

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

In re:

*Ford Fusion and C-Max Fuel Economy
Litigation,*

This Document Relates to All Actions.

Case No. 13-MD-2450 (KMK)

**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT FORD MOTOR
COMPANY'S MOTION TO DISMISS THE CONSOLIDATED
AMENDED CLASS ACTION COMPLAINT AND DEMAND
FOR JURY TRIAL PURSUANT TO FEDERAL RULE
OF CIVIL PROCEDURE 12(B)(6)**

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Defendant Ford Motor Company, pursuant to [Federal Rule of Civil Procedure 12\(b\)\(6\)](#), submits this Motion to Dismiss Plaintiffs' Consolidated Amended Class Action Complaint and Demand for Jury Trial ("CAC") (Doc. No. 51), and in support thereof, states as follows:

I. INTRODUCTION

This case is about the *estimated* fuel economy of 2013 Ford Fusion and C-MAX hybrid vehicles ("subject vehicles") and the comprehensive and detailed federal legislative scheme that governs both the testing of *estimated* fuel economy for new automobiles and disclosure fuel economy *estimates* to consumers. Significantly, this federal legislative scheme both expressly and implicitly preempts any challenge to the testing and disclosure of fuel economy estimates in connection with the sale of new automobiles in the United States. In an obvious, yet insufficient, effort to save their claims from being extinguished by federal preemption, Plaintiffs obscure that the fuel economy figures on which their claims are based are estimates—*not guarantees* of real world fuel economy performance for every driver under all conditions.¹ Indeed, the gravamen of their claims is that Ford acted unlawfully by concealing from them the "actual fuel economy" of the subject vehicles. This position is not only implausible on its face and insufficient as a matter of law, but represents a direct attack on federal law that should be deemed preempted by this Court.

There is another overarching way in which Plaintiffs attempt to avoid preemption. Plaintiffs know that claims based on advertisements containing federally mandated disclosure language concerning the use of EPA estimates are preempted. Plaintiffs make passing reference

¹ In the CAC, Plaintiffs refer to "MPG" approximately 178 times and "fuel economy" approximately 155 times. The words "estimated" and "estimates" each appear only four times.

to this disclosure language in Paragraph 62 of the CAC, seeking to diminish its claim-dispositive significance by calling it “small type at the bottom” and “standard boilerplate language.” (CAC, ¶ 62.) Notably, Plaintiffs fail to mention that such disclosures are mandated by the Federal Trade Commission (“FTC”), and ignore that numerous courts have held that advertisements including such language are non-actionable as a matter of law. (*See* Section IV(A)(2)(a), *infra*.)

Plaintiffs’ apparent solution to avoiding the dispositive effect of FTC disclaimer language in advertisements is to plead virtually no detail about what advertisements they actually saw before purchasing their vehicles, in the hopes that Ford and this Court will be unable to determine whether the required disclosure language was present in those advertisements. In other words, Plaintiffs have not pleaded the most basic facts necessary to demonstrate their claims are actionable, or to place Ford on notice of its alleged wrongful conduct. For instance, Plaintiffs throughout the CAC claim they were exposed to a “47 MPG” advertising campaign, but provide virtually no detail regarding which advertisements were seen by specific Plaintiffs. Nor do they attach copies of the allegedly offending advertisements, webpages, and representations to which they were allegedly exposed, or even provide a single URL link for online viewing. This “hide the ball” approach makes the *entire* CAC susceptible to attack under both [Rule 9\(b\)](#) and the plausibility requirements of [Bell Atlantic Corp. v. Twombly, 550 U.S. 544 \(2007\)](#) and [Ashcroft v. Iqbal, 556 U.S. 662 \(2009\)](#).

Plaintiffs’ claims should also be dismissed for additional, substantive reasons. First, the relevant statute that obligates Ford to conduct fuel economy testing and provide accurate data to the EPA—the Energy Policy Conservation Act of 1975 (the “EPCA”)—contains no private enforcement mechanism for consumers to sue for violations of the statute. *See* [49 U.S.C. §](#)

[32901](#), *et seq.* Thus, Plaintiffs lack standing to assert claims premised on a violation of the EPCA, such as the claims set forth in the CAC.

Second, as indicated above, Plaintiffs' claims should be dismissed because they are preempted by federal statutes and regulations. Plaintiffs' claims are expressly preempted under [49 U.S.C. § 32919](#) to the extent that they seek to impose different fuel economy testing and labeling standards than those imposed under federal law. Their claims are also barred by conflict preemption because they seek to use state law to achieve a change in fuel economy testing, labeling calculation, and reporting that frustrates an important federal objective of uniformity.

Third, because the CAC seeks to intrude into an area that is within the recognized and special competence of a federal agency—the EPA—that has the statutory obligation to regulate estimated fuel economy testing and labeling, this Court should decline to exercise jurisdiction over this dispute pursuant to the doctrine of primary jurisdiction and abstention.

Fourth, Plaintiffs' claims for violations of various state consumer protection statutes (CAC First through Twenty-First Causes of Action), common law fraud (CAC Twenty-Second Cause of Action), and negligent misrepresentation (CAC Twenty-Third Cause of Action) fail because, even if not preempted, Plaintiffs have not demonstrated that they relied upon, or were injured by, an actionable material misstatement by Ford.

Fifth, Plaintiffs' breach of contract claim (CAC Twenty-Fourth Cause of Action) fails because, even if not preempted, it does not identify a specific contract, or specific contractual term, that Ford allegedly breached.

Sixth, Plaintiffs' claim for breach of the covenant of good faith and fair dealing (CAC Twenty-Fifth Cause of Action) fails because they have not identified the existence of a valid contract, which is required to sustain this claim.

Seventh, Plaintiffs' breach of express warranty claim (CAC Twenty-Sixth Cause of Action) fails because the same federal statute that creates the duty for manufacturers to generate and post EPA fuel economy estimates explicitly bars any claim that such estimates constitute a warranty under state or federal law. [49 U.S.C. § 32908\(d\)](#).

Eighth, Plaintiffs' Magnuson-Moss claim (CAC Twenty-Seventh Cause of Action) fails because they have not stated a viable claim for breach of an implied or written warranty.

Ninth, Plaintiffs' unjust enrichment claim (CAC Twenty-Eighth Cause of Action) fails because, even if not preempted, it is based on nothing more than formulaic labels and conclusions, which are insufficient to withstand scrutiny under [Rule 12\(b\)\(6\)](#).

Accordingly, the entire CAC should be dismissed with prejudice.

II. FACTUAL BACKGROUND

A. The New Vehicle EPA Mileage Estimate: Legal and Factual Background.

The testing and disclosure of estimated fuel economy for new vehicles sold in the United States is governed by a comprehensive federal regulatory scheme, under the purview of the EPA, the FTC, and Congress via the EPCA. Every new vehicle sold in the United States is required to be labeled with a sticker that reflects its estimated EPA fuel economy. [49 U.S.C. § 32908\(b\)\(1\)](#). That label refers to "EPA" fuel economy because the process by which fuel economy estimates are determined (and disclosed) is stated in exquisite detail by EPA regulations. The resulting figures are called "estimates" because they are just that—approximate figures, generated for the

purpose of making comparisons between different vehicles based on a common certification process. See [71 Fed. Reg. 77872, 77874 \(Dec. 27, 2006\)](#) (“We believe the new fuel economy estimates will provide car buyers with useful information when comparing the fuel economy of different vehicles.”). What follows is an overview of this comprehensive federal scheme.

1. Current EPA fuel economy test methods.

Methods for calculating city and highway fuel economy have been in place since the 1970s and EPA estimates have appeared on the window stickers of new automobiles sold in the U.S. since the latter part of that decade. [71 Fed. Reg. at 77873-74 \(Dec. 27, 2006\)](#). The current EPA testing regime, which became effective in 2008, gives automobile manufacturers a choice between two methods for testing fuel efficiency and calculating fuel economy estimates. [40 C.F.R. § 600.210-08\(a\)](#). A manufacturer can direct test a vehicle prototype using the “5-cycle method,” which combines long-standing city and highway fuel economy test methods with more recent tests that measure the impact of higher speeds, air conditioning use, and colder temperatures on fuel efficiency.² [71 Fed. Reg. at 77875-76](#); See also http://www.fueleconomy.gov/feg/fe_test_schedules.shtml (last accessed Nov. 18, 2013) ([Ex. 2](#)).³ In order to alleviate the costs to and burdens on manufacturers associated with running the 5-

² As the EPA explains, “[m]anufacturers do not test every new vehicle offered for sale. They are only required to test one representative vehicle—typically a preproduction prototype[.]” See http://www.fueleconomy.gov/feg/which_tested.shtml (last accessed Nov. 18, 2013) ([Ex 1](#)).

³ This Court may take judicial notice of a website hosted by the federal government as it constitutes a government publication. See [Brooklyn Heights Assoc., Inc. v. Nat’l Park Serv.](#), 777 F. Supp. 2d 424, 432 n.6 (E.D.N.Y. 2011) (“... the Court may take judicial notice of the BBP website, which is a government publication.”); [U.S. ex rel. Dingle v. Biopart Corp.](#), 270 F. Supp. 2d 968, 972 (W.D. Mich. 2003) (explaining that it is proper for a federal court to take judicial notice of government documents including government documents available on the internet because they are generally considered not to be subject to reasonable dispute); see also [Cali v. East Coast Aviation Serv.](#), 178 F. Supp. 2d 276, 287 n.6 (E.D.N.Y. 2001) (taking judicial notice of “online database pages from certain government agencies, including the Pennsylvania Department of State, Bureau of Corporations, and the Federal Aviation Administration.”).

cycle method, the EPA also permits manufacturers to calculate fuel economy using the simplified “MPG approach” when certain criteria are met. [40 C.F.R. § 600.210-08\(a\)](#); EPA’s Response to Comments: Fuel Economy Labeling of Motor Vehicles at 7.1 (Testing Burden). ([Ex. 3](#)) The MPG approach allows “vehicles with the same engine, transmission and weight class to use the same fuel economy label value data, since, historically, such vehicle families achieve nearly identical fuel economy performance.” See EPA Aug. 15, 2013 Press Release: EPA Announces Revised Fuel Economy Label Estimates for 2013 Ford C-MAX; Initiates Effort to Update Labeling Procedures to Keep Pace With Industry Trends ([Ex. 4](#)).⁴ Here, for example, “Ford based the 2013 Ford C-Max label on testing of the related Ford Fusion hybrid, which has the same engine, transmission and test weight[.]” *Id.* As the EPA expressly recognized, this method of labeling is permitted by EPA regulations. *Id.*

2. Fuel economy estimates are not guarantees of real world fuel economy.

Despite the fact that the EPA, through the development of its most recent testing scheme, has “improved its methods for estimating fuel economy,” it has nevertheless emphasized that a driver’s “mileage will *still* vary.” http://www.fueleconomy.gov/feg/why_differ.shtml (last accessed Nov. 18, 2013) (italics in original) ([Ex. 5](#)). Indeed, the EPA has long-acknowledged that its required fuel economy estimates are not—and can never be—“perfect” figures that can predict the performance of each vehicle for each driver under all conditions:

It is important to emphasize that fuel economy varies from driver to driver for a wide variety of reasons, such as different driving styles, climates, traffic patterns, use of accessories, loads, weather, and vehicle maintenance. Even different

⁴ This Court can take judicial notice of the EPA press release because it is a government publication. See *supra* Note 3; see also [McLoughlin v. People’s United Bank, Inc., No. 3:08-cv-00944, 2009 WL 2843269, at *7, n.2 \(D. Conn. Aug. 31, 2009\)](#) (“The Court may take judicial notice of the press releases of government agencies.”).

drivers of the same vehicle will experience different fuel economy as these and other factors vary. Therefore, it is impossible to design a “perfect” fuel economy test that will provide accurate, real-world fuel economy estimates for every consumer. With any estimate, there will always be consumers that get better or worse actual fuel economy. The EPA estimates are meant to be a general guideline for consumers, particularly to compare the relative fuel economy of one vehicle to another.

[71 Fed. Reg. at 77874](#). While acknowledging that no single test can produce a prediction of fuel economy for all users, the EPA has still recognized that there is a need for consumers to be provided some quantifiable information about fuel economy, so that comparisons can be made between vehicles:

While the inputs to our estimates are based on data from actual real-world driving behavior and conditions, it is essential that our fuel economy estimates continue to be derived primarily from controlled, repeatable, laboratory tests. Because the test is controlled and repeatable, an EPA fuel economy estimate can be used for comparison of different vehicle and model types. In other words, when consumers are shopping for a car, they can be sure that the fuel economy estimates were measured using a “common yardstick” – that is the same test run under the exact same set of conditions, making the fuel economy estimates a fair comparison from vehicle-to-vehicle.

Id. The EPA requires manufacturers to use laboratory-derived fuel economy estimates for these reasons. The EPA has openly acknowledged, however, that on-road testing by other entities often yield different results than those obtained under the EPA’s testing process:

While some organizations have issued their own fuel economy estimates based on real-world driving, such an approach introduces a wide number of often uncontrollable variables – different drivers, driving patterns, weather conditions, temperatures, etc. – that make repeatable tests impossible. Our new fuel economy test methods are more representative of real-world conditions than the current fuel economy tests – yet we retain our practice of relying on controlled, repeatable, laboratory tests.

* * *

In recent years, there have been a number of studies, conducted by a variety of sources, suggesting that there is often a shortfall between the EPA estimates and real-world fuel economy. Several organizations have provided consumers with

their own fuel economy estimates, which in some cases vary significantly from EPA's estimates. Each of these studies differs in its test methods, driving cycles, sampling of vehicles, and methods of measuring fuel economy. There are strengths and weaknesses of each study Collectively, these studies indicate that there are many cases where real-world fuel economy falls below the EPA estimates. These studies also indicate that real-world fuel economy varies significantly depending on the conditions under which it is evaluated. Nevertheless, taken as a whole, these studies reflect a wide range of real-world driving conditions, and show that typical fuel economy can be much lower than EPA's current estimates.

[Id. at 77874-77879.](#)

3. The disclosure of fuel economy estimates to consumers.

In addition to requiring that manufacturers determine fuel economy estimates pursuant to its detailed testing procedures and calculations, the EPA also requires those estimates to be posted on the Monroney label (or the “window sticker”) for every new vehicle sold in the United States. The precise form and content of that label is fixed in exacting detail by federal law and EPA regulations. *See* [49 U.S.C. § 32908](#); [40 C.F.R. §§ 600.302-08, 600.302-12](#). Sample labels for the subject vehicles (see [Exs. 6, 7](#)) clearly state, in federally-mandated language in the fuel economy section, that “Actual results will vary for many reasons, including driving conditions and how you drive and maintain your vehicle.”⁵ That language was carefully selected by the EPA following an extensive rulemaking process that included public comment and focus group testing of potential language. [71 Fed. Reg. at 77903](#). In selecting that language, the EPA acknowledged that “[a]ll factors that impact fuel economy cannot be listed on the fuel economy label because they are too numerous.” *Id.* at 77903.

⁵ Plaintiffs allege that the window stickers on the subject vehicles, among other things, form the basis of their “breach of contract” and “breach of express warranty” claims. Because Plaintiffs relied on these documents when drafting the CAC, they can be considered here. *See* [Assoko v. City of New York, 539 F. Supp. 2d 728, 732 n.1 \(S.D.N.Y. 2008\)](#) (explaining that even though plaintiffs did not attach relevant agreements to complaint they could be considered by the court when ruling on motion to dismiss because plaintiffs relied “on the agreements in several causes of action[.]”).

Federal law also requires dealers to make available to consumers at the point of sale a current EPA Fuel Economy Guide (“EPA Guide”), which contains the same EPA fuel economy estimates. [49 U.S.C. § 32908\(c\)](#). The 2013 EPA Guide explains:

Your Fuel Economy Will Vary

Even though EPA recently improved its methods for estimating fuel economy, your vehicle’s fuel economy will almost certainly vary from EPA’s estimate. Fuel economy is not a fixed number; it varies significantly based on where you drive, how you drive, and other factors. Thus, it is impossible for one set of estimates to predict fuel economy precisely for all drivers in all environments.

* * *

So, please remember that the EPA ratings are a useful tool for comparing vehicles when car buying, but they may not accurately predict the fuel economy *you* will get.

Model Year 2013 Fuel Economy Guide ([Ex. 8](#)). (emphasis in original).

In order to establish the primacy of federal regulation over the disclosure of EPA fuel efficiency estimates, Congress determined that “a State or political subdivision of a State may adopt or enforce a law or regulation on disclosure of fuel economy or fuel operating costs for an automobile covered by [federal EPA fuel economy estimate disclosures] *only if the law or regulation is identical to that requirement.*” [49 U.S.C. § 32919\(b\)](#) (emphasis added). Congress also established that no State or subdivision of a State may “adopt or enforce a law or regulation *related to* fuel economy standards” under any circumstance. [49 U.S.C. § 32919\(a\)](#) (emphasis added). Further highlighting the fact that EPA mileage estimates are not, and were never intended to be, guarantees of individual vehicle performance, federal law expressly states that “[a] disclosure about fuel economy or estimated annual fuel costs under this section *does not*

establish a warranty under the law of the United States or a State.” [49 U.S.C. § 32908\(d\)](#) (emphasis added).

In furtherance of the federal government’s objective to provide consistently calculated fuel economy information to consumers, the FTC regulates advertising of fuel economy estimates by manufacturers. The FTC requires that manufacturers use the EPA fuel economy estimates as the most-prominent mileage figure in any advertisement that makes “any express or implied representation in advertising concerning the fuel economy of any new automobile.” [16 C.F.R. § 259.2\(a\)](#). The FTC warns that “[f]ailure to comply with the guides may result in corrective action by the Commission under applicable statutory provisions.” [16 C.F.R. §1.5](#). The FTC also determined that the use of the phrase “EPA estimate” is sufficient to advise consumers that mileage references are to EPA estimated fuel economy. [16 C.F.R. § 259.2\(a\)\(2\), n.5](#).

These federal statutes and regulations form a pervasive and comprehensive federal regulatory scheme, directed to providing consumers with objectively verifiable, repeatable information upon which to base comparisons between different vehicles. It is against this comprehensive regulatory backdrop that Plaintiffs’ allegations and claims must be examined.

B. Plaintiffs’ Factual Allegations

While the CAC makes references to numerous press releases, public statements, and advertisements that are attributed to Ford (CAC, ¶¶ 54-86), they are not, for the most part, linked to the individual Plaintiffs or their purchasing decisions. Instead, for most of the individual Plaintiffs, the CAC simply states that they saw “advertisements,” “representations,” “brochures” and/or “websites” stating (1) that the subject vehicles achieved 47 miles per gallon on the

highway, in the city and/or combined, and/or (2) that the subject vehicles achieved better gas mileage than the Toyota Prius V. Plaintiffs do not plead any facts sufficient to determine whether any of these alleged misrepresentations contained federally-mandated disclosure language. At the same time, every Plaintiff makes the implausible claim that he or she would not have purchased their vehicle “if [he or she] had known the *actual fuel economy* of the vehicle.” (CAC, ¶¶ 13-40 (emphasis added).)

Based on these allegations, 29 individual Plaintiffs attempt to assert causes of action under consumer protection statutes in 16 states: Arizona; California; Colorado; Connecticut; Florida; Illinois; Maryland; Michigan; Minnesota; Missouri; New York; Ohio; Oregon; Pennsylvania; Washington; and Wisconsin. (CAC, ¶¶ 112-317.) They also assert claims for: Fraud; Negligent Misrepresentation; Breach of Contract; Breach of Covenant of Good Faith and Fair Dealing; Breach of Express Warranty; Violations of the Magnuson-Moss Warranty Act; and Unjust Enrichment.⁶ (CAC, ¶¶ 318-365.)

III. LEGAL STANDARD

A. Motion to Dismiss Standard

This Court has articulated the legal standard for determining a motion to dismiss pursuant to [Rule 12\(b\)\(6\)](#) as follows:

On a [Rule 12\(b\)\(6\)](#) motion to dismiss a complaint, the court must accept a plaintiff’s factual allegations as true and draw all reasonable inferences in [the plaintiff’s] favor.” [Gonzalez v. Caballero, 572 F. Supp. 2d 463, 466 \(S.D.N.Y. 2008\)](#); *see also* [Ruotolo v. City of New York, 514 F.3d 184, 188 \(2d Cir. 2008\)](#)

⁶ The CAC does not specify which state’s law governs Plaintiffs’ common law claims for Fraud, Negligent Misrepresentation, Breach of Contract, Breach of Covenant of Good Faith, and Fair Dealing, and Unjust Enrichment (although all Plaintiffs appear to claim that California law entitles them to punitive damages for fraud (CAC, ¶ 323)). The same goes for Plaintiffs’ Breach of Express Warranty claim, except Plaintiffs note that 48 states and the District of Columbia have codified the Uniform Commercial Code (U.C.C.) provisions governing what Plaintiffs (and not the drafters of the U.C.C.) refer to as the “express warranty of merchantability.” (CAC, ¶ 349.)

“We review *de novo* a district court's dismissal of a complaint pursuant to [Rule 12\(b\)\(6\)](#) accepting all factual allegations in the complaint and drawing all reasonable inferences in the plaintiff's favor.” (internal quotation marks omitted). “In adjudicating a [Rule 12\(b\)\(6\)](#) motion, a district court must confine its consideration to facts stated on the face of the complaint, in documents appended to the complaint or incorporated in the complaint by reference, and to matters of which judicial notice may be taken.” [Leonard F. v. Isr. Disc. Bank of N.Y.](#), 199 F.3d 99, 107 (2d Cir. 1999) (internal quotation marks omitted).

The Supreme Court has held that “[w]hile a complaint attacked by a [Rule 12\(b\)\(6\)](#) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the ‘grounds’ of his [or her] ‘entitle[ment] to relief’ requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” [Bell Atl. Corp. v. Twombly](#), 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007) (third alteration in original) (citations omitted). Instead, the Court has emphasized that “[f]actual allegations must be enough to raise a right to relief above the speculative level,” *id.*, and that “once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint,” *id.* at 563. Plaintiffs must allege “only enough facts to state a claim to relief that is plausible on its face.” *Id.* at 570. But if a plaintiff has “not nudged [his or her] claims across the line from conceivable to plausible, the[] complaint must be dismissed.” *Id.*; *see also Ashcroft v. Iqbal*, 556 U.S. 662, 679, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (“Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not ‘show[n]’—‘that the pleader is entitled to relief.’” (alteration in original) (citation omitted) (quoting Fed. R. Civ. P. 8(a)(2))).

[Congregation Rabbinical Coll. of Tartikov, Inc. v. Village of Pomona](#), 915 F. Supp. 2d 574, 588 (S.D.N.Y. 2013) (Karas, J.).

When a claim is “premised on allegations of fraud,” the allegations must satisfy the heightened particularity requirement of [Rule 9\(b\)](#). *See In re Morgan Stanley Info. Fund Sec.*, 592 F.3d 347, 358 (2d Cir. 2010); [Rombach v. Chang](#), 355 F.3d 164, 171 (2d Cir. 2004). [Rule 9\(b\)](#) requires that a complaint “(1) specify the statements that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4)

explain why the statements were fraudulent.” [Rombach, 355 F.3d at 170](#); [Mills v. Polar Molecular Corp., 12 F.3d 1170, 1175 \(2d Cir. 1993\)](#). [Rule 9\(b\)](#) applies “to all averments of fraud,” and the wording “is cast in terms of the conduct alleged, and is not limited to allegations styled or denominated as fraud or expressed in terms of the constituent elements of a fraud cause of action.” [Rombach, 355 F.3d at 171](#).

Where the requirements of [Rule 9\(b\)](#) apply, the complaint must explain the fraud “with a high degree of meticulousness” not required by [Rule 8, Desai v. Meyercord, 223 F.3d 1020, 1022 \(9th Cir. 2000\)](#), which means that the plaintiff must identify the conduct amounting to fraud and explain why it is deceitful or misleading. *See* [Rombach, 355 F.3d at 172](#) (“To meet the pleading standard of [Rule 9\(b\)](#), this Court has repeatedly required, among other things, that the pleading ‘explain why the statements were fraudulent.’”) (quoting [Mills, 12 F.3d at 1175](#)). In this case, the CAC falls short of both Rules [8\(a\)](#) and [9\(b\)](#).

B. Plaintiffs’ Claims Should be Evaluated Based on the Law of Their Respective States of Residence.

Plaintiffs’ stated basis for the jurisdiction of this Court is diversity of citizenship—specifically, the class action provisions of [28 U.S.C. § 1332\(a\)\(1\)](#). (CAC, ¶ 10.) A federal court sitting in diversity applies the choice-of-law rules of its forum state, which, in this case, is New York. [Nat’l Gear & Piston, Inc. v. Cummins Power Sys., LLC, No. 10-4145, 2013 WL 5434638, at *5 \(S.D.N.Y. Sept. 27, 2013\) \(Karas, J.\)](#) “Where there is an actual conflict. . . New York has adopted an ‘interest analysis’ approach to choice-of-law questions, ‘intended to give controlling effect to the law of the jurisdiction which, because of its relationship or contact with the occurrence or the parties, has the greatest concern with the specific issue raised.” *Id.* (citations omitted). “In analyzing putative, nationwide consumer-protection class actions, several courts

have determined that the law of the state where each plaintiff resides and purchased the relevant product should apply.” See [*In re Grand Theft Auto Video Game Consumer Litig.*, 251 F.R.D. 139, 146 \(S.D.N.Y. 2008\)](#) (collecting cases).

In this case, New York has no interest in or contacts with the claims of the out-of-state Plaintiffs who, according to the CAC, purchased and operated their vehicles in their respective states of residence. *Id.* at 149 (explaining that states have a strong interest in protecting consumers with respect to sales within their borders but a relatively weak interest (if any) in applying their policies to consumers or sales in neighboring states). For the New York Plaintiffs, the opposite is true—New York may be the only state with any interest in or contact with the subject matter of their claims. *Id.* Accordingly, this Court should apply the law of the respective states of residence of the Plaintiffs when evaluating the viability of their claims.

IV. ARGUMENT

A. **Plaintiffs’ Allegations Are Insufficient Under Rules 8(a) and 9(b).**

“A claim is facially plausible ‘when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. . . . The plausibility standard is not akin to a ‘probability requirement,’ but it asks for more than a sheer possibility that a defendant has acted unlawfully.’” [*In re Scotts EZ Seed Litig.*, No. 12-4727, 2013 WL 2303727, at *3 \(S.D.N.Y. May 22, 2013\)](#) (quoting *Iqbal*, 556 U.S. at 678).

There are three overriding reasons why *none* of the claims in the CAC are plausible.

1. **No vehicle on the road today has an “actual fuel economy.”**

All 29 Plaintiffs base their claims on an allegation that they would not have purchased the subject vehicles if they “had known the *actual fuel economy* of the vehicle[s].” (CAC, ¶¶ 13-40

(emphasis added.) The foundational premise of this argument is that there is an “actual fuel economy” for the 2013 Fusion Hybrid and the C-MAX that, although different from the EPA estimated fuel economy, is somehow capable of being accurately calculated and communicated to each purchaser. This premise is flawed. As the EPA has explained, “[f]uel economy is not a fixed number; it varies significantly based on where you drive, how you drive, and other factors. . . . So, please remember that the EPA ratings are a useful tool for comparing vehicles when car buying, but they may not accurately predict the fuel economy you will get.” (see [Ex. 8](#) EPA Model Year 2013 Fuel Economy Guide at i (bold emphasis added, italics in original). This is precisely why the EPA-approved Monroney window stickers for the vehicles purchased by Plaintiffs state “Your actual mileage will vary” (see [Exs. 6, 7](#)), and precisely why the fuel economy figures transmitted to consumers are *estimates*, not guarantees, promises, legally binding offers, or warranties.

Plaintiffs cannot escape this insufficiency in their pleading by pointing to third-party fuel economy test results, such as the testing performed by Consumer Reports, as indicative of a vehicle’s “actual fuel economy.” (CAC, at ¶¶ 90-92.) These so-called “independent” test processes are materially different from the laboratory-based testing and calculation process that is mandated by the EPA, and thus it is not surprising if they yield different results. See [71 Fed. Reg. at 77874-77879, 77893-77895](#); see *supra* p. 7-8. In fact, Consumer Reports has itself acknowledged that discrepancies between its testing methods and those of the federally-mandated EPA test can explain differences in the reported fuel economy of vehicles—and, in particular, the vehicles at issue in this lawsuit. See *Why do Ford’s new hybrids ace the EPA fuel economy tests?*, Consumer Reports, Dec. 13, 2012, ([Ex. 9](#)). As Consumer Reports stated:

When real-world fuel economy doesn't match EPA estimates, the difference may lie in the cars' design. . . . That difference in mpg may be linked to the way the Ford hybrids work. Ford's system can operate in full-electric mode at speeds up to 62 mpg. That ability can greatly improve fuel economy in the EPA highway cycle, since most of the government's simulated driving test measure gasoline used while driving at lower speeds. But it won't help at all in the highway portion of the Consumer Reports fuel-economy test, which measures gas consumption at 65 mph. . . .

In the Consumer Reports highway test, we record the average fuel usage in two directions at a steady 65 mph on a specific section of highway. In contrast, the majority of the EPA highway cycle simulates a vehicle traveling mostly at speeds below 55 mph. Although the EPA tests reach 80 mph at times, the highway tests include a fair amount of gentle acceleration and coasting. Speeds average only about 48 mph. Under these conditions, Ford's hybrid drive allows the gasoline engine to completely shut off at times, with the resultant increase in fuel economy.

Id.

Far from supporting the suggestion that differences between the Consumer Reports test results and the EPA fuel economy estimates must be the result of fraud or an effort by Ford to conceal the subject vehicles' "actual fuel economy," Consumer Reports' own article attributes the mileage discrepancy to the structural differences between the tests and the unique operating characteristics of the vehicles at issue in this case. Thus, Plaintiffs' foundational premise—that there exists an "actual fuel economy" figure applicable to all drivers under all conditions, that Ford somehow wrongfully withheld—is implausible and warrants dismissal of the CAC.

2. This Court should reject Plaintiffs' "hide the ball" approach to pleading claims allegedly based on an actionable misrepresentation.

- a. *Plaintiffs do not plead enough facts to establish that they were exposed to an actionable representation regarding the estimated fuel economy of the subject vehicles.***

As Plaintiffs are well-aware, any effort to affirmatively challenge the determination of EPA fuel efficiency figures, or to challenge advertisements or other representations based on such figures, is preempted or non-actionable as a matter of law. *See, e.g., Gray v. Toyota Motor*

[Sales, U.S.A., No. 08-1690, 2012 WL 313703, at *6 \(C.D. Cal. Jan. 23, 2012\)](#) (finding that liability based solely on representations regarding the EPA mileage estimates would impermissibly allow one to “directly challenge the accuracy of the EPA estimates by way of state law causes of action,”) and holding that a plaintiff fails to state a cause of action based on such representations (citation omitted); [Brett v. Toyota Motor Sales, U.S.A., Inc., No. 6:08-cv-1168, 2008 WL 4329876, at *7 \(M.D. Fla. Sept. 15, 2008\)](#) (“As a matter of law, Defendant’s practice of advertising the EPA’s estimates and identifying the EPA as the source of those estimates is not unfair or deceptive.”); [Paduano v. Am. Honda Motor Co., 169 Cal. App. 4th 1453, 1470 \(2009\)](#) (holding “[a]s a matter of law, there is nothing false or misleading about Honda’s advertising with regard to its statements that identify the EPA fuel economy estimates for the two Civic Hybrid models.”).

In light of the applicable law, Plaintiffs cannot plausibly state that they were injured by any Ford advertisement without pleading, at a minimum, enough facts to enable Ford and the Court to determine whether each Plaintiff allegedly viewed an advertisement that lacked federally mandated disclosure language, or included some actionable statement that “goes beyond” the EPA estimate. The CAC does not contain such facts. Rather, throughout the CAC, Plaintiffs take a “hide the ball approach” with respect to the various advertisements allegedly viewed by the individual Plaintiffs, which results in a 365 paragraph amended pleading that does not contain a single plausible claim.

By way of example, Plaintiff Richard Weglarz claims that he performed research on Ford’s website, where “he saw and relied upon Ford’s representations that the vehicle would achieve 47 MPG whether in the city or on the highway[,]” and in “reliance on these

representations. . . purchased a 2013 Fusion Hybrid[.]” (CAC, ¶ 22.) Similarly, Plaintiff Matthew Romak allegedly “saw text and video advertisements” on Ford’s website that “informed him that the 2013 Fusion Hybrid achieved 47 MPG in the city, on the highway and combined.” (CAC, ¶ 26.) He then allegedly visited a Ford dealership where he obtained “a brochure which reinforced the message that the 2013 Fusion Hybrid achieved 47 MPG on the highway as well as in city driving.” (*Id.*) In purported reliance on these representations, Mr. Romack purchased a 2013 Fusion Hybrid. (*Id.*) Plaintiff James Oldcorn allegedly decided to buy a 2013 C-MAX “after visiting Ford’s website on several occasions over a period of several weeks where he saw and relied on Ford’s website advertisements and marketing materials that stated the C-MAX achieved 47 miles per gallon highway, city and combined.” (CAC, ¶ 19.)

These types of allegations are repeated for the 29 Plaintiffs. The flaw in this approach is that a Plaintiff who generically claims he or she saw an unspecified “advertisement,” “brochure,” or statement on a “website” stating that the subject vehicles “achieved 47 MPG” has not put Ford on notice of any wrongdoing or pleaded anything more than a conceivable claim. [Congregation Rabbinical Coll., 915 F. Supp. 2d at 588](#) (“ . . . if a plaintiff has ‘not nudged [his or her] claims across the line from conceivable to plausible, the[] complaint must be dismissed.’” (citation omitted)). Without pleadings facts establishing that, for instance, the advertisements or representations in question lacked federally mandated disclosure language, there is simply no way for Ford to determine, or basis for this Court to make a finding, that any representation is actionable or that any of Plaintiffs’ claims are plausible, let alone satisfy the heightened pleading standard of [Rule 9\(b\)](#). See [Rombach, 355 F.3d at 172](#) (“To meet the pleading standard of [Rule 9\(b\)](#), this Court has repeatedly required, among other things, that the pleading ‘explain why

the statements were fraudulent.”); [O’Brien v. Nat’l Prop. Analysts Partners](#), 936 F.3d 674, 676 (2d Cir. 1991) (explaining that the particularity requirement of [Rule 9\(b\)](#) serves to, *inter alia*, provide a defendant with fair notice of a plaintiff’s claim).

The CAC’s claims are similarly vague as they relate to those Plaintiffs who claim they were misled by advertisements stating that “the C-MAX had better horsepower than the Prius V, beat Prius V in MPG” or “that the C-MAX got better gas mileage than the Prius V[.]” (CAC, ¶¶ 14, 23.) None of the individual Plaintiffs in the CAC explain why such advertisements are false or how they were misled by them. [Rombach](#), 355 F.3d at 170 (finding that [Rule 9\(b\)](#) requires a plaintiff to explain why the defendants statements were fraudulent). Indeed, the CAC does not set forth a single fact to establish that the Prius V had “better” EPA estimated fuel economy than either of the subject vehicles at any time relevant to this litigation. Without such a factual predicate, there is no possible way for Ford or this Court to determine whether any of the allegedly offending advertisements are false or constitute something more than non-actionable puffery.

b. *The advertisements described in the CAC are non-actionable.*

Although the CAC does not attach (or provide a link to) any allegedly offending or actionable advertisements, in Paragraphs 63 through 84, Plaintiffs attempt to provide a general description of some advertisements they find objectionable. Importantly, with the exception of one advertisement, which is described in detail at Section IV(E) *infra*, ***none of the individual Plaintiffs allege to have viewed any of these specific advertisements.*** Rather, as indicated above, Plaintiffs’ individual claims are limited to vague references to, *inter alia*, “advertisements,” “brochures,” and “marketing materials.” *See supra* Section IV(A)(2)(a).

Nevertheless, to the extent that Ford can discern what advertisements are being referenced in Paragraphs 63 through 84, even a cursory review indicates they are non-actionable as a matter of law. For example:

- The last bullet point in Paragraph 63 of the CAC complains about an advertisement stating that the C-MAX is a “47 MPG hybrid for me.” Not only does the Ford advertisement containing those words not underline the words “for me,” but immediately following the word “me” is an asterisk that refers potential consumers to the following disclosure language: “EPA-estimated 47 city/47 hwy/47 combined mpg. Actual mileage will vary.” ([Ex. 10](#)) Plaintiffs omit both the asterisk and the disclosure language from the CAC.
- In paragraph 71, Plaintiffs complain about the narration regarding fuel efficiency in a Ford Fusion advertisement titled “Wrong Direction,” but fail to disclose that the advertisement contains the following disclosure language: “EPA-estimated rating of 47 city/47 hwy/47 combined mpg. Actual mileage will vary. Class is Midsize Sedans vs. 2012/2013 competitors.” ([Exs. 11, 12](#))
- In paragraph 72, Plaintiffs complain about a fuel economy-related statement in a Ford Fusion advertisement titled “New Idea,” but omit any reference to the following disclosure language that appears in the advertisement: “Optional EcoBoost. Based on a comparison of U.S. EPA estimated combined fuel economy of Fusion Hybrid (47mpg) and U.S. Federal Highway Admin. 2010 estimate of average fuel economy of all light duty vehicles (21.6 mpg).” ([Exs. 13, 14](#))
- In Paragraph 77, Plaintiffs complain about a Ford C-MAX cartoon advertisement comparing that vehicle to the Toyota Prius V, but do not reveal that the advertised mileage ranges are “based on fueconomy.gov[,]” which is “the official U.S. government source for fuel economy information,” hosted by the U.S. Department of Energy (“DOE”) and the EPA. ([Exs. 15, 16](#))
- Plaintiffs complain of a “similar” cartoon advertisement in Paragraph 78, but omit that both of these disclaimers appear at different times in the advertisement: “EPA-estimated” and “EPA-estimated 47 city/47 hwy/47 combined mpg. Actual mileage will vary.” ([Exs. 17, 18](#))
- The same “EPA-estimated 47 city/47 hwy/47 combined mpg. Actual mileage will vary” disclaimer appears in the advertisements complained of in Paragraphs 80, 81 ([Exs. 19, 20](#)), and 82 of the CAC ([Exs. 21, 22](#)).

Plaintiffs' assertion that Ford's advertising campaign left an "overall impression" on consumers that the subject vehicles would achieve 47 mpg "under real world driving conditions" is not enough to state a plausible claim. (CAC, ¶ 68.) Indeed, any such "impression" is facially implausible, given that it is directly contradicted by the EPA disclosure language appearing in Ford's advertisements, as well as statements on the Monroney label of every new automobile sold in the United States. Without pleading facts to establish that *they* were exposed to and injured by a specific actionable representation by Ford, Plaintiffs claims should not be permitted to move beyond the pleadings stage of this multidistrict litigation.

3. Plaintiffs do not plead a single fact demonstrating that Ford failed to perform proper fuel economy testing on the subject vehicles.

The CAC claims that Ford advertised the estimated fuel economy for the 2013 C-MAX "without ever actually testing the fuel economy" of the vehicle. (CAC, ¶ 100.) Presumably, Plaintiffs are referring to the fact that Ford based the 2013 C-MAX label on testing of the 2013 Fusion Hybrid, as authorized under relevant EPA regulations. (CAC, ¶ 99.) Plaintiffs then claim that because Ford failed to test the C-MAX, "Ford knew that the '47 MPG' estimates were not achieved by the C-MAX." (CAC, ¶ 101.) This theory of liability cannot form the basis of a fraud claim against Ford. The notion that Ford somehow acted improperly by basing the C-MAX label on the Fusion label values is belied by federal law and the EPA's own findings. As explained in Section II(A)(1), federal law expressly permits manufacturers to calculate fuel economy using the simplified "MPG approach" (as opposed to direct testing under the 5-cycle method) when certain criteria are met. Here, Ford was permitted to use the Fusion label values for the C-MAX because of similarities between the two vehicles. As the EPA itself stated, "Ford based the 2013 Ford C-Max label on testing of the related Ford Fusion hybrid, which has the

same engine, transmission and test weight *as allowed under EPA regulations.*” See EPA Aug. 15, 2013 Press Release (emphasis added). Thus, any claim based on Ford’s “failure” to test the C-MAX, or that Ford’s testing “failure” establishes that Ford knew the C-MAX *estimates* were false, is conclusory, not supported by facts, and cannot survive scrutiny at the pleadings stage. See [Burke v. Weight Watchers Int’l, Inc., No. 2:12-06742, 2013 WL 5701489, at *5 \(D.N.J. Oct. 17, 2013\)](#) (granting motion to dismiss and finding state law claims preempted where plaintiff complained that defendant deceptively labeled ice cream bars by using a test method authorized by federal regulation to quantify calories when another test methodology allowed by the same regulation would have resulted in a higher calorie count on the product label).

Because the CAC, as a whole, is both implausible and not pleaded with the specificity required by [Rule 9\(b\)](#), it should be dismissed in its entirety and with prejudice.

B. Plaintiffs Lack Standing To Sue For Violations Of The EPCA.

At their heart, Plaintiffs’ claims are a direct attack upon Ford’s disclosure and advertisement of the EPA estimated fuel economy of the subject vehicles and a critique of Ford’s “failure” to disclose the subject vehicles’ “actual fuel economy.” Such an attack is impermissible by a private litigant.

The EPCA has a detailed compliance and enforcement regime, directed to any potential violations of the Act by manufacturers of automobiles. See [49 U.S.C. §§ 32911, 32912](#); see also Section IV(D), *infra*. Notably absent from those provisions, however, is any allowance for a private right of action for alleged violations of the Act. As this Court has observed:

there is no indication that Congress intended the EPCA to benefit the individual vehicle owner or user. The focus of the EPCA is on regulating fuel economy standards across an entire fleet of manufacturer vehicle models. *Nothing in the*

EPCA expressly grants rights to individual drivers or owners. The statute focuses on the regulated parties and does not put an emphasis on the individual.

[*Metro. Taxicab Bd. of Trade v. City of New York*, No. 08-7837, 2008 WL 4866021, at *6 \(S.D.N.Y. Oct. 31, 2008\)](#) (emphasis added) (citations omitted).

In other words, the EPCA provides the remedies Congress deemed appropriate for violations relating to fuel economy information—and those remedies do not include a private right of action for consumers. As a result, permitting a private enforcement action such as is contemplated here, through state consumer protection laws, would be “inconsistent with the underlying purpose of the legislative scheme and would interfere with the implementation of that scheme to the same extent as would a cause of action directly under the statute.” [*Davis v. United Air Lines, Inc.*, 575 F. Supp. 677, 680 \(E.D.N.Y. 1983\)](#) (internal quotation marks omitted) (cited with approval by [*Grochowski v. Phoenix Constr.*, 318 F.3d 80, 86 \(2d Cir. 2003\)](#)). In [*Grochowski*](#), the Second Circuit expressly barred this type of indirect effort at enforcement of a statute lacking a private right of action. *See* [*Grochowski*, 318 F.3d at 86](#) (“Since in this case . . . no private right of action exists under the relevant statute, the plaintiffs efforts to bring their claims as state common-law claims are clearly an impermissible ‘end run’ around the [federal statute]”).⁷

⁷ Numerous other courts have recognized that litigants cannot use generalized state statutes and common law claims to achieve indirectly what is forbidden directly—private enforcement of a statute that reserves exclusive enforcement for a federal agency. *See* [*Murungi v. Touro Infirmary*, No. 11-1823, 2012 WL 1014811, at *2 \(E.D. La. Mar. 21, 2012\)](#) (“No private right of action exists under [the federal statutes implicated by the Complaint], and Plaintiff lacks standing to bring those claims”); [*Enzymotec Ltd. v. NBTY, Inc.*, No. 08-cv-2627, 2011 WL 2601500, at *6 \(E.D.N.Y. Jun. 29, 2011\)](#) (plaintiff “cannot gain . . . standing by attempting to privately enforce the [federal statute]”); [*Conger v. Danek Med., Inc.*, 27 F. Supp. 2d 717, 720 \(N.D. Tex. 1998\)](#) (“plaintiffs would have no standing to assert that defendants engaged in a conspiracy to violate the [federal statute] because the statute does not provide for a private right of action”); [*In re Orthopedic Bone Screw Prods. Liab. Litig.*, MDL No. 1014, 1997 WL 186325, at *10 \(E.D. Pa. Apr. 16, 1997\)](#) (same); [*Ginochio v. Surgikos, Inc.*, 864 F. Supp. 948, 957 \(N.D. Cal. 1994\)](#) (because no private right of action exists, “summary judgment on the ground of no standing by plaintiff to bring a cause of action to enforce the [federal statute] is granted”).

The lack of a private right of action is particularly significant in this case where the EPA—the regulatory agency empowered by Congress with enforcement authority—evaluated the very conduct complained of by the named Plaintiffs and other consumers. In response, the EPA not only declined to pursue any action against Ford, but acknowledged that the fuel economy estimates for the subject vehicles were generated in accordance with applicable regulations. *See infra* at Section IV(D). Accordingly, Plaintiffs should be precluded from utilizing the consumer protection laws of 16 states to enforce a private right of action for violation of a federal statute that lacks such a provision, and those claims in the CAC should be dismissed with prejudice.

C. Plaintiffs’ Claims Are Preempted By Federal Law.

Plaintiffs’ claim that Ford violated numerous state consumer protection statutes and acted unlawfully under state common law by, among other things, publishing and advertising “false” EPA fuel economy estimates, failing to disclose the “actual fuel economy” for the subject vehicles, and failing to properly conduct federally mandated fuel economy testing on the 2013 C-MAX. Among other forms of relief, Plaintiffs ask this Court to enjoin Ford from “engaging in false advertising” and to “disseminate an informational campaign to correct its misrepresentations and material omissions.” (CAC, Prayer for Relief at ¶ B.(c).) Federal law preempts these claims, both as a matter of express preemption and conflict preemption.

1. 49 U.S.C. § 32919(b) Expressly Preempts Plaintiffs’ Claims.

When Congress enacts an express preemption provision, the “task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress’ pre-emptive intent.” [*Sprietsma v. Mercury Marine*, 537 U.S. 51, 62-63 \(2002\)](#) (citations and quotation marks omitted). If the text alone is not conclusive

in determining the preemptive scope of the provision, a reviewing court may also consider the structure and purpose of the statute and its surrounding regulatory scheme. Medtronic, Inc. v. Lohr, 518 U.S. 470 (1996). While there is a general “presumption that the historic police powers of the States [are] not to be superseded . . . unless that is the clear and manifest purpose of Congress,” Lohr, 518 U.S. at 485, it is equally clear that “the purpose of Congress is the ultimate touchstone in every preemption case.” *Id.* (quotations omitted); *see also Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 391 (1992) (holding state deceptive advertising laws preempted by federal law). Thus, “when Congress has unmistakably ordained that its enactments alone are to regulate a part of commerce, state laws regulating that aspect of commerce must fall.” Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977). Here, the preemptive language chosen by Congress, considered in light of the overall structure and purposes of the surrounding regulatory scheme, leave no doubt that Congress intended to preempt all state-law efforts to impose differing fuel economy disclosure obligations on vehicle manufacturers.

The statute provides that: “a State or a political subdivision of a State may adopt or enforce a law or regulation on disclosure of fuel economy or fuel operating costs for an automobile covered by [49 U.S.C. § 32908] *only if the law or regulation is identical* to that requirement.” 49 U.S.C. § 32919(b) (emphasis added). The subject vehicles are undisputedly covered by 49 U.S.C. § 32908, the general fuel economy labeling provision. Accordingly, the language—and Congressional intent—of the preemptive provision could not be more clear: no state may obligate a vehicle manufacturer to comply with any requirement pertaining to the disclosure of a vehicle’s fuel economy unless an identical requirement is already imposed by

[Section 32908](#). Plaintiffs' core theory of this case, however, *would* impose such a forbidden "non-identical" disclosure requirement.

Here, Plaintiffs attack not only the estimates themselves and their disclosure, but the manner in which Ford generated the estimates. As explained above, Plaintiffs assert that Ford's representations about the EPA fuel efficiency estimates for the subject vehicles are *per se* deceptive because they do not disclose the "actual fuel economy" for the subject vehicles. As a remedy, Plaintiffs seek a judicial decree requiring Ford to abandon the very fuel efficiency figures that Congress and EPA have mandated must be generated and disclosed to all consumers. (CAC, Prayer for Relief at ¶ B.(c).) This constitutes an attempt to enforce a law or regulation that is not "identical" to the disclosure requirements of [49 U.S.C. § 32908](#) and it must be rejected.

But Plaintiffs do not stop there. As explained above, the CAC also posits that because Ford advertised the estimated fuel economy for the 2013 "without ever actually testing the fuel economy" of the vehicle, it "knew that the '47 MPG' estimates were not achieved by the C-MAX." (CAC, ¶¶ 100-101.) This argument is a direct assault on the manner in which Ford arrived at the general label estimates disclosed for the C-MAX and it should be deemed preempted. Moreover, this allegation has no basis in fact, considering that the EPA has already determined that Ford's use of the Fusion's label values for the C-MAX was allowed under EPA regulations. See [Weight Watchers, supra, 2013 WL 5701489, at *5](#).

Indeed, by seeking to compel Ford to discard the "common yardstick" that the EPA has developed for estimating and disclosing fuel economy, Plaintiff introduces an unavoidable conflict with the words and intent of Congress. Under the Supremacy Clause of the United

States Constitution, the only result of such a conflict between a state claim and an express preemption provision of federal law must be the supremacy of the Congressional statute, to the exclusion of the claims brought by Plaintiff in this case. See [U.S. CONST. ART. VI, CL. 2](#); [Maryland v. Louisiana, 451 U.S. 725, 746 \(1981\)](#) (“It is basic to this constitutional command that all conflicting state provisions be without effect.”).

2. 49 U.S.C. § 32919(a) Also Expressly Preempts Plaintiffs’ Claims.

In addition to the prohibition on using State law to adopt or enforce different labeling standards, the express preemption provisions of the EPCA also bar “a law or regulation *related to* fuel economy standards for automobiles covered by an average fuel economy standard[.]” [49 U.S.C. § 32919\(a\)](#) (emphasis added). As the Second Circuit has previously acknowledged, the use of the phrase “relating to” or “related to” in the express preemption provision is a clear signal of broad Congressional intent. See [Mizrahi v. Gonzales, 492 F.3d 156, 159 \(2d Cir. 2007\)](#) (“Congress’s use of the phrase ‘relating to’ in federal legislation generally signals its expansive intent.” (citation omitted)). This broad reading has been attached to the language “relating” or “related to” in considering the preemptive effect of a number of federal statutes, including the EPCA. See [Metro. Taxicab Bd. of Trade, 615 F.3d at 156-57](#) (finding that the “related to” language in § 32919(a) should be interpreted consistent with other statutory preemption provisions containing that phrase and citing case law noting its “expansive” nature); see also [Fellows v. CitiMortgage, Inc., 710 F. Supp. 2d 385, 399-400 \(S.D.N.Y. 2010\)](#) (collecting cases analyzing “related to” language under various federal statutes).

Federal law defines the term “average fuel economy standard” as “a performance standard specifying a minimum level of average fuel economy applicable to a manufacturer in a

year.” [49 U.S.C. § 32901\(a\)\(6\)](#). While the statute does not separately define the term “fuel economy standard,” courts have used this phrase interchangeably with the term “average fuel economy standard.” *See, e.g., In re Ctr. for Auto Safety*, 793 F.2d 1346, 1348 (D.C. Cir. 1986). As noted above, the use of the phrase “related to” in [49 U.S.C. § 32919\(a\)](#) expresses an intent by Congress to give the preemption provision a broad scope. *See, e.g., Morales*, 504 U.S. at 383-84. “Related to fuel economy standards” means having “a connection with, or reference to” those standards (*id.*), viewing the connection or reference in light of the objectives of the statutory scheme. [Egelhoff v. Egelhoff ex rel. Breiner](#), 532 U.S. 141, 147 (2001).

Under this analysis, the testing regime that EPA designs and administers in accordance with its mandate under [49 U.S.C. § 32904](#) is “related to fuel economy standards or average fuel economy standards” because the testing regime, and the fuel economy figures which it generates, determine whether manufacturers are meeting the fuel economy standards set for them by the federal government. That testing and the estimates it produces are the linchpin of the entire scheme of the fuel economy standards and disclosures. Yet, Plaintiffs’ claims here fundamentally challenge the accuracy of the EPA testing regime, by treating disclosure of the EPA fuel economy numbers as deceptive *per se* and attacking Ford’s methods for testing the C-MAX, despite the fact that the very testing that Plaintiffs criticize is expressly allowed under current EPA regulations. Therefore, Plaintiffs’ claims are further preempted under [Section 32919\(a\)](#) because they are impermissibly “related to” fuel economy standards.

3. Implied Or Conflict Preemption Also Bars Plaintiffs’ Claims.

In addition to express preemption—where Congressional or administrative regulatory language explicitly states that all contrary state laws are void—a claim may also be preempted by

operation of conflict preemption. Conflict preemption exists “to the extent that [state law] actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law, or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress.” [*Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 \(1984\)](#) (citations omitted).

The United States Supreme Court has held that “[f]ederal regulations have no less pre-emptive effect than federal statutes.” [*Fid. Fed. Sav. & Loan Ass’n v. de la Cuesta*, 458 U.S. 141, 153 \(1982\)](#). The federal government, through the EPA, and at the direction of Congress, has promulgated a comprehensive set of statutes and regulations to further the federal objective of providing consumers with uniform and comparable fuel economy information. *See* [49 U.S.C. § 32904](#) (vesting EPA with responsibility for establishing test methods and calculation procedures for determining fuel economy estimates); [49 U.S.C. § 32908\(b\)\(1\)](#) (requiring automobile manufactures to display EPA fuel economy estimates on each new automobile offered for retail sale in the United States); [49 U.S.C. § 32908\(c\)\(3\)](#) (mandating that the EPA prepare an annual Fuel Economy Guide); [40 C.F.R. §§ 600.405-08](#) and [600.407-08](#) (requiring dealers to make available a printed copy of the annual Fuel Economy Guide).

In furtherance of this pervasive federal scheme, the FTC has adopted the previously cited directives that require manufacturers to generate EPA fuel economy estimates and use them in any advertising referring to the fuel economy performance. It cannot reasonably be argued that the FTC’s definitive advertising requirements, and the EPA’s explicit testing/labeling requirements, do not together evidence a comprehensive federal scheme to provide consumers with consistent and comparable fuel economy information.

Plaintiffs' objective in this lawsuit is clear. They are attempting to have this Court use the statutory and common laws of 16 states to require that Ford modify its Monroney labels (and related representations) to reflect a different fuel efficiency value (or the subject vehicles' "actual fuel economy"), using a different test than what is dictated by the EPA requirements. If Plaintiffs' state law claims are allowed to proceed, a conceivable result would be different standards for fuel economy labeling and advertising in every state, rather than the national standard promulgated by the EPA and the FTC. This would lead to confusion for consumers, and would undermine the federal scheme and plan for consistent information and testing relating to fuel economy for new automobiles. If Plaintiffs believe the EPA's fuel economy information for the subject vehicles is false, misleading, or deceptive, they should address the issue with the EPA. It cannot be the basis for a private claim. Plaintiffs' state law claims are preempted, and this case should be dismissed.

D. This Court Should Abstain From Intervening Under The Primary Jurisdiction Doctrine.

Even if this Court concludes that Plaintiffs' claims are not preempted or otherwise insufficient, this Court should nonetheless decline to exercise jurisdiction over this case under the doctrine of primary jurisdiction. Primary jurisdiction applies "to claims properly cognizable in court that contain some issue within the special competence of an administrative agency." [Reiter v. Cooper, 507 U.S. 258, 268 \(1993\)](#); *see also* [S. New England Tel. Co. v. Global NAPs, 624 F.3d 123, 135-36 \(2d Cir. 2010\)](#). "[T]he primary jurisdiction doctrine is designed to protect agencies possessing 'quasi-legislative powers' and that are 'actively involved in the administration of regulatory statutes.'" [Clark v. Time Warner Cable, 523 F.3d 1110, 1115 \(9th Cir. 2008\)](#) (quoting [United States v. Gen. Dynamics, 828 F.2d 1356, 1365 \(9th Cir. 1987\)](#)). The

primary jurisdiction doctrine applies when a case “implicates technical and policy questions that should be addressed in the first instance by the agency with regulatory authority over the relevant industry rather than by the judicial branch.” [Clark, 523 F.3d at 1114](#).

Here, the EPA has primary jurisdiction regarding the accuracy of EPA mileage estimates because it “audits the data from [testing performed by manufacturers] and performs its own testing on some of these vehicles to confirm the manufacturers’ results.” (*See* Emission and Fuel Economy Test Data, available at <http://epa.gov/oms/testdata.htm> (last visited Nov. 15, 2013).)([Ex. 23](#)) The EPA’s responsibility regarding this data encompasses not only the fuel economy “window sticker” on every vehicle, but also other uses of these figures. Thus, any question about the accuracy of EPA mileage estimates implicates on-going EPA regulatory activity. This is particularly true under the facts alleged in this case, where Plaintiffs contend that the EPA fuel efficiency estimates of the subject vehicles are not just misleading, but, in the case of the C-MAX, the affirmative result an improper determination by Ford.

The EPA has full administrative and regulatory authority to enforce its obligations under [49 U.S.C. § 32901](#) *et seq.*, governing the determination and disclosure of fuel economy estimates. This authority includes the power to subpoena witnesses, and to bring civil enforcement actions relating to any alleged deficiencies in manufacturer submissions. *See* [49 U.S.C. § 32910\(a\)\(1\)\(C\), \(b\)](#). The Secretary of Transportation has authority to conduct proceedings to determine a manufacturer’s compliance with requirements of [49 U.S.C. § 32901](#) *et seq.*, and to impose significant financial penalties for non-compliance. [49 U.S.C. §§ 32911, 32912](#).

Importantly, the EPA's active involvement in the area of fuel economy regulation does not present a mere hypothetical basis for this Court to abstain from this dispute under the primary jurisdiction doctrine. The recent EPA press release regarding Ford's voluntary re-labeling of the C-MAX demonstrates that the EPA is doing the precise job imparted upon it by Congress, and is applying its institutional expertise to the review of issues that are the subject of Plaintiffs' lawsuit here. *See* [Ex 4](#), EPA Aug. 15, 2013 Press Release.

For these reasons, if Plaintiffs have more than a speculative basis to allege that the mileage estimates for the subject vehicles, or procedures for calculating them, are improper, they should provide the information to the EPA—the agency with primary jurisdiction, that is already fully engaged in the review of Fusion Hybrid and C-MAX fuel economy issues. The EPA can then evaluate what responsive action, if any, is appropriate through its regulatory structure and the resources at its National Vehicles and Fuel Emissions Laboratory. Because the EPA is best positioned to reach an appropriate determination based on its technical expertise and knowledge of the industry, this Court should defer to that expertise, and decline to exercise jurisdiction here by dismissing the CAC in its entirety.

E. Plaintiffs' Consumer Protection, Fraud, And Negligent Misrepresentation Claims All Fail As A Matter of Law Because The CAC Does Not Plead A Single Actionable Representation And They Are Not Pleaded With The Specificity Demanded By Rule 9(b).

Plaintiffs' consumer protection, fraud, and negligent misrepresentation claims all fail for the same reason: no individual Plaintiff pleads facts demonstrating that he or she relied upon and/or was injured by an actionable representation from Ford, *i.e.*, a representation lacking federally mandated disclosure language or one that "goes beyond" the EPA estimate. *See supra*

Section IV(A). While the CAC lists a series of advertisements that Plaintiffs claim are actionable (CAC, at ¶¶ 54-86), only 4 of the 29 Plaintiffs plead that they were exposed to one of those specified advertisements. Furthermore, the claims of those 4 Plaintiffs cannot withstand scrutiny at the pleadings stage because the advertisement they allegedly viewed contains federally mandated disclosure language, and as a result, claims premised on this advertisement are either preempted and/or not actionable as a matter of law.

Specifically, Plaintiffs Holman, Pitkin, Broome, and Harkins claim they were misled by a video titled “Hybrid Games,” which represents that the C-MAX achieves better fuel economy than the Prius V. (CAC, ¶¶ 13, 15, 29, 40.) These Plaintiffs, however, fail to inform the Court that the allegedly misleading representations in that video are nothing more than non-actionable comparisons of the EPA *estimated* fuel economy for the C-MAX and Prius. (*See* Hybrid Games Video [Ex. 24](#))

To illustrate, at the 25 second mark of the Hybrid Games video, a graphic appears which repeats the C-MAX’s original EPA estimated fuel economy figures using federally mandated disclosure language, *i.e.*, “EPA–Estimated. Actual Mileage May Vary.”⁸ ([Ex. 25](#)) At approximately 28 seconds, the estimated fuel economy figures for the Prius appear, also alongside the same federally mandated disclosure language. ([Ex. 26](#)) The only other specific representation regarding fuel economy in the Hybrid Games video is a graphic, which appears at about the 1:04 mark, and states: “C-MAX total range 571 miles. Prius v total range 450 miles. Based on fueleconomy.gov.” ([Ex. 27](#)) There is nothing actionable about this representation

⁸ As noted above, the FTC has determined that the use of the phrase “EPA estimate” is sufficient to advise consumers that mileage references are to EPA estimated fuel economy. [16 C.F.R. § 259.2\(a\)\(2\), n.5.](#)

either. The reported mileage ranges, as the disclaimer indicates, were taken verbatim from www.fueleconomy.gov, “the official U.S. government source for fuel economy information,” hosted by the U.S. Department of Energy (“DOE”) and the EPA. Among other things, the fueleconomy.gov site allows consumers to compare vehicles by providing information on the estimated number of miles a particular vehicle can be operated on one tank of gasoline, based on a government-generated formula for determining such estimates. (See <http://www.fueleconomy.gov/feg/hybrids.jsp>.) There is simply no basis in law for Plaintiffs to bring claims against Ford based on information provided by the EPA and the DOE.

In sum, and as further explained below, all of Plaintiffs’ consumer protection, fraud, and negligent misrepresentation claims fail because they have not identified a single actionable, non-preempted statement upon which they relied and/or caused them injury.

1. Consumer Protection Claims

All of the consumer protection statutes upon which Plaintiffs base their claims require either a showing of reliance on an actionable misrepresentation,⁹ or a showing that an actionable

⁹ **Reliance:** see, e.g., [Arizona: Ariz. Rev. Stat. Ann. § 44-1522\(A\)](#); [Holeman v. Neils](#), 803 F. Supp. 237, 242 (D. Ariz. 1992); California: [Cal. Bus. & Prof. Code section 17204, 17535](#); [In re Tobacco II Cases](#), 46 Cal. 4th 298, 326-28 (2009) (plaintiffs purporting to represent class on California UCL and FAL claims must “plead and prove actual reliance” on challenged advertising); [Olivera v. Am. Home Mortg. Servicing, Inc.](#), 689 F. Supp. 2d 1218, 1224 (N.D. Cal. 2010) (same); Colorado: [May Dep’t Stores Co. v. State ex rel. Woodard](#), 863 P.2d 967, 973-74 (Colo. 1993) (interpreting Colorado Consumer Protection Act to require purchases or other activities by consumers “in reliance on the advertisement.”); Maryland: [Philip Morris Inc. v. Angeletti](#), 358 Md. 689, 753-54, (2000) (finding reliance by consumers to be a “necessary precondition” for bringing a consumer protection act claim); Minnesota: [Thompson v. Am. Tobacco Co.](#), 189 F.R.D. 544, 552-53 (D. Minn. 1999) (plaintiff seeking to recover damages under Minn. Prevention of Consumer Fraud Act must prove individual reliance on defendant’s representation); New York: [N.Y. Gen. Bus. Law § 350](#); [Gale v. Int’l. Bus. Mach. Corp.](#), 781 N.Y.S.2d 45, 46-47 (N.Y. App. Div. 2004) (stating Section 350 false advertising claims require proof of reliance); Oregon: [Feitler v. Animation Celection, Inc.](#), 13 P.3d 1044, 1047 (Or. Ct. App. 2000) (“Where, as here, the alleged violations are affirmative misrepresentations, the causal/‘as a result of’ element requires proof of reliance-in-fact by the consumer.”); Pennsylvania: [Weinberg v. Sun Co.](#), 777 A.2d 442, 445-46 (Pa. 2001) (requiring proof of reliance and causation in false advertising claim).

misrepresentation caused injury to the complaining party.¹⁰ At the very least, Plaintiffs must be exposed to an actionable misrepresentation. As explained in detail above, none of the Plaintiffs have pleaded facts sufficient to make this showing.

A Florida district court addressed a similar scenario in [*Brett v. Toyota Motor Sales, U.S.A., Inc.*, No. 6:08-cv-1168, 2008 WL 4329876, at *7 \(M.D. Fla. Sept. 15, 2008\)](#). The plaintiffs in *Brett* complained that Toyota engaged in unfair and deceptive trade practices by “knowingly” including false and deceptive representations regarding fuel economy in advertising statements related to the Toyota Prius hybrid. *Id.* Plaintiffs also complained (like the Plaintiffs here) that Toyota failed to “disclose the actual fuel efficiency of the” Prius, *id.*, and that Prius advertisements should have contained “an additional, more accurate fuel economy estimate[.]”

¹⁰ **Causation:** See e.g., Arizona: [*Flagstaff Med. Ctr., Inc. v. Sullivan*, 773 F. Supp. 1325, 1361 \(D. Ariz. 1991\), *aff'd in part, rev'd in part on other grounds*, 962 F.2d 879 \(9th Cir. 1992\)](#) (to establish a violation of the Arizona Consumer Fraud Act, a “consumer must show a false promise or misrepresentation made in connection with the sale or advertisement of merchandise and the hearer’s consequent and proximate injury”); California: [*In re Tobacco II Cases*, 46 Cal. 4th at 326-28](#) (plaintiff must allege that defendant’s misrepresentations were the immediate cause of the injury-causing conduct); Colorado: [*Rhino Linings USA, Inc. v. Rocky Mountain Rhino Lining, Inc.*, 62 P.3d 142, 147 \(Colo. 2003\)](#) (to prove a private cause of action under Colorado Consumer Protection Act, the plaintiff must show that the alleged deceptive practice caused the plaintiff’s injury); Connecticut: [*Conn. Gen. Stat. Ann. § 42-110g\(a\)*](#) (private action limited to consumers who suffer ascertainable loss as a result of challenged conduct); Florida: [*Tire Kingdom, Inc. v. Dishkin*, 81 So.3d 437, 448 \(Fla. Ct. App. 2011\), *overruled on other grounds*, 2013 WL 264441 \(Fla. Jan. 24, 2013\)](#) (properly pled consumer claim under FDUPA requires proof of causation and actual damages); Illinois: [*Shannon v. Boise Cascade Corp.*, 805 N.E.2d 213, 217 \(Ill. 2004\)](#) (“[D]eceptive advertising cannot be the proximate cause of damages under the Act unless it actually deceives the plaintiff.”); Maryland: [*Morris v. Osmose Wood Preserving*, 340 Md. 519, 538, n.10, \(1995\)](#) (a private party suing under Maryland Consumer Protection Act must establish actual injury or loss sustained as a result of the prohibited practice); Michigan: [*Mich. Comp. Laws Ann. § 445.911\(2\)*](#) (loss must be sustained as the result of challenged conduct to be actionable); Minnesota: [*Taylor Inv. Corp. v. Weil*, 169 F. Supp. 2d 1046, 1062 \(D. Minn. 2001\)](#) (a plaintiff seeking monetary damages under the consumer fraud statute must “demonstrate a causal nexus between the improper conduct and the monetary loss alleged”); Missouri: [*Mo. Ann. Stat. § 407.025\(1\)*](#) (same); New York: [*N.Y. Gen. Bus. Law § 349*](#); [*Stutman v. Chemical Bank*, 95 N.Y.2d 24, 29 \(2000\)](#) (plaintiff must have suffered injury “as a result of the deceptive act”); Ohio: [*Ohio Rev. Code § 1345.01*](#); [*Reeves v. PharmaJet, Inc.*, 846 F. Supp. 2d 791, 798 \(N.D. Ohio 2012\)](#) (to state a claim under the OCSA, “there must be a cause and effect relationship between the defendant’s acts and the plaintiff’s injuries”); Oregon: [*Feitler.*, 13 P.3d at 1047](#) (causation is a required element of a claim under the Oregon Unlawful Trade Practices Act); Pennsylvania: [*Weinberg*, 777 A.2d at 445-46](#) (requiring proof of reliance and causation in false advertising claim); Washington: [*Pickett v. Holland Am. Line-Westours, Inc.*, 35 P.3d 351, 360 \(Wash. 2001\)](#); [*Holiday Resort Cmty. Ass’n v. Echo Lake Assocs., LLC*, 135 P.3d 499, 507-08 \(Wash. Ct. App. 2006\)](#) (holding that plaintiffs must establish damages and a causal link between the deceptive act and the injury suffered); Wisconsin: [*Novell v. Migliaccio*, 749 N.W.2d 544, 553-54 \(Wis. 2008\)](#) (same).

id. at *7. Based on these allegations, plaintiffs pursued claims against Toyota for violating Florida’s Deceptive and Unfair Trade Practices Act (“FDUTPA”) and for unjust enrichment. *Id.* at *1. Upon Toyota’s motion pursuant to [Rule 12\(b\)\(6\)](#), the district court dismissed both claims.

In dismissing the FDUPTA claim, the *Brett* court recognized that “[f]ederal regulations unequivocally require that every manufacturer or dealer of any new automobile who makes any express or implied advertising representations regarding fuel economy of the vehicle must disclose the fuel economy estimates of the EPA and must disclose. . . the EPA as the source of those estimates.” *Id.* at *7. The court also recognized that conduct specifically permitted or required by federal law falls within the safe harbor provision of FDUPTA and does not violate the Act. *Id.* (citing [Fla. Stat. § 501.212\(1\)](#)). Thus, the court held that Toyota’s “practice of advertising the fuel economy estimates provided by the EPA” is “specifically exempt[ed]” from claims under FDUPTA. *Id.*¹¹ The court also rejected plaintiff’s argument that Toyota violated FDUPTA by not advertising “additional, more accurate” fuel economy estimates. *Id.* The court explained that to accept plaintiffs’ reasoning, “would be contrary to the plain meaning of FDUPTA and the legislative and regulatory scheme for fuel economy labeling and advertising. ***As a matter of law, Defendant’s practice of advertising the EPA’s estimates and identifying the EPA as the source of those estimates is not unfair or deceptive.***” *Id.* (emphasis added).

The result in *Brett* should follow here with respect to Plaintiffs’ consumer protection act claims. First, a majority of the state consumer protection laws under which Plaintiffs bring their

¹¹ See also [Godfrey v. Toyota Motor Sales, U.S.A., Inc., No. 07-5132, 2008 WL 2397497, at *3 \(W.D. Ark. Jun. 11, 2008\)](#) (dismissing Arkansas unfair and deceptive trade practices claim based on mandatory and approved EPA mileage disclosures, holding similar savings clause in Arkansas statute barred claim).

claims contain a savings clause similar to that found in FDUPTA.¹² Second, regardless of the presence of a savings clause, the Florida district court's decision in *Brett* stands for the proposition that advertising the EPA estimates and identifying the EPA as the source of those estimates is not unfair or deceptive as a matter of law. *Id.* at *7. See also [Paduano v. Am.](#)

¹² See, e.g., Arizona: [Ariz. Rev. Stat. Ann. § 44-1523](#) (Consumer Fraud Act shall not apply “to any advertisement which is subject to and complies with the rules and regulations of and the statutes administered by the federal trade commission”); California: [Perea v. Walgreen Co.](#), 939 F. Supp. 2d 1026, 2013 WL 1517416 at *12 (C.D. Cal. 2013) (“[A] defendant is not liable under the [Unfair Competition Law] if some other law clearly permits the conduct”); Colorado: [Showpiece Homes Corp. v. Assurance Co. of Am.](#), 38 P.3d 47, 56 (Colo. 2001) (statute making the Consumer Protection Act inapplicable to conduct in compliance with orders or rules of, or a statute administered by, a federal, state or local government agency [[Colo. Rev. Stat. Ann. § 6-1-106\(1\)\(a\)](#)] means that conduct in compliance with other laws will not give rise to a cause of action under the CPA); Connecticut: [Conn. Gen. Stat. Ann. § 42-110c](#) (Connecticut Unfair Trade Practices Act is inapplicable to “transactions or actions otherwise permitted under law as administered by any regulatory board or officer acting under statutory authority of the state or of the United States”); [Neighborhood Builders, Inc. v. Town of Madison](#), 64 A.3d 800, 801-02 (Conn. App. 2013) (same); Florida: [Brett](#), 2008 WL 4329876, at *3 (“[T]he Defendant’s practice of advertising the fuel economy estimates provided by the EPA is permitted by the rules and regulations of the FTC, and required in any advertising that contains other fuel economy representations. Thus, [the savings provision of FDUPTA] specifically exempts that practice from claims under FDUPTA.”); Illinois: [Ill. Stat. Ch. 815 § 505/10b\(1\)](#); [Bober v. Glaxo Wellcome PLC](#), 246 F.3d 934, 941 (7th Cir. 2001) (Illinois state Consumer Fraud Act “will not impose higher disclosure requirements on parties than those that are sufficient to satisfy federal regulations. If the parties are doing something specifically authorized by federal law, [[815 Ill. Comp. Stat. § 505/10b\(1\)](#)] will protect them from liability under the CFA.”); Michigan: [Mich. Comp. Laws Ann. § 445.904\(a\)](#) (Michigan Consumer Protection Act does not apply to “a transaction or conduct specifically authorized under laws administered by a regulatory board or officer acting under statutory authority of this state or the United States”); [McEntee v. Incredible Tech., Inc.](#), No. 263818, 2006 WL 659347, at *2 (Mich. Ct. App. Mar. 16, 2006); New York: [Law Offices of K.C. Okoli, P.C. v. BNB Bank, N.A.](#), 481 F. App’x. 622, 626 (2d Cir. 2012) (affirming dismissal pursuant to [Rule 12\(b\)\(6\)](#) and finding that [Section 349\(d\)](#) precluded deceptive business practices claim where defendant’s alleged conduct conformed with the Electronic Funds Availability Act and its regulations); Ohio: [Ohio Rev. Code Ann. § 1345.12](#) (Ohio Unfair, Deceptive or Unconscionable Acts or Practices Act does not apply to “an act or practice required or specifically permitted by or under federal law, or by or under other sections of the Revised Code...”); Oregon: [Or. Rev. Stat. Ann. § 646.612](#) (Oregon Unlawful Trade Practices Act does not apply to “conduct in compliance with the orders or rules of, or a statute administered by a federal, state or local government agency.”); [Hinds v. Paul’s Auto Werkstatt, Inc.](#), 810 P.2d 874, 876 (Or. Ct. App. 1991); Washington: [Wash. Rev. Code Ann. § 19.86.170](#) (Washington Unfair Business Practices-Consumer Protection Act shall not apply to “actions or transactions otherwise permitted. . . by any other regulatory body or officer acting under statutory authority of this state or the United States.”); [Walker v. Wenatchee Valley Truck & Auto Outlet, Inc.](#), 229 P.3d 871, 878 (Wash. Ct. App. 2010) (“An industry practice falls within the regulation exception when the activities in question were ‘authorized by statute and that acting within this authority the agency took overt affirmative actions specifically to permit the actions or transactions.’”) (internal quotations omitted).

[Honda Motor Co., 169 Cal. App. 4th 1453, 1470 \(2009\)](#) (“As a matter of law, there is nothing false or misleading about Honda’s advertising with regard to its statements that identify the EPA fuel economy estimates for the two Civic Hybrid models.”). Like the plaintiffs in *Brett*, all 29 individual Plaintiffs in this case claim they were injured by Ford’s failure to advertise more accurate fuel economy estimates for the subject vehicles. Besides being implausible, this assertion does not state a viable claim under any consumer protection law. Moreover, none of the Plaintiffs have set forth *facts* establishing that *they were exposed* to advertising from Ford that departs from “[f]ederal regulations [that] unequivocally require” a manufacturer or dealer to “disclose the fuel economy estimates of the EPA” and “the EPA as the source of those estimates.” [Brett, 2008 WL 4329876, at *7](#). Accordingly, all of Plaintiffs’ consumer protection claims should be dismissed as a matter of law.

2. Common Law Fraud

This Court has recently articulated the standard for pleading fraud under New York law:

In New York, a claim for common law fraud requires a plaintiff to plead (1) a material misrepresentation of fact, (2) knowledge of its falsity, (3) intent to induce reliance, (4) justifiable reliance by the plaintiff, and (5) damages. Additionally, fraud claims are subject to the particularity pleading requirements of [Rule 9\(b\)](#), under which a plaintiff must “(1) detail the statements (or omissions) that the plaintiff contends are fraudulent, (2) identify the speaker, (3) state where and when the statements (or omissions) were made, and (4) explain why the statements (or omissions) are fraudulent.” Moreover, in pleading scienter, a plaintiff needs to allege facts that give rise to a “strong inference” of fraudulent intent either by (1) showing that Defendants had the motive and opportunity to commit fraud or (2) providing strong circumstantial evidence of their conscious misbehavior or recklessness. Finally, in pleading damages, a plaintiff must allege loss causation — that is, that its reliance on the misrepresentation or omission proximately caused the loss.

[Loreley Fin. \(Jersey\) No. 3 Ltd. v. Wells Fargo Sec. LLC, No. 12-3723, 2013 WL 1294668, at *9](#)

[\(S.D.N.Y. Mar. 28, 2013\)](#) (citations omitted).

The CAC fails to meet this standard. At the outset, it should be noted that Plaintiffs' cause of action for fraud (CAC, ¶ 318-323), like a majority of causes of action in the CAC, is nothing more than a generic recitation of the elements a fraud claim under the law of some unknown jurisdiction. Moreover, it alleges no facts, and is exactly the type of "shotgun pleading" that has been criticized by federal courts. As one district court explained:

Defendants also assert that their Fourth Counterclaim is sufficient because it "makes reference to previous paragraphs of the counterclaim." This Court has strongly criticized such use of "shotgun pleading," by which a party pleads several counts or causes of action, each of which incorporates by reference the entirety of its predecessors. As this Court noted, "the shotgun pleader foists off one of the pleading lawyer's critical tasks--sifting a mountain of facts down to a handful of those that are relevant to a given claim--onto the reader." Courts roundly decry shotgun pleading as a subject of "great dismay," "intolerable," and "in a very real sense . . . [an] obstruction of justice." The Court will not act as counsel for Defendants and attempt to determine which facts may support this Fourth Counterclaim. Defendants have not made even a cursory attempt to specify what conduct by Plaintiffs violated the CCPA; thus, the Court will dismiss Defendants' Fourth Counterclaim for failure to state a claim.

Int'l Acad. of Bus. & Fin. Mgmt. v. Mentz, No. 12-00463, 2013 WL 212640, at *7 (D. Colo. Jan. 18, 2013) (citations omitted); see also *Coakley v. Jaffe*, 49 F. Supp. 2d 615, 625 (S.D.N.Y. 1999), abrogated on other grounds by *Curanaj v. Cordone*, 2012 WL 4221042 (S.D.N.Y. Sept. 19, 2012) (finding that "shotgun pleading" demonstrates "utter disrespect for [Rule 8](#)" and exists where the plaintiff sets forth a "potpourri of vague and conclusory allegations that for the most part are not explicitly linked to any specific factual assertions").

Even assuming it pleads facts, Plaintiffs' fraud claim still fails because, without demonstrating that they were exposed to an actionable misstatement (e.g., an advertisement lacking federally mandated disclosure language), Plaintiffs have alleged only "neutral facts," which are incapable of sustaining a fraud claim. See *Kearns v. Ford Motor Co.*, 567 F.3d 1120,

[1126 \(9th Cir. 2009\)](#) (“The pleading of . . . neutral facts fails to give Ford the opportunity to respond to the alleged misconduct.”); *see also* [Loreley Fin., 2013 WL 1294668, at *9](#) (finding [Rule 9\(b\)](#) requires a plaintiff explain *why* the alleged misstatements are fraudulent).

Nor do Plaintiffs, who were all allegedly exposed to a variety of Ford advertisements/representations, plead enough facts to explain which representations they found material (or that could serve as a plausible basis for their claims). *See* [Kearns, 567 F.3d at 1126](#) (“Nowhere in the [Complaint] does [plaintiff] specify what the television advertisements or other sales material specifically stated. Nor did [he] specify when he was exposed to them or which ones he found material.”). For instance, the CAC is devoid of facts to support even an inference that a Plaintiff who read the Monroney label on their vehicle and/or was exposed to an advertisement that contained disclaimer language, could possibly have been misled by a single advertisement that did not (even assuming one exists). *See, e.g.,* [Schuler v. Am. Motors Sales Corp., 197 N.W.2d 493, 495 \(Mich. Ct. App. 1972\)](#) (“[p]laintiff cannot show a misrepresentation by ignoring a part of the information supplied him, and then later claim he was defrauded because he was not told of the facts which he chose to ignore.”). Similarly, no Plaintiff offers any plausible explanation, much less an explanation sufficient to satisfy [Rule 9\(b\)](#), as to how a fuel economy *estimate* can possibly, or should, serve as a guarantee of “real world” fuel economy.

Finally, Plaintiffs offer only labels and conclusions in an insufficient attempt to plead scienter. For instance, Plaintiffs baldly claim that “Ford’s representations were made with knowledge of the falsity of such statements or in reckless disregard of the truth thereof” and that “Ford misrepresented material facts with the intent to defraud Plaintiffs and the Class.” (CAC,

¶¶ 320-321.) There is not a single fact alleged in the CAC that supports these allegations. As one federal court explained, since *Iqbal*, a plaintiff cannot plead scienter “‘simply by saying scienter existed.’” [Eclectic Props. East, LLC v. Marcus & Millichap Co., No. 09-00511, 2012 WL 713829, at *11 \(N.D. Cal. Mar. 5, 2012\)](#) (citation omitted). That is precisely what Plaintiffs attempt here, and their fraud claims should be dismissed.

3. Negligent Misrepresentation Claims

Earlier this year, this Court explained that the elements of a New York negligent misrepresentation claim “are that (1) the defendant had a duty as a result of a special relationship to give correct information; (2) the defendant made a false representation that he or she should have known was incorrect; (3) the defendant knew that the plaintiff desired the information for a serious purpose; (4) the plaintiff intended to rely and act upon it; and (5) the plaintiff reasonably relied on it to his or her detriment.” [BNP Paribas Mortg. Corp. v. Bank of Am., N.A., No. 09-9784, 2013 WL 2452169, at *14 \(S.D.N.Y. June 6, 2013\)](#) (citations omitted). The Court further explained that “[n]egligent misrepresentation is a type of fraud and, as such, is subject to [Rule 9\(b\)](#)’s heightened pleading standard.” *Id.* (collecting cases) (citations omitted).

Like their cause of action for fraud, Plaintiffs’ cause of action negligent misrepresentation contains no factual averments and does not identify the laws of the states under which it is brought. In any event, Plaintiffs’ negligent misrepresentation claims fail for the same reasons as their fraud claims, *i.e.*, they have failed to set forth facts sufficient to establish that they reasonably relied on, or were harmed by, an actionable misrepresentation made by Ford. Moreover, no Plaintiff pleads facts demonstrating that he or she has a “special relationship” with Ford that could give rise to a negligent misrepresentation claim in the first

place. See [Wright v. Kia Motors Am. Inc.](#), 2007 WL 316351, at *5 (D. Or. Jan. 29, 2007) (finding no special relationship and no authority to support a claim for negligent misrepresentation against a seller or manufacturer engaging in arm's length transaction with purchaser of their products). Accordingly, these claims should be dismissed as a matter of law.

F. Plaintiffs Fail to State a Cognizable Breach of Contract Claim

The CAC contains a breach of contract claim, but fails to describe what the purported contract between Plaintiffs and Ford is supposed to be. Paragraph 331 of the CAC claims that Ford through “websites, television advertisements, marketing materials, and vehicle window stickers. . . conveyed uniform representations and offers regarding the quality and performance of [the subject vehicles], including that they achieved the represented fuel economy.” Plaintiffs then claim that they accepted these “offers” when they purchased their vehicles, and that Ford breached these “contracts” when the vehicles did not perform as promised. (CAC, ¶¶ 331-332.)

At no point do Plaintiffs specify the “offers” Ford allegedly made, what agreement is supposed to exist between Plaintiffs and Ford, or what consideration supposedly passed between them. Certainly there is no allegation that Ford offered to sell, or sold, a vehicle directly to any individual Plaintiff. Under New York law, for example, new cars can only be purchased from licensed dealers. See [N.Y. Vehicle & Traffic Law § 415\(3\)\(a\)](#). Further, what is conspicuously not claimed is that Plaintiffs paid any monies *to Ford*. Plaintiffs appear argue that merely representing a product has certain characteristics, in the abstract, creates a non-warranty contractual obligation to an indefinite class of third parties based on separate sales and lease contracts to which Ford is not a party. Such a claim fails to state even the most basic elements of an actual contract claim under New York law. See, e.g., [Sirohi v. Trustees of Columbia Univ.](#),

[162 F.3d 1148, 1998 WL 642463, at *2 \(2d Cir. 1998\)](#) (“[Plaintiff] failed to successfully plead a breach of contract claim because he did not allege the essential terms of the parties’ purported contract ‘in nonconclusory language,’ including the specific provisions of the contract upon which liability is predicated.”); [DeSilva v. N. Shore-Long Island Jewish Health Sys., Inc., No. 10-cv-1341, 2012 WL 748760 \(E.D.N.Y. Mar. 7, 2012\)](#) (same); [ACE Fire Underwriters Ins. Co. v. ITT Indus., Inc., 924 N.Y.S.2d 342, 344 \(App. Div. 2011\)](#) (“The court properly dismissed breach of contract [counterclaim] since it lacked a description of the essential terms of the alleged [agreement]—namely, parties, duration, date, and consideration.” (internal citation omitted)). Plaintiffs’ breach of contract claims should be dismissed.

G. Plaintiffs’ Have Not Sufficiently Stated A Cause Of Action For Breach Of The Covenant Of Good Faith And Fair Dealing.

As to Plaintiffs’ claims for breach of the covenant of good faith and fair dealing, the Court should be advised that Minnesota, Pennsylvania, and Maryland do not recognize this claim as an independent cause of action.¹³ Nevertheless, Plaintiffs’ ability to sustain this claim in any jurisdiction requires them to, at the very least, identify a specific valid and enforceable contract

¹³ [Resnick v. AvMed, Inc., 693 F.3d 1317, 1329 \(11th Cir. 2012\)](#) (“While every contract contains an implied covenant of good faith and fair dealing, under Florida law, a breach of this covenant—standing alone—does not create an independent cause of action”) (internal quotations omitted); [Echo, Inc. v. Whitson Co., 121 F.3d 1099, 1105 \(7th Cir. 1997\)](#) (independent claims for breaches of implied duties of good faith are not recognized under Illinois law); [Medtronic, Inc. v. ConvaCare, Inc., 17 F.3d 252, 256 \(8th Cir. 1994\)](#) (applying Minnesota law and holding that “Minnesota law does not recognize a cause of action for breach of the implied covenant of good faith and fair dealing separate from the underlying breach of contract claim”); [Oates v. Wells Fargo Bank, N.A., 880 F. Supp. 2d 620, 628 \(E.D. Pa. 2012\)](#) (applying Pennsylvania law and holding that Pennsylvania does not recognize an independent cause of action for the breach of the implied duty of good faith and fair dealing); [Adams v. NVR Homes, Inc., 135 F. Supp. 2d 675, 699 \(D. Md. 2001\)](#) (interpreting Maryland law and holding that “a plaintiff seeking a recovery for breach of contract may not in Maryland assert a separate claim for breach of the covenant of good faith and fair dealing implied in that contract”); [Fodale v. Waste Mgmt. of Mich., Inc., 718 N.W.2d 827, 841 \(Mich. Ct. App. 2006\)](#) (Michigan does not recognize an independent cause of action for breach of the implied covenant of good faith and fair dealing).

between the parties (which they have not done).¹⁴ As no Plaintiff states a viable claim for breach of contract or the existence of a valid contract, their claims for breach of the implied covenant of good faith and fair dealing should also be dismissed as matter of law.

H. Plaintiffs' Breach Of Express Warranty Claim Is Barred By Federal Law.

All Plaintiffs make the vague assertion that they formed contracts with Ford when they purchased or leased their vehicles, which include “the promises and affirmations of fact and express warranties made by Ford about the [subject vehicles’] fuel economy through their marketing and advertising campaigns on Ford’s website and at the dealership, including the window stickers affixed to the subject vehicles.” (CAC, ¶ 343.) Plaintiffs also claim that Ford’s “marketing and advertising” regarding the subject vehicles “constitute express warranties[.]” (CAC, ¶ 344.) They further claim that Ford breached these warranties. (CAC, at ¶ 348.)

¹⁴ See, e.g., [Kapsis v. Am. Home Mortg. Servicing Inc.](#), 923 F. Supp. 2d 430, 452 (E.D.N.Y. 2013) (holding that there can be no breach of the implied covenant of good faith and fair dealing without a governing valid contract and dismissing plaintiff's cause of action for breach of the implied covenant of good faith and fair dealing where plaintiff failed to allege the existence of a contract between plaintiff and defendant); [Continental Disc Corp. v. Applied Mfg. Tech., Inc.](#), No. 4:13-00037, 2013 WL 3324368, at *3 (E.D. Mo. Jul. 1, 2013) (explaining that a breach of the implied duty of good faith and fair dealing requires plaintiff to show a the existence of a valid enforceable contract); [Hegel v. Brunswick Corp.](#), No. 09-882, 2011 U.S. Dist. LEXIS 30514, at *23 (E.D. Wis. Mar. 23, 2011) (explaining that no good duty of good faith and fair dealing exists without the existence of a valid contract between the parties); [Love v. Mail on Sunday](#), No. CV057798ABCPJWX, 2006 WL 4046180, at *7 (C.D. Cal. Aug. 15, 2006) (dismissing breach of covenant of good faith and fair dealing claim because plaintiff did not plead express contractual terms from which the implied covenant arose; noting “It is universally recognized [that] the scope of conduct prohibited by the covenant of good faith [and fair dealing] is circumscribed by the purposes and express terms of the contract.”); [Bruno v. Whipple](#), 138 Conn. App. 496, 502, 54 A.3d 184 (Conn. Ct. App. 2012) (a claim for breach of the implied covenant of good faith and fair dealing can only be asserted against a contracting party); [Mortg. Elec. Registration Sys., Inc. v. Mosely](#), No. 93170, 2010 WL 2541245, at *11 (Ohio Ct. App. June 24, 2010) (citing cases and stating that there can be no claim for breach of the implied covenants of good faith and fair dealing independent of a breach of contract action); [Landmark LLC v. Sakai OTIP Trust](#), 151 Wash. App. 1003, 2009 WL 1930174, at *8 (Wash. Ct. App. July 7, 2009) (“there is no free-floating duty of good faith and fair dealing that is unattached to an existing contract”) (internal quotations omitted); [Norman v. State Farm Mut. Auto. Ins. Co.](#), 33 P.3d 530, 537 (Ariz. Ct. App. 2001) (affirming trial court’s ruling that absent a valid contract, a claim for breach of the covenant of good faith and fair dealing cannot stand); [Wells Fargo Realty Advisors Funding, Inc. v. Uioli, Inc.](#), 872 P.2d 1359, 1362-63 (Colo. Ct. App. 1994) (noting that a prerequisite to asserting a claim for breach of the covenant of good faith and fair dealing is the existence of a contract); see also [Vanderselt v. Pope](#), 963 P.2d 130, 133-34 (Or. Ct. App. 1998) (to state claim for breach of duty of good faith and fair dealing, plaintiff must “present evidence that a special relationship or fiduciary-type relationship existed between the parties that was independent of the duties under the contract.”).

In addition to the striking absence of facts supporting these sweeping allegations, Plaintiffs' breach of warranty claim fails as a matter of law. The same federal statute that requires Ford to generate and post EPA fuel economy estimates explicitly bars any claim that such estimates constitute a warranty under State or federal law. *See* [49 U.S.C. § 32908\(d\)](#) (“[a] disclosure about fuel economy or estimated annual fuel costs under this section ***does not establish a warranty*** under the law of the United States or a State.”) (emphasis added). Moreover, [Section 32908\(d\)](#) bars ***all*** warranty claims derived from EPA estimated fuel economy regardless of whether the claims are directed to the EPA estimate on the window sticker itself, or to other advertising statements that reiterate the EPA estimated fuel economy. *See, e.g., Paduano*, [169 Cal. App. 4th at 1453, 1467](#) (“Thus, to the extent that Honda identified the EPA fuel economy estimates in the Monroney sticker and reiterated those EPA mileage estimates in its own advertising, Honda’s provision of those estimates does not constitute an independent warranty that [plaintiff’s] vehicle would achieve the EPA fuel economy estimates or a similar level of fuel economy.”). For this straightforward reason, Plaintiffs’ breach of express warranty claim should be dismissed with prejudice.

Plaintiffs’ breach of express warranty claims should also be deemed preempted to the extent they rely on representations found on the window stickers of the subject vehicles or are otherwise directed to advertising that contains federally mandated EPA disclosure language. For instance, while Paragraph 345 of the CAC lists three statements that Plaintiffs claim constitute express warranties, they do not specify where the statements appeared, when Plaintiffs allegedly saw them, when the warranties were allegedly breached, or, if the statements appeared in advertising, whether those advertisements comply with federal law and are non-actionable as a

matter of law. See [Prue v. Fiber Composites, LLC, No. 11-3304, 2012 WL 1314114, at *9-10 \(S.D.N.Y. Apr. 17, 2012\)](#) (reasoning that a breach of express warranty claim fails where the plaintiff fails to adequately identify the defendant’s actionable conduct, where the alleged representations appeared, or to whom they were made).

I. Plaintiffs Fail to State a Claim for Violation of the MMWA.

The Magnuson-Moss Warranty Act (“MMWA”) creates a federal cause of action for breach of written and implied warranties under state law. See [15 U.S.C. § 2310\(d\)\(1\)](#) (creating a “civil action” for a “consumer who is damaged by the failure of a...warrantor...to comply with any obligation...under a written warranty [or] implied warranty”). The MMWA, however, “does *not* provide an independent cause of action for state law claims, only additional damages for breaches of warranty under state law[.]” [Janke v. Brooks, No. 11-cv-00837, 2012 WL 1229891, at *2 n.3 \(D. Colo. Apr. 11, 2012\)](#) (citation omitted) (emphasis added); see also [Fanok v. Carver Boat Corp., 576 F. Supp. 2d 404, 417 \(E.D.N.Y. 2008\)](#) (“... plaintiff has not pointed to any provision of MMWA that would operate independent of his state law warranty claims. Since the state law warranty claims fail, his MMWA claims fail as well.”). Because Plaintiffs cannot sustain a viable state-law warranty claim against Ford, his MMWA claim necessarily fails as well. See [Cali v. Chrysler Group LLC, No. 10-7606, 2011 WL 383952, at *4 \(S.D.N.Y. Jan. 18, 2011\)](#) (explaining that MMWA claims “stand or fall” with state law warranty claims and dismissing MMWA claim as a matter of law where plaintiff failed to state breach of an express or implied warranty).

Here, Plaintiffs do not state, or attempt to state, a separate claim for breach of an implied warranty, so their MMWA claims cannot proceed on this basis.¹⁵ Nor do Plaintiffs identify a specific “‘written warranty’ as to the [subject vehicles’] fuel economy” that was allegedly breached by Ford. (CAC, ¶ 356.) The only document that could possibly serve as a written warranty in this case is the 2013 Model Year Ford Hybrid Car and Electric Vehicle Warranty Guide that accompanied the subject vehicles at the time they were sold or leased by Plaintiffs. None of the Plaintiffs claim that Ford breached this written warranty. Nor can they salvage their MMWA claims by pointing to Ford advertisements and marketing materials. This Court recently addressed the issue of when a representation in advertising constitutes a written warranty under the MMWA. See [In re Scotts EZ Seed Litig., supra, 2013 WL 2303727, at *4](#). Citing and quoting the FTC’s regulatory interpretation of the MMWA,¹⁶ the Court explained that a statement constitutes a “written warranty” *only* if it promises (1) a specified level of performance over a (2) specified period of time. *Id.* at *4 (citing and quoting [16 C.F.R. § 700.3](#) and [Skelton v. Gen. Motors Corp., 660 F.2d 311 \(7th Cir. 1981\)](#)). In this case, Plaintiffs’ “shotgun” attempt to plead a MMWA claim does not identify a single representation by Ford that meets the criteria of a “written warranty” under the MMWA. Moreover, as explained above in Section IV(I), federal

¹⁵ Although Plaintiffs state in their MMWA cause of action that “there exists an implied warranty for the sale of such product within the meaning of the MMWA[,]” (CAC, 356), they do not specify this supposed “implied warranty” or how it was allegedly breached by Ford. To the extent they are claiming that the MMWA provides them with a cause of action for breach of implied warranty, they are simply incorrect as a matter of law.

¹⁶ Specifically, the Court quoted this passage from the FTC: “Certain representations, such as energy efficiency ratings for electrical appliances, care labeling of wearing apparel, and other product information disclosures may be express warranties under the Uniform Commercial Code. However, these disclosures alone are not written warranties under this Act. Section 101(6) provides that a written affirmation of fact or a written promise of a specified level of performance must relate to a specified period of time in order to be considered a “written warranty.” A product information disclosure without a specified time period to which the disclosure relates is therefore not a written warranty.” [In re Scotts EZ Seed Litig., 2013 WL 2303727, at *4 \(quoting 16 C.F.R. § 700.3\)](#).

law bars any claim that advertising the EPA estimated fuel economy for the subject vehicles constitutes a actionable warranty. *See* [49 U.S.C. § 32908\(d\)](#).

Accordingly, Plaintiffs' MMWA claim fails as a matter of law because they have not established an underlying breach of an implied or written warranty.

J. Plaintiffs' Unjust Enrichment Cause Of Action Fails As A Matter Of Law.

1. The California and Florida Plaintiffs cannot recover from Ford for unjust enrichment.

California courts have recognized repeatedly that “[u]njust enrichment is not [an independent] cause of action, [or even a remedy, but rather ‘a general principle, underlying various legal doctrines and remedies.’” [McBride v. Boughton](#), 123 Cal. App. 4th 379, 387-388 (2004) (citation omitted).¹⁷ Therefore, the California Plaintiffs' causes of action for “unjust enrichment” should be dismissed with prejudice.

Although Florida recognizes an independent unjust enrichment cause of action, Florida Plaintiff Oldcorn cannot sustain his unjust enrichment claim against Ford because he does not allege to have purchased his C-MAX directly from Defendant Ford Motor Company. *See* [Szymczak v. Nissan N. Am., Inc.](#), No. 10-7493, 2011 U.S. Dist. LEXIS 153011 (S.D.N.Y. Dec. 16, 2011) (citing [Am. Safety Ins. Serv., Inc. v. Griggs](#), 959 So. 2d 322, 331 (Fla. Dist. Ct. App. 2007) (“The plaintiffs must show they directly conferred a benefit on the defendants.”)). Thus, his unjust enrichment claim should also be dismissed.

¹⁷ *See* [Enreach Tech., Inc. v. Embedded Internet Solutions, Inc.](#), 403 F. Supp. 2d 968, 976 (N.D. Cal. 2005) (“[U]njust enrichment is not a valid cause of action in California.”); [Jogani v. Superior Court](#), 165 Cal. App. 4th 901, 911 (2008) (“[U]njust enrichment is not a cause of action.”); [Lauriedale Assocs., Ltd. v. Wilson](#), 7 Cal. App. 4th 1439, 1448-49 (1992) (“The phrase ‘[u]njust [e]nrichment’ does not describe a theory of recovery, but an effect: the result of a failure to make restitution under circumstances where it is equitable to do so.”); *see also* [Smith v. Ford Motor Co.](#), 462 Fed. Appx. 660, 665 (9th Cir. 2011) (finding plaintiffs' argument that unjust enrichment is an independent cause of action “has no merit.”).

2. None of the Plaintiffs plead any facts supporting their unjust enrichment claims.

In addition to the reasons supporting dismissal of the claims of the California and Florida Plaintiffs, all of the unjust enrichment claims stated in the CAC should be dismissed because their cause of action is nothing more than a generic and factually barren recitation of the elements of a theoretical composite unjust enrichment cause of action from no particular state. In New York, for example, the basic elements of an unjust enrichment claim are: (1) defendant was enriched; (2) such enrichment was at the expense of the plaintiff; and (3) the circumstances were such that in equity and good conscience the defendant should make restitution. *See Nat'l Cas. Co. v. Vigilant Ins. Co.*, 466 F. Supp. 2d 533, 543 (S.D.N.Y. 2006).

“However, applying the broad discretion contained in the third element, [New York] courts have imposed various additional requirements such as: services must have been performed for the defendant[;] services must have been performed at defendant’s behest[;] or defendant must have assumed an obligation to pay plaintiff for services it received[.]” *See, e.g., Nat’l Cas. Co.*, 466 F. Supp. 2d at 543-44 (citing *Kagan v. K-Tel Entm’t, Inc.*, 568 N.Y.S.2d 756, 757 (N.Y. App. Div. 1991)) (“a plaintiff must demonstrate that services were performed *for the defendant* resulting in unjust enrichment” (italics in original)).¹⁸ None of the instant Plaintiffs set forth any factual allegations demonstrating that they performed a service for Ford, conferred a benefit (much less a “specific” and “direct” benefit) upon Ford at Ford’s request, or that Ford assumed

¹⁸ *See Heller v. Kurz*, 643 N.Y.S.2d 580, 581-82 (N.Y. App. Div. 1996) (services must have been performed for the defendant); *Prestige Caterers v. Kaufman*, 736 N.Y.S.2d 335, 336 (N.Y. App. Div. 2002) (services must have been performed at defendants’ behest); *see also In re Bayou Hedge Funds Invest. Litig.*, 472 F. Supp. 2d 528, 531-32 (S.D.N.Y. 2007) (noting that “the essence of unjust enrichment is that one party parted with money or a benefit that was received by another at the expense of the first party. . . . The benefit must be ‘specific’ and ‘direct’ in order to support an unjust enrichment claim.”).

an obligation to pay Plaintiffs for any such services. Accordingly, their shotgun attempt to plead unjust enrichment claims should be rejected as a matter of law.

V. CONCLUSION

The Consolidated Amended Complaint in its entirety lacks the necessary factual predicate to make Plaintiffs' claims plausible under *Twombly* and *Iqbal*. The Amended Complaint is also devoid of the detailed recitations necessary under [Rule 9\(b\)](#) to support Plaintiffs' foundational claims of consumer fraud and other common law claims—claims that are preempted under federal law in any event. Even if Plaintiffs' claims are not dismissed on these grounds, they are properly directed to the EPA, and not this Court. For all these reasons, and for those stated above, this action should be dismissed with prejudice in its entirety.

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Respectfully submitted,

/s/

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