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United States District Court  
For the Northern District of California

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 PLAINTIFF’S  
SECOND AMENDED COMPLAINT**

**(Docket No. 157)**

**I. INTRODUCTION**

Plaintiffs in this putative nationwide and multi-state class action are nineteen individuals and one organization residing in twelve different states. *See* Docket No. 154 (Second Amended Complaint) (SAC); *see also* Docket No. 167 (stipulation dismissing the sole named plaintiffs in the SAC who resided in Connecticut and Florida, respectively). Plaintiffs each purchased at least one vehicle from Defendant Ford Motor Company that was equipped by Ford with an “infotainment system” known as MyFord Touch (MFT). The gravamen of the numerous allegations pleaded over 204 pages in Plaintiffs’ complaint is that Ford sold Plaintiffs and other putative class members vehicles with defective MFT systems, despite Ford’s knowledge at the time of sale that the MFT system it had designed was seriously unsound. For example, Plaintiffs allege that the MFT systems in their vehicles are frequently rendered completely inoperable, leaving Plaintiffs unable to operate their vehicles’ “climate controls, including windshield defrosters, as well as rearview cameras” which are all “operated only through the MyFord Touch touchscreen.” SAC at ¶ 245.

This Court previously issued a lengthy order in this case granting in part and denying in part Ford’s motion to dismiss Plaintiffs’ First Amended Complaint (FAC). *See In re MyFord Touch*

1 *Consumer Litig.*, 46 F. Supp. 2d 936 (N.D. Cal. 2014). On May 8, 2015 – the last day to file an  
2 amended complaint under this Court’s scheduling order – Plaintiffs filed their SAC. Docket No.  
3 145-4; Docket No. 131. The principal material differences between the first and second amended  
4 complaints are that (1) the SAC now pleads various claims under the laws of the State of  
5 Washington brought by newly-added named Plaintiff Leif Kirchoff, and (2) the SAC alleges breach  
6 of contract under the laws of each state where a named Plaintiff resides. *Compare* Docket No. 47  
7 (FAC) *with* SAC.

8 Currently pending before the Court is Ford’s motion to dismiss the SAC under Rule 12(b)(6).  
9 *See generally* Docket No. 157 (Mot.). In general, Ford’s motion seeks dismissal of the two new  
10 types of claims first pleaded in the SAC (*i.e.*, those for breach of contract as well as various claims  
11 brought under Washington law), as well as dismissal of a handful of previously unchallenged claims  
12 that Plaintiffs re-pleaded in the SAC. For the reasons explained below, and further for the reasons  
13 discussed on the record at the hearing on this matter, Ford’s latest motion to dismiss is granted in  
14 part and denied in part.

## 15 **II. DISCUSSION**

16 For the purposes of this motion, the Court assumes the reader’s familiarity with its earlier  
17 Order on Ford’s motion to dismiss the Plaintiffs’ FAC. *See In re MyFord Touch Consumer Litig.*,  
18 46 F. Supp. 2d 936. As the Court noted in that Order, while Plaintiffs have asserted various claims  
19 under federal and state law, the causes of action in the FAC could “loosely be categorized into (1)  
20 fraud claims and (2) breach-of-warranty claims.” *Id.* at 946. The SAC still contains mostly fraud or  
21 breach-of-warranty claims, but, as noted above, Plaintiffs have now pleaded substantially identical  
22 allegations of breach of contract against Ford under the laws of all 12 states where Plaintiffs reside.  
23 Moreover, the SAC pleads claims under Washington law on behalf of a new Plaintiff, Kirchoff.

24 In its pending motion to dismiss, Ford asks the Court to dismiss Plaintiffs’ newly added  
25 breach of contract allegations in their entirety. Ford also asks the Court to dismiss certain of  
26 Plaintiffs’ fraud and breach-of-warranty allegations; especially those brought for the first time under  
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1 Washington law. Finally, Ford asks (and Plaintiffs largely do not oppose) that the Court reaffirm its  
2 earlier rulings dismissing certain claims in the FAC.<sup>1</sup> The Court's discusses Ford's requests below.

3 A. Breach of Contract Claims

4 Plaintiffs pleaded in their SAC that Ford committed breach of contract under the laws of each  
5 of the 12 states where a named Plaintiff resides. *See, e.g.*, SAC at ¶¶ 353-357 (California); ¶¶ 446-  
6 450 (Arizona). At the hearing, Plaintiffs' agreed to voluntarily dismiss all of their breach of contract  
7 allegations.<sup>2</sup> Because the last day to amend the pleadings in this case has passed, these causes of  
8 action are dismissed with prejudice. *See* Docket No. 131 (last day to amend pleadings was May 8,  
9 2015).

10 B. Fraud Claims

11 1. Affirmative Misrepresentation Claims

12 In its earlier Order, this Court dismissed all but one of the Plaintiffs' fraud claims that were  
13 predicated on any alleged affirmative misrepresentations made by Ford about the MFT system. *See*  
14 *In re MyFord Touch*, 46 F. Supp. 3d at 953-56 (“[T]o the extent Plaintiffs have asserted any fraud  
15 claims based on an affirmative representation (as opposed to a failure to disclose), the Court grants  
16 Ford's motion [to dismiss], with one exception.”). The one exception the Court made was for  
17 Plaintiff Miller (New York), who alleged that “he was informed by the sales representatives at  
18 Mahopac Ford that Ford had corrected any defects in” the MFT system before he purchased his

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19  
20 <sup>1</sup> Ford also asked the Court to dismiss Plaintiff Miskell's tort claims under Ohio law, but  
21 later withdrew this portion of its motion. *See* Mot. at 16; Docket No. 172 (Reply Br.) at 13 (“Ford  
22 withdraws its argument based on the Ohio Products Liability Act at this time.”). In a single footnote  
23 in its motion to dismiss, Ford also hinted that dismissal of Plaintiff Creed's Magnuson-Moss claim  
24 might be appropriate, but did not squarely ask this Court to dismiss the claim or otherwise argue  
25 dismissal was appropriate. *See* Mot. at 4 n.1. In its reply brief, Ford actually argues that the Court  
26 should dismiss Creed's Magnuson-Moss claim for reasons not articulated in its motion. Reply Br. at  
27 14. The Court finds that Ford waived this argument because it was not adequately presented in its  
28 motion to dismiss, and it therefore declines to address Ford's argument or otherwise dismiss Creed's  
Magnuson-Moss claim. *See Somers v. Digital Realty Trust, Inc.*, -- F. Supp. 3d --, 2015 WL  
4483995, at \*3 (N.D. Cal. 2015) (holding that an argument cannot be raised for the first time in a  
party's reply brief). Ford similarly waived its argument that Plaintiff Miller's express warranty  
claim must be dismissed – a position it did not even allude to, let alone squarely raise, in its motion.  
*See* Reply Br. at 11.

<sup>2</sup> Counsel are advised that the better practice is to inform the Court reasonably well in  
*advance* of a scheduled hearing date if they plan to withdraw or otherwise concede challenged  
claims.

1 vehicle. *Id.* at 955 (emphasis omitted). The Court found that the dealer representative’s alleged  
2 statement that “all defects with the MFT system had been corrected” was an “affirmative  
3 representation” that Plaintiffs had adequately alleged was false. *Id.* The Court further found that the  
4 FAC contained adequate allegations of agency between Ford and its dealers to impute the alleged  
5 representation to Ford, at least for the limited purpose of surviving a motion to dismiss. *Id.* at 956.

6 Ford now asks this Court to reaffirm its earlier ruling with respect to fraud claims based on  
7 affirmative misrepresentations, and dismiss any possible representation (as opposed to omission)  
8 grounded fraud claims brought by the two new named Plaintiffs in the SAC, Miskell (Ohio) and  
9 Kirchoff (Washington). Plaintiffs acknowledge that Miskell has not adequately pleaded any  
10 misrepresentation-based fraud claim, and thus any such claim is hereby dismissed with prejudice.  
11 Plaintiffs argue, however, that “Kirchoff’s detailed factual allegations are virtually identical to  
12 Miller’s allegations, which this Court has already found to be sufficient under Rule 9(b).” *Opp. Br.*  
13 at 6. Plaintiffs are mistaken, and thus the Court finds that Kirchoff has not adequately pleaded a  
14 fraud cause of action based on any affirmative misrepresentation.

15 As described above, the Court found that Miller adequately pleaded a fraudulent  
16 misrepresentation where he alleged that he was told that “Ford has corrected any defects in MyFord  
17 Touch,” when Ford allegedly had not, in fact, eliminated all of the defects in the MFT. *See* FAC at ¶  
18 164; *see also In re MyFord Touch*, 46 F. Supp. 3d at 955. Put differently, Miller adequately alleged  
19 that he was affirmatively told that the MFT was completely free of defects (*i.e.*, “Ford has corrected  
20 any defects in MyFord Touch”).<sup>3</sup> Kirchoff, however, does not allege that he was similarly told that  
21 the MFT was defect-free before he purchased his vehicle. Instead, Kirchoff alleges that in February  
22 2013 he was “informed by the sales representatives at Bickford Ford that Ford *had made significant*  
23 *improvements* to the MyFord Touch system.” SAC at ¶ 207 (emphasis added). Kirchoff’s  
24 arguments are problematic. First, the Court finds that this allegation is not sufficiently particularized  
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26 <sup>3</sup> Interestingly, in the SAC Miller now alleges that he was informed by the dealer  
27 representatives that “Ford had corrected *many* of the defects in MyFord Touch.” SAC at ¶ 144  
28 (emphasis added). Given the materially different wording compared to the FAC, it is possible that  
even Miller no longer adequately alleges an actionable affirmative misrepresentation. Because Ford  
did not raise this argument, however, the Court will not definitively address it.

1 to pass muster under Rule 9(b). Notably, Kirchoff does not allege specifically what “improvements”  
2 he was told Ford had made to the MFT system. For instance, the complaint does not adequately  
3 plead whether such “improvements” were designed to fix defects in the system, or to add new  
4 features to the MFT.

5 In any event, Kirchoff’s affirmative misrepresentation claim must be dismissed for another  
6 reason – Kirchoff does not sufficiently allege in the complaint that the specific challenged  
7 representation was false. Indeed, elsewhere in the SAC, Plaintiffs affirmatively pleaded that Ford  
8 *had* made at least some improvements to the MFT system before Kirchoff purchased his vehicle in  
9 February 2013. *See, e.g.*, SAC at ¶ 10 (alleging that in early 2012, Ford reported a “‘things-gone-  
10 wrong’ rate for its MyFord Touch system of 500 for every 1,000 vehicles” but by “late 2012, Ford  
11 reported 400 problems with its MyFord Touch system for every 1,000 vehicles”); ¶ 284 (same); ¶  
12 285 (quoting Ford spokesperson as stating that Ford has “reduced complaints by nearly 50 percent  
13 since launch”). Under Washington law, a Plaintiff alleging a fraudulent misrepresentation must  
14 plead (and ultimately prove) that the alleged actionable statement was actually false. *See Landstar*  
15 *Inway Inc. v. Samrow*, 325 P.3d 327 (Wash. App. 2014); *see also Baertschi v. Jordan*, 413 P.2d 657,  
16 660 (Wash. 1966). Here, Kirchoff has not adequately pleaded a fraudulent misrepresentation  
17 because he has not pleaded with enough specificity to make a claim of falsity. Hence, this cause of  
18 action is dismissed with prejudice.

19 2. Second Time Vehicle Purchasers and Materiality

20 In the SAC, Plaintiffs Rodriguez (Texas) and Mitchell (Iowa) each allege that they purchased  
21 a second vehicle equipped with an MFT system *after* they purportedly became aware of alleged  
22 problems with the MFT system in the first Ford vehicles that they purchased. Indeed, Mitchell  
23 pleaded that he bought a 2014 Lincoln MKZ after he had signed the FAC in this case in November  
24 2013, alleging that the MFT system is seriously defective and “Ford does not have a fix for the  
25 defect.” FAC at ¶ 14; SAC at ¶ 101 (alleging that Mitchell purchased a 2014 Lincoln MKZ in  
26 January 2014). According to Ford, these allegations regarding second vehicle purchases  
27 conclusively demonstrate that any fraudulent omissions regarding the quality of the MFT could not  
28 have been material to these Plaintiffs, because the Plaintiffs would not have purchased another

1 MFT-equipped vehicle knowing it to be defective had these defects truly been material to their  
2 original purchasing decisions. Ford's argument has some merit with respect to Plaintiff Mitchell.  
3 Indeed, at the hearing Plaintiffs agreed to voluntarily dismiss Mitchell's fraud claims. Hence, these  
4 claims are dismissed with prejudice.

5         However, the Court denies Ford's motion to dismiss Rodriguez's fraudulent omissions  
6 claims for lack of materiality. Rodriguez alleges in the SAC that he purchased an MFT-equipped  
7 2012 Ford Focus for his own use on May 17, 2011. SAC at ¶ 171. On December 12, 2011,  
8 Rodriguez then purchased an MFT-equipped 2012 Ford Explorer "for the exclusive use of his sister  
9 and her family." *Id.* at ¶ 178. Ford claims that the second purchase conclusively establishes that the  
10 performance of the MFT-system was not material to Rodriguez's purchasing decision(s). Ford is  
11 wrong for multiple reasons. First, Rodriguez does not plead when he first became aware that the  
12 MFT system in his own 2012 Ford Focus was allegedly defective.<sup>4</sup> *See id.* at ¶ 173 (alleging  
13 generally, without specifying a time, that "[s]ince the date of the purchase of his vehicle, Plaintiff  
14 Rodriguez has taken his Ford Focus in for service at least 6-8 times to Tipton Ford"). As pleaded,  
15 Rodriguez may have learned of the extent of the MFT problems only after he purchased the second  
16 vehicle. Moreover, it is also plausible that even if Rodriguez's own MFT system had begun  
17 seriously malfunctioning before December 2011, Rodriguez could have believed that the incident  
18 was isolated (*e.g.*, he could have assumed he purchased a lemon) or repairable. Unlike Mitchell,  
19 who purchased his second MFT-equipped vehicle after participating *in this lawsuit* alleging that  
20 Ford's MFT problems were (allegedly) systemic and not fixable, there is nothing in the SAC to  
21 suggest that Rodriguez knew at the time he purchased his second MFT-equipped vehicle that any  
22 defect in his own MFT system was not an isolated (or reasonably isolated) incident, or that Ford  
23 would be unable to fix the defects in the MFT system. Thus, the Court will not dismiss Rodriguez's  
24 fraudulent omissions claims on the ground suggested by Ford.

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27         <sup>4</sup> Rodriguez does plead that he began experiencing problems with his MFT system soon after  
28 purchase, but the extent of these problems are not detailed, and Rodriguez does not suggest that he  
knew his MFT system was seriously defective soon after he purchased the vehicle. SAC at ¶ 173.

1           3.       Mitchell’s Iowa Consumer Fraud Act Claim is Dismissed

2           Ford argues that Mitchell’s putative class claim under Iowa’s Consumer Fraud Act must be  
3 dismissed because he does not allege that he obtained the approval of the Iowa Attorney General  
4 before filing suit. Mot. at 13-14. Plaintiffs have agreed to voluntarily dismiss this claim, and the  
5 Court thereby dismisses it with prejudice.

6 C.       Breach of Warranty Claims

7           1.       Plaintiff Mitchell’s Breach of Express Warranty Claim

8           There is no dispute that Mitchell never brought his 2014 Lincoln MKZ in for repairs to either  
9 Ford or any Ford dealer. *See Opp. Br.* at 14-15. In its prior Order, this Court held that four of the  
10 twenty-four Plaintiffs included in the FAC “do not have viable express warranty claims because they  
11 never brought their cars in for repairs in the first instance.” *In re MyFord Touch*, 46 F. Supp. 3d at  
12 970. The Court noted that all of the case law presented to it requires a plaintiff claiming breach of  
13 an express warranty to give the seller the opportunity to repair or replace the product “*before* the  
14 exclusive repair and replace remedy is considered to have failed of its essential purpose.” *Id.*  
15 (quoting *Asp v. Toshiba Am. Consumer Prods., LLC*, 616 F. Supp. 2d 721, 729 (E.D. Ohio 2008)  
16 (emphasis added). The Court rested its dismissal of the four Plaintiffs’ breach of warranty claims  
17 exclusively on their failure to bring their vehicles in for repair. *Id.*

18           As an independent ground supporting its decision to dismiss the express warranty claims of  
19 those four Plaintiffs, the Court also discussed and rejected Plaintiffs’ “futility” theory. Plaintiffs had  
20 argued that they should be “excused from bringing in their cars for repairs because to do so would  
21 have been futile.” *In re MyFord Touch*, 46 F. Supp. 3d at 970. The Court noted that “Plaintiffs have  
22 cited no cases establishing a futility exception to the presentation required by the express terms of  
23 the express warranty.” *Id.* at 971. Moreover, the Court noted that even if, “in theory,” futility could  
24 be considered an excuse for not tendering their allegedly defective vehicles for warranty repairs,  
25 Plaintiffs had not even adequately alleged futility. As the Court explained, “[e]ven assuming a  
26 futility argument is theoretically possible, here, there are insufficient allegations in the complaint to  
27 make futility plausible.” *Id.*

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1 Over a year has passed since the Court initially rejected the Plaintiffs’ futility theory, yet  
2 Plaintiffs have once again failed to cite any case – let alone any Iowa case law – that supports their  
3 contention that an individual can maintain a claim for breach of express warranty where that  
4 individual did not even give the defendant an opportunity to honor the terms of that warranty (*i.e.*,  
5 attempt to fix or replace the product). Rather, Plaintiffs suggest that this Court should create a  
6 “futility” doctrine out of whole cloth, and then find that Mitchell alleges sufficient facts to plausibly  
7 demonstrate that it would have been futile for him to bring his 2014 Lincoln in for warranty service  
8 because Ford would have been unable to repair the vehicle even if it had been given the chance. The  
9 Court declines to do so. While this Court was previously willing (in dicta) to entertain the  
10 possibility that futility “theoretically” could excuse a failure to tender a vehicle for repair, Plaintiffs  
11 have still not identified any case in support of this argument. Given that all the cases presented to  
12 the Court uniformly require the plaintiff to give the defendant a chance to perform warranty service  
13 before the defendant can be held liable for breach of warranty, Mitchell’s breach of express warranty  
14 claim is dismissed with prejudice. *See In re MyFord Touch*, 46 F. Supp. 3d at 970-71; *see also In re*  
15 *Toyota Motor Corp. Unintended Acceleration Mktg., Sales Pracs. & Prods. Liab. Litig.*, 754 F.  
16 Supp. 3d 1145, 1179 (C.D. Cal. 2010).

17 2. Plaintiff Kirchoff’s Express Warranty Claim

18 Ford argues in a single paragraph of its motion to dismiss that Kirchoff’s claim for breach of  
19 express warranty must be dismissed because, under Washington law, a plaintiff needs to plead that  
20 “he was aware of the terms” of the relevant express warranty before the purchase was made. The  
21 Court finds that Ford’s argument is without merit. First and foremost, Plaintiffs – including Kirchoff  
22 – *do* allege that they were “aware” of Ford’s limited warranty before purchasing they purchased  
23 their vehicles. Paragraph 287 reads that “[e]ach Plaintiff was provided with a warranty and it was *a*  
24 *basis of their purchase* of their vehicles.” SAC at ¶ 287 (emphasis added); *see also* SAC at ¶ 286  
25 (alleging that “Ford provides an express limited warranty on each vehicle” in “connection with the  
26 sale” of such vehicles, and in the warranty “Ford promises to repair any defect or malfunction that  
27 arises in the vehicle during a defined period of time”). *See Faulkner v. ADT Sec. Servs., Inc.*, 706  
28 F.3d 1017, 1019 (9th Cir. 2013) (explaining that for the purposes of a Rule 12(b)(6) motion to



1 dismiss, all “well-pleaded allegations of material fact in the complaint are accepted as true and are  
2 construed in the light most favorable to the non-moving party”).

3 In any event, Ford has not cited any case that squarely stands for the legal proposition it  
4 asserts; namely that a plaintiff must plead awareness of the terms of a clearly labeled express  
5 warranty that was provided to the consumer at the time of sale, in order to sue for breach of that  
6 warranty. In fact, one of Ford’s cited cases seems to directly undercut Ford’s contention. In  
7 *Kerzman v. NCH Corp.*, No. 05-cv-1820-JLR, 2007 U.S. Dist. LEXIS 17000, at \*7 (W.D. Wash.  
8 Mar. 9, 2007), the district judge explained that to “state a claim for express warranty under  
9 [Washington law], Plaintiffs must show that (1) the warranty was made part of the basis of the  
10 bargain; (2) the warranty relates to a material fact concerning the product; and (3) the warranty turns  
11 out to be untrue.” Nowhere in this formulation is there a requirement that the plaintiff be aware of  
12 any precise warranty term at the time of purchase in order to later recover for breach of express  
13 warranty.

14 Ford’s other cases appear equally inapposite or inconclusive. In *Baughn v. Honda Motor*  
15 *Co., Ltd.*, the Washington Supreme Court considered whether statements made in television  
16 advertisements could constitute an express warranty. 727 P.2d 655, 669 (Wash. 1986). That is, the  
17 Court was concerned with the scope of any express warranty, and whether certain advertising  
18 statements could be considered part of any warranty. The Court concluded that breach of express  
19 promises made in such ads *could* potentially be actionable under an express warranty theory, so long  
20 as the purchaser “was aware of such representations.” *Id.* In that case, the plaintiff alleged that he  
21 knew that Honda advertised a “mini-trail bike as a good one for children and stated that ‘You meet  
22 the nicest people on a Honda.’” *Id.* The Court affirmed the dismissal of an express warranty claim,  
23 explaining that “[s]uch statements do not rise to the level of express representations for which  
24 recovery . . . is allowed.” *Id.* *Baughn* is clearly not of assistance to Ford – unlike in *Baughn*,  
25 Kirchoff alleges that the express warranty statements were made part of the basis of the bargain  
26 because Ford actually issued him a printed express warranty. This is not a case like *Baughn* where  
27 the scope of the warranty was in dispute because it was unclear what representations the plaintiff  
28 was aware of; here, there is an express written warranty with a defined scope.

1 Ford's final case, *Touchet Valley Grain Growers, Inc. v. Opp & Seibold Gen. Const., Inc.*,  
2 similarly fails to control the outcome here. 831 P.2d 724, 731 (Wash. 1992). In *Touchet*, the  
3 product purchaser claimed that the manufacturer had made express warranty statements in *both* an  
4 "advertising brochure" as well as in a "price book and purchase order." *Id.* In resolving the  
5 purchaser's express warranty contentions, the Supreme Court first quoted *Baughn* for the  
6 proposition that an express warranty can be created "when a manufacturer makes express  
7 representations, in advertising or otherwise, to a plaintiff." *Id.* (quoting *Baughn*, 727 P.2d at 655).  
8 In the very next sentence, the Supreme Court wrote: "Recovery for breach of an express warranty is  
9 contingent on a plaintiff's knowledge of the representation." *Id.* (citing *Baughn*, 727 P.2d at 655).  
10 The Court then immediately went on to discuss whether the manufacturer's statements in the  
11 advertising brochure constituted express warranties. *Id.* The Supreme Court ultimately held that  
12 the statements in the advertising materials before it were sufficiently specific to constitute actionable  
13 express warranties. *Id.* After completing its discussion of the statements contained in the  
14 advertising brochure, the Supreme Court then went on to separately analyze statements made in the  
15 price book and purchase order that the defendant had "labeled 'standard warranty.'" *Id.* In its  
16 discussion of the statements contained in the price book and purchase order, the Supreme Court did  
17 not cite *Baughn*, nor did the Court discuss whether awareness of any "standard warranty" terms was  
18 a required element of plaintiff's breach of warranty claim. *Id.* at 731-32. Rather, the Court  
19 discussed and resolved the issue of whether the express warranty benefitted the end user (*i.e.*,  
20 plaintiff). *Id.*

21 The Court does not read *Touchet Valley* to hold that specific awareness of the terms of a  
22 standard printed warranty that otherwise forms the basis of the parties' bargain is required to state a  
23 claim for breach of express warranty. Rather, *Touchet Valley* holds, consistent with *Baughn*, that  
24 "awareness" must be shown if the plaintiff intends to argue that other types of "*representation[s]*"  
25 (*e.g.*, advertising statements) form part of the express warranty; *i.e.*, where the representations are  
26 used by the plaintiff to define the scope of the warranty. *Id.* at 731 ("Recovery for breach of an  
27 express warranty is contingent on a plaintiff's knowledge of the representation."). This reading is  
28 consistent with other Washington case law, such as *Kerzman*, which was decided after *Touchet*

1 Valley, as well as Washington statutory law, none of which appears to impose a “knowledge  
2 requirement” for breach of a clearly labeled express warranty. *See* Wash. Rev. Code § 62A.2-313  
3 (no knowledge requirement); *Kerzman*, 2007 U.S. Dist. LEXIS 17000, at \*7 (same). To hold  
4 otherwise would run counter to the general contract principle that parties to a written contract are  
5 generally bound by all its provisions regardless of whether one party or the other read or was  
6 otherwise aware of a particular provision. Finally, and to reiterate, even if Ford were correct that  
7 there is such a knowledge requirement under Washington law, Kirchoff has adequately pleaded  
8 knowledge of the express warranty here. Ford’s motion to dismiss Kirchoff’s breach of express  
9 warranty claim is therefore denied.

10 3. Plaintiff Kirchoff’s Implied Warranty Claim

11 Ford’s final argument is that Kirchoff’s breach of implied warranty claim must be dismissed  
12 because he did not adequately plead facts that support his conclusory allegation that he is a third-  
13 party beneficiary of an implied warranty between Ford and Bickford Ford, the dealer that sold  
14 Kirchoff his Ford F-250. Mot. at 15-16; *see also* SAC at ¶ 1060 (alleging that Kirchoff “and the  
15 Washington Class members are intended third-party beneficiaries of contracts between Ford and its  
16 dealers”). Ford is correct.

17 The parties recognize that under Washington law, a party typically must be in contractual  
18 privity with the manufacturer to state a claim for breach of an implied warranty. *See, e.g., Tex*  
19 *Enterprises v. Brockway Standard, Inc.*, 66 P.3d 625, 628 (Wash. 2003) (noting that traditionally “a  
20 plaintiff may not bring an implied warranty action . . . without contractual privity”); *see also In re*  
21 *MyFord Touch*, 46 F. Supp. 3d at 981 (dismissing various implied warranty claims pleaded in the  
22 FAC for lack of privity). Both parties also acknowledge that Washington law admits an exception to  
23 the privity rule where the purchaser is “the intended third party beneficiary of the implied warranty  
24 that the manufacturer gave to its intermediate dealer.” *Id.* (citing *Touchet Valley*, 831 P. 2d at 730).

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1 Here, Kirchoff has failed to allege sufficient facts to plausibly establish his alleged third-party  
2 beneficiary status.<sup>5</sup>

3 In determining whether an individual plaintiff is a third-party beneficiary of an implied  
4 warranty, the Washington courts look to the “sum of [the] interaction” between the purchaser and  
5 manufacturer, as well as the “expectations between the purchaser and the manufacturer,” if any.  
6 *Touchet Valley*, 831 P. 2d at 730 (citing *Kadiak Fisheries Co. v. Murphy Diesel Co.*, 422 P.2d 496  
7 (Wash. 1967)). “Because implied warranties arise by operation of law without specific adoption by  
8 the seller, we recognize that such warranties must be *more closely guarded* than express warranties,  
9 whose adoption requires some voluntary action.” *Tex Enterprises*, 66 P.3d at 629 (emphasis added).  
10 Thus in *Kadiak*, the Washington Supreme Court held that an indirect purchaser (Kadiak) of a 325  
11 horsepower maritime diesel motor was a third-party beneficiary of an implied warranty between the  
12 manufacturer of the motor (Murphy Diesel) and the product seller (Alaska Pacific) where Murphy  
13 Diesel knew the identity, purpose and requirements of Kadiak’s specifications, constructed the  
14 motor to those specifications, and shipped the motor directly to Kadiak. *See Kadiak*, 422 P.2d at  
15 503-04 (stating that the manufacturer “engineered and constructed the motor to meet certain  
16 specifications, e.g., the bed of the [boat],” and had contact with the purchaser “before and after  
17 shipment”). The manufacturer also sent a regional sales representative and a service technician to  
18 help with the installation of the motor in Kadiak’s fishing boat, and, after repeated mechanical  
19 problems, attempted to fix the engine on Kadiak’s behalf. *Id.* at 503. The Court concluded that  
20 “[u]nder these circumstances, it is beyond dispute that Alaska Pacific’s purchase of the motor from  
21 Murphy Diesel was upon the consideration that a merchantable motor, fit and suitable for the marine  
22 purposes of Kadiak, would be supplied. Kadiak thus became the beneficiary of the contract, with  
23 Alaska Pacific as the conduit through which the duty of ordinary care and the implied warranties of  
24 merchantability and fitness flowed” *Id.* at 503-04.

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27 <sup>5</sup> Previously, this Court rejected Ford’s arguments that neither California nor North Carolina  
28 recognize a third-party beneficiary exception at all. *In re MyFord Touch*, 46 F. Supp. 2d at 984-85.  
The Court did not address Ford’s current argument, however, that the complaint did not contain  
adequate allegations to invoke the third-party beneficiary exception.

1 The Washington Supreme Court reached a similar conclusion in *Touchet Valley*. See 831  
2 P.2d at 730. There, the indirect purchaser plaintiff was held to be a third-party beneficiary of the  
3 implied warranties of merchantability and fitness between the manufacturer and the seller of pre-  
4 fabricated metal buildings where, like in *Kadiak*, the manufacturer knew the indirect purchaser’s  
5 “identity, its purpose, and its requirements,” designed “the building knowing the specifications were  
6 the purchaser’s,” delivered the product directly to the purchaser, and attempted to make repairs after  
7 the product turned out to be defective. *Id.* As the Court explained, “the sum of this interaction is  
8 indistinguishable from *Kadiak*,” and hence the Court held that the indirect purchaser “was the  
9 intended beneficiary of [defendant]’s implied warranties to [seller]. Those warranties assured the  
10 merchantability of [defendant]’s fabricated building components and their fitness for [plaintiff]’s  
11 *known particular purpose.*” *Id.* (emphasis added).

12 Kirchoff’s allegations in the SAC stand in stark contrast to the facts of both *Kadiak* and  
13 *Touchet Valley*, the only cases that Kirchoff actually cites in support of his third-party beneficiary  
14 status. Here, the only interactions that allegedly occurred between Kirchoff and Ford all occurred  
15 *after* Kirchoff had already purchased his Ford truck from the dealer: According to Kirchoff he “spent  
16 approximately 20 hours on the phone with the Ford SYNC support team, diagnosing the problems  
17 [with his MFT], documenting several issues, and receiving commitments that those issues would be  
18 carefully review by the software team for a future software release.” SAC at ¶ 208. There is no  
19 allegation of any pre-purchase interactions between Ford and Kirchoff, and especially no allegations  
20 similar to those in either *Kadiak* or *Touchet Valley* that the manufacturer designed the end-product  
21 specifically for the purchaser to his specifications, shipped the product directly to the indirect  
22 purchaser, or installed the product for the indirect purchaser. Rather, the “sum of the interaction”  
23 between the parties here was roughly 20 hours worth of calls to Ford’s technical support team after  
24 the sale. Given that the Washington Supreme Court has cautioned that implied warranties should be  
25 “closely guarded,” the Court finds that Kirchoff has not adequately pleaded sufficient facts to  
26 plausibly demonstrate that he was a third-party beneficiary to any contracts between Ford and  
27 Bickford Ford. To hold otherwise would significantly expand the third-party beneficiary exception  
28 to the general rule that privity is required to state a breach of implied warranty claim.

1 At the hearing, the Plaintiffs suggested that Kirchoff should be permitted to amend this claim  
2 to plead additional facts; namely that he submitted numerous “requirements” to Ford when he  
3 purchased his vehicle (*e.g.*, he ordered a red truck with certain options). The Court will not permit  
4 Plaintiffs to amend this claim. First, the Court reiterates that the deadline for the amendment of  
5 pleadings has long since passed, and this litigation has been ongoing for years. *See* Docket No. 131  
6 (last day to amend pleadings was May 8, 2015). Plaintiffs filed their SAC on the very last day to file  
7 an amended pleading. It was incumbent on Plaintiffs to file a complaint that would not require  
8 further amendment. *See Zucco Partners, LLC v. Digimarc Corp.*, 552 F.3d 981, 1007 (9th Cir.  
9 2009). Plaintiffs cannot amend now, because they cannot meet the good cause standard of Rule 16.

10 Perhaps more importantly, however, the proposed amendment would not cure the identified  
11 deficiency. In both *Kadiak* and *Touchet Valley*, the actual end product that failed – and thus the  
12 product that was the subject of the lawsuit – had been custom designed for the plaintiff to meet the  
13 plaintiffs’ specific requirements. *See Kadiak*, 422 P.2d at 498 (custom marine diesel engine failed);  
14 *Touchet Valley*, 831 P.2d at 726 (structural failure of custom designed grain storage building). This  
15 helped establish a substantial and direct relationship with the manufacturer sufficient to create a  
16 third party beneficiary. Here, Kirchoff does not propose to allege that Ford custom designed an  
17 MFT system for his vehicle – rather, he simply claims he could allege that he transmitted some non-  
18 MFT related requirements to Ford. The Court fails to see how such facts would plausibly support  
19 Kirchoff’s contention that he was an intended third-party beneficiary of any implied warranty  
20 between Ford and Bickford Ford with respect to the MFT system.

21 Put simply, the Court finds that the facts of this case as alleged, and as Plaintiff proposes to  
22 allege them if granted leave to amend, are not sufficient to state a plausible claim for breach of any  
23 implied warranty against Ford under a third-party beneficiary theory.

### 24 **III. CONCLUSION**


25 The Court dismisses the following claims with prejudice: (1) all of Plaintiffs’ breach of  
26 contract allegations; (2) Plaintiff Miskell’s and Kirchoff’s fraud claims based on an alleged  
27 affirmative misrepresentation theory; (3) Plaintiff Mitchell’s fraud claims; (4) Plaintiff Mitchell’s  
28 breach of express warranty claim; and (5) Plaintiff Kirchoff’s breach of implied warranty claim.

1 The Court denies Ford's motion with respect to all other claims in the SAC. Plaintiffs shall file an  
2 amended complaint that conforms with this order and the Court's prior orders within thirty (30)  
3 days. Plaintiffs may not amend any of the claims that this Court has dismissed either in this order or  
4 any earlier order.

5 This order disposes of Docket No. 157

6  
7 IT IS SO ORDERED.

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9 Dated: August 31, 2015

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13 EDWARD M. CHEN  
14 United States District Judge  
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