No. 22-1245

United States Court of Appeals
For the Sixth Circuit

In re: FORD MOTOR COMPANY F-150 AND RANGER TRUCK FUEL ECONOMY MARKETING AND SALES PRACTICES LITIGATION

MARSHALL B. LLOYD; TRACEY TRAVIS; DUSTIN DAWSON and RICK SHAWLEY, on behalf of themselves and all others similarly situated; MICHAEL SMITH; EVAN ALLEN, AL BALLS, BRIAN LEGA, STEPHEN MATTSON, JOHN SAUTTER, RANDY TRANSUE, and RICK SHURTLIFF; RONALD J. DISMUKES, JEFFERY FOSHEE, and ACCURATE CONSTRUCTION CORPORATION; STEVE BEAVERS; DAVID BREWER, RYAN COMBS, VICTOR PEREZ, HAROLD BROWER, KYLE MANNION, NICHOLAS LEONARDI, DEAN KRINER, JAMES WILLIAMS, MATTHEW COMBS, DUSTIN WALDEN, STEVEN HULL, KENNETH BERNARD, MARK HILL, CODY SMITH, DANIEL GARDNER, ROBERT GOOLSBY, JOHN JUNG, MATTHEW SMITH, and JOSH BRUMBAUGH; RYAN HUBERT, individually and on behalf of all others similarly situated; WILLIAM DON COOK, individually and on behalf of all others similarly situated; HILARY GOODFRIEND, KATHRYN HUMMEL, and SCOTT FORMAN, individually and on behalf of others similarly situated; DILLON DRAKE; RAMIN SARTIP, DARREN HONEYCUTT, and AHMED ABDI, on behalf of themselves and all others similarly situated; JAMAR HAYNES, SCOTT WHITEHILL, MATTHEW BROWNLEE, BENJAMIN BISCHOFF, STEPHEN LESZCZYNSKI, CASSANDRA MORRISON, ROBERT RANEY, and DAVID POLLEY; MARK NAPIER, individually and on behalf of all others similarly situated; KEITH FENCL, individually and on behalf of all others similarly situated; MARK ARENDT, on behalf of himself and all others similarly situated; HARVEY ANDERSON; ROSALYNDA GARZA and JEFFREY QUIZHPI, individually and on behalf of others similarly situated; JEFFREY KALOUSTIAN, individually and on behalf of others similarly situated; RONALD CEREMELLO, RANDALL MAINGOT, GEORGE ANDREW RAYNE, ROBERT LOVELL, and SAMUEL HUFFMAN;

Plaintiffs-Appellants,

vs.

FORD MOTOR COMPANY,

Defendant-Appellee.

Appeal of Judgment of United States District Court
for the Eastern District of Michigan

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Sixth Circuit Rule 26.1(a), Plaintiffs-Appellants Marshall B. Lloyd, Tracey Travis, Dustin Dawson, Rick Shawley, Michael Smith, Evan Allen, Al Balls, Brian Lega, Stephen Mattson, John Sautter, Randy Transue, Rick Shurtliff, Ronald J. Dismukes, Jeffery Foshee, Steve Beavers, David Brewer, Ryan Combs, Victor Perez, Harold Brower, Kyle Mannion, Nicholas Leonardi, Dean Kriner, James Williams, Matthew Combs, Dustin Walden, Steven Hull, Kenneth Bernard, Mark Hill, Cody Smith, Daniel Gardner, Robert Goolsby, John Jung, Matthew Smith, Josh Brumbaugh, Ryan Hubert, William Don Cook, Hilary Goodfriend, Kathryn Hummel, Scott Forman, Dillon Drake, Ramin Sartip, Darren Honeycutt, Ahmed Abdi, Jamar Haynes, Scott Whitehill, Matthew Brownlee, Benjamin Bischoff, Stephen Leszczynski, Cassandra Morrison, Robert Raney, David Polley, Mark Napier, Keith Fencl, Mark Arendt, Harvey Anderson, Rosalynda Garza, Jeffrey Quizhpi, Jeffrey Kaloustian, Ronald Ceremello, Randall Maingot, George Andrew Rayne, Robert Lovell, and Samuel Huffman state as follows: they are not corporate entities and, as such, have no parent corporation and are not a publicly-held corporation owning 10% or more of stock of a party.

In further statement, Plaintiff-Appellant Accurate Construction Corporation states as follows: it is a corporation; but it does not have any parent corporation; nor is there a publicly-held corporation that holds 10% or more of Accurate Construction Corporation stock; nor does Accurate Construction Corporation have any relation to a party not present in this appeal with a substantial financial interest in the outcome of this litigation.

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I. STATEMENT IN SUPPORT OF ORAL ARGUMENT

All Plaintiffs request oral argument. This appeal involves issues of importance regarding: (1) whether 49 U.S.C. § 32919(b) expressly preempts state-law claims based on violations of duties that parallel federal requirements; (2) whether implied preemption bars state-law claims based on violation of duties that parallel federal requirements; (3) whether a case should be stayed or dismissed under the doctrine of primary jurisdiction when a government agency has delegated testing to private manufacturers under standards set by a private organization; and (4) whether Plaintiffs stated fraudulent misrepresentation and fraudulent omissions claims under state consumer protection statues and state common law.

II. STATEMENT OF JURISDICTION

The District Court had subject matter jurisdiction under 28 U.S.C. § 1332, because Plaintiffs and Defendant Ford Motor Company reside in different states. The District Court had supplemental jurisdiction over Plaintiffs' State law claims under 28 U.S.C. § 1367. The District Court also had jurisdiction over this lawsuit pursuant to 28 U.S.C. § 1332(a)(1), as modified by the Class Action Fairness Act of 2005, because Plaintiffs and Defendant are citizens of different states; there are more than 100 members of the Class; the aggregate amount in controversy exceeds $5 million, exclusive of attorneys' fees, interest, and costs; and Class members reside across the United States. 28 U.S.C. § 1332(d)(1)-(2).

After receipt on February 23, 2022 of the District Court's Final Judgment dismissing with prejudice all of Plaintiffs' claims in the underlying action (Judgment, RE 96, Page ID # 4908), Plaintiffs timely filed a Notice of Appeal on March 23, 2022. This Court has jurisdiction to review the Final Judgment under 28 U.S.C. §1291.

III. STATEMENT OF ISSUES

Whether Plaintiffs' claims are expressly preempted by 49 U.S.C. § 32919(b).

Whether Plaintiffs' claims are barred by the doctrine of implied preemption.

Whether Plaintiffs' claims should be stayed or dismissed based on the doctrine of primary jurisdiction.

Whether Plaintiffs state fraudulent misrepresentation and omission claims on which relief can be granted for violation of state consumer-protection statutes and state common law, based on the use of fraudulent fuel-economy estimate figures on the Monroney Stickers and other Ford materials given to consumers at the point of sale.

Whether Plaintiffs state fraudulent misrepresentation and omissions claims on which relief can be granted for violation of state consumer-protection statutes and state common law, based on Ford's failure to disclose in consumer advertisements,

marketing and at the point of sale the accurate fuel-economy estimates absent Ford's cheating on tests.[1]

IV. STATEMENT OF THE CASE

This appeal arises from a proposed class action brought by Plaintiffs from twenty-eight states who allege that Ford Motor Company cheated on fuel economy testing on some of its best-selling trucks. Using those doctored test results, Ford made fraudulent misrepresentations and omissions by reporting inaccurate fuel economy ratings on the Monroney Stickers[2] and in Ford's advertisements and marketing to consumers alleging that the Class Vehicles (hereinafter known as

[1] Plaintiffs do not appeal from the following rulings in that Order by the District Court: (1) its holding that Plaintiffs lack standing to assert claims arising under the laws of the states where no named plaintiff resides or has been injured, (2) its holding that Plaintiffs cannot bring class-action claims under the consumer-protection laws of seven States that bar class actions in State courts, (3) its holding that 49 U.S.C. § 32908(d) bars Plaintiffs' claims for breach of warranty, (4) its holding that Ford's New Vehicle Limited Warranty does not apply to design defects, (5) its holding that Plaintiffs could not satisfy the pre-suit notice requirement of the federal Magnuson-Moss Warranty Act by demonstrating that providing such notice would be objectively futile, (7) its dismissal of Plaintiffs' claim for breach of contract, and (8) its dismissal of Plaintiffs' claim for violation of the Michigan Consumer Protection Act. *See* Sections II, V, VI, VII, VIII, IX. Order, RE 95, Page ID # 4891-4893, 4899-4900, 4901-4902, 4902-4904, 4904-4906, 4906-4907.

[2] The Sticker, referred to as the "Monroney Sticker," is on the window of every new car and includes information about the vehicle's price, engine and transmission specifications, other mechanical and performance specs, fuel economy and emissions ratings, safety ratings, and standard and optional features.

"Vehicles") were "most fuel efficient" and "best in class" for fuel economy.[3] *See, e.g.*, Plaintiffs' First Amended Consolidated Complaint ("FAC"), RE 78, Page ID # 2056-2061 (¶¶ 9, 11, 15, 17-20, 22). The fuel economy ratings that Ford reported were false and misleading because they were not calculated according to federal law, and Plaintiffs' claims are predicated on state-law disclosure duties parallel to the federal duties.

The District Court did not address Plaintiffs' omissions-based state-law fraud claims with respect to both incorrect fuel estimates on the Monroney Sticker and in advertisements and marketing to consumers touting the Vehicles as "best in class." The District Court did not to use the word "omission" once in its 44-page opinion and instead focused solely on Plaintiffs' affirmative misrepresentation claims. And, the District Court erred further by fundamentally misunderstanding Plaintiffs' theory of liability and relying on inapposite case law. Plaintiffs do not seek to hold Ford to a higher or different standard regarding fuel economy estimates than required by the EPA (such as requiring a "real world" fuel economy—which was at issue in the cases relied upon by the District Court). Rather, Plaintiffs seek to hold Ford accountable via state-law fraud claims paralleling EPA standards for Ford's fraudulent misrepresentations and omissions regarding Ford's falsified fuel

[3] The Vehicles in the Class include but are not limited to the model year 2019 and 2020 Ford Ranger and the 2018, 2019, and 2020 Ford F-150.

economy estimates on Monroney Stickers and in advertisements and other marketing materials that falsely touted the Vehicles' fuel economy as "best-in-class" and "most fuel efficient." Dismissal of Plaintiffs' claims leaves consumers with no recourse for Ford's fraud.

A. Statement of Facts

1. The calculation of fuel economy.

Automotive manufacturers, such as Ford, perform the testing used by the EPA to calculate fuel economy. While federal law requires automotive manufacturers to follow a specific testing methodology set by the Environmental Protection Agency ("EPA"), (FAC, RE 78, Page ID # 2167-2169 (¶¶ 433-434)), importantly, the EPA usually does not perform its own testing and did not do so in this matter. Thus, the EPA, and consumers, rely on testing performed directly by the manufacturer. Thus, any impropriety in the testing process is the sole fault of the testing manufacturers such as Ford here. Here, Plaintiffs allege Ford, not the EPA, committed state and common law fraud.

Initially, each vehicle manufacturer conducts a "coastdown test" to measure "Road Load." FAC, RE 78, Page ID # 2150 (¶ 398). In a coastdown test, a vehicle is brought to a high speed on a flat, straight road and then set coasting in neutral until it slows to a low speed. FAC, RE 78, Page ID # 2168-2169 (¶ 434). By recording the time the vehicle takes to slow down, it is possible to model the forces affecting

the vehicle. FAC, RE 78, Page ID # 2168-2169 (¶ 434). The test provides data regarding aerodynamic drag, tire rolling resistance, and drivetrain frictional losses. FAC, RE 78, Page ID # 2168-2169 (¶ 434). The coastdown test and Road Load measurement is governed according to standards developed by the Society of Automotive Engineers (SAE), which is a private organization. FAC, RE 78, Page ID # 2168-2169 (¶ 434).

Next, manufacturers place vehicles on a dynamometer (essentially, a treadmill for cars), and while a fixture holds the vehicle in place, the vehicle's driven wheels turn on the dynamometer using controlled procedures also standardized by the SAE. FAC, RE 78, Page ID # 2168-2169, 2171 (¶¶ 434, 437). Road Load data from the coastdown test is then inputted to simulate the actual load on the engine during on-road driving, and fuel consumption and emissions are measured during the test. FAC, RE 78, Page ID # 2171, 2173 (¶¶ 437, 441-442). The results of these various tests then form the basis of the EPA fuel economy ratings consumers see on the vehicle's Monroney Sticker. FAC, RE 78, Page ID # 2056, 2171-2172 (¶¶ 5, 7, 439). All underlying data is reported to the EPA. FAC, RE 78, Page ID # 2173-2174 (¶ 443). But, the EPA generates fuel economy ratings without independently verifying most of the submissions; manufacturers are on the "honor system" to report accurate test results, a system Ford abused by submitting fraudulently-obtained and, thus,

incorrect results, to the detriment of consumers and the proposed class. FAC, RE 78, Page ID # 2172, 2176-2177 (¶¶ 440, 448).

2. Ford manipulated Vehicles' fuel economy.

In this case, Ford misrepresented and miscalculated Road Load data for the Vehicles. FAC, RE 78, Page ID # 2058-2059, 2172 (¶¶ 15, 16, 440). The computer models and testing practices Ford used to calculate Road Load during coastdown testing departed from SAE standards and manipulated material factors such as how aerodynamic drag, tire rolling resistance, and drivetrain frictional losses affect the Vehicles' performance. FAC, RE 78, Page ID # 2058-2059, 2061, 2168-2170 (¶¶ 15, 16, 22, 434, 435). Ford's manipulation of these factors produced artificially-reduced resistance for the Vehicles. FAC, RE 78, Page ID # 2172-2173 (¶ 440). Ford then used this manipulated Road Load data when testing the Vehicles on the dynamometer, leading to results that artificially inflated the Vehicles' fuel economy. FAC, RE 78, Page ID # 2171-2172, 2173-2177, 2179 (¶¶ 439, 441-449, Fig. 2, ¶¶ 452-453, Table 5).

In September 2018, several Ford employees expressed concerns about the testing practices at Ford pertaining to emissions and fuel efficiency. FAC, RE 78, Page ID # 2167 (¶ 432). In February 2019, Ford admitted it was looking into these concerns about its "computer-modeling methods and calculations used to measure fuel economy and emissions." FAC, RE 78, Page ID # 2167 (¶ 432). Ford's March

2019 SEC filing revealed that Ford was under criminal investigation by the United States Department of Justice ("DOJ") for its fuel economy and emissions certifications practices. FAC, RE 78, Page ID # 2166-2167 (¶¶ 430, 432). Pressured by the initiation of a governmental criminal investigation, Ford stated that it would look into the testing of the 2019 Ranger truck before looking at its other vehicles. FAC, RE 78, Page ID # 2157 (¶ 411).

Ford's initial self-reporting of this wrongful activity spawned a two-year DOJ criminal investigation, as well as investigations by the EPA and CARB (California Air Resources Board). FAC, RE 78, Page ID # 2166-2167 (¶¶ 430, 432). And even though these investigations have since closed,[4] the decision not to criminally indict or pursue other action does not mean that Ford has been found innocent: rather, it often stands for the understanding that a civil action is the most effective mechanism to bring tangible justice to the victims, as in this MDL.[5] Presently, this case is the

[4] Ford's Quarterly Report, period ending Sept. 2020, filed Oct. 29, 2020. Motion to Dismiss Opp., Ex. 2, RE 85-3, Page ID # 4251, https://d18rn0p25nwr6d.cloudfront.net/CIK-0000037996/8851be13-4f97-49f2-a7fc-d8fd3bfe62c7.pdf; Notice of Gov't Agency Decision, RE 94, Page ID # 4646-4663.

[5] For instance, The Miller Law Firm obtained a $970,500,000 recovery in the largest securities fraud settlement absent a criminal indictment, SEC prosecution, or financial restatement. (*See* Motion to Dismiss Opp., Ex. 3, RE 85-4, Page ID # 4301-4304, citing: https://www.reuters.com/article/us-aig-classaction-settlement/aig-investors-970-5-million-settlement-wins-u-s-court-approval-idUSKBN0MG2E920150321).

only mechanism by which Plaintiffs and the members of the classes they seek to represent could obtain a remedy for Ford's deceptive conduct.

As set out in Plaintiffs' Complaint, RE 78, Page ID # 1216, 2171-2180 (¶¶ 9-10, 438-454), independent testing conducted on Ford F-150 and Ford Ranger vehicles vindicated the concerns of consumers and Ford's own employees: Ford did not follow appropriate coastdown testing procedures, and instead disclosed inaccurate resistance figures to increase the MPG Rating of its F-150 and Ranger vehicles.[6]

Ford miscalculated "Road Load"—the force imparted on a vehicle while driving at a constant speed over a smooth, level surface from sources such as tiring rolling resistance, driveline losses, and aerodynamic drag. FAC, RE 78, Page ID # 2058-2059 (¶ 15). Ford's internal lab tests did not account for these factors, which led to artificially inflated—and entirely inaccurate—fuel economy projections. FAC, RE 78, Page ID # 2058-2059 (¶ 15). The information on the Monroney Stickers for the Vehicles would be markedly lower if they were calculated using proper, accurate coastdown testing procedures. FAC, RE 78, Page ID # 2056-2057 (¶ 9).

[6] For example, the Sticker for a 2018 Ford F-150 V6 indicates mileage of 20 city, 26 highway, and 22 combined. Accurate coastdown testing of a 2018 Ford F-150 V6 reveals the following: The real highway fuel number is 22.7 MPG compared to 26.6 reported by Ford to the EPA. FAC, RE 78, Page ID # 2056-2057 (¶ 9).

For instance, the Monroney Sticker for a 2018 F-150 V6 provides mileage of "20 city, 26 highway and 22 combined." However, "[a]ccurate coastdown testing" of the same model reveals "[t]he real highway fuel number is 22.7 MPG compared to 26.6 reported by Ford to the EPA. For city driving it is 17.7 MPG compared to 19.6 reported to the EPA," resulting in a highway fuel difference of 15% and city difference of 10%. FAC, RE 78, Page ID # 2056-2057 (¶ 9). Assuming a lifetime of 150,000 miles for a truck, "city driving would consume an extra 821 gallons over the lifetime of the truck" with highway driving resulting in 968 gallons of extra fuel. FAC, RE 78, Page ID # 2057 (¶ 9). These represent "material differences as manufacturers fight for every 1/10th of a difference in miles per gallon both to attract customers and to earn credits under the applicable environmental emissions regulations." FAC, RE 78, Page ID # 2057 (¶ 10).

Thus, Ford "used its inaccurate fuel economy ratings on the window stickers to sell and lease these trucks to consumers," and these differences were material. FAC, RE 78, Page ID # 2055 (¶ 2); *see also, e.g.*, FAC, RE 78, Page ID # 2056-2057, 2059-2061 (¶¶ 6-11, 17-20).

3. Ford's affirmative misrepresentations and omissions regarding fuel efficiency induce purchase or lease of Vehicles.

By cheating, Ford made its F-150 and Ranger trucks more appealing and competitive in the marketplace, to the point of being named "best in class" for fuel economy for some F-150's, which, in turn, drove up sales and profits. FAC, RE 78,

Page ID # 2180 (¶ 456). Ford did so not only by disclosing an inflated MPG rating on the Monroney Stickers of each of the Vehicles but also by misrepresenting the artificially-inflated fuel economy in advertisements, press releases and other public disclosures to consumers (defined collectively as "misrepresentations").

In addition to fraudulent disclosures on the Monroney Sticker, Ford engaged in systematic marketing and advertising campaigns for all of the Vehicles to tout the inflated fuel efficiency. For instance, Ford's media center touted the 2019 Ranger truck as having "Unmatched fuel efficiency." FAC, RE 78, Page ID # 2182, 3039-3041 (¶ 462; FAC Ex. 4). Ford knew that to sell the Ranger effectively, it had to tout its fuel efficiency and reduced emissions, and that such promises were material to consumers. FAC, RE 78, Page ID # 2057, 2159-2160 (¶¶ 10, 414, 415). Ford promised that certain 2018 F-150s were "best in class" for fuel economy, and it promised certain miles per gallon for other F-150 models, which were robust enough to make them attractive to the market. FAC, RE 78, Page ID # 2061, 2184-2190 (¶¶ 20, 465-66, 468, 470).

Likewise, to stimulate F-150 sales and maintain its lead over competitors like the Dodge Ram, Ford misrepresented that the 2018 Ford F-150 would be best in class for fuel economy and/or published and advertised inflated fuel economy. FAC, RE 78, Page ID # 2184 (¶ 465). Ford told consumers to expect "better fuel economy" in the 2018 F-150 (as early as August 2017). FAC, RE 78, Page ID # 2184 (¶ 466).

An August 10, 2017 cnet.com article acknowledged "2018 Ford F-150 touts best-in-class towing, payload, fuel economy." FAC, RE 78, Page ID # 2185, 3114-3117 (¶ 468; FAC Ex. 19). Likewise, the 2018 Ford F-150 brochure lists the doctored fuel economy for various types of F-150s. FAC, RE 78, Page ID # 2185-2190, 3118-3153 (¶ 470; FAC Ex. 20).

Ford promised consumers that its midsize truck, the 2019 Ford Ranger, "will deliver with durability, capability and fuel efficiency, while also providing in-city maneuverability and the freedom desired by many midsize pickup truck buyers to go off the grid." FAC, RE 78, Page ID # 2059 (¶ 17). Ford also told customers that its "All-New Ford Ranger [was] Rated Most Fuel Efficient Gas-Powered Midsize Pickup in America." FAC, RE 78, Page ID # 2059 (¶ 17). Ford likewise publicly misrepresented that the 2019 Ranger "is no-compromise choice for power, technology, capability and efficiency whether the path is on road or off." FAC, RE 78, Page ID # 2059 (¶ 17). And Ford's sales brochures declared that the 2019 Ford Ranger was "most fuel efficient in its class." FAC, RE 78, Page ID # 2182-2183, 3069-3093 (¶ 463; FAC Ex. 13). Ford never disclosed that it had manipulated the MPG ratings by deliberately omitting essential test data in its calculations.

Even after Ford employees came forward about the cheating, Ford's media center still touted the 2019 Ranger truck as having "amazing performance without compromise," and highlighted claims of unmatched fuel efficiency. FAC, RE 78,

Page ID # 2182, 3039-3041 (¶ 462; FAC Ex. 4). Undeterred, Ford falsely promised consumers that the "adventure-ready 2019 Ford Rangers is the most fuel-efficient gas-powered midsize pickup in America—providing a superior EPA-estimated city fuel economy rating and unsurpassed EPA estimated combined fuel economy rating versus the competition." FAC, RE 78, Page ID # 2060 (¶ 19).

Ford made all of these false statements—misrepresenting the Vehicles' fuel economy—on Ford's website, in brochures detailing the qualities of the vehicles, in television commercials, and in radio advertisements. *See, e.g.*, FAC, RE 78, Page ID # 2059-2060, 2064, 2066, 2068-2072, 2075, 2077, 2079, 2082, 2084, 2086, 2088, 2090-2097, 2099, 2103, 2105-2111, 2116-2123, 2125, 2127, 2129, 2131, 2136, 2138, 2140, 2142, 2144-2145, 2147, 2182-2183, 2185-2190 (¶¶ 17, 19, 30, 38, 46, 54, 62, 78, 86, 94, 110, 118, 126, 134, 142, 150, 158, 166, 174, 182, 198, 206, 214, 222, 230 254, 262, 270, 278, 285, 293, 301, 309, 317, 341, 349, 357, 365, 374, 381, 389, 462-464, 470). All the while, Ford knew that the calculated fuel economy was fraudulent. FAC, RE 78, Page ID # 2056, 2057-2059, 2061, 2167, 2182, 2191 (¶¶ 6, 15, 16, 22, 410, 432, 462, 472).

Ford sold its 2019 and 2020 Ford Rangers and 2018, 2019, and 2020 F-150 models without disclosing that its cheating on the coastdown testing was the reason for the inflated fuel economy. Ford knew that it would be material to a reasonable consumer; namely, that Ford omitted required factors during internal vehicle testing

processes in order to advertise and tout that its trucks were more fuel efficient than they actually were, and that this testing had artificially-discounted certain factors. *See, e.g.*, FAC, RE 78, Page ID # 2056, 2058-2059, 2061 (¶¶ 6, 8, 15, 18, 22). The economic injury to consumers resulting from Ford's deception is extreme. For example, Ford has sold approximately one million 2018 and 2019 F-150s. FAC, RE 78, Page ID # 2058 (¶ 13). According to the detailed assumptions set forth in Plaintiffs' FAC, due to Ford's deception, the extra fuel costs for all 2018 and 2019 F-150s, just a portion of the total Vehicles in this case, have been calculated as approximately $1.9-$2.32 billion (as of August 2020, and depending on the amount of city versus highway driving undertaken). FAC, RE 78, Page ID # 2058 (¶ 13). Moreover, common sense dictates that additional modeling with current gas prices pushes that approximation astronomically higher.

B. Procedural History and Rulings Presented for Review.

The District Court dismissed the FAC in its entirety. Order, RE 95, Page ID # 4907. The following rulings by the District Court are presented for review.

The District Court incorrectly held that all of Plaintiffs' claims are expressly preempted by 49 U.S.C. § 32919(b). Order, RE 95, Page ID # 4879-4888. The District Court erred in holding that all of Plaintiffs' claims are impliedly preempted. Order, RE 95, Page ID # 4888-4891. The District Court erroneously held that the doctrine of primary jurisdiction bars all of Plaintiffs' claims. Order, RE 95, Page ID

4893-4895. The District Court erred in holding that Plaintiffs failed to state claims on which relief can be granted based on materials that "merely" contain fuel-economy estimates. Order, RE 95, Page ID # 4895-4899. The District Court further erred by failing to address Plaintiffs state law fraudulent omissions claims on based on Ford's failure to disclose the accurate fuel-economy estimates absent Ford's cheating, in both consumer advertisements and marketing and on the Monroney Stickers.[7]

V. STANDARDS OF REVIEW

The District Court's rulings are subject to *de novo* review. "This court reviews the district court's grant of a motion to dismiss for failure to state a claim de novo." *Wamer v. Univ. of Toledo*, 27 F.4th 461, 465-66 (6th Cir. 2022) (citing *Doe v. Miami Univ.*, 882 F.3d 579, 588 (6th Cir. 2018). "Whether a federal law preempts state law is a legal question we review de novo." *Torres v. Precision Indus., Inc.*, 995 F.3d 485, 491 (6th Cir. 2021) (citing *McDaniel v. Upsher-Smith Lab'ys, Inc.*, 893 F.3d 941, 944 (6th Cir. 2018)). "We apply de novo review to the district court's decision regarding primary jurisdiction." *U.S. ex rel. Wall v. Circle C Const., L.L.C.*, 697 F.3d 345, 351 (6th Cir. 2012) (citing *United States v. Haun*, 124 F.3d 745, 747 (6th Cir. 1997)).

[7] *See* footnote 1 for a list of rulings Plaintiffs are not appealing.

"To survive a motion to dismiss [under Rule 12(b)(6)], a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Wamer*, 27 F.4th at 466 (citation and internal quotation marks omitted). The Court construes the complaint in the light most favorable to the plaintiffs, accepts their allegations as true, and draws all reasonable inferences in favor of the plaintiffs. *Id.* Factual allegations must be enough to raise a right to relief above the speculative level. *Id. See also Anders v. Cuevas*, 984 F.3d 1166, 1174 (6th Cir. 2021) ("[W]e construe the complaint in the light most favorable to the nonmoving party, accept the well-pled factual allegations as true, and determine whether the complaint contains enough facts to make the legal claims facially plausible."). Similarly, in reviewing a "a district court's determination of Article III standing," this Court "'must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party.'" *Binno v. Am. Bar Assoc.*, 826 F.3d 338, 344 (6th Cir. 2016) (quoting *Warth v. Seldin*, 422 U.S. 490, 501 (1975) and *Murray v. U.S. Dep't of Treasury*, 681 F.3d 744, 748 (6th Cir. 2012)). Finally, this Court has explained that "[w]e review questions of law *de novo*." *Sofco Erectors, Inc. v. Trs. Of Ohio Operating Eng'rs Pension Fund*, 15 F.4th 407, 418 (6th Cir. 2021) (citing *Sherwin-Williams Co. v. New York State Teamsters Conf. Pension, Ret. Fund*, 158 F.3d 387, 393 (6th Cir. 1998)).

VI. SUMMARY OF THE ARGUMENT

Ford cheated on its fuel economy testing on some of its best-selling and most popular trucks. FAC, RE 78, Page ID # 2055 (¶ 2). The EPA relied on Ford's fraudulent testing in calculating the average fuel economy rating of these trucks. Ford then used its inaccurate fuel economy ratings on the window stickers to sell and lease these trucks to consumers. FAC, RE 78, Page ID # 2055 (¶ 2). Over a million Ford truck owners are now driving vehicles that will cost them thousands of dollars more to own or lease than they anticipated. FAC, RE 78, Page ID # 2055-2057 (¶¶ 2, 9). Because of Ford's deception, all purchasers and lessees of these vehicles paid more for these vehicles than they are worth. FAC, RE 78, Page ID # 2055 (¶ 2). Plaintiffs do not contest the EPA's calculation of the fuel economy ratings for the Vehicles or claim that Ford failed to disclose fuel economy ratings for real world driving conditions. Rather, Plaintiffs seek to hold Ford responsible for its violation of state law for its fraudulent misrepresentations and omissions in its testing, leading to false fuel economy ratings listed on the window stickers of new and leased vehicles. The District Court's preemption ruling deprives consumers who purchased these trucks of any recourse against Ford for its fraudulent testing, misrepresentations, and omissions.

Plaintiffs' claims are not preempted by 49 U.S.C. § 32919(b), which provides that a state "may adopt or enforce a law or regulation on disclosure of fuel economy

or fuel operating costs for an automobile covered by section 32908 only if the law or regulation is identical to that requirement." Plaintiffs allege that under federal law, Ford must disclose *non-fraudulent* EPA estimates, and allege that Ford is liable for damages under state laws for Ford's fraudulent estimates. As the Supreme Court has consistently held, preemption statutes (such as this) permit state-law remedies for the violations of duties that parallel federal duties. *See, e.g.*, *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 495 (1996) ("Nothing in [21 U.S.C.] § 360k denies Florida the right to provide a traditional damages remedy for violations of common-law duties when those duties parallel federal requirements."); *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 448 (2005) ("[A]lthough FIFRA does not provide a federal remedy to farmers and others who are injured as a result of a manufacturer's violation of FIFRA's labeling requirements, nothing in [7 U.S.C.] § 136v(b) precludes states from providing such a remedy.").

Plaintiffs' claims are also not barred by the doctrine of implied preemption. *First*, field preemption does not bar those claims, because an express preemption provision "'implies that matters beyond that reach are not pre-empted.'" *Torres v. Precision Indus., Inc.*, 995 F.3d at 491 (quoting *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 517 (1992)). *Second*, conflict preemption does not apply, because Plaintiffs claim only that Ford was required to comply with the federal regulations for testing. And Plaintiffs' claim does not present an obstacle to the accomplishment

of the federal scheme but instead supports that scheme by seeking to hold Ford responsible for its fraudulent testing.

The primary jurisdiction doctrine does not apply. Courts may defer to an "agency's primary jurisdiction to ensure needed uniformity in an area or when the agency has 'special competence' over the issue." *In re FirstEnergy Sols. Corp.*, 945 F.3d 431, 452 (6th Cir. 2019) citing to *United States v. W. Pac. R.R.*, 352 U.S. 59, 64 (1956). Neither of those standards applies here. *First*, referral to the EPA is not needed to "advance regulatory uniformity." *Charvat v. EchoStar Satellite, LLC*, 630 F.3d 459, 466 (6th Cir. 2010). The issue is whether Ford falsified its testing, which is an individualized, fact-based issue based on established regulations. This is particularly true because the EPA did not devise the coastdown tests at issue. Instead, those tests were established by the Society of Automotive Engineers ("SAE"). *See* 40 C.F.R. § 1066.301 (incorporating SAE standards). As a result, there is no reason to defer this matter to the EPA to advance "regulatory uniformity." *Second*, the EPA itself does not claim to have "special competence" with respect to the testing procedures at issue, given that the EPA acknowledges that it conducts "independent testing on about 15% of vehicle models each year."[8] And Ford does not contend that the EPA independently tested the vehicles at issue in this litigation. So the EPA does not have "special competence" to test the fuel economy of vehicles.

[8] *Id.*

Similarly, Plaintiffs state claims on which relief can be granted for violation of state consumer protection statutes, based on Ford's fraudulent EPA estimates. Ford does not and cannot cite any case for the proposition that such fraudulent EPA estimates do not subject it to liability, when the purpose of EPA estimates is to "provide car buyers with useful information when comparing the fuel economy of different vehicles." 71 Fed. Reg. 77872, 77874 (Dec. 27, 2006).

VII. ARGUMENT

A. Plaintiffs' claims are not preempted.

Plaintiffs' claims are neither expressly nor impliedly preempted. Congress has authorized state-law remedies for claims that are based on disclosure duties that are identical to the federal disclosure duties for EPA estimates. *See* 49 U.S.C. § 32919(b). Plaintiffs allege that Ford violated those duties by cheating on the coastdown tests that it used to set EPA estimates and thus is not immune from liability to Plaintiffs, when the purpose of EPA estimates is to "provide car buyers with useful information when comparing the fuel economy of different vehicles." 71 Fed. Reg. 77872, 77874 (Dec. 27, 2006). It "is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct." *See Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984).

1. 49 U.S.C. § 32919(b) does not expressly preempt Plaintiffs' claims.

Plaintiffs' claims are not preempted by 49 U.S.C. § 32919(b), which states: "When a requirement under section 32908 of this title is in effect, a State or a

political subdivision of a State may adopt or enforce a law or regulation on disclosure of fuel economy or fuel operating costs for an automobile covered by section 32908 only if the law or regulation is identical to that requirement."[9] Plaintiffs' claims are not preempted, because they are based on state-law duties that are identical to duties that federal law imposes on auto manufacturers.

Specifically, Plaintiffs allege that Ford violated its state-law duties by using fraudulently-calculated fuel economy estimates, omitting to disclose the correct fuel economy on the Monroney Stickers, fraudulently misrepresenting that the Vehicles were "best in class" for fuel economy and "most fuel efficient" in advertisements for the Vehicles, and omitting that due to Ford's cheating, the Vehicles were not best in class in fuel economy. As Plaintiffs allege, "Ford cheated on its fuel economy testing on some of its best-selling and most popular trucks. Ford then used its inaccurate fuel economy ratings on the window stickers to sell and lease these trucks to consumers." FAC, RE 78, Page ID # 2055-2057 (¶¶ 2, 5-10). Plaintiffs claim that the fraudulent testing and advertising constitutes common-law fraud and violates all of the statutory consumer protection laws at issue. Moreover, Ford cannot plausibly argue that it is free under state laws to use false testing to defraud consumers.

[9] The District Court correctly rejected Ford's argument that 49 U.S.C. § 32919(a) preempts Plaintiffs' claims, because that subsection applies to fleet fuel efficiency standards, not to the mileage of individual models. *See* Order, RE 95, Page ID # 4885-4887.

Those state-law duties are identical to Ford's duties under federal law. Any automobile manufacturer must list "the fuel economy of the automobile" on the Monroney Sticker. 49 U.S.C. § 32908(b)(1)(A). And any "violation of subsection (b) of this section is "an unfair or deceptive act or practice in or affecting commerce under the Federal Trade Commission Act." *Id.* § 32908(c)(2). Crucially, federal law requires that "fuel economy" be measured "under testing and calculation procedures prescribed by the Administrator." *Id.* § 32904(c). So under both federal and state law, cheating on tests, providing false fuel economy figures, and omitting the true fuel economy are unfair acts. Thus, Plaintiffs' claims are not preempted, because the evidence that Ford violated its state-law duties will also show that it violated its identical duties under federal law.

In three cases, the Supreme Court has held that similar preemption clauses permit states to provide a remedy based on state-law duties that parallel federal law, such as here. *First*, in *Medtronic, Inc. v. Lohr*, 518 U.S. at 486, the Court examined the Medical Device Amendments of 1976 (MDA), which provides that "no State … may establish or continue in effect with respect to a device intended for human use any requirement (1) which is different from, or in addition to, any requirement applicable under this chapter to the device, and (2) which relates to the safety or effectiveness of the device or to any other matter included in a requirement applicable to the device under this chapter." *Id*. (citing 21 U.S.C. § 360k(a)). The

Supreme Court held that "it is clear that the Lohrs' allegations may include claims that Medtronic has, to the extent that they exist, violated FDA regulations. At least these claims, they suggest, can be maintained without being pre-empted by § 360k, and we agree." *Id*. at 495. As the Court held, "[n]othing in § 360k denies Florida the right to provide a traditional damages remedy for violations of common-law duties when those duties parallel federal requirements." *Id*. Similarly here, Ford's duties under state law and federal law are identical with respect to its testing procedures and disclosures about its vehicles' fuel economy.

Second, in *Bates v. Dow Agrosciences LLC*, 544 U.S. 431 (2005), the Court held that the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) did not preempt a claim under the Texas consumer protection act that the plaintiffs' crops were damaged by Dow's pesticide. The *Bates* Court interpreted FIFRA's preemption clause, which provides that states "shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter." *Bates*, 544 U.S. at 436 (citing 7 U.S.C. § 136v(b)). The Court held that "a state-law labeling requirement is not pre-empted by § 136v(b) if it is equivalent to, and fully consistent with, FIFRA's misbranding provisions." *Bates*, 544 U.S. at 447. The Court explained that the "'parallel requirements' reading of § 136v(b) that we adopt today finds strong support in *Medtronic, Inc. v. Lohr*…." *Id*. "In addressing a similarly worded pre-emption provision in a statute regulating

medical devices, we found [in *Lohr*] that '[n]othing in [21 U.S.C.] § 360k denies Florida the right to provide a traditional damages remedy for violations of common-law duties when those duties parallel federal requirements.'" *Id.* (quoting *Lohr*, 518 U.S. at 495) (footnote omitted). Similarly here, nothing in federal law denies the states at issue the right to provide a damages remedy for Ford's violation of parallel state-law duties for testing and disclosing a vehicle's non-fraudulent fuel economy.

Third, in *Riegel v. Medtronic, Inc*., 552 U.S. 312, 330 (2008), the Supreme Court reiterated that "State requirements are pre-empted under the MDA only to the extent that they are 'different from, or in addition to' the requirements imposed by federal law. § 360k(a)(1)." So "§ 360k does not prevent a State from providing a damages remedy for claims premised on a violation of FDA regulations; the state duties in such a case 'parallel,' rather than add to, federal requirements." *Id.* (citing *Medtronic v. Lohr*, 518 U.S. at 495). Once again, *Riegel* supports Plaintiffs' claims for state-law remedies for violation of parallel state-law duties.

This Court has followed the Supreme Court's holdings in those three cases. In *Howard v. Sulzer Orthopedics, Inc*., 382 F. App'x 436, 437 (6th Cir. 2010), this Court held that § 360k(a) did not preempt a negligence claim that the defendant "failed to comply with certain Food and Drug Administration (FDA) regulations when it manufactured a knee implant that failed in Howard's body." This Court explained that "§ 360k does not prevent a state from providing a damages remedy

for claims premised on a violation of FDA regulations; the state duties in such a case 'parallel,' rather than add to, federal requirements." *Id*. at 440 (quoting *Riegel*, 552 U.S. at 330).[10] Once more, *Howard* supports Plaintiffs' claims here.

The District Court incorrectly held that Plaintiffs' claims are preempted even though the state-law disclosure duties they seek to enforce parallel the federal duties that Ford violated with its fraudulent testing and fraudulent "fuel economy" listings. The District Court incorrectly held that Plaintiffs' claims are preempted because "the very relief Plaintiffs seek includes that this Court require that all Class members be notified about the 'correct fuel economy' of the vehicles." Order, RE 95, Page ID # 4887. That is *exactly* the type of parallel enforcement allowed by section 32919(b). Both state and federal law require Ford to list the "correct fuel economy." Order, RE 95, Page ID # 4874, 4887. As Ford admits, "'[c]omparisons are, after all, the *purpose* of the EPA estimates.'" Order, RE 95, Page ID # 4899 (citing Ford's Reply, RE 88, Page ID # 4443). And false comparisons based on fraudulent testing violate state-

[10] Other Courts of Appeal similarly hold that state-law remedies for violation of federal law are not preempted by similar preemption clauses. *See, e.g.*, *Hughes v. Bos. Sci. Corp*., 631 F.3d 762, 771 (5th Cir. 2011) ("[A] failure to warn claim is not expressly preempted to the extent that it is based on Boston Scientific's violation of applicable FDA regulations…. This claim does not impose additional or different requirements to the federal regulations, but is parallel to the federal requirements."); *Bausch v. Stryker Corp*., 630 F.3d 546, 553 (7th Cir. 2010) ("Our conclusion that plaintiff Bausch's claims for defective manufacture in violation of federal law are not expressly preempted by section 360k is consistent with the Supreme Court's decisions in *Lohr* and *Riegel*….").

law duties, just as they violate federal standards. As the Supreme Court stated in *Bates*, "If Congress had intended to deprive injured parties of a long available form of compensation, it surely would have expressed that intent more clearly." 544 U.S. at 449-50. Plaintiffs here—as in *Lohr*, *Bates*, and *Howard*—may seek remedies under state law for Ford's violations of state-law duties that parallel the federal requirements.

In holding otherwise, the District Court relied on three inapposite cases. *See In re Ford Fusion & C-MAX Fuel Econ. Litig.*, No. 13-MD-2450, 2015 WL 7018369 (S.D.N.Y. Nov. 12, 2015) ("*C-Max I*"); *Paduano v. Amer. Honda Motor Co., Inc.*, 169 Cal. App. 4th 1453 (Cal. App. 2009); *Yung Kim v. General Motors, LLC*, 99 F. Supp. 3d 1096 (C.D. Cal. 2015). Order, RE 95, Page ID # 4882-4885. In *C-Max I*, Plaintiffs did not claim that Ford's estimates failed to comply with EPA testing or disclosure standards, but rather challenged Ford's use of the EPA fuel estimates rather than real world performance estimates. 2015 WL 7018369, at *27. This distinction is key. Here, Plaintiffs do not allege that Ford has an additional obligation to disclose the "real world" fuel economy performance (such as driving with trailer, city driving vs. expressway, or dirt road vs. concrete), as the plaintiffs did in *C-Max I*. Crucially, Plaintiffs do not allege that Ford had an *additional* obligation to disclose a *real-world* performance rating. Rather, Plaintiffs allege Ford *cheated* on the testing used in the creation and marketing of the fuel economy rating. Similarly, in *Paduano*

and *Yung Kim*, the plaintiffs did not allege that the defendant manufacturers cheated on their testing or that the EPA estimates were fraudulent. Nonetheless, the courts in those cases held that the false advertising claims were not expressly preempted. *See Paduano*, 169 Cal. App. 4th at 1477 (plaintiff "seeks to prevent Honda from making misleading claims about how easy it is to achieve better fuel economy"); *Yung Kim*, 99 F. Supp. 3d at 1104 ("Plaintiff challenges GM's use of the EPA estimates in a way that may give consumers the mistaken impression that they are able to achieve real-world mileage and tank range derived from those figures."). None of those three cases supports the District Court's holding here that Plaintiffs' claims are expressly preempted.

2. Plaintiffs' claims are not barred by implied preemption.

Plaintiffs' claims also are not barred by the doctrine of implied preemption. In *Torres v. Precision Indus., Inc.*, 995 F.3d at 491, this Court noted that "[i]mplied preemption has two types, field and conflict." Neither type bars Plaintiffs' claims here.

First, field preemption does not apply, because the federal law at issue is not "so 'pervasive' in one particular field that it exclusively occupies that field." *Id.* In *Torres*, this Court held that field preemption did not preclude a claim under the Immigration Reform and Control Act ("IRCA"), because "Congress expressly considered preemption when it enacted IRCA. It preempted state laws imposing

sanctions on employers for employing unauthorized aliens…. Because this preemption provision defines the statute's preemptive reach, this 'implies that matters beyond that reach are not pre-empted.'" *Id*. (quoting *Cipollone v. Liggett Grp., Inc*., 505 U.S. 504, 517 (1992)). This Court further held that field preemption did not apply because the IRCA did not occupy "the *entire* field of employment regulation, including causes of action arising out of an individual's employment, authorized or not." *Torres*, 995 F.3d at 492 (emphasis in original).

Similarly here, field preemption does not bar Plaintiffs' claims, because Congress expressly considered preemption when it enacted § 32919. And as *Lohr*, *Bates*, and *Riegel* make clear, § 32919 permits state-law remedies for the violation of state-law duties that parallel federal duties, so Chapter 329 of Title 49 does not occupy the entire field of remedies for fraudulent EPA testing.

Second, Plaintiffs' claims are not barred by conflict preemption. As this Court explained in *Torres*, there "are two types of conflict preemption: impossibility and obstacle." *Id*. (citing *McDaniel*, 893 F.3d at 944). "The first occurs when it is impossible to comply with both federal and state regulations." *Id.* (citing *Fednav, Ltd. v. Chester*, 547 F.3d 607, 623 (6th Cir. 2008)). And the "second occurs when the state law is 'an obstacle to the accomplishment and execution of' the federal scheme." *Id.* (citation omitted). "Impossibility" preemption does not apply here, because Plaintiffs claim that Ford's testing and disclosure duties are identical under

state and federal law. And Plaintiffs' claims do not present an obstacle to the accomplishment of the federal scheme but instead support that scheme by seeking to hold Ford responsible for its violation of identical state and federal duties.

Moreover, Ford's implied preemption argument is erroneous because the EPA does *not* test the vast majority of vehicles (including those at issue here). The EPA states that the "fuel economy label provides consumers with reliable and repeatable estimates of real-world fuel economy for national-average drivers and conditions allowing consumers to compare fuel economy across different car models."[11] But it also explains that the "EPA oversees the MPG values on fuel economy labels in a variety of ways including … [c]onducting independent testing on about 15% of vehicle models each year."[12] In similar circumstances, the Supreme Court rejected an implied-preemption argument in *Wyeth v. Levine*, 555 U.S. 555 (2009). The Court explained that "[s]tate tort suits uncover unknown drug hazards and provide incentives for drug manufacturers to disclose safety risks promptly…. Failure-to-

[11] https://www.epa.gov/recalls/fuel-economy-label-updates#:~:text=EPA%20oversees%20the%20MPG%20values,production%20vehicles%20provided%20by%20manufacturers. This Court may take judicial notice of this statement. *See Kentucky v. Biden*, 23 F.4th 585, 601 n.8 (6th Cir. 2022) ("We may take judicial notice of generally known information or government websites…."); *Broom v. Shoop*, 963 F.3d 500, 509 (6th Cir. 2020) ("'This court and numerous others routinely take judicial notice of information contained on state and federal government websites.'") (citation omitted).

[12] *Id*.

warn actions, in particular, lend force to the FDCA's premise that manufacturers, not the FDA, bear primary responsibility for their drug labeling at all times." *Id*. at 579. Similarly here, Ford and other automobile manufacturers bear the primary responsibility for providing non-fraudulent EPA estimates, and state-law suits such as this uncover fraudulent tests and provide incentives for Ford to disclose the truth.

Finally, the District Court's ruling on implied preemption is erroneous. The District Court stated that it "agrees with Ford that Plaintiffs' state-law claims in this case—that they admit would require Ford to construct and disclose to consumers an additional, supposed 'true fuel economy' for their vehicles—stand as an obstacle to the accomplishment and execution of that federal regime." Order, RE 95, Page ID # 4891. In fact, Plaintiffs have not admitted that Ford had to conduct an "additional" fuel-economy test. Instead, Plaintiffs contend that Ford was required to conduct and disclose *non-fraudulent* fuel economy estimates, as discussed above with respect to express preemption.

B. Plaintiffs' claims are not barred by the doctrine of primary jurisdiction.

The primary jurisdiction doctrine does not apply to Plaintiffs' claims. Courts "must apply the doctrine of primary jurisdiction on a case-by-case basis, deferring to an administrative agency only when the reasons for the existence of the doctrine are present." *Consol. Rail Corp. v. Grand Trunk W. R. Co*., 607 F. App'x 484, 492 (6th Cir. 2015) (citation omitted). As this Court has explained, courts may defer to

an "agency's primary jurisdiction to ensure needed uniformity in an area or when the agency has 'special competence' over the issue." *In re FirstEnergy Sols. Corp.*, 945 F.3d at 452 (citing *United States v. W. Pac. R.R.*, 352 U.S. at 64).

Neither of those standards applies here. *First*, referring this matter to the EPA is not needed to "advance regulatory uniformity." *Charvat v. EchoStar Satellite, LLC*, 630 F.3d 459, 466 (6th Cir. 2010). The issue in this matter is whether Ford falsified its testing, which is an individualized, fact-based issue based on established regulations. *See U.S. ex rel. Wall v. Circle C Const., L.L.C.*, 697 F.3d 345, 354 (6th Cir. 2012) ("the determination whether Circle C acted with the requisite intent to defraud the government in violation of the FCA does not necessitate technical, agency specific expertise"). This is particularly true because the EPA did not devise the coastdown tests at issue. Instead, those tests were established by the Society of Automotive Engineers ("SAE"). *See* 40 C.F.R. § 1066.301 (incorporating SAE standards). As a result, there is no reason to defer this matter to the EPA to advance "regulatory uniformity."

Second, the EPA itself does not claim to have "special competence" with respect to the testing procedures at issue, given that the EPA acknowledges that it conducts "independent testing on about 15% of vehicle models each year."[13] And Ford does not contend that the EPA independently tested the vehicles at issue in this

[13] *Id.*

litigation, so the EPA plainly does not have "special competence" to test the fuel economy of vehicles. *See Nader v. Allegheny Airlines, Inc*., 426 U.S. 290, 304 (1976) (invoking primary jurisdiction doctrine is appropriate when issue "involves technical questions of fact *uniquely* within the expertise and experience of an agency") (emphasis added). Thus, the EPA does not have specialized knowledge in developing *or* applying the standards that were devised by the SAE. By delegating testing to manufacturers, the EPA plainly believes that private experts—including Ford's experts—are fully capable of complying with SAE standards without *any* involvement by the EPA.

The reasoning of a lower court exposes the flaw in Ford's argument. *See In re Edgewell Pers. Care Co. Litig*., No. 16-cv-3371, 2018 WL 7858623 (E.D.N.Y. Sept. 4, 2018). In *Edgewell*, the plaintiffs alleged that the defendant's "SPF 50" sunscreen products do not have an SPF of 50. *Id.* The Court rejected the defendants' argument that "the FDA has primary jurisdiction over the action." *Id*. at *4. The *Edgewell* Court stated that to "the extent defendants argue that SPF testing itself is so technical, complicated, and/or scientific that that only the FDA can resolve plaintiff's claims of inaccuracy, the court is unconvinced." *Id*. at *7. The Court explained that "[m]anufacturers, not the FDA, perform FDA prescribed tests that determine the applicable and final SPF rating and label for a product, and they 'are not required to obtain pre-marketing review or approval of their labels from the FDA' so long as

they conduct their tests pursuant to FDA regulations." *Id.* (citation and footnote omitted). As a result, the Court found that the plaintiffs' claim "is primarily a legal issue of alleged misrepresentation, based on results of FDA-regulated testing rather than technical expertise." *Id.* Based in part on this finding, the Court rejected the defendants' primary jurisdiction argument. *Id.* at *10. That reasoning applies here, because the EPA's delegation of testing to the manufacturers it regulates demonstrates that the EPA does not have special competence to conduct the testing at issue.[14]

Other than cases setting forth the general concept of primary jurisdiction, the District Court cited only two district court decisions in erroneously holding that the doctrine of primary jurisdiction bars all of the plaintiffs' claims. In *C-MAX I*, as noted above, the plaintiffs did not claim that Ford falsified EPA tests. *See* 2015 WL 7018369, at *22 ("Plaintiffs are not challenging Defendant's compliance with the EPCA, including the accuracy of the Monroney Stickers or other information Defendant provided about the EPA-estimated MPG for the Vehicles."). Instead, the plaintiffs alleged "that Defendant failed to independently test and disclose the fuel economy of the C-MAX in order to determine its 'actual performance'" when

[14] *See also U.S. Pub. Int. Rsch. Grp. v. Atl. Salmon of Maine, LLC*, 257 F. Supp. 2d 407, 425 (D. Me. 2003) (rejecting primary jurisdiction argument where "EPA has, in fact, recently delegated the task of setting conditions for, and issuing, the NPDES permits to the State of Maine"), *aff'd*, 339 F.3d 23 (1st Cir. 2003).

driven. *Id*. at *27. As to that claim, the Court held that "passing judgment on whether there is a way to calculate fuel economy for the C-Max, and whether that should be disclosed, directly implicates the methods devised by the EPA, and the disclosure requirements devised by the FTC" and are "barred here by the primary jurisdiction doctrine." *Id*. at *30.

In contrast, Plaintiffs here do not claim that Ford failed to independently test the vehicles' *actual* mileage in real world conditions. Instead, Plaintiffs claim that Ford falsified the EPA estimates. And as to that claim, the EPA does not claim to have special expertise, given that it farms out the calculations to Ford and all other manufacturers under standards set by the SAE.

In the other case cited by the District Court, *Gilles v. Ford Motor Co*., 24 F. Supp. 3d 1039, 1050 (D. Colo. 2014), the *Gilles* Court, which rejected Ford's primary jurisdiction argument there, merely stated in conclusory fashion that EPA "estimates surely depend on technical information not within the conventional experience of this Court." Order, RE 95, Page ID # 4895 (citing *Gilles*, 24 F. Supp. 3d at 1050).[15] The *Gilles* Court did not recognize that the EPA has any special expertise as to testing, as shown by its delegation of testing to manufacturers, such

[15] The District Court further attempted to distinguish *Gilles*—stating that *Gilles* did not involve the accuracy of MPG estimates (Order, RE 95, Page ID # 4895); but, again, the District Court failed to address Plaintiffs' allegations of fraud; the estimates here are not simply imprecise but rather are fraudulent in their creation.

as Ford. And that statement in *Gilles* misapprehends primary jurisdiction. The court *itself* need not have experience as to technical aspects of the EPA estimates. Indeed, courts routinely adjudicate technical issues.[16] Instead, the question is whether the EPA has "special competence" in testing vehicles to set EPA estimates. And as shown above, it does not.

C. State-law fraudulent misrepresentation and omission Claims based on materials that "merely" contain EPA-mandated fuel-economy estimates should not be dismissed.

The District Court erroneously ruled that "to the extent that any of the consumer protection act claims are based upon materials that merely contain EPA-mandated fuel-economy estimates, those claims fail to state a claim." Order, RE 95, Page ID # 4897. In reaching that conclusion, the District Court did not discuss Plaintiffs' contention that Ford deceived all consumers by falsifying EPA estimates, which are intended to "provide car buyers with useful information when comparing the fuel economy of different vehicles." 71 Fed. Reg. 77872, 77874 (Dec. 27, 2006). Instead, the District Court relied solely on inapposite cases in which the plaintiffs

[16] *See Counts v. Gen. Motors, LLC*, 237 F. Supp. 3d 572, 593 (E.D. Mich. 2017) ("There is no doubt that many of the technical factual questions implicated by Plaintiffs' claims are solidly within the EPA's expertise. But federal courts must frequently adjudicate disputes involving complicated technical claims, particularly in the field of products liability. Simply put, mere technical complexity is not a 'compelling and legitimate' reason for a federal court to decline jurisdiction.") (internal quotations omitted).

did *not* challenge the EPA estimates as fraudulent or otherwise improper. Order, RE 95, Page ID # 4896-4897.

Ford cannot avoid liability by claiming that it was required to list the EPA estimates at issue. As discussed above, Ford was required to disclose *accurate* EPA estimates, not fraudulently-inflated estimates. Moreover, the Supreme Court has explained that "half-truths—representations that state the truth only so far as it goes, while omitting critical qualifying information—can be actionable misrepresentations." *Universal Health Servs., Inc. v. United States*, 579 U.S. 176, 188 (2016). "A classic example of an actionable half-truth in contract law is the seller who reveals that there may be two new roads near a property he is selling, but fails to disclose that a third potential road might bisect the property." *Id*. at 188-89. Here, Ford deceived consumers into believing the EPA estimates were accurate, while failing to disclose they were in fact the result of fraudulent testing. *See also id*. at 188 n.4 ("'[A] statement that contains only favorable matters and omits all reference to unfavorable matters is as much a false representation as if all the facts stated were untrue.' Restatement (Second) of Torts, § 529, Comment a, pp. 62-63 (1976).").

D. The District Court erroneously ruled that Plaintiffs fail to state claims relating to Ford's representations that the Vehicles are the "most fuel efficient" and "best in class" for fuel economy.

The District Court also incorrectly held that Plaintiffs failed to state valid claims based on Ford's misrepresentations that the Vehicles are the "most fuel efficient" and "best in class" for fuel economy. Ford based those representations on objective but false testing data. *See, e.g.*, FAC, RE 78, Page ID # 2060, 2182-2185 (¶¶ 19, 462, 463, 465, 469). As a result, they are not puffery. Indeed, "Ford asserts that '[c]omparisons are, after all, the purpose of the EPA estimates." Order, RE 95, Page ID # 4899 (quoting Ford's reply brief).

Thus, this case is like *City of Monroe Emps. Ret. Sys. v. Bridgestone Corp.*, 399 F.3d 651, 672 (6th Cir. 2005), which held that the plaintiffs stated a claim for securities fraud based on Firestone's statement that "[w]e continually monitor[s] the performance of all our tire lines, and the objective data clearly reinforces our belief that these are high-quality, safe tires.'" This Court explained that "the statement was an assertion of a relationship between data and a conclusion, one that a finder of fact could test against record evidence." *Id.* at 674. "The key is whether the proposition at issue can be proven or disproven using standard tools of evidence." *Id.* Similarly here, Ford's claims to consumers that the Vehicles are the "most fuel efficient" and

"best in class" for fuel economy can be proven or disproven by analyzing the tests conducted by Ford and the alleged EPA mileage.[17]

Instead of addressing Plaintiffs' contention that Ford's advertising claims are false because they are based on objective but fraudulent testing, the District Court erroneously based its dismissal ruling on *In re Ford Fusion and C-Max Fuel Econ. Litig.*, 13-MD-2450, 2017 WL 3142078 (S.D.N.Y., July 24, 2017) ("*C-Max II*"). *See* Order, RE 95, Page ID # 4899. In *C-Max II*, the Court held that mileage comparisons in advertisements were not actionable because "the commercials rely on the EPA-estimated fuel economy of the Vehicles to make comparisons." 2017 WL 3142078, at *10. But the plaintiffs in *C-Max II* did *not* claim that Ford's EPA estimates were based on fraudulent data. *C-Max II* merely stands for the proposition that comparisons based on *non-fraudulent* EPA estimates are valid. Plaintiffs here make no such claim.

Moreover, Ford's representations that the Vehicles are the "most fuel efficient" and "best in class" for fuel economy are relevant for Plaintiffs' omissions theory. Plaintiffs allege that Ford sold Vehicles "while omitting information that would be material to a reasonable consumer; namely, that Ford miscalculated factors

[17] *See also In re Omnicare, Inc. Sec. Litig.*, 769 F.3d 455, 470 (6th Cir. 2014) ("When an alleged misrepresentation concerns 'hard information'—'typically historical information or other factual information that is objectively verifiable'—it is actionable if a plaintiff pleads facts showing that the statement concerned a material fact and that it was objectively false or misleading.") (citation omitted).

during internal vehicle testing processes in order to report that its vehicles were more fuel efficient than they actually were, and discounted common real-world driving conditions." FAC, RE 78, Page ID # 2061 (¶ 22). Plaintiffs also allege that Ford fraudulently failed to disclose the truth about the EPA mileage of the Vehicles, including that it had falsified the tests, so that the Vehicles are *not* the "most fuel efficient" and "best in class" for fuel economy. *See, e.g.*, FAC, RE 78, Page ID # 2268-2269 (¶ 779). Ford should have disclosed the truth at its dealerships and by other means that would reach Plaintiffs and other purchasers of Vehicles. *See, e.g.*, *Daniel v. Ford Motor Co*., 806 F.3d 1217, 1226 (9th Cir. 2015) ("There are, of course, various ways in which a plaintiff can demonstrate that she would have been aware of a defect, had disclosure been made. Here, Plaintiffs chose to do so by showing that they would have been aware of the defect had Ford disclosed it to its dealerships."). Moreover, Ford's advertisements and marketing materials are other ways by which Ford could have (and should have) disclosed the truth regarding the fuel economy as *accurately* measured. And Ford's repeated emphasis that the vehicles are "best in class" shows that *accurate* estimates are material and should have been disclosed. For this additional reason, the District Court erroneously held that Plaintiffs' claims should be dismissed to the extent Plaintiffs allege that Ford should have disclosed that the Vehicles are *not* the "most fuel efficient" and "best in class" for fuel economy.

VIII. Conclusion

Plaintiffs respectfully request that this Court reverse the District Court's dismissal of Plaintiffs' fraudulent misrepresentation and omission claims under state common law and state consumer-protection statutes.

Dated: June 22, 2022

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Plaintiffs-Appellants' Opening Brief complies with the type-volume limitation pursuant to Fed. R. App. P. 32(a)(7). The foregoing Brief of Plaintiffs-Appellants contains 9,664 words of Times New Roman 14-point proportional type. The word processing software used to prepare this brief was Microsoft Word for Microsoft 365.

Dated: June 22, 2022

CERTIFICATE OF SERVICE

I hereby certify that on June 22, 2022, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will send notification of such filing to all attorneys of record.

/s/ E. Powell Miller
E. Powell Miller

Designation of Record

Doc. Entry No.	Date Entered	Page ID Range	Description of Document
78	08/21/2020	2029-3018	First Amended Complaint
78	08/21/2020	2055	First Amended Complaint
78	08/21/2020	2055-2057	First Amended Complaint
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85-3	01/08/2021	4251	Ford's Quarterly Report
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94	02/23/2022	4646-4663	Notice of Government Agency Decision
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95	02/23/2022	4882-4885	Order and Opinion Granting Motion to Dismiss
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95	02/23/2022	4907	Order and Opinion Granting Motion to Dismiss
96	02/23/2022	4908	Judgment Dismissing First Amended Complaint