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14 **UNITED STATES DISTRICT COURT**
15 **NORTHERN DISTRICT OF CALIFORNIA**
16 **SAN FRANCISCO DIVISION**

17 IN RE

18 MYFORD TOUCH CONSUMER
19 LITIGATION

Case No. 13-cv-3072-EMC

**PLAINTIFFS' MEMORANDUM OF
LAW IN OPPOSITION TO
DEFENDANT FORD MOTOR
COMPANY'S MOTION TO DISMISS
PLAINTIFFS' FIRST AMENDED
COMPLAINT**

Hearing Date: April 3, 2014
Time: 1:30 p.m.
Judge: Hon. Edward M. Chen
Courtroom: 5

CLASS ACTION

JURY TRIAL DEMANDED

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20 VA. CODE ANN. § 59.1-508.3 34

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I. INTRODUCTION

1
2 Plaintiffs' First Amended Class Action Complaint ("FAC") details the circumstances by
3 which Ford misled millions of customers into purchasing or leasing vehicles equipped with MyFord
4 Touch, a poorly researched, hastily designed, and inherently defective in-car entertainment and
5 communication system. By misrepresenting the system's safety benefits, such as freedom from
6 distracted driving, and functionality benefits, such as voice and touch controls, and by omitting
7 material facts relating to the safety of the system, Ford has injured its customers. Ford's dismissal
8 arguments are entirely meritless and should be rejected.

9 In its dismissal memorandum ("Def. Mem."), Ford ignores large tracts of the FAC. Ford
10 criticizes Plaintiffs for not identifying any "affirmative misrepresentation," for example,¹ yet it
11 overlooks its concrete, nationally distributed marketing representations touting the specific safety
12 and functionality benefits of MyFord Touch.² It attempts to support its legal argument that the Class
13 Vehicles were merchantable by claiming that "[n]one of Plaintiffs has alleged that their vehicle was
14 unfit for driving at any point,"³ which, of course, is untrue.⁴ Ford also claims that Plaintiffs have
15 failed to show that their vehicles "experienced specific concerns that could not be remedied despite
16 multiple repair attempts,"⁵ but it fails to account for the FAC's allegations about Plaintiffs who
17 repeatedly returned their vehicles to the dealer, to no avail.⁶ Indeed, Ford appears to misunderstand
18 the premise of Plaintiffs' case: contrary to Ford's promise in its Limited Warranty to "repair,"
19
20

21 ¹ See, e.g., Def. Mem. at 1.

22 ² See, e.g., ¶¶ 250-60. As used herein, "¶ ___" refers to paragraphs of Plaintiffs' First Amended
Complaint.

23 ³ See Def. Mem. at 2.

24 ⁴ Several Plaintiffs also could not use their vehicles at various points because they had been
brought in for futile attempts to have their My Ford Touch System repaired. See ¶¶ 77 ("[d]uring the
25 many service visits made by Plaintiff Thomas-Maskrey, she was unable to use her vehicle"), 93
("Plaintiff D'Aguzzo has suffered an ascertainable loss as a result of Ford's omissions and/or
26 misrepresentations associated with the MyFord Touch system, including ... lost use of the vehicle
while being serviced"), 104 ("[t]he Ford dealership asked her to bring her Ford Escape in for service
again, and kept her vehicle in its shop for weeks at a time, depriving her of use of the vehicle"), 155
27 ("[d]uring the many service visits made by Plaintiff Rizzo, he was unable to use his vehicle").

⁵ Def. Mem. at 2.

28 ⁶ See, e.g., ¶¶ 23-30, 51, 57-60, 69-71, 76-77.

1 “replace” or “adjust” any parts on the Class Vehicles that malfunction, and to Ford’s many other
2 representations, as detailed herein, the MyFord Touch system is defective, and there is no fix.⁷

3 Moreover, Ford misstates the law. It asserts the FAC fails to demonstrate that Ford
4 knowingly concealed material information at the time of sale, but it overlooks several recent cases
5 holding, based on similar allegations, that a manufacturer does have a disclosure obligation. Ford
6 disingenuously claims that the failure of the MyFord Touch system – which Ford widely marketed
7 as a safety feature – does not render the Class Vehicles unsafe. But recent consumer automobile
8 cases make clear that the type of defect plaguing the MyFord Touch system is indeed a safety
9 problem that Ford must disclose. Finally, and as explained below, the other legal technicalities
10 advanced by Ford with respect to some of Plaintiffs’ claims – based on the economic-loss rule,
11 statutes of limitations, privity, and certain pre-suit notice requirements – are equally unpersuasive.
12 As a result, the Court should deny Ford’s motion in its entirety.

13 II. FACTUAL BACKGROUND

14 A. The defective SYNC system in the Class Vehicles

15 Ford’s SYNC[®] is a factory-installed, integrated in-vehicle communications and
16 entertainment system that allows users to make hands-free telephone calls, control music, and
17 perform other functions using voice commands. The SYNC system consists of applications and user
18 interfaces developed by Ford and other third-party developers using a Microsoft-designed Windows
19 embedded automotive-operating system. Ford released the original SYNC into the retail market in
20 2007 when Ford installed the system in twelve groups of model year 2008 vehicles in North
21 America. ¶¶ 232-33, 247.

22 Ford initially promoted the SYNC system as a product providing drivers with the ability to
23 operate Bluetooth-enabled mobile phones and digital media players in Ford vehicles using voice
24 commands, steering wheel controls, and radio controls. Ford later expanded the SYNC software so
25 text messages received by the vehicle operator could be “vocalized” by a digitized female voice
26 named “Samantha” and read aloud through the vehicle’s speaker system. ¶ 233.

27
28 ⁷ ¶ 8.

1 The SYNC system's brain is the Accessory Protocol Interface Module ("APIM"), which
2 interfaces with all vehicle audio sources as well as high-speed and medium-speed vehicle Controller
3 Area Network buses ("CAN"). The SYNC system's Microsoft Windows auto-based operating
4 system can also receive software updates through the use of the vehicle's USB port. ¶¶ 248-49.

5 In 2007, as a standalone option, the SYNC system's suggested retail price was \$395. Around
6 January 2010, Ford announced the release of the MyFord Touch system (branded as MyLincoln
7 Touch in Ford's Lincoln brand products) (collectively referred to as "MyFord Touch") as the next-
8 generation of the Ford SYNC system. ¶ 235. Ford's suggested retail price for the MyFord Touch as a
9 stand-alone option was approximately \$1000. ¶ 241.

10 The MyFord Touch system is generally available only on medium to high-end trim
11 packages. With MyFord Touch, Ford aimed to create a technological infotainment system that
12 would be available not only on its higher-end vehicles, but would become the signature feature of
13 all Ford vehicles – a feature that would increase sales of vehicles across the entire range of Ford,
14 Mercury, and Lincoln products. ¶ 237. As with the SYNC system, the MyFord Touch system was
15 designed to enable drivers to integrate nearly all mobile phones, PDAs and digital media players
16 into their vehicles. Once integrated, the operation of these devices is performed by voice commands,
17 touch-screen inputs, steering-wheel controls, radio controls, Bluetooth and Wi-Fi connectivity.
18 ¶¶ 232-33, 250, 259. The MyFord Touch system controls include two color LCD displays in the
19 gauge cluster and one 8-inch LCD touch screen in the center stack, a media hub with two USB
20 ports, input jacks, and five-way controls located on the steering wheel and SYNC voice-activated
21 communications and entertainment system. ¶¶ 242-46.

22 Ford actively touts the SYNC system. It has a website dedicated solely to it:
23 <http://www.ford.com/technology/svnc/>. Among other claims, this website states that "SYNC helps
24 you keep your eyes on the road and stay connected to your world." The SYNC website contains
25 several videos, one of which is titled "SYNC SAVED MY LIFE." This video purports to depict
26 someone reading a letter they wrote after being in a serious car accident. Among other things, the
27 video narrator says "SYNC saved my life," "if SYNC had not dialed 911, I certainly would have
28 perished at the bottom of that river," "SYNC is there when nobody else is," and "it gave me my life

1 ... that's the ultimate technology." The video displays the words "SYNC. Can call for help, even if
2 you can't." ¶ 251.

3 This automated emergency function operates through a SYNC feature called "911Assist,"
4 which, according to Ford's website, operates as follows: "In the event of an accident in which an
5 airbag deploys or, in certain vehicles, the fuel pump shutoff is activated, 911 Assist with GPS uses a
6 properly paired and connected mobile phone inside the vehicle to make a call directly to a 911
7 operator and gives emergency responders your exact location." Ford's promotion of the SYNC
8 system also capitalizes on the recent enactment of distracted driver laws. Over a dozen states have
9 enacted laws that prohibit the use of hand-held cell phones while driving. The Sync system website
10 promotes its hands-free calling feature as follows: "You never have to miss a call just because
11 you're behind the wheel. If your phone rings, you can answer with the push of a button, and you can
12 make a call with the sound of your voice." This website further states that "[c]alling anyone is as
13 easy as saying his or her name." ¶¶ 252-53.

14 **B. The TSBs and warranty extension**

15 Well aware of the many SYNC/MyFord Touch system problems experienced by consumers,
16 Ford issued several Technical Service Bulletins ("TSB") and updates in an unsuccessful effort to
17 resolve them. On or around April 27, 2011, Ford issued TSB 11-4-18 pertaining to Ford vehicles
18 equipped with the SYNC system and the MyFord Touch or MyLincoln Touch options. Specifically,
19 Ford's TSB noted that these systems may experience blank screens, missing presets, lack of voice
20 recognition, incorrect dialing of phone numbers and display problems with the backup camera. The
21 TSB recommended reprogramming the software system. ¶¶ 274-75.

22 On or around July 22, 2011, Ford issued TSB 11-7-24, which superseded Ford's TSB from
23 11-4-18, again pertaining to the functionality of Ford vehicles equipped with the SYNC system and
24 the MyFord Touch or MyLincoln Touch options. Specifically, this TSB explained that Class
25 Vehicles "may experience" various symptoms caused by the defective APIM, including
26 "blank/black display screen, radio switches from off to on or changes state after ending a phone call
27 or voice command, phone pairing, incorrect Sirius channel selection using voice command, unable
28 to download photo resolution 800x378, phonebook downloads, AM/FM missing preset display

1 information, voice recognition, voice recognition when using SYNC services, USB device
2 detection, travel-link download time, Sirius channel art-logo mismatch, clock intermittently displays
3 incorrect time, traffic direction and information ..., calling wrong phone number, travel link
4 subscription, address book downloads, navigation set in kilometers but voice communicates in
5 miles, and backup camera scrolling display.” As a result, Ford’s TSB recommended performing a
6 software update by fully reprogramming the APIM, and, where reprogramming was unsuccessful,
7 replacing the APIM. ¶ 276.

8 On or around March 6, 2012, Ford issued Customer Satisfaction Program Campaign 12M01
9 pertaining to Ford vehicles equipped with the SYNC system and the MyFord Touch or MyLincoln
10 Touch options. This campaign explained that certain MY 2011-2012 Explorer, Edge, MKX and MY
11 2012 Focus vehicles equipped with the SYNC system and the MyFord Touch or MyLincoln Touch
12 options may require replacement of the APIM, the brain of the SYNC system. Ford’s 12M01
13 Campaign extended warranty coverage of the APIM to four years of service from the warranty start
14 date on Ford vehicles and five years on Lincoln vehicles, regardless of mileage. ¶ 278.

15 On or about November 5, 2012, Ford issued TSB 12-11-1 due to concerns with “navigation,
16 voice recognition, call sound quality, phone pairing and/or system performance” in Class Vehicles.
17 This TSB provided steps for a full software update of the APIM to the latest software version now
18 available, version V3.5.1. Those Class Vehicles equipped with navigation required a new SD-card
19 for proper navigation function. On or about November 8, 2012, Ford issued Campaign
20 “DEMONSTRATION/DELIVERY HOLD – Application Performance Upgrade 11 AOI” because
21 software was released to “improve overall system functionality, voice recognition, screen refresh
22 rates, response to touch, and to simplify screens for ease of use” due, again, to concerns with
23 “navigation, voice recognition, call sound quality, phone pairing and/or system performance.”
24 ¶¶ 280-82.

25 On or about November 15, 2012, Ford issued TSB 12-11-2 because certain vehicles
26 equipped with the SYNC system and the MyFord Touch or MyLincoln Touch options, built on or
27 before May 14, 2012, “exhibit a screen message indicating navigation stopped functioning contact
28 your dealer, GPS has a red strike through X, Navigation unavailable is displayed in the upper right

1 hand corner of the screen ...” Ford instructed that technicians perform a reprogram of the Global
2 Position Satellite Module (GPSM). ¶ 283.

3 On or about January 14, 2013, Ford issued Campaign “DEMONSTRATION/DELIVERY
4 HOLD Application Performance Upgrade 12A04” because software was released to “improve
5 overall system functionality and performance including navigation, voice recognition, call sound
6 quality, and phone pairing.” As a result, and due to new software, Ford instructed dealers “to inspect
7 the APIM software level and if necessary, reprogram the Accessory Protocol Interface Module”
8 If the system was unresponsive, inoperative, or if the vehicle software update was unsuccessful,
9 dealers were instructed to replace the SYNC module. ¶ 284.

10 On June 17, 2013, Ford issued a press release titled “SYNC and MyFord Touch Sold on 79
11 Percent of New Ford Vehicles, New Technology Drives Quality Satisfaction.” Ford announced
12 that, combined, SYNC and MyFord Touch systems are sold on 79 percent of new 2013 Ford
13 vehicles. According to Ford, customers cite to these features as a reason consumers prefer Ford
14 vehicles over competitors. Despite touting the successes of SYNC and MyFord Touch systems,
15 Ford contradicted that position by stating it would redesign the MyFord Touch system across all
16 product lines and return to knobs for some functions due to the profound problems with the system.
17 ¶¶ 15, 239.

18 **C. Consumers’ similar experiences and complaints**

19 Plaintiffs’ experiences are by no means isolated or outlying occurrences. Indeed, the Internet
20 is replete with examples of blogs and other websites where consumers have complained of the exact
21 same SYNC/MyFord Touch system defects within the Class Vehicles. Likewise, the database
22 maintained by the National Highway Traffic Safety Administration contains dozens of similar
23 consumer complaints. ¶¶ 288-91.

24 **III. LEGAL STANDARD**

25 Ford seeks dismissal of the FAC under Fed. R. Civ. P. 12(b)(6) and, with respect to
26 Plaintiffs’ fraud-based claims, under Fed. R. Civ. P. 9(b). *See* Def. Mem. at 1-3, 6-8. “To survive a
27 motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a
28

1 claim to relief that is plausible on its face.”⁸ A motion to dismiss challenges the legal sufficiency of
 2 the claims alleged.⁹ A complaint “must plead ‘enough facts to state a claim to relief that is plausible
 3 on its face.’”¹⁰ A claim has facial plausibility “when the plaintiff pleads factual content that allows
 4 the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.”¹¹
 5 In addressing a motion to dismiss, “a court must take all allegations of material fact as true and
 6 construe them in the light most favorable to the nonmoving party.”¹²

7 “A pleading is sufficient under Rule 9(b) if it identifies the circumstances constituting fraud
 8 so that a defendant can prepare an adequate answer from the allegations.”¹³ Under Rule 9(b), the
 9 fraudulent omission claims asserted by Plaintiffs “can succeed without the same level of specificity
 10 required by a normal fraud claim.”¹⁴ Contrary to Ford’s claim that “all of Plaintiffs’ claims under
 11 state consumer protection statutes must satisfy Rule 9(b),” Def. Mem. at 6, some consumer-
 12 protection statutes do not require pleading such claims with the particularity required under 9(b).¹⁵

13 IV. ARGUMENT

14 A. Plaintiffs plead affirmative misrepresentations

15 Ford erroneously contends that the FAC fails to set forth even one affirmative
 16 misrepresentation. Def. Mem. at 1, 8-11. But in fact, Plaintiffs allege that Ford aggressively

17
 18 ⁸ *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

19 ⁹ See *Cuviello v. City & Cnty. of San Francisco*, 940 F. Supp. 2d 1071, 1079 (N.D. Cal. 2013).

20 ¹⁰ *Id.* (citing *Cousins v. Lockyer*, 568 F.3d 1063, 1067 (9th Cir. 2009)).

21 ¹¹ *Id.* (citing *Iqbal*, 556 U.S. at 556).

22 ¹² *Department of Fair Empl. & Hous. v. Law Sch. Admission Council Inc.*, 896 F. Supp. 2d 849, 854 (N.D. Cal. 2012).

23 ¹³ *Apodaca v. Whirlpool Corp.*, 2013 U.S. Dist. LEXIS 176363, at *11 (C.D. Cal. Nov. 8, 2013) (quoting *Moore v. Kayport Package Express, Inc.*, 885 F.2d 531, 540 (9th Cir. 1989)).

24 ¹⁴ *Falk v. Gen. Motors Corp.*, 496 F. Supp. 2d 1088, 1099 (N.D. Cal. 2007) (citations omitted); see also *In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices, and Prods. Liab. Litig.*, 754 F. Supp. 2d 1145, 1189 (C.D. Cal. 2010) (*In re Toyota UA I*) (Rule 9(b) strictures relaxed for fraudulent omission claims “because ‘[r]equiring a plaintiff to identify (or suffer dismissal) the precise time, place, and content of an event that (by definition) did not occur would effectively gut state laws prohibiting fraud-by-omission’”) (quoting *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 684 F. Supp. 2d 942, 961 (N.D. Ohio 2009)).

25 ¹⁵ See, e.g., *Pelman ex rel. Pelman v. McDonald’s Corp.*, 396 F.3d 508, 511 (2d Cir. 2005) (“an action under [New York General Business Law] § 349 is not subject to the pleading-with-particularity requirements of Rule 9(b), but need only meet the bare-bones notice-pleading requirements of Rule 8(a)”).

1 promoted the MyFord Touch system with a nationwide multi-media campaign, luring consumers
 2 with the promise of very specific benefits and functions that, as Ford knew at the time, would fail to
 3 materialize because of the hopelessly defective nature of the ill-designed, hastily researched
 4 MyFord Touch platform.¹⁶ Twenty Plaintiffs allege they saw advertisements for and representations
 5 made by Ford about MyFord Touch, including on television, in print, and on the Internet, and have
 6 recounted to the best of their abilities the content of those representations – all of which tout
 7 MyFord Touch’s safety benefits and accessibility through voice and touch controls.¹⁷ Because
 8 Ford’s statements mischaracterize specific product features, they are not mere puffery. Additionally,
 9 several Plaintiffs allege that Ford’s authorized dealerships made specific, affirmative
 10 misrepresentations about MyFord Touch, which may be imputed to Ford.¹⁸ Finally, all Plaintiffs
 11 have alleged that they relied upon Ford’s false warranty statements.¹⁹ These allegations are
 12 sufficient to state fraud-based claims based on Ford’s affirmative misrepresentations.

13 **1. The FAC puts Ford on notice of the misrepresentations at issue in this action.**

14 Ford does not dispute that it made the specific representations set forth in the FAC. Rather,
 15 Ford seeks dismissal of Plaintiffs’ claims to the extent they are predicated on Ford’s affirmative
 16 misrepresentations because the FAC does not pair each Plaintiff with a particular advertisement.
 17 Def. Mem. at 8-9. Through this formalistic argument, which misconstrues the pleading
 18 requirements, Ford attempts to impose an unrealistic burden on Plaintiffs.²⁰ As discussed above,
 19 Rule 9(b) requires Plaintiffs to put Ford on notice of the claims against it to allow it to prepare its
 20 defense, but it does not require particularity for particularity’s sake. If the FAC does not describe or

21 ¹⁶ See, e.g., ¶¶ 250-60.

22 ¹⁷ See ¶¶ 22 (Whalen), 43 (CDD), 56 (Raney-Aarons), 66 (Watson), 78 (Thomas-Maskrey), 85
 23 (Battle), 98 (Sheerin), 106 (Makowski), 126 (Creed), 148 (Matlin), 157 (Rizzo), 164 (Miller), 172
 24 (Purcell), 180 (Fink), 187 (Zuchowski), 195 (Avedisian), 202 (Rodriguez), 210 (Ervin), 217
 25 (Connell), 225 (Miller-Jones). The FAC reproduces a number of Ford’s advertisements in which
 26 Ford makes affirmative misrepresentations about MyFord Touch’s safety benefits and voice and
 27 touch functions. See ¶¶ 250-56, 259-60.

28 ¹⁸ See ¶¶ 22 (Whalen), 37 (CDD), 49 (Rosser), 84 (Battle), 126 (Creed), 164 (Miller), 180
 (Fink), 187 (Zuchowski).

¹⁹ See ¶ 298.

²⁰ See, e.g., *In re Tobacco II Cases*, 207 P.3d 20, 40 (Cal. 2009) (“where ... a plaintiff alleges
 exposure to a long-term advertising campaign, the plaintiff is not required to plead with an
 unrealistic degree of specificity that the plaintiff relied on particular advertisements or statements”).

1 reproduce a specific representation contained in Ford’s written materials (¶¶ 250-60) or uttered by
 2 Ford sales representatives (¶¶ 22, 37, 49, 84, 126, 164, 180, 187), then Plaintiffs will not be seeking
 3 to hold Ford accountable for that representation in this action. Ford requires no greater notice of the
 4 statements at issue in order to prepare its defense.

5 Significantly, each of these alleged misrepresentations is based on a uniform message
 6 designed to tout the MyFord Touch system’s purported safety benefits and accessibility through
 7 voice and touch controls. All of these representations are false because, as *every* Plaintiff has
 8 alleged, MyFord Touch systematically fails to respond to voice and touch commands – including by
 9 regularly failing entirely and otherwise regularly losing voice and touch functionality.²¹ In each
 10 instance, Ford made the misrepresentations.²² The FAC thus adequately alleges the “who, what,
 11 where, when, and how” of the misrepresentations and provides “an explanation as to why the
 12 statement[s] ... complained of w[ere] false or misleading.”²³

13 **2. Ford’s marketing misrepresentations are not puffery.**

14 Nor can Ford succeed by arguing that its affirmative misrepresentations constitute mere
 15 puffery. Def. Mem. at 10-11, 34. According to the Ninth Circuit, ““misdescriptions of specific or
 16 absolute characteristics of a product are actionable.””²⁴ Cherry-picking from Plaintiffs’ allegations
 17 regarding the advertisements each Plaintiff reviewed before purchasing their Class Vehicles, Ford
 18 focuses only on its representations that MyFord Touch would “enhance” the driving experience and
 19
 20
 21

22 ²¹ These allegations also undermine Ford’s argument that Plaintiffs “fail[] to identify what
 23 information was allegedly material to each Plaintiff’s purchase decision and leaves uncertain
 24 whether the Plaintiff experienced any problems with that feature.” Def. Mem. at 11. Each Plaintiff
 25 has plainly alleged that the MyFord Touch voice and touch controls in their Class Vehicles – the
 26 subject of Ford’s nationwide advertising campaign – failed to operate. ¶¶ 23, 36, 50, 57, 68, 76, 83,
 27 90, 97, 103, 112, 119, 128, 147, 154, 163, 170, 178, 186, 193, 201, 208, 216, 223.

28 ²² Where a specific dealership or individual touted the safety and/or voice and touch
 functionality of MyFord Touch, the FAC identifies the dealership or individual. ¶¶ 22, 37, 49, 84,
 126, 164, 180, 187.

²³ *Johnson v. Wal-Mart Stores, Inc.*, 2013 U.S. App. LEXIS 22119, at *4 (9th Cir. Oct. 30,
 2013) (citations omitted).

²⁴ *Cook, Perkiss and Liehe, Inc. v. Northern Cal. Coll. Serv. Inc.*, 911 F. 2d 242, 246 (9th Cir.
 1990) (quoting *Stiffel Co. v. Westwood Lighting Grp.*, 658 F. Supp. 1103, 1115 (D.N.J. 1987)).

1 “increase the safety” of its vehicles. Def. Mem. at 10. But the FAC sets forth far more specific
2 misrepresentations that Ford overlooks in forging its half-hearted straw-man argument.²⁵

3 Ford does not explain how such statements, which mischaracterize specific product features,
4 constitute puffery. Plaintiffs allege in detail that MyFord Touch’s purported voice and touch
5 controls are frequently inaccessible as a result of systemic failure and lock-up.²⁶ Plaintiffs (and other
6 drivers) cannot “answer [calls] with the push of a button [or] make a call with the sound of [their]
7 voice[s],” cannot “easily control phone, entertainment, climate, and ... navigation with ... touch
8 controls and voice commands,” and cannot “easily access[] through voice ... or with a simple tap on
9 the touchscreen” Class Vehicles’ “functions, settings and information.”²⁷ Rather, when MyFord
10 Touch crashes or its voice and touch functionality fails, as frequently occurs, Plaintiffs (and other
11 drivers) must attend to MyFord Touch’s malfunctions, leading to distracted driving and other unsafe
12 conditions. Plaintiffs therefore adequately allege that Ford’s statements about MyFord Touch’s
13 purported safety benefits and voice and touch controls are demonstrably false.²⁸

14 **3. The Court may impute misrepresentations of authorized Ford dealerships to**
15 **Ford.**

16 Ford relies on *Maietta v. Ford Motor Co.*²⁹ to argue that statements of authorized Ford
17 dealerships cannot be imputed to Ford. Def. Mem. at 9. The *Maietta* court, however, mistakenly

18 ²⁵ See, e.g., ¶¶ 253 (MyFord Touch allows drivers to “answer [calls] with the push of a button,
19 and you can make a call with the sound of your voice”), 254 (“[w]ith [MyFord Touch], you can
20 easily control phone, entertainment, climate, and available navigation with intuitive touch controls
21 and voice commands”), 259 (MyFord Touch “makes the vehicle functions, settings and information
22 easily accessible to the driver through voice, steering wheel controls or with a simple tap on the
23 touchscreen”).

24 ²⁶ See ¶¶ 23, 36, 50, 57, 68, 76, 83, 90, 97, 103, 112, 119, 128, 147, 154, 163, 170, 178, 186,
25 193, 201, 208, 216, 223.

26 ²⁷ ¶¶ 253-54, 259.

27 ²⁸ Ford’s reliance on *Oestreicher v. Alienware Corp.*, 544 F. Supp. 2d 964 (N.D. Cal. 2008),
28 *aff’d*, 322 Fed. Appx. 489 (9th Cir. 2009), is misplaced. The vague statements at issue in that case –
that “each unit is packed full of fans and exhaust units to ensure optimum performance” and that the
products exhibit “superb, uncompromising quality” – are a far cry from Ford’s specific promises
about the MyFord Touch voice and touch controls. Where the *Oestreicher* statements are subjective
and cannot be proven inaccurate, Ford claims that MyFord Touch has specific features – voice and
touch controls – that it effectively lacks, leading to concrete safety risks. This key point also
distinguishes Ford’s misrepresentations from the “vague statement” at issue in *Morgan v. Harmonix*
Music Sys., Inc., 2009 WL 2031765, at *3 (N.D. Cal. July 30, 2009) (finding visual depictions of
drum pedal non-actionable), on which Ford ineffectively relies.

²⁹ *Maietta v. Ford Motor Co.*, 1997 U.S. Dist. LEXIS 3788 (N.D. Ill. Mar. 24, 1997).

1 relied on Illinois state-court decisions, failing to recognize the difference between the federal notice-
 2 pleading requirements and Illinois' more onerous fact-pleading requirements, leading another
 3 federal court from the same district to reject *Maietta* as unpersuasive. *See Kent v. Celozzi-Ettleson*
 4 *Chevrolet, Inc.*³⁰

5 As in *Kent*, Ford is not entitled to dismissal of the FAC's fraud-based claims premised on
 6 affirmative misrepresentations by Ford's authorized dealerships because "an automobile dealership
 7 may under certain circumstances be an agent of the manufacturer," including circumstances giving
 8 rise to apparent or ostensible agency.³¹ Further, agency is a fact question, so dismissal at the
 9 pleading stage is inappropriate.³²

10 Nevertheless, the FAC includes ample factual allegations from which the Court can infer the
 11 existence of agency relationships between Ford and its authorized dealers with respect to the
 12 MyFord Touch. *See, e.g.*, ¶¶ 274-87 (detailing numerous TSBs, software updates, and
 13 correspondence issued by Ford to authorized Ford dealers, instructing them to perform specific tasks
 14 on customers' MyFord Touch units).³³ Plaintiffs have sufficiently demonstrated an agency
 15 relationship between Ford and its authorized dealers.³⁴

16 **4. Ford's warranty statements are misrepresentations.**

17 Finally, Ford's own Limited Warranty contains an affirmative misrepresentation by virtue of
 18 its promise to "repair, replace or adjust" Plaintiffs' MyFord Touch systems in a manner that corrects
 19 the defects. *See* Def. Mem. at 4. While Ford is correct that the Limited Warranty contains a generic
 20 admission of potential defect, using that to insulate Ford from liability for misrepresenting specific
 21

22 _____
 23 ³⁰ *Kent v. Celozzi-Ettleson Chevrolet, Inc.*, 1999 U.S. Dist. LEXIS 17282, at *10 (N.D. Ill. Nov.
 24 3, 1999) (*Maietta* "rel[ies] on decisions from the Illinois state courts, which are not truly pertinent
 25 because Illinois, unlike the federal courts, is a fact pleading jurisdiction").

26 ³¹ *Id.* at *11.

27 ³² *Id.* at *10. *See also Guerrero v. Gen. Motors Corp.*, 2008 U.S. Dist. LEXIS 119839, at *11
 28 (E.D. Cal. Apr. 14, 2008) (question of agency relation between GM and employee of authorized
 GM dealership a "question of fact for the jury to decide").

³³ *See Lau v. Mercedes-Benz USA, LLC*, 2012 U.S. Dist. LEXIS 11358, at *12 (N.D. Cal. Jan.
 31, 2012) (determining that authorized dealers were agents of automaker defendant because
 warranty repairs were performed by dealers).

³⁴ *See id.*

1 product features (or knowingly omitting specific defects) would undermine the remedial purpose of
 2 state consumer-protection laws, as other courts have found in rejecting this very argument.³⁵

3 **5. The FAC pleads fraudulent omissions.**

4 The FAC adequately alleges Ford withheld material facts that it had a duty to disclose
 5 regarding the safety and functionality of MyFord Touch. As Ford concedes, manufacturers are
 6 obligated to disclose product defects impacting safety, as well as defects of which they possess
 7 exclusive knowledge. *See* Def. Mem. at 15-16. The FAC alleges that Ford was obligated to disclose
 8 the defects for these reasons, and because Ford actively concealed them, because it knew or should
 9 have known of them at the time of sale, and because it made partial disclosures triggering such a
 10 duty. The FAC thus adequately pleads fraud-based claims based on Ford’s fraudulent omissions.

11 **6. Ford failed to disclose the existence of MyFord Touch defects known to Ford
 12 that impact the safety of the Class Vehicles.**

13 Ford contends that Plaintiffs fail to allege one or more unitary defects rather than a
 14 multiplicity of individual flaws or symptoms. Def. Mem. at 12 (describing a “laundry list of
 15 problems”). This formulaic argument fails because the FAC adequately sets forth (i) the specific
 16 defects Ford failed to disclose, (ii) the safety-related consequences of those defects, and (iii) facts
 17 supporting not merely Ford’s knowledge but Ford’s *exclusive* knowledge of those defects.

18 **a. The defects**

19 The FAC alleges MyFord Touch is plagued by specific software and hardware defects that
 20 caused the “flaws” or symptoms experienced by Plaintiffs and described throughout the FAC.³⁶
 21 Specifically, the FAC alleges that the software defects are partly responsible for the total system
 22 failures and black-outs, peripheral device connectivity problems (wired and Bluetooth), and other

23 ³⁵ *See, e.g., Mickens v. Ford Motor Co.*, 900 F. Supp. 2d 427, 443 (D.N.J. 2012) (rejecting
 24 identical argument by Ford under New Jersey consumer-fraud statute).

25 ³⁶ The software defects Plaintiffs identify include: deadlocks and task starvations; buffer and/or
 26 stack overflows; race conditions; missed real-time deadlines; logical errors within algorithms,
 27 subroutines, and device drivers; dead ends in state machines; and invalid pointer dereferences and
 28 related errors in pointer arithmetic. The hardware defects include: memory corruptions, including
 database corruptions; spurious electrical signals, including interrupts; invalid or improper messages
 on the Controller Area Network buses; stuck memory bits; miscalibrated or malfunctioning sensors
 (like the camera charge-couple device) and actuators (for window defrosters and climate controls);
 and insufficient electrical grounds. *See* ¶¶ 268-69.

1 dysfunctions experienced by all MyFord Touch users, including Plaintiffs. *See, e.g.*, ¶¶ 262-73. The
 2 FAC also explains how the hardware defects contribute to the flaws or symptoms experienced by
 3 Plaintiffs. Plaintiffs have traced the defects outlined above to failures of Ford’s software process and
 4 architecture choices – failures that Ford should have corrected before releasing MyFord Touch to
 5 the public. *See* ¶ 271. These allegations demonstrate the MyFord Touch system defects are common
 6 defects that came about as a result of Ford’s inadequate development and testing of the product.

7 The FAC also alleges that MyFord Touch is defective because it was not designed with a
 8 quick, easy, and reliable way to reboot a malfunctioning unit without first pulling the vehicle to the
 9 side of the road, and without causing loss of the user’s personal data and configuration settings.
 10 ¶ 272. This design failure introduces safety risks of its own, including distracted driving.³⁷ Ford’s
 11 dismissal argument ignores this allegation.

12 The FAC clearly demonstrates that the MyFord Touch system’s tendencies to crash, freeze,
 13 lose voice and touch responsiveness, and lose wireless and peripheral device connectivity are all
 14 rooted in a small number of software and hardware defects that came about as a result of Ford’s
 15 inadequate testing and development of the MyFord Touch system before its public release. This is
 16 more than sufficient to put Ford on notice of the defects.

17 **b. The defects’ safety-related consequences**

18 The FAC alleges that these specific product defects introduce safety risks associated with all
 19 MyFord Touch units. Because all Class Vehicles are still under warranty, Plaintiffs’ claims do not
 20 require them to demonstrate a safety risk. *See* Def. Mem. at 17. Instead, the existence of an
 21 unreasonable safety risk in this case is relevant because courts routinely hold that it is a material fact
 22 that must be disclosed.³⁸ The FAC nonetheless alleges that the MyFord Touch defects result in
 23

24 ³⁷ *See Pacific Indem. Co. v. Therm-O-Disc, Inc.*, 476 F. Supp. 2d 1216, 1226 (D.N.M. 2006)
 25 (“failure to incorporate into a product an optional safety feature or device may constitute a defective
 26 condition of the product”); *In re Toyota UA I*, 754 F. Supp. 2d at 1193 (finding lack of “fail-safe
 mechanism” capable of mitigating unintended acceleration in vehicles a “material fact”).

27 ³⁸ *See Seifi v. Mercedes-Benz USA, LLC*, 2013 U.S. Dist. LEXIS 73415, at *20-22 (N.D. Cal.
 28 May 23, 2013) (car manufacturer had duty to disclose a defect that “plausibly constitutes an
 unreasonable safety risk”) (citing *Ehrlich v. BMW of North Am., LLC*, 801 F. Supp. 2d 908, 918
 (C.D. Cal. 2010)).

1 substantial dangerous conditions that put drivers, passengers, pedestrians, and other motorists at risk
2 of personal injury and property damage.

3 Far from dreaming up merely “speculative” dangers, Plaintiffs allege that MyFord Touch
4 creates concrete risks that have, in fact, materialized for many drivers, including Plaintiffs. For
5 example, Plaintiffs Whalen (¶ 25), Raney-Aarons (¶ 58), D’Aguanno (¶ 90), Sheerin (¶ 97), Matlin
6 (¶ 147), Rizzo (¶ 154), Fink (¶ 178), Zuchowski (¶ 186), Avedisian (¶ 193), and Ervin (¶ 208) have
7 all alleged that the rearview (or back-up) camera feature of MyFord Touch has failed to operate
8 when driving their Class Vehicles in reverse. Despite Ford’s unreasoned, unsupported assertion to
9 the contrary, when a rearview camera locks up or provides inaccurate readings, this obviously
10 produces a concrete danger of harm to persons and property. Anyone and anything passing behind
11 the vehicle while the driver backs up is likely to be hit by the vehicle. Drivers cannot keep a lookout
12 while driving in reverse if the rearview camera they rely upon is displaying a frozen or time-lagged
13 image, unbeknownst to them, or even no image at all. Indeed, Ford promotes the rearview camera
14 feature as a safety feature (*see, e.g.*, ¶ 180) and NHTSA describes rearview cameras as safety
15 features (*see, e.g.*, ¶ 256). As Plaintiffs allege, many drivers have reported encountering the same
16 problems with their MyFord Touch rearview cameras. *See, e.g.*, ¶¶ 289 (consumer reports on
17 syncsucks.com), 291 (consumer reports to NHTSA).³⁹

18 The MyFord Touch defects also introduce a high risk of distracted driving. Although Ford
19 promotes MyFord Touch as enabling drivers “to keep your hands on the wheel and eyes on the
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21 ³⁹ Selected reports reproduced in the FAC include the following statements relating to the
22 MyFord Touch rearview camera feature: “Yesterday I started the vehicle and the entire screen was
23 out including the backup sensors and camera. I have contacted Ford and the dealership but they do
24 not seem to be very responsive.... I find this to be a safety issue as my wife relies on the camera and
25 sensors when parking a vehicle”; “Backup camera works or not. Depends on the day”; MyFord
26 Touch automatically launched an “upgrade and disabled all related features for about 30 minutes....
27 It ... appears to always happen immediately after starting the car, which is when the rear view
28 camera is very likely to be needed”; “backup camera system goes down or screen freezes while
backing up”; MyFord Touch “has been freezing, back up camera blacking out... Dealer said it has
to do with the new system and there being bugs”; “Not having the backup camera is risky for there
may be small children behind the vehicle”; “The [MyFord Touch] system has a multitude of defects,
but the safety related defect is that the system can spontaneously reboot at any time with no warning
to the driver. This can happen at random, and multiple times within a short period of time. When
backing up this shuts down the backup camera which could result in injuries to children who get
behind the vehicle.” ¶ 291.

1 road” (¶ 250), when the voice and touch functionality fails, when peripheral device connectivity or
2 Bluetooth fail, and when the whole system unexpectedly crashes, MyFord Touch causes drivers to
3 attend to its malfunctions rather than the road. Ford represents unequivocally to the public that
4 “[d]riving while distracted can result in loss of vehicle control” (¶ 254), but its brief trivializes that
5 risk.

6 The much-touted 9-1-1 Assist feature is also disabled when MyFord Touch crashes or
7 becomes inoperable. ¶ 264. Thus, if the vehicle is in a collision, nothing triggers the system to dial
8 9-1-1 and alert emergency medical professionals to the vehicle’s location, as promised by Ford. The
9 safety risk that the faulty MyFord Touch system creates in these circumstances is palpable.

10 Nor is Ford’s secondary argument – that the defects alleged create no safety risks because
11 MyFord Touch is an “optional” device – persuasive. *See* Def. Mem. at 16-17. Ford builds yet
12 another straw man, arguing “[a] vehicle with a MyFord Touch system that, due to an alleged defect,
13 at times does not allow for hands-free calling, does not display what is behind the car when it is in
14 reverse, or does not automatically call 9-1-1 in certain circumstances is no less safe than the same
15 vehicle not equipped with a MyFord Touch system.” Def. Mem. at 16. This erroneously relies on a
16 comparison of vehicles equipped with MyFord Touch against vehicles equipped with no in-car
17 communication/entertainment system, rather than the appropriate comparison, *viz.*, of vehicles
18 equipped with the dysfunctional MyFord Touch system against vehicles equipped with functional
19 systems of a similar nature. This is not a case faulting a manufacturer for offering state-of-the-art
20 safety equipment only as a premium option to an elite few (indeed, MyFord Touch has been
21 installed in more than five million Class Vehicles); rather, it is a case involving a manufacturer’s
22 premature introduction of a defectively designed communication/entertainment unit, which induces
23 drivers to depend on it, and therefore, when the system crashes, it creates its own safety hazards.⁴⁰

24 Ford’s argument fails as a result.

25
26 ⁴⁰ Under Ford’s reasoning, no manufacturer could be held liable for injuries sustained as a result
27 of defective “optional” equipment, such as sunroofs; after all, according to Ford, a vehicle with a
28 faulty sunroof is “no less safe” than a vehicle with no sunroof at all. But this is patently untrue
because the optional sunroof creates its own safety hazards if improperly designed. Indeed, Ford
itself has been found liable for injuries sustained by occupants of its vehicles equipped with faulty
sunroofs. *See, e.g., TRW Vehicle Safety Sys., Inc. v. Moore*, 936 N.E.2d 201, 210 (Ind. 2010)

1 Finally, Ford’s argument that “[a]s a matter of judicially-noticeable facts,” it is untrue that
2 climate-control functions are routed exclusively through MyFord Touch, fails because is simply
3 incorrect. *See* Def. Mem. at 16. In at least some of the Class Vehicles, Ford eliminated the physical
4 knobs for climate-control functions, including defrosters. ¶ 263. After outcry from consumers, Ford
5 backtracked on this design choice and reintroduced knobs. ¶ 15. To the extent Ford is referring not
6 to knobs but to steering-wheel controls, Ford’s argument still fails because the steering-wheel
7 controls are also routed through MyFord Touch, and at least one Plaintiff has specifically alleged
8 that her vehicle’s steering-wheel controls failed when her MyFord Touch unit failed. ¶ 170
9 (Purcell). Finally, even if functional analog climate controls were present in all Class Vehicles, this
10 is irrelevant to Ford’s motion because the FAC alleges additional safety risks unrelated to the
11 presence or absence of analog climate controls, as described above.

12 **c. Ford’s knowledge of the defects**

13 The FAC alleges facts sufficient to demonstrate that Ford knew of the alleged defects. Even
14 under Rule 9(b), Plaintiffs may plead Ford’s knowledge generally.⁴¹ Plaintiffs allege that Ford knew
15 about the MyFord Touch defects on at least the following three grounds: (i) Ford issued
16 several secret TSBs to its authorized dealers acknowledging the MyFord Touch problems and
17 instructing them to perform specific corrective tasks (although these failed); (ii) Ford directly or
18 indirectly received early complaints from customers putting it on notice of the defects; and (iii) at
19 least one Plaintiff alleged that Ford dealership personnel informed him that the MyFord Touch
20 problems he experienced were common. Plaintiffs, by contrast, could not have identified the defects
21 until after purchasing or leasing their Class Vehicles and experiencing the MyFord Touch for
22 themselves. As set forth below, Plaintiffs sufficiently allege Ford’s exclusive knowledge of the
23 defects.

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27 (affirming finding of Ford’s liability under claim for negligent sunroof design where decedent was
killed in part because of “the failure of [the sunroof’s] mounting brackets”).

28 ⁴¹ *Iqbal*, 556 U.S. at 686-87 (state of mind need not be pled under “elevated pleading standard”
but the “less rigid ... strictures of Rule 8”).

(1) Technical Service Bulletins

Allegations that an automobile manufacturer issued TSBs to its dealers relating to the relevant feature or equipment suffice to plead the manufacturer’s knowledge of the defect, even where issuance of the TSBs occurs after a plaintiff purchased or leased the vehicle.⁴² Plaintiffs allege that Ford issued MyFord Touch-related TSBs to its dealers on April 27, 2011 (¶ 275); July 22, 2011 (¶ 276); March 13, 2012 (¶ 277); September 1, 2012 (¶ 279); November 5, 2012 (¶ 280); November 15, 2012 (¶ 283); August 5, 2013 (¶ 285); and October 3, 2013 (¶ 286). As the FAC’s descriptions of each TSB show, Ford attempted to address problems affecting virtually every feature of MyFord Touch (*e.g.*, blank screens, failure of voice recognition, failure of touch commands, rearview-camera display problems, failure to pair with mobile phones and peripheral devices, radio malfunctions, USB device failure, incorrect traffic and GPS information, and general system performance).

Plaintiffs also allege that Ford launched a “Customer Service Satisfaction Campaign” on March 6, 2012 (¶ 278) and “performance upgrade” campaigns on November 8, 2012 (¶ 281), and January 14, 2013 (¶ 284), in connection with which Ford sent letters to Ford dealers instructing them to perform specific tasks to optimize consumers’ MyFord Touch systems. The March 6, 2012 campaign went as far as requiring dealers to replace the APIM module (the “brain” of MyFord Touch) in certain Class Vehicles, but because the APIM design itself is defective, this “fix” did not cure the defect. Indeed, all of the “fixes” and upgrades Ford launched failed to correct the defects in the MyFord Touch system. ¶ 287. These allegations demonstrate that Ford was well aware of the defects complained of, and indeed had exclusive knowledge of the specific hardware and software defects described by Plaintiffs.

⁴² See, *e.g.*, *Falco v. Nissan North America, Inc.*, 2013 U.S. Dist. LEXIS 147060, at *17-18 (C.D. Cal. Oct. 10, 2013) (finding allegations that defendant “issued the first of several [TSBs] to its dealerships instructing technicians to replace components of the Timing Chain Tensioning System in the vehicles covered by the complaint” in July 2007 sufficient to “permit plausible inferences that [defendant] was aware of the defect at the time they sold the vehicles in 2005 and 2006”); *Mui Ho v. Toyota Motor Corp.*, 931 F. Supp. 2d 987, 998 (N.D. Cal. 2013) (finding allegations that TSBs regarding headlight defect were issued after plaintiffs purchased their vehicles sufficient to permit the inference that defendant was aware of the issue at the time of the sales).

1 (2) Consumer complaints

2 Similarly, allegations that consumers directly or indirectly notified an automobile
3 manufacturer of problems with the relevant feature or equipment suffice to plead the manufacturer's
4 knowledge of the defect.⁴³ Plaintiffs allege that consumer complaints regarding MyFord Touch,
5 specifying precisely the problems experienced by each Plaintiff, began to appear as early as October
6 28, 2010.⁴⁴ The FAC reproduces 19 detailed complaints made by consumers to NHTSA. ¶ 291.
7 Plaintiffs also allege that consumers posted similar complaints on various websites dedicated to
8 problems with MyFord Touch, including syncsucks.com, outofmytouch.com, and
9 forsyncproblems.com, as well as general vehicle forums. ¶¶ 8, 288-90. Several Plaintiffs, finally,
10 directly notified Ford of the MyFord Touch problems they experienced,⁴⁵ and nearly all took their
11 Class Vehicles to authorized Ford dealers for MyFord Touch-related service.⁴⁶ Cumulatively, these
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13 ⁴³ See, e.g., *Grodzitsky v. Am. Honda Motor Co., Inc.*, 2013 U.S. Dist. LEXIS 82746, at *22
14 (C.D. Cal. June 12, 2013) (finding both “[c]omplaints made directly to [d]efendant” and
15 “[c]omplaints posted about the [alleged defect] on ‘public online vehicle owner forums’” supported
16 inference of manufacturer’s knowledge of defect); *Aguilar v. General Motors, LLC*, 2013 U.S. Dist.
17 LEXIS 149108, at *14 (E.D. Cal. Oct. 16, 2013) (finding that “early consumer complaints” about
18 the alleged defect supported inference of manufacturer’s knowledge of defect); *Falco*, 2013 U.S.
19 Dist. LEXIS 147060, at *16 (same); *Mui Ho*, 931 F. Supp. 2d at 998 (same); *In re Toyota Motor
Corp. Hybrid Brake Mktg., Sales Practices and Prods. Liab. Litig.*, 890 F. Supp. 2d 1210, 1219
20 (C.D. Cal. 2011) (same); *Ehrlich v. BMW of N. Am., LLC*, 801 F. Supp. 2d 908, 918-19 (C.D. Cal.
21 2010) (same); *Clark v. LG Elecs. USA, Inc.*, 2013 U.S. Dist. LEXIS 155179, at *12, 14 (S.D. Cal.
22 Oct. 29, 2013) (finding that consumer complaints posted on websites indicating consumers called
23 defendant’s customer service lines to complain about alleged defect supported inference of
24 manufacturer’s knowledge of defect).

25 ⁴⁴ Ford makes much of the timing element of a fraudulent-concealment claim (e.g., Def. Mem. at
26 12-15, 20), but Ford misdirects its rhetoric because no Plaintiff purchased or leased a Class Vehicle
27 before October 2010. Plaintiffs’ allegations therefore show that Ford’s knowledge of the defects
28 precedes any Plaintiff’s purchase or lease. Moreover, Ford cannot persuasively argue that the
availability of public information about MyFord Touch (such as news reports or federal databases)
preceding Plaintiffs’ dates of purchase or lease defeats any Plaintiff’s claims. As numerous courts
have held, such availability does nothing to undercut a consumer’s fraud-based claims, if only
because consumers are not generally required to conduct research before shopping for a new
vehicle. See, e.g., *In re Toyota UA I*, 754 F. Supp. 2d at 1192 (“[w]hile prospective customers could
have been tipped off to the possibility of [sudden unintended acceleration] by researching past
complaints filed with NHTSA, many customers would not have performed such a search, nor would
they be expected to”).

29 ⁴⁵ See, e.g., ¶¶ 38-42 (CDD); 51 (Rosser); 70 (Watson); 194 (Avedisian).

30 ⁴⁶ See, e.g., ¶¶ 26-27 (Whalen); 39 (CDD); 51 (Rosser); 71 (Watson); 77 (Thomas-Maskrey); 92
31 (D’Aguanno); 104 (Makowski); 112 (Oremland); 120 (Mitchell); 147 (Matlin); 155 (Rizzo); 171
32 (Purcell); 179 (Fink); 194 (Avedisian); 201 (Rodriguez); 209 (Ervin); 216 (Connell); 224 (Miller-
33 Jones).

1 allegations show that Ford knew about the defects and indeed was the only entity capable of
2 knowing their full extent.⁴⁷

3 (3) Technicians' statements

4 Finally, allegations that non-employee technicians described the problems with the relevant
5 feature or equipment as "common" suffice to plead the manufacturer's knowledge of the defect.⁴⁸
6 At least one Plaintiff made such allegations. *See* ¶ 40 (CDD "spoke with Greg Murphy, a service
7 manager at AutoNation (Power Ford)," who "explained ... that he knew the MyFord Touch system
8 was defective, that Ford had no intentions of correcting the defect, that his dealership had received
9 complaints from customers about MyFord Touch, and that his dealership was not telling new car
10 customers about the MyFord Touch problems"). Like that of the repair technician in *Clark*, Mr.
11 Murphy's candor supports a finding that Ford knew about the defects.⁴⁹

12 Because Ford had exclusive knowledge of the MyFord Touch defects, Ford had a duty to
13 disclose those defects to Plaintiffs and the other Class members. The case law on which Ford relies
14 does not compel a different result. Ford relies on *Wilson v. Hewlett-Packard Co.*⁵⁰ to contend that
15 Plaintiffs have failed to sufficiently demonstrate that it had knowledge of the defects in the MyFord
16 Touch system at the time of sale. *See* Def. Mem. at 14-15. But the 14 consumer complaints on
17 which the *Wilson* plaintiffs relied to demonstrate defendant's pre-sale knowledge did not indicate
18 how or where they were made and were either undated or dated years after plaintiffs had purchased
19 their laptops.⁵¹ *Wilson* is easily distinguishable in light of the mountain of evidence (including eight
20 TSBS, numerous consumer complaints, and a dealer admission) cited in the FAC.

23 ⁴⁷ *In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices, and Prods. Liab.*
24 *Litig.*, 754 F. Supp. 2d 1208, 1227 (C.D. Cal. 2010) (*In re Toyota UA II*) (finding plaintiffs alleged
25 facts sufficient to demonstrate manufacturer's exclusive knowledge "of the sheer magnitude and
26 ongoing nature of the defect, as well as potential ways of identifying and correcting the defect").

⁴⁸ *See, e.g., Clark*, 2013 U.S. Dist. LEXIS 155179, at *15-16 (finding statement of repair
26 technician servicing appliance that alleged defect is a "common" problem supported inference of
27 manufacturer's knowledge of defect).

⁴⁹ *See id.*

⁵⁰ *Wilson v. Hewlett-Packard Co.*, 668 F.3d 1136 (9th Cir. 2012).

⁵¹ *Id.* at 1148.

1 Indeed, several decisions issued subsequent to *Wilson* have found that plaintiffs adequately
2 pled time of sale knowledge based on allegations similar to those in the FAC. The court in *Long v.*
3 *Graco Children’s Prods.*, for example, held that plaintiff sufficiently pled fraudulent omissions
4 under California’s Consumer Legal Remedies Act (“CLRA”) by alleging defendant “knew or
5 should have known” about the defect at the time of sale due to (i) NHTSA and Amazon.com
6 complaints from before and after plaintiff’s purchase, (ii) the existence of consumer complaints
7 directly to defendant, and (iii) on information and belief, “pre-release testing data” that was
8 performed.⁵² The court in *Jekowsky v. BMW of N. Am., LLC* likewise found plaintiff’s allegations
9 that defendant knew or should have known of the defect during the warranty period, based on
10 “consumer complaints, watchdog reports, and federal regulatory databases” as well as “authorized
11 dealerships in California were receiving ‘an inordinate number of complaints from dealers regarding
12 cracked Alloy Wheels during the warranty period’” sufficient to show defendant was aware of the
13 defect.⁵³

14 For the same reasons, Ford’s reliance on *Sanders v. Apple Inc.*⁵⁴ is misplaced. *See* Def.
15 Mem. at 19. Plaintiff in that case made generic allegations that defendant must have known of a
16 defect’s existence by virtue of its “superior position of knowledge” and “exclusive knowledge as the
17 manufacturer.”⁵⁵ Plaintiffs here do much more.

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20 ⁵² *Long v. Graco Children’s Prods.*, 2013 U.S. Dist. LEXIS 121227, at *20-29 (N.D. Cal. Aug. 26, 2013).

21 ⁵³ *Jekowsky v. BMW of N. Am., LLC*, 2013 U.S. Dist. LEXIS 175374, at *2, 15 (N.D. Cal. Dec. 13, 2013). *See also Decker v. Mazda Motor of Am., Inc.*, 2011 U.S. Dist. LEXIS 124182, at *12
22 (C.D. Cal. Oct. 24, 2011) (finding plaintiff’s allegations sufficient to show defendant knew or
23 should have known about the defect at the time of sale based on “superior and exclusive knowledge
24 of the [defect], through its ‘dealerships, pre-release testing data, warranty data, customer complaint
25 data, and replacement part sales data, among other internal sources of aggregate information about
26 the problem.’”); *Banks v. Nissan N. Am., Inc.*, 2012 U.S. Dist. LEXIS 37754, at *2-3 (N.D. Cal. Mar. 20, 2012) (finding plaintiffs’ allegations regarding “a) the [TSB] ... issued by defendant on May 12, 2006, involving a braking defect in vehicles after a computerized diagnostic interrogation reveals error code C1179; and b) the existence of numerous NHTSA consumer complaints regarding brake failure since 2004 (some smaller portion of which reference the C1179 error code referenced in the TSB)” to plausibly allege defendant’s knowledge of an unreasonable safety risk and defendant’s intent to conceal this knowledge from consumers).

27 ⁵⁴ *Sanders v. Apple Inc.*, 672 F. Supp. 2d 978, 986 (N.D. Cal. 2009).

28 ⁵⁵ *Id.* at 986.

1 **7. Ford actively concealed the existence of MyFord Touch defects.**

2 Much more than Ford’s “mere non-disclosure” evidences that Ford actively concealed (and
3 conceals) the MyFord Touch defects. *Cf.*, Def. Mem. at 21. The FAC’s allegations about Ford’s
4 practices in purportedly remedying MyFord Touch units, as well as Ford’s adamant pre-litigation
5 denials that the defects exist, adequately establish Ford’s active concealment of the MyFord Touch
6 defects.

7 Ford’s failed “repairs” of Plaintiffs’ MyFord Touch units, which amounts to replacing
8 defective parts with equally defective parts, demonstrates Ford’s active concealment of the
9 defects.⁵⁶ Concealing TSBs also demonstrates active concealment.⁵⁷ Ford concealed its TSBs, which
10 were only published to and implemented by authorized Ford dealers, and contacted consumers only
11 when a user-controlled software update was available. ¶¶ 28 (user-controlled update), 274-87
12 (TSBs).

13 Ford offers two frail arguments against the sufficiency of Plaintiffs’ active-concealment
14 allegations: its remedial efforts may be for “legitimate business purposes” and the Federal Rules of
15 Evidence (“FRE”) render evidence of such efforts inadmissible. Def. Mem. at 21. That a party’s
16 conduct has multiple “purposes,” some of which may be “legitimate,” does not preclude a court
17 from considering such conduct in the context of a complaint for fraud. With respect to the second
18 argument, as Ford well knows, the FRE concern admissibility at trial, not sufficiency of factual
19 allegations in a pleading. Both of these arguments should be rejected.

20 But Ford completely overlooks a further set of allegations that strongly support a finding of
21 active concealment. Multiple Plaintiffs alleged that Ford, via its technical or customer-service
22 representatives, adopted a blame-the-victim strategy and expressly denied that a defect existed when
23 Plaintiffs contacted Ford. *See, e.g.*, ¶¶ 42 (“[a] Ford Consumer Affairs representative that identified
24 himself as ‘Mark’ ... denied that [MyFord Touch] was experiencing system-wide problems,”
25 faulting Plaintiff CDD’s devices rather than Ford’s system), 104 (Makowski), 164 (Miller). Such

26 ⁵⁶ *See Mui Ho*, 931 F. Supp. 2d at 999 (“[d]efendants’ decisions to repair Class Vehicles’
27 headlamps only temporarily, or to replace them with other defective parts” demonstrates active
concealment).

28 ⁵⁷ *In re Toyota UA I*, 754 F. Supp. 2d at 1190.

1 allegations demonstrate active concealment. In *Apodaca v. Whirlpool Corp.*, for example, the court
 2 found that “allegations that [d]efendant denied the defect when [p]laintiffs called to request repairs
 3 or replacement dishwashers” supported a finding of active concealment.⁵⁸ The court in *Tietsworth v.*
 4 *Sears, Roebuck & Co.* likewise found that “[d]efendants’ alleged denial of a defect when [p]laintiffs
 5 called to request free servicing or replacements” supported a finding of active concealment.⁵⁹

6 **8. Ford’s partial representations about MyFord Touch triggered a duty to disclose**
 7 **the defects.**

8 Ford represented that the voice and touch controls in MyFord Touch enable drivers “to keep
 9 your hands on the wheel and eyes on the road” (¶ 250), and that its features “create an interactive,
 10 rich interface that makes the vehicle functions, settings and information easily accessible to the
 11 driver through voice, steering wheel controls or with a simple tap on the touch screen” (¶ 259).
 12 These “undistracted driving” and “easy accessibility” claims are misleading because they fail to
 13 disclose material facts, namely the MyFord Touch defects described above.⁶⁰ They thus trigger
 14 Ford’s duty to disclose those defects.

15 As to reliance, “[a]ctual reliance is presumed (or at least inferred) when the omission is
 16 material.”⁶¹ A plaintiff adequately pleads reliance on fraudulent omissions where the complaint
 17 describes, generally, how plaintiff would have been exposed to the omitted material fact.⁶² Twenty
 18 Plaintiffs alleged that they viewed websites or advertisements that could have contained disclosures
 19 of the alleged defects (¶¶ 22, 43, 56, 66, 78, 85, 98, 106, 126, 148, 157, 164, 172, 180, 187, 195,
 20 202, 210, 217, 225), and the FAC reproduces a number of specific examples (*see, e.g.*, ¶¶ 250-56,
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23 ⁵⁸ *Apodaca v. Whirlpool Corp.*, 2013 U.S. Dist. LEXIS 176363, at *21-22 (C.D. Cal. Nov. 8,
 24 2013).

⁵⁹ *Tietsworth v. Sears, Roebuck & Co.*, 720 F. Supp. 2d 1123, 1134-35 (N.D. Cal. 2010).

25 ⁶⁰ *Apodaca*, 2013 U.S. Dist. LEXIS 176363, at *22 (defendant’s claim to using “commercial
 26 grade components” in product “failed to disclose material facts related to this partial representation,
 namely the potential problems with the control board and detergent dispenser”).

⁶¹ *Ehrlich*, 801 F. Supp. 2d at 919 (citing *In re Tobacco II Cases*, 46 Cal. 4th 298, 327 (2009)).

27 ⁶² *Daniel v. Ford Motor Co.*, 2013 U.S. Dist. LEXIS 80638, at *13 (E.D. Cal. June 6, 2013)
 28 (plaintiff pled reliance on omission where complaint identifies “website, advertisement, or other
 material that could plausibly contain the allegedly omitted fact”).

1 259-60).⁶³ It is also well-settled that, where omitted facts relate to the very purpose or operability of
 2 a product, as here, reliance is adequately alleged even without such additional allegations. Ford’s
 3 position “defies common sense and real-world business practice. No [automobile manufacturer]
 4 would ever advertise its product to, in essence, consistently fail”⁶⁴ “Such disclosures do not exist
 5 in the real world because they represent product or service failure.”⁶⁵ Plaintiffs thus adequately
 6 allege reliance on Ford’s partial disclosures, triggering a duty to disclose the MyFord Touch defects.

7 Ford relies heavily on *Gray v. Toyota Motor Sales, U.S.A.*⁶⁶ and *Smith v. Ford Motor Co.*⁶⁷
 8 to contend that it did not have a disclosure obligation to Plaintiffs. *See* Def. Mem. at 15-17. These
 9 cases are easily distinguishable. Plaintiffs in *Gray* alleged that Toyota knowingly marketed
 10 inaccurate fuel-economy figures.⁶⁸ The case had nothing to do with safety, other than to reaffirm the
 11 principle that a defendant has a disclosure duty when safety issues are implicated.⁶⁹ *Smith* involved
 12 an ignition-lock defect that prevented drivers from starting and shutting off their vehicle’s engines.⁷⁰
 13 In finding the safety issues associated with this defect to be “speculative,” Judge Chesney noted that
 14 the cases relied on by plaintiffs “concerned a ‘severe risk of injury while the vehicle was in
 15 motion,’” whereas the dangers envisioned in *Smith* “deriv[ed] in each instance from the particular
 16 location at which the driver initially has parked the vehicle” and were not supported by any
 17 evidence that the defect caused the vehicles to stop unexpectedly or under dangerous conditions.⁷¹
 18 Notably, Judge Conti recently refused to apply this holding from *Smith* in a case involving

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 20
 21 ⁶³ The FAC further alleges that had the material information been disclosed, Plaintiffs would not
 22 have bought or leased the Class Vehicles, or would have paid less for them. *See, e.g.*, ¶¶ 502, 820.

23 ⁶⁴ *Clark*, 2013 U.S. Dist. LEXIS 155179, at *18-19.

24 ⁶⁵ *Id.*

25 ⁶⁶ *Gray v. Toyota Motor Sales, U.S.A.*, 2012 U.S. Dist. LEXIS 15992 (C.D. Cal. Jan. 23, 2012),
 26 *aff’d*, 2014 U.S. App. LEXIS 2197 (9th Cir. Feb. 5, 2014).

27 ⁶⁷ *Smith v. Ford Motor Co.*, 749 F. Supp. 2d 980 (N.D. Cal. 2010), *aff’d*, 462 Fed. Appx. 660
 28 (9th Cir. 2011).

⁶⁸ 2012 U.S. Dist. LEXIS 15992, at *3.

⁶⁹ *See id.* at *11-15 (“[i]t is undisputed that the case before us [does not involve] a safety-related
 defect.”).

⁷⁰ 749 F. Supp. 2d at 989.

⁷¹ *Id.* at 991.

1 headlamps in cars that flicker or go out.⁷² Clearly, the description of the defect in the FAC – which
 2 include instances where the MyFord Touch defect manifested while a Class Vehicle was in motion⁷³
 3 – make this case closer to *Mui Ho* than to *Gray* or *Smith*.

4 As demonstrated above, the FAC pleads the requisite factual content to allow this Court to
 5 draw the reasonable inference that Ford is liable for its fraudulent conduct in relation to its defective
 6 MyFord Touch system.

7 **B. Plaintiffs’ Iowa, Texas, and Virginia consumer-fraud claims are not time barred.**

8 Without citing a single case from Iowa, Texas or Virginia, Ford argues that Plaintiffs’
 9 consumer-fraud claims are time barred under each of those states’ laws. *See* Def. Mem. at 22-23.
 10 For the reasons set forth below, this position is without merit.

11 **First**, each state permits a defendant’s fraudulent or active concealment to toll the statute of
 12 limitations.⁷⁴ The FAC’s allegations of Fords’ active concealment (*e.g.*, ¶¶ 230-31, 665, 1017, 1072)
 13 are sufficient to toll these statutes of limitation here.

14
 15

⁷² *See Mui Ho*, 931 F. Supp. 2d at 997 (N.D. Cal. 2013).

16 ⁷³ *See* ¶¶ 137, 155, 193, 201, 216.

17 ⁷⁴ **Iowa:** *Baier v. Ford Motor Co.*, 2005 U.S. Dist. LEXIS 17338, at *10-11 (N.D. Iowa Apr. 21,
 18 2005) (“[t]he Iowa Supreme Court has determined that fraudulent concealment can toll a statute of
 19 limitations where one party has a cause of action against a second party but that second party, by
 fraud or fraudulent concealment, prevented the first party from obtaining knowledge of the cause of
 action”) (citing *McClendon v. Beck*, 569 N.W.2d 382, 385 (Iowa 1997)).

20 **Virginia:** *In re Bldg. Materials Corp. of Am.*, 2013 U.S. Dist. LEXIS 61228, at *11-12 (D.S.C.
 21 Apr. 29, 2013) (“Virginia law allows for the tolling of a statute of limitations period where the
 22 plaintiff can demonstrate fraudulent concealment”) (citing *Flick v. Wyeth LLC*, 2012 U.S. Dist.
 23 LEXIS 78900, at *3 (W.D. Va. June 6, 2012)). *But see Robertson v. Ford Motor Co.*, 40 Va. Cir.
 231, 233 (Va. Cir. Ct. 1996) (“[t]here are no statutorily mandated ways in which the statute of
 24 limitations may be tolled under the [Virginia Consumer Protection Act]”). Even if this outlier case
 25 could be read as prohibiting the tolling of the statute, Ford’s argument should still be rejected
 26 because Virginia follows the discovery rule for this claim. *See Skibinski v. Lunger*, 70 Va. Cir. 423,
 423 (Va. Cir. Ct. 2006).

27 **Texas:** TEX. BUS. & COM. CODE § 17.565 (“[t]he period of limitation provided in this section
 28 may be extended for a period of 180 days if the plaintiff proves that failure timely to commence the
 action was caused by the defendant’s knowingly engaging in conduct solely calculated to induce the
 plaintiff to refrain from or postpone the commencement of the action”). Jose Randy Rodriguez – the
 Texas plaintiff against whom Ford asserts a statute--of limitations defense – bought his vehicle on
 May 17, 2011, and filed his action on July 26, 2013. *See Rosser v. Ford Motor Co.*, No. 13-3471-
 EMC. Thus, if the Texas Deceptive Trade Practices Act’s two-year statute of limitations is extended
 by 180 days under Tex. Bus. & Com. Code § 17.565, the deadline for filing this claim would have
 been November 13, 2013, at the earliest (*i.e.*, 180 days after May 17, 2013).

1 **Second**, each state also follows the discovery rule, which provides that the statute of
 2 limitations only begins to accrue when the plaintiff discovers (or should have discovered) the
 3 violation.⁷⁵

4 Ford’s contention that certain Plaintiffs immediately became aware that their MyFord Touch
 5 system was defective (*See* Def. Mem. at 22-23) is misplaced. Courts routinely decline to resolve
 6 such factual questions – such as when the plaintiff actually became aware of the existence of a cause
 7 of action – in connection with a motion to dismiss.⁷⁶ Significantly, these Plaintiffs attempted to fix
 8 the problems with their MyFord Touch systems by returning their vehicles to a Ford dealer, and/or
 9 by installing software updates on their own. ¶¶ 120, 201, 216. None of these recent efforts resolved
 10 their MyFord Touch systems’ ongoing problems. *See id.*

11 Equally unpersuasive is Ford’s argument that Plaintiffs’ tolling allegations are “directly
 12 contradicted” by the fact that different plaintiffs filed a separate class-action lawsuit in a Louisiana
 13 state court in January of 2012.⁷⁷ *See* Def. Mem. at 23. While Ford claims that case also involved
 14 “alleged defects in MyFord Touch systems,” it does not describe the nature of those allegations or
 15 explain how anything in that lawsuit would be sufficient to put Plaintiffs on notice of their claims.
 16 *Id.* To the contrary, Ford had previously joined Plaintiffs in representing to this Court that “[t]o the
 17 best of the parties’ knowledge, other than the three above-captioned cases [in this Court], there are

18
 19 ⁷⁵ **Texas:** *St Johns United Methodist Church v. Delta Elecs.*, 2012 U.S. Dist. LEXIS 109037, at
 20 *6 (S.D. Tex. Aug. 3, 2012) (“[t]he [Texas Deceptive Trade Practices Act’s] two-year statute of
 21 limitations period is tolled under the discovery rule until the plaintiff discovers, or through the
 22 exercise of reasonable care and diligence should have discovered, his injury”); *Skibinski*, 70 Va. Cir.
 23 at 423 (“[t]he statute of limitations in an action for violation of the Virginia Consumer Protection
 Act...based upon allegations of misrepresentation, deception, or fraud begins to accrue when the
 violation is discovered or, by the exercise of due diligence, should have been discovered”). **Iowa:**
 IOWA CODE § 714H.5(5) (statute of limitations for Iowa’s Consumer Fraud Act is two years from
 “the occurrence of the last event giving rise to the cause of action...or within two years of the
 discovery of the violation of this chapter by the person bringing the action, whichever is later.”).

24 ⁷⁶ *See Barr v. Prudential-Bache Secur., Inc.*, 1991 U.S. App. LEXIS 30014, at *3 (9th Cir. Dec.
 25 12, 1991) (“[w]hether a plaintiff knew or should have known of a cause of action presents a
 26 question of fact for the trier of fact”) (quoting *Reeves v. Teuscher*, 881 F.2d 1495, 1501 (9th Cir.
 1989)). *See also Official Comm. of Admin. v. Bricker*, 2010 U.S. Dist. LEXIS 99140, at *28 (N.D.
 Ohio Sept. 21, 2010); *McAdams v. CitiFinancial Mortg. Co.*, 2008 U.S. Dist. LEXIS 16094, at *18
 (M.D. La. Mar. 3, 2008).

27 ⁷⁷ To the extent that Ford is suggesting that this January 2012 filing would have triggered the
 28 running of these two-year-long statute of limitations, it would result in the deadline for filing the
 case January 2014. This action was filed well before then.

1 no other pending related cases.” *See* Dkt. No. 33, at 9. Ford accordingly fails to meet its burden of
 2 invoking the statute of limitations as an affirmative defense here.⁷⁸

3 **C. Ford’s argument that the economic-loss rule bars Plaintiffs’ claims is meritless.**

4 Ford asserts that Plaintiffs’ “tort-based” claims are barred under the economic-loss doctrine.
 5 Def. Mem. at 24. The economic-loss doctrine is a “judicially created doctrine that sets forth the
 6 circumstances under which a tort action is prohibited if the only damages suffered are economic
 7 losses.”⁷⁹ But, this doctrine is not a hard-and-fast “rule,” as Ford suggests.⁸⁰ Indeed, as the Ninth
 8 Circuit explained, “[m]any courts have explicitly refused to extend the economic loss doctrine
 9 beyond the product liability context or beyond claims for negligence and strict liability.... [And
 10 where,] some courts have applied the economic loss doctrine to bar recovery ... [those claims] have
 11 usually amounted to nothing more than a failure to perform a promise contained in a contract.”⁸¹

12 Nevertheless, seeking to stretch the economic-loss doctrine beyond its limits, Ford attempts
 13 to apply it to the Colorado, Florida, and North Carolina Plaintiffs’ statutory and common-law fraud
 14 claims. In doing so, Ford argues that Plaintiffs’ claims are nothing more than products-liability or
 15 breach-of-warranty claims retitled as fraud. But in making this argument, Ford turns a blind eye to
 16 the fact that the “essence” of Plaintiffs’ “tort-based” claims is *not* merely that the MyFord Touch
 17 system “did not perform as advertised,” as Ford incorrectly asserts, but, rather, that Ford
 18 *fraudulently induced* Plaintiffs to purchase or lease the Class Vehicles, or to pay substantially more
 19 for the Class Vehicles. ¶¶ 17, 514, 558, 560-61, 619, 655, 657-58, 870, 907, 909-10. Ford’s
 20 arguments ultimately run counter to case law in the relevant states, and therefore fail.

21 ⁷⁸ *See I-Enterprise Co. LLC v. Draper Fisher Jurvetson Mgmt. Co.V, LLC*, 2005 U.S. Dist.
 22 LEXIS 47041, at *37 (N.D. Cal. July 15, 2005) (“the statute of limitations is an affirmative defense
 23 to be raised by the defendants ... not a pleading requirement that must be satisfied by the plaintiff
 24 ‘A defendant raising the statute of limitations as an affirmative defense has the burden of
 25 proving the action is time barred.’”) (quoting *California Sansome Co. v. U.S. Gypsum*, 55 F.3d 1402
 26 (9th Cir. 1995)).

27 ⁷⁹ *Tiara Condominium Assoc., Inc. v. Marsh & McLennan Cos.*, 110 So. 3d 399, 401 (Fla.
 28 2013).

⁸⁰ *See, e.g., Calloway v. City of Reno*, 993 P.2d 1259, 1265-66, 1266 n.3 (Nev. 2000) (refusing
 to delineate the universe of claims that would, or would not, be subject to the economic-loss
 doctrine, and holding that “the more reasoned method” is to examine in each case “the relevant
 policies in order to ascertain the proper boundary between the distinct civil law duties that exist
 separately in contract and tort”).

⁸¹ *Giles v. GMAC*, 494 F.3d 865, 875-76 (9th Cir. 2007).

1 **1. Plaintiff Sheerin’s Colorado claims are not barred.**

2 Ford asserts that the economic-loss doctrine bars Plaintiff Sheerin’s tort-based claims (*i.e.*,
3 his statutory claims under the Colorado’s Consumer Protection Act (“CCPA”), and his common-law
4 claims for strict liability and fraud). Def. Mem. at 24. These arguments fail because Ford overlooks
5 key case law holding that the economic-loss doctrine does not apply to Plaintiff Sheerin’s tort-based
6 claims.

7 First, under Colorado law, the economic-loss doctrine does not, and cannot, bar Plaintiff
8 Sheerin’s strict-liability claim. On the contrary, the Colorado Supreme Court expressly permits strict
9 liability claims for purely economic losses.⁸² Notwithstanding this clear authority from Colorado’s
10 highest court, which is directly on point, Ford’s moving papers do not address the decision. Indeed,
11 Ford fails to cite even a *single* case where strict-liability claims were disallowed for economic losses
12 under Colorado law.

13 Instead, Ford selectively quotes from *Carter v. Brighton Ford, Inc.*⁸³ But Ford’s reliance is
14 misplaced because the *Carter* decision only addressed contract-based claims. Specifically, *Carter*
15 examined whether the “innocent seller” defense under the Colorado Products Liability Act shielded
16 defendant from plaintiff’s claims for breach of implied warranty of merchantability and revocation
17 of acceptance.⁸⁴ Ford’s argument concerning Plaintiff’s strict-liability claims therefore must fail.

18 Ford also contends that the economic-loss doctrine bars Plaintiff Sheerin’s statutory CCPA
19 and common-law fraud claims. But Ford again overlooks key case law. Critically, Colorado courts
20 do not apply the economic-loss doctrine in circumstances where the tort claims at issue establish a
21 duty independent of the contract.⁸⁵

22 _____
23 ⁸² *Hügel v. Gen. Motors Corp.*, 544 P.2d 983, 989 (Colo. 1975) (“Although there is a split
24 among the jurisdictions as to whether the damage to the product sold is covered under the doctrine
25 of strict liability, we think the wiser view is that it is. Since ... the burden of having cast a defective
26 product into the stream of commerce falls upon the manufacturer, it appears inconsistent to limit his
27 responsibility to property other than the product sold.”).

28 ⁸³ *Carter v. Brighton Ford, Inc.*, 251 P.3d 1179 (Colo. App. 2010).

⁸⁴ *See* 251 P.3d at 1181.

⁸⁵ *Town of Alma v. AZCO Constr., Inc.*, 10 P.3d 1256, 1263 (Colo. 2000) (where there is “a duty
independent of any contractual obligations, the economic loss rule has no application and does not
bar a plaintiff’s tort claim because the claim is based on a recognized independent duty of care and
thus does not fall within the scope of the rule”).

1 Here, under the CCPA, Ford owes an independent statutory duty to Plaintiff Sheerin –
 2 outside of any contract – (i) not to, among other things, make “a false representation as to the
 3 characteristics, ingredients, uses, benefits, alterations, or quantities of goods,” (ii) not to “represent[]
 4 that goods ... are of a particular standard, quality, or grade ... if he knows or should know that they
 5 are of another,” and (iii) not to “advertise[] goods ... with intent not to sell them as advertised.”⁸⁶
 6 Plaintiff Sheerin’s CCPA claim is based on Ford’s violations of those duties. The economic-loss
 7 doctrine therefore does not bar Plaintiff’s CCPA claim.⁸⁷

8 Similarly, Colorado courts instruct that the economic-loss doctrine would not bar Plaintiff
 9 Sheerin’s common-law fraud claim because, like Plaintiff Sheerin’s CCPA claim, it is based on the
 10 breach of a duty specific to the claim – not to engage in fraud – which is independent of any
 11 contract.⁸⁸ With respect to Plaintiff Sheerin’s CCPA and common-law fraud claims, because Ford
 12 owes a duty independent of the contract, the economic-loss rule accordingly does not apply.

13 Nevertheless, ignoring this precedent, Ford exclusively relies on *Rees v. Unleaded Software,*
 14 *Inc.*⁸⁹ Ford asserts that *Rees* bars all of Plaintiff Sheerin’s fraud-based claims, including those
 15 asserted under the CCPA. *Rees*, however, similarly fails to support Ford’s assertions. As discussed
 16 above, the economic-loss doctrine does not apply when the duty that has been allegedly breached is
 17 not derived from the contract. In *Rees*, the conduct at issue concerned defendant’s breach of its
 18 duties under the contract, not any duties arising independently of the contract.⁹⁰

19 Plaintiff Sheerin’s claims are premised on misrepresentations intended to induce reliance,
 20 *not* on Ford’s promise to perform.⁹¹ Here, the essence of Plaintiffs’ fraud-based claims is *not* merely
 21

22 ⁸⁶ COLO. REV. STAT. § 6-1-105(1)(b), (g), and (i).

23 ⁸⁷ *See, e.g., A.C. Excavating v. Yacht Club II Homeowners Ass’n*, 114 P.3d 862, 865-70 (Colo.
 24 2005) (recognizing that homeowners association’s negligence claims under the Construct Defect
 Action Reform Act were based on a duty independent of contract and, thus, not barred by the
 economic-loss rule).

25 ⁸⁸ *See, e.g., Brody v. Bock*, 897 P.2d 769, 776 (Colo. 1995) (common-law fraud claim not barred
 by economic-loss rule because it is based on violation of a duty independent of contract).

26 ⁸⁹ *Rees v. Unleaded Software, Inc.*, 2013 Colo. App. LEXIS 1870 (Colo. App. 2013).

27 ⁹⁰ 2013 Colo. App. LEXIS 1870, at *8 (economic-loss rule applied because the alleged false and
 misleading statements at issue were about defendant’s *ability to perform contractual duties*).

28 ⁹¹ *See Brody*, 897 P.2d at 776 (distinguishing between a promise to perform and a promise
 intending to induce reasonable reliance and action on the part of the promisee); *Keller v. A.O. Smith*

1 that the MyFord Touch system did not perform as promised, but, also that Ford fraudulently induced
 2 Plaintiffs to purchase or lease the Class Vehicles, or to pay substantially more for the Class Vehicles
 3 than they otherwise would have absent the fraud. *See* ¶¶ 17, 514, 558, 560-61, 619, 655, 657-58,
 4 870, 907, 909-10. Accordingly, *Rees* is inapposite.

5 **2. Plaintiff Oremland’s tort claims under Florida law are not barred.**

6 With respect to Florida law, Ford similarly argues that Plaintiff is asserting fraud-based
 7 claims that are purportedly predicated on the same conduct giving rise to his claims for breach of
 8 warranty under a product-liability theory. Def. Mem. at 24. Ford therefore asserts that the claims are
 9 barred by the economic-loss doctrine. But Ford is mistaken. As discussed above, like Plaintiff
 10 Sheerin, Plaintiff Oremland’s “tort-based” claims are alleged statutory violations and allege that
 11 Ford fraudulently induced him to purchase his Class Vehicle, or to pay substantially more for it than
 12 he otherwise would have absent the fraud. Like the result under Colorado law, Plaintiff Oremland’s
 13 claims accordingly are not barred, because Florida recognizes that the economic-loss doctrine does
 14 not apply to statutory causes of action and claims of fraudulent inducement to a contract.

15 Nevertheless, relying on *Burns v. Winnebago Indus., Inc.*,⁹² Ford argues that the economic-
 16 loss rule bars Plaintiff Oremland’s “tort-based” claims under Florida law. In *Burns*, the district court
 17 refused to apply the negligent-misrepresentation and fraudulent-inducement exceptions to Florida’s
 18 economic-loss doctrine.⁹³ Specifically, the *Burns* court believed that it was “unclear” whether the
 19 Florida Supreme Court’s decision in another case⁹⁴ “affect[ed] the viability of [those] exceptions.”⁹⁵
 20 And the analysis in *Burns* is based on a misreading of the *Tiara* court’s holding. In *Tiara*, the
 21 Florida Supreme Court traced the history of the economic-loss doctrine in Florida. The Florida
 22 Supreme Court then held as follows:

24 *Harvestore Prods., Inc.*, 819 P.2d 69 (Colo. 1991) (holding that plaintiff’s negligent misrepresenta-
 25 tion claim was “independent of any principle of contract law,” because the alleged misrepresenta-
 tions related to claims *intended to induce action* – to purchase farm equipment – not a promise to
 perform duties in a contract).

26 ⁹² *Burns v. Winnebago Indus., Inc.*, 2013 U.S. Dist. LEXIS 116377 (M.D. Fla. Aug. 16, 2013).

27 ⁹³ *Id.* at *8.

28 ⁹⁴ *Tiara Condo. Ass’n v. Marsh & McLennan Cos.*, 110 So. 3d 399 (Fla. 2013).

⁹⁵ 2013 U.S. Dist. LEXIS 116377, at *8.

1 Having reviewed the origin and original purpose of the economic loss
 2 rule, and what has been described as the unprincipled extension of that
 3 rule, *we now take this final step and hold that the economic loss rule*
 4 *applies only in the products liability context. We thus recede from our*
 5 *prior rulings to the extent that they have applied the economic loss*
 6 *rule to cases other than products liability.... Our experience with the*
 7 *economic loss rule over time, which led to the creation of the excep-*
 8 *tions to the rule, now demonstrates that expansion of the rule beyond*
 9 *its origins was unwise and unworkable in practice. Thus, today we*
 10 *return the economic loss rule to its origin in products liability.*^{196]}

11 Contrary to the *Burns* court’s holding, there was no ambiguity – the *Tiara* court did *not* hold
 12 that the well-recognized exceptions to the economic-loss rule are no longer applicable in the
 13 products-liability context, it merely overruled prior case law applying the economic-loss rule to
 14 contractual-privity cases.

15 Setting aside Ford’s misplaced reliance on *Burns*, the economic-loss doctrine does not apply
 16 under Florida law to claims like Plaintiff Oremland’s concerning alleged breaches of independent
 17 duties arising from statute or fraud.⁹⁷ Ford’s argument, accordingly, is meritless.

18 **3. Plaintiff Fink’s tort claims under North Carolina law are not barred.**

19 Ford argues that Plaintiff Fink’s claim under the North Carolina Unfair and Deceptive Trade
 20 Practices Act (“UDTPA”) (Count I) is barred by the economic-loss doctrine. Ford’s reliance on *Ellis*
 21 *v. Louisiana-Pac. Corp.*⁹⁸ is misplaced. *Ellis* is distinguishable. In *Ellis*, the district court ruled the
 22 economic-loss rule barred plaintiff’s UDTPA claims because the damage sought under the UDTPA
 23 claim “[was] the same damage upon which the breach of warranty claim is based.”⁹⁹ In contrast,
 24 here, Plaintiff Fink alleges under UDTPA that he was damaged because Ford’s fraudulent
 25

26 ⁹⁶ *Tiara Condo. Ass’n*, 110 So. 3d 407 (emphasis added).

27 ⁹⁷ *See, e.g., Comptech Int’l, Inc. v. Milam Commerce Park, Ltd.*, 753 So. 2d 1219, 1223 (Fla.
 28 1999) (holding that “the economic loss rule does not bar statutory causes of action”); *HTP, Ltd. v.*
Lineas Aeras Costarricenses S.A., 685 So. 2d 1238, 1240 (Fla. 1996) (recognizing that “fraudulent
 inducement claims may coexist with breach of contract claims,” and holding that plaintiff’s “cause
 of action for fraud in the inducement is an independent tort and is not barred by the economic loss
 rule”); *Samuels v. King Motor Co.*, 782 So. 2d 489, 498 (Fla. Ct. App. 2001) (determining that the
 trial court erred in dismissing plaintiff’s claims for fraud in the inducement and deceptive and unfair
 trade practices, and stating that “the economic loss rule does not bar the Plaintiffs’ fraud in the
 inducement claim because fraudulent inducement is a tort independent from any underlying
 contract.”); *Delgado v. J.W. Courtesy Pontiac GMC-Truck, Inc.*, 693 So. 2d 602, 609 (Fl. Ct. App.
 1997) (holding that economic-loss rule does not affect Florida’s unfair trade practices act).

⁹⁸ *Ellis v. Louisiana-Pac. Corp.*, 2011 U.S. Dist. LEXIS 129378 (W.D.N.C. Nov. 8, 2011), *aff’d*,
 699 F.3d 778 (4th Cir. 2012).

⁹⁹ 2011 U.S. Dist. LEXIS 129378, at *4-5.

1 misrepresentations induced him and other North Carolina consumers to lease or purchase Class
 2 Vehicles, or to pay more for the vehicles than they otherwise would have. ¶¶ 17, 870. This damage
 3 is separate and distinct from the damage caused by the fact that the MyFord Touch system is
 4 defective and does not work as advertised. Accordingly, *Ellis* is inapposite.

5 Additionally, because the North Carolina appellate courts have not yet decided whether to
 6 extend the economic-loss rule to UDTPA claims, the district court in *Ellis* improperly created North
 7 Carolina law. On appeal, the Fourth Circuit recognized this, and refused to affirm the district court's
 8 ruling on grounds that the economic-loss rule bars UDTPA claims.¹⁰⁰ Accordingly, at a minimum,
 9 Plaintiffs request that this Court follow the Fourth Circuit's lead in refusing to create new law by
 10 applying the economic-loss rule to the UDTPA.

11 Ford also contends that the economic-loss rule bars Plaintiff Fink's fraudulent concealment
 12 claim (Count V). But Ford fails to cite a single case holding that the economic-loss rule bars fraud
 13 claims under North Carolina law. Def. Mem. 24-25. Indeed, North Carolina does not apply the
 14 economic-loss rule to fraud claims.¹⁰¹ Accordingly, Ford's argument that the economic-loss rule
 15 bars Count V under North Carolina law also fails.

16 **4. Plaintiff Zuchowski's negligence claim under Ohio law is not barred.**

17 In Ohio, the economic-loss doctrine's applicability depends on the complexity of the parties
 18 and the type of tort claim at issue.¹⁰² Where, as here, the parties are *not* in contract privity, courts

19
 20 ¹⁰⁰ See *Ellis v. Louisiana-Pac. Corp.*, 699 F.3d 778, 787 n.5 (4th Cir. 2012) ("the North Carolina
 21 courts have never addressed whether UDTPA claims are subject to the [economic loss rule], and in
 22 the absence of such direction, we are well-advised to rely on other grounds."). See also *Time
 Warner Entm't-Advance/Newhouse P'ship v. Carteret-Craven Elec. Membership Corp.*, 506 F.3d
 304, 315 (4th Cir. 2007) ("as a court sitting in diversity, we should not create or extend the North
 Carolina common law").

23 ¹⁰¹ See *In re Ford Motor Co. Vehicle Paint Litig.*, 1996 U.S. Dist. LEXIS 11063, at *37 (E.D.
 24 La. July 30, 1996) ("North Carolina has allowed plaintiffs to recover purely economic losses in an
 25 action for fraud," and holding that economic-loss doctrine did not bar plaintiff's fraudulent-
 26 misrepresentation claim under North Carolina law); see also *Club Car, Inc. v. Dow Chem. Co.*, 2007
 NCBC LEXIS 10, at *9 (N.C. Super. Ct. May 3, 2007) (noting that the "North Carolina appellate
 courts have yet to extend the application of the economic loss doctrine to bar claims based on
 fraud").

27 ¹⁰² See, e.g., *HDM Flugservice GmbH v. Parker Hannifin Corp.*, 332 F.3d 1025, 1029 (6th Cir.
 28 2003) (stating that "parties lacking privity might be subject to the economic loss rule under some
 circumstances and that commercial parties lacking privity, as opposed to non-commercial parties,
 would be foreclosed from recovering economic losses"); *Cincinnati Gas & Elec. Co. v. Gen. Elec.*

1 apply a more relaxed rule allowing individual consumers to bring negligence claims for solely
 2 economic injuries.¹⁰³ Under this relaxed rule, there can be no argument that Plaintiff Zuchowski's
 3 negligence claim is barred by the economic-loss doctrine.¹⁰⁴

4 Setting aside its flawed economic-loss rule argument, Ford also argues that Plaintiff
 5 Zuchowski's negligence claim fails "because Ford has complied with all of its obligations to him
 6 under its written warranty." Def. Mem. at 26. This argument is based on Sections VI – VIII of
 7 Ford's motion, which, as explained herein, are meritless. Accordingly, this argument also fails.

8 **D. The FAC pleads a plausible claim for breach of express warranty.**

9 **1. The FAC alleges sufficient detail establishing that Plaintiffs had malfunctioning,
 10 defective MyFord Touch systems in their vehicles that Ford was unable to fix.**

11 Ford insists it did all that its New Vehicle Limited Warranty required of it. Its agents at Ford
 12 dealerships, according to Ford "repair[ed], replace[d], or adjust[ed]" all malfunctioning parts
 13 "without charge" during the warranty period. Def. Mem. at 27. But, according to Ford, the warranty
 14 does not promise that Ford will actually make the malfunctioning part work. *Id.* For this reason,
 15 Ford urges, the FAC fails to allege that Ford breached its Limited Warranty.

16 But any notion of "repair" in this context requires fixing something that is broken. Con-
 17 sumers would understand Ford's warranty to "repair" a malfunctioning part as a promise to make

18 *Co.*, 656 F. Supp. 49, 56-61 (S.D. Ohio 1986) ("since there is a written contract between
 19 sophisticated parties and plaintiffs seek recovery for economic loss alone, plaintiffs are limited to
 20 such remedies that are available under contract law").

21 ¹⁰³ See *LaPuma v. Collinwood Concrete*, 661 N.E.2d 714, 716 (Ohio 1996) (consumer's failure
 22 to allege other than economic damages does not destroy tort claim but only removes it from purview
 23 of products-liability statutes); *Midwest Ford, Inc. v. C.T. Taylor Co.*, 694 N.E.2d 114, 116-17 (Ohio
 24 Ct. App. 1997) (noting that, in the absence of privity, Ohio law distinguishes between consumers,
 25 who may maintain negligence claim for solely economic damages, and commercial buyers, who
 26 may not); *Trgo v. Chrysler Corp.*, 34 F. Supp. 2d 581, 591 n.9 (N.D. Ohio 1998) (acknowledging
 27 that the Supreme Court of Ohio had "recently allowed certain tort claims to proceed even though the
 28 plaintiff sought only economic damages" where the plaintiff was a consumer, but holding that
 "Plaintiffs Trgo would not be able to pursue economic loss damages in tort because of their status as
 commercial buyers").

¹⁰⁴ Ford concedes that the Ohio Supreme Court expressly limited its holding in *Chemtrol
 Adhesives* barring negligence claims under the economic-loss rule to parties in *contractual privity*.
 Def. Mem. at 25. Accordingly, *Chemtrol Adhesives* is not dispositive here, because there is no
 contract between the parties. See *Midwest Ford, Inc.*, 694 N.E.2d at 116 ("The [*Chemtrol*] Court
 expressly disclaimed reconsideration of whether, *absent privity*, a plaintiff can recover economic
 losses under tort theories.... Since *Midwest* is not in privity with O'Brien, *Chemtrol* is not
 dispositive.") (emphasis in original).

1 the part work as represented – not to replace one malfunctioning part with another. Dictionaries
 2 define “repair” as to “fix” or “restore by replacing a part or putting together what is torn or broken,”
 3 or to “restore to a sound or healthy state.”¹⁰⁵ Courts similarly define the term as “to fix anything that
 4 is broken.”¹⁰⁶ Servicing a malfunctioning part but failing to make it work does not qualify as a
 5 “repair.” The warranty’s promise to replace or adjust a malfunctioning part similarly requires the
 6 adjusted or replacement part to function properly after completion of the warranty work. Contrary to
 7 Ford’s suggestion, the FAC alleges in great detail that Ford failed to cure the malfunctioning
 8 MyFord Touch system in each Plaintiff’s vehicle.¹⁰⁷

9 Ford cites three authorities as support that its failure to repair the defective SYNC systems
 10 does not constitute a breach of warranty. Br. at 30. But the decisions are distinguishable because
 11 plaintiffs did not allege or establish that the repairs failed.¹⁰⁸

12 Ford next argues that those Plaintiffs who did not seek a repair from Ford cannot assert a
 13 warranty claim. Def. Mem. at 28. This argument is unpersuasive. As the FAC makes clear, it would
 14 have been futile for Plaintiffs to seek such a repair because the Limited Warranty failed its essential
 15 purpose. The same UCC provision on which Ford relies recognizes that a warrantor’s inability to

16
 17 ¹⁰⁵ See, e.g., <http://www.merriam-webster.com/dictionary/repair?show=0&t=1391989166>
 (defining transitive-verb form of “repair”).

18 ¹⁰⁶ See, e.g., *Sonnier v. State Farm Mut. Auto. Ins. Co.*, 509 F.3d 673, 676 (5th Cir. 2007);
Delawder v. Am. Woodmark Corp., 178 Fed. Appx. 197, 202 (4th Cir. 2006).

19 ¹⁰⁷ See, e.g., ¶¶ 23-30, 51, 57-60, 69-71, 76-77. The FAC alleges the specific problems that each
 20 Plaintiff experienced, the Plaintiff’s attempts to obtain repair from a Ford dealership, and that the
 21 repair(s) failed because the Plaintiff continues to experience same problems afterwards. See, e.g.,
 22 ¶¶ 21-33 (Whalen); ¶¶ 36, 38-40, 42 (Center for Defensive Driving); ¶¶ 50-51 (Grif Rosser);
 23 ¶¶ 57-60 (Megan Raney-Aarons); ¶¶ 68-71 (Watson); 76-77 (Thomas-Maskrey); 90, 92
 (D’Aguanno); 103-04 (Makowski); 112 (Oremland); 119-20 (Mitchell)¹⁰⁷; 128-41 (Creed); ; 147
 (Matlin); 154-55 (Rizzo); 170-71 (Purcell); 178-79 (Fink); 193-94 (Avedisian); 201 (Rodriguez);
 208-09 (Ervin); 216 (Connell); 223-24 (Miller-Jones). These allegations, together with allegations
 that Ford’s agents told Plaintiffs that Ford could not fix the problems (e.g., ¶ 40), plead that Ford
 breached its Limited Warranty to repair, replace or adjust malfunctioning parts.

24 ¹⁰⁸ See *Computer Network, Inc. v. AM Gen. Corp.*, 696 N.W.2d 49, 55 (Mich. Ct. App. 2005)
 (“all repairs were actually made”); *LaBonte v. Ford Motor Co.*, 1999 Ohio App. LEXIS 4795, at
 25 *16-17 (Ohio Ct. App., Oct. 7, 1999) (“Ford complied with the terms of its limited warranty by
 26 making repairs and/or adjustments to affect the warning light on two occasions (at 17,784 miles and
 21,185 miles) and that the problem did not reoccur until approximately 36,608 miles”); *Bradbury v.*
 27 *DaimlerChrysler Corp.*, 2007 WL 6930486 (Mass. Super. Ct. Sept. 18, 2007) (trial court
 distinguished *Santosuosso v. Gibbs Ford, Inc.*, 1992 Mass.App.Div. 167 (1992), for holding that
 28 “defendant’s ‘best efforts’ to fix the vehicle, when ultimately unsuccessful are insufficient to satisfy
 the warranty requirements”) (emphasis added).

1 cure the defect nullifies the limitation: “Where circumstances cause an exclusive or limited remedy
 2 to fail of its essential purpose, remedy may be had as provided in this [code].” U.C.C. § 2-719(2).¹⁰⁹
 3 Courts agree that a purchaser is released from the remedies provided in a limited warranty when
 4 they are ineffective, such as when the warrantor cannot repair a defect.¹¹⁰

5 **2. Ford’s New Vehicle Limited Warranty was part of every bargain because Ford**
 6 **promised the warranty to each purchaser as part of each transaction.**

7 Ford moves to dismiss the FAC’s express-warranty claims on the ground that the FAC does
 8 not plead that any warranty – including Ford’s written New Vehicle Limited Warranty provided to
 9 every vehicle purchaser – was part of the bargain or that any Plaintiffs relied on it. Def. Mem. at 35-
 10 37. But U.C.C. § 2-313(1)(a) does not require a showing of reliance by the buyer; rather, it provides
 11 that “[a]ny affirmation of fact or promise made by the seller to the buyer which relates to the goods
 12 and becomes part of the basis of the bargain creates an express warranty that the goods shall
 13 conform to the affirmation or promise.” The FAC alleges that each Plaintiff purchased (or leased) a
 14 Ford or Lincoln vehicle *and* Ford’s promise to repair or replace defective parts. Ford’s New Vehicle
 15 Limited Warranty was a central part of each and every purchase or lease. *See* ¶¶ 297, 298, 473, 527,
 16 579, 624, 677, 723, 771, 827, 876, 928, 979, 1032, 1077.

17 This is more than enough to establish that Ford’s Limited Warranty was part of each
 18 Plaintiff’s bargain. Courts are reluctant – for evident reasons – to let manufacturers evade their
 19 obligations under a warranty, where the warranty was used to entice customers to buy the
 20 manufacturer’s product. Courts therefore readily find that a manufacturer’s written warranty is part
 21 of a transaction. In *LWT, Inc. v. Childers*, for example, the Tenth Circuit ruled that the mere fact a
 22 manufacturer’s written warranty was printed in the manufacturer’s product catalog, which had been
 23

24 ¹⁰⁹ This U.C.C. provision has been adopted in all 15 states in which Plaintiffs reside. *See, e.g.*,
 25 ALA. Code § 7-2-719(2); ARIZ. REV. STAT. § 47-2719(B); CAL. COM. CODE § 2719(2); COLO. REV.
 26 STAT. § 4-2-719(2); CONN. GEN. STAT. § 42a-2-719(2); FLA. STAT. § 672.719(2); IOWA CODE
 27 § 554.2719(2); MASS. GEN. LAWS ch. 106, § 2-719; N.J. STAT. § 12A:2-719(2); N.Y. U.C.C. Law
 28 § 2-719(2); N.C. GEN. STAT. § 25-2-719(2); OHIO REV. CODE ANN. 1302.93(B); 13 Pa.C.S.
 § 2719(b); TEX. BUS. & COM. CODE § 2.719(b); VA. CODE ANN. § 59.1-508.3(b).

27 Ford also claims that the FAC does not allege defects that Ford failed to fix. Def. Mem. at 28-
 28 29. But the FAC plainly alleges such defects, *see supra* at 12-13, and the Ford did not fix them, .

¹¹⁰ *Hadar v. Concordia Yacht Builder, Inc.*, 886 F. Supp. 1082, 1099-1100 (S.D.N.Y. 1995).

1 provided to the purchaser/plaintiff before the transaction, was enough to create a factual question
2 whether it was part of the purchase transaction:

3 A limited warranty contained in a manufacturer's catalog may be
4 considered part of the basis of the parties' bargain, so long as the
5 purchaser received the catalog and had an opportunity to read the
6 warranty ... prior to or at the time of the sale The question of
7 whether the catalog containing the limited warranty became part of
8 the parties' bargain is ordinarily one of fact for the jury.¹¹¹

9 Ford's reliance on *Yancey v. Remington Arms Co., LLC*, where a district court applying the
10 law of North Carolina dismissed written-warranty claims against a rifle manufacturer for failing to
11 prove reliance is misplaced.¹¹² That court overlooked the fact that, decades before, the North
12 Carolina Supreme Court ("NCSC") recognized that while reliance remains a requirement of an
13 express-warranty claim, it can be readily inferred. In *Kinlaw v. Long Mfg. N. C., Inc.*, the North
14 Carolina supreme court reversed the trial court's dismissal (affirmed by a lower appellate court) of
15 an express-warranty claim arising from the alleged breach of a tractor manufacturer's written
16 warranty.¹¹³ The court ruled that the lack of privity does not bar an express-warranty claim where
17 the manufacturer makes representations about the product to induce a purchase.¹¹⁴ *Kinlaw* and its
18 ease-of-inferring-reliance rule remains controlling law in North Carolina, notwithstanding *Yancey's*
19 failure to recognize it.¹¹⁵

20 Ford also contends it need not honor its written warranty to California purchasers absent
21 express allegations of reliance.¹¹⁶ California law, however, is to the contrary. As the district court
22 held in *In re Toyota Motor Corp.*, reliance, while perhaps once required in some states' common

23 ¹¹¹ *LWT, Inc. v. Childers*, 19 F.3d 539, 541 (10th Cir. 1994).

24 ¹¹² *Yancey v. Remington Arms Co., LLC*, 2013 U.S. Dist. LEXIS 140397, at *7, *26 (M.D.N.C.
25 Sept. 30, 2013).

26 ¹¹³ *Kinlaw v. Long Mfg. N. C., Inc.*, 259 S.E.2d 552, 553-54 (N.C. 1979).

27 ¹¹⁴ *Id.* at 555-57 (explaining with approval movement away from privity requirement in other
28 jurisdictions).

¹¹⁵ See, e.g., *Prichard Enters v. Adkins*, 858 F. Supp. 2d 576, 585 (E.D.N.C. 2012); *Bussian v. DaimlerChrysler Corp.*, 411 F. Supp. 2d 614, 621 (M.D.N.C. 2005); *Bernick v. Jurden*, 293 S.E.2d 405, 414 (N.C. 1982).

¹¹⁶ Def. Mem. at 36 n.17 (citing *Keegan v. Am Honda Motor Co.*, 284 F.R.D. 504, 546 (C.D. Cal. 2012)).

1 law, is not required under the U.C.C.¹¹⁷ As to Ford’s violation of California’s Beverly-Song Act, the
 2 claim does not require privity or reliance. Indeed, “the Act applies to new motor vehicle
 3 manufacturers who make express warranties.”¹¹⁸ It does not state or imply that reliance is necessary
 4 to create an express warranty.¹¹⁹ Moreover, the FAC explicitly alleges that Ford’s written warranty
 5 “formed the basis of the bargain” for each Plaintiff. ¶¶ 297-98, 423, 473.

6 Ford’s remaining authorities do not address manufacturers’ written warranties extended to
 7 purchasers as part of the purchase transaction. Instead, most concern advertising and other
 8 representations aside from those in the contract. In *Hydroxycut Mktg. Litig. & Sales Prac. Litig. v.*
 9 *Iovate Health Sciences Grp.*, for example, the complaint did not allege breach of a written warranty
 10 – indeed, it provided no indication as to “which affirmations or promises formed the ‘basis of their
 11 bargain.’”¹²⁰ The complaints in *Walters v. Carson*¹²¹ and *Mills v. Bristol-Myers Squibb Co.*¹²² also
 12 did not allege a written warranty. In *Horowitz v. Stryker Corp.*, the court complained that “Plaintiff
 13 does not even describe how this representation [about a medical device] was made.”¹²³ In *Hobbs v.*
 14 *General Motors Corp.*, the alleged representation about a “full size spare” tire did not appear in the
 15 written warranty.¹²⁴ In *Yurcic v. Purdue Pharma, L.P.*, there was no written warranty or no public
 16 representations to support an express-warranty claim.¹²⁵ These cases are easily distinguished,
 17 because the FAC specifically identifies the actual terms of Ford’s Limited Warranty breached by
 18

19
 20 ¹¹⁷ *In re Toyota UA I*, 754 F. Ct. Supp. 2d at 1183 n.22 (quoting *Weinstat v. Dentsply Int’l, Inc.*,
 103 Cal. Rptr. 3d 614, 626 (Cal. App. 2010)).

21 ¹¹⁸ *Jensen v. BMW of North Am., Inc.*, 41 Cal. Rptr. 2d 295, 304 (Cal. Ct. App. 1995).

22 ¹¹⁹ See CAL. CIV. CODE § 1791.2(a)(1) (“A written statement arising out of a sale to the
 23 consumer of a consumer good pursuant to which the manufacturer ... undertakes to preserve or
 maintain the utility or performance of the consumer good or provide compensation if there is a
 failure in utility or performance.” (b) provides: “if such words [‘warrant’ or ‘guarantee’] are used
 then an express warranty is created.”).

24 ¹²⁰ *Hydroxycut Mktg. Lit. & Sales Prac. Lit. v. Iovate Health Sciences Grp.*, 801 F. Supp. 2d
 993, 1008 (S.D. Cal. 2011).

25 ¹²¹ *Walters v. Carson*, 2012 U.S. Dist. LEXIS 178473, at *8-9 (D.N.J. Dec. 17, 2012).

26 ¹²² *Mills v. Bristol-Myers Squibb Co.*, 2011 U.S. Dist. LEXIS 90357, at *7-8 n.3 (D. Ariz. Aug.
 11, 2011).

27 ¹²³ *Horowitz v. Stryker Corp.*, 613 F. Supp. 2d 271, 286 (E.D.N.Y. 2009).

28 ¹²⁴ *Hobbs v. General Motors Corp.*, 134 F. Supp. 2d 1277, 1280-81 (M.D. Ala. 2001).

¹²⁵ *Yurcic v. Purdue Pharma, L.P.*, 343 F. Supp. 2d 386, 394-95 (M.D. Pa. 2004).

1 Ford's inability to repair Plaintiffs' defective MyFord Touch systems. ¶¶ 299, 301, 386, 422, 472,
2 526, 578, 623,676, 722, 770, 826, 875, 927, 978, 1031, 1076.

3 In short, the FAC alleges that Ford provided its Limited Warranty to every Plaintiff as part
4 of each Plaintiff's transaction and identified the warranty as included with each purchase. Privity is
5 not required to enforce the warranty and, to the extent any state requires reliance, it is easily inferred
6 from these circumstances.

7 **3. To the extent applicable, Plaintiffs have satisfied the U.C.C. notice**
8 **requirements.**

9 Ford next contends that Plaintiffs from nine states failed to provide Ford with the notice set
10 forth in U.C.C. § 2-607. *See* Def. Mem. at 37, n.19. Preliminarily, this U.C.C. section only requires
11 notice to a "seller." *See* U.C.C. § 2-607(3). Courts distinguish between an immediate seller (which
12 Ford is not) and a remote manufacturer (which Ford is), and hold that § 2-607(3)'s notice
13 requirement applies only to the former but not to the latter.¹²⁶ There is also case law from the
14 majority of those states recognizing that the filing of a complaint itself can satisfy this notice
15 requirement.¹²⁷ Regardless, Ford's contention that it lacked the requisite knowledge under U.C.C.
16 § 2-607 is disingenuous in light of the overwhelming allegations in the FAC concerning consumer
17 complaints, the NHTSA database, news articles and direct notice *of this particular problem* Ford
18
19

20 ¹²⁶ *See Rosales v. FitFlop USA, LLC*, 882 F. Supp. 2d 1168, 1178 (S.D. Cal. 2012) ("when
21 claims are against a defendant in its capacity as a manufacturer, not as a seller, plaintiff is not
22 required to give notice") (citations omitted).

23 ¹²⁷ **(Arizona):** *Hearn v. R.J. Reynolds Tobacco Co.*, 279 F. Supp. 2d 1096, 1116 (D. Ariz.
24 2003); **(Colorado):** *Cooley v. Big Horn Harvestore Sys., Inc.*, 813 P.2d 736, 741 (Colo. 1991);
25 **(Iowa):** *Wright v. Brooke Grp. Ltd.*, 114 F. Supp. 2d 797, 830 (N.D. Iowa 2000); **(Ohio):** *Chemtrol*
Adhesives, Inc. v. Am. Mfrs. Mut. Ins. Co., 537 N.E.2d 624, 636 (Ohio 1989); **(Pennsylvania):**
Precision Towers, Inc. v. Nat-Com, Inc., 2002 Phila. Ct. Com. Pl. LEXIS 16, at *13 (Sept. 23,
2002); **(Virginia):** *Board of Dirs. of Bay Point Condominium Ass'n, Inc. v. RML Corp.*, 2002 Va.
Cir. LEXIS 10, at *55-57 (Va. Cir. Ct. Jan. 28, 2002).

26 In the remaining states (**Florida** and **Texas**), there is authority that U.C.C. § 2-607 does not
27 require notice to a remote manufacturer like Ford. *See Federal Ins. Co. v. Lazzara Yachts of N. Am.,*
28 *Inc.*, 2010 U.S. Dist. LEXIS 28865, at *14 (M.D. Fla. Mar. 25, 2010); *Vintage Homes, Inc. v.*
Coldiron, 585 S.W. 2d 886, 888 (Tex. Civ. App. 1979). **Alabama** also recognizes that the notice
requirement is "not to be automatically applied." *Hobbs v. GMC*, 134 F. Supp. 2d 1277, 1284 (M.D.
Ala. 2001).

1 received from Plaintiffs and similarly situated consumers. *See, e.g.*, ¶¶ 4, 63, 144, 194.¹²⁸ The court
2 can reject Ford’s argument to dismiss the warranty claims on this basis.

3 **4. Lack of direct privity does not require dismissal of Plaintiffs’ common-law**
4 **breach-of-warranty claim under Arizona law.**

5 Plaintiffs do not contest Ford’s argument that Arizona law requires privity for breach of
6 express and implied warranty claims under the U.C.C. *See* Def. Mem. at 39, 43. But that limitation
7 only applies to Counts II and III of the FAC – not to Count IV’s common-law breach-of-contract
8 claim. The Arizona Supreme Court held in *Seekings v. Jimmy GMC, Inc.* that Arizona law does not
9 require privity for such claims that arise *outside* of the U.C.C.¹²⁹ Based on *Seekings*, the court in *In*
10 *re Horizon Organic Milk Plus DHA Omega-3 Mktg. & Sales Practice Litig.* recently rejected a
11 virtually identical attempt by a remote manufacturer to dismiss an Arizona breach-of-express-
12 warranty claim that arose outside of the U.C.C., even where there was no privity.¹³⁰ This Court
13 should do the same here, and deny Ford’s request to dismiss Count IV.¹³¹

14 ¹²⁸ Ford’s argument that Plaintiffs waited an unreasonable amount of time to commence
15 litigation is similarly unavailing. *See* Def. Mem. at 39. Plaintiffs are consumers, many of whom
16 brought their vehicles into Ford dealers in an attempt to remedy the problems with their MyFord
17 Touch systems. The comments to the rule indicate that the rule should be given a liberal
18 construction under the circumstances. U.C.C. § 2-607 (2012), *Official Comment 4* (“[a] reasonable
19 time for notification from a retail consumer is to be judged by different standards so that in his case
20 it will be extended, for the rule requiring notification is designed to defeat commercial bad faith, not
21 to deprive a good faith consumer of his remedy”).

22 ¹²⁹ *Seekings v. Jimmy GMC, Inc.*, 638 P.2d 210, 215 (Ariz. 1981) (“lack of privity between a
23 manufacturer and retail purchaser does not preclude a claim outside the U.C.C. for breach of express
24 warranty”).

25 ¹³⁰ *In re Horizon Organic Milk Plus DHA Omega-3 Mktg. & Sales Practice Litig.*, 2013 U.S.
26 Dist. LEXIS 105830, at *66-70 (S.D. Fla. 2013).

27 ¹³¹ Ford contends the Court should dismiss the FAC’s breach-of-contract claims also because the
28 FAC does not allege a contract between Ford and each Plaintiff. Def. Mem. at 40 n.20. But the FAC
does alleges such contracts. *E.g.*, ¶ 297 (“In connection with the sale (by purchase or lease) of each
one of its new vehicles, Ford provides an express limited warranty on each vehicle. In those war-
ranties, Ford promises to repair any defect or malfunction that arises in the vehicle during a defined
period of time. This warranty is provided by Ford to the vehicle owner in writing.”). The Ford New
Vehicle Limited Warranty Guide explicitly states that Ford itself made the warranty promises to the
Plaintiffs. *E.g.*, Declaration of Randall W. Edwards, Ex.A (Dkt. No. 57-2) at 8 (“[t]his chart gives a
general summary of your warranty coverage provided by Ford Motor Company under the New
Vehicle Limited Warranty”); *id.* at 9 (“Ford provides the New Vehicle Limited Warranty in order to
remedy any such defects that result in vehicle part malfunction or failure during the warranty
period”). Ford’s promises to buyers create contract privity. *See, e.g., Rothe v. Maloney Cadillac,*
Inc., 518 N.E.2d 1028, 1030-31 (Ill. 1988) (“we recognized in *Szajna* the privity of contract which
exists between a manufacturer and consumer when the manufacturer makes a contractual promise
(express warranty) directly to the consumer”).

1 **E. Plaintiffs properly state breach-of-implied-warranty claims**

2 From its launch in 2010, Ford hailed the MyFord Touch as an “intuitive driver experience”
 3 intended to significantly enhance the safety and convenience of Ford vehicles. *See* ¶¶ 5-6, 235, 251-
 4 256, 258-59. In reality, however, the MyFord Touch system is, and always has been, plagued with
 5 numerous defects. These are not minor inconveniences that merely interfere with entertaining
 6 passengers in the Class Vehicles. Rather, as described in the FAC, these system failures directly
 7 jeopardize the safety of the driver and passengers, and other motorists and pedestrians. ¶¶ 7-14, 257,
 8 261-70, 288-91. Because the Class Vehicles equipped with the MyFord Touch system do not
 9 conform to their ordinary and intended use, Ford has breached the implied warranty of
 10 merchantability.¹³²

11 **1. Class vehicles equipped with the MyFord Touch system do not conform to their**
 12 **ordinary, intended use.**

13 Ford argues that, because Plaintiffs have not specifically alleged that they were unable to
 14 drive the Class Vehicles and “[t]he ordinary purpose of a vehicle is to drive,” Plaintiffs’ breach of
 15 implied warranty of merchantability claims fail. Def. Mem. at 42. Under Ford’s unreasonably
 16 narrow view, if it delivers a car that will start and can be driven, that is enough. But that is not the
 17 law. Indeed, Ford’s own authorities undermine its argument.¹³³ In short, “California courts reject the
 18 notion that merely because a vehicle provides transportation from point A to point B, it necessarily
 19 does not violate the implied warranty of merchantability.”¹³⁴

22 ¹³² *See Berenblat v. Apple, Inc.*, 2009 U.S. Dist. LEXIS 80734, at *2 (N.D. Cal. Aug. 21, 2009)
 23 (“[m]erchantability’ requires that a product conform to its ordinary and intended use”).

24 ¹³³ For example, Ford relies on *Skelton v. General Motors Corp.*, 500 F. Supp. 1181 (N.D. Ill.
 25 1980), for the proposition that breach-of-implied-warranty claims against a car manufacturer fail
 26 where the subject vehicles are still capable of providing transportation. In *Skelton*, however, the
 27 plaintiffs alleged that the defendant replaced the original transmission with an inferior model, but
 they did not allege that the replacement transmission adversely impacted the vehicle’s operation. *Id.*
 at 1191-92. Here, Plaintiffs have alleged that the defects in the MyFord Touch system affect
 primary driving functions of the Class Vehicles. *See* ¶¶ 7, 262-66, 291. *Skelton* accordingly is
 inapposite.

28 ¹³⁴ *Keegan v. Am. Honda Motor Co.*, 838 F. Supp. 2d 929, 946 (C.D. Cal. 2012) (internal
 citations omitted).

1 Numerous other courts across the country agree. Ford cannot escape liability under
2 Plaintiffs' implied-warranty-of-merchantability claims merely because the Class Vehicles provide
3 basic transportation.¹³⁵

4 Moreover, Ford's argument improperly ignores the fact that it *specifically intended* and, in
5 fact, marketed and advertised that the MyFord Touch would improve the Class Vehicles' safety and
6 functionality. As Plaintiffs allege, "infotainment systems" like the MyFord Touch system are
7 "designed to attract buyers who want to manage available technology while on the road, while
8 minimizing distractions, and maximizing safety." ¶ 2.¹³⁶ Understanding this, "Ford aggressively
9 promoted its MyFord Touch system as a revolutionary technology that enhances the safety and
10 convenience of Ford vehicles." ¶¶ 5, 251-56, 258-59.

11 Additionally, Ford charges a hefty premium of approximately \$1,000 to add the "state-of-
12 the-art technology" to new vehicle purchases, which clearly indicates that Ford perceives the
13 MyFord Touch as a considerable enhancement to the safety and functionality of the Class Vehicles.
14 ¶ 241. Accordingly, it is reasonable to infer that the Class Vehicles' intended purpose is not merely
15
16

17 ¹³⁵ *Galitski v. Samsung Telecomms. Am., LLC*, 2013 U.S. Dist. LEXIS 171908, at *39-40 (N.D.
18 Tex. Dec. 5, 2013) (holding that, despite still being able to use his Samsung Galaxy phone, plaintiff
19 nonetheless plead a plausible claim for breach of implied warranty, because he alleged there was a
20 "[a] defect that causes [his] phone to randomly freeze, shut down, and power-off while in standby
21 mode, thereby making it impossible to receive or deliver calls, messages or data and requiring him
22 to remove the battery, reinsert it, and re-power the phone just for it to work again"); *Date v. Sony
23 Elecs., Inc.*, 2010 U.S. Dist. LEXIS 96870, at *37-38 (E.D. Mich. Sept. 16, 2010) (holding that
24 plaintiffs properly stated a claim for breach of implied warranty against Sony on grounds that
25 Sony's TVs could not "accept and display 1080p signal natively" as advertised, despite plaintiffs'
26 admission that they were still able to watch regular programming on the Sony TVs); *Stearns v.
27 Select Comfort Retail Corp.*, 2009 U.S. Dist. LEXIS 48367 (N.D. Cal. June 5, 2009) ("[T]here must
28 be a fundamental defect that renders the product unfit for its ordinary purpose. At the same time,
this does not mean the alleged defect must preclude any use of the product at all."); *see also Isip v.
Mercedes-Benz USA, LLC*, 155 Cal. App. 4th 19, 27 (2007) (rejecting notion that a car is fit for its
ordinary purpose merely because it can still be driven, and explaining that "[a] vehicle that smells,
lurches, clanks, and emits smoke over an extended period of time is not fit for its intended
purpose").

¹³⁶ *See also* ¶ 240 ("As Ford's President stated at the time MyFord Touch was rolled out, '[a]s
we began developing [MyFord Touch's] capability, we saw this groundswell of new technology,
new functionality and incredible capability opening up to consumers It was readily apparent that
unless we devised an intuitive interface to help drivers manage these capabilities, they could detract
– and possibly distract – from the driving experience.'").

1 basic transportation, but, rather, transportation with enhanced technological and safety features.¹³⁷
 2 Finally, Ford overlooks the fact that several Plaintiffs were unable to use their vehicles at all while
 3 they were the subject of fruitless attempts to repair the MyFord Touch systems. *See* ¶¶ 77, 93, 104,
 4 155. In sum, because the Class Vehicles do not, and cannot, meet their intended use, there can be no
 5 real dispute that Ford has breached the implied warranty of merchantability. ¶¶ 7-14, 257, 261-70,
 6 288-91.

7 **2. The Alabama, California, and North Carolina implied-warranty-of-**
 8 **merchantability claims are not barred by the absence of privity.**¹³⁸

9 **a. Plaintiff Battle can cure her implied-warranty claim under Alabama law**
 10 **by amendment.**

11 Alabama Plaintiff Battle acknowledges that her common-law implied-warranty claim
 12 requires privity with Ford. She can cure this defect, however. Alabama offers an alternative to
 13 common-law implied warranty that does not require privity where, like here, the unmerchantability
 14 claim is based on allegations of an “unreasonably dangerous” product.¹³⁹ Accordingly, Plaintiff
 15 Battle should be given the opportunity to replead this claim.
 16
 17
 18

19 ¹³⁷ *See Fleisher v. Fiber Composites, LLC*, 2012 U.S. Dist. LEXIS 157343, at *21-23 (E.D. Pa.
 20 Nov. 2, 2012) (“The FAC alleges that Fiber ‘marketed, promoted, and sold Portico [decking
 21 material] products to increase the aesthetic appeal, as well as to enhance the outdoor enjoyment of a
 22 consumer’s properties.’ We agree with Plaintiffs that, based on these allegations in the FAC, it is
 23 reasonable to infer that the ordinary use of outdoor decking material, and the use for which Fiber
 24 intended Portico, is in part to ‘increase the aesthetic appeal’ and ‘enhance the outdoor enjoyment’ of
 25 Plaintiffs’ residential properties. Thus, the FAC adequately alleges that under the warranty of
 merchantability, the minimum quality required of Portico is one which the consumer expects to
 satisfy a certain aesthetic expectation.”); *Date*, 2010 U.S. Dist. LEXIS 96870, at *38 (denying
 defendants’ motion to dismiss plaintiffs’ implied warranty claims and stating that the “Court cannot
 conclude, as a matter of law, that these 1080p televisions were fit for their intended use when they
 were allegedly unable to perform to the essential promises made in their advertisements and
 marketing materials”).

26 ¹³⁸ Plaintiffs withdraw the implied-warranty-of-merchantability claims of Plaintiff Aguanno
 (Arizona – Count I), Plaintiff Makowski (Connecticut – Count III), Plaintiff Oremland (Florida –
 27 Count III), Plaintiff Mitchell (Iowa – Count III), and Plaintiffs Miller and Purcell (New York –
 Count IV). Plaintiffs also dismiss the breach of express warranty claim under the Arizona U.C.C.
 for lack of privity.

28 ¹³⁹ *See, e.g., White Consol. Indus., Inc. v. Wilkerson*, 737 So. 2d 447, 449, 451 (Ala. 1999).

1 **b. The California Plaintiffs may bring implied-warranty-of-merchantability**
 2 **claims despite a lack of privity with Ford.**

3 The California Plaintiffs bring breach-of-implied-warranty claims under California
 4 Commercial Code § 2314 (Count IV) and the Song-Beverly Act (Count VIII). Ford contends that
 5 both of these claims should be dismissed for lack of privity. This argument is meritless.

6 Under California Commercial Code § 2314, a plaintiff asserting breach-of-warranty claims
 7 must stand in vertical contractual privity with the defendant.¹⁴⁰ But California courts recognize a
 8 well-established exception to the privity requirement where, as here, the consumer is a third-party
 9 beneficiary of the contract between the manufacturer and a third party.¹⁴¹

10 In California, courts specifically “permit a third party to bring an action even though he is
 11 not specifically named as a beneficiary, if he is *more than incidentally benefited by the contract.*”¹⁴²
 12 Here, there can be no real dispute that the California Plaintiffs “more than incidentally benefitted”
 13 from the contract between Ford and its authorized dealerships, and, thus, may assert breach-of-
 14 implied-warranty claims under California Commercial Code § 2314 as third-party beneficiaries.¹⁴³

15 Ford’s reliance on *Clemens v. DaimlerChrysler Corp.*¹⁴⁴ in support of its privity argument is
 16 misplaced. In *Clemens*, the Ninth Circuit considered an implied-warranty claim that a vehicle
 17 purchaser asserted against the manufacturer from which he did not directly purchase the vehicle,

18 ¹⁴⁰ *See Anunziato v. eMachines, Inc.*, 402 F. Supp. 2d 1133, 1141 (C.D. Cal. 2005).

19 ¹⁴¹ *See In re Toyota UA I*, 754 F. Supp. 2d at 1185 (“where a plaintiff pleads that he or she is a
 20 third-party beneficiary to a contract that gives rise to the implied warranty of merchantability,
 21 he/she does not say what the holding says may assert a claim for the implied warranty’s breach”);
 22 *Cartwright v. Viking Indus., Inc.*, 249 F.R.D. 351, 356 (E.D. Cal. 2008) (plaintiffs were, as third-
 23 party beneficiaries, entitled to maintain a breach-of-implied-warranty claim against the
 24 manufacturer where plaintiffs, not the distributors, were the intended consumers); *Arnold v. Dow*
 25 *Chem. Co.*, 91 Cal. App. 4th 698, 720 (2001) (finding, based on the fact that distributors and
 26 retailers were not intended to be the ultimate consumers, that plaintiff could maintain breach-of-
 27 implied-warranty claim notwithstanding lack of privity with pesticide manufacturer).

28 ¹⁴² *Gilbert Fin. Corp. v. Steelform Contracting Co.*, 82 Cal. App. 3d 65, 69-70 (1978) (emphasis
 added).

¹⁴³ *See In re Toyota UA I*, 754 F. Supp. 2d at 1185 (holding that consumers were intended third-
 party beneficiaries where they “pled that they purchased vehicles from a network of dealers who are
 agents of [Toyota],” that the “dealers were not intended to be the ultimate consumers of the
 Defective Vehicles and have no rights under the warranty agreements provided with the Defective
 Vehicles,” and “the warranty agreements were designed for and intended to benefit the ultimate
 consumers only”).

¹⁴⁴ *Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017 (9th Cir. 2008).

1 ultimately affirming the district court’s dismissal based on the lack of vertical privity.¹⁴⁵ The
 2 *Clemens* court, however, did not consider the third-party beneficiary exception to the vertical privity
 3 requirement.¹⁴⁶ Instead, after noting various *other* exceptions to the privity requirement, the court
 4 went on to note that the plaintiff did not seek applications of any of the established exceptions.¹⁴⁷
 5 Rather, the plaintiff in *Clemens* invited the creation of a “similar exception” for his case, an
 6 invitation that the court declined, noting that “a federal court sitting in diversity is not free to create
 7 new exceptions to it.”¹⁴⁸ The Ninth Circuit thus had no occasion in *Clemens* to consider the
 8 California appellate cases recognizing the third-party beneficiary exception to the vertical privity
 9 requirement of implied warranty claims.

10 Additionally, Ford’s argument that the Song-Beverly Act requires “vertical privity” between
 11 the California Plaintiffs and Ford has been soundly rejected by other courts.¹⁴⁹ The Court should
 12 similarly reject that argument here.

13 **c. Privity is not required for implied-warranty-of-merchantability claims**
 14 **under North Carolina law.**

15 Under North Carolina law, “the absence of an allegation of privity between plaintiff and
 16 warrantor in the sale of the warranted item is not fatal to the claim.”¹⁵⁰ North Carolina courts have
 17 also observed that “the UCC is neutral on the requirement of privity, or a contractual relationship,
 18 when the defendant is not the plaintiff’s immediate seller” and that North Carolina’s “allegiance to
 19 the principle of privity has, at best, wavered.”¹⁵¹

20 ¹⁴⁵ *Id.* at 1021, 1023-24.

21 ¹⁴⁶ *Id.* at 1023.

22 ¹⁴⁷ *Id.*

23 ¹⁴⁸ *Id.* at 1024.

24 ¹⁴⁹ *See, e.g., Ehrlich*, 801 F. Supp. 2d at 921 (distinguishing conflicting case law and citing,
 25 among other sources, *Witkin*, for proposition that Song-Beverly eliminates vertical privity
 26 requirement and distinguishing split of authority on basis that courts finding vertical privity
 27 requirement ignored the plain language of statute); *Gonzalez v. Drew Indus. Inc.*, 750 F. Supp. 2d
 28 1061, 1072 (C.D. Cal. 2007) (“although defendants argue that the implied warranty claims should
 be dismissed because they have no vertical privity with Gonzalez, this argument ignores the plain
 language of the Song-Beverly Act, which has been interpreted by a sister-district court in this
 district as explicitly imposing an implied warranty on manufacturers as well as retail sellers”) (citing
Gusse v. Damon Corp., 470 F. Supp. 2d 1110, 1116 n.9 (C.D. Cal. Jan. 17, 2007)).

¹⁵⁰ *Bernick v. Jurden*, 293 S.E.2d 405, 414 (N.C. 1982).

¹⁵¹ *Id.* (citations omitted).

1 In an analogous case, the North Carolina Court of Appeals reversed a trial court's dismissal
 2 of a lessee's cross claim against a seller-supplier for breach of express warranty due to alleged lack
 3 of privity.¹⁵² The lessee had originally been sued by the lessor, but then named the seller-supplier as
 4 a third-party defendant. The seller-supplier moved to dismiss the lessee's cross claims on grounds
 5 that the seller-supplier was only in privity with the lessor, who had purchased the equipment. In
 6 reversing the trial court's dismissal of the lessee's cross claim, the *Coastal Leasing* court stated:

7 In the present case, [lessee] alleged express and implied warranties
 8 flowing to him as third-party beneficiary of the equipment sales
 9 contract, breach of those warranties and damages Further, [lessee]
 10 has the right to try to prove that the seller's direct representations to
 him, in addition to any express or implied warranties to the lessor,
 formed part of the "basis of the bargain" for purposes of triggering
 remedies for breach of express warranty.¹⁵³

11 Similar to *Coastal Leasing*, Plaintiff Fink is a third-party beneficiary of the transaction
 12 between Ford and the authorized Ford dealership from which he purchased the Class Vehicle. *See*
 13 ¶ 176. Accordingly, Plaintiff Fink's implied-warranty claims under North Carolina law should not
 14 be dismissed.

15 **3. Notice is either not required or has been given because Ford knew of the defects**
 16 **in the MyFord Touch System and concealed them from Plaintiffs**

17 Plaintiffs have either met or are excused from their obligation to provide Ford with notice
 18 under Section 2-607(3)(a) of the Uniform Commercial Code. The FAC contains detailed allegations
 19 that Ford knew of the defect well before the lawsuit was filed through Ford's own internal
 20 investigations and testing and consumer complaints. ¶¶ 8, 10-12, 262-91. Under these
 21 circumstances, any notice before the filing of this lawsuit is unnecessary – the lawsuit itself is
 22 sufficient to satisfy any statutory notice requirements.¹⁵⁴

23
 24
 25 ¹⁵² *See Coastal Leasing Corp. v. O'Neal*, 405 S.E.2d 208 (N.C. Ct. App. 1991).

26 ¹⁵³ *Id.* at 212.

27 ¹⁵⁴ *See In re Bridgestone/Firestone Inc. v. Wilderness Tires Prods. Liab. Litig.*, 155 F. Supp. 2d
 28 1069, 1110-11 (S.D. Ind. 2001), *rev'd on other grounds*, 288 F.3d 1012 (7th Cir. 2002) (holding
 that plaintiffs satisfied U.C.C. § 2-607's notice requirement, and the policies behind it, by filing the
 complaint, and explaining that "no purpose would be served by requiring pre-litigation notice"
 because the defendant had "ample notice" of the defects and chose not to remedy them).

1 **F. Ford’s scattershot arguments challenging the FAC’s Magnuson-Moss Warranty Act**
 2 **claim fail.**

3 In three short paragraphs, Ford asserts three cursory arguments to dismiss the FAC’s
 4 Magnuson-Moss Warranty Act (“MMWA”) claims. It first argues that a MMWA claim requires a
 5 viable state-law breach-of-warranty claim. Def. Mem. at 45. As shown above, the FAC alleges
 6 viable express and implied-warranty claims.

7 Ford next asserts that the MMWA does not protect the seven Plaintiffs who leased, rather
 8 than purchased, their vehicles, who, according to Ford, are not “consumers” under the MMWA.
 9 First, Ford’s argument is belied by the terms of its warranty, which provides:

10 The New Vehicle Limited Warranty and the Emissions Warranties
 11 described in this booklet apply to your vehicle if: ...

- 12 • it was originally sold *or leased* by Ford Motor Company or one of
 13 its dealers in the United States or U.S Federalized Territories; and it
 14 was originally registered/licensed and operated in the United States,
 15 U.S. Federalized Territories, or Canada.¹⁵⁵

16 If Ford intended to exclude lessees like the seven Plaintiffs from its written warranties, it would not
 17 have drafted the warranties to include leased vehicles.

18 Further, Congress enacted the MMWA to enhance the enforceability of warranties on con-
 19 sumer products and protect the “ultimate user of the product.”¹⁵⁶ The MMWA allows a “consumer”
 20 to bring a suit where the consumer claims to be “damaged by the failure of a supplier, warrantor, or
 21 service contractor to comply with any obligation under this [Act] or under a written warranty,
 22 implied warranty, or service contract.”¹⁵⁷ Pertinent here, the MMWA defines “consumer” to
 23 encompass lessees like the Plaintiffs. The lessee Plaintiffs are “consumers” under the MMWA. To
 24 qualify as a consumer who may file suit under the MMWA, a person must come within one of three
 25 alternative categories of consumers, the third of which is a “catch-all” category: “any other person

25 ¹⁵⁵ See, e.g., Edwards Decl., Ex. A (Dkt. No. 57-2), at 4 (emphasis added).

26 ¹⁵⁶ See, e.g., *Am. Honda Motor Co. v. Cerasani*, 955 So. 2d 543, 545 (Fla. 2007); *Szubski v.*
 27 *Mercedes-Benz, U.S.A., L.L.C.*, 796 N.E.2d 81, 88 (Ct. Com. Pl. Ohio 2003); *Cohen v. Am Gen.*
 28 *Corp.*, 264 F. Supp. 2d 616, 621 (N.D. Ill. 2003).

¹⁵⁷ 15 U.S.C. § 2310(d); see also *Voelker v. Porsche Cars N. Am., Inc.*, 353 F.3d 516, 522 (7th
 Cir. 2003).

1 who is entitled ... under applicable State law to enforce against the warrantor ... the obligations of
2 the warranty¹⁵⁸

3 This definition squarely encompasses the lessee Plaintiffs. Their lease agreements explicitly
4 extend Ford's warranty to their leased car and commenced on the first date of their lease. State laws
5 plainly permit them as lessees to enforce the warranty against Ford, the warrantor.¹⁵⁹ Nowhere does
6 Ford assert that state law somehow bars Ford's Limited Warranty from encompassing these
7 Plaintiffs' leases. Ford instead asserts its challenge to the lessee Plaintiffs *only* under the MMWA,
8 while not disputing that their warranty rights are no different from purchaser plaintiffs. *See* Def.
9 Mem. at 45. The lessee Plaintiffs thus are "consumers" entitled to sue Ford under the MMWA for
10 their injuries from Ford's inability to repair their defective MyFord Touch systems.¹⁶⁰

11 Courts have also rejected Ford's argument, holding that any interpretation of the MMWA as
12 inapplicable to leases "is inconsistent with the purposes of the [MMWA] – to protect the ultimate
13 user of the product."¹⁶¹ Most courts addressing the issue conclude that the MMWA applies to
14 warranties extended with a lease.¹⁶² Ford's outlier authorities, *DiCintio v. DaimlerChrysler Corp.*¹⁶³
15 and *Parrot v. Daimlerchrysler Corp.*¹⁶⁴ do not compel a different result here.¹⁶⁵

16
17 ¹⁵⁸ 15 U.S.C. § 2301(3). *See also In re Toyota Motor Corp. Unintended Acceleration Mktg.*,
2012 U.S. Dist. LEXIS 189744, at *326-28 (C.D. Cal. May 4, 2012) (*In re Toyota UA III*).

18 ¹⁵⁹ *See, e.g., Am. Honda Motor Co. v. Cerasani*, 955 So. 2d 543, 547 (Fla. 2007) (Florida Lemon
19 Law entitles lessees to enforce automobile warranties); *Uniflex, Inc. v. Olivetti Corp. of Am.*, 445
20 N.Y.S.2d 993, 995 (N.Y. App. Div. 1982) (lessee can pursue breach-of-warranty claim where
21 purchase order between the lessor and the manufacturer expressly extended to the lessee the right to
22 enforce against the manufacturer all warranties running from the manufacturer to the lessor);
Pearson v. DaimlerChrysler Corp., 813 N.E.2d 230, 240-41 (Ill. App. Ct. 2004) (lessee has standing
to enforce manufacturer's limited warranty); *Ryan v. Am. Honda Motor Co., Inc.*, 896 A.2d 454,
457 (N.J. 2006) (lessee "is entitled to enforce the warranty under New Jersey law"). *Lucy v. Kia
Motors Am., Inc.*, 48 Va. Cir. 460, 461-62 (1999) (lessees entitled to enforce express warranties
before and after passage of Virginia Motor Vehicle Warranty Enforcement Act).

23 ¹⁶⁰ *See Voelker*, 353 F.3d at 524; *Am. Honda*, 955 So. 2d at 546; *Cohen*, 264 F. Supp. 2d at 621
24 ("where the sale of a vehicle is merely to facilitate a lease, the issuance of the warranty accompanies
25 this sale, and the lessor explicitly transfers its rights in the warranty to the lessee – the lessee is
protected by the Magnuson-Moss Act"). Here, of course, there was no need for the Ford dealership
to assign the leased vehicle's warranty to the lessee Plaintiff because the warranty and the lease
agreement *directly* extended the warranty to them.

26 ¹⁶¹ *Szubski*, 796 N.E.2d at 88; *see also Cohen*, 264 F. Supp. 2d at 621 ("[t]his reading ... best
27 serves Congress' goal of 'better protecting consumers'") (citation omitted); *Mesa v. BMW of N.
Am., LLC*, 904 So. 2d 450, 458 (Fla. Dist. Ct. App. 2005) (same).

28 ¹⁶² *See In re Toyota UA III*, 2012 U.S. Dist. LEXIS 189744, at *329; *Am. Honda*, 955 So. 2d at
547-49; *Ryan*, 896 A.2d at 456-58; *Peterson v. Volkswagen of Am., Inc.*, 697 N.W.2d 61, 68, 70-71

1 Finally, Ford contends that Plaintiffs must exhaust dispute-resolution procedures before
 2 asserting their MMWA claims. Def. Mem. at 45-46. But the MMWA recognizes a futility exception
 3 to dispute-resolution requirements.¹⁶⁶ The FAC plainly alleges that Ford’s dispute-resolution
 4 procedure would be futile due to its demonstrated inability to cure the defects in its MyFord Touch
 5 systems. FAC ¶¶ 8, 12, 14, 16, 321.

6 **G. Plaintiff Makowski’s waiver**

7 Ford acknowledges that Plaintiff Makowski’s fraud-based claims (Counts I, IV, and V) were
 8 not released as a result of her acceptance of the outcome of the dispute-resolution procedure offered
 9 by Ford. Def. Mem. at 46. Her release therefore does not affect those claims. Plaintiff Makowski
 10 acknowledges that her express and implied-warranty claims against Ford (Counts II and III) have
 11 been released and thus withdraws them.

12 **H. The FAC alleges that Ford, without proper public notification, extended its Limited**
 13 **Warranty to cover the continuing malfunctioning of the MyFord Touch system,**
 14 **thereby alleging a California secret-warranty claim**

15 Ford’s secret-warranty-adjustment program qualifies as an unlawful “adjustment program”
 16 as that phrase is defined by the clear and straightforward language of California’s Motor Vehicle
 17 Warranty Adjustment Programs Act (“MVWAPA,” also known as the “Secret Warranty Law”).¹⁶⁷
 18 MVWAPA defines an “adjustment program” as a “program” or “policy” that (i) “expands or
 19 extends the consumer’s warranty beyond its stated limit,” or (ii) “under which a manufacturer offers

20 (Wis. 2005); *Mangold v. Nissan N. Am., Inc.*, 809 N.E.2d 251, 254-55 (Ill. App. Ct. 2004);
 21 *Dekelaita v. Nissan Motor Corp. in United States*, 799 N.E.2d 367, 372 n.3, 374-75 (Ill. App. Ct.
 22 2003); *Szubski*, 796 N.E.2d at 88; *Cohen*, 264 F. Supp. 2d at 621 n.1.

23 ¹⁶³ *DiCintio v. DaimlerChrysler Corp.*, 768 N.E.2d 1121 (N.Y. 2002).

24 ¹⁶⁴ *Parrot v. Daimlerchrysler Corp.*, 130 P.3d 530 (Ariz. 2006).

25 ¹⁶⁵ The state court decisions in *DiCintio* and *Parrot* do not control here. Ford cites them for their
 26 interpretation of the MMWA, a *federal* law. State-court interpretations of a federal statute do not
 27 govern here. This Court thus can apply the majority authorities finding that the MMWA reaches to
 28 warranties arising from vehicle leases and reject *DiCintio* and *Parrot*’s imprudent rulings as well
 as deserving their outlier status. Ford’s written warranty commenced on the first day of Plaintiffs’
 leases under the warranty’s express terms. Under *Voelker* and its many progeny, the lessee Plaintiffs
 can assert a MMWA claim. Even an Arizona appellate court applied *Parrot* narrowly (and rejected
DiCintio) to conclude that a lessee can assert a MMWA claim. *Mago v. Mercedes-Benz, U.S.A.,*
Inc., 142 P.3d 712, 718-19 (Ariz. Ct. App. 2006).

¹⁶⁶ See *In re Toyota UA I*, 754 F. Supp. 2d at 1188-89; *In re Toyota UA III*, 2012 U.S. Dist.
 LEXIS 189744, at *322-23.

¹⁶⁷ CAL. CIV. CODE § 1795.90, *et seq.*

1 to pay all or any part of the cost of repairing, or to reimburse consumers for all or part of any part of
 2 the cost of repairing, any condition that may substantially affect vehicle durability, reliability, or
 3 performance.”¹⁶⁸ If the alleged Ford program satisfies either of the criteria set forth in § 1795.90(d),
 4 it is an “adjustment program” within the meaning of the MVWAPA.

5 The Secret Warranty Law imposes duties on vehicle manufacturers for any adjustment
 6 programs. Among these are to notify consumers about the covered “condition” and the program’s
 7 “terms and conditions.”¹⁶⁹ The FAC alleges that Ford, faced with widespread customer complaints
 8 about its failing MyFord Touch systems, extended its written warranty on the APIM module, the
 9 MyFord Touch system’s “brain,” resulting in a four-year warranty for Ford vehicles and five years
 10 for Lincoln vehicles. ¶¶ 248, 274-78, 413. In particular, the FAC alleges that in early March 2012,
 11 Ford launched a Customer Satisfaction Program Campaign 12M01 (“Campaign 12M01”) targeting
 12 Ford vehicles equipped with the MyFord Touch system. Ford would replace the APIM module
 13 under this 12M01 campaign, which also extended the warranty period: “Ford’s Campaign 12M01
 14 extended warranty coverage of the APIM to four years of service from the warranty start date on
 15 Ford vehicles and five years on Lincoln vehicles, regardless of mileage.” ¶ 278.

16 Ford also issued multiple TSBs (¶ 274) that repeatedly updated SYNC software in vain
 17 efforts to resolve the system failures. ¶¶ 276-86, 413.

18 Key to the claim, the FAC alleges that Ford never gave the statute-mandated notice to
 19 California Plaintiffs and class members or to the California Department of Motor Vehicles of its
 20 warranty extension and series of secret TSB programs. ¶¶ 414-16. Ford does not directly dispute the
 21 allegation. This alone states a secret-warranty claim under § 1792.92. As the court held in *Morris v.*
 22 *BMW*, “Defendants do not deny that they failed to inform the public of the adjustment program
 23 stemming from the TSB. Plaintiffs thus have successfully alleged violations of the Secret Warranty
 24 Act.”¹⁷⁰

26 ¹⁶⁸ CAL. CIV. CODE § 1795.90(d).

27 ¹⁶⁹ CAL. CIV. CODE § 1795.92.

28 ¹⁷⁰ *Morris v. BMW*, 2007 U.S. Dist. Lexis 85513, at *18 (N.D. Cal. Nov. 7, 2009). *See also*
Marsikian v. Mercedes Benz USA, LLC, 2009 U.S. Dist. LEXIS 117012, at *18 (C.D. Cal. May 4,

1 Ford instead focuses on the secret TSB program, and tries to sweep Ford’s warranty
 2 extension into the TSB allegations. Def. Mem. at 47 (“Plaintiffs generically allege (wrongly) that
 3 the TSBs ‘expanded and/or extended the original warranty’”). The FAC plainly alleges, however,
 4 that Ford extended its written warranty coverage to four (Ford) or five (Lincoln) years without
 5 referencing the TSB program. ¶ 278.

6 Ford’s authorities are thus inapposite. None address an explicit, albeit secret, extension of
 7 the warranty period. For example, in *Corson v. Toyota Motor Sales, U.S.A., Inc.*, plaintiffs alleged
 8 an adjustment program based on Defendants’ issuance of a TSB.¹⁷¹ Defendants disputed that this
 9 TSB constituted such a program, and the court agreed because plaintiffs did not allege that the TSB
 10 directed dealers to provide free repair for a defective vehicle outside the warranty period.¹⁷² The
 11 court distinguished *Ehrlich v. BMW*¹⁷³ on the ground that the *Ehrlich* complaint did allege a secret
 12 program of free repairs beyond the warranty period¹⁷⁴ – just like the FAC here.

13 Similarly, in *Cholakyan v. Mercedes-Benz USA, LLC*, the court found that plaintiff “failed to
 14 allege facts that would support a finding that the TSB extended warranty coverage beyond the
 15 original period or constituted an adjustment program.”¹⁷⁵ And there likewise was no allegation of a
 16 warranty extension in *Cirulli v. Hyundai Motor Co.*¹⁷⁶ Rather, the complaint only alleged that
 17 defendant “repaired vehicles on a case-by-case basis” and quietly declined to charge “the most vocal
 18 [c]lass members”¹⁷⁷ This was insufficient.

19 In short, California’s Secret Warranty Law required Ford to notify all California Class
 20 Members of its warranty-coverage extension that provides free MyFord Touch system software
 21 updates and reinstallations. Ford failed to do so. The FAC sufficiently states a claim.

22
 23 2009) (complaint stated a Secret-Warranty Law claim by alleging defendant secretly extended its
 written warranty to cover a previously excluded defect).

24 ¹⁷¹ *Corson v. Toyota Motor Sales, U.S.A., Inc.*, 2013 U.S. Dist. LEXIS 63260, at *15 (C.D. Cal.
 Apr. 24, 2013).

25 ¹⁷² *Id.* at *17.

26 ¹⁷³ *Ehrlich*, 801 F. Supp. 2d at 920.

27 ¹⁷⁴ *See id.*

28 ¹⁷⁵ *Cholakyan v. Mercedes-Benz USA, LLC*, 796 F. Supp. 2d 1220, 1241 (C.D. Cal. 2011).

¹⁷⁶ *Cirulli v. Hyundai Motor Co.*, 2009 U.S. Dist. LEXIS 125139 (C.D. Cal. June 12, 2009).

¹⁷⁷ *Id.* at *16.

V. CONCLUSION

Ford's motion should be denied for the reasons set forth above.

DATED: February 21, 2014

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing was filed electronically via the Court's ECF system, on February 21, 2014. Notice of electronic filing will be sent to all parties by operation of the Court's electronic filing system.

Dated: February 21, 2014

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