” *Iqbal*, 129 S. Ct. at 1949.

10 Ford’s 12(b)(6) motion presents arguments with respect to the following categories of  
 11 claims: (1) fraud claims; (2) certain tort claims; (3) express warranty claims; (4) implied warranty  
 12 claims; (5) claims under the federal Magnuson-Moss Warranty Act (“MMWA”); and (6) claims  
 13 under California’s secret warranty law. Because the instant case involves fraud claims, Rule 9(b) is  
 14 also implicated. “Under Rule 9(b), claims alleging fraud are subject to a heightened pleading  
 15 requirement, which requires that a party ‘state with particularity the circumstances constituting fraud  
 16 or mistake.’” *Reese v. Malone*, No. 12-35260, 2014 U.S. App. LEXIS 2747, at \*17 (9th Cir. Feb.  
 17 13, 2014).

18 The Court’s opinion addresses first the fraud and tort claims. The opinion then turns to the  
 19 warranty-related claims.

### 20 **III. FRAUD AND TORT CLAIMS**

#### 21 A. Fraud Claims

22 Plaintiffs’ fraud claims are based on state law. The fraud claims are either claims for  
 23 fraudulent concealment (common law) or claims for fraud based on a consumer protection statute.

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**United States District Court**  
For the Northern District of California

1	<b>California</b>	Count I	California Unfair Competition Law, Cal. Bus. & Prof. Code § 17200
2		Count II	California Consumer Legal Remedies Act, Cal. Civ. Code § 1750
3		Count III	California False Advertising Law, Cal. Bus. & Prof. Code § 17500
4		Count VI	Fraud by concealment
5			
6	<b>Alabama</b>	Count IV	Fraudulent concealment
7	<b>Arizona</b>	Count I	Consumer Fraud Act, Ariz. Rev. Stat. § 44-1521
8		Count V	Fraudulent concealment
9	<b>Colorado</b>	Count I	Consumer Protection Act, Colo. Rev. Stat. § 6-1-101
10		Count VI	Fraudulent concealment
11	<b>Connecticut</b>	Count I	Unfair Trade Practices Act, Conn. Gen. Stat. Ann. § 42-110A
12		Count V	Fraudulent concealment
13	<b>Florida</b>	Count I	Florida Deceptive & Unfair Trade Practices Act, Fla. Stat. § 501.201
14		Count V	Fraudulent concealment
15	<b>Iowa</b>	Count I	Consumer Frauds Act, Iowa Code § 714H.1
16		Count V	Fraudulent concealment
17	<b>Massachusetts</b>	Count I	Massachusetts Consumer Protection Act, Mass. Gen. Laws Ch. 93A
18		Count V	Fraudulent concealment
19	<b>New Jersey</b>	Count I	New Jersey Consumer Fraud Act, N.J. Stat. Ann. § 56:8-1
20		Count V	Fraudulent concealment
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1	<b>New York</b>	Count I	New York General Business Law § 349
2		Count II	New York General Business Law § 350
3		Count VI	Fraudulent concealment
4	<b>North Carolina</b>	Count I	North Carolina Unfair & Deceptive Trade Practices Acct, N.C. Gen. Stat. § 75-1.1
5		Count V	Fraudulent concealment
6	<b>Ohio</b>	Count I	Consumer Sales Practices Act, Ohio Rev. Code § 1345.01
7		Count VI	Fraudulent concealment
8	<b>Pennsylvania</b>	Count I	Unfair Trade Practices & Consumer Protection Law, Pa. Stat. Ann. § 201-1
9		Count V	Fraudulent concealment
10	<b>Texas</b>	Count I	Deceptive Trade Practices Act, Tex. Bus. & Com. Code § 17.41
11		Count V	Fraud by concealment
12	<b>Virginia</b>	Count I	Virginia Consumer Protection Act, Va. Conn. Ann. § 59.1-196
13		Count V	Fraudulent concealment

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20 With respect to the fraud claims, Ford makes the following arguments: (1) that Plaintiffs

21 have failed to plead with sufficient particularity any affirmative misrepresentation by Ford; (2) that,

22 to the extent Plaintiffs claim a failure to disclose by Ford, they fail to plead sufficient facts that (a)

23 Ford knew, at the time of sale, of a material fact of which Plaintiffs were not aware and that (b) Ford

24 had a duty to disclose in the first place; and (3) that, for the Iowa, Texas, and Virginia Plaintiffs,

25 their fraud claims based on the consumer protection statutes are time barred.

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1           1.       Affirmative Misrepresentation

2           The Court agrees with Ford that Plaintiffs have failed to state a fraud claim based on an  
3 affirmative misrepresentation. Below are typical allegations from the operative complaint regarding  
4 the fraud on Plaintiffs:

5                     Plaintiff Whalen selected and ultimately purchased her vehicle, in part,  
6 because of the features of the [MFT] system, as represented through  
7 advertisements and representations made by Ford. Specifically, prior  
8 to her purchase of the vehicle, Plaintiff Whalen viewed television  
9 advertisements regarding the [MFT] and a representative of Henry  
10 Curtis Ford made verbal representations about [MFT] to Plaintiff  
11 Whalen. A salesperson from Henry Curtis Ford even demonstrated  
12 the [MFT] and Bluetooth system working through his phone and stated  
13 Plaintiff Whalen could connect her phone or IPOD to the system and  
14 listen to music. She recalls that the advertisements and representations  
15 touted the voice command features of the [MFT] system, including,  
the ability to adjust the temperature of the vehicle; the ability to  
control the audio portion of the vehicle without having to take her eyes  
off the road; and the purported ability to dial 9-1-1 in the event of an  
accident. *None of the advertisements reviewed or representations  
received by Plaintiff Whalen contained any disclosure relating to any  
defects in the [MFT] system.* Had Ford disclosed that the [MFT] in  
her vehicle suffered from numerous defects which would prevent her  
full use of her vehicle and pose safety risks, she would not have  
purchased her vehicle with [MFT], or would have paid less for the  
vehicle.

16       FAC ¶ 22 (emphasis added).

17                     Plaintiff Zuchowski saw advertisements for and representations made  
18 by Defendant Ford about MyFord Touch, including television, print  
19 media, and on the internet. The Marshall Ford salesperson represented  
20 that the MyFord Touch system worked well and had full functionality.  
21 Although Plaintiff Zuchowski cannot recall the exact language from  
22 the various publications, he recalls the materials touting the innovative  
23 nature of MyFord Touch, how it would enhance the driving  
24 experience, and increase the safety of the vehicle. *None of these  
publications contained any disclosure relating to any defects in the  
MyFord Touch system.* Had these materials that Plaintiff Zuchowski  
viewed disclosed that the MyFord Touch in his vehicle suffered from  
numerous defects which would prevent his full use of his vehicle and  
pose safety risks, he would not have leased his vehicle with MyFord  
Touch, or certainly would not have paid as much as he did for his  
vehicle.

25       FAC ¶ 187 (emphasis added).

26           As indicated by the above, Plaintiffs' fraud theory is really a failure to disclose rather than an  
27 affirmative misrepresentation. As Ford contends, Plaintiffs are not really arguing that the MFT  
28 system does not have the features described in, *e.g.*, Ford's advertisements. *See Mot.* at 9. Rather,

1 their beef is that the features of the MFT system do not work (and that Ford knew that fact at the  
2 time of the sales/leases to Plaintiffs but failed to disclose such). This is not a case where, *e.g.*, Ford  
3 made an affirmative representation that the MFT system was defect free. In fact, the opposite is true  
4 given the limited warranty, which expressly states that the warranty does not mean that each Ford  
5 vehicle is defect free.

6 The case law cited by Ford is on point. Those cases show that, unless a product  
7 manufacturer makes claims about, *e.g.*, a product's quality or reliability, no claim based on an  
8 affirmative misrepresentation is viable. For example, in *In re iPhone 4S Consumer Litigation*, No. C  
9 12-1127 CW, 2014 U.S. Dist. LEXIS 19363 (N.D. Cal. Feb. 14, 2014), the plaintiffs filed suit  
10 against Apple regarding the Siri feature on its iPhone. Judge Wilken rejected the plaintiffs' fraud  
11 claim in part because they failed to point to "any specific statement by Apple that expressly  
12 indicates that Siri would be able to answer every question, or do so consistently." *Id.* at \*20-21; *see*  
13 *also Morgan v. Harmonix Music Sys., Inc.*, No. C08-5211 BZ, 2009 WL 2031765, at \*3 (N.D. Cal.  
14 July 30, 2009) (stating that "plaintiffs have alleged no specific representations about the durability  
15 of the foot pedal" on the drum set); *Long v. Hewlett-Packard Co.*, No. C 06-02816 JW, 2007 U.S.  
16 Dist. LEXIS 79262, at \*21 (N.D. Cal. July 27, 2007) (stating that "[t]he word 'notebook' describes  
17 the type of product being sold; it does not constitute a representation regarding the quality of the  
18 computer's parts, nor a representation regarding the consistency or longevity of the computer's  
19 operation").

20 The case law cited by Plaintiffs is not to the contrary. For example, in *Consumer Advocates*  
21 *v. Echostar Satellite Corp.*, 113 Cal. App. 4th 1351 (2003), a fraud claim was asserted against the  
22 defendant because it had represented in its advertisements that, *e.g.*, a customer would receive 50  
23 channels from its satellite TV services. According to the defendant, the fraud claim was not viable  
24 because this statement "was not a statement that all 50 channels would be available at all times." *Id.*  
25 at 1362. The court held that whether the statement was untrue or misleading was a triable issue of  
26 fact to be resolved later. More importantly (at least for purposes of this opinion), the court indicated  
27 that the theory here would be one of a failure to disclose. *See id.* ("Under the False Advertising Act  
28 and the UCL, '[a] perfectly true statement couched in such a manner that it is likely to mislead or

1 deceive the consumer, *such as by a failure to disclose other relevant information*, is actionable.”)  
2 (emphasis added).

3 In their opposition, Plaintiffs suggest that, at the very least, there were affirmative  
4 misrepresentations made in Ford’s limited warranty. Plaintiffs admit that “the Limited Warranty  
5 contains a generic admission of potential defect” but maintain that “using that to insulate Ford from  
6 liability for misrepresenting specific product features (or knowingly omitting specific defects) would  
7 undermine the remedial purpose of state consumer-protection laws.” Opp’n at 11-2. But Plaintiffs  
8 miss the point here. The fact that Ford’s limited warranty stated “[t]his warranty does not mean that  
9 each Ford vehicle is defect free,” Docket No. 57-2 (RJN, Ex. A) (Limited Warranty at 8-9), does not  
10 provide a basis for a claim that Ford made an *affirmative misrepresentation* that the MFT system  
11 was defect free.

12 Plaintiffs’ reliance on *Mickens v. Ford Motor Co.*, 900 F. Supp. 2d 427 (D.N.J. 2012), *see*  
13 Opp’n at 12 n.35, is unavailing. In *Mickens*, the court simply stated that “[w]arranty coverage of a  
14 particular problem does not, as a matter of law, negate a CFA [Consumer Fraud Act] claim that the  
15 manufacturer knowingly *omitted* information about a design defect.” *Mickens*, 900 F. Supp. 2d at  
16 442 (emphasis omitted). But here Plaintiffs are trying to argue not just an omission (failure to  
17 disclose) but also an affirmative misrepresentation.

18 Accordingly, to the extent Plaintiffs have asserted any fraud claims based on an affirmative  
19 representation (as opposed to a failure to disclose), the Court grants Ford’s motion, with one  
20 exception.

21 The exception is with respect to one Plaintiff, Mr. Miller (New York). For Mr. Miller, there  
22 is the allegation that, he “was aware of some mixed reviews of [MFT], [but] *he was informed by the*  
23 *sales representatives at Mahopac Ford that Ford had corrected any defects in [MFT].*” FAC ¶ 164  
24 (emphasis added). This is an affirmative representation – *i.e.*, that all defects with the MFT system  
25 had been corrected.

26 Ford contends that the Court should still dismiss Mr. Miller’s claim because “[a] statement  
27 by a salesperson at a dealership cannot be imputed to Ford absent an agency relationship, which  
28 Plaintiffs have not even attempted to plead.” Mot. at 9 (citing *Maietta v. Ford Motor Co.*, No. 96 C

1 8347, 1997 U.S. Dist. LEXIS 3788 (N.D. Ill. Mar. 24, 1997) (citing an Illinois Supreme Court  
 2 opinion for the proposition that “[a] complaint relying on agency must plead facts which, if proved,  
 3 establish the existence of an agency relationship[;] [i]t is insufficient to merely plead the legal  
 4 conclusion of agency”).<sup>2</sup> Plaintiffs argue in return that whether there is an agency relationship is a  
 5 question of fact and, here, they have made sufficient “factual allegations from which the Court can  
 6 infer the existence of agency relationships between Ford and its authorized dealers with respect to  
 7 [MFT].” Opp’n at 11. Plaintiffs cite in particular ¶¶ 274-87 of the complaint, which discuss the  
 8 TSBs and software updates sent by Ford to dealers.

9 Based on these paragraphs, Plaintiffs have made sufficient allegations of agency to withstand  
 10 the motion to dismiss. “Under New York law an agent may bind his principal in matters within the  
 11 scope of his agency,” *Agristor Leasing v. Hollister*, No. 83-CV-1357, 1985 U.S. Dist. LEXIS 12872,  
 12 at \*9 (N.D.N.Y. Dec. 12, 1985), and “[a] principal is liable for an agent’s misrepresentations [or  
 13 other frauds] that cause pecuniary loss to a third party, when the agent acts within the scope of  
 14 his . . . authority.” *Seifts v. Consumer Health Solns. LLC*, No. 05 Civ. 09355 (RJH), 2011 U.S.  
 15 Dist. LEXIS 113617, at \*19 (S.D.N.Y. Sept. 30, 2011); *cf. Sachs v. Cantwell*, No. 10 Civ. 1663  
 16 (JPO), 2012 U.S. Dist. LEXIS 125335, at \*55 (S.D.N.Y. Sept. 4, 2012) (stating that, “[u]nder New  
 17 York law, ‘an employer may be vicariously liable for an intentional tort committed by an employee  
 18 if the employee was acting within the scope of employment at the time the tort was committed’”). It  
 19 is reasonable to infer that an agency relationship may be found where a salesperson of an authorized  
 20 dealership of Ford makes a representation about the Ford product in the course of the sale of that  
 21 product.

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22  
 23 <sup>2</sup> Plaintiffs criticize *Maietta* because the court there “relied on Illinois state-court decisions,  
 24 failing to recognize the difference between federal notice-pleading requirements and Illinois’[s]  
 25 more onerous fact-pleading requirements, leading another federal court from the same district to  
 26 reject *Maietta* as unpersuasive.” Opp’n at 11. But the federal court case cited by Plaintiffs – *Kent v.*  
 27 *Celozzi-Ettleson Chevrolet, Inc.*, No. 99 C 2868, 1999 U.S. Dist. LEXIS 17282 (N.D. Ill. Nov. 3,  
 28 1999) – was decided before *Twombly* and *Iqbal*. Post-*Iqbal* and/or *Twombly*, courts have held that a  
 conclusory allegations of an agency relationship is not enough. *See, e.g., Castaneda v. Saxon*  
*Mortg. Servs.*, No. CIV. 2:09-01124 WBS DAD, 2010 U.S. Dist. LEXIS 17235, at \*18 (E.D. Cal.  
 Feb. 26, 2010) (stating that “plaintiffs have not alleged sufficient facts to suggest an agency  
 relationship between Novastar and plaintiffs’ mortgage brokers outside of the conclusory allegation  
 that Novastar had an agency relationship with the brokers and provided direction for them to breach  
 their fiduciary duties”).

1 In its reply brief, Ford argues that “instructions to dealers about how to perform repairs do  
2 not create an agency relationship regarding sales representations.” Reply at 4. While this argument  
3 is not necessarily without merit, ultimately, the scope of the agency is a factual one for the jury to  
4 resolve, especially as information about Ford’s precise relationship with its dealers – in particular,  
5 with regard to MFT – is largely within Ford’s possession, custody, or control.

6 2. Failure to Disclose

7 For Plaintiffs’ claims that Ford engaged in fraud by failing to disclose, Ford makes two  
8 primary arguments: (1) that Plaintiffs have failed to adequately allege Ford knew, at the time of sale,  
9 of a material fact of which Plaintiffs were not aware and (2) that Plaintiffs have failed to adequately  
10 allege Ford had a duty to disclose in the first place.

11 a. Knowledge of Material Fact of Which Plaintiffs Were Unaware

12 As preliminary matter, the Court rejects Ford’s argument that the fraud claims based on a  
13 failure to disclose should be dismissed because its limited warranty *informed* customers that the  
14 vehicles were not defect free. As noted above, in *Mickens*, the court stated that “[w]arranty  
15 coverage of a particular problem does not, as a matter of law, negate a CFA [Consumer Fraud Act]  
16 claim that the manufacturer knowingly omitted information about a design defect.” *Mickens*, 900 F.  
17 Supp. 2d at 442. Moreover, it would be odd to say that a generic disclosure of possible defects  
18 should insulate Ford from liability if it actually knew of a specific defect.

19 Aside from the above argument, Ford makes two main arguments as to why Plaintiffs have  
20 not adequately alleged that Ford knew, at the time of sale, of a material fact of which Plaintiffs were  
21 not aware: (1) “Plaintiffs’ allegations do not set forth which facts were allegedly material to each  
22 Plaintiff” and (2) “Plaintiffs’ . . . allegations . . . fail to establish Ford’s knowledge” of these facts.  
23 Opp’n at 13.

24 i. Materiality

25 The materiality is argument weak. Plaintiffs should not be obligated to spell out which exact  
26 features of the MFT system they were most interested in. The FAC adequately conveys that the  
27 MFT system was an attractive component because of safety features and features that make the  
28 driving experience easier or more enjoyable. Furthermore, “materiality is generally a question of

1 fact,” *Kwikset Corp. v. Superior Court*, 51 Cal. 4th 310, 333 (2011), and a reasonable jury could  
2 well conclude that the problems with the MFT system were material facts because the system  
3 arguably was the subject of Ford’s marketing efforts – the system enhanced the functionality and  
4 experience of the vehicle, including its safety.

5 Although Ford contends that there is no safety risk if the MFT system is rendered inoperable  
6 because a car without the MFT system can still be safe (*e.g.*, cars that are not Fords or Lincolns do  
7 not have the MFT system), a reasonable jury could still conclude otherwise. For instance, a  
8 reasonable jury could find that a MFT system that suddenly breaks down while a person is driving  
9 the car could cause a safety risk because of the driver becoming distracted. More obviously, a  
10 reasonable jury could find a safety risk if a person was relying on the rearview camera feature of  
11 MFT while driving in reverse and that feature broke down. *See, e.g.*, FAC ¶ 25 (Plaintiff Whalen  
12 alleging that “the backup camera would freeze *while driving*”). The Court also notes that it is odd  
13 for Ford to quibble with materiality here when it promoted the MFT system as a desirable  
14 component of a vehicle in the first place. In other words, if the MFT system was so desirable, then it  
15 would not be surprising for Plaintiffs to consider a problem with the system – particularly a systemic  
16 one – a material fact.

17 ii. Knowledge

18 As for Ford’s argument that Plaintiffs have failed to sufficiently allege Ford knew, at the  
19 time of sale, of the material facts (*i.e.*, the problems with the MFT system), that argument is also  
20 problematic. In evaluating the argument, the Court bears in mind that Plaintiffs purchased or leased  
21 their vehicles containing the MFT system between October 2010 and April 2013, with most  
22 purchases or leases taking place in 2011 and 2012. According to Plaintiffs, Ford knew at the time of  
23 the purchases or leases that there were problems with MFT based on, *e.g.*, (1) the TSBs and updates  
24 that it issued to dealers; (2) the customer complaints that were made (*e.g.*, websites set up  
25 specifically to complain about MFT and nineteen complaints ranging from October 2010 to July  
26 2013 made to NHTSA, *see* FAC ¶¶ 288-91); and (3) a statement by a salesperson at a dealership  
27 (apparently some time in 2013) that the MFT problems he experienced were common. *See* Opp’n at  
28 16.

1 For Plaintiffs who purchased or leased their vehicles from 2011 to 2013, there is a plausible  
2 allegation of knowledge on the part of Ford. For example, three Plaintiffs (CDD, Mr. Miller, and  
3 Mr. Miller-Jones) purchased or leased their vehicles in 2013. Prior to 2013, Ford had issued six  
4 TSBs to dealers as well as two updates. *See* FAC ¶¶ 275-83. Thus, it is more than fair to say that,  
5 by 2013, Ford was aware of significant problems with the MFT system. Of course, most Plaintiffs  
6 purchased or leased their vehicles before 2013 (four in 2010, six in 2011, and eleven in 2012). Prior  
7 to 2012, Ford had issued only two TSBs and no updates. *See* FAC ¶¶ 275-76. Nevertheless, it is  
8 still reasonable to infer that, if Ford had issued four TSBs and two updates in 2012 alone, Ford  
9 should have known of problems with MFT by around 2011, *i.e.*, before it could recommend what  
10 repairs or updates needed to be done. Presumably, the TSBs and updates were preceded by an  
11 accretion of knowledge by Ford. *See Falco v. Nissan N. Am., Inc.*, No. CV 13-00686 DDP (MANx),  
12 2013 U.S. Dist. LEXIS 147060, at \*17-18 (C.D. Cal. Oct. 10, 2013) (stating that, where defendant  
13 issued the first of several TSBs in July 2007 and further did a redesign in 2006 or 2007, that  
14 “permit[s] plausible inferences that [defendant] was aware of the defect at the time they sold the  
15 vehicles in 2005 and 2006”).

16 The closer question is whether there is enough to charge Ford with knowledge with respect  
17 to those Plaintiffs who purchased or leased their vehicles in 2010. 2010 was the year of the rollout  
18 of MFT. That being the case, Plaintiffs would basically have to be alleging that, at or about the time  
19 of rollout, Ford knew that the MFT system had problems. While the Court has some doubts whether  
20 Plaintiffs will actually be able to prove such, that does not mean that Plaintiffs’ case is implausible.  
21 The first TSB issued in April 2011, *i.e.*, only a few months after the rollout of the MFT system. One  
22 could reasonably infer that the TSB was issued in response to consumer complaints that surfaced  
23 immediately after rollout. That there were such complaints is substantiated by the NHTSA  
24 complaints identified by Plaintiffs, as well as the fact that some of the 2010 Plaintiffs began taking  
25 in their cars for servicing almost immediately. *See, e.g.*, FAC ¶¶ 120 (Mr. Mitchell), 216 (Mr.  
26 Connell).

27 Accordingly, for 12(b)(6) purposes, given all reasonable inferences must be drawn in  
28 Plaintiffs’ favor, the Court finds that Plaintiffs have adequately pled knowledge on the part of Ford.



1                   b.       Duty to Disclose

2           The parties agree that, where a fraud claim is based on nondisclosure or concealment, there  
3 must first be a duty to disclose and that a duty can arise from the following circumstances:

- 4 (1)     when there is a known defect in a consumer product and there are safety concerns associated  
5         with the product's use<sup>3</sup>;
- 6 (2)     when the defendant had exclusive knowledge of material facts not known to the plaintiff;
- 7 (3)     when the defendant actively conceals a material fact from the plaintiff; and
- 8 (4)     when the defendant makes partial representations but also suppresses some material facts.

9 *See, e.g., Smith v. Ford Motor Co.*, 749 F. Supp. 2d 980, 987-88 (N.D. Cal. 2010) (Chesney, J.); *see*  
10 *also Wilson v. Hewlett-Packard*, 668 F.3d 1136, 1141 (9th Cir. 2012).

11           In the instant case, Plaintiffs have relied on each of the above circumstances in arguing that  
12 Ford had a duty to disclose. For purposes of this opinion, the Court need only address the first two  
13 categories.

14                   i.       Safety Concerns

15           As indicated above, Plaintiffs have alleged enough to implicate a duty to disclose based on  
16 safety concerns alone. Ford argues that a vehicle with an inoperable MFT system “is no less safe  
17 than the same vehicle not equipped with a [MFT] system,” Mot. at 16, but, as discussed above, a  
18 reasonable jury could find that a suddenly malfunctioning MFT system could create a safety risk,  
19 particularly if the system were to suddenly crash while a person was driving. It is one thing for a  
20 product never to have a feature; it is another for a consumer to have purchased the product with that  
21 feature and to depend on that feature, only to have it suddenly malfunction. Ford contends that,  
22 “[b]y this rationale, any feature on a car can become a safety risk,” as virtually any defect could  
23 become distracting to the driver.” Mot. at 17. But this argument is not particularly convincing  
24 given the prominence of the MFT system and its far-reaching capabilities with respect to the driving  
25 experience.

26 \_\_\_\_\_

27           <sup>3</sup> Both at the hearing and in their papers, Plaintiffs argued that they did not have to show a  
28 safety risk because “all Class Vehicles are still under warranty.” Opp’n at 13. However, Plaintiffs  
also admitted in their brief that there is a “duty to disclose a defect that ‘plausibly constitutes an  
unreasonable safety risk.’” Opp’n at 13 n.38.

1 In any event, there are certain obvious safety risks if there is a breakdown in the MFT system  
2 – e.g., if the rearview mirror camera or the defroster were to stop functioning. *See, e.g.*, FAC ¶ 266  
3 (“Additionally, because certain crucial vehicle functions, including the defroster and the rearview  
4 camera, are routed through and controlled by MyFord Touch, these features become inoperable  
5 when the MyFord Touch system crashes. Thus, driving in winter becomes dangerous because the  
6 driver cannot defrost his or her windshield and other windows, and drivers are more likely to collide  
7 with other cars or pedestrians when moving in reverse because the rearview camera fails.”). These  
8 safety concerns are not speculative as the concerns were in *Smith*, 749 F. Supp. 2d at 991 (stating  
9 that “Plaintiffs offer no evidence that the ignition-lock defect causes engines to shut off  
10 unexpectedly or causes individuals to stop their vehicles under dangerous conditions,” and thus  
11 “agree[ing] with Ford that the dangers envisioned by plaintiffs are speculative in nature, deriving in  
12 each instance from the particular location at which the driver initially has parked the vehicle and/or  
13 the driver’s individual circumstances”).

14 To the extent Ford disputes a safety risk because the defroster can be operated outside of the  
15 MFT system, *see* Reply at 12, it is not clear from the evidence provided by Ford that that purported  
16 fact is indeed true. For example, ¶ 243 of the FAC show buttons for “My Temp” but it is not clear  
17 that that function controls the defroster. Also, page 27 of the MFT Handbook, *see* Def.’s RJN, Ex. B  
18 (MFT Handbook), does not clearly show a button for a defroster. Furthermore, Plaintiffs allege in  
19 their complaint that, “[i]n at least some of the Class Vehicles, Ford eliminated the physical knobs for  
20 climate-control functions, including defrosters. ¶ 263. *After outcry from consumers*, Ford  
21 backtracked on this design choice and *reintroduced knobs*. ¶ 15.” Opp’n at 16 (emphasis added).  
22 Thus, even if Ford’s evidence did show that a defroster can be operated outside of the MFT system,  
23 Plaintiffs have alleged that this was not always the case.

24 As for Ford’s contention that a safety risk from a broken rearview camera is not that  
25 significant because there are many cars today and during the relevant period that do not have such  
26 camera, that argument is also unpersuasive. Ford’s position fails to take into account that a safety  
27 risk can arise by virtue of the fact that there is a safety feature in a product that a consumer comes to  
28 depend upon (or at least a reasonable jury could so find).

1 Accordingly, for 12(b)(6) purposes, the Court concludes that a reasonable jury could find a  
2 safety concern here with respect to MFT that gives rise to a duty to disclose.

3 ii. Exclusive Knowledge

4 Even if there were insufficient safety concerns to give rise to a duty to disclose, Ford could  
5 still have a duty to disclose based on an independent ground. According to Plaintiffs, one such  
6 ground is exclusive knowledge. Exclusive knowledge can be established where, *e.g.*, the defendant  
7 knew of a defect while the plaintiffs did not and, “given the nature of the defect, it was difficult to  
8 discover.” *Collins v. eMachines, Inc.*, 202 Cal. App. 4th 249, 256 (2011).

9 But exclusivity is not limited to this specific circumstance. Indeed, courts have noted that  
10 “[e]xclusivity is not applied with rigidity.” *Czuchaj v. Conair Corp.*, No. 13-CV-1901-BEN (RBB),  
11 2014 U.S. Dist. LEXIS 54410, at \*10 (S.D. Cal. Apr. 17, 2014). Thus, for example, even the  
12 presence of information online does not automatically defeat exclusive knowledge. *See id.* at \*11.  
13 Also, exclusivity is analyzed in part by determining whether the defendant has superior knowledge.  
14 *See id.*; *see also Johnson v. Harley-Davidson Motor Co. Grp., LLC*, 285 F.R.D. 573, 583 (E.D. Cal.  
15 2012). But where a plaintiff simply makes conclusory allegations that a defendant has superior  
16 knowledge, that is not enough to overcome a 12(b)(6) challenge. *See, e.g., Taragan v. Nissan N.*  
17 *Am., Inc.*, No. 09-3660 SBA, 2013 U.S. Dist. LEXIS 87148, at \*21-22 (N.D. Cal. June 20, 2013)  
18 (indicating that “a plaintiff cannot establish a duty by pleading, *in a purely conclusory fashion*, that  
19 a defendant was in a superior position to know the truth about a product and actively concealed the  
20 defect”; adding that, “Plaintiffs must allege specific facts that they claim should have alerted Nissan  
21 that the Intelligent Key system design was, in fact, defective”) (emphasis added).

22 Here, Ford primarily argues against exclusive knowledge on the ground that there was public  
23 knowledge about problems with the MFT system. *See Mot.* at 20. While the complaint does contain  
24 allegations regarding publicly available knowledge, that is far from being dispositive. Even if the  
25 public – and therefore Plaintiffs – were aware of some problems with MFT, that does not establish  
26 that either the public or Plaintiffs knew or should have known of the severity of the problems,  
27 including the fact that the problems could not be fixed (as alleged by Plaintiffs). Indeed, as Ford  
28 conceded at the hearing, Plaintiffs would not have had full awareness of the TSBs because the full

1 content of the TSBs was not publicly available on the NHTSA website. Even if Plaintiffs were  
2 aware of the TSBs, that would suggest that the problems, even if significant, were still capable of  
3 being repaired. Plaintiffs would not know that the MFT system was in fact not capable of repair, as  
4 alleged in the FAC.

5 3. Time Bar

6 Ford's final argument regarding the fraud claims is that, for the Iowa, Texas, and Virginia  
7 Plaintiffs,<sup>4</sup> their fraud claims based on the consumer protection statutes are time barred.

8 Ford contends – and Plaintiffs do not dispute – that the consumer protection statutes for these  
9 states is two years. Plaintiffs also do not dispute that they filed suit more than two years after the  
10 Iowa, Texas, and Virginia Plaintiffs first experienced problems with the MFT system. Where the  
11 parties disagree is whether there is a basis for tolling of the statute of limitations.

12 Statute of limitations is, of course, an affirmative defense that a plaintiff has no obligation to  
13 plead around in his or her complaint. *See Belluomini v. CitiGroup, Inc.*, No. CV 13-01743 CRB,  
14 2013 U.S. Dist. LEXIS 103882, at \*9 n.3 (N.D. Cal. July 24, 2013) (stating that “[f]ederal courts  
15 have repeatedly held that a plaintiff is not required to plead facts in his complaint in order to avoid  
16 potential affirmative defenses”). But where there is a statute-of-limitations problem apparent from  
17 the face of the complaint, *see id.* at \*10 n.3 (noting that a Rule 12(b)(6) motion may still be made  
18 where “it is apparent from the face of the complaint that an action will be time barred”), it is not  
19 uncommon for a plaintiff to make allegations of tolling, as Plaintiffs did in their FAC.

20 Here, Plaintiffs pled tolling based on Ford's active concealment – *i.e.*, Ford's active  
21 concealment of the problems with MFT prevented Plaintiffs from finding out about Ford's fraud  
22 (failure to disclose the problems with MFT). *See* FAC ¶ 230 (“Any applicable statute(s) of  
23 limitation has been tolled by Defendant's knowing and active concealment and denial of the facts  
24 alleged herein.”).

25 For purposes of 12(b)(6), Plaintiffs have adequately alleged active concealment. If, as  
26 Plaintiffs allege, Ford pretended to fix the problems with MFT instead of actually admitting that the

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28 <sup>4</sup> Mr. Mitchell is the only Iowa Plaintiff. The Texas Plaintiffs are Mr. Rodriguez and Mr. Ervin. The Virginia Plaintiffs are Mr. Connell and Mr. Miller-Jones.

1 problems could not be fixed, that would be active concealment.<sup>5</sup> *Cf. Ho v. Toyota Motor Corp*, 931  
 2 F. Supp. 2d 987, 999 (N.D. Cal. 2013) (Conti, J.) (finding that plaintiffs had adequately pled active  
 3 concealment by alleging, *inter alia*, that defendants repaired the class vehicles' headlamps only  
 4 temporarily or replaced them with other defective parts). Also, active concealment is supported by  
 5 Plaintiffs' allegation that Ford kept the existence of the TSBs "secret" – *i.e.*, Ford never shared the  
 6 existence of the TSBs with Plaintiffs when they took their cars in for service.

7 Moreover, aside from active concealment, there are enough allegations in the complaint to  
 8 support Plaintiffs' position (as argued at the hearing) that the fraud claims did not accrue until well  
 9 after they first began to experience problems with their cars.<sup>6</sup> First, a single problem with MFT did  
 10 not establish that there was a systemic problem with the system. Second, and even more important,  
 11 even after successive problems with the MFT system, that does not in and of itself establish that  
 12 Plaintiffs should therefore have known of Ford's alleged *fraud* in concealing the extent of the  
 13 problems with the MFT system.

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 20 <sup>5</sup> In its papers, Ford suggests that Federal Rule of Evidence 408 would bar any evidence of  
 21 repairs. However, at this stage of the proceedings (*i.e.*, 12(b)(6)), the Court is not concerned about  
 the admissibility of evidence. *See* Opp'n at 21.

22 <sup>6</sup> *See, e.g.*, Iowa Code § 714H.5(5) ("An action pursuant to this chapter must be brought  
 23 within two years of the occurrence of the last event giving rise to the cause of action under this  
 24 chapter or within two years of the discovery of the violation of this chapter by the person bringing  
 the action, whichever is later."); Tex. Bus. & Com. Code § 17.565 ("All actions brought under this  
 25 subchapter must be commenced within two years after the date on which the false, misleading, or  
 deceptive act or practice occurred or within two years after the consumer discovered or in the  
 26 exercise of reasonable diligence should have discovered the occurrence of the false, misleading, or  
 deceptive act or practice."); Va. Code Ann. § 8.01-249 ("The cause of action in the actions herein  
 27 listed shall be deemed to accrue as follows: [¶] 1. In actions for fraud or mistake, in actions for  
 28 violations of the Consumer Protection Act (§ 59.1-196 *et seq.*) based upon any misrepresentation,  
 deception, or fraud, and in actions for rescissions of contract for undue influence, when such fraud,  
 mistake, misrepresentations, deception, or undue influence is discovered or by the exercise of due  
 diligence reasonably should have been discovered.").

1 B. Certain Tort Claims

2 For certain tort claims, Ford has also argued for dismissal largely on the basis of the  
3 economic loss rule. The claims at issue here are as follows:

<b>Colorado</b>	Count I	Colorado Consumer Protection Act, Colo. Rev. Stat. § 6-1-101
	Count II	Strict Product Liability
	Count VI	Fraudulent Concealment
<b>Florida</b>	Count I	Florida Deceptive & Unfair Trade Practices Act, Fla. Stat. § 501.201
	Count V	Fraudulent Concealment
<b>North Carolina</b>	Count I	North Carolina Unfair & Deceptive Trade Practices Act, N.C. Gen. Stat. § 75-1.1
	Count V	Fraudulent Concealment
<b>Ohio</b>	Count IV	Negligence

15 1. Colorado

16 a. Strict Liability Claim

17 For the Colorado Plaintiff (Mr. Sheerin), Ford asserts that, where a plaintiff brings a strict  
18 liability claim, and the only damages sought are damages to the product itself (*i.e.*, economic loss  
19 and not, *e.g.*, damages to the plaintiff or other property belonging to the plaintiff), Colorado does not  
20 recognize such a claim.

21 The critical case is *Hiigel v. General Motors Corp.*, 544 P.2d 983 (Colo. 1975). There, the  
22 Colorado Supreme Court adopted the doctrine of strict liability in tort which was stated in § 402A of

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1 the Restatement.<sup>7</sup> It also determined that “a failure to warn adequately can render a product,  
2 otherwise free of defect, defective for purposes of § 402A.” *Id.* at 987.

3 For purposes of this case, however, the *Hiigel* court’s significant ruling was with respect to  
4 the issue of damages for strict liability. More specifically, the *Hiigel* court criticized the trial court’s  
5 interpretation of § 402A as being

6 too narrow. Although there is a split among the jurisdictions as to  
7 whether the damage *to the product sold* is covered under the doctrine  
8 of strict liability, *we think the wiser view is that it is*. Since under §  
9 402A the burden of having cast a defective product into the stream of  
10 commerce falls upon the manufacturer, it appears inconsistent to limit  
11 his responsibility to property other than the product sold.

12 *Id.* at 989 (emphasis added).

13 A subsequent decision of the Colorado Supreme Court, *Town of Alma v. AZCO Construction,*  
14 *Inc.*, 10 P.3d 1256 (Colo. 2000), did not overrule *Hiigel* in this regard. *Town of Alma* addressed the  
15 issue of whether the rule barred the plaintiff’s claim for negligence, not strict liability.<sup>8</sup>

16 b. Fraud Claims

17 According to Ford, the two fraud claims under Colorado law (*i.e.*, fraudulent concealment  
18 and the consumer protection statute) are directly barred by the economic loss rule.

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19 <sup>7</sup> Under that section,

- 20 (1) One who sells any product in a defective condition  
21 unreasonably dangerous to the user or consumer or to his  
22 property is subject to liability for physical harm thereby caused  
23 to the ultimate user or consumer, or to his property, if
- 24 (a) the seller is engaged in the business of selling such a  
25 product, and
- 26 (b) it is expected to and does reach the user or consumer  
27 without substantial change in the condition in which it  
28 is sold.

*Hiigel*, 544 P.2d at 986 (internal quotation marks omitted).

<sup>8</sup> And even with regard to negligence, the Colorado Supreme Court stated that “a party suffering only economic loss from the breach of an express or implied contractual duty may not assert a tort claim for such a breach *absent an independent duty of care under tort law.*” *Town of Alma*, 10 P.3d at 1264 (emphasis added).

1 In *Town of Alma*, the Colorado Supreme Court opined on the economic loss rule, stating that  
2 “[t]he key to determining the availability of a contract or tort action lies in determining the source of  
3 the duty that forms the basis of the action.” *Town of Alma*, 10 P.3d at 1262. *See id.* (stating that  
4 “[a] breach of duty which arises under the provisions of a contract must be redressed under  
5 contract, and a tort action will not lie”). Here, Plaintiffs make three arguments as to a duty of care  
6 owed by Ford independent of the contract: (1) a duty under the consumer protection statute (in short,  
7 a statutory duty), (2) a duty not to fraudulently induce another to enter a contract, and (3) a duty to  
8 disclose that exists independent of the contract.

9 Plaintiffs’ position has merit on all three grounds. For example, in *A.C. Excavating v. Yacht*  
10 *Club II Homeowners Association*, 114 P.3d 862 (Colo. 2005), the Colorado Supreme Court  
11 essentially recognized that a statutory duty was a duty independent of a contract. *See id.* at 865, 868  
12 (noting that case law established that subcontractors owe homeowners a duty of care, independent of  
13 any contractual obligations, to act without negligence in the construction of homes and that “the  
14 General Assembly has [also] explicitly recognized that subcontracts are under an independent duty  
15 of care”); *see also Stan Clauson Assocs. v. Coleman Bros. Constr., LLC*, 297 P.3d 1042, 1047 (Colo.  
16 Ct. App. 2013) (“concluding] that SCA does not owe Coleman a duty independent of the  
17 agreement[;] [l]and planning is not a profession that is held to an independent duty and standard of  
18 care *under any Colorado statute*, nor have land planners otherwise been held to such a duty or  
19 standard at common law in our state”) (emphasis added). Here, one of Plaintiffs’ fraud claims has a  
20 statutory basis. *See Colo. Rev. Stat. § 6-1-101* (Colorado Consumer Protection Act).

21 Also, although “fraud claims cannot proceed where they arise from duties implicated by the  
22 parties’ contract,” pre-contractual allegations of fraudulent inducement are not barred by the  
23 economic loss rule. *XeDAR Corp. v. Rakestraw*, No. 12-cv-01907-CMA-BNB, 2013 U.S. Dist.  
24 LEXIS 3416, at \*17-18 (D. Colo. Jan. 8, 2013). Notably, *Town of Alma* intimated such in a  
25 footnote. *See Town of Alma*, 10 P.3d at 1263 n.10 (citing Texas state court opinion noting that  
26 fraudulent inducement is based on an independent duty, thus precluding application of the economic  
27  
28



1 loss rule). Colorado courts of appeal have also so indicated.<sup>9</sup> *See, e.g., Makoto USA, Inc. v. Russell,*  
 2 250 P.3d 625, 628 (Colo. Ct. App. 2009) (noting that another court “suggested that pre-contractual  
 3 claims of fraudulent inducement might be considered independent of the contract – and hence not be  
 4 barred by the economic loss rule [–] [b]ut, as this case comes before us, the parties agree that the  
 5 jury’s \$ 50,000 theft award was predicated on the final post-contractual installment payment made in  
 6 2004[,] long after the contract was entered”). In this case, Plaintiffs allege pre-contractual  
 7 fraudulent inducement led them to purchase or lease the vehicles. *See, e.g.,* FAC ¶ 22 (Plaintiff  
 8 Whalen alleging that she saw television advertisements regarding MFT and that a dealership  
 9 salesperson made verbal representations about MFT; also alleging that she selected and purchased  
 10 her vehicle in part because of the feature of MFT as represented through the advertisements and  
 11 representations made by Ford).

12 The case cited by Ford – *i.e., Van Rees v. Unleaded Software, Inc.,* 2013 Colo. App. LEXIS  
 13 1870 (Colo. Ct. App. Dec. 5, 2013) – is not to the contrary. Indeed, in *Van Rees*, the court  
 14 acknowledged that a precontract false representation intended to induce action would not get the  
 15 benefit of the economic loss rule. *See id.* at \*7-9. The economic loss rule was a bar to the fraud  
 16 claims in *Van Rees* because the plaintiff did not really assert fraudulent inducement (even though he  
 17 claimed precontract representations had been made). Rather, the gist of the plaintiff’s fraud claim  
 18 was simply that the defendant had falsely promised to perform certain contract terms. *See id.* at \*7,  
 19 9. The court underscored that the promise to perform was memorialized in the parties’ contracts and  
 20 that the risk of nonperformance was something that the plaintiff could have protected against  
 21 through contract bargaining. *See id.* at \*8, 10 (stating that, “[b]y bargaining for contract prices and  
 22 duties, the parties had the ability to account for the risk of nonperformance”); *cf. Makoto*, 250 P.3d  
 23

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24 <sup>9</sup> Note that there are some courts in other states that have found an exception to the  
 25 fraudulent inducement exception to the economic loss rule. These courts have largely relied on an  
 26 opinion from a Michigan state court, *Huron Tool & Engineering Co. v. Precision Consulting*  
 27 *Services, Inc.*, 532 N.W.2d 541 (Mich. Ct. App. 1995), which held that “the economic-loss doctrine  
 28 does apply to claims for fraudulent inducement if the allegedly fraudulent misrepresentations relate  
 solely to the ‘quality or character of the goods sold.’” *Irwin Seating Co. v. IBM*, 306 Fed. Appx.  
 239, 243 (6th Cir. 2009). *Huron*, however, has been criticized. *See Werwinski v. Ford Motor Co.*,  
 286 F.3d 661, 677-78 (3d Cir. 2002) (noting that *Huron* “is not without its critics,” but also pointing  
 to cases defending *Huron*).

1 at 628 (noting that “another division of this court recently rejected a similar contention that ‘a claim  
2 for fraud in the performance of a contract necessarily is based on a duty independent of the  
3 contract’”).

4 Finally, as discussed in Part IV.A.2.b, Ford had a duty to disclose that was entirely  
5 independent of any contract between itself and Plaintiffs. That duty to disclose had nothing to do  
6 with the terms of the limited warranty that Ford extended to Plaintiffs.

7 2. Florida

8 As above, Ford challenges the two fraud claims of the Florida Plaintiff (Mr. Oremland) – *i.e.*,  
9 fraud under the consumer protection statute and fraudulent concealment – on the basis of the  
10 economic loss rule. And as above, Plaintiffs contend that the economic loss rule is not applicable  
11 because the fraud claims are based on a duty independent of any contract – *i.e.*, a statutory duty, a  
12 duty not to fraudulently induce another to enter a contract, and a duty to disclose.

13 Plaintiffs’ position is supported by the Florida Supreme Court’s decision in *Tiara Condo*  
14 *Association v. Marsh & McLennan Companies, Inc.*, 110 So. 3d 399 (Fla. 2013). There, the  
15 Supreme Court acknowledged prior case law holding that there are exceptions to the economic loss  
16 doctrine, including where there is fraudulent inducement and where there are free-standing statutory  
17 causes of action. *See id.* at 406 (noting that “we . . . reaffirmed in cases involving either privity of  
18 contract or products liability, the other exceptions to the economic loss rule that we have developed,  
19 such as for . . . fraudulent inducement . . . or free-standing statutory causes of action still apply”).  
20 As noted above, both exceptions apply here.

21 The case that Ford cites, *Burns v. Winnebago Industries, Inc.*, No. 8:13-cv-1427-T-24 MAP,  
22 2013 U.S. Dist. LEXIS 116377 (M.D. Fla. Aug. 16, 2013), is not to the contrary. While the *Burns*  
23 court did find that the plaintiff’s fraudulent concealment claim was barred by the economic loss rule,  
24 it made no ruling that *all* claims for fraud are necessarily barred by the rule. Furthermore, the court  
25 recognized the fraudulent inducement exception to the rule but simply held that, “under the facts  
26 alleged, the exception . . . do[es] not apply.” *Id.* at \*9. Unfortunately, the specific facts of the case  
27 are not clear from the order, and therefore why the fraudulent inducement exception was not  
28 applicable cannot be determined.

1 As for *HTC Leleu Family Trust v. Piper Aircraft, Inc.*, No. 1:12-cv-21118-KMM, 2012 U.S.  
 2 Dist. LEXIS 149498 (S.D. Fla. Oct. 17, 2012), another case cited by Ford, it too is of little support.  
 3 There, the court explained that, “[i]f the fraud is in a term of the bargain, it is not barred by the  
 4 economic loss rule,” but, “if the alleged fraud relates to an act of performance, then it is barred.” *Id.*  
 5 at \*10-11.<sup>10</sup> Ultimately, the court found the plaintiff’s fraudulent inducement claim (as well as  
 6 fraudulent concealment and negligent misrepresentation claims) not viable because it was related to  
 7 whether the defendant adequately performed under the contract – “that is, whether Defendant  
 8 breached the agreement by providing a defective Aircraft.” *Id.* at \*12. Here, Plaintiffs’ fraudulent  
 9 inducement claim is not based on Ford’s performance under the contract (which presumably would  
 10 be to repair or replace a defect within the limited warranty period). *Cf. Marvin Lumber & Cedar Co.*  
 11 *v. Ppg Indus.*, 223 F.3d 873, 896 (8th Cir. 2000) (noting that “[t]he defendant must have  
 12 fraudulently induced the plaintiff to enter into the agreement, and that inducement must be a promise  
 13 other than merely pledging to perform the terms of the contract”).

14 3. North Carolina

15 The North Carolina Plaintiff (Mr. Fink) also brings two fraud claims, one under a consumer  
 16 protection statute and another for fraudulent concealment – both of which have been challenged on  
 17 the basis of the economic loss rule.

18 The fraudulent concealment claim is clearly viable based on Plaintiffs’ theory that they were  
 19 fraudulently induced to purchase or lease the vehicles with the MFT system. *See Schumacher*  
 20 *Immobilien Und Beteiligungs AG v. Prova, Inc.*, No. 1:09cv00018, 2010 U.S. Dist. LEXIS 107526,  
 21 at \*5 (M.D.N.C. Oct. 7, 2010) (stating that, “[u]nder North Carolina law, a party to a contract owes  
 22 the other contracting party a separate and distinct duty not to provide false information to induce the

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23  
 24 <sup>10</sup> In support of this statement, the *HTC* court cited *Allen v. Stephan Co.*, 784 So. 2d 456, 458  
 25 (Fla. Ct. App. 2000) (“To determine whether the economic loss rule bars recovery under fraud, the  
 26 question is simply this: is the fraud alleged in an act of performance or in a term of the bargain?  
 27 Where, as here, the representation is simply made and relied upon in inducing the completion of the  
 28 transaction, then clearly it is a term of the bargain. Nothing further was required of the Allens [the  
 sellers] in connection with this contract term after they made the representation that all SRP’s taxes  
 had been paid. If, however, the misrepresentation had been in connection with the seller’s  
 performance – such as the ability to provide increased reservations and better hotel management  
 services in Hotels of Key Largo, which required continuing action on the part of the seller, then the  
 fraud is in the performance and the economic loss rule bars recovery sounding in tort.”).

1 execution of the contract”); *see also* *Wireless Communs., Inc. v. Epicor Software Corp.*, No.  
2 3:10CV556-DSC, 2011 U.S. Dist. LEXIS 2633, at \*14 (W.D.N.C. Jan. 11, 2011) (distinguishing,  
3 *inter alia*, *Schumacher* because, there, the validity of the contract was challenged and the plaintiff  
4 “specifically pled facts that the defendant[] never intended to perform the contract[] or specifically  
5 intended to deceive the plaintiff[]”). Furthermore, the fraudulent concealment claim is viable based  
6 on the duty to disclose which exists independent of any contract (*e.g.*, the limited warranty).

7 As for the claim under the consumer protection statute, here, there is authority to support  
8 Ford’s position – namely, *Ellis v. Louisiana-Pacific Corp.*, No. 3:11CV191, 2011 WL 5402878  
9 (W.D.N.C. Nov. 8, 2011). In *Ellis*, the court found that the plaintiffs’ claim under the consumer  
10 protection statute was barred by the economic loss rule because they already had a contractual  
11 remedy available, *i.e.*, a warranty remedy. *See id.* at \*1. The court also noted that “the damage  
12 incurred by the plaintiff is not separate and apart from the damage arising out of a breach of  
13 warranty claim.” *Id.* at \*2; *see also* *Bussian v. DaimlerChrysler Corp.*, 411 F. Supp. 2d 614, 625,  
14 627 (M.D.N.C. 2005) (report and recommendation, subsequently adopted by district court)  
15 (concluding that “Plaintiff’s unfair or deceptive trade practices claim should be dismissed pursuant  
16 to the ‘economic loss rule’”; but “limit[ing] its decision to cases such as the instant case involving  
17 allegations of a defective product where the only damage alleged is damage to the product itself and  
18 the allegations of unfair trade practices are intertwined with the breach of contract or warranty  
19 claims”). But Plaintiffs legitimately point out that, on the *Ellis* appeal, the Fourth Circuit declined to  
20 make a ruling on whether the economic loss rule barred the plaintiffs’ claim. It explained as  
21 follows: “[T]he North Carolina courts have never addressed whether [Unfair and Deceptive Trade  
22 Practices Act] claims are subject to the [economic loss rule], and in the absence of such direction,  
23 we are well-advised to rely on other grounds” for dismissal. *Ellis v. La.-Pac. Corp.*, 699 F.3d 778,  
24 787 n.5 (4th Cir. 2012).

25 As the Fourth Circuit indicated, no state court has expressly ruled on whether claims under  
26 the consumer protection statute may be barred by the economic loss rule. Only a few federal district  
27 courts in North Carolina have so ruled. *See, e.g.*, Reply at 19 (citing, *e.g.*, *Malone v. Tamko Roofing*  
28 *Prods.*, No. 3:13-cv-00089-MOC-DCK, 2013 U.S. Dist. LEXIS 145530, at \*6-7 (W.D.N.C. Oct. 8,

1 2013)). In light of this fact, the Court is not precluded from holding, and does so hold, that the  
 2 consumer protection statute here gives rise to a duty independent of the contract and therefore  
 3 should not be barred by the economic loss rule. *See Coker v. DaimlerChrysler Corp.*, 617 S.E.2d  
 4 306, 319 (N.C. Ct. App. 2005) (Hudson, J., dissenting) (supporting the view that claims under  
 5 consumer protection statute “are exempt from the economic loss rule because the rule is judicial, not  
 6 legislative, and must give way to specific legislative policy pronouncement allowing damages for  
 7 economic loss[;] [i]n other words, by enacting a remedy for economic losses suffered by reason of  
 8 an act deemed wrongful by the statute, the legislature has effectively preempted the economic loss  
 9 rule for those cases covered by the act”).<sup>11</sup> In any event, the economic loss rule does not apply to  
 10 Plaintiffs’ claim of fraudulent concealment.

11 4. Ohio

12 Finally, Ford contends that the Ohio Plaintiff’s (Mr. Zuchowski) claim for negligence is  
 13 barred by the economic loss doctrine. In support of this position, Ford cites *Chemtrol Adhesives,*  
 14 *Inc. v. American Manufacturers Mutual Insurance Co.*, 537 N.E.2d 624 (Ohio 1989). There, the  
 15 Ohio Supreme Court took note of the “general rule . . . that a plaintiff who has suffered only  
 16 economic loss due to another’s negligence has not been injured in a manner which is legally  
 17 cognizable or compensable.” *Id.* at 630.

18 The reason for denying recovery in negligence for purely economic  
 19 loss lies not in a failure to find “negligent” conduct by the  
 20 manufacturer, nor in a lack of proximate relationship between that  
 21 conduct and the consumer’s injury. Rather, the key factor is the  
 22 extent, and more important, the source, of the duty owed by the  
 23 manufacturer to the consumer. In negligence, the law imposes upon  
 24 the manufacturer of a product the duty of reasonable care. That duty  
 25 protects the consumer from physical injury, whether to person or  
 26 property. However, the law of negligence does not extend the  
 27 manufacturer’s duty so far as to protect the consumer’s economic  
 28 expectations, for such protection would arise not under the law but  
 rather solely by agreement between the parties. “[W]hen the  
 promisee’s injury consists merely of the loss of his bargain, no tort  
 claim arises because the duty of the promisor to fulfill the term of the  
 bargain arises only from the contract.”

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27 <sup>11</sup> The majority in *Coker* declined to address the economic loss rule “in light of our holding  
 28 that plaintiffs lack standing to assert either fraud or unfair and deceptive trade practices claims.”  
*Coker*, 617 S.E.2d at 314.

1 In the instant case, Midland-Ross provided Chemtrol with an  
2 arch dryer pursuant to the contract between them. If the defect in the  
3 arch dryer had caused personal injury or damage to other property of  
4 Chemtrol, Midland-Ross might be found to have breached its duty of  
5 care imposed by law, and recovery in negligence would accordingly  
6 lie. However, Chemtrol's losses here were economic, i.e., additional  
7 expenses incurred because the Midland-Ross arch dryer did not  
8 perform as expected. Midland-Ross' duty to provide a working arch  
9 dryer arose not under the law of negligence but rather under its  
10 contract with Chemtrol.

11 *Id.* at 630-31.

12 In response, Plaintiffs argue that *Chemtrol* is not dispositive because, there, the parties were  
13 two business entities (*i.e.*, the plaintiff was not a consumer); moreover, the parties were in  
14 contractual privity. According to Plaintiffs, there is a more relaxed rule where a consumer brings  
15 suit and is not in contractual privity with the defendant. *See* Opp'n at 31-32.

16 Plaintiffs' view has support. For example, in *In re Porsche Cars N.A., Inc. Plastic Coolant*  
17 *Tubes Products Liability Litigation*, 880 F. Supp. 2d 801 (S.D. Ohio 2012), the court took note that,  
18 under *Chemtrol*, a commercial plaintiff in contractual privity with the defendant could not recover  
19 damages in tort for purely economic loss. *See id.* at 871. But in *Chemtrol*, the court "distinguished  
20 parties in privity from those not in privity, stating, '[f]or an ordinary consumer, i.e., one not in  
21 privity of contract with the seller or manufacturer against whom recovery is sought, an action in  
22 negligence may be an appropriate remedy to protect the consumer's property interests.'" *Id.* The  
23 *Porsche* court went on to cite several Ohio district court opinions which "permitted individual  
24 consumers to bring negligence claims for purely economic loss against a manufacturer with whom  
25 they are not in privity of contract." *Id.* at 872.

26 As Ford points out in its reply brief, Judge Seeborg recently held to the contrary in *Ford*  
27 *Tailgate*. In *Ford Tailgate*, Judge Seeborg cited a 1965 Ohio Supreme Court decision, *see Inglis v.*  
28 *Am. Motors Corp.*, 209 N.E.2d 583 (Ohio 1965), for the proposition that, under Ohio law, "a  
plaintiff cannot recover in negligence for purely economic losses allegedly caused by a defective  
product when the only damage is to the product itself." *Ford Tailgate*, 2014 U.S. Dist. LEXIS  
32287, at \*23; *see also Inglis*, 209 N.E.2d at 140 (agreeing with Dean Prosser's comments that "the  
usual rule . . . for negligence [is] there is no liability for mere pecuniary loss of a bargain"). He

1 acknowledged that “[a] more recent Ohio decision [*i.e.*, *Chemtrol*] suggested in dicta that this rule  
 2 applies only where the consumer was in privity with the manufacturer at the time of sale.” *Ford*  
 3 *Tailgate*, 2014 U.S. Dist. LEXIS 32287, at \*23-24. But, he explained, “[t]he Ohio state courts . . .  
 4 continue to apply *Inglis* not *Chemtrol* in cases involving individual consumers.” *See id.* at \*24-25  
 5 (citing three cases). While some federal district courts in Ohio followed *Chemtrol*, none “cite *Inglis*  
 6 or discuss the continuing viability of that case. Because *Inglis* continues to be the rule in Ohio,  
 7 defendant’s motion to dismiss plaintiffs’ Ohio negligence claim . . . must be granted without leave to  
 8 amend.” *Id.* at \*25-26.

9 However, the three Ohio state court cases cited by Judge Seeborg did not rely on *Inglis* in  
 10 any way in reaching their conclusions. In fact, all cited *Chemtrol*, though none seems to have  
 11 considered the *Chemtrol* dicta which suggested that a plaintiff-individual consumer not in privity  
 12 with the defendant would not be subject to the economic loss rule. The Court therefore respectfully  
 13 declines to follow Judge Seeborg’s approach – particularly because, here, the duty to disclose on the  
 14 part of Ford has nothing to do with any contract (*e.g.*, the limited warranty) between Ford and  
 15 Plaintiffs.

#### 16 C. Summary on Fraud and Tort Claims

17 For the foregoing reasons, the Court rules as follows on the fraud and tort claims:

- 18 (1) On the fraud claims based on an affirmative misrepresentation, the motion to dismiss is  
 19 granted except as to Mr. Miller (a New York resident). The dismissal is without prejudice.
- 20 (2) On the fraud claims based on a failure to disclose, the motion to dismiss is denied.
- 21 (3) On the Colorado strict liability and fraud claims, the motion to dismiss is denied.
- 22 (4) On the Florida fraud claims, the motion to dismiss is denied.
- 23 (5) On the North Carolina fraud claims, the motion to dismiss is denied.
- 24 (6) On the Ohio negligence claim, the motion to dismiss is denied.

#### 25 IV. WARRANTY CLAIMS

26 Plaintiffs have asserted multiple warranty-based claims, some based on statutes and some  
 27 based on a breach of contract or the common law. Ford has primarily challenged the statutory  
 28 warranty claims.

1 A. Express Warranty Claims

2 Plaintiffs' claims for breach of express warranty are largely predicated on state statutes that  
3 have adopted UCC § 2-313.<sup>12</sup> UCC § 2-313 provides in relevant part as follows: "Any affirmation  
4 of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the  
5 basis of the bargain creates an express warranty that the goods shall conform to the affirmation or  
6 promise." UCC § 2-313(1)(a). Here, the only express warranty at issue is that contained in Ford's  
7 limited warranty, which provides that "authorized Ford Motor Company dealers will, without  
8 charge, repair, replace, or adjust all parts on our vehicle that malfunction or fail during normal use  
9 during the applicable coverage period due to a manufacturing defect in factory-supplied materials or  
10 factory workmanship." Docket No. 57-2 (RJN, Ex. A) (Limited Warranty at 9).

11 According to Plaintiffs, Ford breached the terms of the limited warranty because Ford and/or  
12 its dealers were ultimately unable to fix the problems with MFT, and thus the warranty failed of its  
13 essential purpose. *See, e.g., Philippine Nat'l Oil Co. v. Garrett Corp.*, 724 F.2d 803, 808 (9th Cir.  
14 1984) (stating that "a repair or replace remedy fails of its essential purpose only if repeated repair  
15 attempts are unsuccessful within a reasonable time") (emphasis omitted); *Asp v. Toshiba Am.*  
16 *Consumer Prods., LLC*, 616 F. Supp. 2d 721, 729 (S.D. Ohio 2008) (stating that a remedy fails of its  
17 essential purpose where "buyers of products governed by exclusive repair and replace warranties . . .  
18 are able to show that repairing or replacing the product will not remedy the defect"); *Malkamaki v.*  
19 *Sea Ray Boats, Inc.*, 411 F. Supp. 2d 737, 745 (N.D. Ohio 2005) (stating that "[f]ailure to cure  
20 defects under warranty within a reasonable time supports a finding that a remedy failed of its  
21 essential purpose"); *see also* Docket No. 57-2 (RJN, Ex. A) (Limited Warranty at 9) (stating that  
22 "[t]his exclusive remedy shall not be deemed to have failed its essential purpose so long as Ford,  
23 through its authorized dealers, is willing and able to repair, replace, or adjust defective parts in the  
24 prescribed manner").

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25  
26 <sup>12</sup> The one exception is California. In the FAC, there is no *direct* claim for breach of express  
27 warranty pursuant to California Commercial Code § 2313; rather, the California claim for breach of  
28 express warranty is based on California Civil Code §§ 1791.2 and 1793.2(D) (the Song-Beverly  
Act). However, Plaintiffs have indirectly implicated § 2313 in their claim for violation of California  
Business & Professions Code § 17200. *See* FAC ¶ 328(vi) (alleging that Ford has violated § 17200  
by violating various California laws, including § 2313).



1           1.       Failure to Present Vehicle for Repair

2           In its motion, Ford argues first that four of the twenty-four Plaintiffs (namely, Ms. Battle,  
3 Mr. Sheerin, Mr. Miller, and Mr. Zuchowski) do not have viable express warranty claims because  
4 they never brought their cars in for repairs in the first instance. Without doing so, Ford contends,  
5 these Plaintiffs cannot assert a failure of essential purpose because Ford was never given the  
6 opportunity to repair, replace, or adjust the MFT system in their cars.

7           Ford's position is supported by the case law. For example, in *Asp*, a district court held that,  
8 "before the exclusive repair and replace remedy is considered to have failed of its essential purpose,  
9 'the seller *must be given an opportunity to repair or replace the product.*'" *Asp*, 616 F. Supp. 2d at  
10 729 (emphasis added); *see also In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales*  
11 *Pracs. & Prods. Liab. Litig.*, No. 8:10ML 02151 JVS (FMOx), 754 F. Supp. 2d 1145, 1179 (C.D.  
12 Cal. 2010) (stating that "Plaintiffs who neither sought repairs pursuant to the recalls nor sought  
13 repairs for SUA-related issues may not pursue a claim for breach of express warranty based on the  
14 written warranty"); *Cooley v. Big Horn Harvestore Sys., Inc.*, 813 P.2d 736, 744 n.7 (Colo. 1991)  
15 (stating that, "[t]o establish their claim of failure of essential purpose . . . , the plaintiffs were  
16 required to establish [*inter alia*] that the defendants had an opportunity to repair or replace the  
17 defects [but] were unable to do so"); *cf. Taliaferro v. Samsung Telecomms. Am., LLC*, No. 3:11-CV-  
18 1119-D, 2012 WL 169704, at \*2 (N.D. Tex. Jan. 19, 2012) (stating that "a plaintiff cannot state a  
19 claim for breach of express warranty unless he meets the conditions precedent prescribed by the  
20 express warranty").

21           Furthermore, the case on which Plaintiffs relied at the hearing, *McCollough Enterprises, LLC*  
22 *v. Marvin Windows & Doors*, No. Civil Action 09-0573-WS-B, 2010 WL 5014670 (S.D. Ala. Dec.  
23 2, 2010), is not to the contrary. In *McCollough*, the district court simply stated that, "[i]f the remedy  
24 promised by the seller is so hollow or ineffectual as to be meaningless, then the warranty fails of its  
25 essential purpose and the customer is not bound by limitations of remedy contained therein." *Id.* at  
26 \*8. But the fact that a customer is not bound by a warranty's limitations of remedy once that  
27 warranty has failed of its essential purpose is a different issue from whether a defendant should be  
28

1 given an opportunity to repair or replace before the warranty can be said to have failed of its  
2 essential purpose.

3 To the extent Plaintiffs make the alternative argument that they are excused from bringing in  
4 their cars for repairs because to do so would have been futile, the Court is not persuaded. The Court  
5 acknowledges that futility may, in theory, be a basis for an excuse. Even in *Asp*, the district court  
6 implicitly acknowledged such; it rejected the plaintiff's futility argument only because "[a] handful  
7 of customer complaints about the DVR, and their experience with Toshiba's ability to repair or  
8 replace the alleged defect, does not reasonably give rise to an argument that it would have been  
9 futile for Plaintiff to give Toshiba the opportunity to fix his DVR." *Asp*, 616 F. Supp. 2d at 731.  
10 Still Plaintiffs have cited no cases establishing a futility exception to the presentation required by the  
11 express terms of the express warranty.

12 Even assuming a futility argument is theoretically possible, here, there are insufficient  
13 allegations in the complaint to make futility plausible. Based on the complaint, the Court does not  
14 have a sense of whether Ford's alleged inability to fix the problems with MFT was commonplace,  
15 unique to Plaintiffs, or somewhere in between. Plaintiffs do not contend that none of MFT's  
16 problems could not be repaired. We do not know whether the named Plaintiffs' vehicles could have  
17 been repaired. Indeed, even if half of Ford's cars had problems with MFT, as alleged by Plaintiffs in  
18 their complaint, *see* FAC ¶ 10, that does not necessarily mean that Plaintiffs' problems could not be  
19 fixed.

20 Although Plaintiffs contend that the inability to fix was commonplace, that is not adequately  
21 supported by the complaint, which simply points to (1) Plaintiffs' own experiences, (2) 19 NHTSA  
22 complaints, and (3) two Internet websites called "syncsucks.com" and "outofmytouch.com." *See*  
23 FAC ¶¶ 8, 288 *et seq.* The website complaints can be discounted because there are no allegations in  
24 the FAC that there were complaints on the websites about MFT not being fixable. *See* FAC ¶¶ 288-  
25 90. For the NHTSA complaints, most of the complaints did suggest or state that the MFT problems  
26 were not fixable. But even if the Court were to credit all 19 NHTSA complaints as making claims of  
27 irreparable problems with MFT, and further credit the 20 Plaintiffs who did bring in their cars for  
28 repairs, that would still leave the Court with only 39 complaints. While this is more than just a

1 handful of complaints and certainly raises the possibility of futility, it still does not meet the  
2 requisite plausibility standard of *Iqbal* and *Twombly*.

3 Accordingly, the Court dismisses the claims of the following four Plaintiffs: Ms. Battle, Mr.  
4 Sheerin, Mr. Miller, and Mr. Zuchowski. The dismissal on this basis is without prejudice.  
5 However, as discussed below, there are independent reasons to dismiss with prejudice the express  
6 warranty claims for two Plaintiffs (Ms. Battle and Mr. Sheerin) – *i.e.*, for failure to provide notice of  
7 the breach of warranty.

8 2. “Lumping” Problems/Repairs

9 For the remaining twenty Plaintiffs, Ford concedes that they did bring their cars in for  
10 repairs. Ford contends, however, that their claims for breach – predicated on a failure of essential  
11 purpose – should still be dismissed on an independent ground. More specifically, Ford argues that,  
12 even if these Plaintiffs did bring their cars in for multiple repairs, the repairs were for different  
13 problems, and Plaintiffs cannot “lump” the problems/repairs together to establish a failure of  
14 essential purpose. Ford asserts:

15 Just as a warranty for a new smart phone does not fail its  
16 essential purpose when the phone receives a warranty repair for a  
17 malfunctioning camera and, later, receives another warranty repair for  
18 a problem with its Bluetooth capability, Ford’s Limited Warranty does  
19 not fail of its essential purpose when a vehicle equipped with a [MFT]  
20 system receives a warranty repair for a malfunctioning back-up  
21 camera and later receives a warranty repair for an issue with its  
22 Bluetooth capability. This is because the system experienced two  
23 different problems, each of which was successfully repaired.

24 Mot. at 29.

25 Ford’s argument is not without any support. *See, e.g., Schultz v. Gen. R.V. Ctr.*, No. 04-  
26 72562, 2006 WL 2583140, at \*11 (E.D. Mich. Sept. 6, 2006) (stating that “Plaintiffs cannot  
27 establish a claim that the limited warranty’s exclusive remedy of repair or replacement . . . failed of  
28 its essential purpose by lumping together all the repairs and the aggregate amount of time his RV  
was out of service”); *Computer Network, Inc. v. AM Gen. Corp.*, 696 N.W.2d 49, 55 (Mich. Ct. App.  
2005) (noting that “[t]here were numerous different repairs to the vehicle over a lengthy period,  
most of which were not repeat repairs”). Nevertheless, the Court rejects the argument because this  
case is only at the 12(b)(6) stage. In contrast to *Computer Network*, all of the problems here relate to

1 the MFT system specifically. *Compare id.* at 53 (discussing different problems with plaintiff’s  
 2 vehicle which were facially unrelated – *e.g.*, engine problems, malfunctioning turn signals, defective  
 3 steering, defective air conditioning, etc.). Moreover, Plaintiffs have alleged there is an underlying  
 4 defect within the MFT system (software and/or hardware). Even if that underlying defect manifests  
 5 itself in different ways within the MFT system, that does not necessarily detract from the allegation  
 6 that there is still an underlying systemic defect. That assertion is supported by factual allegations in  
 7 the complaint, in particular, the allegations related to Ford’s issuance of the TSBs and software  
 8 updates. In other words, if Ford was trying to fix the problems with MFT by issuing TSBs and  
 9 software updates that implemented systemic types of fixes, that lends support to Plaintiffs’ theory  
 10 that the varying problems were manifestations of an underlying systemic problem and hence  
 11 “grouping” is permissible, at least for pleading purposes.

12 3. Basis of the Bargain

13 Ford argues that, even if the twenty Plaintiffs’ express warranty claims cannot be dismissed  
 14 on the ground of “lumping,” there is another basis for dismissal. As noted above, UCC § 2-313  
 15 provides in relevant part as follows: “Any affirmation of fact or promise made by the seller to the  
 16 buyer which relates to the goods and *becomes part of the basis of the bargain* creates an express  
 17 warranty that the goods shall conform to the affirmation or promise.” UCC § 2-313(1)(a) (emphasis  
 18 added). According to Ford, “basis of the bargain” means that Plaintiffs must have been aware of and  
 19 relied on the limited warranty prior to purchasing their vehicles – *i.e.*, without reliance, no express  
 20 warranty claim is viable.

21 The Court does not agree. Comment 3 to UCC § 2-313 provides as follows:

22 The present section deals with affirmations of fact by the seller,  
 23 descriptions of the goods or exhibitions of samples, exactly as any  
 24 other part of a negotiation which ends in a contract is dealt with. No  
 25 specific intention to make a warranty is necessary if any of these  
 26 factors is made part of the basis of the bargain. In actual practice  
 27 affirmations of fact made by the seller about the goods during a  
 28 bargain are regarded as part of the description of those goods; *hence*  
*no particular reliance on such statements need be shown in order to*  
*weave them into the fabric of the agreement.* Rather, any fact which is  
 to take such affirmations, once made, out of the agreement requires  
 clear affirmative proof. The issue normally is one of fact.

1 UCC § 2-313, cmt. 3 (emphasis added). *See, e.g., Weinstat v. Dentsply*, 180 Cal. App. 4th 1213,  
2 1227 (2010) (noting that “[p]re-[UCC] law governing express warranties required the purchaser to  
3 prove reliance on specific promises made by the seller” but that the UCC does not; under comment  
4 3, there is a “presumption that the seller’s affirmations go to the basis of the bargain”). Ford has  
5 failed to show that any of the states at issue rejected comment 3 when they adopted their versions of  
6 UCC § 2-313. In fact, the statutes indicate that comment 3 was actually incorporated.

7 The Court acknowledges that there are a few lower court cases indicating that reliance is  
8 required, even where a claim is based on UCC § 2-313. *See, e.g., Corson v. Toyota Motor Sales,*  
9 *U.S.A., Inc.*, No. CV 12-08499 JGB (VBKx), 2013 WL 18027009, at \*9 (C.D. Cal. Apr. 24, 2013)  
10 (interpreting Pennsylvania law). However, these cases are not dispositive, particularly as they do  
11 not address and account for comment 3 to UCC § 2-313. Moreover, none are decisions of the  
12 highest state court. Also, many of the cases cited by Ford are distinguishable because they did not  
13 involve *written* warranties delivered in connection with a sale (as here). Where there is an express  
14 written warranty, an assertion that the warranty not part of the deal between the issuing party and  
15 receiving party is far less persuasive. *See Cipollone v. Liggett Group, Inc.*, 893 F.2d 541, 568 n.29  
16 (3d Cir. 1999) (although requiring plaintiff to prove that she knew of the advertisement containing  
17 the “affirmation of fact or promise” to meet the basis-of-the-bargain requirement, noting that this  
18 burden would not be imposed where a written warranty was delivered to the purchaser in connection  
19 with a sale because, in such a situation, “there is no question that the plaintiff has knowledge that the  
20 alleged warranty exists”); *Norcold v. Gateway Supply Co.*, 798 N.E.2d 618, 623 (Ohio Ct. App.  
21 2003) (stating that “comment 3 indicates that UCC section 2-313 is relevant to the question of  
22 whether an express warranty has been *created*, and the ‘basis of the bargain’ rule is not applicable to  
23 situations where written warranties are clear and express”). *See generally Pegasus Mgmt. Co., Inc. v.*  
24 *Lyssa, Inc.*, 995 F. Supp. 29, 38 (D. Mass. 1998) (stating that “[t]he problems of a reliance, and a  
25 right to rely, on the representations do not appear when the action is grounded in warranty” because  
26 “[t]he warranty is as much a part of the contract as any other part”).

27 At the hearing, Ford argued still that, under California law, reliance is a requirement where  
28 the parties are not in privity with one another. In support of this argument, Ford cites *Keegan v.*

1 *American Honda Motor Co.*, 284 F.R.D. 504 (C.D. Cal. 2012). In *Keegan*, the parties disputed  
2 whether reliance was required for an express warranty claim. The district court acknowledged that,  
3 previously, a state appellate court had stated: “[B]reach of express warranty arises in the context of  
4 contract formation *in which reliance plays no role.*” *Id.* at 546 (quoting *Weinstat*; emphasis added).  
5 The *Keegan* court, however, distinguished *Weinstat* because, “[t]here, plaintiff alleged an express  
6 warranty claim against the product seller” and so the claim was “based on privity of contract. Here,  
7 none of the plaintiffs purchased his or her vehicles directly from the manufacturer. Therefore, none  
8 was in privity with defendants.” *Id.*

9 While *Keegan* supports Ford’s position, other courts interpreting California law have not  
10 found such a limitation – *i.e.*, they have not required reliance where the parties are not in privity.  
11 *See, e.g., Toyota*, 754 F. Supp. 2d at 1183 & n.22 (in case where plaintiffs sued car manufacturer,  
12 stating that plaintiffs had to have been exposed to the advertising but adding that there is no reliance  
13 requirement under *Weinstat*); *McVicar v. Goodman Global, Inc.*, No. SACV 13-1223-DOC (RNBx),  
14 2014 WL 794585, at \*11 (C.D. Cal. Feb. 25, 2014) (in case where plaintiffs sued air conditioner  
15 manufacturer, relying on *Weinstat*); *Horvath v. LG Elecs. Mobilecomm USA, Inc.*, No. 11-CV-  
16 01576-H-RBB, 2012 WL 2861160, at \*6 (S.D. Cal. Feb. 13, 2012) (in case where plaintiffs sued  
17 mobile phone manufacturer, relying on *Weinstat*).

18 Finally, although Plaintiffs did not buy or lease their vehicles directly from Ford (and thus no  
19 privity), there is no dispute that Ford did extend a limited warranty to Plaintiffs upon their purchase  
20 or lease of the cars. A privity requirement would seem to have little meaning under such  
21 circumstances of this case. The Court also notes that, even if reliance were required for an express  
22 warranty claim under California Commercial Code § 2313, there is no comparable reliance  
23 requirement for an express warranty claim under the Song-Beverly Act – a claim which Plaintiffs  
24 have advanced here.

25 The Court therefore concludes that dismissal under Rule 12(b)(6) on the ground of reliance is  
26 not warranted.

27

28

1           4.     Notice

2           Ford also contends there is a notice requirement for a claim of express warranty based on  
3 UCC § 2-607(3)(a). UCC § 2-607(3)(a) provides that, “[w]here a tender has been accepted, . . . the  
4 buyer must within a reasonable time after he discovers or should have discovered any breach notify  
5 the seller of breach or be barred from any remedy.” UCC § 2-607(3)(a). Ford asserts that, here,  
6 eleven Plaintiffs (namely, Ms. Battle, Mr. D’Aguanno, Mr. Sheerin, Dr. Oremland, Mr. Mitchell,  
7 Mr. Zuchowski, Mr. Avedisian, Mr. Rodriguez, Mr. Ervin, Mr. Connell, and Mr. Miller-Jones)  
8 failed to allege that they satisfied this notice requirement. There is no dispute among the parties that  
9 there is a notice requirement for each of the states at issue under the relevant statute.

10           As the parties agreed at the hearing, the notice issue must be evaluated on a state-by-state  
11 basis. The Court first addresses the express warranty claims of Ms. Battle, Mr. Sheerin, and Mr.  
12 Zuchowski. Although the Court has already dismissed these Plaintiffs’ express warranty claims on  
13 the ground of failure to present the car for repair, the dismissal was without prejudice. Here, a  
14 failure to comply with the notice requirement is a basis for dismissal with prejudice.

15           a.     Ms. Battle (Alabama)

16           The Court agrees with Ford that Ms. Battle’s express warranty claim should be dismissed for  
17 failure to comply with the notice requirement.

18           First, contrary to what Plaintiffs argue, the notice required here was notice to Ford, the  
19 manufacturer of Ms. Battle’s car, and not just notice to the direct seller of Ms. Battle’s car.  
20 Admittedly, UCC § 2-607(a)(3) on its face refers to notice to the seller. Nevertheless, some states,  
21 including Alabama, require notice to the manufacturer where the manufacturer (and not the seller) is  
22 the one being sued. *See Hobbs v. Gen. Motors Corp.*, 134 F. Supp. 2d 1277, 1285(M.D. Ala. 2001)  
23 (stating that “remote manufacturers should be afforded the same protections as sellers, either by way  
24 of notice provided directly to them, or through notice to them by the direct seller from the buyer”).

25           Second, although Plaintiffs contend that Ms. Battle provided the requisite notice to Ford  
26 when Plaintiffs filed the instant lawsuit, that argument lacks merit. Under Alabama law, the filing of  
27 a complaint does not constitute notice. *See id.* (stating that notice must “precede the filing of the  
28 complaint,” at least in a case involving economic harm rather than personal injury); *see also Jewell*

1 v. *Seaboard Indus.*, 667 So. 2d 653, 661 (Ala. 1995) (concluding that plaintiff did not give sufficient  
2 notice of breach because, before he filed his complaint, he made no attempt to notify defendant that  
3 he had experienced problems).

4 Third, Plaintiffs suggest that the purpose underlying the notice requirement has been satisfied  
5 because Ford already knew that many of its customers were having problems with MFT. *See* Opp'n  
6 at 37-38 (arguing that "Ford's contention that it lacked the requisite knowledge under U.C.C. § 2-  
7 607 is disingenuous in light of the overwhelming allegations in the FAC concerning consumer  
8 complaints, the NHTSA database, news articles and direct notice of *this particular problem* Ford  
9 received from Plaintiffs and similarly situated consumers"). But similar arguments have been  
10 rejected by courts applying Alabama law. For example, in *Smith v. Apple*, No. 08-AR-1498-S, 2009  
11 WL 3958096 (N.D. Ala. Nov. 4, 2009), a district court stated: "[A] general awareness on Apple's  
12 part of alleged defects in its iPhone does not extinguish the purpose of the notice requirement, nor  
13 does it substitute for that requirement under Alabama law." *Id.* at \*1; *see also In re Ford Motor Co.*  
14 *E-350 Van Prods. Liab. Litig.*, No. 03-4558 (HAA), 2008 WL 4126264, at \*6, 9 (D.N.J. Sept. 2,  
15 2008) (dismissing Alabama warranty claim for failure to comply with notice requirement even  
16 though there were allegations that Ford was "fully aware of the alleged defect from the earliest  
17 stages of the E350's development, [and] was further warned by the NTSB and NHTSA").

18 Accordingly, the Court dismisses Ms. Battle's express warranty claim. The dismissal is with  
19 prejudice as Plaintiffs have failed to show that they could make an amendment that would overcome  
20 dismissal on this basis.

21 b. Mr. Sheerin (Colorado)

22 The Court also concludes that dismissal of Mr. Sheerin's express warranty claim is proper.

23 Unlike Alabama law, Colorado law does not require notice to the manufacturer. *See Cooley*,  
24 813 P.2d at 741-42 (stating that notice to the immediate seller is required, not to anyone beyond the  
25 immediate seller, including the manufacturer). Nevertheless, that does not obviate the requirement  
26 that notice still must be given to the seller, and here no notice was given to the seller because, as  
27 noted above, Mr. Sheerin did not even bring his car in for a repair.

28



1 As above, the Court dismisses the express warranty claim with prejudice – *i.e.*, because  
2 Plaintiffs have failed to show that they could make an amendment that would overcome dismissal on  
3 this basis.

4 c. Mr. Zuchowski (Ohio)

5 For Mr. Zuchowski, the express warranty claim is not subject to dismissal based on the  
6 notice requirement.

7 Ohio law appears to require notice to a manufacturer. *See, e.g., Radford v. Daimler Chrysler*  
8 *Corp.*, 168 F. Supp. 2d 751, 754 (N.D. Ohio 2001) (in case where plaintiff sued car manufacturer for  
9 damages to her car when it spontaneously caught fire, dismissing Ohio warranty claim based on  
10 failure to provide notice).

11 But, under Ohio law, the filing of a complaint can serve as notice of breach. *See Chemtrol*,  
12 537 N.E.2d at 638 (stating that “we believe in a proper case the filing of a civil complaint could  
13 serve as notice of breach” although concluding that “this is not such a case, as Lexington’s suit was  
14 filed a full two years after the damages were sustained”); *cf. Lincoln Elec. Co. v. Technitrol, Inc.*,  
15 718 F. Supp. 2d 876, 883 (N.D. Ohio 2010) (stating that “[t]he circumstances in this case are similar  
16 to the circumstances described in *Chemtrol* that would preclude the complaint from constituting  
17 sufficient notice: defendant had no prior knowledge of the defects, and the complaint was filed a  
18 long period of time after plaintiff’s damages were sustained”). Ford argues to the contrary, citing *St.*  
19 *Clair v. Kroger Co.*, 581 F. Supp. 2d 896 (N.D. Ohio 2008), where the court stated: “The policy  
20 reasons for pre-litigation notice are not satisfied by the filing of a complaint.” *Id.* at 903. However,  
21 *St. Clair* failed to take into account the Ohio Supreme Court’s clear statement in *Chemtrol* that, “in a  
22 proper case[,] the filing of a civil complaint could serve as notice of breach.” *Chemtrol*, 537 N.E. 2d  
23 at 638. The district court’s decision in *St. Clair* is therefore not persuasive.

24 Furthermore, *Chemtrol* is not inconsistent with the function of notice. While some courts  
25 have observed that the purpose of the notice requirement is to give *pre-litigation* notice of a breach,  
26 *see Schmidt v. Ford Motor Co.*, No. 12-7222, 2013 WL 5303947, at \*5 (E.D. Pa. Sept. 20, 2013)  
27 (stating that the purpose ““is to allow the seller an opportunity to resolve the dispute regarding an  
28 alleged breach before the buyer initiates a lawsuit””), other courts have framed the purpose

1 underlying the notice requirement more broadly, stating, *e.g.*, that the notice requirement is  
2 “designed to allow the defendant seller an opportunity for repairing the defective item, reducing  
3 damages, avoiding defective products in the future, negotiating settlements, and protecting against  
4 stale claims.” *Kerr v. Hunter Div.*, 32 Va. Cir. 497, 507 (1981). While often pre-suit notice best  
5 serves those purposes, notice by complaint may serve that function as well. *See Kerr*, 32 Va. at 507  
6 (noting, *e.g.*, that “[n]egotiating settlement does not of course contemplate only pre-suit  
7 negotiations”).

8 Finally, to the extent Ford argues that Mr. Zuchowski did not provide timely notice of the  
9 alleged breach, that is a factual question for the jury to decide. Here, Mr. Zuchowski filed suit  
10 against Ford on July 26, 2013. *See Rosser v. Ford Motor Co.*, No. C-13-3471 EMC (Docket No. 1)  
11 (complaint). He leased his vehicle in March 2012, *i.e.*, more than a year earlier. *See* FAC ¶ 184.  
12 Although he began to experience problems with his MFT system “[a]lmost immediately following  
13 the lease date of his vehicle,” FAC ¶ 186, that does not establish that Mr. Zuchowski knew, or even  
14 should have known, at that time that Ford’s limited warranty had *failed of its essential purpose*. The  
15 question is when Mr. Zuchowski knew or should have known that the MFT system was not  
16 repairable. Simply because Mr. Zuchowski’s car had a problem at the outset does not establish that  
17 the problem was not repairable at that time; nor is it even enough to put Mr. Zuchowski on inquiry  
18 notice of such.

19 d. Mr. D’Aguanno (Arizona)

20 The Court rejects Ford’s contention that, as a matter of law, Mr. D’Aguanno failed to satisfy  
21 the notice requirement.

22 Admittedly, there is case law indicating that, under Arizona law, notice of a breach must be  
23 conveyed to the manufacturer of a product. *See, e.g., Hearn v. R.J. Reynolds Tobacco Co.*, 279 F.  
24 Supp. 2d 1096, 1115-16 (D. Ariz. 2003) (in case where plaintiffs sued tobacco manufacturers,  
25 dismissing Arizona warranty claims for failure to provide notice within a reasonable time).  
26 However, case law also indicates that, under Arizona law, notice can be given through the filing of a  
27 complaint. *See id.* (stating that “filing a complaint upon an opposing party (as is the case here) may  
28 constitute reasonably timely notice” because “notice of the claim of breach need take no special

1 form' and 'where no particular mode of notice is required by the statute[,] what constitutes giving of  
2 notice is liberally construed"); *see also Tasion Comm. Inc. v. Ubiquiti Networks, Inc.*, No. C-13-  
3 1803 EMC, 2014 WL 1048710, at \*9 (N.D. Cal. Mar. 14, 2014) (stating that "Arizona courts have  
4 expressly held that the Complaint itself may constitute notice"); *Yee*, 2010 WL 2572976, at \*3  
5 (stating that "[t]he notice 'need take no special form,' and the complaint itself may provide adequate  
6 notice").

7 To the extent Ford argues that no timely notice was given, that is question of fact for the jury  
8 to decide.

9 e. Dr. Oremland (Florida)

10 The Court rejects Ford's contention that, as a matter of law, Dr. Oremland failed to satisfy  
11 the notice requirement.

12 Ford's argument is predicated on the assumption that Florida law requires notice to the  
13 manufacturer. However, at least one district court has held that notice to a manufacturer is not  
14 required because the relevant Florida statute refers to notice to a seller, not a manufacturer. *See Fed.*  
15 *Ins. Co. v. Lazzara Yachts of N. Am., Inc.*, No. 8:09-CV-607-T-27MAP, 2010 U.S. Dist. LEXIS  
16 28865, at \*14 (M.D. Fla. Mar. 25, 2010) (stating that "[t]he plain language of the statute . . . does not  
17 require notice to a manufacturer," as opposed to a seller; adding that "[t]he parties have not cited to  
18 any Florida case extending [the] notice requirements to a manufacturer").

19 In its reply brief, Ford cites *Jovine v. Abbott Laboratories, Inc.*, 795 F. Supp. 2d 1331 (S.D.  
20 Fla. 2011), to support its position. In *Jovine*, the district court did dismiss the plaintiff's express  
21 warranty claim because he failed to allege that he gave the defendants notice of the alleged breach of  
22 warranty. *See id.* at 1339-40. But even if the Court assumes – in Ford's favor – that the defendants  
23 were manufacturers (or at least not direct sellers of the product to the plaintiff), *Jovine* is of limited  
24 support because no rationale was given in the opinion as to why notice to a manufacturer (or a  
25 remote seller) is required, particularly given the plain language of the statute.

26 f. Mr. Mitchell (Iowa)

27 As to Mr. Mitchell, the Court rejects Ford's notice argument.  
28

1 Under Iowa law, notice to the manufacturer is not required. *See, e.g., Wright v. Brooke Grp.*  
2 *Ltd.*, 114 F. Supp. 2d 797, 830 (N.D. Iowa 2000) (stating that, “[b]ecause defendants never sold  
3 cigarettes to Mr. Wright or contracted to sell cigarettes to Mr. Wright, the notice provision . . . was  
4 never triggered” and thus Mr. Wright never had a duty to notify defendants of his warranty claims).

5 Ford’s reliance on *Randa v. U.S. Homes, Inc.*, 325 N.W.2d 905 (Ia. Ct. App. 1982), is not  
6 persuasive because, there, the third-party defendant may have been a direct seller to the third-party  
7 plaintiff rather than a remote manufacturer. *See id.* at 910 (stating that the evidence at trial “showed  
8 that U.S. Plywood sold vertical cedar plywood to [U.S. Homes] to be used as exterior siding”).

9 g. Mr. Avedisian (Pennsylvania)

10 For Mr. Avedisian, the Court also rejects Ford’s notice argument.

11 Under Pennsylvania law, it does appear that notice to a manufacturer is required. *See, e.g.,*  
12 *Schmidt*, 2013 WL 5303947, at \*5 (stating that, under Pennsylvania law, “a plaintiff, specifically a  
13 buyer, must provide notification of the alleged product defect to the manufacturer prior to bringing  
14 suit on a breach-of-warranty theory”); *In re Ford E-350 Van Prods. Liab. Litig.*, No. CV-03-4558  
15 (GEB), 2010 WL 2813788, at \*39-40 (D.N.J. July 9, 2010) (in case where plaintiffs sued car  
16 manufacturer, denying summary judgment to manufacturer on alleged lack of notice because there  
17 was a factual dispute as to the reasonableness of the time within which the plaintiffs gave notice).

18 However, under Pennsylvania law, the filing of a complaint may constitute sufficient notice.  
19 *See id.* at \*39-40. Even a case cited by Ford concedes such. *See Precision Towers, Inc. v. Nat-Com,*  
20 *Inc.*, No. 2143, 2002 Phila. Ct. Com. Pl. LEXIS 16, at \*13 (Sept. 23, 2002) (stating that “[t]he filing  
21 of a complaint has been held to satisfy the notice requirement for a breach of warranty claim”).

22 As to whether Mr. Avedisian gave timely notice, that is a question of fact for the jury to  
23 decide.

24 h. Mr. Rodriguez and Mr. Ervin (Texas)

25 For Mr. Rodriguez and Mr. Ervin, the express warranty claims fail because of failure to  
26 satisfy the notice requirement.

27 First, although Plaintiffs cite a case to support their position that notice to a manufacturer is  
28 not required, *see Vintage Homes, Inc. v. Coldiron*, 585 S.W.2d 886, 888 (Tex. Civ. App. 1979)

1 (stating that the notice requirement “applies only as between a buyer and his immediate seller” – not  
2 a manufacturer), the weight of Texas authority supports Ford’s position that such notice is required.  
3 *See, e.g., McKay v. Novartis Pharms. Corp.*, 934 F. Supp. 2d 898, 912-13 (W.D. Tex. 2013) (noting  
4 that “[t]he Texas Supreme Court has acknowledged a split among its courts of appeals with regard to  
5 whether a buyer is required to give notice . . . to a remote seller/manufacturer”; adding that “[t]hree  
6 out of the four Texas courts of appeal which have addressed the issue have held that the buyer is  
7 required”); *United States Tire-Tech, Inc. v. Boeran, R.V.*, 110 S.W.3d 194, 199 (Tex. Ct. App. 2003)  
8 (stating that “a buyer is required to give notice of an alleged breach of warranty to a remote  
9 manufacturer”).

10 Second, under Texas law, the filing of a complaint does not constitute notice. *See id.* at 110  
11 S.W.3d at 202 (stating that “commencement of litigation [did not] satisfy this notice requirement”).

12 Finally, generalized knowledge of concerns are also insufficient to meet the notice  
13 requirement: “The manufacturer must be made aware of a problem with a particular product  
14 purchased by a particular buyer.” *Id.* This would seem particularly true where it is not a foregone  
15 conclusion that Plaintiffs’ cars were in fact not repairable.

16 The Court therefore dismisses the express warranty claims of Mr. Rodriguez and Mr. Ervin.  
17 The dismissal is with prejudice as Plaintiffs have failed to show that they could amend their pleading  
18 to avoid dismissal on this basis.

19 i. Mr. Connell and Mr. Miller-Jones (Virginia)

20 Finally, the Court rejects Ford’s contention that the notice requirement is a bar to the express  
21 warranty claims of Mr. Connell and Mr. Miller Jones.

22 Even if notice to the manufacturer were required, *compare Hebron v. Am. Isuzu Motors, Inc.*,  
23 60 F.3d 1095, 1098 (4th Cir. 1995) (in case where plaintiff sued car manufacturer, dismissing  
24 Virginia warranty claim for failure to provide notice in a reasonable time frame), *with Bay Point*  
25 *Condo. Ass’n v. RML Corp.*, 57 Va. Cir. 295, 317 (2002) (stating that buyer was not required to give  
26 notice of warranty claim to manufacturer because manufacturer was not the seller in the transaction);  
27 *Kerr*, 32 Va. Cir. at 503, 508 (1981) (stating that “[t]he buyer need only given notice to his seller,  
28 not to the remote manufacturers”), the filing of a complaint may constitute notice. *See Aqualon Co.*

1 v. *Mac Equip., Inc.*, 149 F.3d 262, 270 (4th Cir. 1998) (examining whether the notice – *i.e.*, filing of  
2 the complaint – was done within a reasonable time); *Bay Point Condo.*, 57 Va. Cir. at 319 (noting  
3 that the UCC does not bar using a claim for damages as notification; adding that, in case under  
4 consideration, “none of the policy concerns surrounding the giving of notice were even remotely  
5 applicable”). *But see Kerr*, 32 Va. Cir. at 508 (indicating that, at least most of the time, notice  
6 cannot be given by filing suit; stating that the statute is designed “to deny [a law]suit to serve as  
7 notice in those cases where pre-suit notice serves a beneficial purpose”); *cf. Cole v. Keller Indus.*,  
8 132 F.3d 1044, 1048 (4th Cir. 1998) (stating that “a non-purchaser is not required to give notice,  
9 under Va. Code § 8.2-607 to the manufacturer, as a condition precedent to suing on a warranty under  
10 the Virginia law for personal injuries,” which suggests that pre-suit notice is required if statute  
11 otherwise applicable).

12 As to whether either Mr. Connell or Mr. Miller-Jones gave timely notice, that is a question of  
13 fact for the jury to decide.

14 5. Privity Requirement Under Arizona Law

15 As to Mr. D’Aguanno (Arizona), Ford raises one final argument in favor of dismissal of the  
16 express warranty claim. More specifically, Ford contends that his claim should be dismissed  
17 because “Arizona requires a plaintiff to be in privity with a defendant to state a claim for breach of a  
18 U.C.C. warranty,” Mot. at 39, and, here, Mr. D’Aguanno did not buy his car from Ford but rather a  
19 dealer.

20 In their opposition, Plaintiffs concede that the UCC-based express warranty claim should be  
21 dismissed. *See Opp’n* at 38. Plaintiffs argue, however, that Mr. D’Aguanno’s express warranty  
22 claim based on the common law and/or breach of contract is still viable. *See* FAC ¶ 498 (“To the  
23 extent Ford’s limited warranties are deemed not to be warranties under the Uniform Commercial  
24 Code as adopted in Arizona, Plaintiff pleads in the alternative under common law warranty and  
25 contract law.”). In turn, Ford contends that even these claims are subject to dismissal.

26 The Court agrees in part. To the extent Plaintiffs assert a claim for common law warranty,  
27 courts have held that such a claim, under Arizona law, sounds in tort, and, therefore, Mr.  
28

1 D'Aguanno's common law warranty claim "falls squarely within the parameters of the 'economic  
2 loss' rule." *Apollo Grp. v. Avnet, Inc.*, 58 F.3d 477, 481 (9th Cir. 1995).

3 But Plaintiffs have also alleged a warranty claim based on breach of contract. Here, Ford  
4 argues that the contract-based claim "fails because '[a]llege[d] breach of contract should not be  
5 construed as including breach of warranty theories.'" Mot. at 40 (quoting *Mandeville v. Onoda  
6 Cement Co.*, 67 Fed. App'x 417, 418 (9th Cir. 2003)). But *Mandeville* is not citable authority under  
7 Ninth Circuit Rule 36-3. See 9th Cir. R. 36-3(b) (allowing for citation of unpublished authority  
8 issued on or after January 1, 2007). Moreover, *Mandeville* did not address *Flory v. Silvercrest  
9 Industries*, 633 P.2d 383 (Ariz. 1981), where the Arizona Supreme Court suggested that a "contract  
10 of warranty" can exist outside of the UCC. *Id.* at 390; see also *In re Horizon Organic Milk Plus  
11 DHA Omega-3 Mktg. & Sales Prac. Litig.*, 955 F. Supp. 2d 1311, 1340 (S.D. Fla. 2013) (noting that,  
12 "in *Flory*, the Arizona Supreme Court found that a written warranty made by the manufacturer of a  
13 mobile home to the buyers did not qualify as an express warranty under the U.C.C. because it was  
14 not made by the seller of the mobile home, but that the manufacturer's warranty may have formed a  
15 separate, enforceable contract between the manufacturer and [buyer]").

16 Accordingly, for Mr. D'Aguanno, the UCC-based express warranty claim is dismissed as is  
17 his common law express warranty claim. However, his breach-of-contract express warranty claim  
18 survives. The dismissal of the former claims is with prejudice.

19 B. Implied Warranty Claims

20 1. Fit for Ordinary and Intended Purpose

21 For each of the states at issue, Plaintiffs have brought a claim (or claims) of breach of the  
22 implied warranty of merchantability. Most claims, although not all,<sup>13</sup> are based on state statutes that  
23 have adopted UCC § 2-314. UCC § 2-314 provides that "a warranty that the goods shall be  
24 merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of  
25 that kind" and that "[g]oods to be merchantable must be at least such as . . . are fit for the ordinary  
26 purposes for which such goods are used." UCC § 2-314. For all of the claims, whether or not based

27 \_\_\_\_\_  
28 <sup>13</sup> See, e.g., FAC ¶ 396 *et seq.* (breach of implied warranty under the California Song-Beverly Act); FAC ¶ 940 *et seq.* (breach of implied warranty under Ohio tort law).

1 on the UCC, Plaintiffs generally offer the same basic theory – *i.e.*, that the class vehicles were not fit  
2 for their ordinary purpose. *See, e.g.*, FAC ¶ 359 (alleging that “[t]hese Class Vehicles . . . were not  
3 in merchantable condition and are not fit for the ordinary purpose for which cars are used”); FAC ¶  
4 404 (alleging that, “[b]ecause of the defects in the Class Vehicles’ [MFT] systems that cause certain  
5 crucial safety, communication, navigational, and entertainment functions of the Class Vehicles to  
6 become inoperative, they are not safe to drive and thus not fit for ordinary purposes”). In its papers,  
7 Ford argues that the implied warranty claims must be dismissed because the ordinary purpose of a  
8 car is to provide transportation and, here, Plaintiffs have never alleged that they were not able to  
9 drive their cars as a result of any problems with MFT.

10 While Ford’s position is not without any merit, the Court is not persuaded that dismissal  
11 under Rule 12(b)(6) is warranted. As even Ford implicitly concedes, the ordinary purpose of a car is  
12 not just to provide transportation but rather safe, reliable transportation. *See, e.g., Carlson v. Gen.*  
13 *Motors Corp.*, 883 F.2d 287, 297 (4th Cir.1989) (“Since cars are designed to provide transportation,  
14 the implied warranty of merchantability is simply a guarantee that they will operate in a safe  
15 condition and substantially free of defects. Thus, where a car can provide safe, reliable  
16 transportation, it is generally considered merchantable.”) (internal quotation marks omitted). Here,  
17 it is a question of fact for the jury as to whether the problems with MFT posed enough of a safety  
18 risk that the cars at issue could not be said to provide safe, reliable transportation.<sup>14</sup>

19 To be sure, the safety risk in the instant case may not be of the same magnitude as those in  
20 some of the cases cited by Ford. *See, e.g., Cholakyan v. Mercedes-Benz USA, LLC*, 796 F. Supp. 2d  
21 1220, 1243-44 (C.D. Cal. 2011) (taking note of plaintiff’s allegation that water leak defect could  
22 cause engine and/or electrical failure: “[v]ehicles subject to engine failure cannot be said to be  
23 merchantable”); *cf. Tae Hee Lee v. Toyota Motor Sales, U.S.A., Inc.*, No. CV 13-7431-JFW (VBx),

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24  
25 <sup>14</sup> Plaintiffs’ contrary argument is that the purpose of the car equipped with MFT system is to  
26 provide not just “basic transportation, but, rather, transportation with enhanced technological and  
27 safety features.” Opp’n at 41. Plaintiffs cite no case that, in analyzing the warranty of  
28 merchantability, countenances the disassembly of a product into its component parts as Plaintiffs  
suggest. Identifying a particular component of a car (such as electric windows, stereo radio,  
Bluetooth, etc.) and using that to define the ordinary purpose of the car as one which so equipped  
would merely be an exercise in question begging. To have any meaning, the purpose of the car for  
purposes of the warranty of merchantability must be more general.



1 2014 WL 211462 (C.D. Cal. Jan. 9, 2014) (stating that plaintiffs could not “allege that their pre-  
 2 collision braking feature failed to automatically slow their vehicles in an unavoidable frontal  
 3 collision.”). But the level of risk to safety need not be gross or certain. *See, e.g., Aguilar v. Gen.*  
 4 *Motors, LLC*, No. 13-cv-00437-LJO-GS, 2013 WL 5670888, at \*7 (E.D. Cal. Oct. 16, 2013) (taking  
 5 note of plaintiff’s allegation that a steering defect could “result in potential failure of power steering,  
 6 pulling to the left and right, and loss of steering control during the normal course of driving[;] [s]uch  
 7 a defect would render a vehicle unfit for driving”); *cf. Ho*, 931 F. Supp. 2d at 997-98 (in the context  
 8 of assessing a fraud claim, “find[ing] that Plaintiffs successfully showed that the alleged defect  
 9 posed a genuine safety risk because a headlamp flickering or going out at night or in inclement  
 10 weather could put the car’s driver in danger”). *Id.* at \*13. At this juncture, the Court finds the  
 11 degree of safety risk posed by the alleged defective MFT system cannot be decided on a Rule  
 12 12(b)(6) motion.

13           2.     Privity

14           Ford asserts that, even if the Court finds a sufficiently alleged safety risk to create a question  
 15 of fact regarding fitness for pleading purposes, the implied warranty claims of certain Plaintiffs  
 16 should still be dismissed because they require privity and, here, Plaintiffs did not buy or lease their  
 17 vehicles from Ford. Plaintiffs concede that Ford is right as to some of the individuals and therefore  
 18 has withdrawn the implied warranty claims of Mr. D’Aguanno, Ms. Makowski, Dr. Oremland, Mr.  
 19 Mitchell, Mr. Miller, and Mr. Purcell. *See Opp’n* at 41 n.138. However, Plaintiffs argue that there  
 20 are still viable implied warranty claims for those individuals from Alabama (Ms. Battle), California  
 21 (Ms. Whalen, CDD, Mr. Rosser, Ms. Raney-Aarons, Mr. Watson, and Ms. Thomas-Maskrey), and  
 22 North Carolina (Mr. Fink).

23           a.     Alabama

24           For Alabama, Plaintiffs actually concede that the implied warranty claim (pursuant to  
 25 Alabama Code § 7-2-314) should be dismissed. Plaintiffs argue, however, that they have a  
 26 comparable tort claim under the Alabama Extended Manufacturer’s Liability Doctrine (“AEMLD”).  
 27 *See Opp’n* at 41 & n.139 (citing *White Consolid. Indus., Inc. v. Wilkerson*, 737 So. 2d 447, 449 (Ala.  
 28 1999) (stating that “[a] claim under the AEMLD is grounded in tort and is premised on the notion

1 that ‘a [manufacturer’s marketing] a product not reasonably safe, when applied to its intended use in  
2 the usual and customary manner, constitutes negligence as a matter for law’”; adding that, “[u]nder  
3 the AEMLD, a manufacturer has the duty to design and manufacture a product that is reasonably  
4 safe for its intended purpose and use’”); *see also Tusculumbia City Sch. Sys. v. Pharmacia Corp.*, 871  
5 F. Supp. 2d 1241, 1247 (N.D. Ala. 2012) (sating that the AEMLD is “Alabama’s hybridized variant  
6 of the theory of strict liability in tort”); *Cain v. Sheraton Perimeter Park S. Hotel*, 592 So. 2d 218,  
7 220 (Ala. 1991) (stating that “[t]he AEMLD is not based on a theory of strict liability in tort, but it  
8 retains a fault concept”). Plaintiffs ask for leave to amend so that they can asserted such a claim.

9       Based on Plaintiffs’ concession, the Court dismisses the implied warranty claim based on §  
10 7-2-314. Plaintiffs’ request for leave to amend to assert a AEMLD claim is denied. As Ford argues,  
11 a claim brought pursuant to the AEMLD would be futile here because it would be barred by the  
12 economic loss rule. *See Vesta Fire Ins. Corp. v. Milam & Co. Constr., Inc.*, 901 So. 2d 84, 107 (Ala.  
13 2004) (“[The economic loss] doctrine states that a plaintiff’s AEMLD claim that a product is  
14 defective is limited to a contractual recovery when the evidence shows that the defect caused injury  
15 to only the product and to no other property.”); *Ford Motor Co. v. Rice*, 726 So. 2d 626, 631 (Ala.  
16 1998) (“Under [the economic loss] rule, a cause of action does not arise under tort theories of  
17 negligence, wantonness, strict liability, or the AEMLD where a product malfunctions or is defective  
18 and thereby causes damages only to the product itself.”); *Wellcraft Mar., Div. of Genmark Indus.,*  
19 *Inc. v. Zarzour*, 577 So. 2d 414, 418 (Ala. 1990) (“[T]here is no cause of action in tort under the  
20 AEMLD for a product defect that results in damage only to the product itself. . . . A defective  
21 product is a loss of the benefit of a bargain which is a contract rather than a tort action.”) (internal  
22 quotation marks omitted).

23               b.       California

24       As a preliminary matter, the Court notes that Plaintiffs have asserted two implied warranty  
25 claims under California law – one pursuant to California Commercial Code § 2314 (modeled on the  
26 UCC) and one pursuant to the Song-Beverly Act. For the implied warranty claim under the Song-  
27 Beverly Act, there is no privity requirement. *See Ehrlich v. BMW of N. Am., LLC*, 801 F. Supp. 2d  
28 908, 921 (C.D. Cal. 2010) (noting that the “weight of authority” states “the plain language of section

1 1792 of the Song-Beverly Act does not impose a . . . vertical privity requirement”; citing several  
 2 cases as well as Witkin in support); *see also* Cal. Civ. Code § 1729 (providing that “every sale of  
 3 consumer goods that are sold at retail in this state shall be accompanied by the manufacturer’s and  
 4 the retail seller’s implied warranty that the goods are merchantable”).

5 For the UCC-based implied warranty claim, Plaintiffs concede that there is a privity  
 6 requirement but argue that “California courts recognize a well-established exception to the privity  
 7 requirement where, as here, the consumer is a third-party beneficiary of the contract between the  
 8 manufacturer and a third party.”<sup>15</sup> Opp’n at 42.

9 Plaintiffs are correct that some courts have recognized a third-party beneficiary exception to  
 10 the privity requirement. *See, e.g., Roberts v. Electrolux Home Prods.*, No. CV 12-1644 CAS  
 11 (VBKxx), 2013 U.S. Dist. LEXIS 185488, at \*27, 30 (C.D. Cal. Mar. 4, 2013) (noting that courts  
 12 have disagreed as to whether a consumer can assert an implied warranty claim “as third-party  
 13 beneficiaries of agreements between the manufacturer and retailer,” but concluding that a consumer  
 14 can – *i.e.*, that there is “an exception to the privity requirement that applies when a plaintiff is the  
 15 intended beneficiary of implied warranties in agreements linking a retailer and a manufacturer”).  
 16 These courts have typically cited *Gilbert Financial Corp. v. Steelform Contracting Co.*, 82 Cal. App.  
 17 3d 65 (1978), in support. *See Roberts*, 2013 U.S. Dist. LEXIS 185488, at \*27-28. In *Gilbert*, the

18 \_\_\_\_\_  
 19 <sup>15</sup> In their complaint, Plaintiffs invoked this third-party beneficiary exception but made other  
 arguments as well:

20 *Plaintiffs and the other Class members have had sufficient direct*  
 21 *dealings with either the Ford or their agents (dealerships) to establish*  
 22 *privity of contract between Plaintiffs and the other Class members.*  
 23 *Notwithstanding this, privity is not required in this case because*  
 24 *Plaintiffs and the other Class members are intended third-party*  
 25 *beneficiaries of contracts between Ford and its dealers; specifically,*  
 26 *they are the intended beneficiaries of Ford’s implied warranties. The*  
 27 *dealers were not intended to be the ultimate consumers of the Class*  
 28 *Vehicles and have no rights under the warranty agreements provided*  
*with the Class Vehicles; the warranty agreements were designed for*  
*and intended to benefit the ultimate consumers only. Finally, privity is*  
*also not required because Plaintiffs’ and the other Class members’*  
*Class Vehicles are dangerous instrumentalities due to the*  
*aforementioned defects and nonconformities.*

FAC ¶ 361 (emphasis added). The Court, however, does not address Plaintiffs’ other arguments as they were not specifically raised in their opposition brief.

1 plaintiff-homeowner asserted an implied warranty claim against a subcontractor. The trial court  
2 dismissed the claim on the basis of lack of privity. On appeal, the appellate court stated: “[U]nder  
3 the facts of this case we do not need to decide the issue of privity per se” because, “[u]nder Civil  
4 Code section 1559 and the cases interpreting it, we conclude [the plaintiff-homeowner] is a third  
5 party beneficiary of the contract between [the contractor] and [the defendant-subcontractor] and  
6 therefore can sue for breach of the implied warranty of fitness.” *Gilbert*, 82 Cal. App. 3d at 69.

7 Not all courts, however, have recognized the third-party beneficiary exception. For example,  
8 in *Xavier v. Philip Morris USA Inc.*, 787 F. Supp. 2d 1075 (N.D. Cal. 2011) (Alsup, J.), the court  
9 declined to rely on *Gilbert* because it

10 dealt with a plaintiff who contracted with a general contractor to build  
11 a building and later sued a subcontractor whom the contractor had  
12 hired to work on the project. That decision explicitly did ‘not need to  
13 decide the issue of privity’ because it found that the plaintiff was a  
14 third-party beneficiary of the contract between the general contractor  
15 and the contractor. No reported California decision has held that the  
16 purchaser of a consumer product may dodge the privity rule by  
17 asserting that he or she is a third-party beneficiary of the distribution  
18 agreements linking the manufacturer to the retailer who ultimately  
19 made the sale.

20 *Id.* at 1083. In *Long v. Graco Children’s Prods., Inc.*, No. 13-cv-01257-WHO, 2013 U.S. Dist.  
21 LEXIS 121227 (N.D. Cal. Aug. 26, 2013) (Orrick, J.), the court did not make any mention of *Gilbert*  
22 at all. Rather, it decided not to recognize the third-party beneficiary exception because of the Ninth  
23 Circuit’s decision in *Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017 (9th Cir. 2008), which it  
24 concluded was binding authority. *See Long*, 2013 U.S. Dist. LEXIS 121227, at \*47-48.

25 In *Clemens*, the Ninth Circuit began by taking note that an implied warranty claim under  
26 California Commercial Code § 2314 requires vertical privity. *See Clemens*, 534 F.3d at 1023. The  
27 court acknowledged, however, that “[s]ome particularized exceptions to the [privity] rule exist. The  
28 first arises when the plaintiff relies on written labels or advertisements of a manufacturer. The other  
exceptions arise in special cases involving foodstuffs, pesticides, and pharmaceuticals, and where  
the end user is an employee of the purchaser.” *Id.* at 1023. Notably, the plaintiff did not assert any  
of these exceptions; “[i]nstead, he urges that they are exemplary rather than exhaustive, and that  
similar equities support an exception for his case.” *Id.* The Ninth Circuit

1 decline[d] this invitation to create a new exception that would permit  
2 [the plaintiff's] action to proceed. [In] [s]o doing, we acknowledge  
3 that state courts have split on this privity question, *see Rothe v.*  
4 *Maloney Cadillac, Inc.*, 492 N.E.2d 497, 502, 97 Ill. Dec. 61 (Ill. App.  
5 Ct. 1986), *aff'd in part and rev'd in part, Rothe v. Maloney Cadillac,*  
6 *Inc.*, 518 N.E.2d 1028 (Ill. 1988) (collecting cases on both sides), and  
7 that the requirement may be an archaism in the modern consumer  
8 marketplace. *See Hyundai Motor Am., Inc. v. Goodin*, 822 N.E.2d  
9 947, 952-59 (Ind. 2005) (discussing the history of the privity  
10 requirement at length and rejecting its application to  
11 consumer-manufacturer warranty claims). Nonetheless, California  
12 courts have painstakingly established the scope of the privity  
13 requirement under California Commercial Code section 2314, and a  
14 federal court sitting in diversity is not free to create new exceptions to  
15 it. *See Day & Zimmermann, Inc. v. Challoner*, 423 U.S. 3, 4 (1975).  
16 A lack of vertical privity requires the dismissal of Clemens's implied  
17 warranty claims.

18 *Id.* at 1023-24.

19 While Ninth Circuit authority is binding on this Court, this Court does not read *Clemens* (as  
20 the court did in *Long*) as foreclosing the third-party beneficiary exception. Although *Clemens*, like  
21 this case, involved a plaintiff who bought a car from a dealership and then sued the manufacturer for  
22 a defect with the car, it is not clear whether the plaintiff argued for application of the third-party  
23 beneficiary exception specifically. As indicated above, the Ninth Circuit's opinion simply reflects  
24 that the plaintiff argued for "similar equities." *Clemens*, 534 F.3d at 1023. Furthermore, that the  
25 plaintiff did not invoke the third-party beneficiary exception specifically is suggested by the fact that  
26 nowhere in the *Clemens* decision did the Ninth Circuit address *Gilbert*.

27 In light of *Gilbert* and the lack of a clear holding to the contrary in *Clemens*, the Court  
28 concludes that the third-party beneficiary exception remains viable under California law. In *Xavier*,  
of course, the court chose not to follow *Gilbert* because *Gilbert* involved a homeowner suing a  
subcontractor, and not a consumer suing a product manufacturer. While that same factual distinction  
can be made between *Gilbert* and the instant case, the Court does not find that factual distinction  
material. Neither the *Xavier* court nor Ford here has explained why this difference should command  
a result different from that in *Gilbert*.

Accordingly, the Court rejects Ford's contention that the third-party beneficiary exception is  
not cognizable under California law.

1 c. North Carolina

2 Similar to above, Plaintiffs contend that the North Carolina implied warranty claim is viable  
3 because, even though there is a privity requirement, there is, in effect, a third-party beneficiary  
4 exception to the privity rule. In support, Plaintiffs rely on *Coastal Leasing Corp. v. O'Neal*, 405  
5 S.E.2d 208 (N.C. Ct. App. 1991).

6 In *Coastal Leasing*, an individual negotiated for the purchase of an ice maker and a  
7 condensing unit from the defendant-company. The company “suggested and was instrumental in  
8 arranging for a lease transaction in lieu of a sale.” *Id.* at 233. Accordingly, the individual leased the  
9 equipment from a leasing company instead, with the defendant-company selling and supplying the  
10 equipment to the leasing company. Subsequently, the leasing company sued the individual because  
11 he failed to pay the balance due under the equipment lease. The individual in turn filed a crossclaim  
12 against the defendant-company, asserting that the equipment had malfunctioned. On appeal, the  
13 defendant-company argued that the individual could not assert any breach-of-warranty claims  
14 against it because he lacked privity with the company. The court rejected the argument, explaining  
15 that “[the individual] alleged express and implied warranties flowing to him as third-party  
16 beneficiary of the equipment sales contract [between the leasing company and the defendant-  
17 company], breach of those warranties and damages. ‘If the third party is an intended beneficiary, the  
18 law implies privity of contract.’” *Id.* at 236.

19 Based on *Coastal Leasing*, the Court rejects Ford’s lack-of-privity argument as untenable.  
20 The third-party beneficiary theory is valid under North Carolina law. Nothing in *Coastal Leasing*  
21 suggests that the third-party beneficiary exception should be limited to the leasing context or to  
22 situations in which the direct seller is a mere agent of the consumer.

23 3. Notice

24 In addition to the privity requirement, Ford argues that there is a notice requirement which  
25 must be satisfied in order for Plaintiffs to move forward with their implied warranty claims. Here,  
26 Ford’s notice argument is the same as that raised in Part V.A.4, *supra*, with respect to the express  
27 warranty claims. Plaintiffs agree that the same notice analysis should apply. Accordingly, the  
28

1 Court's rulings on notice with respect to the express warranty claims are also applicable to the  
2 implied warranty claims (based on the UCC) as well.

3 C. Claims Under the Magnuson-Moss Warranty Act ("MMWA")

4 Plaintiffs have submitted not only state statutory warranty claims but also a federal statutory  
5 warranty claim, namely, a claim for violation of the MMWA.

6 1. Derivative Claim

7 Ford argues first that Plaintiffs' MMWA claim is, essence, derivative of the state express and  
8 implied warranty claims. The MMWA provides in relevant part that "a consumer who is damaged  
9 by the failure of a supplier, warrantor, or service contractor to comply with any obligation under this  
10 title, or under a written warranty, implied warranty, or service contract, may bring suit for damages  
11 and other legal and equitable relief." 15 U.S.C. § 2310(d); *see also* FAC ¶¶ 317-18 (indicating that  
12 MMWA claim is based on express and implied warranties). Ford contends that the MMWA claim  
13 should therefore be dismissed for the same reasons that the express and implied warranty claims  
14 should be dismissed. *See, e.g., Clemens*, 534 F.3d at 1022 (noting that plaintiff "alleges a violation  
15 of the [MMWA] only insofar as [defendant] may have breached its warranties under state law; there  
16 is no allegation that [defendant] otherwise failed to comply with the [MMWA and] [t]herefore, the  
17 federal claims hinge on the state law warranty claims"). In opposition, Plaintiffs do not dispute that  
18 the MMWA claim rises or falls with the state express and implied warranty claims. *See, e.g., Opp'n*  
19 at 45 (simply arguing that "the FAC alleges viable express and implied-warranty claims").  
20 Accordingly, the Court concludes that the MMWA claim is dismissed in part – more specifically, to  
21 the extent the Court has dismissed any of the state express and implied warranty claims.

22 2. Leases

23 Ford asserts next that, to the extent there is any MMWA claim that is not dismissed pursuant  
24 to the above, there is an independent basis for dismissal as to seven Plaintiffs (namely, CDD, Ms.  
25 Raney-Arons, Mr. Matlin, Mr. Rizzo, Mr. Miller, Ms. Purcell, and Zuchowski). These Plaintiffs  
26 did not purchase their vehicles but rather only leased them and, according to Ford, the MMWA does  
27 not provide a remedy for persons who are simply lessees.

28

1 Courts are divided on the issue of whether a lessee can bring a claim under the MMWA. In  
2 assessing this issue, this Court begins with the plain language of the MMWA. Under the statute, “a  
3 consumer who is damaged by the failure of a supplier, warrantor, or service contractor to comply  
4 with any obligation under this title, or under a written warranty, implied warranty, or service  
5 contract, may bring suit for damages and other legal and equitable relief.” 15 U.S.C. §§ 2310(d)(1).

6 The term “consumer” is defined as follows:

7 [1] a buyer (other than for purposes of resale) of any consumer  
8 product, [2] any person to whom such product is transferred during the  
9 duration of an implied or written warranty (or service contract)  
10 applicable to the product, and [3] any other person who is entitled by  
the terms of such warranty (or service contract) or under applicable  
State law to enforce against the warrantor (or service contractor) the  
obligations of the warranty (or service contract).

11 *Id.* § 2301(3). The third category is made up of two subclauses – (a) a person who is entitled by the  
12 terms of “such warranty” to enforce the obligations of “the warranty” and (b) a person who is  
13 entitled under the applicable state law to enforce the obligations of “the warranty.” *See Am. Honda*  
14 *Motor Co. v. Cerasani*, 955 So. 2d 543, 548 (Fla. 2007). The question is whether a lessee can be a  
15 consumer under any of the above definitions. In their papers, the parties primarily focus on category  
16 three only – in particular, the second subclause. However, the Court finds it prudent to address all  
17 three categories. *See, e.g.*, Opp’n at 47 n.165 (putting at issue second category through reliance on  
18 *Mago v. Mercedes-Benz, U.S.A., Inc.*, 142 P.3d 712, 717-18 (Ariz. Ct. App. 2006)).

19 Clearly, a lessee is not a consumer under category one. A lessee does not actually “buy” a  
20 consumer product but rather only leases a consumer product.

21 Category two, however, presents a closer call. For example, if a car dealership purchases  
22 from a car manufacturer a vehicle that has a warranty and then the dealership leases the car to a  
23 person while the warranty is still valid, the lessee is arguably a person to whom the vehicle is  
24 transferred during the duration of the warranty. Ford implicitly argues that this construction must be  
25 rejected because of the way that “written warranty” and “implied warranty” is defined in the  
26 MMWA.

27 • “Written warranty” means, *e.g.*, “any written affirmation of fact or written promise made *in*  
28 *connection with the sale* of a consumer product by a supplier to a buyer . . . which written



1 affirmation [or] promise . . . becomes part of the basis of the bargain between a supplier and  
2 a buyer for purposes other than resale of such a product.” 15 U.S.C. § 2301(6)(A) (emphasis  
3 added).

- 4 • “Implied warranty” means “an implied warranty arising under State law . . . *in connection*  
5 *with the sale* by a supplier of a consumer product.” *Id.* § 2301(7) (emphasis added).

6 But just because written warranty and implied warranty require a connection with a sale does not  
7 mean that the sale must be one between the direct supplier and the consumer. In other words,  
8 nothing in the statute prevents the necessary “sale” as that term is used in §§ 2301(6)(A) and (7) as  
9 being a sale between a direct supplier and a lessor. *See Dekelaita v. Nissan Motor Corp.*, 799  
10 N.E.2d 367, 373-74 (Ill. Ct. App. 2003) (stating that, “[w]here, as here, there was a sale – between  
11 the dealer and the lessor – it suffices to say that there was a written warranty issued in connection  
12 with the sale”); *see also Mago*, 142 P.3d at 717 (“decid[ing] that a qualifying sale must occur  
13 something within the sequence of events that ultimately places the consumer product with the  
14 consumer[;] [plaintiff] produced evidence that the sale from Dealer to Lessor led to his lease [and,]  
15 [c]onsequently, [plaintiff] is not precluded from seeking relief under the [MMWA] merely because  
16 he was not the buyer in the qualifying sale”). In other words, in a typical car lease, the warranty  
17 claimed by Plaintiffs herein can be said to have been “issued in connection with” the “sale” between  
18 dealer and the lessor (*e.g.*, the finance company).

19 Of course, one might argue that a written warranty (at least) requires more – *i.e.*, that the  
20 requisite sale between the supplier and buyer must be for “purposes other than resale of [the  
21 consumer] product.” 15 U.S.C. § 2301(6)(A). However, courts have recognized that a lessor  
22 purchases the vehicle not for resale, but to lease it to the lessee. *See Mago*, 142 P.3d at 718  
23 (“decid[ing] that a vehicle lessor can qualify as a buyer ‘for purposes other than resale’” because  
24 “the plain language of § 2301(6) does not require that a buyer purchase the consumer product  
25 without a future intent to resell the product [–] [r]ather, § 2301(6) requires only that the buyer have  
26 purposes for purchasing the product other than resale” and “[a] buyer who purchases a vehicle for  
27 the purpose of leasing it possesses such a purpose”; adding that to interpret otherwise “would lead to  
28 an absurd result” as “most consumers who purchase a vehicle intend to resell it after a period of

1 use”); *Peterson v. Volkswagen of Am., Inc.*, 697 N.W.2d 61, 71 (Wisc. 2005) (stating that, “[w]hile  
2 it is true that [the leasing company] [i]s likely to sell the vehicle after the expiration of the lease  
3 (potentially even to plaintiff[]), the *purpose* of the transaction between [the leasing company] and  
4 defendant was not for resale, but for the lease of the vehicle to plaintiff[ ]”).

5 To be sure, not all courts are in agreement on this issue. See *Voelker v. Porsche Cars N.*  
6 *Am., Inc.*, 353 F.3d 516, 523, 525 (7th Cir. 2003) (noting that, under category one, the sale to the  
7 buyer must be “other than for purposes of a resale,” and that, “whenever a lessor takes title to a  
8 car, at least one of its purposes is, presumably, the actual resale of the vehicle”; applying the same  
9 analysis to category three). However, the interpretation advanced by Plaintiffs comports with the  
10 plain language of the statute, and the parties have not pointed to, *e.g.*, any legislative history  
11 suggesting that “resale” as used in the MMWA was meant to cover “lease.”

12 Finally, category three also allows for a lessee to be a consumer. Under category three, a  
13 consumer is “any other person who is entitled by the terms of such warranty (or service contract) or  
14 under applicable State law to enforce against the warrantor (or service contractor) the obligations of  
15 the warranty (or service contract).” 15 U.S.C. § 2301(3). As noted above, the third category is  
16 made up of two subclauses: (a) a person who is entitled by the terms of “such warranty” to enforce  
17 the obligations of “the warranty” and (b) a person who is entitled under the applicable state law to  
18 enforce the obligations of “the warranty.” A lessee can be a consumer under the first subclause  
19 because “such warranty” refers back to a written or implied warranty as defined under the MMWA,  
20 and, as discussed above, a written or implied warranty under the MMWA simply requires a  
21 connection with a sale, and a sale can be one between the supplier and a lessor. For a written  
22 warranty, there is also the requirement that the sale be for purposes other than resale, but as noted  
23 above a lease is for a purpose other than resale.

24 As for the second subclause, here, it is not clear whether the warranty referred to is a written  
25 or implied warranty as defined by the MMWA. See *Voelker*, 353 F.3d at 525 (stating that, “[f]or  
26 *Voelker* [the plaintiff-lessee] to state a valid claim, . . . the New Car Limited Warranty need not meet  
27  
28

1 the definition of written warranty contained in § 2301(6)).<sup>16</sup> But even assuming both subsections  
2 refer to the same warranty, that is not an obstacle to Plaintiffs for the reasons stated in the above  
3 paragraph.

4 In any event, Plaintiffs who are lessees are entitled under state law to enforce the limited  
5 warranty issued by Ford if only because the limited warranty on its face states that it applies both to  
6 sales and leases. *See* Docket No. 57-2 (RJN, Ex. A) (Limited Warranty at 4) (stating that the limited  
7 warranty applies if the vehicle “was originally sold or leased by Ford Motor Company or one of its  
8 dealersr in the United States or U.S. Federalized Territories, and it was originally registered/licensed  
9 and operated in the United States, U.S. Federalized Territories, or Canada”); *cf. Voelker*, 353 F.3d at  
10 524 (finding that plaintiff-lessee was entitled under state law to enforce a new car limited warranty  
11 because “Copans [the dealership] . . . assigned to [plaintiff] ‘all its rights under the Porsche Limited  
12 Warranty’” and, “[u]nder the state of Illinois, as an assignee of that warranty, a lessee like [plaintiff]  
13 was entitled to enforce the rights arising from the warranty”).

14  
15  
16 <sup>16</sup> *See also American Honda Motor Co., Inc. v. Cerasani*, 955 So. 2d 543, 548 (Fla. 2007). In  
17 *American Honda*, the Florida Supreme Court maintained that “the warranty” as used in the second  
18 subclause does not have to mean a written or implied warranty as defined in the MMWA because  
19 the first subclause of category three uses the term “such warranty” whereas the second subclause  
20 only uses the term “the warranty”:

21 The demonstrative adjective “such,” meaning “of the same type, class,  
22 or sort,” refers to the antecedent noun “written warranty.” Thus, the  
23 first alternative in Category Three requires that the warranty be a  
24 “written warranty” as defined in section 2301(6). However, Congress  
25 did not use the term “written warranty” or “such warranty” in setting  
26 forth the criteria for the second alternative, instead using the generic  
27 term “the warranty.” Therefore, we conclude that the type of warranty  
28 enforceable under state law that will enable a person to qualify as a  
Category Three consumer is not limited to the narrow definition of  
“written warranty” provided in the MMWA.

25 *Id.* at 548. Arguably, however, the phrase “the warranty” is arguably used not only for purposes of  
26 the second subclause but for purposes of the first subclause (*i.e.*, a person entitled by the terms of  
27 “such warranty” to enforce the obligations of “the warranty”). Nothing on the face of the statute  
28 suggests that phrase “the warranty” should have different meanings for the two subclauses. *See*,  
*e.g., DiCintio v. DaimlerChrysler Corp.*, 768 N.E.2d 1121, 1126-27 (N.Y. 2002) (stating that the  
“warranty” referred to in *either* the first or second subclause of category three “must be a written or  
implied warranty as defined [under the MMWA], and, as such, must arise in connection with a  
sale”).

1           3.     Exhaustion

2           Finally, Ford challenges the MMWA claim on the ground that all Plaintiffs except one (Ms.  
3 Makowski) failed to exhaust dispute resolution procedures before asserting the MMWA claim.

4           Title 15 U.S.C. § 2310(a)(3) provides as follows:

5                     One or more warrantors may establish an informal dispute settlement  
6                     procedure which meets the requirements of the Commission’s rules  
7                     under paragraph (2). If –

8                     (A)     a warrantor establishes such a procedure,

9                     (B)     such procedure, and its implementation, meets the  
10                     requirements of such rules, and

11                     (C)     he incorporates in a written warranty a requirement that the  
12                     consumer resort to such procedure before pursuing any legal  
13                     remedy under this section respecting such warranty,

14                     then (i) the consumer may not commence a civil action (other than a  
15                     class action) under subsection (d) of this section unless he initially  
16                     resorts to such procedure; and (ii) a class of consumers may not  
17                     proceed in a class action under subsection (d) except to the extent the  
18                     court determines [sic] necessary to establish the representative  
19                     capacity of the named plaintiffs, unless the named plaintiffs (upon  
20                     notifying the defendant that they are named plaintiffs in a class action  
21                     with respect to a warranty obligation) initially resort to such  
22                     procedure.

23           15 U.S.C. § 2310(a)(3).

24           Here, Ford’s limited warranty does require the use of an informal dispute settlement  
25           procedure before a claim under the MMWA may be brought in a lawsuit. *See* Docket No. 57-2  
26           (RJN, Ex. A) (Limited Warranty at 7) (“You are required to submit your warranty dispute to the  
27           BBB AUTO LINE before exercising rights or seeking remedies under the [MMWA].”). Notably,  
28           Plaintiffs do not dispute this in their papers. Plaintiffs’ only contention in their papers is that the  
“dispute-resolution procedure would be futile due to [Ford’s] demonstrated inability to cure the  
defects in its [MFT] systems.” *Opp’n* at 47; *see, e.g.,* FAC ¶ 14 (alleging that “[o]wner and lessee  
requests that Ford fix the problems have been futile[;] [d]espite the issuance of the TSBs and the  
upgrades, Ford does not have a fix for the defect”).

Similar to above, the Court recognizes the possibility of a futility exception. *See Toyota*, 754  
F. Supp. 2d at 1188-89 (taking note of cases that futility could be an excuse for failure to comply

1 with the dispute resolution mechanism; ultimately concluding that plaintiffs' allegations allowed for  
2 an inference of futility). However, as above, based on the allegations in the complaint, the Court  
3 cannot say that resort to the informal dispute settlement procedure provided for by Ford would have  
4 been futile for each Plaintiff. Accordingly, dismissal of the MMWA claim (without prejudice) is  
5 appropriate based on the failure to comply with the informal dispute settlement procedure.

6 D. Ms. Makowski's Waiver (Connecticut)

7 Finally, as to one Plaintiff, Ms. Makowski, Ford contends that all warranty-based claims  
8 should be dismissed because she actually participated in an informal dispute resolution procedure  
9 and, in accepting the arbitrator's decision, she "[gave] up any right to sue [Ford] in court on any  
10 claim that has been resolved at the arbitration hearing, unless the business fails to perform according  
11 to the Arbitrator's decision or unless otherwise provided by state or federal law." Docket No. 57-4  
12 (RJN, Ex. C) (acceptance of arbitration decision).

13 In the FAC, Ms. Makowski has three warranty claims: (1) breach of express warranty, *see*  
14 Conn. Gen. stat. Ann. § 42A-2-313; (2) breach of implied warranty, *see id.* § 42A-2-314; and (3)  
15 breach of contract/common law warranty. In their opposition, Plaintiffs concede that the first two  
16 claims were released, *see* Opp'n at 47, but is silent as to the third claim. Ford has made out at least a  
17 prima facie showing that the third claim should be dismissed because it must have been resolved at  
18 the arbitration hearing. *See, e.g.*, Docket No. 57-4 (RJN, Ex. C) (stating that, "[i]n the original  
19 customer claim form that was filed with BBB Auto Line on May 31, 2012 the customer stated that  
20 the desired outcome to resolve the concern would be one of the following[:] replace the system,  
21 extend the manufacturer warranty or assist the customer in obtaining a new vehicle"). Plaintiffs  
22 failed to substantively explain why the third claim should not be dismissed. Thus, the Court agrees  
23 with Ford that the third claim should also be dismissed.

24 E. Claim Under California Secret Warranty Law

25 Ford challenges Plaintiffs' claim for relief brought pursuant to California's Secret Warranty  
26 Law. Under the California Secret Warranty Law, "[a] manufacturer shall, within 90 days of the  
27 adoption of an adjustment program, . . . notify by first-class mail all owners or lessees of motor  
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1 vehicles eligible under the program of the condition giving rise to and the principal terms and  
2 conditions of the program.” Cal. Civ. Code § 1795.92(a). An adjustment program is defined as

3 any program or policy [1] that expands or extends the consumer’s  
4 warranty beyond its stated limit or [2] under which a manufacturer  
5 offers to pay for all or any part of the cost of repairing, or to reimburse  
6 consumers for all or any part of the cost of repairing, any condition  
7 that may substantially affect vehicle durability, reliability, or  
performance, other than service provided under a safety or emission-  
related recall campaign. “Adjustment program” does not include ad  
hoc adjustments made by a manufacturer on a case-by-case basis.

8 *Id.* § 1795.90(d).

9 Plaintiffs’ secret warranty claim is based on three different theories: (1) that Ford’s TSBs  
10 constituted an adjustment program; (2) that Ford’s decision to pay or give reimbursements for MFT  
11 repairs “in some situations” constituted an adjustment program, FAC ¶ 414; and (3) that Ford’s  
12 Campaign 12M01 constituted an adjustment program. Ford contends that none of these theories  
13 supports a viable secret warranty claim.

14 To the extent Plaintiffs asserts that the TSBs constituted an adjustment program, the Court  
15 agrees with Ford. While repairs were made to vehicles pursuant to the TSBs, nothing indicates that  
16 the TSBs either expanded or extended the existing warranty on the cars beyond its stated limit.  
17 Plaintiffs have simply offered a conclusory allegation that the TSBs expanded or extended the  
18 original warranty without any specific factual allegations in support. *See* FAC ¶ 413 (alleging that  
19 the TSBs “were part of a program set forth by Ford where Ford’s dealers would repair the defective  
20 vehicles free of charge only when certain undisclosed conditions were met and that “this program  
21 expanded and/or extended the original warranty, and therefore constitutes an ‘adjustment  
22 program’”). *See also Corson v. Toyota Motor Sales, U.S.A., Inc.*, No. CV 12-08499 JGB (VBKx),  
23 2013 U.S. Dist. LEXIS 63260, at \*18 (C.D. Cal. Apr. 24, 2013) (stating that, “even though Plaintiffs  
24 allege that the TSB ‘constituted a program or policy that expands or extends, in a blanket fashion,  
25 consumers’ standard warranty beyond the stated limit,’ Plaintiffs do not provide any factual support  
26 for such allegation”). Notably, Plaintiffs admitted at the hearing that Ford’s limited warranty was  
27 still in effect at the time cars were brought in for repairs. The FAC fails to satisfy the pleading  
28 requirement of *Twombly* and *Iqbal*.

1 As for Plaintiffs’ theory that Ford’s decision to pay or reimburse for MFT repairs “in some  
2 situations,” FAC ¶ 414, that clearly is insufficient to support a valid secret warranty claim. As noted  
3 above, an “[a]djustment program’ does not include ad hoc adjustments made by a manufacturer on  
4 a case-by-case basis.” Cal. Civ. Code § 1795.90(d).

5 However, Plaintiffs’ secret warranty claim is viable to the extent Plaintiffs assert that Ford’s  
6 Campaign 12M01 constituted an adjustment program. Campaign 12M01 meets the definition of an  
7 adjustment program because Plaintiffs have alleged that it extended the warranty available on cars.  
8 See FAC ¶ 278 (“Ford’s Campaign 12M01 extended warranty coverage of the APIM to four years of  
9 service from the warranty start date on Ford vehicles and five years on Lincoln vehicles, regardless  
10 of mileage.”). In addition, Plaintiffs have adequately alleged that Ford failed to timely give notice of  
11 this adjustment program. See FAC ¶¶ 410, 415.

12 Accordingly, Plaintiffs’ secret warranty claim is valid to the extent it is based on the alleged  
13 adjustment program Campaign 12M01.

14 F. Summary

15 For the foregoing reasons, the Court dismisses the following warranty-based claims.

Jennifer Whalen	California	MMWA claim: dismissed without prejudice for failure to follow informal dispute resolution process  California secret warranty claim: dismissed in part (claim based on Campaign 12M01 survives)  All other warranty claims survive
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Center for Defensive Driving (CDD)	California	<p>MMWA claim: dismissed without prejudice for failure to follow informal dispute resolution process</p> <p>California secret warranty claim: dismissed in part (claim based on Campaign 12M01 survives)</p> <p>All other warranty claims survive</p>
Grif Rosser	California	<p>MMWA claim: dismissed without prejudice for failure to follow informal dispute resolution process</p> <p>California secret warranty claim: dismissed in part (claim based on Campaign 12M01 survives)</p> <p>All other warranty claims survive</p>
Megan Raney-Aarons	California	<p>MMWA claim: dismissed without prejudice for failure to follow informal dispute resolution process</p> <p>California secret warranty claim: dismissed in part (claim based on Campaign 12M01 survives)</p>
Richard Decker Watson	California	<p>MMWA claim: dismissed without prejudice for failure to follow informal dispute resolution process</p> <p>California secret warranty claim: dismissed in part (claim based on Campaign 12M01 survives)</p> <p>All other warranty claims survive</p>



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<p>Darcy Thomas-Maskrey</p>	<p>California</p>	<p>MMWA claim: dismissed without prejudice for failure to follow informal dispute resolution process</p> <p>California secret warranty claim: dismissed in part (claim based on Campaign 12M01 survives)</p> <p>All other warranty claims survive</p>
<p>Angela Battle</p>	<p>Alabama</p>	<p>Express warranty: dismissed with prejudice for failure to provide notice; also dismissed for failure to present car for repair</p> <p>Implied warranty: dismissed with prejudice for failure to provide notice and lack of privity; no leave to file AEMLD claim because such a claim would be futile</p> <p>MMWA claim: dismissed with prejudice to the extent derivative of the express and implied warranty claims above; also dismissed without prejudice for failure to follow informal dispute resolution process</p> <p>This leaves as the only warranty claim the claim for breach of contract/common law warranty</p>

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<p>Joe D’Aguanno</p>	<p>Arizona</p>	<p>Express warranty claim: dismissed with prejudice for lack of privity</p> <p>Implied warranty claim: dismissed with prejudice for lack of privity</p> <p>Claim for breach of contract/common law warranty: claim for common law warranty dismissed with prejudice based on economic loss doctrine (but no dismissal of claim for breach of contract)</p> <p>MMWA claim: dismissed with prejudice to the extent derivative of the express and implied warranty claims above; dismissed without prejudice for failure to follow informal dispute resolution process</p> <p>This leaves as the only warranty claim the claim for breach of contract</p>
<p>James Laurence Sheerin</p>	<p>Colorado</p>	<p>Express warranty claim: dismissed with prejudice for failure to provide notice; also dismissed for failure to present car for repair</p> <p>Implied warranty claim: dismissed with prejudice for failure to provide notice</p> <p>MMWA claim: dismissed with prejudice to the extent derivative of the express and implied warranty claims above; also dismissed without prejudice for failure to follow informal dispute resolution process</p> <p>This leaves as the only warranty claim the claim for breach of contract/common law warranty</p>

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<p>Deb Makowski</p>	<p>Connecticut</p>	<p>Express warranty claim: dismissed with prejudice based on arbitration release</p> <p>Implied warranty claim: dismissed with prejudice based on arbitration release; also dismissed with prejudice for lack of privity</p> <p>Claim for breach of contract/common law warranty: dismissed with prejudice based on arbitration release</p> <p>MMWA claim: dismissed with prejudice as derivative of the express warranty, implied warranty, and breach of contract/common law warranty claims above</p> <p>No warranty claims left</p>
<p>George Oremland</p>	<p>Florida</p>	<p>Implied warranty claim: dismissed with prejudice for lack of privity</p> <p>MMWA claim: dismissed with prejudice to the extent derivative of implied warranty claim above; also dismissed without prejudice for failure to follow informal dispute resolution process</p> <p>This leaves as the only warranty claims the express warranty claim and claim for breach of contract/common law warranty</p>

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<p>Thomas Mitchell</p>	<p>Iowa</p>	<p>Implied warranty claim: dismissed with prejudice for lack of privity</p> <p>MMWA claim: dismissed with prejudice to the extent derivative of implied warranty claim above; also dismissed without prejudice for failure to follow informal dispute resolution process</p> <p>This leaves as the only warranty claims the express warranty claim and claim for breach of contract/common law warranty</p>
<p>William Creed</p>	<p>Massachusetts</p>	<p>MMWA claim: dismissed without prejudice for failure to follow informal dispute resolution process</p> <p>All other warranty claims survive</p>
<p>Joshua Matlin</p>	<p>New Jersey</p>	<p>MMWA claim: dismissed without prejudice for failure to follow informal dispute resolution process</p> <p>All other warranty claims survive</p>
<p>Russ Rizzo</p>	<p>New Jersey</p>	<p>MMWA claim: dismissed without prejudice for failure to follow informal dispute resolution process</p> <p>All other warranty claims survive</p>

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<p>Jeffrey Miller</p>	<p>New York</p>	<p>Express warranty claim: dismissed without prejudice for failure to present car for repair</p> <p>Implied warranty claim: dismissed with prejudice for lack of privity</p> <p>MMWA claim: dismissed with/without prejudice to the extent derivative of express and implied warranty claims above; also dismissed without prejudice for failure to follow informal dispute resolution process</p> <p>This leaves as the only warranty claim the claim for breach of contract/ common law warranty</p>
<p>Nuala Purcell</p>	<p>New York</p>	<p>Implied warranty claim: dismissed with prejudice for lack of privity</p> <p>MMWA claim: dismissed with prejudice to the extent derivative of implied warranty claim above; also dismissed without prejudice for failure to follow informal dispute resolution process</p> <p>This leaves as the only warranty claims the express warranty claim and claim for breach of contract/common law warranty</p>
<p>Daniel Fink</p>	<p>North Carolina</p>	<p>MMWA claim: dismissed without prejudice for failure to follow informal dispute resolution process</p> <p>All other warranty claims survive</p>

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<p>Jason Zuchowski</p>	<p>Ohio</p>	<p>Express warranty claim: dismissed without prejudice for failure to present car for repair</p> <p>MMWA claim: dismissed without prejudice to the extent derivative of express warranty claim above; also dismissed without prejudice for failure to follow informal dispute resolution process</p> <p>This leaves as the only warranty claims the implied warranty claim and claim for breach of contract</p>
<p>Art Avedisian</p>	<p>Pennsylvania</p>	<p>MMWA claim: dismissed without prejudice for failure to follow informal dispute resolution process</p> <p>All other warranty claims survive</p>
<p>Jose Randy Rodriguez</p>	<p>Texas</p>	<p>Express warranty claim: dismissed with prejudice for failure to provide notice</p> <p>Implied warranty claim: dismissed with prejudice for failure to provide notice</p> <p>MMWA claim: dismissed with prejudice to the extent derivative of the express and implied warranty claims above; also dismissed without prejudice for failure to follow informal dispute resolution process</p> <p>This leaves as the only warranty claim the claim for breach of contract/common law warranty</p>

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Michael Ervin	Texas	Express warranty claim: dismissed with prejudice for failure to provide notice  Implied warranty claim: dismissed with prejudice for failure to provide notice  MMWA claim: dismissed with prejudice to the extent derivative of the express and implied warranty claims above; also dismissed without prejudice for failure to follow informal dispute resolution process  This leaves as the only warranty claim the claim for breach of contract/common law warranty
Jason Connell	Virginia	MMWA claim: dismissed without prejudice for failure to follow informal dispute resolution process  All other warranty claims survive
Henry Miller-Jones	Virginia	MMWA claim: dismissed without prejudice for failure to follow informal dispute resolution process  All other warranty claims survive

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**V. CONCLUSION**

For the foregoing reasons, Ford's motion to dismiss is granted in part and denied in part. The Court's specific rulings on the fraud/tort and warranty claims can be found in Part IV.C and V.F.

This order disposes of Docket No. 56.

IT IS SO ORDERED.

Dated: May 30, 2014

  
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EDWARD M. CHEN  
United States District Judge