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12
13
14 **UNITED STATES DISTRICT COURT**
15 **NORTHERN DISTRICT OF CALIFORNIA**

16 FRANK BIEDERMAN, JOSEPH GAMBA,
TREVOR WHITEHOUSE, GARY
17 AGOSTINI, JEFFREY HETTINGER, JILL
SCOTT, CARL ANDERS TROEDSSON,
18 MICHAEL CAPP, FRED CHAPMAN, and
DUSTEN ACKER, on behalf of themselves
19 and all others similarly situated,

20 Plaintiffs,

21
22 vs.

23 FCA US LLC, a Delaware corporation, and
CUMMINS INC., an Indiana corporation,

24 Defendants.
25
26
27
28

Case No. 3:23-cv-06640-JSC

**FCA US LLC'S NOTICE OF MOTION
AND MOTION TO DISMISS
PLAINTIFFS' CONSOLIDATED
AMENDED CLASS ACTION
COMPLAINT; MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT**

Action Filed: December 27, 2023

DATE: Thursday November 7, 2024

TIME: 10:00 a.m.

JUDGE: Hon. Jacqueline Scott Corley

COURTROOM: 8

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on Thursday November 7, 2024, at 10:00 a.m., or as soon thereafter as counsel may be heard, in Courtroom 8 of the above-captioned courthouse located at 450 Golden Gate Ave., San Francisco, California, Defendant FCA US LLC will and hereby does move this Court for an order under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) dismissing Plaintiffs' Consolidated Amended Class Action Complaint.

This motion is based on this Notice of Motion, the following Memorandum of Points and Authorities, and on such other and further matters as may be presented to the Court at or prior to the hearing.

DATED: October 10, 2024

KLEIN THOMAS LEE & FRESARD

By: /s/ Kristyn Wong

Stephen A. D'Aunoy

Thomas L. Azar, Jr.

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Exhibit A *United States v. Cummins Inc.*, No. 1:24-cv-00088-APM (D.D.C.), Docket No. 2-1
(filed Jan. 10, 2024) (“Consent Decree”)

Exhibit B Declaration of Joshua McDonald

I. INTRODUCTION

This is a putative nationwide class action about model-year 2013-2018 Ram 2500 and 3500 trucks manufactured by FCA US LLC and equipped with diesel engines, engine control, and emissions control systems supplied by Cummins, Inc.¹ Plaintiffs seek to “piggyback” on the announcement of a settlement and consent decree recently negotiated between Cummins, the U.S. Environmental Protection Agency (“EPA”), and the California Air Resources Board (“CARB”) over allegations that software functions and calibrations in Cummins’ engines violated the Clean Air Act (“CAA”) because they constitute “defeat devices” or “auxiliary emission control devices” that were inadequately disclosed during the vehicle emissions testing and certification process.² Under the settlement, Cummins has agreed to implement, among other things, recalls and free repairs, updated emissions-control software, and an extended warranty to ensure the vehicles have fully-compliant emissions systems.³

The premise of Plaintiffs’ claims is that they were injured by Cummins’ alleged deception of the regulators in emissions testing. But, clearly, no standing, injury, or justiciable controversy can be found now, given the agreement to implement recalls and provide free repairs. Nor can Plaintiffs use this lawsuit to improperly undermine the role of a federal regulatory agency like the EPA. And, in any event, Plaintiffs’ allegations pertaining to FCA US are wholly conclusory, and fail to state any viable claim. For these reasons, and those discussed herein, the Court should dismiss the complaint in its entirety as to FCA US.

II. ISSUES TO BE DECIDED

1. Whether certain of Plaintiffs’ claims are preempted?
2. Whether the Court should dismiss Plaintiffs’ nationwide class claims because Plaintiffs lack standing and fail to specify which state laws apply?
3. Whether the Court should dismiss the fraud-based claims because (i) they fail

¹See, generally, Consolidated Amended Class Action Complaint (“CAC”), ECF #75.

²See, generally, *United States v. Cummins Inc.*, No. 1:24-cv-00088-APM (D.D.C.), Docket No. 2-1 (filed Jan. 10, 2024). A copy of the consent decree is also attached as Exhibit A.

³See, e.g., *id.* at ¶¶ 19-22, 24, 26.

Rule 9(b)'s pleading standards, (ii) Plaintiffs do not adequately allege pre-sale knowledge or reliance, (iii) the referenced statements are puffery, (iv) Plaintiffs fail to establish any duty to disclose for any alleged omission, and (v) for other state-specific reasons?

4. Whether the Court should dismiss the express warranty claims because Plaintiffs fail to adequately allege the terms of the alleged warranties, reliance, any actual breach, or notice?

5. Whether the Court should dismiss the implied warranty claims because Plaintiffs fail to adequately allege the vehicles are not merchantable, privity, or notice?

6. Whether the Court should dismiss the unjust enrichment claim because (i) it is not a standalone cause of action, (ii) the applicable warranties, as express contracts, bar the claim, (iii) Plaintiffs have an adequate remedy at law, and (iv) the claim is duplicative of Plaintiffs' other pleaded claims?

III. RELEVANT FACTS

A. Allegations Regarding Plaintiffs' Vehicle Purchases And Experiences.

Plaintiffs reside in California and aver purchasing the subject vehicles from unnamed "authorized FCA dealership[s]" in California.⁴ See CAC, ¶¶ 11, 17, 23, 35, 41, 47, 54, 60, 66.

Plaintiff	Year/Make/Model	Date of Purchase	Paragraph
Frank Biederman	2017 Ram 2500	"in or around June 2017"	¶ 11
Joseph Gamba	2018 Ram 2500	"in 2018"	¶ 17
Trevor Whitehouse	2018 Ram 2500	"in or around April 2018"	¶ 23
Gary Agostini	2016 Ram 3500	"in or around November 2017"	¶ 29
Jeffrey Hettinger	2016 Ram 3500	"in 2016"	¶ 35
Jill Scott	2015 Ram 3500	"in or around February 2016"	¶ 41
Carl Anders Troedsson	2015 Ram 2500	"April 19, 2015"	¶ 47
Michael Cappa	2016 Ram 3500	"in or around June 2016"	¶ 54
Fred Chapman	2016 Ram 2500	"in or around May 2016"	¶ 60
Plaintiff Dusten Acker	2017 Ram 3500	"in or around"	¶ 66

Every Plaintiff proffers generic allegations about "conduct[ing] extensive research" at some unspecified point before purchasing a vehicle, which, for each Plaintiff, consisted of viewing "the Ram website," "authorized FCA dealership websites," and "Defendants' websites." *Id.* at ¶¶ 12, 18, 30, 36, 42, 48, 55, 61, 67. About half of the plaintiffs assert they also spoke with unnamed individuals

⁴Plaintiffs define the subject vehicles as being model-year "2013 to 2018 Ram 2500 and Ram 3500 trucks equipped with a Cummins 6.7-Liter diesel engine." See CAC, ¶ 197(a).

1 at authorized dealerships, and although one plaintiff says he reviewed a brochure he does not say
2 when. *Id.* at ¶¶ 24, 30, 36, 42, 55, 67.⁵

3 Plaintiffs claim that through these sources “Defendants” represented the subject vehicles
4 (1) were equipped with “a clean-burning,” “powerful,” and “reliable” diesel engine and a “Diesel
5 Exhaust Fluid” (“DEF”) system that “consumed less DEF and polluted less” than “earlier models
6 and/or equivalent gasoline-powered trucks”; (2) boasted “good fuel economy”; (3) had a “low cost of
7 ownership”; (4) had “strong towing and hauling capabilities”; (5) featured “high performance”; and
8 (6) complied with “emissions law and regulations.” *Id.* at ¶¶ 12, 14, 18, 20, 24, 26, 30, 32, 36, 38, 42,
9 44, 48, 51, 55, 57, 61, 63, 67, 69. But, according to Plaintiffs, at the time of their respective vehicle
10 purchases, “Defendants concealed and omitted” that the subject vehicles (1) were equipped with
11 “[d]efeat [d]evices designed to cheat emissions tests and to deceive consumers” and (2) “could
12 perform as advertised only by emitting pollutants.” *Id.* at ¶¶ 14, 20, 26, 32, 38, 44, 51, 57, 63, 69.

13 **B. The Purported Defeat Device, EPA/CARB Complaint, and Emissions Recall.**

14 As a result of these purported “defeat devices,” in January 2024 the EPA and CARB filed a
15 complaint against Cummins, and ultimately, the EPA, CARB, and Cummins filed a joint consent
16 decree in which Cummins agreed to pay a \$1.675 billion civil penalty to the United States and a
17 \$146 million civil penalty to California, as well as an agreement to implement recalls, provide
18 owners with free repairs, update emissions-control software, and offer extended warranties to ensure
19 fully-compliant emissions systems. *Id.* at ¶¶ 106-131; *see also* n.2, *supra*. With FCA US’s help,
20 Cummins initiated the recall in November 2023. *Id.* at ¶ 132. To date, seven Plaintiffs have received
21 the recall, *id.* at ¶¶ 16, 22, 28, 46, 59, 65, and three have not, *id.* at ¶¶ 34, 40, 53.⁶

22 Plaintiffs who have had the recall performed collectively assert that its performance has
23 increased their operating costs and “inconvenience[d]” them with lower fuel economy, “degraded”
24

25 ⁵Chapman alleges viewing “trade magazines and online videos” but does not contend
FCA US has any connection to such materials. *Id.* at ¶ 61.

26 ⁶Agostini avers “the dealer has been unable to perform the recall” but does not say why. *Id.*
27 at ¶ 34. Hettinger and Troedsson say they “intend[] to complete the recall in the near future,” but
28 neither explains why they have not received it in the eleven months since it was announced in
November 2023. *Id.* at ¶¶ 40, 53.

the vehicle’s performance, has led to “spurious and hard-to-clear check engine lights” and an inability to pass certain emissions testing. *Id.* at ¶¶ 140-144. Five Plaintiffs say their vehicles’ DEF consumption has increased while fuel economy has decreased, *id.* at ¶¶ 16, 22, 28, 59, 65, two say their vehicles’ power and towing capability has decreased, *id.* at ¶¶ 22, 59, and one says his vehicle “did not pass a smog test after the emission recall was performed,” *id.* at ¶ 59.⁷ Plaintiffs contend the recall’s effects “undermine *Cummins*’ representation that the recall remedy would come at ‘no cost.’” *Id.* at ¶ 145 (emphasis added).

C. The Proposed Classes, Claims, and Relief Sought.

Plaintiffs purport to represent a nationwide class consisting of “[a]ll persons or entities in the United States who own, owned, lease, and/or leased a [subject vehicle] as of December 23, 2023,” as well as a similarly defined California-based subclass. *Id.* at ¶ 197(a)-(b).

On behalf of the putative nationwide class, as against FCA US, Plaintiffs bring a claim for “fraud by concealment” (Count II). *Id.* at ¶¶ 244-258. Then, on behalf of the putative California subclass, Plaintiffs bring claims for:

- violations of the California Consumers Legal Remedies Act (“CLRA”), False Advertising Law (“FAL”), and Unfair Competition Law (“UCL”) (Counts III, IV, and X), *id.* at ¶¶ 259-291, 360-381;
- breach of express and implied warranties under the California Commercial Code and the Song-Beverly Consumer Protection Act (Counts V, VI, VII, and VIII), *id.* at ¶¶ 292-348;
- breach of California’s emissions warranties (Count IX), *id.* at ¶¶ 349-359; and
- unjust enrichment (Count XI), *id.* at ¶¶ 382-393.

For relief, Plaintiffs seek, among other things, (i) monetary damages and civil penalties, (ii) equitable relief, *e.g.*, “an injunction enjoining Defendants’ misconduct”; (3) “pre- and post-judgment interest on any amounts awarded”; and (4) “costs and attorneys’ fees.” *Id.* at ¶¶ 257, 274, 290, 308, 322, 347, 348, 359, 381 & pp. 91-92.

⁷Two Plaintiffs say their vehicles either require “further servicing” or “continued to experience problems” but do not elaborate. *Id.* at ¶¶ 46, 71.

IV. ARGUMENT

A. The Governing Legal Standards.

To survive a motion to dismiss under Rule 12(b)(1), a plaintiff must “‘clearly . . . allege facts demonstrating’ each element” required to establish he has standing. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338, 136 S.Ct. 1540, 1547 (2016) (citation omitted). To meet this standard, a plaintiff must set forth *facts* showing he “(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision.” *Id.*

To survive a motion to dismiss under Rule 12(b)(2), the *plaintiff* must establish that jurisdiction is proper. *Ranza v. Nike, Inc.*, 793 F.3d 1059, 1068 (9th Cir. 2015). To do so, they “cannot ‘simply rest on the bare allegations of its complaint.’” *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 800 (9th Cir. 2004).

To survive a motion to dismiss under Rule 12(b)(6), a complaint must contain “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). This requires a plaintiff to “plead[] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). “Determining whether a complaint states a plausible claim for relief is context specific, requiring the reviewing court to draw on its experience and common sense.” *Id.* at 663-64.

B. The CAA and EPCA Preempt Plaintiffs’ Misrepresentation Claims.

Plaintiffs assail FCA US for making false representations and concealing information about the subject vehicles’ fuel economy, emissions levels, performance. *See* § II.A, *supra*. But the Clean Air Act (“CAA”) and Energy Policy and Conservation Act (“EPCA”) preempt these types of claims, regardless of whether they undergird state law consumer protection, common law fraud, warranty, or unjust enrichment claims.

Express Preemption: To the extent premised on claims of misrepresentation, Plaintiffs’ state law claims are expressly preempted because, “[u]nder both the EPCA and the CAA, [it is] *the EPA* [who] is tasked with making an affirmative statement *about the vehicle’s performance* based on its

1 review of manufacturers’ data.” *See Counts v. Gen. Motors, LLC*, 681 F.Supp.3d 778, 784
 2 (E.D.Mich. 2023) (emphasis added). “Performance” also encompasses fuel economy and
 3 emissions. *See id.* (noting EPA review “results in either [1] **a fuel-economy** estimate under the
 4 EPCA ... or [2] a Certificate of Conformity (COC) based on **emissions** testing under the CAA.” *Id.*
 5 (emphasis added); *see also* 42 U.S.C. § 7543(a) (CAA) (“No State or any political subdivision
 6 thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new
 7 motor vehicles or new motor vehicle engines subject to this part.”).

8 Accordingly, courts have dismissed similar emissions-based misrepresentation claims on
 9 express preemption grounds. *See, e.g., In re Ford Motor Co. F-150 & Ranger Truck Fuel Econ.*
 10 *Mktg. & Sales Pracs. Litig.*, 65 F.4th 851 (6th Cir. 2023) (affirming dismissal of fuel economy-
 11 based claims on preemption grounds), *cert. denied sub nom. Lloyd v. Ford Motor Co.*, 144 S.Ct.
 12 332 (2023); *Bledsoe v. FCA US LLC*, 2024 WL 445334 (E.D.Mich. 2024) (granting FCA US and
 13 Cummins judgment on the pleadings as to emissions-based claims under *In re Ford Motor*), *appeal*
 14 *docketed*, No. 24-1094 (6th Cir. 2024).

15 Field Preemption: Field preemption also bars these claims. Field preemption occurs when
 16 federal regulation in an area is “so pervasive as to make reasonable the inference that Congress left
 17 no room for the States to supplement it.” *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 98
 18 (1992). Here, Congress intended Title II of the CAA to occupy the field of new vehicle emission
 19 standards, and Plaintiffs’ averments of certain representations as being false encroach on that field.
 20 *See, e.g., Washington v. Gen. Motors*, 406 U.S. 109, 114 (1972) (“Congress has largely pre-empted
 21 the field with regard to ‘emissions from new motor vehicles’”); *see also In re Caterpillar*, 2015
 22 WL 4591236, *15 (D.N.J. 2015) (CAA “clearly manifests Congressional intent to occupy the field
 23 of emissions standards enforcement”).

24 Congress’s broad grant of authority to the EPA confirms its intentions. *See, e.g., Counts*,
 25 681 F.Supp.3d at 784 (noting EPA has “substantial power to investigate and to penalize
 26 manufacturers that stray off either course” and may “impose fines ... and even revoke a vehicle’s
 27 COC”); *Jackson v. Gen. Motors Corp.*, 770 F.Supp.2d 570, 573 (S.D.N.Y. 2011) (noting EPA, under
 28

CAA, “has developed an extensive set of regulations regarding emissions, in addition to comprehensive enforcement provisions and penalties”). Plaintiffs’ state law claims are premised upon FCA US’s purported noncompliance with federal emission standards, *see, generally*, CAC, a field which Congress intended the CAA to occupy, and thus should be dismissed as field-preempted. *See Roberts v. N. Am. Van Lines, Inc.*, 394 F.Supp.2d 1174, 1182-84 (N.D.Cal. 2004) (state-law breach of contract and consumer protection claims field-preempted where “federal regulations governing the interstate transportation of household goods [were] so pervasive as to manifest Congress’ intent to occupy this entire field” and where plaintiffs’ state law claims were “predicated on violations of federal law”).

Conflict Preemption: Finally, conflict preemption applies too. Conflict preemption occurs when compliance with both federal and state regulations is impossible, or when state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *Gade*, 505 U.S. at 98. Such is the case here for multiple reasons.

First, where Plaintiffs’ state law claims are premised on FCA US’s representations about federal emission standards or regulatory compliance, allowing those claims to move forward would hinder the federal government’s objective of providing **uniform** emissions standards and instead essentially allow **Plaintiffs**—rather than the EPA—to enforce the federal defeat device prohibition and federal fuel economy testing and disclosure standards. *In re Volkswagen “Clean Diesel” Litig.*, 94 Va. Cir. 189, 197 (Va. Cir. Ct. 2016) (“permitting parties to bring a warranty claim on the basis of a violation of federal emissions law would directly interfere with a central object of federal emission regulation: enforcing manufacturer’s compliance with emissions standards”).

Second, the same claims seek to impose remedies **beyond** those provided by federal law for the same conduct the EPA is charged with addressing. As the Supreme Court observed, “remedies form an ingredient of any integrated scheme of regulation.” *San Diego Bldg. Trades Council, Millmen’s Union, Local 2020 v. Garmon*, 359 U.S. 236, 247 (1959). Thus, a state law imposing a “**supplemental** sanction for violations” of a federal statute is preempted because every additional state remedy “incrementally diminishes” the federal agency’s control over enforcement of the

1 federal statute and “thus further detracts from the ‘integrated scheme of regulation’ created by
 2 Congress.” *Wis. Dept. of Indus., Labor & Human Relations v. Gould Inc.*, 475 U.S. 282, 288-89
 3 (1986) (emphasis added); *see also Arizona v. United States*, 567 U.S. 387, 402 (2012) (“Permitting
 4 the State to impose its own penalties for the federal offenses here would conflict with the careful
 5 framework Congress adopted.”).

6 As discussed above, Plaintiffs’ claims are essentially “predicated on deceit against [the] EPA
 7 during new-vehicle certification.” *In re Volkswagen “Clean Diesel” Mktg., Sales Practices, &
 8 Prod. Liab. Litig.*, 264 F.Supp.3d 1040, 1054 (N.D.Cal. 2017). But *Buckman Co. v. Plaintiffs’ Legal
 9 Comm.*, long ago foreclosed the possibility of using state law to punish manufacturers who use deceit
 10 during the regulatory approval process. 531 U.S. 341, 343, 348 (2001) (finding Federal Food, Drug,
 11 and Cosmetic Act preempted state law claims that defendants “made fraudulent representations to
 12 the [FDA] in the course of obtaining [pre-market] approval” because “the federal statutory scheme
 13 **amply empowers the FDA** to punish and deter fraud against the Agency” (emphasis added)).

14 For this same reason, claims premised on purported misrepresentations relating to CARB
 15 regulations are also preempted. The CAA allows California “to adopt and enforce its own emission
 16 standards as long as those standards are approved by the EPA.” *In re Chrysler-Dodge-Jeep
 17 Ecodiesel Marketing, Sales Practices, and Products Liability Litigation*, 295 F. Supp. 3d 927, 942
 18 n.3 (N.D. Cal. 2018), overruled on other grounds by *Quynh Phan v. Sargento Foods, Inc.*, 2021 WL
 19 2224260 (N.D. Cal. 2021); *see also* 42 U.S.C. § 7543(b). And, because CARB’s emissions
 20 standards are a matter of federal grace, attempts to enforce them through private litigation are
 21 preempted in the same way attempts to enforce the EPA’s standards are.

22 Further, where a California statute gives a specific government entity exclusive
 23 responsibility to regulate a given area, California courts prohibit attempts to use civil litigation to
 24 enforce those regulations. *See, e.g., City of Modesto Redevelopment Agency v. Dow Chem. Co.*,
 25 2005 WL 1171998, *17 (Cal. Sup. Ct. 2005). Because the California legislature designated CARB
 26 as “responsible for the establishment of ambient air quality and emissions standards and air pollution
 27 control programs,” *see* Cal. Pub. Res. § 30414(a), Plaintiffs cannot use common law and statutory
 28

1 claims to enforce those regulations.

2 *Third*, and finally, allowing the claims to proceed risks “different juries in different States
3 reach[ing] different decisions on similar facts,” *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 871
4 (2000), thereby creating direct conflicts with the EPA’s and other state agencies’ determinations—
5 which is exactly what preemption is designed to **avoid**. *See, e.g.*, H.R. Rep. No. 90-728, at 21 (Oct.
6 3, 1967) (Title II preemption intended to avoid “uncertainties involved in litigation”).

7 Accordingly, permitting Plaintiffs to proceed with their state law claims, which are aimed at
8 enforcing emissions standards, and to the extent they are premised on purported misrepresentations,
9 would stand “as an obstacle to the accomplishment and execution of the full purposes and objectives
10 of Congress.” *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 98 (1992).

11 C. The Nationwide Fraudulent Concealment Claim (Count II)

12 Plaintiffs—who are from California, reside in California, and purchased their Subject
13 vehicles in California—purport to bring a “fraud by concealment” claim on behalf of a putative
14 nationwide class. *See* CAC, ¶¶ 11-71, 245. Those nationwide class allegations fail for three separate
15 reasons.

16 1. Lack of Standing Under Rule 12(b)(1)

17 Plaintiffs lack standing to assert a claim on behalf of a nationwide class. “Despite the [CAC]
18 listing only one generic ‘fraud by omission’ claim ..., what Plaintiff[s] [are] attempting to do here
19 is assert fifty fraud by omission claims ... one of each claim for each state—on behalf of fifty
20 separate state-specific classes.” *Carpenter v. PetSmart, Inc.*, 441 F.Supp.3d 1028, 1039 (S.D.Cal.
21 2020). But Plaintiffs do **not** have “standing to assert claims on behalf of unnamed class members
22 under other states’ laws that do not govern [their] own claims” because “[they] did not suffer any
23 injuries in fact traceable to any alleged violations of any other states’ laws.” *Id.* “Labeling the
24 putative class as a ‘nationwide class’ does not overcome this fatal deficiency.” *Id.* Accordingly,
25 the claims on behalf of the nationwide class “must be dismissed because [Plaintiffs] ... lack[]
26 Article III standing to assert claims under those other states’ laws.” *Id.* at 1041.

2. ***Failure To Specify Which State(s) Law(s) Apply Under Rule 12(b)(6)***

Plaintiffs fail to specify under which state(s) law(s) they purport to proceed. *See* CAC, ¶¶ 244-258. This alone warrants dismissal of the nationwide claim. *See, e.g., Mendez v. Glob. Inst. of Stem Cell Therapy & Rsch., USA*, 2022 WL 3019858, *4 (S.D.Cal. 2022) (dismissal where plaintiffs “fail[ed] to identify which state laws govern the claims brought on behalf of the putative nationwide class,” as “the Court [could not] determine whether those claims have been adequately pled”); *Augustine v. Talking Rain Beverage Co., Inc.*, 386 F.Supp.3d 1317, 1333 (S.D.Cal. 2019) (“Plaintiffs’ failure to identify which state laws govern their common law claims means the claims brought on behalf of the nationwide class have not been adequately pled.”).

D. The Fraud-Based Claims (Counts III, IV, X, and XI)

1. ***Rule 9(b) (All Claims)***

Misrepresentations: Plaintiffs offer scattershot references to “Defendants’ representations,” seen by different Plaintiffs in different places. *See* § III.A, *supra* (emphasis added). But they do not plead (i) which Defendant made which representations, (ii) which Plaintiffs saw which representations and when; and (iii) whether Plaintiffs saw and relied on any misrepresentation specifically for their purchase. ***These allegations do not even satisfy Rule 8, see, e.g., Temple v. Bank of Am., N.A.***, 2015 WL 3658834, *2 (N.D.Cal. 2015) (“This ‘failure to indicate which defendant was allegedly responsible for which wrongful act ... renders the Complaint deficient under Rule 8.’”), ***much less Rule 9(b), see, e.g., Wanetick v. Mel's of Modesto, Inc.***, 811 F.Supp.1402, 1406 (N.D.Cal. 1992) (Rule 9(b) not satisfied where allegations “fail[] to specify which Defendants are charged with which misrepresentations and which facts support these allegations of liability”); *Nevarez v. Gen. Motors, LLC*, 2024 WL 3915235, *4 (C.D.Cal. 2024) (complaint must allege ***facts*** showing (1) “***where*** the representations were made”; (2) “***when*** Plaintiffs viewed the [] materials”; (3) “***which*** false statements ***they relied upon***”; and (4) “if ***they*** heard or relied on these representations prior to ***their*** ... purchase[s]”); *Thornton v. Micro-Star Int’l Co.*, 2017 WL 10621210, *7 (C.D.Cal. 2017) (“Plaintiffs allege the representations were made on website advertisements, fora, third-party reviewers’ websites, promotional materials, and product

documentation” but “fail to identify the *locations* of particular advertisements or promotional materials, which ones *they* read, and how they are material”) (emphases added).

And, while Plaintiffs offer some exemplar advertisements, *see* CAC, ¶¶ 147-164, they do not allege “if these statements were made *to the general public or them specifically*,” which Rule 9(b) also requires. *Nevarez*, 2024 WL 3915235 at *4 (Emphasis added); *see also Kuehl v. Gen. Motors LLC*, 2023 WL 8353784, *3 (C.D.Cal. 2023) (dismissal where complaint did “not identify where or to whom representation was made” or “what was false and misleading about it,” and “identifie[d] statements that were made to the general public, [but] not *to [plaintiff] specifically*”); *In re Ford Motor Co. DPS6 Powershift Transmission Prods. Liab. Litig.*, 483 F.Supp.3d 838, 843 (C.D.Cal. 2020) (claim failed where plaintiffs failed to specify what marketing materials *they* relied upon) (emphases added).

Omissions: To state an omission-based fraud claim, a plaintiff must, in relevant part, specify which defendant concealed which facts, *see, e.g., Edwards v. Wachovia Mortg.*, 2011 WL 589831, *3 (S.D.Cal. 2011); *Ines v. Countrywide Home Loans, Inc.*, 2009 WL 690108, *5 (S.D.Cal. 2009), as well as provide representative samples of the materials that *they* relied upon to make *their* purchase that failed to include the purportedly withheld information, *Raynaldo v. Am. Honda Motor Co.*, 2022 WL 4358096, *7-8 (N.D.Cal. 2022); *Williams v. Tesla, Inc.*, 2021 WL 2531177, *7 (N.D.Cal. 2021); *Marolda v. Symantec Corp.*, 672 F.Supp.2d 992, 1002 (N.D.Cal. 2009); *Sarkesian v. Ford Motor Co.*, 2023 WL 2994117, *7 (S.D.Cal. 2023); *Eisen v. Porsche Cars N. Am., Inc.*, 2012 WL 841019, *3 (C.D.Cal. 2012). Plaintiffs do neither.

Plaintiffs collectively refer to Defendants, without differentiating between FCA US and Cummins as to what conduct each supposedly undertook in “conceal[ing] and omit[ing]” information. *See* § II.A, *supra*. And Plaintiffs fail to provide the requisite representative samples of the kinds of materials that *they* relied upon. To be sure, they offer (i) brochures for 2013-18 Ram 2500/3500 trucks, *see* CAC, ¶¶ 148-50, 156, 158, 163, & n.44-45, 48, 51, 53; (ii) “Press Kits” for 2013, 2014, and 2017 Ram trucks, *id.* at ¶¶ 151, 157, 162, & n.46, 49, 50, 52; (iii) an owners’ manual for a 2013 Ram truck, *id.* at ¶ 162 & n.47; and (iv) unspecified “labels in the [subject vehicles], *id.*

1 at ¶ 153; but no Plaintiff says they encountered, let alone relied upon, any of those things at any
2 point, *see id.* at ¶¶ 11-71.⁸

3 2. **No Pre-Sale Knowledge Allegations (All Claims)**

4 To state a CLRA, FAL, UCL, or fraudulent concealment claim, Plaintiffs must plead, at
5 minimum, that FCA US knew of the purported defect ***before each Plaintiff*** purchased their vehicle.
6 *See, e.g., Resnick v. Hyundai Motor Am., Inc.*, 2017 WL 1531192, *14 (C.D.Cal. 2017) (dismissing
7 fraudulent concealment, UCL, CLRA, and FAL claims for lack of sufficient pre-sale knowledge
8 allegations). And, while “Rule 9(b) permits knowledge to be alleged generally, allegations of
9 knowledge ***must still be factual, not conclusory.***” *In re Volkswagen “Clean Diesel” Mktg., Sales*
10 *Pracs., & Prod. Liab. Litig.*, 2019 WL 4581340, *6 (N.D.Cal. 2019) (emphasis added); *see also Shu*
11 *v. Toyota Motor Sales USA, Inc.*, 669 F.Supp.3d 888, 901 (N.D.Cal. 2023) (dismissing claim where
12 complaint did not “allege[] pre-sale knowledge ... other than in conclusory allegations that have no
13 predicate fact allegations”); *Salvestrini v. Gen. Motors, LLC*, 2024 WL 3626695, *4 (S.D.Cal. 2024)
14 (“While allegations of knowledge may be made ‘generally’, the allegations must still be ***factual***,
15 and the Court need not accept legal conclusions couched as facts ...”) (emphasis added).

16 Plaintiffs must also distinguish between defendants. *See, e.g., Pro Water Sol., Inc. v. Angie’s*
17 *List, Inc.*, 457 F Supp.3d 845, 852 (C.D.Cal. 2020) (dismissing where “[plaintiffs] grouped
18 Defendants together” in pleading knowledge because “Rule 9(b) ... requires plaintiffs to
19 ‘differentiate their allegations when suing more than one defendant’” (citations omitted)).

20 But the CAC does none of that. Nearly all of Plaintiffs’ knowledge allegations are lobbed
21 against both FCA US and Cummins, collectively, *see, e.g., CAC*, ¶¶ 182-184, 250, 251, 253, 266,
22 269, 270, 282, 364, 366, 367, and the few allegations levied against FCA US alone are conclusory
23 at best, *i.e., ¶¶ 301, 343*. That is nowhere near enough. *See, e.g., Luna v. Gen. Motors LLC*, 2024
24 WL 3173287, *3 (N.D.Cal. 2024) (knowledge not alleged where complaint fails to “make ***specific***
25 ***averments*** that [defendant] concealed information about the [products] or ... had fraudulent intent.”)

27 ⁸Cappa alleges he viewed a brochure, but he does not say whether he viewed it before his
28 vehicle purchase. *Id.* at ¶ 55

(emphasis added).

3. *Puffery (Misrepresentation Claims)*

Nearly all of the alleged misrepresentations constitute inactionable puffery.⁹ Compare § III.A, with *Vitt v. Apple Comput., Inc.*, 469 Fed.Appx. 605, 607 (9th Cir. 2012) (representations that product was “durable,” “reliable,” and “high performance” were inactionable); *Sulligan v. Ford Motor Co.*, 2023 WL 5180330, *11 (E.D.Mich. 2023) (representation product had “low-cost of ownership” is “nonactionable puffery”); *Treuhart v. Mercedes-Benz USA, LLC*, 2021 WL 2864877, *5 (C.D.Cal. 2021) (representations that vehicle had “clean diesel,” was “reliable,” and “had a low-emission clean diesel engine” are “clearly puffery”); *In re Gen. Motors LLC CP4 Fuel Pump Litig.*, 393 F.Supp.3d 871, 877 (N.D.Cal. 2019) (“broad claims of ‘reliability’ and ‘durability’” and “references to ‘superior fuel economy,’ ... and ‘emission performance’” were “mere sales puffery”).

And, *even if* FCA US’s purported marketing of DEF consumption and pollution levels as superior to comparable vehicles could be construed as extending beyond “mere puffery,” Plaintiffs do not (and cannot) identify anything that “was false and misleading about [them].” *Nevarez*, 2024 WL 3915235 at *4.

4. *Reliance (Misrepresentation Claims)*

Misrepresentation claims require pleading *actual* reliance. *Williams v. Apple, Inc.*, 449 F.Supp.3d 892, 912 (N.D.Cal. 2020) (FAL); *Rojas-Lozano v. Google, Inc.*, 159 F.Supp.3d 1101, 1114 (N.D.Cal. 2016) (CLRA); *Backhaut v. Apple, Inc.*, 74 F.Supp.3d 1033, 1047 (N.D.Cal. 2014) (UCL). But not one Plaintiff alleges seeing any supposed misrepresentations *before* purchasing his vehicle. See § III.A, *supra*. And, although each avers they “conducted extensive *research*,” none suggest they actually “saw and relied on” any specific misrepresentation before their purchases. See CAC, ¶¶ 12, 18, 24, 30, 36, 48, 55, 61, 67 (emphasis added); *see also Shu*, 669 F.Supp.3d at 898 (“[Plaintiff alleges she] ‘*reviewed* the Monroney label.’ The plaintiffs contend that the complaint ‘logically implies’ that she read the sticker (and relied on it) before she bought the RAV4. *That inference cannot be drawn because the complaint does not specify when she read the label.*”

⁹The emission-compliance representation fails for other reasons. See §§ IV.B, D.1-2, 4, 6.

(emphases added)).

Plaintiffs' failure to plead their misrepresentation claim under Rule 9(b) also undermines reliance:

[The] allegations ... are fairly generic for all plaintiffs: they reviewed marketing materials and website information and saw the misrepresentations ... [These] allegations generally identify the sources of the misrepresentations as the websites and brochures. But the circumstances constituting the fraud must be specific enough to give defendants notice of the particular misconduct which is alleged to constitute the fraud charged so that they can defend against the charge and not just deny that they have done anything wrong. ... *one cannot tell what the plaintiffs saw and how they saw it (e.g., from mailings, on the websites for the dealerships or Toyota, or otherwise)* ... Courts have required plaintiffs to identify the specific advertisements and promotional materials that *they* relied on, and when *they* saw them.

Id. (emphases added); *compare, e.g., CAC*, ¶¶ 12, 18, 24, 30, 36, 48, 55, 61, 67.

5. Duty to Disclose (Omission Claims)

To plead their omission-based fraud claims, Plaintiffs must establish, *with facts*, that FCA US had duty to disclose, *i.e.*, that:

(1) ... [T]he omission was material; (2) the alleged defect was central to the product's function; *and* (3) the defendant (a) is plaintiff's fiduciary, (b) has 'exclusive knowledge' of material facts, (c) 'actively conceals' a material fact, *or* (d) makes misleading partial representations [the *LiMandri* factors].

In re Natera Prenatal Testing Litig, 664 F.Supp.3d 995, 1008 (N.D.Cal. 2023) (emphases added) (quoting *Hodsdon v. Mars, Inc.*, 891 F.3d 857, 863 (9th Cir. 2018)).¹⁰ Failure to plead *any* of the three is alone sufficient to warrant dismissal on duty to disclose grounds. *See Hayden v. Bob's Red Mill Nat. Foods, Inc.*, 2024 WL 1643696, *10 (N.D.Cal. 2024) ("[T]he failure to satisfy the 'central function' prong resolves the question of whether Defendant has a duty to disclose ..."). Plaintiffs here plead none of them.

Materiality: Each Plaintiff alleges that "Defendants' representations" about their vehicles "were material to [their] purchasing decision," *see CAC*, ¶¶ 12, 18, 24, 30, 36, 48, 55, 61, 67, but they do not explain *why* such misrepresentations were material, which they must do under Rule

¹⁰*See also Smith v. Intel Corp.*, 2024 WL 3834706, *6 (N.D.Cal. 2024); *Hammerling v. Google LLC*, 615 F.Supp.3d 1069, 1085 (N.D.Cal. 2022).

1 9(b).¹¹ See § IV.E.1, *supra*.

2 Central Function: “A defect affects the central function of a product when it renders the
3 product **incapable of use by any consumer.**” *Garlough v. FCA US LLC*, 2021 WL 4033177, *5
4 (E.D.Cal. 2021) (emphasis added). Here, no Plaintiff alleges that the defect renders their vehicle
5 unusable, or even that it affects its central functionality in some manner. See CAC, ¶¶ 11-71.
6 Instead, they report only “increasing maintenance and repair costs.” *Id.* at ¶ 251. “Under California
7 law, a manufacturer has ‘no duty to disclose’ a defect where the “risk posed by the alleged defect
8 [is] the cost to repair the product.” *Sharma v. BMW of N. Am. LLC*, 2016 WL 4395470, *5 (N.D.Cal.
9 2016); compare, e.g., *Antonyan v. Ford Motor Co.*, 2022 WL 1299964, *4 (C.D.Cal. 2022)
10 (“[Plaintiff] allege[d] that due to the defect, his [vehicle] stalled and **could not be restarted** ...
11 Therefore, the defect affected the [vehicle]’s central functionality.”) (emphasis added).

12 LiMandri Factors: Plaintiffs assert FCA US’s alleged exclusive knowledge, active
13 concealment, and partial misleading representations all trigger a duty to disclose. See CAC, ¶¶ 250,
14 252, 253, 270, 366. But, again, Plaintiffs plead no **facts** showing FCA US had **any** degree of pre-
15 sale knowledge, let alone exclusive knowledge. See § IV.E.2, *supra*. Likewise, Plaintiffs plead no
16 **facts** showing concealment, and “bare legal conclusions” do not suffice. *Mosqueda v. Am. Honda*
17 *Motor Co., Inc.*, 443 F.Supp.3d 1115, 1130–31 (C.D.Cal. 2020). But that is all that Plaintiffs offer.
18 See CAC, ¶¶ 250, 252, 253, 270, 366. Plaintiffs also fail to plead misleading partial representations
19 with sufficient specificity, as they leave out the **who, what, when, where, and why**. See § IV.E.1,
20 *supra*.

21 6. Statute-Specific Arguments (Counts III and X)

22 CLRA: The CLRA requires that a plaintiff provide the defendant with thirty days’ notice
23 before filing suit. See Cal. Civ.Code § 1782(a). Here, Plaintiffs point to (i) “investigations
24 conducted by governmental regulators” and (ii) the letters they sent on December 27, 2023 and
25 September 6, 2024. See CAC, ¶¶ 275-276. But the former does not count because the plaintiff’s

26 _____
27 ¹¹Plaintiffs offer a few conclusory safety allegations, see CAC, ¶¶ 283, 288, 364, but this does
28 not suffice, see, e.g., *In re Toyota RAV4 Hybrid Fuel Tank Litig.*, 534 F.Supp.3d 1067, 1103 (N.D.Cal.
2021).

notice “must be in writing and must be sent by certified or registered mail, return receipt requested.” *Keilholtz v. Lennox Hearth Prod. Inc.*, 2009 WL 2905960, *2 (N.D.Cal. 2009) (quotations omitted). And neither does the latter, since the letters were sent *the same day* Plaintiffs filed suit (*see* ECF #1), and just four days before being named in the CAC.

UCL “Fraudulent” Prong: “[T]he standard for deceptive practices under the fraudulent prong of the UCL applies equally to claims for misrepresentation under the CLRA,” so “courts often analyze the two statutes [UCL and CLRA] together.” *Kowalsky v. Hewlett-Packard Co.*, 771 F.Supp.2d 1156, 1162–63 (N.D.Cal. 2011). So, the UCL “fraud” prong misrepresentation claim fails for the same reasons the analogous CLRA claim fails. *See* § IV.E, *supra*. As to omissions, the Ninth Circuit held “a failure to disclose a fact one has no affirmative duty to disclose” is *not* “‘likely to deceive’ anyone within the meaning of the UCL.” *Taleshpour v. Apple, Inc.*, 2022 WL 1577802, *2 (9th Cir. 2022). Because there was no duty to disclose, the UCL fraudulent prong omission claim also fails. *See* § IV.E.5, *supra*.

Separately, to plead a UCL fraudulent prong claim, a plaintiff must allege facts demonstrating she has standing, which requires showing “that she actually relied upon the allegedly deceptive or misleading statements.” *Snapkeys, Ltd. v. Google LLC*, 2020 WL 6381354, **6-7 (N.D.Cal. 2020) (dismissing claim with prejudice). Plaintiffs do not. *See* § IV.E.4, *supra*.

UCL “Unfair” Prong: Where “[a] [p]laintiff’s claim under the unfair prong overlaps entirely with [his] CLRA claim” and suffers “the same deficiencies,” a [plaintiff] has not plausibly pled a UCL violation under the unfair prong.”¹² *Enea v. Mercedes-Benz USA, LLC*, 2019 WL 402315, *7 (N.D.Cal. 2019). Plaintiffs here predicate their UCL unfair prong claim upon the same facts as their CLRA claim. *See, e.g.*, CAC, ¶ 372. Further, Plaintiff pleads no facts tying the UCL claim to any legislative policy, anti-competitive behavior, or conduct that is “immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers,” which he must do to state an “unfair” prong claim. *Conejo v. JPMorgan Chase Bank*, 2011 WL 6149246, *5 (C.D.Cal. 2011);

¹²*See also Wilson v. Hewlett-Packard Co.*, 668 F.3d 1136, 1145 n.5 (9th Cir.) (“the failure to disclose a fact that a manufacturer does not have a duty to disclose ... does not constitute an unfair or unlawful practice”); *Tesla, Inc.*, 2022 WL 899847, *5 (N.D.Cal. 2022).

1 *see also Santa Barbara Smokehouse, Inc. v. Aquachile, Inc.*, 2020 WL 6743592, *5-7 (C.D.Cal.
2 2020) (conclusory allegations insufficient).

3 UCL “Unlawful” Prong: A claim under the UCL’s “unlawful” prong claim should be
4 dismissed when a plaintiff has not established the violation of any other law. *See, e.g., Altman v.*
5 *PNC Mortg.*, 850 F.Supp.2d 1057, 1077 (E.D.Cal. 2012); *Brios v. Wells Fargo Bank*, 737 F.Supp.2d
6 1018, 1033 (N.D.Cal. 2010). Again, that is the case here: because Plaintiffs fail to adequately allege
7 any such violation, the claim under this prong fails.

8 Finally, the UCL claim should be dismissed under ***all prongs*** for the additional reason that
9 the UCL provides “purely equitable relief,” and Plaintiff has failed to plead facts showing he lacks
10 an adequate remedy at law. *See, e.g., Sonner v. Premier Nutrition Corp.*, 971 F.3d 834, 844-45 (9th
11 Cir. 2020) (affirming dismissal of UCL claim where plaintiff “fail[ed] to demonstrate that he lacks
12 an adequate legal remedy”); *Lisner v. Sparc Grp. LLC*, 2021 WL 6284158, *8 (C.D.Cal. 2021)
13 (finding that plaintiffs “must establish that they lack an adequate remedy at law to seek restitution,
14 which they fail to do here”); *Gibson v. Jaguar Land Rover N. Am., LLC*, 2020 WL 5492990, *3-4
15 (C.D.Cal. 2020) (dismissing UCL claim with prejudice where plaintiff could “not bring equitable
16 claims” in absence of “facts that could support a finding that monetary relief is insufficient to
17 compensate him and the putative class for the alleged harm”). Instead, Plaintiffs offer only a
18 conclusory allegation of being without one. *See* CAC, ¶ 380. That is not enough.

19 E. The Express Warranty Claims (Counts V, VI, and IX)

20 1. Failure to Allege Exact Terms of Warranties (Counts V, VI, IX)

21 “[T]o state a claim for breach of express warranty” under both the UCC and Song-Beverly,
22 “[a] Plaintiff must allege ***the exact terms*** of the warranty that have been breached.” *Kargar v. BMW*
23 *of N. Am., LLC*, 2024 WL 3915218, *2 (C.D.Cal. 2024) (citations omitted) (emphasis added). Here,
24 Plaintiffs allege FCA US provided them with four separate warranties. *See* CAC, ¶¶ 297-300. But
25 courts have construed similar averments as ***not*** alleging the exact terms of those warranties and how
26 those terms were breached, dismissing the warranty claims on that basis. *See, e.g., Cho v. Hyundai*
27 *Motor Co., Ltd.*, 636 F.Supp.3d 1149, 1174 (C.D.Cal. 2022) (“Plaintiffs allege the Powertrain
28

Warranty covers the ‘engine, transmission, and drive systems,’ and therefore ‘is the applicable warranty related to the Oil Consumption Defect.’ ... However, this hollow statement, without more, fails to identify any express term of the warranty that was allegedly breached.”); *see also Pelayo v. Hyundai Motor Am., Inc.*, 2021 WL 1808628, *7 (C.D.Cal. 2021); *Becerra v. Gen. Motors LLC*, 241 F.Supp.3d 1094, 1113 (S.D.Cal. 2017); *Hardt v. Chrysler Grp. LLC*, 2015 WL 12683963, *12 (C.D.Cal. 2015).

2. Failure to Allege Reliance Upon Warranties (Counts V, VI, IX)

“[W]hen the parties are not in privity, California law requires a showing that a plaintiff relied on an alleged warranty.” *Cho*, 636 F.Supp.3d at 1174. Privity is absent here because no Plaintiff avers purchasing a subject vehicle directly from FCA US, *see* § III.A, *supra*, but, even so, no Plaintiff alleges they “relied on the express warranty in deciding to purchase his or her vehicle.” *Asghari v. Volkswagen Grp. of Am., Inc.*, 42 F.Supp.3d 1306, 1335 (C.D.Cal. 2013) (dismissing claim). Even Plaintiffs’ conclusory reliance allegations fail to mention any warranty. *See, e.g.*, CAC, ¶¶ 12, 18, 24, 36, 42, 48, 55, 61, 67. When a plaintiff pleads neither privity nor reasonable reliance, courts dismiss that claim. *See, e.g., Asghari*, 42 F.Supp.3d at 1335; *Sanders v. Apple Inc.*, 672 F.Supp.2d 978, 988 (N.D.Cal.2009); *Stearns v. Select Comfort Retail Corp.*, 2008 WL 4542967, *5 (N.D.Cal. 2008); *Moncada v. Allstate Ins. Co.*, 471 F.Supp.2d 987, 997 (N.D.Cal.2006); *see also Coleman v. Boston Scientific Corp.*, 2011 WL 3813173, *4 (E.D.Cal. 2011).

3. Failure to Repair/Conform (Counts V, VI and IX)

Song Beverly Act: “[U]nder the Song-Beverly Act, Plaintiffs must show that [Defendant] failed to conform the [subject vehicle] to the express warranty within a reasonable number of repair attempts.” *Pineda v. Nissan N. Am., Inc.*, 2022 WL 2920416, *3 (C.D.Cal. 2022). Here, three Plaintiffs do not claim to have *ever* brought their vehicles in for service, despite having received notice their vehicles had been recalled. *See* CAC, ¶¶ 34, 40, 53. The remainder allege only that their vehicles underwent the recall at some unspecified time and place. *Id.* at ¶¶ 16, 22, 28, 59, 65, 71. That is not enough.

A plaintiff does not satisfy the repair requisite where they “simply recite[] th[e] element [of

the claim] ... without any detail” and neglects to “provide critical information such as the number of repair attempts, what defects were addressed at each appointment, and what issues there may have been in attempting to repair the alleged defects.” *Pineda*, 2022 WL 2920416 at *3; *see also* *Lemke-Vega v. Mercedes-Benz USA, LLC*, 2023 WL 3604318, *5 (N.D.Cal. 2023); *Nilsen v. Tesla, Inc.*, 2023 WL 3763811, *5 (N.D.Cal. 2023); *Kodjanian v. Mercedes-Benz USA, LLC*, 2022 WL 1515683, *3 (C.D.Cal. 2022). ***Even if*** these Plaintiffs had sufficiently alleged presenting their vehicles for a repair, “as a matter of law, one opportunity to repair is never enough.” *Arakelian v. Mercedes-Benz USA, LLC*, 2018 WL 6422649, *3 (C.D.Cal. 2018). Plaintiffs also attempt to plead a futility exception, *see* CAC, ¶¶ 321, 356, but “no court has ever held that futility actually provides an exception to [this rule],” *Arakelian*, 2018 WL 6422649, *3. This Court should not be the first.

California UCC: Plaintiffs allege “FCA [US] breached the express warranty promising to repair and correct FCA [US]’s defect in materials and workmanship” by “not repair[ing] the Subject vehicles’ materials and workmanship defects. *See* CAC, ¶ 303. From the outset, a bald, generic assertion of a failure to repair “is conclusory and unsupported by facts.” *Acedo v. DMAX, Ltd.*, 2015 WL 12912365, *18 (C.D.Cal. 2015). Plaintiffs do not say when they supposedly presented their vehicles for servicing under the warranty, when that service was refused, or that they were required to pay for repairs and replacements that were purportedly covered by the warranty. That is fatal to the claim. *Id.* (dismissing on similar allegations).

Plaintiffs also attempt to plead two exceptions to the presentment requirement: futility and failure of essential purpose. *See* CAC, ¶¶ 304-305. But this District has found “that there is no ‘futility’ exception to the presentment requirement” for UCC express warranty claims. *Pereda v. Gen. Motors LLC*, 2022 WL 19975388, *13 (N.D.Cal. 2022). And failure of essential purpose applies “only if ***repeated*** repair attempts are unsuccessful within a reasonable time.” *Philippine Nat. Oil Co. v. Garrett Corp.*, 724 F.2d 803, 808 (9th Cir. 1984) (emphasis added); *see also* *Browning v. Am. Honda Motor Co.*, 549 F.Supp.3d 996, 1011-12 (N.D.Cal. 2021) (“Plaintiffs ... who only allege that they brought their Class Vehicles in for repair once ... cannot pursue express warranty claims ...”). Plaintiffs plead no facts to suggest they presented their vehicles for multiple

1 repair attempts.

2 **4. Failure to Plead Notice (Counts V)**

3 The statute requiring a plaintiff to plead pre-suit notice applies to both express and implied
4 warranty claims. *See* Cal. Com. Code § 2607(3)(a). Plaintiffs' UCC express warranty claim fails
5 for lack of notice for the same reason their implied warranty claims does. *See* § IV.G.3, *infra*.

6 **F. The Implied Warranty Claims (Counts VII and VIII)**

7 **1. The Vehicles Are Merchantable (Counts VII and VIII)**

8 "[T]he implied warranty of merchantability ... is breached **only** when goods lack 'even **the**
9 **most basic** degree of fitness for ordinary use.'" *Benipayo v. Volkswagen Grp. of Am., Inc.*, 2020 WL
10 553884, *4 (N.D.Cal. 2020) (emphasis added) (quoting *Birdsong v. Apple, Inc.*, 590 F.3d 955, 958
11 (9th Cir. 2009)). That is not the case here. Plaintiffs aver that the subject vehicles were "not fit for
12 the ordinary purpose for which vehicles are used" because they "included illegal Defeat Devices,"
13 which caused the vehicles to "not comply with emissions regulations" and rendered their labeling
14 misleading. *See* CAC, ¶¶ 331, 324, 342, 344. But "[a] product may be used even if it violates
15 regulatory requirements." *Benipayo*, 2020 WL 553884, *5. In fact, many courts "have similarly
16 rejected arguments akin to Plaintiffs' theory that a car that does not meet emissions standards set by
17 law is by definition unmerchantable or necessarily fails to meet a 'minimum level of quality.'" *Id.*
18 at *5; *see also Thomas v. Costco Wholesale Corp.*, 2014 WL 5872808, *3 (N.D.Cal. 2014) (rejecting
19 argument that a product was not merchantable because it "could not be legally sold or held" and
20 dismissing implied warranty claim); *Swearingen v. Amazon Pres. Partners, Inc.*, 2014 WL 3934000,
21 *1 (N.D.Cal. 2014) (rejecting allegations product was "illegal" insufficient to allege that it "lack[ed]
22 even the most basic degree of fitness for ordinary use" and dismissing implied warranty claim).

23 Likewise, "the heart of the merchantability inquiry is ***fitness for use, not conformity to***
24 ***labeling***, and courts have held that mislabeling alone cannot render a product unmerchantable."
25 *Benipayo v. Volkswagen Grp. of Am., Inc.*, 2020 WL 553884, *4 (N.D.Cal. 2020) (emphasis added);
26 *see also Riley v. Volkswagen Grp. of Am., Inc.*, 2022 WL 17829997, *1 (9th Cir. 2022) (affirming
27 dismissal because "marketing promises and an emissions compliance sticker ... are not labels under
28

the implied warranty provision of the Song-Beverly Act”).

2. *No Privity (Counts VII and VIII)*

Vertical privity is “a strict requirement for breach of implied warranty claims under California law.” *Smith v. Intel Corp.*, 2024 WL 3834706, *9 (N.D.Cal. 2024) (dismissing UCC and Song-Beverly claims and citing *Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017, 1024 (9th Cir. 2008)). Yet, every Plaintiff alleges purchasing his vehicle from an unnamed “authorized FCA [US] dealership,” *not* FCA US. *See* § III.A, *supra*; *see also* CAC, ¶¶ 332.

Plaintiffs attempt to escape that fact by alleging they were third-party beneficiaries of FCA US’s contracts with its “certified/authorized retailers who sold or leased” the subject vehicles. *Id.* at ¶¶ 332, 345. But this District, “after carefully considering the circuit split on this issue, has *not* found a third-party beneficiary exception to these privity requirements.” *Smith*, 2024 WL 3834706, *9 (emphasis added).

3. *Failure to Plead Notice (Count VII)*

To avoid dismissal of a breach of warranty claim in California, a buyer must plead that notice of the alleged breach was provided to the seller within a reasonable time after discovery of the breach. *See, e.g., Alvarez v. Chevron Corp.*, 656 F.3d 925, 932 (9th Cir.2011). Plaintiffs argue the requirement does not apply here because they did not purchase their vehicles directly from FCA US. *See* CAC, ¶¶ 332, 345. But Plaintiffs admit they purchased their vehicles “from ... *authorized retailers*[,] ... [t]herefore, the exception does not apply to this case.” *Minkler v. Apple, Inc.*, 65 F.Supp.3d 810, 817 (N.D.Cal. 2014) (emphasis added); *see also* CAC, ¶¶ 11, 17, 23, 35, 41, 47, 54, 60, 66.

In any event, Plaintiffs suggest that, even if notice was required, they provided it through their December 2023 pre-suit letters and government investigations. *Id.* at ¶ 332. But the letter was sent the same day and therefore does not suffice. *See, e.g., Alvarez*, 656 F.3d at 932 (same-day letter does not provide pre-suit notice for warranty claim); *see also Evans v. DSW, Inc.*, 2017 WL 7058232, *4 (C.D.Cal. 2017) (same); *Adkins v. Apple Inc.*, 147 F.Supp.3d 913, 920 (N.D.Cal. 2014) (same). And regulatory investigations do not suffice because the statute requires that *the plaintiff*

1 provide notice that he considers defendant to be in breach—it is not enough that a product may have
 2 general issues. *See* Cal. Com. Code § 2607(3)(a). In any event, “it appears relatively easy for a
 3 consumer to comply with [§] 2607(3)(A), and the burden of doing so is so slight that [a] [c]ourt
 4 [should be] unwilling to dispense with the notice required by [§] 2607(3)(A) and unwilling to invite
 5 extensive satellite litigation into futility and/or actual knowledge.” *See Davis v. Apperience Corp.*,
 6 2014 WL 5528232, *5 (N.D.Cal. 2014).

7 **G. The Unjust Enrichment Claim (Count XI).**

8 Aside from its failure to meet Rule 9(b)’s pleading standards, *see* § IV.E.1, *supra*, it fails for
 9 multiple other, and separate, reasons.

10 *Not A Cause Of Action*: “Unjust enrichment ***is not a cause of action***, but rather, a general
 11 principle, underlying various legal doctrines and remedies.” *Wen v. Greenpoint Mtg. Funding, Inc.*,
 12 2021 WL 5449048, *4 (N.D.Cal. 2021) (emphasis added); *see also M&M Consulting Group, LLC*
 13 *v. JP Morgan Bank, N.A.*, 2021 WL 71436, *8 (C.D.Cal. 2021) (“[T]here is no cause of action in
 14 California for unjust enrichment”). Because Plaintiffs have not pled any other viable claim, their
 15 “unjust enrichment theory cannot stand as a claim on its own.” *Wen*, 2021 WL 5449048, *4.

16 *Express Contract Bars Claim*: Even if this Court “construe[d] the [unjust enrichment claim]
 17 as a quasi-contract claim seeking restitution,” it would still fail because the claim “cannot lie where
 18 there exists between the parties a valid express contract covering the same subject matter.” *Udo v.*
 19 *Wells Fargo Bank, N.A.*, 2023 WL 8600791, *3 (N.D.Cal. 2023). Here, Plaintiffs admit FCA US
 20 provided various warranties for their vehicles when purchased new. *See* § IV.F.1, *supra*. There can
 21 be no doubt that these warranties cover “the same subject matter” as Plaintiffs’ unjust enrichment
 22 claim. *See, e.g., CAC*, ¶¶ 382-393.

23 *Adequate Remedy At Law*: The unjust enrichment claim would also fail because Plaintiffs
 24 have an adequate remedy at law (assuming they could plead a viable claim). *See, e.g., Sharma v.*
 25 *Volkswagen AG*, 524 F.Supp.3d 891, 907-09 (N.D.Cal. 2021) (dismissing unjust enrichment claim
 26 where plaintiffs did not explain ***why*** monetary damages would not provide relief sought); *see also*
 27 *Milman v. FCA US LLC*, 2019 WL 3334612, *9 (C.D.Cal. 2019) (dismissing unjust enrichment
 28

claim and finding “even if pled in the alternative this would not excuse the requirement that [plaintiff] plead facts showing no adequate legal remedy exists”). Plaintiffs assert they overpaid for their vehicles at the point of sale” and that “the out-of-pocket cost of owning and operating” their vehicles was increased. *See* CAC, ¶¶ 8-9; *see also id.* at ¶¶ 136, 145. This is “exactly the type of injury for which legal remedies are appropriate.” *Sharma*, 524 F.Supp.3d at 908.

Duplicative: Finally, the unjust enrichment claim is wholly duplicative of the other claims. *Compare* CAC, ¶¶ 382-93, *with id.* at ¶¶ 244-381. For this additional reason, the Court should dismiss the claim. *See Robie v. Trader Joe’s Co.*, 2021 WL 2548960, *7 (N.D.Cal. 2021) (“Plaintiff’s claim for unjust enrichment fails to identify any independent theory of unjust enrichment that does not rise or fall with her statutory claims or are merely duplicative of those claims. As such, this separate cause of action is also dismissed.”); *In re Hard Disk Suspension Assemblies Antitrust Litig.*, 2021 WL 4306018, *24 (N.D.Cal. 2021) (dismissing unjust enrichment claim as “duplicative” where plaintiffs also sought restitution under the UCL).

V. CONCLUSION

For the reasons stated herein, FCA US respectfully requests this Court dismiss Plaintiffs’ Consolidated Amended Class Action Complaint in its entirety and with prejudice.

DATED: October 10, 2024

KLEIN THOMAS LEE & FRESARD

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CERTIFICATE OF SERVICE

I hereby certify that on October 10, 2024, I electronically filed the foregoing document using the CM/ECF system which will send notification of such filing to the e-mail addresses registered in the CM/ECF system, as denoted on the Electronic Mail Notice List.

/s/ Kristyn Wong