UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MARIE DEMARIA, SHERI GRIMM, JUANITA WALKER, DOUG BURKHOLDER, KEITH SIEFKEN, HERB BROWN, CANDACE KIXMILLER, ROSLYN CORBIN, DENNIS BIRD, NITZALI BELTRAN-ASHLINE, DONALD YOUNG, TWILA ASHWORTH, THOMAS WILBUR, PETER PETERSEN, JOSEPH MILLER, TAMMY PETTY, LAURIE SAUDER, and GARY OLDS on behalf of themselves and all others similarly situated,

Plaintiff,

vs.

NISSAN NORTH AMERICA INC., NISSAN MOTOR COMPANY, LTD.,

Defendant.

Case No. 1:15-cv-03321

Judge Hon. John Robert Blakey

NISSAN NORTH AMERICA'S MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS THE FIRST AMENDED COMPLAINT PURSUANT TO RULES 12(b)(2) AND 12(b)(6)

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INTRODUCTION

Instead of bolstering Ms. DeMaria's claims under Illinois law, the drafters of the first amended complaint have added 17 new named plaintiffs from 15 other states, along with many more pages of conclusory allegations. The FAC should be dismissed for several reasons.

First, the out-of-state plaintiffs have alleged no facts showing that Nissan North America is subject to personal jurisdiction in Illinois as to their claims. They cannot establish specific jurisdiction in Illinois because they do not allege that their claims arise from any of Nissan's contacts with that state. They also cannot establish general jurisdiction, as recent U.S. Supreme Court decisions make clear. The out-of-state claims must therefore be dismissed.

Second, all the plaintiffs' claims fail because the FAC still contains no facts showing that Nissan knew about the alleged defect at the time it was selling the class vehicles, a required element for every claim except warranty. Plaintiffs' theory is not only speculative but implausible—they allege mainly that due to unspecified pre-release testing, Nissan must have known "immediately" (in 2001) of a problem that none of the plaintiffs themselves noticed for another thirteen years. Plaintiffs' allegation that Nissan "must have known" by about 2005 because of warranty claims and customer complaints is also nothing but speculation.

Third, the FAC also does not allege the other circumstances of fraud with particularity, such as who Plaintiffs dealt with and what created a duty to disclose. Because Plaintiffs allege no affirmative misrepresentations, the latter is also a required element of all their fraud claims.

Fourth, Plaintiffs' implied-warranty-of-merchantability claims fail simply because none of them allege their cars were not merchantable when they were delivered, or indeed for many years after that. Implied warranties do not last forever.

Finally, if Plaintiffs' cause of action for "negligence" is intended as a tort claim rather than some other species of fraud, it fails because of the economic-loss doctrine.

FACTS

Plaintiffs' First Amended Complaint has expanded to a total of 18 named plaintiffs in 16 different states, but as with the initial complaint it alleges almost no facts about the individual plaintiffs or their particular transactions. For example, the FAC alleges only that:

- Marie DeMaria bought a 2005 Altima in 2010 from an unidentified party in Illinois, where she lives. FAC ¶¶ 4, 46. In 2014, she found a hole in the floorboard. *Id*. ¶ 48. She asked a"Nissan dealership" to fix the problem for free, but it refused. *Id*. ¶ 49.

- Sheri Grimm bought a used 2002 Altima in 2006 from a dealer in Missouri,where she lives. FAC ¶¶ 5, 50-53. She alleges she discovered "significant rust" almost a decade later, when the car was 13 years old. *Id*. ¶ 53.

- Juanita Walker bought a 2003 Altima in 2005 from a dealer in Alabama, where she lives. *Id*. ¶¶ 6, 54, 55. She further alleges only that at some point, she found rust in her floorboards when she removed the floor mats for cleaning. *Id*. ¶ 56.

The similarly brief allegations of all 18 plaintiffs are summarized on the next page. In particular, Nissan[1] highlights the following points supported by that chart and the cited FAC paragraphs:

- Two plaintiffs live in Missouri and two in Massachusetts, which is why the case involves 18 named plaintiffs but only 16 states.

- Though there are plaintiffs from Massachusetts and Indiana, they have not alleged any claims under their states' consumer-protection laws.

- Only the Ohio plaintiff, Ms. Perry, owns a Maxima, which she bought used in 2014.

- Most plaintiffs do not allege whether they bought new or used cars, but common sense suggests that, for example, that a 2005 Altima bought in 2014 was bought used. On that basis, about half appear to have been new and half used.

- The earliest purchase date alleged is in 2004, and the latest (a used car) in 2015. Of the cars allegedly bought new, the latest purchase date was in 2007.

- The earliest alleged discovery of rust was in "summer 2014"; the shortest alleged time between model year and rust discovery (*i.e.*, vehicle age) is about nine years.

- Only five of the named plaintiffs allege the rust damage has been repaired; three paid to have it repaired (at an average cost of $233), and two did it themselves.

[1] In this brief, "Nissan" refers only to Nissan North America, Inc. Its parent company, Nissan Motor Company, Ltd., has not appeared or been served, and is not subject to personal jurisdiction in Illinois.

	Name	FAC ¶¶	State COA	Model Year	Year Bought	Bought From	New? [2]	Discovery	Fixed?
AL	Walker	6, 54-56	6	2003	2005	Dealer	[New]	Unknown	Unknown
IA	Siefken	8, 62-65	9	2005	2006	Dealer	[New]	Apr. 2015	No
IL	DeMaria	4, 46-49	7, 8	2005	2010	Unknown	[Used]	Mid-2014	No
IN	Burkholder	7, 57-61	None	2005	2014	Private	[Used]	Apr. 2015	No
KS	Brown	9, 66-70	10	2006	2010	Dealer	[Used]	Fall 2014	No
KY	Kixmiller	10, 71-75	11	2002	2004	Dealer	[New]	Mar. 2015	No
MA	Bird	12, 80-84	None	2006	2006	Dealer	[New]	Nov. 2014	No
MA	Beltran-Ashline	13, 85-89	None	2005	2004	Dealer	New	Late 2014	Yes (self)
MD	Corbin	11, 76-79	12	2005	2004	Dealer	New	Oct. 2014	No
MI	Young	14, 90-93	13	2006	2007	Dealer	[New]	Apr. 2015	No
MO	Grimm	5, 50-53	14	2002	2006	Dealer	Used	2015	No
MO	Ashworth	15, 94-98	14	2004	2007	Dealer	[Used]	Late 2014	Yes ($350)
NH	Wilbur	16, 99-102	15	2006	2009	Dealer	[Used]	Mar. 2015	No
NJ	Petersen	17, 103-07	16	2005	2005	Dealer	New	Late 2014	Yes (self)
NY	Miller	18, 108-12	17, 18	2005	2004	Dealer	New	May 2015	No
OH	Petty	19, 113-15	19	2004	2014	Private	[Used]	Early 2015	No
PA	Sauder	20, 116-19	20	2004	2011	Private	[Used]	Unknown	Yes ($300)
VA	Olds	21, 120-24	21	2005	2005	Dealer	New	May 2015	Yes ($150)

Plaintiffs allege that Nissan "is a California corporation that has its headquarters and principal place of business in Franklin, Tennessee." *Id.* ¶ 22. They also allege that "[t]he Court may exercise jurisdiction over Nissan because Nissan is registered to conduct business in Illinois; has sufficient minimum contacts in Illinois; and intentionally avails itself of the markets within Illinois through the promotion, sale, marketing and distribution of its vehicles." *Id.* ¶ 25.

Nissan's New Vehicle Warranty provides basic coverage for 36 months or 36,000 miles, whichever comes first; rust is covered under this warranty, but body sheet metal panels that are perforated by rust are covered for five years, regardless of mileage. Ex. A at pp. 4-5.[3] These time

[2] If bracketed, the plaintiff has not alleged whether the car was new or used. The entries in this column assume that the car was used if the model year and purchase year are three or more years apart.

[3] Because Plaintiffs refer to and rely on the express warranty (FAC ¶ 37), the Court may properly consider it here. *Williamson v. Curran*, 714 F.3d 432, 436 (7th Cir. 2013).

periods begin on "the date the vehicle is delivered to the first retail buyer or put into use, whichever is earlier." Ex. A at p. 4. The warranty provides that any implied warranties afforded "shall be limited to the duration of this written warranty." *Id.* It also includes "corrosion protection guidelines" that owners should follow. *Id*. at p. 45.

Plaintiffs allege that the floorboards are "prone to" rust prematurely, but according to Plaintiffs, any rust would be "premature": "Floorboards are intended to last the life of the vehicle and are not a 'wear component' that owners or service technicians expect to repair or replace during the vehicle's anticipated useful life." FAC ¶ 31. But as Plaintiffs themselves point out, Nissan warrants cars against rust for only a limited time. *Id*. ¶ 37. Ms. DeMaria previously alleged that the rust "cannot be blamed on the weather," but conceded that in some areas "snow and salt have a higher chance of causing a rusty underbody." Compl. ¶ 18. As Nissan pointed out, according to the news reports she cited, almost all NHTSA rust complaints have involved those areas. The FAC no longer claims the problem "cannot be blamed on the weather," and almost all the new plaintiffs also live in northern or northeastern states. FAC ¶¶ 4-21.

Plaintiffs allege Nissan knew of the defect "in or around 2001" because it discovered this "immediately" through "extensive pre-release testing." FAC ¶¶ 34-37. They allege it is "industry standard" to "perform a number of presale tests to assess components such as the floorboard for any tendency to corrode." *Id*. ¶ 35. They do not allege which test Nissan actually performed, or when or how it discovered the defect, only that "[i]t is not plausible that Nissan could have performed comprehensive testing of this nature without detecting the defect." FAC ¶ 35.

Plaintiffs then allege Nissan continued to sell the defective vehicles for the next seven years, "all the while" receiving data confirming the problem in the form of "warranty claims and customer complaints." FAC ¶ 36. They allege that this data is "known only to Nissan," but

"surmise" that it shows Nissan knew "a worrisome percentage of its customers were submitting corrosion related warranty claims" and complaints in the "early to mid-2000s." *Id.* ¶ 37. None of the named plaintiffs allege *they* did so, however. Ms. DeMaria was the first to discover corrosion in her vehicle, and that was in "the summer of 2014." FAC ¶ 48. The earliest discovery date alleged in any of the cited anonymous complaints is May 2009. FAC ¶¶ 41-43.

The FAC remains unclear as to exactly what the alleged defect *was*. Plaintiffs allege that "due to vast improvements in manufacturing and design technologies, motor vehicles manufactured in recent decades experience significantly reduced levels of corrosion," and that these "standard corrosion prevention techniques include the use of corrosion-resistant materials, coated steels, sealers, and polymers." *Id.* ¶¶ 33-34. They then allege that "Nissan opted to deviate from optimal corrosion protection," but do not say exactly how it did this. *Id.* ¶ 34.

Finally, Plaintiffs again allege that a rusty floorboard is a dangerous "safety defect." *Id.* ¶ 1, 2, 32. They theorize that fumes, rocks, or feet might pass through, or that advanced rust might affect a car's structural integrity. But again the FAC does not allege that any of these things has happened to a named plaintiff, or to anyone else, for that matter. Notably, Plaintiffs alleged in the initial complaint that "[a]s a result of the Defect, there has been at least one reported accident with injuries" (Compl. ¶ 2), but they have now retracted that claim, as the FAC does not allege there have been any accidents, let alone injuries, resulting from a rusty floorboard.

ARGUMENT

I. The out-of-state plaintiffs' claims fail for lack of personal jurisdiction.

A. Plaintiffs have the burden to establish general or specific jurisdiction.

In response to a 12(b)(2) motion the plaintiff must make at least a prima facie showing to support jurisdiction. *Kipp v. Ski Enter. Corp. of Wis., Inc.*, 783 F.3d 695, 697 (7th Cir. 2015). This Court "must apply the personal jurisdiction rules of the state in which it sits." *Id.* Here, the

Illinois long-arm statute permits jurisdiction up to the limits of the Due Process Clause, and so the "the state statutory and federal constitutional inquiries merge." *Tamburo v. Dworkin*, 601 F.3d 693, 700 (7th Cir. 2010) (*citing* 735 Ill. Comp. Stat. 5/2–209(c)).

There are two kinds of personal jurisdiction: general and specific. *See generally Daimler AG v. Bauman*, — U.S. —, 134 S. Ct. 746, 751, 187 L.Ed.2d 624 (2014); *Walden v. Fiore*, — U.S. —, 134 S. Ct. 1115, 1121, 188 L. Ed. 2d 12 (2014); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. —, 131 S. Ct. 2846, 2851, 180 L.Ed.2d 796 (2011); *see also Kipp*, 783 F.3d at 697 (discussing both *Daimler* and *Goodyear*).

General jurisdiction is "all-purpose": it allows a state to exercise jurisdiction over a defendant even "on causes of action arising from dealings entirely distinct from" its activities within the state. *Goodyear*, 131 S. Ct. at 2853. But because it is so powerful, the high court has restricted its use. In particular, the high court's recent decisions have "raised the bar" for general jurisdiction, holding it is proper only when a corporate defendant is truly "at home" in the state:

> In recent years, the Supreme Court has clarified and, it is fair to say, raised the bar for this type of jurisdiction. Because general jurisdiction exists even with respect to conduct entirely unrelated to the forum state, the Court has emphasized that it should not lightly be found. Instead..., general jurisdiction exists only when the organization is "essentially at home" in the forum State.

Kipp, 783 F.3d at 698 (quoting *Goodyear*, 131 S. Ct. at 2851).

By contrast, "[s]pecific jurisdiction is case-specific; the claim must be linked to the activities or contacts with the forum." *Kipp*, 783 F.3d at 698; *see Industrial Models, Inc. v. SNF, Inc.*, No. 14 C 8340, 2015 WL 2399089, at *5 (N.D. Ill. May 18, 2015) (holding defendant's contacts with Illinois irrelevant where they had "nothing to do with this lawsuit"). Indeed, it is *cause-of-action* specific: "Each cause of action alleged must independently arise from one of the enumerated acts" in the long-arm statute. *Heritage House Rest., Inc. v. Cont'l. Funding Grp., Inc.*, 906 F.2d 276, 279 (7th Cir. 1990); *see* 735 Ill. Comp. Stat. 5/2–209(a) (subjecting a person

who "does any of the acts hereinafter enumerated" to jurisdiction "as to any cause of action arising from the doing of any of such acts"). A specific-jurisdiction analysis involves two questions: (1) whether the purposeful in-state activity from which the cause of action allegedly arose was significant enough to constitute "minimum contacts" with the state; and (2) if so, whether it would offend "traditional notions of fair play and substantial justice" to subject the defendant to suit under the circumstances. *See Asahi Metal Indus. Co. v. Superior Court of Cal.*, 480 U.S. 102, 113 (1987); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476-77 (1985).

B. Plaintiffs do not allege facts establishing general jurisdiction.

The Supreme Court has identified only two places where a corporation can always be considered "at home": the states of its incorporation and its principal place of business. *Daimler*, 134 S. Ct. at 760; *Kipp*, 783 F.3d at 698. The Court has not foreclosed the possibility that a corporation might be considered at home in another state, but its recent decisions make clear that such a case would have to be truly "exceptional." *Daimler* at 761 n.19.

Most importantly, it is not enough now, if it ever was, to allege only that a corporation does business—even a great deal of business—in the forum state. "[T]he stringent criteria laid out in *Goodyear* and *Daimler* ... require more than the 'substantial, continuous, and systematic course of business' that was once thought to suffice." *Kipp* at 698 (quoting *Daimler* at 760-61). In both those cases, the plaintiffs offered evidence that the defendants did business in the relevant states either directly, via subsidiaries, or by putting goods in the "stream of commerce." *Goodyear* at 2851-52, 2854-56; *Daimler* at 752, 758-59. And in both cases, the Court held that these business activities were far from sufficient to render the corporation at home in the state. *Goodyear* at 2856-57, *Daimler* at 759-62. Under the plaintiffs' "sprawling view of general jurisdiction," it held, "any substantial manufacturer or seller of goods would be amenable to suit, on any claim for relief, wherever its products are distributed," but that is not the law. *Goodyear*

at 2856-57. Even evidence of a "substantial, continuous, and systematic course of business" in the state, therefore, would not be enough to establish general jurisdiction.

Here, Plaintiffs admit that Nissan is a California corporation with its principal place of business in Tennessee. FAC ¶ 22. It is therefore not "at home" in Illinois for either of those reasons. Otherwise, Plaintiffs allege only this:

> The Court may exercise jurisdiction over Nissan because Nissan is registered to conduct business in Illinois; has sufficient minimum contacts in Illinois; and intentionally avails itself of the markets within Illinois through the promotion, sale, marketing and distribution of its vehicles.

Id. ¶ 25. The latter two allegations are only legal conclusions, and relevant only to specific jurisdiction. Beyond that, Plaintiffs allege only that Nissan is *registered* to conduct business in Illinois and that it in fact does business there. But this is exactly what the Supreme Court has rejected—conclusory statements that, if accepted, would subject Nissan and every other substantial corporation to general jurisdiction in every state in America. *See Daimler* at 761 n.20 ("A corporation that operates in many places can scarcely be deemed at home in all of them.").

Indeed, even before the Court "raised the bar" on general jurisdiction, these facts would not have been enough. *See, e.g.*, *uBid, Inc. v. GoDaddy Grp., Inc.*, 623 F.3d 421, 424 (7th Cir. 2010). In *uBid*, the plaintiff asserted general jurisdiction based on GoDaddy's advertising, which had generated "hundreds of thousands" of Illinois customers and "millions of dollars in revenue" from the state. While these contacts were "extensive and deliberate," they were not enough "to require GoDaddy to answer in Illinois for any conceivable claim that any conceivable plaintiff might have against it." *Id.* at 426. Plaintiffs here have not alleged anything of the kind.

C. Plaintiffs do not allege facts establishing specific jurisdiction.

Only one plaintiff has alleged sufficient facts to justify specific jurisdiction as to her claims—Marie DeMaria. *See* FAC ¶¶ 4, 46. All other plaintiffs allege they bought their cars in

their home states, and allege no facts at all connecting their claims to Illinois. *Id*. ¶¶ 50-124. None even mentions the *word* "Illinois." This plainly does not establish specific jurisdiction because that "must rest on the *litigation-specific* conduct of the defendant in the proposed forum state." *Advanced Tactical Ordnance Sys., LLC v. Real Action Paintball, Inc.*, 751 F.3d 796 (7th Cir. 2014) (emphasis in original). None of the out-of-state plaintiffs make any effort to show this.

For example, Sheri Grimm alleges that she lives in St. Louis County, Missouri (FAC ¶ 5), and bought a used 2002 Altima in 2006 from Moore Nissan in Ellisville, Missouri, for personal use. *Id*. ¶¶ 50-52. She does not allege that she has ever left Missouri, so presumably her economic loss, if any, occurred there. She hopes to represent a subclass of other Missouri residents in a claim for violation of the Missouri Merchandising Practices Act. *Id*. ¶ 314-332. What is she doing in Illinois? Like the other out-of-state plaintiffs, she alleges no possible basis for specific jurisdiction as to any of her causes of action.

Nor does it matter that there is one plaintiff listed in the caption who *has* alleged specific jurisdiction. The out-of-state plaintiffs cannot simply hitch their wagons to Ms. DeMaria's, for several reasons. First, if a plaintiff must establish specific jurisdiction independently for each separate cause of action by that person, it follows that the same must be true for claims brought by two separate *people*. *See, e.g., Weisblum v. Prophase Labs, Inc.*, No. 14-CV-3587, 2015 WL 738112, at *3 (S.D.N.Y. Feb. 20, 2015) (dismissing claims brought by named plaintiff who bought product in California, but not the one who bought it in New York); *Heritage House*, 906 F.2d at 279; *see also Seiferth v. Helicopteros Atuneros, Inc.*, 472 F.3d 266, 275 (5th Cir. 2006) ("[t]here is no such thing as supplemental specific personal jurisdiction....").

Second, the activities of the plaintiff or a third party in the forum state are irrelevant to the jurisdictional analysis. *Advanced Tactical Ordnance*, 751 F.3d at 801. It is the *defendant's*

contacts and fairness to the *defendant* that matter. If Nissan could not be required to defend a case brought by Sheri Grimm alone in Illinois, for example (and it surely could not), to allow a different result merely because another person has also sued there would effectively make jurisdiction turn on a decision by a third party to the case (or, more accurately, by her lawyers).

Third, the end result of this would be just what the Court has rejected—it would subject any "substantial manufacturer or seller ... to suit, on any claim for relief, wherever its products are distributed." *Goodyear* at 2856. The Court was addressing general jurisdiction, but this would allow the same result via specific jurisdiction: any number of claims with no relationship to the forum could be imported if even one unhappy customer could be found there. But as the Court said in *Daimler*, nothing in its jurisprudence "suggests that a particular quantum of local activity should give a State authority over a far larger quantum of activity having no connection to any in-state activity." 134 S. Ct. at 762 n.20 (internal quotes omitted).

D. Asserting specific jurisdiction over Nissan with respect to out-of-state claims would violate basic principles of fair play and substantial justice.

Even if Plaintiffs had alleged facts showing "minimum contacts" relevant to these claims, they would still have to show that jurisdiction over Nissan "would comport with 'traditional notions of fair play and substantial justice.'" *Jennings v. AC Hydraulic A/S*, 383 F.3d 546, 549 (7th Cir. 2004) (*quoting Asahi*, 480 U.S. at 113).[4] This requires an analysis of: (1) the burden on the defendant; (2) the forum state's interest in adjudicating the dispute; (3) the plaintiff's interest in obtaining relief; (4) judicial economy; and (5) the state's interest in furthering fundamental social policies. *Asahi*, 480 U.S. at 113.

[4] The *Daimler* majority clarified that the *Asahi* analysis applies only "when *specific* jurisdiction is at issue." 134 S. Ct. at 762 n.20 (emphasis in original).

Here, the first and fourth factors generally weigh against exercising jurisdiction. In many cases these might not be especially significant, but here Plaintiffs' approach would burden both Nissan and this Court with the need to consider and analyze evidence and legal authorities from at least 16 and as many as 49 states. That would be expensive, time-consuming, and unmanageable. *See, e.g.*, *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1018 (7th Cir. 2002).

The other three factors weigh even more heavily against jurisdiction. Neither these plaintiffs nor the state of Illinois has any legitimate interest in litigating these foreign claims here. To begin with, none of the plaintiffs have alleged or likely can allege any reason why they cannot obtain relief in their home states. They may well have an interest in obtaining relief, but they can just as well get it at home. Illinois certainly has an interest in resolving a dispute involving Ms. DeMaria, one of its citizens, but it has, or should have, no interest whatever in these out-of-state claims. *See, e.g.*, *Metro. Life Ins. Co. v. Robertson-Ceco Corp.*, 84 F.3d 560, 574 (2d Cir. 1996) (holding Vermont had "absolutely no interest" in a case between out-of-state parties involving out-of-state conduct, weighing heavily against jurisdiction); *Follette v. Clairol, Inc.*, 829 F. Supp. 840 at 846-47 (W.D. La. 1993), *aff'd*, 998 F.2d 1014 (5th Cir. 1993) (holding Texas's interest was "tenuous at best" and did not support jurisdiction).

In fact, Illinois *could* have no legitimate interest in reaching out to exercise jurisdiction over matters entirely within another state. *See, e.g.*, *Hanson v. Denckla*, 357 U.S. 235, 251 (1958) (holding that personal jurisdiction limits are "a consequence of territorial limitations on the power of the respective States"). Illinois could not have directly regulated the transactions in which the out-of-state plaintiffs engaged, nor could it apply its own law to resolve any resulting disputes. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 822 (1985). It could not constitutionally award the punitive damages that the out-of-state plaintiffs demand. *See State*

Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 421-22 (2003) ("A basic principle of federalism is that each State may make its own reasoned judgment about what conduct is permitted or proscribed within its borders...."). Plaintiffs' approach violates this basic principle.

II. Plaintiffs' fraud claims fail because the FAC still alleges no facts that would show Nissan knew the allegedly concealed fact at the time of sale.

To survive a 12(b)(6) motion, a complaint must allege facts stating a facially plausible claim for relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *Adams v. City of Indianapolis*, 742 F.3d 720, 728 (7th Cir. 2014). A claim is facially plausible under Rule 8 if it has sufficient factual content to allow the court to "draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. Facts "merely consistent with" liability are not enough. *Id.* Further, mere legal conclusions are not "facts" for Rule 8 purposes. *Iqbal* at 678-79; *Twombly* at 555.

Most of Plaintiffs' allegations are also subject to Rule 9(b), which applies to statutory as well as common-law fraud claims, and to claims based on omission as well as those based on affirmative misrepresentations. *Camasta v. Jos. A. Bank Clothiers, Inc.*, 761 F.3d 732, 736-37 (7th Cir. 2014) (applying Rule 9(b) to Illinois CFA); *Kesse v. Ford Motor Co.*, No. 14 C 6265, 2015 WL 920960, at *3-4 (N.D. Ill. Mar. 2, 2015) (applying Rule 9(b); dismissing claim of failure to disclose safety defect); *see also Hammer v. Residential Credit Solutions, Inc.*, No. 13 C 6397, 2014 WL 4477948, at *12 (N.D. Ill. Sept. 11, 2014) (holding that allegations of fraudulent concealment for tolling purposes must also be pleaded with particularity).

Rule 9(b) requires more than stating just the facts necessary to allow the defendant to prepare an answer, as is sometimes argued; the point "is to force the plaintiff to do more than the usual investigation before filing" because of the potential harm caused by irresponsible fraud charges. *Ackerman v. Nw. Mut. Life Ins. Co.*, 172 F.3d 467, 469 (7th Cir. 1999).

Except for the new implied-warranty cause of action (Count 2), all of Plaintiffs' claims are still based on the theory that Nissan knew about the alleged defect but concealed it from them. That is obviously true of the common-law and statutory concealment claims (Counts 3 and 6-21, FAC ¶¶ 156-64, 185-436), but is also true of the others. *See* Count 1, FAC ¶¶ 136-41 (seeking declaratory judgment that Nissan knew of defect but failed to disclose it); Count 4, ¶¶ 165-77 (alleging Nissan was negligent for same reason); Count 5, ¶¶ 178-84 (alleging it was unjustly enriched for same reason). These claims should be dismissed because Plaintiffs have failed to allege Nissan knew the concealed fact at the time it sold the vehicles. *See Jensen v. Bayer AG*, 862 N.E.2d 1091, 1098 (Ill. App. Ct. 2007) (holding allegations of knowledge at time of sale are required); *see also Schwebe v. AGC Flat Glass N. Am., Inc.*, No. 12-C-9873, 2013 WL 2151551, at *5 (N.D. Ill. May 16, 2003) ("One cannot engage in a deceptive practice when one lacks knowledge regarding the issue in question."); *White v. DaimlerChrysler Corp.*, 856 N.E.2d 542, 548-49 (Ill. App. Ct. 2006); *Kesse*, 2015 WL 920960, at *3-4.[5]

A. The FAC remains unclear as to the fact(s) Nissan allegedly concealed.

To begin with, Plaintiffs still do not make clear just what they claim Nissan knew but concealed. The fact that metal rusts over time is common knowledge, and so Plaintiffs' claim is necessarily that Nissan knew the floorboards might rust *prematurely*. But Plaintiffs never explain just what they mean by this, a failure that defeated the similar claim in *White*.

[5] The cases in the text involve Illinois consumer statutes. Similar laws elsewhere also require knowledge. *See, e.g., Reid v. Unilever U.S., Inc.*, 964 F. Supp. 2d 893, 915-16 (N.D. Ill. 2013) (Alabama DTPA; citing *Sam v. Beaird*, 685 So.2d 742, 744 (Ala. Civ. App. 1996)); *Allen v. Bank of Am., N.A.*, 933 F. Supp. 2d 716, 727 (D. Md. 2013) (Maryland CPA); *Herbrandson v. ALC Home Inspection Servs., Inc.*, No. 244523, 2004 WL 316275, at *4 (Mich. Ct. App. Feb. 19, 2004) (Michigan CPA); *Cox v. Sears Roebuck & Co.*, 647 A.2d 454 (N.J.1994) (New Jersey CFA); *Woods v. Maytag Co.*, No. 10–CV–0559, 2010 WL 4314313, at *16 (E.D.N.Y. Nov. 2, 2010) (New York GBL § 349); *Lambert v. Downtown Garage, Inc.*, 553 S.E.2d 714 (Va. 2001) (Virginia CPA). Knowledge is also universally required for common-law concealment claims. *See, e.g., Weidner v. Karlin*, 932 N.E.2d 602, 605 (Ill. App. Ct. 2010); *McMullen v. Joldersma*, 435 N.W.2d 428, 430 (Mich. Ct. App. 1988); *Artilla Cove Resort, Inc. v. Hartley*, 72 S.W.3d 291, 298 (Mo. Ct. App. 2002); *Goddard v. Stabile*, 924 N.E.2d 868, 874 (Ohio Ct. App. 2009).

In *White*, the plaintiff accused DaimlerChrysler of using exhaust manifolds that were "prone to" cracking at unacceptably high rates and/or unacceptably early in the vehicle's lifetime. 856 N.E.2d at 545. The plaintiff alleged—just as Plaintiffs do here—that the parts in question "generally do and are expected to last the lifetime of the vehicle, and consumers thus generally do not need to pay for repair or replacement...." *Id*. The court rejected this, partly because the plaintiff did not "define these general phrases or provide more detail about the number of failures that occurred ...." *Id*. at 549-50. Because the concealed fact was the tendency to fail "too often" or "too soon," in other words, the plaintiff had to plead facts showing the rates were excessive and that the defendant knew they were excessive. *Id*.; *see also Callaghan v. BMW of N. Am., LLC*, No. 13-cv-04794-JD, 2014 WL 6629254, at *3-4 (N.D. Cal. Nov. 21, 2014) (holding that alleging "transmission was prone to premature failure" did not satisfy Rule 8 because transmissions can fail for many reasons); *Rockford Mem'l Hosp. v. Havrilesko*, 858 N.E.2d 56, 63 (Ill. App. Ct. 2006) (dismissing claim that hospital concealed charges above industry standard where pleaded facts did not show hospital actually knew what others charged).

Here, too, Plaintiffs' allegations are unclear. To say that the automotive industry "has known for decades" that rust and corrosion may cause metal parts to degrade (FAC ¶ 32) is certainly true, but so has everyone else. The risk of corrosion can be reduced, Plaintiffs allege, by using certain "manufacturing and design technologies," and Plaintiffs list some of these. *Id*. ¶¶ 33-34. They then allege that "in or around 2001" Nissan "opted to deviate from optimal corrosion prevention" and thereby "produced floorboards that corrode at an accelerated rate...." FAC ¶ 34. But they do not allege *how* Nissan "opted to deviate from [the] optimal," how that affected the floorboards, or what they mean by "accelerated." For that matter, they don't actually allege Nissan knew at the time that this decision, whatever it was, would result in materially

accelerated corrosion—only that such corrosion later in fact occurred. This would likely not even be sufficient to allege that a defect existed, were this a product-liability case; it is far from sufficient to allege knowledge of such a defect for purposes of a fraudulent-concealment claim.

B. The allegations based on presale testing are insufficient and implausible.

Even setting aside the above, however, Plaintiffs' claims fail because they have not plausibly alleged that whatever these facts were, Nissan knew them at the time of sale. To the contrary, Plaintiffs' allegations in that regard are not just insufficient but inherently implausible.

Plaintiffs allege primarily that Nissan knew about the defect "immediately"—by which they mean "in or around [late] 2001," when the first Class Vehicles were sold—on the grounds that Nissan must have learned about it during "presale" testing it probably conducted:

> It has long been industry standard, including at Nissan, to perform a number of presale tests to assess components such as the floorboard for any tendency to corrode. Among other things, this testing is to ensure that moisture dissipates and does not cause alloy changes in the floorboard. The tests evaluate both the selected mechanism of corrosion protection and the completed assembly. It is not plausible that Nissan could have performed comprehensive testing of this nature without detecting the defect.

FAC ¶ 35. Plaintiffs do not allege Nissan actually conducted these unidentified tests—they allege Nissan *must have* done some sort of "testing of this nature" and that "it is not plausible" that had it done so, it would have failed to detect the defect. This is insufficient.

A federal court in California recently rejected a nearly identical argument in a case that also involved an alleged corrosion defect. *Williams v. Yamaha Motor Corp., U.S.A.*, No. CV 13-05066 BRO, 2015 WL 2375906 (C.D. Cal. Apr. 29, 2015). There, too, the plaintiffs alleged that the manufacturer knew or should have known the product was excessively prone to corrosion "as a result of its pre-market procedures, pre-release testing data and engineering research related to" the engine component at issue. 2015 WL 2375906, at *8. They provided "significant details" about the importance of risk analysis in the marine-engine industry, "a process that requires

extensive corrosion testing before releasing the product into the market." *Id*. These tests, they argued, would have led Yamaha to discover the risk of more severe and early corrosion, a risk it did not disclose. *Id*. The court rejected this.

The problem, the court held, was that the argument improperly required it to infer that Yamaha's *opportunity* to learn about the defect via testing necessarily meant it *did* learn about the defect. 2015 WL 2375906, at *9. That was not a reasonable inference because the plaintiffs had pleaded no facts showing Yamaha actually or necessarily performed any particular test, let alone that the test would have yielded the claimed results. *Id*. The allegations were therefore merely speculation, "alleging only in essence that the manufacturer would be negligent if it did not" run those tests. *Id*. In other words, the allegations might describe a negligent-design claim arguing that a manufacturer *should* have known about the defect, but not a fraud claim, which requires allegations of *actual* knowledge at the time of sale.

Many other courts have also held that allegations about testing that manufacturers "must have" or "should have" performed are not enough to plead presale knowledge. *See, e.g., Wilson v. Hewlett-Packard Co.*, 668 F.3d 1136, 1147 (9th Cir. 2012); *Burdt v. Whirlpool Corp.*, No. C 15-01563, 2015 WL 4647929, at *4 (N.D. Cal. Aug. 5, 2015); *Romero v. Toyota Motor Corp.*, 916 F. Supp. 2d 1301, 1308-11 (S.D. Fla. 2013) (finding no evidence supporting claim that tests showed actual presale knowledge); *Greene v. BMW of N. Am.*, No. 2:11-04220, 2012 WL 5986461, at *7 (D.N.J. Nov. 28, 2012) (holding similar allegations "little more than ungrounded speculation"); *Evitts v. DaimlerChrysler Motors Corp.*, 834 N.E.2d 942, 949 (Ill. App. Ct. 2005) ("[F]or plaintiffs to insist that said testing inevitably led to defendants' knowledge of the alleged defect is conclusory and is not sufficient to impute that knowledge to defendants at the time of sale."). Plaintiffs' allegations are speculative in just the same way.

C. The allegations based on customer complaints and warranty data are insufficient and speculative.

Plaintiffs now allege that Nissan received customer complaints during the "early to mid-2000s" that should have put it on notice of a defect. FAC ¶¶ 36-37. To begin with, numerous courts have held that customer complaints themselves establish only that customers complained, not that an underlying defect necessarily existed. *See, e.g.*, *Wilson*, 668 F.3d at 1148 (citing *Berenblat v. Apple, Inc.*, No. 08-4969 JF, 2010 WL 1460297, at *9 (N.D. Cal. Apr. 9, 2010)); *Williams*, 2015 WL 2375906, at *10 (noting *Wilson* "echoed doubt expressed by other courts that customer complaints in and of themselves adequately support an inference" of knowledge); *McQueen v. BMW of N. Am., LLC*, No. CIV. A. 12-06674, 2014 WL 656619, at *4 (D.N.J. Feb. 20, 2014) (holding allegations based on consumer complaints are "of little utility"); *Durso v. Samsung Electronics Am., Inc.*, No. 2:12-CV-05352, 2013 WL 5947005, at *10 (D.N.J. Nov. 6, 2013) (dismissing concealment claims because customer complaints "do not provide any factual basis" for knowledge allegation); *Munch v. Sears Roebuck & Co.*, No. 06C7023, 2007 WL 2461660, at *3 (N.D. Ill. Aug. 27, 2007) (holding allegations of "high incidence of repair" and "high number of complaints" were insufficient to plausibly infer knowledge of defect).

But here, Plaintiffs' speculation about what Nissan might have learned from customer complaints in the "early to mid-2000s" is actually contradicted by the few details they provide about the complaints of which they claim Nissan should have been aware. Most of the named plaintiffs do not allege they ever complained to Nissan (or anyone else); and of those who allege they did, none complained earlier than 2014. FAC ¶¶ 49, 69, 74, 84, 112, 115. As for the anonymous complaints Plaintiffs mention, many of them are undated; where a date is given or can be deduced, it is usually in 2014 or 2015; and the earliest date of any complaint cited is May 2009. FAC ¶¶ 41-43. Thus, Plaintiffs' own allegations contradict their claim that Nissan learned

of a defect from customer complaints at some point before 2008. *See, e.g.*, *Durso*, at *10 (finding customer complaints from 2011 did not support inference of knowledge in 2004).[6]

Similar problems defeat Plaintiffs' suggestion that Nissan must have known of the defect because of warranty claims that supposedly began "immediately." Even if this had happened, again the claims themselves would not necessarily mean that the manufacturer was aware of a *defect*. *Williams*, 2015 WL 2375906, at *11 (holding warranty-claim theory "similarly speculative"). But in fact, here Plaintiffs *admit* they are speculating:

> Although Nissan's aggregated data, including warranty claims and customer complaints, are known only to Nissan, **it is not difficult to surmise what Nissan was learning** in the early to mid-2000s. With respect to warranty data, the Class Vehicles came with a stand-alone, five-year warranty for corrosion, so Nissan needed to do nothing in the way of analytics to know that a worrisome percentage of its customers were submitting corrosion related warranty claims.

FAC ¶ 37 (emphasis added). Not surprisingly, Plaintiffs do not provide any details as to what these data show: what the "worrisome percentage" actually was, what absolute number of claims that might represent, or even any suggestion as to what percentage or number of claims should reasonably be considered "worrisome," let alone establish constructive knowledge of a defect.

Further, none of the named plaintiffs or anonymous customers actually alleges submitting a corrosion-related warranty claim during the five-year warranty period. Indeed, the only mention of warranty claims attributed to any of those people is a complaint that Nissan would not fix a car for free because the warranty period had already *expired*. *See id.* ¶¶ 41-44. Of course, that is how limited warranties work. But more to the point, Plaintiffs' allegations again undermine their claim that Nissan knew "in the early to mid-2000s" of the defect because it must

[6] In the initial complaint, Plaintiffs conceded there had been no complaints *at all* while Nissan was selling the Class Vehicles, because they alleged only that owners began complaining "as far back as" or "as early as" 2008. Compl. ¶¶ 21, 22. Now they claim Nissan was receiving complaints *the entire time* it was selling the Class Vehicles, as early as 2001. FAC ¶ 36. They plead no facts to support this new claim.

have been receiving warranty claims that early. In short, Plaintiffs' surmises cannot support an inference that Nissan knew about the alleged defect while the class vehicles were being sold.

D. Plaintiffs' theory of the case is inherently implausible.

Plaintiffs' theory is especially weak given that they allege a *corrosion* defect. Even if a defect caused rust to begin immediately—and Plaintiffs plead no facts suggesting it did—a major rust problem would necessarily have taken time to manifest. *See also* FAC ¶ 2 (alleging the rust is not visible even to mechanics or technicians until the floorboard has completely rusted through). As the court held in *Williams*, which was also a corrosion-defect case, this makes a plaintiff's effort to allege early knowledge of such a defect implausible:

> That is, it is implausible to infer both that the defect [corroding engine manifolds] took five to seven years to manifest for most ordinary customers—a notion supported by the fact that none of the twenty named plaintiffs sought repairs during the warranty periods—and that 'many' customers were submitting warranty claims as a result of this defect beginning in 2001.

Williams, 2015 WL 2375906, at *11 (citation omitted). Here, too, it is implausible for Plaintiffs to allege that Nissan knew "immediately" about a defect that might years later cause "premature" corrosion. As in *Williams*, that is supported by the fact that none of the named plaintiffs sought repairs during the warranty period, and indeed none of them even allege that they (or their mechanics) noticed the corrosion until 2014. Even the cited consumer complaints mention no date earlier than May 2009, by which time Nissan was no longer selling any of the class vehicles.

Therefore, Plaintiffs' allegations that Nissan knew of the alleged defect at the time of sale are based on "surmise," not on facts making their claim plausible.[7] For that reason alone, the Court should dismiss all of Plaintiffs' common-law and statutory fraud claims.

[7] Nissan assumes that Plaintiffs mention its technical service bulletin (FAC ¶ 39) only to support the allegation that the cars are defective, not to suggest Nissan knew of a defect at the time of sale. The TSB could not support the latter claim because it was issued in the summer of 2015, a fact Plaintiffs omit.

III. Plaintiffs have not pleaded the other circumstances of fraud with particularity.

Allegations other than knowledge must be pleaded with particularity. *See, e.g.*, *Camasta*, 761 F.3d at 737-38. The FAC also fails this test for multiple reasons.

A. Plaintiffs do not identify the party who allegedly defrauded them.

First, a complaint that "lumps all the defendants together" and fails to specify who allegedly did what fraudulent act must be dismissed. *Sears v. Likens*, 912 F.2d 889, 893 (7th Cir. 1990). Here, as in the initial complaint Plaintiffs specifically say that they "shall refer collectively to" the two corporate defendants as "Nissan." FAC ¶ 23. That is not permitted.

Second, even reading "Nissan" to mean only "Nissan North America," no plaintiff alleges with particularity that he or she actually dealt with Nissan or any of its authorized agents. In fact, three of them (Burkholder, Petty, and Sauder) *admit* they did not. FAC ¶¶ 58, 113, 117 (alleging purchases in 2011 and 2014 from private parties). Ms. DeMaria has again failed to disclose the seller in her case. FAC ¶¶ 46-47. The rest allege that they bought from dealerships, only a few of which even have "Nissan" in the name. But none of these plaintiffs allege that these dealers were actually Nissan agents, let alone allege facts that would demonstrate agency. The law is clear that simply alleging "authorized dealer" status does not establish agency. *Bushendorf v. Freightliner Corp.*, 13 F.3d 1024, 1026 (7th Cir. 1993); *Connor v. Ford Motor Co.*, No. 96 C 8343, 1997 WL 724528, at *2 (N.D. Ill. Nov. 12, 1997); *see also, e.g.*, *Herremans v. BMW of N. Am., LLC.*, No. CV 14-02363, 2014 WL 5017843, at *6 (C.D. Cal. Oct. 3, 2014) (citing and agreeing with *Connor*); *Theos & Sons, Inc. v. Mack Trucks, Inc.*, 729 N.E.2d 1113, 1121-22 (Mass. 2000) (citing similar holdings from, *e.g.*, Alabama, Iowa, and Kentucky). And in no case do they identify any actual person they might have spoken with when they bought their cars. In short, Plaintiffs have failed to allege this fundamental element of any fraud case.

B. Plaintiffs do not allege any representation with particularity.

Although some of Plaintiffs' causes of action refer generally to "representations about the safety and reliability of the class vehicles" (*see, e.g.*, FAC ¶ 192, 224, 239), nowhere in the complaint do Plaintiffs identify affirmative representations of any kind. That obviously fails to comply with Rule 9(b). *Camasta*, 761 F.3d at 737-78. This failure has three consequences here.

First, to the extent Plaintiffs are alleging any claims based on affirmative misrepresentations, those claims must be dismissed. It is not clear they *are* alleging this, with the possible exception of Mr. Miller's assertion of New York GBL § 350 (Count 18), which is limited to the claim that Nissan engaged in "false advertising." *See* FAC ¶ 377-84. It is not enough to simply allege that "through its advertising," a defendant "disseminated statements that were untrue or misleading," which is as particular as this claim gets. *Id*. ¶ 380.

Second, however, at least two of the relevant states (Illinois and New Jersey) preclude consumer-fraud claims entirely if there has been no communication between the plaintiff and defendant, holding that such a plaintiff will be unable to prove causation:

> [W]e have repeatedly emphasized that in a consumer fraud action, the plaintiff must actually be deceived by a statement or omission. **If there has been no communication with the plaintiff, there have been no statements and no omissions. In such a situation, a plaintiff cannot prove proximate cause**. ... A consumer cannot maintain an action under the Illinois Consumer Fraud Act when the plaintiff does not receive, directly or indirectly, communication or advertising from the defendant.

DeBouse v. Bayer, 922 N.E.2d 309, 316 (Ill. 2009) (emphasis added); *see Kesse*, 2015 WL 920960, at *4 (dismissing CFA claim that Ford concealed safety defect in vehicle); *Schwebe*, 2013 WL 2151551, at *3 (dismissing DTPA claim that manufacturer concealed latent defect); *Weske v. Samsung Elec. Am., Inc.*, 42 F. Supp. 3d 599, 607-08 (D.N.J. 2014) (similar holding under New Jersey law).

Third, even where that is not the law, to the extent Plaintiffs seek to base a concealment claim on the theory that alleged partial representations created a duty to disclose, they have failed to do that as well. That theory, too, requires that the alleged partial representations be pleaded with particularity. *See, e.g.*, *Iles v. Swank*, No. 04 C 3757, 2005 WL 1300773, at *5 (N.D. Ill. Mar. 18, 2005). Here, Plaintiffs plead none at all.

C. Plaintiffs fail to allege a duty to disclose for multiple reasons.

The above means that Plaintiffs must base their duty allegations on something other than partial representations. This, too, must be alleged with particularity. *See, e.g.*, *Wigod v. Wells Fargo Bank, N.A.*, 673 F.3d 547, 571 (7th Cir. 2012); *Publications Int'l Ltd. v. Mindtree Ltd.*, No. 13 C 05532, 2014 WL 3687316, at *5-6 (N.D. Ill. July 24, 2014). Again Plaintiffs' allegations fall short.

1. There is no duty to disclose to the general public.

Numerous courts have held that plaintiffs who bought used cars from private parties cannot sue the manufacturer for concealment because the manufacturer simply had no duty to disclose anything to them or to any other member of the public at large. *See, e.g.*, *In re Gen. Motors Corp. Anti-Lock Brake Litig.*, 966 F. Supp. 1525, 1535–36 (E.D. Mo. 1997) (holding GM had no duty to disclose defects to used-car buyers and/or public at large), *aff'd sub nom. Briehl v. Gen. Motors Corp.*, 172 F.3d 623 (8th Cir. 1999); *Marrone v. Greer & Polman Constr., Inc.*, 405 N.J. Super. 288, 294–97 (2009) (holding buyers of used goods have no claim under New Jersey consumer protection law), *abrogated on other grounds by Dean v. Barrett Homes, Inc.*, 204 N.J. 286 (2010); *see also Taylor v. Am. Honda Motor Co.*, 555 F. Supp. 59, 64 (M.D. Fla. 1983) (noting consensus that there is no basis for "impos[ing] upon merchants a duty to disclose information to the public at large"), 4B Larry Lawrence, Lawrence's Anderson on the Uniform

Commercial Code § 2-721:33 (3d ed. 2010) ("A seller is not liable for 'fraudulent concealment' on the theory that the seller failed to make a disclosure to the general public.").

Here, only Sheri Grimm admits she bought a used car (FAC ¶ 50), but Nissan submits that the Court may reasonably infer that at least half the named plaintiffs (including Ms. DeMaria) did, because their date of purchase indicates the car was from three to ten years old at the time. *See* Chart at p.3, *supra*. Again, three of the plaintiffs—including Ms. Petty, the only named plaintiff who owns a Maxima—admit they bought from private parties. FAC ¶¶ 58, 113, 117. While some of the plaintiffs do allege they bought new cars from dealers with "Nissan" in the name, as noted above they allege no facts establishing that these dealers were actually Nissan agents. Therefore, *none* of the plaintiffs adequately allege a duty to disclose on Nissan's part because they do not allege they actually did business with Nissan or one of its agents, and so they can fare no better than would any other member of the general public.

2. There is generally no duty to disclose a risk of post-warranty defects.

Even if some plaintiffs had adequately alleged the foregoing, they would face another problem: the express limited warranty that specifically mentions what they claim was concealed. *See* Ex. A. As many courts have held, an express warranty may limit, among other things, the scope of the duty to disclose with which a manufacturer may be charged.

Nissan's warranty puts a buyer on notice that (for example) defects may arise, that those defects might include corrosion, and that Nissan warrants the car against these defects only for a limited period of time. There is generally no further duty to disclose the possibility that defects might arise after that limited time has expired. *See, e.g.*, *Smith v. Ford Motor Co.*, 462 F. App'x 660, 663 (9th Cir. 2011) (holding no such duty generally exists under California law); *Daugherty v. Am. Honda Motor Co.*, 144 Cal. App. 4th 824, 832-37 (2006) (same); *Eisert v. Kantner*, No. 2-10-13, 2010 WL 3836205, at *2 (Ohio Ct. App. Oct. 4, 2010) (dismissing Ohio CSPA claim

because manufacturer had no legal obligation as to post-warranty defects); *Owen v. Gen. Motors Corp.*, No. 06-4067, 2007 WL 172355, at *4-5 (W.D. Mo. Jan. 18, 2007) (dismissing Missouri concealment claim for same reason); *Nobile v. Ford Motor Co.*, No. 10-1890, 2011 WL 900119, at *6 (D.N.J. Mar. 14, 2011) (applying New Jersey law; holding consumer-fraud claim fails where a "vehicle component has outperformed the warranty period");[8] *Perkins v. DaimlerChrysler Corp.*, 890 A.2d 997, 1004 (N.J. Super. Ct. App. Div. 2006) (same); *Against Gravity Apparel v. Quarterdeck Corp.*, 699 N.Y.S.2d 368, 369 (App. Div. 1999) (holding failure to disclose risk of post-warranty failure does not violate GBL § 349).

As the judge in *Owen* expressed particularly well, imposing a broader duty to disclose defeats the purpose of limited warranties and makes little sense in terms of economic policy:

> The problem with the ... argument, beside the lack of legal authority supporting it, is the untenably broad definition of "superior knowledge" it assumes. Plaintiffs allege that GM [had] "superior knowledge" that its wiper assemblies were likely to break after the warranty period expired. But of course every manufacturer knows its products are likely to break at some point outside the warranty period. That is precisely why products are warranted only for finite periods: a manufacturer makes choices in designing and building a product, knowing that those choices make the product's failure more or less likely after a certain point. Based on its assessment of the variables ..., a manufacturer may warrant that the product will not break for a certain number of years during which it believes malfunction is less probable. This is an economic decision, and the difference between the estimated longevity of the product and the length of the warranty covering it influence its purchase price….
>
> As these kinds of decisions go into the warranting of every product, a manufacturer's knowledge that its product may malfunction sometime after its warranty expires cannot be considered "superior knowledge" for the purposes of a fraudulent concealment claim. Indeed, every consumer must be charged with the knowledge that a product she purchases may and probably will break at some point in the future, most likely after the warranty has expired.

[8] New Jersey courts have also held that means a plaintiff cannot establish an "ascertainable loss" as required under the NJ CFA. *Glass v. BMW of N. Am., Inc.*, No. CIV. A. 10-5259, 2011 WL 6887721, at *10-11 (D.N.J. Dec. 29, 2011) (citing cases).

2007 WL 172355, at *5. For similar reasons, Nissan had no duty to disclose risks that Plaintiffs were charged with knowing and that the express warranty disclosed in any event.

3. Plaintiffs' "safety risk" argument is also implausible.

Some courts have recognized an exception to the above that applies if a manufacturer knew that a potential post-warranty failure could present an unreasonable safety hazard. *See, e.g.*, *Daugherty*, 144 Cal. App. 4th at 835-36 (holding manufacturer's duty "is limited to its warranty obligations absent either an affirmative misrepresentation or a safety issue"); *Wilson*, 668 F.3d 1136, 1147 (holding post-warranty disclosure duty extends only to defect having nexus to "unreasonable safety hazard"). Plaintiffs appear to base their duty allegations on this theory, but the argument is implausible here, to say the least.

Plaintiffs argue that the corrosion is necessarily invisible until it actually perforates the floorboard. FAC ¶ 2. It therefore could allow "exhaust and other harmful fumes" to enter the passenger compartment, and might eventually create "gaping holes" in a floorboard, "so large in fact that a passenger's foot or a large rock could fit through the gap before he or she realizes that the floorboard has been compromised." *Id.* A sufficiently rusty floorboard, they claim, might even "reduce the vehicle's structural integrity" and that of components that attach to the floorboard, such as passenger seating. FAC ¶ 32. This is speculation at best.

To begin with, none of the named plaintiffs alleges he or she was injured, or indeed that anyone has *ever* been injured, as a result of a rusty floorboard. Nor do the anonymous complaints mention injuries. In fact, only five of the 18 named plaintiffs even allege a rust perforation of any kind, much less a "gaping hole" or threats to "structural integrity"; others allege only "significant rust," and some do not even allege the rust was "significant" when discovered.

As for the claim that the rust is an invisible threat, undetectable until safety is already compromised, at least half of the named plaintiffs admit that they discovered the rust during

routine maintenance as simple as having the oil changed or even cleaning the floor mats. FAC ¶¶ 56 (alleging discovery "when she removed the floor mats for cleaning"), 64 (during "routine maintenance"), 68 (same), 73 (same), 78 (while changing brake pads), 82 ("during a routine oil change"), 92 (same), 97 (same), 106 (while changing tires), 114 (during brake replacement). In other words, if owners simply followed routine procedures such as those in the owners' manual, Plaintiffs' own allegations show that owners or their mechanics would likely discover rust before it ever became "significant," let alone severe enough to pose any sort of safety hazard.

Further, the theory that a perforation could allow exhaust and "other harmful fumes"—whatever those might be—to enter the passenger compartment is puzzling, because cars are not airtight to begin with. Setting aside, possibly, something like a simultaneous perforation in the same car's exhaust manifold, something that no plaintiff alleges and that is highly unlikely, the risk involved would be no greater than that posed by rolling down the car's window or allowing the vents to bring in outside air while driving or sitting in traffic. It is not surprising that Plaintiffs do not allege a single incident of anyone actually being harmed in this way, whether a "defect" was involved or not. [9]

If the "safety" exception were construed broadly enough to include allegations like these, the exception would swallow the rule that a manufacturer's duty is generally limited to its warranty obligations. But in this case, in any event, Plaintiffs' allegations that slowly rusting floorboards constitute a "serious safety risk" are at best speculation that is inconsistent with their own alleged experiences. *See, e.g.*, *Smith*, 462 F. App'x at 663 (holding allegations were "too speculative, as a matter of law, to amount to a safety issue giving rise to a duty of disclosure").

[9] None of the plaintiffs allege they have stopped driving their vehicles because of rusty floorboards. *See Greene*, 2012 WL 5986461, at *6 (rejecting implied-warranty claim partly because plaintiff continued to use the product: "One wonders: if a tire is safe for driving, why is it unsafe for litigation?")

For that reason, too, all Plaintiffs' fraud claims should be dismissed. This includes those labeled otherwise but predicated on fraud. *See Med. Assurance Co. v. Hellman*, 610 F.3d 371, 377 (7th Cir. 2010) (holding court applying Declaratory Judgment Act "must evaluate the parties' rights based on the same body of substantive law that would apply in a conventional action."); *Pirelli Armstrong Tire Corp. Retiree Med. Benefits Trust v. Walgreen Co.*, 631 F.3d 436, 447 (7th Cir. 2011) (agreeing fraud claim "took the unjust enrichment claim with it.").[10] The cause of action for negligence also alleges concealment; it either fails for the reasons above or (if it is a tort claim) the reasons in Section V below.

IV. Plaintiffs' implied-warranty-of-merchantability claim fails because they do not allege their cars were unmerchantable when delivered.

Plaintiffs' second cause of action is a "nationwide" claim for breach of the implied warranty of merchantability, brought under the Magnuson-Moss Warranty Act. The Act does not create substantive rights; it provides a federal cause of action to enforce warranty rights created by state law. *Anderson v. Gulf Stream Coach, Inc.*, 662 F.3d 775, 781 (7th Cir. 2011); *Voelker v. Porsche Cars N. Am., Inc.*, 353 F.3d 516, 525 (7th Cir. 2003). Here, Plaintiffs allege only a breach of the implied warranty of merchantability. FAC ¶ 148. Any such claims fail.

Implied warranties do not last forever. Indeed, implied warranties normally have *no* "duration": a breach, if any, occurs at the time of delivery, "regardless of the aggrieved party's lack of knowledge of the breach." *See, e.g.*, 810 ILCS 5/2-725; *Richards v. Eli Lilly and Co.*, 355 F. App'x 74, 75 (7th Cir. 2009). Here no plaintiff even alleges his or her car was unmerchantable at the time of delivery, only that he or she found rust many years later. That does not state a

[10] The unjust enrichment claim also fails because of Plaintiffs' failure to allege any interaction between themselves and Nissan or a Nissan agent. This claim requires facts showing the plaintiff conferred, and the defendant voluntarily received, a benefit it would be unjust for defendant to retain. *See, e.g., AA Sales & Assoc., Inc. v. JT&T Prods. Corp.*, 48 F. Supp. 2d 805, 807 (N.D. Ill. 1999).

merchantability claim. *See, e.g., Priebe v. Autobarn, Ltd.*, 240 F.3d 584, 588 (7th Cir. 2001) (holding warranty not breached where car was fit at time of sale; plaintiff drove it for another 30,000 miles); *Indiana Nat'l Bank of Indianapolis v. De Laval Separator Co.*, 389 F.2d 674, 677-78 (7th Cir. 1968) (affirming directed verdict because steel part was merchantable when sold, though it later corroded); *Stevenson v. Mazda Motor of Am., Inc.*, No. 14-5250, 2015 WL 3487756, at *13 (D.N.J. June 2, 2015) (holding warranty not breached "where a car has been driven for years before a defect manifested"); *In re Nissan Radiator/Transmission Cooler Litig.*, No. 10 CV 7493, 2013 WL 4080946, at *8 (S.D.N.Y. May 30, 2013) (finding vehicles "merchantable as a matter of law" because they had been driven thousands of miles); *Sheris v. Nissan N. Am., Inc.*, Civ. No. 07-2516, 2008 WL 2354908, at *6 (D.N.J. June 3, 2008) (same, noting this is "the weight of authority" nationwide).

State law sometimes imposes a minimum duration for implied warranties (generally a year or less), but Plaintiffs do not allege this is the case in any relevant state. Even if they had, every state's law and the Magnuson-Moss Act allow sellers to limit an implied warranty to the duration of an express limited warranty. *See, e.g.*, 15 U.S.C. § 2308(b). Nissan's express warranty has such a provision. Exh. A at p. 4. Therefore, here no implied warranty could have lasted longer than three years (for rust) or five years (for rust perforation) from the date of the *first sale* of the car. *Id*. Again, to plaintiff alleges that his or her car was unmerchantable during that time. *See, e.g.*, *Stevenson*, 2015 WL 3487756, at *13; *Voicheck v. Ford Motor Co.*, No. 12-6534, 2013 WL 1844273, at *4 (E.D. Pa. May 2, 2013) (applying Penn. law); *Tokar v. Crestwood Imports, Inc.*, 532 N.E.2d 382, 387-89 (Ill. App. Ct. 1988).

Finally, even if the merchantability claims were otherwise valid, they would fail in several relevant states for lack of privity. *Rampey v. Novartis Consumer Health, Inc.*, 867 So. 2d

1079, 1087 (Ala. 2003); *Voelker*, 353 F.3d at 525 (Illinois law); *Compex Int'l Co. v. Taylor*, 209 S.W.3d 462, 464-65 (Ky. 2006); Mich. Comp. Laws § 440.2318; *Kraft v. Staten Island Boat Sales, Inc.*, 715 F. Supp. 2d 464, 475 n.4 (S.D.N.Y. 2010) (New York law); *Curl v. Volkswagen of Am., Inc.*, 871 N.E.2d 1141, 1144-48 (Ohio 2007).

V. The economic-loss doctrine bars any tort claim for negligence and the implied-warranty claim under Massachusetts law.

The economic-loss doctrine precludes tort liability in cases that do not involve personal injury. *See, e.g.*, *Moorman Mfg. Co. v. Nat'l Tank Co.*, 435 N.E.2d 443, 453 (Ill. 1982); *Trans States Airlines v. Pratt & Whitney Canada, Inc.*, 682 N.E.2d 45, 48-55 (Ill. 1997); *Kesse*, 2015 WL 920960, at *2-3; *see generally Schreiber Foods, Inc. v. Lei Wang*, 651 F.3d 678, 680-83 (7th Cir. 2011) (discussing economic theory behind the doctrine). It is meant to "avoid[] the consequences of open-ended tort liability" by restricting recovery to contract or fraud theories unless a plaintiff has been personally injured. *In re Chicago Flood Litig.*, 680 N.E.2d 265, 274 (Ill. 1997). Like Illinois, the other states relevant here recognize the economic-loss doctrine.[11]

Here, as discussed above it appears that Plaintiffs' cause of action for "negligence" is simply asserting another form of concealment or omission claim, and so it fails for the reasons set forth in sections II and III above. But if Plaintiffs are trying to state a tort claim, that claim

[11] *See, e.g., Lloyd Wood Coal Co. v. Clark Equip. Co.*, 543 So. 2d 671 (Ala. 1989); *Indianapolis-Marion Cnty. Pub. Library v. Charlier Clark & Linard, P.C.*, 929 N.E.2d 722, 729 (Ind. 2010); *Determan v. Johnson*, 613 N.W.2d 259, 261-64 (Iowa 2000); *Koss Constr. Co. v. Caterpillar, Inc.*, 960 P.2d 255 (Kan. App. 1998); *Giddings & Lewis, Inc. v. Indus. Risk. Insurers*, 348 S.W.3d 729 (Ky. 2011); *Morris v. Osmose Wood Preserving*, 667 A.2d 624, 631 (Md. 1995); *Hooper v. Davis-Standard Corp.*, 482 F. Supp. 2d 157, 159 (D. Mass. 2007); *Huron Tool and Eng'g Co. v. Precision Consulting Servs., Inc.*, 532 N.W.2d 541, 544 (Mich. Ct. App. 1995); *Dannix Painting, LLC v. Sherwin-Williams Co.*, 732 F.3d 902, 906-10 (8th Cir. 2013) (applying Missouri law and citing cases); *Lempke v. Dagenais*, 547 A.2d 290, 291 (N.H. 1988); *Alloway v. Gen. Marine Indus.*, 695 A.2d 264, 275 (N.J. 1997); *Bocre Leasing Corp. v. Gen. Motors Corp.*, 84 N.Y.2d 685, 621 N.Y.S.2d 497 (1995); *Chemtrol Adhesives, Inc. v. Am. Mfrs. Mut. Ins. Co.*, 537 N.E.2d 624, 629-30 (Ohio 1989); *Inglis v. Am. Motors Corp.*, 209 N.E.2d 583, 588 (Ohio 1965); *Werwinski v. Ford Motor Co.*, 286 F.3d 661, 670 (3d Cir. 2002) (applying Pennsylvania law); *Rotonda Condo. Unit Owners Ass'n v. Rotonda Assocs.*, 380 S.E.2d 876, 879 (Va. 1989).

would be barred by the economic-loss doctrine in every relevant jurisdiction because Plaintiffs do not allege that they—or anyone else, for that matter—have been personally injured as a result of a rusty floorboard. *See, e.g.*, *Determan*, 613 N.W.2d at 263-64 (holding doctrine barred claim alleging failure to disclose structural problems that might one day cause house to collapse).

Finally, in Massachusetts the economic-loss doctrine also bars implied-warranty claims where no personal injury is involved. *Hooper*, 482 F. Supp. 2d at 159 (citing cases). That state's law treats both negligence and implied-warranty claims as a form of strict-liability tort, and accordingly both types of claim are barred by the doctrine on facts like those here. *Id*.

This case is a poster child, in fact, for the policies underlying the economic-loss doctrine. Many restrictions on common-law claims have eroded over the years, but mostly in the context of personal-injury actions. If a plaintiff has been injured, then doctrines like privity and the economic-loss rule do not stand in the way. But courts continue to recognize that in the absence of physical injury (or fraud), liability should be regulated by contract principles, because "tort law is a superfluous and inapt tool for resolving purely commercial disputes. We have a body of law designed for such disputes. It is called contract law." *Miller v. U.S. Steel Corp.*, 902 F.2d 573, 574 (7th Cir. 1990). Here, Plaintiffs had an express warranty (and implied warranties as well), and their vehicles more than lived up to that warranty. All of Plaintiffs' claims here are essentially an effort to renegotiate that deal and obtain a warranty that lasts not five years, but forever, or at least as long as the car can otherwise be driven. They have been unable to allege a fraud or merchantability claim, and the law appropriately bars any tort claim on these facts.

CONCLUSION

The out-of-state plaintiffs have alleged no basis for personal jurisdiction. Substantively, Plaintiffs' fraud claims fail to comply with either Rule 8 or Rule 9(b), and their warranty and tort claims (if any) also fail. The FAC should be dismissed.

Dated: August 31, 2015

Respectfully submitted,

NISSAN NORTH AMERICA, INC.

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One of Its Attorneys

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APPENDIX A: TABLE OF CLAIMS

Count	Claim	Paragraphs
1	Declaratory Judgment Act (nationwide)	136-41
2	Magnuson-Moss Warranty Act (implied warranty) (nationwide)	142-55
3	Fraudulent concealment (nationwide)	156-64
4	Negligence (nationwide)	165-77
5	Unjust enrichment (nationwide)	178-84
6	Alabama Deceptive Trade Practices Act	185-198
7	Illinois Consumer Fraud Act	199-213
8	Illinois Deceptive Trade Practices Act	214-29
9	Iowa Consumer Frauds Act	230-46
10	Kansas Consumer Protection Act	247-64
11	Kentucky Consumer Protection Act	265-80
12	Maryland Consumer Protection Act	281-95
13	Michigan Consumer Protection Act	296-313
14	Missouri Merchandising Practices Act	314-32
15	New Hampshire Consumer Protection Act	333-48
16	New Jersey Consumer Fraud Act	349-59
17	New York General Business Law § 349	360-76
18	New York General Business Law § 350	377-84
19	Ohio Consumer Sales Practices Act	385-402
20	Pennsylvania Unfair Trade Practices and Consumer Protection Law	403-18
21	Virginia Consumer Protection Act	419-36

CERTIFICATE OF SERVICE

I hereby certify that on August 31, 2015, the foregoing was electronically filed with the Clerk of the Court, by which notification of such filing was electronically sent and served to all parties via the CM/ECF system.

/s/ Todd C. Jacobs