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)

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT FORD MOTOR COMPANY'S MOTION TO DISMISS THE CONSOLIDATED AMENDED CLASS ACTION COMPLAINT

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I. INTRODUCTION

This is a straightforward case about Defendant Ford Motor Company's ("Defendant" or "Ford") aggressive national advertising campaign, which deceptively marketed the fuel economy of the 2013 Ford Fusion hybrid (the "Fusion") and 2013 C-MAX (the "C-MAX") vehicles (collectively the "Vehicles"). ¶1.[1] Through its advertising campaign, Ford sought to gain market share in the growing hybrid market to outsell its competition, such as the Toyota Prius, by representing that the 2013 models of the Vehicles had made a quantum leap in fuel economy and would ***deliver*** "47 MPG." ¶3. Although Ford's advertisements gave reasonable consumers the impression they could expect to attain 47 miles per gallon when driving on the highway, in the city, or combined, and reap substantial savings at the pump as a result, the Vehicles did not and could not deliver Ford's claimed fuel economy under real world driving conditions. ¶5. Ford's scheme is not a mere trifle to consumers – as Ford knows, fuel economy is the number one selling point for hybrid vehicles. As a result of its advertising campaign, Ford's sales skyrocketed, ¶4, thousands of Ford hybrid consumers were deceived and suffered damages in the process, leading Plaintiffs to initiate this lawsuit.

To support its motion to dismiss, Ford attempts to reframe the well-pled allegations of the CAC. For instance, although Ford spends six pages of its brief describing the Environmental Protection Agency ("EPA") regulatory framework and the disclaimers that accompany EPA fuel economy estimates (Def. Br. at 4-10) – *tellingly, without a single citation to the CAC* – Plaintiffs' allegations do not challenge the EPA estimates themselves or mandated disclosures.[2] Rather,

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[1] All "¶__" references are to the Consolidated Amended Class Action Complaint ("CAC"), filed October 15, 2013.

[2] This is why, as Ford observes, the CAC rarely uses the word "estimate." *See* 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

Plaintiffs focus on Ford's misrepresentations about the fuel economy that its Fusion and C-MAX vehicles would reportedly achieve. These representations go beyond the mere disclosure of EPA estimates, including such statements as the Vehicles would "deliver" or "achieve" 47 MPG under real world driving conditions, "47 mpg for me," and that the C-MAX would "offer 'real car' range at 570 miles on one tank of gas." ¶63, 66. The CAC also alleges that, despite Ford's failure to conduct testing on the C-MAX,[3] Ford repeatedly touted that the C-MAX "delivered" and "achieved" the advertised fuel economy. Ford's advertisements intentionally used these false and misleading statements to demonstrate that the fuel economy of the Vehicles was superior to other hybrid vehicles in the market, such as the Prius and Camry, thereby gaining valuable market share and the accompanying revenues and profits at the expense of Plaintiffs and the Class. ¶¶69-86.

Setting aside its erroneous description of Plaintiffs' allegations, the crux of Ford's challenge to the CAC is that Plaintiffs' claims are preempted by federal law. But, preemption does not apply in this case because Ford's advertising extended beyond the mere disclosure of EPA estimates. Rather, fuel economy ***was*** the selling point for these Vehicles. Ford seems to argue that it is free to make any representations it wishes regarding fuel economy in its advertising because the EPA imposes certain fuel economy disclosures. Ford's position finds no support in the case law, however. Based upon similar allegations, courts have previously rejected preemption arguments

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12(b)(6) ("Def. Br.") at 1, n. 1. Ford, however, spends several pages describing the EPA regulations and testing protocols, factual detail that appears nowhere in the CAC and is thus outside the proper scope for Ford's motion to dismiss. *See Pani v. Empire Blue Cross Blue Shield*, 152 F.3d 67, 71 (2d Cir. 1998) (on motion to dismiss, the court's review is limited to "the allegations contained within the four corners of the complaint"). Thus, the Court can and should disregard the extrinsic materials attached to Ford's motion papers. *See id.*

[3] Plaintiffs do not challenge Ford's failure to conduct testing on the C-MAX. Instead, Ford's failure to conduct the EPA testing on the C-MAX shows it had no basis for touting the superior fuel economy for these Vehicles in its advertising campaign.

similar to Ford's here. *See, e.g.*, *Kehlie R. Espinosa v. Hyundai*, Case No. CV12-800-GW, Dkt. No. 27, at 3 (C.D. Cal. Apr. 23, 2012) (Wu, J. tentative opinion issued April 23, 2012, minute order adopting same April 24, 2012), attached hereto as Exhibit A; *Paduano v. Am. Honda Motor Co., Inc.*, 169 Cal. App. 4th 1453 (2009); *see generally* Part IV.A.

Ford's attempt to confuse the issues by framing Plaintiffs' claims as alleging violations of the Energy Policy Conservation Act of 1975 (the "EPCA") and EPA testing guidelines are similarly misguided because Plaintiffs neither allege that Ford violated the EPCA, nor challenge the manner in which the estimated figures were calculated. Similarly, because Plaintiffs do not challenge the accuracy of the estimates certified by the EPA or the manner in which they were calculated, the primary jurisdiction doctrine has no bearing on this case. *See* Part IV.B.

As shown herein, the CAC adequately alleges violations of the consumer protection statutes, Magnuson-Moss Warranty Act ("MMWA"), warranties, and state common law. *See* Part IV.E. Plaintiffs have given Ford ample notice of the claims by describing many of the advertisements alleged to be false and misleading and detailing why the statements were misleading. Plaintiffs' allegations are sufficient at this stage of the case.

For all the reasons set forth herein, Plaintiffs respectfully request that the Court deny Ford's motion to dismiss.

II. FACTUAL ALLEGATIONS

A. Ford Introduces the Fusion and C-MAX in an Effort to Boost Its Hybrid Sales

Fuel economy is a primary consideration for consumers when they purchase a new car, particularly given rising fuel costs. ¶42. This is particularly true for hybrid vehicles and, as a result, automakers charge a price premium for hybrid cars. ¶¶43-46. Attempting to capitalize on this growing and lucrative market, Ford launched the 2010 Fusion Hybrid. ¶47. Unfortunately for Ford,

the 2010-2012 models of the Fusion Hybrids achieved significantly lower fuel economy than competing vehicles, namely the Toyota Prius, which offered nearly 50 MPG for city/highway combined. As a result, sales of the Fusion Hybrid lagged. ¶¶47-50.

In an effort to turn around its faltering hybrid vehicle sales and better compete with Toyota, Ford introduced the 2013 Fusion and C-MAX, both of which Ford claimed beat the competition in fuel economy, delivering 47 MPG city, 47 MPG highway, and 47 MPG combined. ¶51.

B. Ford's Nationwide Marketing Campaign Tells Consumers that the Fusion and C-MAX *Will* Deliver 47 MPG

1. Ford's Extensive "47" Campaign

To drive sales of the 2013 Fusion and C-MAX and increase its market share in the hybrid vehicle market, Ford implemented an extensive national marketing campaign that revolved around the theme that the Vehicles would achieve 47 MPG.

According to Ford, the "47" campaign was designed to reach *all* potential hybrid purchasers of *all* age groups and *all* income levels. ¶57. The 47 MPG message was designed "to go with people where they go – desktop mobile to digital to social to experimental." *Id.* Ford referred to this widespread, multifaceted advertising strategy as a "transmedia" campaign. *Id.* Ford spread its 47 MPG message through a variety of media, including its website, TV commercials, magazine advertisements, social media, a Times Square launch event, webisodes, dealership advertisements, promotional brochures, and press releases. ¶58. The pervasiveness of the 47 MPG message ensured that the primary thing consumers knew about the Vehicles was Ford's claim that they could achieve 47 MPG.

Ford's assertions in its advertisements were not required by the EPA, but were voluntarily made by Ford to convince consumers that the Vehicles delivered excellent real-world fuel economy

(47 MPG) that beat out the competition, namely the Toyota Prius and Toyota Camry Hybrid. And it worked; Ford's hybrid sales skyrocketed.

2. Ford's "47" Campaign Touted the Real-World Fuel Economy of the Fusion and C-MAX

Ford touted that its hybrid vehicles, including the Fusion and C-MAX, offer "real vehicle performance, technology, and value." ¶60. Throughout the "47" campaign Ford promoted the Vehicles' *real world* fuel economy performance. Statements about the Vehicles' real-world performance included:

- "The Ford Fusion Hybrid ***delivers*** a remarkable 47 mpg city and highway."
- "Fusion Hybrid ***gets*** 47 mpg in the city, on the highway, and combined."
- The C-MAX will "***deliver*** an impressive list of metrics, such as its 570-mile overall range" and "C-MAX Hybrid to ***offer 'real car' range*** at 570 miles on one tank of gas . . ., beating Toyota Prius v by 120 miles."
- Speaking of the Fusion Hybrid's 47 MPG claims, Ford said: "***You can get it***. It is there."
- "Being ***more real*** is another way this [47 mpg] campaign ***truly reflects*** the vehicle."

¶¶59-68 (emphasis added).

Ford's advertising campaign failed to reasonably inform consumers that 47 MPG was not achievable. To the contrary, the thrust of Ford's "47" campaign was that the vehicles could and would *deliver*, and that consumers could and would *achieve*, 47 MPG. ¶¶63, 67. When Ford rhetorically asked in an ad whether consumers could really expect "47 mpg in the city and on the highway?," it answered "Yes, it's true. The all new Fusion Hybrid achieves 47 mpg combined." ¶63.

Even in advertisements where Ford describes the 47 MPG figure as EPA-certified, it misleadingly stated that the vehicles will ***deliver*** 47 MPG, not that 47 MPG is merely an estimate that consumers could not expect to achieve under real-world driving conditions:

- "C-MAX Hybrid ***delivers*** EPA-certified 47 mpg city, 47 mpg highway ratings – better than the Toyota Prius V on the highway – for a 47 mpg combined rating."
- "The Ford Fusion ***delivers*** a U.S. EPA-certified 47 mpg city, 47 mpg highway and 47 mpg combined in its hybrid model."

¶63. Although some advertisements contained boilerplate disclosures in fine-print footnotes about the fuel economy figures being "estimates" (¶62), individual advertisements and the entirety of Ford's advertising campaign overwhelmed the fine print and drove home the message that consumers could achieve 47 MPG in real world driving. Ford's tiny-print disclaimers do not absolve it from liability for false and misleading advertising. *See* Part IV.D.

Ford also underscored its 47 MPG promise by comparing that figure to competing vehicles.

- 2013 Fusion Hybrid "tops the Toyota Camry Hybrid by 8 mpg highway and 4 mpg city, and ***delivers the highest-ever fuel economy numbers*** in city and highway driving for a midsize sedan."
- Ford stated that the C-MAX "delivers EPA-certified 47 mpg city, 47 mpg highway ratings – 7 mpg better than the Prius V" and claimed that customers would pay less at the dealership and less at the pump for a C-MAX versus a Prius V.
- C-MAX "beats Prius V with better mpg" and is "Miles Per Gallon Ahead of the Competition."

¶¶69-86 (emphasis added). Ford's "47 MPG" campaign was highly successful in convincing consumers that the Vehicles offered superior fuel economy, and Ford profited as a result.

C. The Fusion and C-MAX Do Not Deliver 47 MPG as Advertised

After Ford began selling the Fusion and C-MAX, consumers and independent automotive professionals realized that the vehicles did not deliver the promised fuel economy. ¶¶87-96. Consumers lodged complaints about the fuel economy of their Fusion and C-MAX vehicles with

Ford, the EPA, online forums, and Plaintiffs' lawyers. ¶89. The majority of these complaints report an inability to even reach an MPG in the high 30's, much less the 47 MPG Ford had promised. *Id*.

Independent testing also confirmed that the Fusion and C-MAX did not deliver the advertised 47 MPG. ¶¶90-93. In fact, automotive professionals routinely achieved fuel economy in the high 30's, confirming consumers' experiences. *Id*. *Consumer Reports* testing showed that the Fusion and C-MAX had the largest discrepancy between their overall results and the published fuel economy figures of any current models they had tested in the marketplace. ¶92. One automotive professional even consulted Ford's chief engineer to get recommendations on what driving methods would lead to the best fuel economy. ¶90. Yet, even with this advice, the tester was unable to achieve anywhere near the advertised 47 MPG. *Id*.

D. Ford Acknowledges that the Fusion and C-MAX Do Not Deliver 47 MPG

Although completely ignored by Ford, the CAC also describes Ford's inadequate remedial measures to correct the advertised fuel economy of the C-MAX, which Ford implemented ***after*** the filing of these actions. ¶¶97-103. Recognizing that the Fusion and C-MAX did not deliver 47 MPG as touted in the advertisements, Ford began offering vehicle owners a software upgrade to improve their fuel economy, though consumers continue to report mileage below the advertised 47 MPG. ¶97. Importantly, Ford does not dispute the CAC's allegation that this amounted to an "implicit acknowledgement that [Ford's] '47 MPG' campaign was misleading." *Id*. Moreover, as alleged in the CAC, Ford's remedial measures do not adequately compensate consumers for the damages incurred as a result of Ford's false advertising. ¶¶102-03.

Ford also lowered the advertised MPG figures for the C-MAX from 47/47/47 to 45 city, 40 highway, and 43 combined. ¶98. Ford has also announced that the C-MAX's 47/47/47 fuel economy figures were taken from fuel economy testing of the Fusion. ¶99. Ford's use of the

Fusion's testing when advertising the C-MAX's fuel economy indicates that the two vehicles should "achieve nearly identical fuel economy performance" based on their design specifications. Def. Br. at 16. Despite the vehicles' supposedly identical fuel economy performance, and Ford's acknowledgement that the C-MAX's fuel economy figures were inaccurate, Ford has still not restated the fuel economy of the Fusion.

III. LEGAL STANDARDS

Ford moves to dismiss on Federal Rule of Civil Procedure 12(b)(6) and bears the burden of showing that Plaintiffs have failed to state a claim. CHARLES ALAN WRIGHT & ARTHUR R. MILLER, ET AL., 5B Fed. Prac. & Proc. Civ. § 1357 (3d ed. 2010) ("All federal courts are in agreement that the burden is on the moving party to prove that no legally cognizable claim for relief exists.").

"[T]he purpose of Federal Rule of Civil Procedure 12(b)(6) 'is to test, in a streamlined fashion, the formal sufficiency of the plaintiff's statement of a claim for relief without resolving a contest regarding its substantive merits.'" *Halebian v. Berv*, 644 F.3d 122, 130 (2d Cir. 2011) (quoting *Global Network Commc'ns, Inc. v. City of New York*, 458 F.3d 150, 155 (2d Cir. 2006)). The Court must do so "without regard for the weight of the evidence that might be offered in support of Plaintiff's claims." *Korova Milk Bar of White Plains, Inc. v. PRE Props., LLC*, No. 11 Civ. 3327 (ER), 2013 WL 417406, at *5 (S.D.N.Y. Feb. 4, 2013). "In considering a [Rule 12(b)(6)] motion to dismiss, the court is to accept as true all facts alleged in the complaint," and must "draw all reasonable inferences in favor of the plaintiff." *Kassner v. 2nd Avenue Delicatessen Inc.*, 496 F.3d 229, 237 (2d Cir. 2007).[4] Through this lens, according to the Supreme Court's decisions in *Twombly* and *Iqbal*, the Court must determine whether the well-pleaded factual allegations "plausibly give rise

[4] Here, as throughout, internal citations and internal quotation marks are omitted, and emphasis supplied, unless otherwise noted.

to an entitlement to relief." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007) (stating that pleadings must contain "enough facts to state a claim to relief that is plausible on its face"); *see also U1IT4less, Inc. v. FedEx Corp.*, 896 F. Supp. 2d 275, 285 (S.D.N.Y. 2012) (citing *Iqbal* and *Twombly*).

Citing *Twombly*, the Second Circuit has emphasized that plausibility "does not impose a probability requirement at the pleading stage," but simply asks whether a complaint presents sufficient facts to "permit a reasonable inference" that the plaintiff has stated a claim. *Anderson News, L.L.C. v. Am. Media, Inc.*, 680 F.3d 162, 182-84 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 846 (2013) (quoting *Twombly*, 550 U.S. at 556); *see also Quinn v. Walgreen Co.*, No. 12 CV 8187 (VB), 2013 WL 4007568, at *5 (S.D.N.Y. Aug. 7, 2013). The Second Circuit in *Anderson News* also instructed that, where there is more than one plausible interpretation of the alleged facts, the plaintiff's claim need not be the most plausible inference:

> Because plausibility is a standard lower than probability, a given set of actions may well be subject to diverging interpretations, each of which is plausible. The choice between or among plausible inferences or scenarios is one for the factfinder…The choice between two plausible inferences that may be drawn from factual allegations is not a choice to be made by the court on a Rule 12(b)(6) motion… A court ruling on such a motion may not properly dismiss a complaint that states a plausible version of the events merely because the court finds a different version more plausible. Rather, in determining whether a complaint states a claim that is plausible, the court is required to proceed "on the *assumption that all the [factual] allegations in the complaint are true.*"

Anderson News, 680 F.3d at 184-85 (emphasis in original). Under this standard, Ford fails to show that Plaintiffs cannot state a claim.

IV. PLAINTIFFS' CLAIMS SHOULD BE UPHELD

A. Ford Has Not Overcome the Strong Presumption against Preemption

There is a strong presumption ***against*** finding Plaintiffs' claims are preempted. *See generally Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) ("[B]ecause the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state-law causes of action."). The party arguing that federal law preempts a state law bears the burden of establishing preemption. *See In re Methyl Tertiary Butyl Ethanol (MTBE) Prods. Liability Litig.*, 725 F.3d 65, 96 (2d Cir. 2013).

When determining whether federal preemption applies, the "ultimate touchstone" inquiry is whether Congress intended federal regulation to supersede state law. *Wyeth v. Levine*, 555 U.S. 555, 565 (2009). The Court's analysis begins "with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Id*. (alterations omitted). "Thus, when the text of a pre-emption clause is susceptible of more than one plausible reading, courts ordinarily accept the reading that disfavors pre-emption." *Altria Group, Inc. v. Good*, 555 U.S. 70, 77 (2008).

At issue here are state law claims that are quintessentially within the states' historic police powers, including consumer protection laws of general applicability aimed at preventing deceptive marketing and sales practices. *See In re Farm Raised Salmon Cases*, 42 Cal. 4th 1077, 1088 (2008). Thus, "[t]he presumption against preemption applies with particular force in a case such as this one that involves consumer protection laws." *Paduano*, 169 Cal. App. 4th at 1474 (*cited in* Def. Br. at 17) (citing *Farm Raised Salmon Cases*, 42 Cal. 4th at 1088). Ford has not met its burden to overcome the strong presumption against preemption and show that Congress intended to preempt Plaintiffs' state law claims regarding Ford's alleged deceptive advertising.

1. Express Preemption Does Not Apply

Ford argues that Plaintiffs' claims are expressly preempted by two provisions: (i) 49 U.S.C. §32919(b) and (ii) 49 U.S.C. §32919(a). The court finds preemption only if, applying the standard judicial tools of statutory construction (starting with its plain language), the challenged state law falls within the scope of Congress's clear intent to preempt. *See, e.g.*, *Medtronic*, 518 U.S. at 484-86. Here, as other courts have found, neither provision evinces Congressional intent to preempt the types of claims at issue.

a. Section 32919(b)

Section 32919(b) limits a state's ability to "adopt or enforce a law or regulation ***on*** disclosure of fuel economy or fuel operating costs" except in circumstances where "the law or regulation is identical to [the federal requirement under 49 United States Code section 32908]." *Paduano*, 169 Cal. App. 4th at 1478 (italics and alteration in original) (quoting 49 U.S.C. § 32919(b)). And Ford doesn't take issue with the point that preemption is limited to "state-law efforts to impose differing fuel economy obligations on vehicle manufacturers." Def. Br. at 25.

In a case analyzing similar claims, the court found that Section 32919(b) does ***not*** preempt state laws of general applicability, such as the ones at issue here, because they are not "based on" conflicting fuel economy obligations. *See Paduano*, 169 Cal. App. 4th at 1478 (*cited in* Def. Br. at 17 for a different proposition). In particular, the *Paduano* court rejected a preemption challenge to false advertising claims about the fuel economy of 2004 Honda Civic Hybrids, analogizing Section 32919(b)'s use of the word "***on***" to the phrase "based on" used in the Federal Cigarette Labeling and Advertising Act ("Labeling Act"), which the U.S. Supreme Court held does not preempt state law deceptive advertising claims. *Id.* (relying on *Altria Group*, 555 U.S. at 87).

In *Altria Group*, the Supreme Court considered whether the Labeling Act preempted plaintiffs' Maine Unfair Trade Practices Act ("MUTPA") claims that defendants fraudulently advertised their "light" cigarettes as delivering less tar and nicotine. *See* 555 U.S. at 73. There, the Labeling Act contained an express preemption provision that disallowed any state law imposing a "requirement or prohibition ***based on*** smoking and health . . . with respect to the advertising or promotion of any cigarettes, which the Court found did *not* "limit[] the States' authority to prohibit deceptive statements in cigarette advertising." *Id.* at 79. In explaining its holding, the Court stated that the plaintiffs' claims were not preempted because they "allege[d] a violation of the duty not to deceive as that duty is codified in the MUTPA. The duty codified in that state statute . . . has nothing to do with smoking and health." *Id.* at 81. It was inconsequential that the claims had to do with smoking and health because the "phrase 'based on smoking and health' modifies the state-law rule at issue rather than the particular application of that rule." *Id.* at 80. The Court concluded that "the phrase 'based on smoking and health' fairly but narrowly construed does not encompass the more general duty not to make fraudulent statements." *Id.* at 87.

Here, "[t]he word '***on***' in 49 United States Code section 32919(b) is the functional equivalent of the words "***based on***" in the provision of the Labeling Act at issue in *Altria Group*." *Paduano*, 169 Cal. App. 4th at 1478. And, none of the state laws at issue are based "'on' disclosure of fuel economy or fuel operating costs." *Id.* at 1478. Rather, the state laws at issue, including Plaintiffs' consumer protection, warranty, and common law claims are "laws of general application that create a duty not to deceive, just like the MUTPA." *Id.* Ford does not argue otherwise, but simply tries to twist Plaintiffs' theory into one about non-identical disclosure requirements. But, as in *Paduano*, "the phrase on disclosure of fuel economy or fuel operating costs, like the language in the Labeling

Act addressed in *Altria Group*, cannot be construed to encompass the general duty not to make fraudulent or misleading statements." *Id.* Thus, no express preemption applies.

Just like the state laws under which Plaintiffs bring their claims, the "theory" of this case does not concern regulations about fuel economy, or Ford's federally-mandated disclosures, as Ford suggests. Rather, the gravamen of the CAC is Ford's advertising campaign was deceptive because it portrayed a false impression about the "superior" fuel economy of the Fusion and C-MAX, beyond the mere disclosure of EPA estimates. For example, Plaintiffs allege advertisements in which Ford touted the C-Max: (1) could go 570 miles on a tank of gas, (2) "beats Prius v with better MPG," (3) was "Ford's first hybrid vehicle to offer 47 mpg across the board," (4) takes "customers from Los Angeles to Las Vegas and back on one tank of gas," (5) offers '"real car' range at 570 miles on one tank of gas" and (6) "returns the same fuel economy wherher driving cross-country or across the city" were untrue or misleading. ¶¶ 63, 65-66, 73. In addition, Plaintiffs allege advertisements for the Fusion Hybrid that it: (1) "tops the Toyota Camry Hybrid by 8 mpg highway and 4 mpg city," (2) doubles the fuel economy of the average vehicle; (3) is "the most fuel efficient midsize sedan in America;" (4) "delivers a remarkable 47 mpg city and highway;" (5) "achieves 47 combined mpg – doubling the fuel economy of the average vehicle;" and (6) "gets 47 MPG in the city, on the highway and combined" were untrue or misleading. ¶¶63, 66, 68, 70-72.

Even setting aside that the state laws at issue are not preempted because their statutory text does not impose obligations that overlap with federal law, the application of those laws to the claims at issue is not inconsistent with federal law.[5]

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[5] Ford's reference to allegations about the manner in which Ford generated its EPA estimates is taken out of context. As explained above, those allegations only go to the issue as to Ford's lack of good-faith basis for touting the superior fuel economy of the C-MAX. *See*, *supra*, n.3.

Courts other than *Paduano* have also flatly rejected defendants' arguments that false advertising claims alleging misrepresentations of fuel economy are expressly preempted by Section 32919(b). *See Espinosa*, Case No. CV12-800-GW, Ex. A; *Yung Kim v. General Motors, LLC*, No. CV 11-06459 (GAF), slip op. at 7-8. (C.D. Cal. Mar. 9, 2012), attached hereto as Exhibit B; *True v. Am. Honda Motor Co.*, 520 F. Supp. 2d 1175, 1181 (C.D. Cal. 2007). Most recently, in *Espinosa*, the Central District of California held, "to the extent that Plaintiffs claims rest on allegations that Hyundai voluntarily made additional assertions, beyond the disclosure of the mileage estimates, that are untrue or misleading, and the federal law does not require, or even address, these additional assertions, plaintiffs' claims are not preempted." Ex. A at 3. Tellingly, Ford does not cite a single case assessing preemption under Section 32919(b). Instead, elsewhere, Ford says Plaintiffs' claims should be preempted without specifying the legal basis for such a conclusion. *See, e.g.*, Def. Br. at 16. Ford's authorities for the vague proposition that Plaintiffs' claims, in its view, should be preempted are readily distinguishable.

First, *Gray v. Toyota Motor Sales, U.S.A.*, No. 08-1690, 2012 WL 313703 (C.D. Cal. Jan. 23, 2012), did not even address preemption. And, it is distinguishable as plaintiffs advanced a "pure omission" theory alleging that Toyota failed to disclose results of its internal fuel efficiency tests and had abandoned allegations of affirmative misrepresentations. *Id.* at *3-4. Here, in contrast, Plaintiffs have provided detailed allegations regarding the affirmative misrepresentations of Ford in advertising the fuel economy of its Vehicles. ¶¶69-86. Thus, the analysis in *Gray* – whether Toyota owed plaintiff an additional duty of disclosure – is not applicable. *See id.* at *6.

Second, Ford's reliance on *Brett v. Toyota Motor Sales, U.S.A., Inc.*, No. 08-1168, 2008 WL 4329876 (M.D. Fla. Sept. 15, 2008), is similarly misplaced. There, the court did not even address the defendants' implied preemption argument. *See id.* at *9 n.5. And the case is factually

distinguishable. Plaintiffs alleged that the advertisement of the EPA estimates, alone, misrepresented the fuel economy of the Prius, and did not, as Plaintiffs do here, rely on additional assertions regarding the Vehicles' fuel economy beyond the mere disclosure of the EPA estimates. *See id.* at *1-2. *Brett* doesn't help Ford.

a. Section 32919(a)

Plaintiffs' claims are also not expressly preempted by Section 32919(a). Section 32919(a) provides that "a State or a political subdivision of a State may not adopt or enforce a law or regulation ***related to*** fuel economy ***standards*** or average fuel economy ***standards*** for automobiles covered by an average fuel economy ***standard*** under this chapter." 49 U.S.C. § 32919(a). This time, the plain language of Ford's authority is instructive: a state law is "related to" a preempted subject when "the challenged law contains a reference to the preempted subject matter or makes the existence of the preempted subject matter essential to the law's operation." *Metro. Taxicab Bd. of Trade v. City of New York*, 615 F.3d 152, 156 (2d Cir. 2010). Thus, no preemption applies because the state consumer protection statutes and other laws at issue here do not refer to fuel economy disclosures or testing, nor are fuel economy disclosures or testing essential to their operation.

Here, again, *Paduano* is instructive. There, the court rejected the argument that Section 32919(a) preempted certain false advertising claims about Honda Civic Hybrids. The court found that the provision related specifically to fuel economy "standards," which specifically pertain to Corporate Average Fuel Economy ("CAFE") standards, rather than "specific mileage ***estimates*** for a particular vehicle, like the Civic Hybrid, that the parties are discussing in this case." 169 Cal. App. 4th at 1474-75. Further, the court noted that the "'average fuel economy standard' is defined as 'a performance standard [prescribed by the Secretary of Transportation] specifying a minimum level of average fuel economy applicable to a manufacturer in a model year.'" *Id.* at 1475 (citing to 49

U.S.C. § 32901(6)). The court found that these "standards" referred to in Section 32919(a) "are not the same as the fuel economy estimates for each model of vehicle that are required to be posted on the Monroney label . . . ." *Id.* Thus, the court rejected the notion that the plaintiff's claims sought "to impose or enforce a law 'related to fuel economy standards or average fuel economy standards,'" because the consumer protection statutes at issue in that case did not "'relate to' the imposition of minimum fuel efficiency performance standards on Honda or other vehicle manufacturers for a class, subclass, or fleet of vehicles." *Id.* at 1475-76. As such, no preemption applied there, and similarly, no preemption applies here.

Ford's authorities are readily distinguishable. In *Metro Taxicab*, the initial city rule required "new taxicabs that were put into service on or after October 1, 2008 achieve at least 25 city miles per gallon of fuel, and those that were put into service beginning October 1, 2009 achieve 30 city miles per gallon (the "25/30 MPG rule")." 615 F.3d at 154. That rule was challenged and enjoined, so the city repealed "the 25/30 MPG rule, and issued new rules that regulated taxicab 'lease caps' – the maximum dollar amount per shift for which taxis can be leased – to provide incentives for reduced fuel usage and cleaner taxis." *Id.* at 155. In analyzing whether the new rules were preempted, the court considered "whether the rules relate to 'fuel economy standards,'" in that they "contain a reference to fuel economy standards or make fuel economy standards essential to the operation of those rules." *Id.* at 157. The court found that they did because the rules "expressly rely on a distinction between hybrid and non-hybrid vehicles." *Id.* Specifically, the city rules did "nothing more than draw a distinction between vehicles with greater or lesser fuel-efficiency" and thus did relate to fuel economy standards. *Id.*

Here, by contrast, none of the state laws at issue contains any reference to fuel economy standards, either directly or indirectly, nor do they make fuel economy standards essential to their

operation. Rather, as explained above, the state law claims at issue are consumer protection and other laws of general applicability. Moreover, Plaintiffs do not seek to impose differing fuel economy standards on Ford through their state-law claims; rather, they simply seek to recoup the damages they incurred as a result of Ford's misleading advertising campaign regarding the alleged fuel economy that Ford voluntarily touted as to the Fusion and C-MAX vehicles.

Ford's other authorities do not relate to preemption under Section 32919(a) and are distinguishable on other grounds. For example, in *Morales v. Transworld Airlines*, 504 U.S. 374 (1992), plaintiffs sought to enforce Air Travel Industry Enforcement Guidelines adopted by several states which contained detailed standards governing the content and format of airline advertising, frequent flyer programs and compensation resulting from overbooked flights. There, the Supreme Court found that such guidelines were preempted by the federal regulation at issue, which expressly barred states from "enact[ing] or enforc[ing] any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier. . . ." *Id.* at 379. The Court found specifically that the state guidelines "relate[d] to" airline rates because "every one of the guidelines . . . bears a "reference to" airfares. *Id.* at 388. Here, in contrast, none of the state laws at issue bears any reference to fuel economy standards.

Egelhoff v. Egelhoff ex rel Breiner, 532 U.S. 141 (2001), also shows why Plaintiffs' claims are ***not*** preempted here. There, the Court found that state laws only impermissibly related to ERISA plans "if it has a connection with or reference to such a plan." *Id.* at 147. Because the Washington law at issue bound "ERISA plan administrators to a particular choice of rules for determining beneficiary status," and required them to "pay benefits to the beneficiaries chosen by state law, rather than to those identified in the plan documents," contrary to federal ERISA law, it had an impermissible connection to ERISA plans. *See id.* The Court concluded, "unlike generally

applicable laws regulating areas where ERISA has nothing to say, which we have upheld notwithstanding their incidental effect on ERISA plans, this statute governs the payment of benefits, a central matter of plan administration." *Id.* at 147-48. Again, in contrast, the laws at issue here are laws of general applicability regulating matters such as false advertising, unfair competition, warranties and unjust enrichment. There is no credible argument that the state laws at issue are in anyway "related" to fuel economy standards.

In *Fellows v. CitiMortgage*, 710 F. Supp. 2d 385 (S.D.N.Y. 2010), the plaintiff alleged that CitiMortgage's disclosures regarding cancellation of private mortgage insurance were insufficient under state law, despite the fact that CitiMortgage had fully complied with the disclosure requirements of the Homeowners Protection Act of 1998 ("HPA"). *Id*. at 402. There, the court found that the state law claims were preempted by the HPA because the plaintiff was attempting to "impose requirements for PMI and cancellation and disclosure that are not required by the HPA." *Id*. Unlike in *Fellows*, Plaintiffs do not allege that state law requires Ford to do anything in addition to, or inconsistent with, federal law. The problem is not that Ford said too little, but that it said too much. Importantly, the court also held that Fellows' contract claims were not preempted by the HPA because "the breach of contract claim is not predicated on any violation of state-imposed obligations, but rather on CitiMortgage's purported self-imposed undertaking under the Mortgage." *Id*. at 403. Similarly, Plaintiffs here do not argue that state law places any additional obligations on Ford, but rather that Ford is liable for its voluntary conduct that went beyond the scope of the federal requirements.

Other courts have distinguished *Fellows* and found that preemption does not apply to claims similar to those asserted here. For example, as the court explained in *Dwoskin v. Bank of America, N.A.*, 850 F. Supp. 2d 557 (D. Minn. 2012), the plaintiffs' fraud and consumer law consumer

protection claims did not "relate to" the HPA's disclosure requirements and thus were not preempted. *See id.* at 568. Rather, "claims for fraud or negligent misrepresentation impose a separate duty: the duty not to lie or misrepresent information. *Id.* The court reasoned:

> The fraud and misrepresentation claims center on whether the Bank misrepresented a fact to the plaintiffs. Proving such a claim will not focus on the detailed disclosure provisions of the HPA, but rather on the Bank's alleged false representation to the plaintiffs. . . . As such, they are not preempted by the HPA. Likewise, the Dwoskins' claim under the MCPA seeks to enforce a [] general duty not to mislead or deceive customers.
> . . .
> Unlike *Fellows*, the Dwoskins do not seek to use the MCPA to impose requirements on the content of PMI-related disclosures or the procedures for PMI cancellation. Instead, the Dwoskins seek to use the MCPA to enforce a general claim that a business cannot tell a customer one thing and then proceed to do another. Such claims under the MCPA are not preempted by the HPA.

Id. at 568-69. Similarly, here Plaintiffs' claims seek to enforce a general duty on Ford not to mislead or deceive purchasers of its Vehicles. These types of claims are not preempted under Section 32919(a). No express preemption applies.

2. Implied or Conflict Preemption Does Not Apply

Conflict preemption exists only where it is impossible to comply with both the federal and state law. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984). Where, as here, there is an express preemption clause, that provision informs the Court as to "the existence and scope of any implied preemption." *Paduano*, 169 Cal. App. 4th at 1478 (citing *Farm Raised Salmon*, 42 Cal. 4th at 1092). "'[A]n express definition of the pre-emptive reach of a statute 'implies' – i.e., supports a reasonable inference – that Congress did not intend to pre-empt other matters . . . .'" *Id.* (citing *Farm Raised Salmon*, 42 Cal. 4th at 1092). "[D]eference should be paid to Congress's detailed attempt to clearly define the scope of preemption under the [relevant statutory scheme]." *Id.* at 1478-79 (citing *Farm Raised Salmon*, 42 Cal. 4th at 1092).

Ford's conflicting preemption argument is premised on the baseless contention that Plaintiffs seek to "use the statutory and common law of 16 states to require that Ford modify its Monroney labels (and related representations) to require a different fuel efficiency value . . . using a different test than what is dictated by the EPA requirements." Def. Br. at 30. Tellingly, Ford does not cite to a single allegation in the CAC which requests such a modification. That is because none exists.

What Plaintiffs' CAC alleges is that Ford made specific affirmative statements about the fuel efficiency of the Ford Fusion Hybrid and C-MAX vehicles that were false or misleading. These advertisements went beyond mere reiteration of the EPA estimates. *See, e.g.*, *True*, 520 F. Supp. 2d at 1181 ("Plaintiff's complaint challenges the manner in which Defendant advertised the Honda Civic Hybrid in mediums other than the Monroney Sticker and information booklet"); *Paduano*, 169 Cal. App. 4th at 1480 ("It is the combination of the EPA fuel estimates with Honda's additional assertions in its advertising materials that creates the problem of which Paduano complains.").

False advertising claims regarding fuel economy do not stand as an obstacle to accomplishing the purpose of the EPCA. *See id.*; *True*, 520 F. Supp. 2d at 1181 ("As no clear and manifest Congressional intent to regulate advertising exists, the Court must adhere to the presumption that Congress intended to leave the regulation of false advertising, and unfair business practices of auto manufacturers, to the state. In fact, allowing the States to regulate false advertising and unfair business practices perhaps may further the goals of the EPCA."). *Paduano*, again, is helpful: "if Paduano were to prevail on his [California deceptive practices act] claims, this would not produce an effect that the federal law seeks to avoid with respect to regulating and posting fuel economy estimates. . . . Paduano seeks to regulate statements Honda has made outside the scope of the Monroney Label beyond its mere reiteration of the EPA's estimated fuel economy in its advertising."

169 Cal. App. 4th at 1485; *see also Kim*, Case No. CV 11-06459, Ex. B at 9-10; *True*, 520 F. Supp. 2d at 1180.

Likewise, enforcement of the state statutory and common law claims at issue here would not compromise Ford's compliance with the EPA's testing and labeling requirements. Thus, there is no implied preemption of Plaintiffs' claims.

B. The Primary Jurisdiction Doctrine Does Not Warrant Dismissal

Ford argues the Court should decline jurisdiction under the primary jurisdiction doctrine. However, that doctrine does not apply to the garden variety consumer claims at issue here.

The doctrine of primary jurisdiction arises when a claim "requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body." *United States v. Western Pac. R.R. Co.*, 352 U.S. 59, 64 (1956). Stated somewhat differently, when a case raises "issues of fact not within the conventional experience of judges" or when a case requires "the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over." *Far E. Conference v. United States*, 342 U.S. 570, 575 (1952).

Contrary to Ford's assertion, however, the primary jurisdiction doctrine does not automatically apply whenever the factual subject matter of a lawsuit touches and concerns issues within the purview of an agency. *See Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290, 305 (1978) ("The standards to be applied in an action for fraudulent misrepresentation are within the conventional competence of the courts, and the judgment of a technically expert body is not likely to be helpful in the application of these standards to the facts of this case."). Nor is the primary jurisdiction doctrine intended to "'secure expert advice' for the courts from regulatory agencies

every time a court is presented with an issue conceivably within the agency's ambit." *Brown v. MCI WorldCom Network Servs., Inc.*, 227 F.3d 1166, 1172 (9th Cir. 2002).

While there is no mechanical formula for applying the doctrine of primary jurisdiction, in each case "the question is whether the reasons for the existence of the doctrine are present and whether the purpose it serves will be aided by its application in the particular litigation." *Western Pac. R.R. Co.*, 352 U.S. at 64. In considering whether to apply the doctrine, courts weigh the following four factors:

> (1) whether the question at issue is within the conventional experience of judges or whether it involves technical or policy considerations within the agency's particular field of expertise;
>
> (2) whether the question at issue is particularly within the agency's discretion;
>
> (3) whether there exists a substantial danger of inconsistent rulings; and
>
> (4) whether a prior application to the agency has been made.

RCA Global Commc'ns. Inc., v. Western Union Tel. Co., 521 F. Supp. 998, 1006 (S.D.N.Y. 1981).

Here, applying the same four enumerated factors, the Court should find that the primary jurisdiction doctrine does not apply. Plaintiffs' allegations concern whether Ford's advertisements were deceptive and misleading, a question whose answer does not require specialized expertise of the EPA and is not subject to the EPA's discretion. There is no danger of inconsistent rulings because the EPA will not be asked to determine Plaintiffs' state law claims, and no prior application to an agency regarding the state law claims has been made to the EPA.

The Second Circuit's analysis in *National Communications Association Inc. v. AT&T*, is also instructive:

> This case, however, does not involve the statutory reasonableness of the tariff or other abstract concepts. Instead, it focuses on a threshold question: whether at the time NCA applied, it qualified for Contract Tariff No. 54. *That, in turn, depends on a rather simple factual*

> *question: whether NCA had timely paid its bills. This issue could easily be resolved by a district court in a reasonable amount of time. It does not require the FCC's policy expertise, or its specialized knowledge, and it is within the district court's experience.*

46 F.3d 220, 223 (2d Cir. 1995). Similarly, in the case at bar, the claims involve garden variety issues of whether Ford's advertisements are deceptive. These types of issues are well within the purview of this Court.

Ford's primary jurisdiction argument incorrectly construes the CAC as alleging that Ford failed to follow the correct procedure in estimating fuel efficiency set by the EPA. What the CAC actually alleges, however, is that Ford voluntarily made misleading statements and assertions about the Vehicles' fuel economy that went beyond the mere disclosure of the EPA estimates. Although this lawsuit touches on a subject matter that is regulated by the EPA (fuel efficiency measures), the gravamen of Plaintiffs' case is simple: Ford knew that the fuel efficiency numbers and gas savings it promoted could not realistically be achieved by consumers, but promoted them anyway as a primary selling point for the Vehicles.

Ford's statements constitute false advertising and its conduct violates garden variety consumer protection laws. They require no policy expertise of the EPA. Thus, the Court should not decline to exercise its jurisdiction based on the doctrine of primary jurisdiction.

C. Plaintiffs Do Not Bring a Claim for Violation of the EPCA

Ford also makes the strained argument that, despite what its states, the entire CAC alleges a violation of the EPCA and thus "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." Def. Br. at 24. Plaintiffs, however, do not allege expressly or impliedly a violation of the EPCA anywhere in the CAC as a basis for their consumer protection claims or otherwise.

As support for the proposition that Plaintiffs' claims are an "end run around" the EPCA and its lack of a private right to enforcement, Ford cites *Grochowski v. Phoenix Construction*, 318 F. 3d 80 (2d Cir. 2003). *See* Def. Br. at 23. Ford's argument fails for many of the same reasons that its preemption arguments fail. *See* Part IV.A (describing the differences between Plaintiffs' claims and the enforcement of federally-mandated fuel economy disclosures).

In *Grochowski*, the plaintiffs were employed on various public works construction projects and the wages they earned were governed by the Davis-Bacon Act ("DBA"), which did not provide a private right of action. *Id*. at 85. Plaintiffs sued their employers under state common law to recover unpaid wages and overtime compensation required by the DBA. *Id*. at 83-84. Plaintiffs' claims in *Grochowski* failed because they were attempting to use state law to enforce specific requirements – wages schedules for construction workers – that were established by the federal Davis-Bacon Act. *Id.* at 86. Plaintiffs in this case do not make an analogous claim. Plaintiffs do not claim that state consumer protection laws provide a private right of action for enforcing the federally-mandated fuel economy disclosures governed by the EPCA. Instead, Plaintiffs allege that Ford's advertisements about the Vehicles' fuel economy, which went beyond the disclosures required by the EPCA, were false and misleading.

Metropolitan Taxicab Board of Trade v. City of New York, No. 08 Civ. 7837 (PAC), 2008 WL 4866021 (S.D.N.Y. Oct. 31, 2008), is instructive on this point. There, the district court concluded that plaintiffs would suffer irreparable harm (an unrecoverable loss of money) if the city rule imposing different fees for hybrid taxicabs versus non-hybrid taxicabs was enforced because the EPCA did not permit a private right of action, and thus "it is likely that a court would not permit Plaintiffs to recover their expected damages [for violation of the ECPA] through a § 1983 claim." *Id*. at *6.

Plaintiffs in this case, however, have not pled an EPCA violation and are not attempting to use Section 1983 or state law to pursue damages under the EPCA. The court in *Metro Taxicab* also found that the EPCA preempted the TLC regulations because they "set standards that relate to an average number of miles that New York City taxicabs must travel per gallon of gasoline," *id.*, at *9, and imposed a fuel economy mandate on taxicabs, *id.*, at *11. The consumer protection laws under which Plaintiffs are pursuing their claims, in contrast, are laws of general applicability that address false or misleading advertising advertisements. The state laws at issue here contain no such fuel economy mandates and make no reference to the EPCA; thus, they are readily distinguishable from the type of regulation that overlaps with the requirements of the EPCA.

D. Ford's Advertisements Regarding the Vehicles' Fuel Economy Are Actionable even if Accompanied by Federally-Mandated Disclosures

Throughout its Motion, Ford essentially argues that any advertisements in which it made statements regarding the Vehicles' fuel economy that also contain the federally-mandated disclosures are not actionable, regardless of the content of the specific advertisement. *See* Def. Br. at 18, 20-21. Ford essentially argues that it can include false and misleading statements in its advertisements – statements that go well beyond federally-regulated EPA estimates – as long as the advertisements also contains the federally-mandated disclosure. The law says otherwise.

Advertisers cannot use fine print to contradict other statements in an ad. *Cliffdale Associates, Inc*. 103 F.T.C.110, 180-81 (F.T.C. 1984). An advertising practice falls within the prohibition of deceptive acts or practices in or effecting commerce (1) if it is likely to mislead consumers acting reasonably under the circumstances (2) in a way that is material. *FTC v. Gill*, 265 F.3d 944, 950 (9th Cir. 2001) (citing *FTC v. Pantron I Corp*., 33 F.3d 1088, 1095 (9th Cir. 1994)). A misleading impression is material if it "involves information that is important to consumers and, hence, likely to affect their choice of, or conduct regarding, a product." *F.T.C. v. Cyberspace.com, LLC*, 453 F.3d

1196, 1201 (9th Cir. 2006); *F.T.C. v. Commerce Planet, Inc.*, 8:09-CV-01324-CJC, 2012 WL 2930418, at *8 (C.D. Cal. June 22, 2012). Deception may not be sufficiently cured merely by the inclusion of disclaimers in small print. *Cyberspace.com*, 453 F.3d at 1200; *Chapman v. Skype Inc.*, 220 Cal. App. 4th 217, 231 (Cal. App. 2d Dist. 2013) (effect of disclosures is a question of fact not appropriate for resolution on a motion to dismiss); *F.T.C. v. John Beck Amazing Profits, LLC*, 865 F. Supp. 2d 1052 (C.D. Cal. 2012). And in any event, whether a fine-print disclosure is sufficient to avoid deception is a question of fact, not ordinarily suitable for a motion to dismiss. *See, e.g.*, *Chapman v. Skype Inc.*, 220 Cal. App. 4th 217, 231 (Cal. App. 2d Dist. 2013) ("In our view, Chapman adequately alleges a misrepresentation of fact based on Skype's use of the word "Unlimited" to describe calling plans that were not unlimited. Whether Skype disclosed the limits in a manner that would avoid any deception goes mainly to the issue of justifiable reliance. This is a question of fact.").

Here, Ford argues that its assertions regarding the Vehicles' fuel economy are not actionable because they contain the federally-mandated disclosure language. However, use of the federally-mandated disclosure language in the fine print of its advertisements does not give Ford carte blanche to make any false assertions it wishes regarding the fuel economy of the Vehicles. Here, Ford's advertisements were designed to and did leave consumers with the impression that the advertised fuel economy and attendant gas savings can be achieved. Information contrary to Ford's overall message that is buried in small-print does not provide Ford a safe harbor that allows it to evade the remedial consumer protection laws and any accompanying liability that may arise from its overall deceptive advertising campaign. *See, infra*, pg. 40 (discussing remedial nature of consumer protection laws). Ford's argument should be rejected.

E. Plaintiffs' Claims are Sufficiently Pled

1. Many of Plaintiffs' Claims Are Governed by Rule 8(a)

Plaintiffs have provided sufficient detail regarding Ford's conduct to support their claims. Nevertheless, Ford focuses heavily on the particularity requirements of Rule 9(b), with only a passing reference to the requirements of Rule 8 even though Rule 8 serves as the guidepost for the majority of Plaintiffs' claims.

"Federal Rule of Civil Procedure 8 requires a complaint to contain 'a short and plain statement of the claim showing that the pleader is entitled to relief.'" *DiPetto v. U.S. Postal Serv.*, 383 Fed. Appx. 102, 103 (2d Cir. 2010) (quoting Fed. R. Civ. P. 8(a)(2)). "Th[e]…notice pleading standard [of Rule 8(a)] relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims." *Pelman ex rel. Pelman v. McDonald's Corp.*, 396 F.3d 508, 512 (2d Cir. 2005) (quoting *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512-13 (2002)).

In *Twombly*, the Supreme Court endorsed Rule 8(a)(2)'s general requirements that a complaint provide only "a short and plain statement of the claim showing that the pleader is entitled to relief." 550 U.S. at 554. Detailed facts are therefore not necessary, and the statement need only "give the defendant fair notice of what the … claim is and the grounds upon which it rests." 550 U.S. at 555-56; *see Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (collecting cases). *Twombly* found that the requirement that complaints plausibly state claims simply "reflects the threshold requirement of Rule 8(a)(2) that the 'plain statement' possess enough heft to 'sho[w] that the pleader is entitled to relief.'" 550 U.S. at 556-57.

The Second Circuit has found that *Twombly* and *Iqbal* did not alter the long-standing notice pleading standard for Rule 8(a)(2). *See Arista Records, LLC v. Doe 3*, 604 F.3d 110, 119-20 (2d Cir.

2010) (rejecting the notion that *Twombly* and *Iqbal* imposed a heightened pleading standard that requires "a complaint to include specific evidence, [and] factual allegations in addition to those required by Rule 8 . . . .").

Substantive state and federal law determine whether the elements of the alleged claims at issue sound in fraud, thereby triggering the application of Rule 9(b). *See Quinn*, 2013 WL 4007568, at *7-8 (finding New York and Connecticut consumer protection acts are not subject to heightened pleading requirements of Rule 9(b)); *Leonard v. Abbott Labs., Inc.*, No. 10-CV-4676 (ADS) (WDW), 2012 WL 764199, at *20 (E.D.N.Y. Mar. 5, 2012) (following Second Circuit precedent and finding state law claims that do not require the elements of common law fraud such as reliance are governed by Rule 8(a), not 9(b)) (citing *City of New York v. Smokes–Spirits.com, Inc.*, 541 F.3d 425 (2d Cir. 2008)); *Pelman*, 396 F.3d at 511; *accord Schoenfeld v. Giant Stores Corp.*, 62 F.R.D. 348, 350 (S.D.N.Y. 1974) (denying motion to dismiss in class action based on Rule 9(b) because the Rule explicitly limits its scope to pleadings which involve fraud or mistake).

Courts have found that "no matter how parsed," false advertising is not identical to a claim of fraud because "[f]raud requires[] not just the making of a statement known to be false, but also, *inter alia*, a specific intent to harm the victim and defraud him of his money or property." *See*, *e.g.*, *John P. Villano Inc. v. CBS, Inc.*, 176 F.R.D. 130, 131 (S.D.N.Y. 1997). Accordingly, "[t]he making of a false statement [in advertising] is not *per se* one of those 'Special Matters' that Rule 9 requires be specially pleaded. Rather, the particularity requirement of Rule 9(b) is limited to averments of 'fraud or mistake.'"[6] *Id.* The only allegation that Ford intended to defraud Plaintiffs and the Class

[6] On this point, *Villano* is compelling because it involved false advertising under the Lanham Act, which requires proof of actual deception, rather than its likelihood, which is the Federal Trade Commission Act ("FTC Act") standard that serves as a model for most state consumer fraud acts that prohibit deceptive or unfair trade practices. *See Sandoz Pharms. Corp. v. Richardson-Vicks, Inc.*,

and deprive them of their money appears in Plaintiffs' Count for fraud. *See* ¶¶318-23. Ford ignores this point entirely and foregoes any careful analysis of the other 27 counts.[7]

Contrary to Ford's position, the heightened pleading requirements of Rule 9(b) do not apply to Plaintiffs' consumer protection claims, except in the rare instance that those claims are expressly predicated on fraudulent conduct. *See Quinn*, 2013 WL 4007568, at *7 (citing *Pelman ex rel. Pelman*, 396 F.3d at 511) (holding that claims brought under New York and Connecticut consumer protection statutes are not subject to the heightened pleading requirements of Rule 9(b)); *Galstaldi v. Sunvest Cmtys. USA, LLC*, 637 F. Supp. 2d 1045, 1058 (S.D. Fla. 2009) (Rule 9(b) does not apply to claims brought under the FDUTPA); *McKie v. Sears Protection Co.*, No. 10-1531-PK, 2011 WL 1587103, at *3 (D. Or. Apr. 26, 2011) (claims brought pursuant to Oregon's Unfair Trade Practices Act need not meet the pleading requirements of Rule 9(b)).

In addition, where, as here, many of Plaintiffs' claims are founded on unfair conduct, Plaintiffs need not meet the heightened pleading standards of Rule 9(b). *See Windy City Metal Fabricators & Supply, Inc. v. CIT Technology Financing Servs., Inc.*, 536 F.3d 663, 670 (7th Cir. 2008) (stating that "[b]ecause neither fraud nor mistake is an element of unfair conduct under Illinois' Consumer Fraud Act, a cause of action for unfair practices under the Consumer Fraud Act

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902 F.2d 222, 230 (3d. Cir. 1990) (setting forth Lanham Act versus Federal Trade Commission Act standards); *FTC v. Med. Billers Network, Inc.*, 543 F. Supp. 2d 283, 314 (S.D.N.Y. 2008) (citing *FTC v. Communidyne, Inc.*, 1993 WL 558754, at *2 (N.D. Ill. Dec. 3, 1993) ("a claim under Section 5(a) is not a claim of fraud or mistake subject to Rule 9(b) because has *no scienter or reliance requirement*")); *id.* (citing *FTC v. Nat'l Testing Servs., LLC*, No. 3:05-613, 2005 WL 2000634 at *2 (M.D. Term. Aug. 18, 2005) ("Rule 9(b) does not apply to Section 5(a) claims because *neither intent to deceive, proof of consumer reliance, nor proof of consumer injury are necessary elements*")).

[7] *See* ¶¶318-23 (Twenty-Second Cause of Action) (common law fraud). The remaining counts are based on state unfair or deceptive trade practice acts (¶¶312-17); breach of warranty (¶¶341-51); Magnuson-Moss Warranty Act (¶¶352-60); and unjust enrichment (¶¶361-65).

need only meet the notice pleading standard of Rule 8(a), not the particularity requirement in Rule 9(b)."); *Seldon v. Home Loan Servs., Inc.*, 647 F. Supp. 2d 451, 469-70 (E.D. Pa. 2009) (claims pled under the catchall provision of the Pennsylvania Unfair Trade Practices and Consumer Protection Law need not meet Rule 9(b)'s particularity requirement); *Trunzo v. Citi Mortg.*, 876 F. Supp. 2d 521, 542 (W.D. Pa. 2012) (same); *Vernon v. Qwest Commc'ns Int'l., Inc.*, 643 F. Supp. 2d 1256, 1265 (W.D. Wash. 2009) (allegations of likely deception under the Washington and Minnesota consumer protection do not trigger Rule 9(b)'s heightened pleading requirements).

As shown above, the majority of Plaintiffs' claims are subject to the liberal pleading requirements of Rule 8, which Plaintiffs have more than adequately met, as discussed further below. Ford's argument that Plaintiffs' claims should be dismissed based upon Rule 9(b) is not well-taken.

2. Rule 9(b) Pleading Standards Are Relaxed in This Case

To the extent that Rule 9(b) applies to any of Plaintiffs' claims, Ford misstates its requirements in the context of Plaintiffs' allegations. Ford assumes that the rule broadly requires a heightened fact pleading standard in all instances. Def. Br. at 39. In so doing, Ford fails to consider the elements or factual context of Plaintiffs' claims with respect to Rule 9(b). Ford's broad-brush approach is wrong for several reasons.

First, this Court has found that "Rule 9(b) must still be read in light of the liberal pleading requirement of Rule 8, which only requires a 'short and plain statement' of the claim." *Glidepath Holding B.V. v. Spherion Corp.*, 590 F. Supp. 2d 435, 451 (S.D.N.Y. 2007) (Karas, J., presiding). *See also* WRIGHT & MILLER, 5A Fed. Prac. & Proc. Civ. § 1298:

> [Rule 8 and Rule 9(b)] must be read in conjunction with each other. . . . Thus, it is inappropriate to focus exclusively on the fact that Rule 9(b) requires particularity in pleading the circumstances of fraud. This is too narrow an approach and fails to take account of the general simplicity and flexibility contemplated by the federal rules and the many cases construing them; in a sense, therefore, the rule

> regarding the pleading of fraud does not require absolute particularity or a recital of the evidence, especially when some matters are beyond the knowledge of the pleader and can only be developed through discovery.

"Plaintiffs are [thus] not required to plead with detailed evidence." *Id.*; *In re Bayer Corp., Combination Aspirin Prods. Mktg. & Sales Practs. Litig.*, 701 F. Supp. 2d 356, 366 (E.D.N.Y. 2010) (citing *Int'l Motor Sports Group, Inc. v. Gordon*, No. 82709, 98 CIV 5611, 1999 WL 619633, at *4 (S.D.N.Y. Aug. 16, 1999) ("Rule 9(b) 'does not require that a complaint plead fraud with the detail of a desk calendar or a street map.'")). Under Rule 9(b), "allegations may [even] be made on information and belief where the fraud is based on matters within the adverse party's sole knowledge" provided they are "accompanied by a statement of the facts upon which the belief is founded." *Id.* at 451-52.

Second, Rule 9(b) must be considered in light of its purposes and the complaint's factual context and circumstances. "Rule 9(b) generally requires that a plaintiff specify the who, what, where, when and why of the alleged fraud; specifying which statements were fraudulent and why, who made the statements to whom, and when and where the statements were made." *Jovel v. i-Health, Inc.*, No. 12CV5614 (JG), 2013 WL 5437065, at *11 (E.D.N.Y. Sept. 27, 2013). "Whether a complaint complies with the Rule [(9)(b)] however depends 'upon the nature of the case, the complexity or simplicity of the transaction or occurrence, the relationship of the parties and the determination of how much circumstantial detail is necessary to give notice to the adverse party and enable him to prepare a responsive pleading.'" *United States v. Wells Fargo Bank, N.A.*, No. 12 Civ. 7527(JMF), 2013 WL 5312564, at *16 (S.D.N.Y. Sept. 24, 2013). "It is only common sense that the sufficiency of pleadings under Rule 9(b) may depend upon the nature of the case . . . ." *U.S. Bank Nat. Ass'n v. PHL Variable Ins. Co.*, No. 12 Civ. 6811(CM)(JCF), 2013 WL 791462, at *9 (S.D.N.Y. Mar. 5, 2013). "To approach the issue otherwise would allow the more sophisticated to escape

liability . . . due to the complexity of their scheme and their deviousness in escaping detection." *Id.*; *HealthONE of Denver, Inc. v. UnitedHealth Group Inc.*, 805 F. Supp. 2d 1115, 1121 (D. Co. Mar. 28, 2011) (finding Rule 9(b) must be read in conjunction with Rule 8, which requires only simple and concise pleading, and that "a court must not allow particularity requirements to pervert and allow a "sophisticated defrauder[ ] [to] successfully [ ] conceal the details of their fraud.").

Accordingly, "[w]here the misstatements are alleged to have occurred over a period of time . . . the pleadings are not required 'to provide the date and time of every communication. . . .'" *Lehman Bros. Commer. Corp. v. Minmetals Int'l Non-Ferrous Metals Trading Co.*, No. 94 Civ. 8301(JFK), 1995 WL 608323, at *2 (S.D.N.Y. Oct. 16, 1995). "Moreover, in cases where knowledge of who uttered the statements is in the control of the defendants, the pleadings need not pinpoint precisely who the speaker was before discovery is taken." *Id.*; *Dwoskin*, 850 F. Supp. 2d at 569 ("Despite the particularity requirements of FRCP 9(b), "conclusory allegations of defendant's knowledge as to the true facts and of defendant's intent to deceive" are allowed."). Rule 9(b) "does not require absolute particularity or a recital of the evidence, especially when some matters are beyond the knowledge of the pleader and can only be developed through discovery." WRIGHT & MILLER, 5A Fed. Prac. & Proc. Civ. § 1298.

The same analysis holds true for claims, like those asserted here, based on nationwide advertising and misconduct that occurred over a period of months. The case most directly on point is *True*, which, like this case, alleged false advertising and misrepresentation of fuel economy on a nationwide basis. In *True*, the plaintiff brought deceptive trade practices and false advertising claims under state law, alleging that Honda advertised the Honda Civic Hybrid ("HCH") with allegedly false statements of its fuel efficiency and the prospective cost savings to the consumer. *See* 520 F. Supp. 2d at 1178. The plaintiff also alleged that Honda "'communicated' misleading or deceptive

advertisements 'to every consumer who purchased an HCH during the Class Period, and the ads were a substantial factor, if not the controlling factor, in inducing Plaintiff and the putative class members to purchase the HCH.'" *Id*. at 1183. Honda challenged the complaint in part based on Rule 9(b). The court rejected Honda's challenge finding that the plaintiff had adequately pled his false advertising claims:

> Plaintiff's allegations are sufficient to give Defendant fair notice of the particular misconduct that forms the basis of his claims. *Vess*, 317 F.3d at 1106. Plaintiff alleges that between March 1, 2003, and March 1, 2007 (when), Defendant advertised the HCH in print and on the Internet (how) to consumers (who) throughout the United States (where) with statements of its fuel efficiency and the prospective cost savings to the consumer that were up to 53 percent below actual figures, while omitting or softening the "[a]ctual mileage will vary" disclaimer (what). (Compl.¶¶ 1, 4, 19–20.)
>
> Although Plaintiff's Complaint alleges only in general terms that the advertisements induced Plaintiff to purchase the HCH, Plaintiff's knowledge and state of mind are not subject to Rule 9(b). *See* Fed. R. Civ. P. 9(b) ("Malice, intent, *knowledge, and other condition of mind of a person* may be averred generally.") (emphasis added). Thus, Defendant's argument that Plaintiff must demonstrate which particular advertisements induced him to purchase the HCH is premature at the pleading stage. Defendant's motion under Rule 9(b) is denied.

Id. at 1183; *accord Jovel*, 2013 WL 5437065, at *11 (discussing who, where, when, what, and how Rule under 9(b)). As explained in detail below, Plaintiffs have sufficiently alleged their claims to put Ford on notice of their claims. Nothing more is required at this stage of the litigation.

3. Plaintiffs' Consumer Protection Claims Are Adequately Pled

Ford's assertion that Plaintiffs' consumer protection claims are not pleaded with the requisite particularity under Rule 9(b) is erroneous. Even if Rule 9(b) does apply in some form, which as

shown above is not true as to the vast majority of Plaintiffs' consumer protection claims, the allegations are sufficiently particularized to put Defendant on notice of the misconduct at issue.

Specifically, as to each of their claims and in the factual context of the CAC, Plaintiffs have clearly set forth factual allegations that meet the appropriate pleading standards: Plaintiffs have alleged the "where" (*i.e.*, ads appearing in TV commercials, magazine ads, social media, "Webisodes," newspapers, brochures, Ford's website, and press releases, *see* ¶¶3, 13-40, 58, 64, 66-67, 71-72, 75, 77-82); the "what" (*i.e.*, specifically-identified advertisements relating to the Vehicles' fuel economy, *see* ¶¶5, 13, 51, 56, 62-67, 70-84, 100, 114); the "who" (*i.e.*, Ford); the "when' (*i.e.*, 2013 Model year advertisements, beginning in September 2012, *see* ¶¶ 3-4, 56, 64, 74, 76); and the "why" (*i.e.*, consumers were misled about the fuel economy of the Vehicles, *see* ¶¶ 5, 68, 85-96, 103).[8] This detailed information is sufficient to place Ford on notice of the basis of Plaintiffs' claims such that it may prepare its defense of this action, and thus, the claims readily satisfies Rule 9(b).

Ford's position is particularly unpersuasive considering that it is well aware of the contents of its own advertising materials and is thus readily able to ascertain the time and place it used the misleading language. *See Rosales v. FitFlop USA, LLC*, 882 F. Supp. 2d 1168, 1175-77 (S.D. Cal. 2012) (finding plaintiffs satisfied Rule 9(b) for California's UCL and CLRA claims where complaint included allegations of defendant's marketing misrepresentations that were part of an extensive advertising campaign, the relevant time period of those misrepresentations, and examples of the marketing materials which were representative of the alleged misrepresentations, upon which

[8] Despite Ford's argument to the contrary, each named Plaintiff in the CAC is alleged to have viewed and relied upon at least one advertisement with a misleading representation about the Vehicles' fuel economy, and the substance of such representations are described. *See* ¶¶13-40.

plaintiffs relied in making their purchases); *Von Koenig v. Snapple Beverage Corp.*, 713 F. Supp. 2d 1066, 1077 (E.D. Cal. 2010) (finding allegations of time frame of deceptive marketing, including "examples" of the marketing, which deceived consumers, were "sufficient to establish the "time, place, and specific content" requirements of Rule 9(b)" for California's Unfair Competition Law and California's False Advertising Law).

Despite sufficient notice of the claims against it, Ford contends that Plaintiffs have not adequately stated a cause of action under the various state consumer protections laws. But, setting aside its "safe harbor" argument, Ford proffers only a single argument that Plaintiffs have not sufficiently pled their consumer protection claims, namely, that Plaintiffs' failed to allege that they were "exposed to an actionable misrepresentation." Def. Br. at 34-35. Notably, Ford does *not* challenge that its representations were material to a reasonable consumer. Nor does it challenge whether Plaintiffs have alleged reliance or causation under any particular statute, aside from its overarching claim that Plaintiffs have failed to establish that they were exposed to an actionable misrepresentation.

Plaintiffs have plainly alleged that they were exposed to actionable misrepresentations. Each Plaintiff alleges that he or she was exposed to, and relied on, statements by Ford that his or her Fusion or C-MAX vehicle would "achieve" and "get" 47 MPG, and in many instances, that the Vehicles would deliver better fuel economy than the Toyota Prius or the Toyota Camry Hybrid. *See* ¶¶13-40. And, throughout the CAC, Plaintiffs provide detailed examples of the types of advertisements they saw. *See, e.g.*, ¶63 ("The all new Fusion Hybrid achieves 47 combinged mpg…;" "Fusion Hybrid gets 47 MPG…"). At the pleading stage, Plaintiffs' contentions are sufficient to allege that Plaintiffs were actually exposed to and relied on Ford's misleading advertisements, and certainly sufficient to allege causation and damages for those consumer

protection statutes that require such a showing. To the extent Ford wishes to know more, it will have an opportunity to take discovery in due course.

Ford, however, seems to believe that Plaintiffs are required to identify the *exact* advertisements that each Plaintiff saw because some advertisements – those that use the EPA 47 MPG figure or include disclosures – are not actionable. Therefore, Ford claims, without knowing the *exact* advertisements Plaintiffs saw, the Court cannot determine whether the advertisements they saw were actionable. Again, however, Ford's argument is premised on a misreading of Plaintiffs' case. Plaintiffs do not allege that Ford failed to include disclosures stating that 47 MPG was an "EPA estimate." Instead, Plaintiffs allege that Ford's advertisements were nevertheless deceptive and misleading because they included additional, voluntary statements that were designed to leave consumers with the impression that 47 MPG was the fuel economy the Vehicles *could* achieve, irrespective of whether 47 MPG was also an EPA estimate. *See* Part II.B, II.D. Plaintiffs allege that Ford's promotion of the Fusion and C-MAX vehicles revolved around its 47 MPG promise and that its marketing campaign was designed to convey its real-world 47 MPG message to all would-be purchasers. Each Plaintiff alleges that he or she was exposed to, and relied on, such advertisements, and were damaged as a result. *See* ¶¶13-40.

Ford also argues that the misrepresentations identified by Plaintiffs are not actionable because they are barred by the savings clauses in certain state consumer protection laws. Ford's argument again misinterprets Plaintiffs' claims and misapplies the safe harbor provisions. Its reliance on *Brett* exemplifies the shortcomings in Ford's argument. 2008 WL 4329876. In *Brett*, plaintiffs alleged that the advertisement of the EPA estimates, alone, misrepresented the fuel economy of the Prius in violation of the FDUTPA. *Id.* at *1-2. The Plaintiffs in *Brett* also alleged that Toyota should have provided more accurate fuel economy numbers, in addition to the EPA

estimates. *Id.* at *7. Plaintiffs here do not make either claim, and instead challenge Ford's additional, voluntary statements about the Vehicles' fuel economy that went beyond the mere disclosure of the EPA estimates. *Brett* is inapplicable.

Furthermore, similar to the savings clauses in the other consumer protection statutes at issue, FDUTPA prohibits claims relating to an act or practice "required" or "specifically permitted" by federal or state law. But, a plaintiff need not demonstrate that a defendant's conduct violated a specific rule to be deceptive. *Prohias v. Pfizer, Inc.*, 490 F. Supp. 2d 1228, 1233 (S.D. Fla. 2007).

Here, the relevant savings clauses are inapplicable because the EPCA does not require or specifically permit the conduct Plaintiffs allege. As explained above, Ford's alleged misconduct went beyond the mere disclosure of an EPA estimate. As alleged throughout the CAC, Ford's advertisements were predicated upon false and misleading statements that gave consumers the impression that the Vehicles could achieve a certain fuel economy, that consumers would save money at the pump, and that the fuel economy of the Vehicles was superior to competitive hybrid vehicles in the market. Further, Ford repeatedly advertised that the C-MAX "delivered" and "achieved" the EPA-estimated fuel economy, creating a false impression for consumers. Ford's deceptive conduct is certainly not required or specifically permitted by the EPA.

The EPA did not approve Ford's marketing campaign, and it undoubtedly did not permit Ford to make the additional deceptive representations alongside the fuel economy estimates including, for example, that the C-MAX "delivered" or "achieved" the EPA-estimated fuel economy or that the C-MAX would "offer 'real car' range at 570 miles on one tank of gas" or "beats Prius V with better mpg." *See Blue Cross & Blue Shield of N.J., Inc. v. Phillip Morris, Inc.*, 133 F. Supp. 2d 162, 175-76 (E.D.N.Y. 2001) (declining to apply savings clause in New York General Business Law §349, and finding that "[c]ompliance with regulations does not immunize misconduct outside the

regulatory scope;" "[n]o case holds that when intentional deception is alleged, unrelated regulatory supervision immunizes[]," and "[r]egulatory compliance with federal agencies does not warrant a blanket protection…"); *see also In re Frito-Lay N. Am., Inc. All Natural Litig.*, No. 12-MD-2413(RRM)(RLM), 2013 WL 4647512, at *20-23 (E.D.N.Y. Aug. 29, 2013) (declining to apply safe harbor provisions of New York, Florida and California consumer protection statutes where Defendant promoted products as "all natural" and laws did not "specifically permit" such labeling); *In re Horizon Organic Milk Plus DHA Omega-3 Marketing and Sales Practice Litig.*, No. 12-md-02324, 2013 WL 3830124, at *23-25 (S.D. Fla. July 24, 2013) (concluding that Arizona, Florida, and Illinois safe harbor provisions did not apply where advertisements went beyond representations approved or authorized by FDA or FTC); *Mary Elizabeth Nursing Center, Inc. v. Lyon*, No. CV116010713, 2012 WL 6924420, *4 (Conn. Super. Ct. Dec. 24, 2012) ("[T]he burden [of proving the statutory exception under § 42–110c is a difficult one to meet. . . . [A] defendant must show that such scheme affirmatively permits the practice which is alleged to be unfair or deceptive."); *Hinds v. Paul's Auto Werkstatt, Inc.*, 810 P.2d 874, 876 (Or. Ct. App. 1991) ("We construe ORS 646.612(1) to exempt only *conduct* that is *mandated* by other laws") (emphasis in original); *Walker v. Wenatchee Valley Truck and Auto Outlet, Inc.*, 229 P.3d 871, 878 (Wash Ct. App. 2010) ("[T]he activity in question must be expressly permitted instead of merely being not prohibited. No administrative code provision approved or authorized the advertising utilized here.").[9] As a result, the cases cited by Ford are inapplicable.

In addition to sufficiently identifying the advertisements that were deceptive and misleading, Plaintiffs have adequately asserted that Ford's conduct is proscribed by each state's consumer

[9] Ford does not identify safe harbor provisions in Maryland, Minnesota, Missouri, Pennsylvania, and Wisconsin. Def. Br. at 37, n. 12.

protection law, which similarly require Plaintiffs to allege that Ford engaged in deceptive or unfair conduct directed at consumers.

For example, Plaintiffs allege:

- "[W]ith the 2013 model year, Ford launched a massive and misleading advertising campaign designed to convey to the autobuying public that two of its new 2013 hybrid models - the all new second generation Fusion Hybrid and the C-MAX - had made a quantum leap in fuel economy and now delivered 47 city, 47 highway and 47 MPG combined . . . ." ¶3.

- "The problem for consumers was that Ford's "47 MPG" advertising campaign was highly misleading, as the fuel economy of the 2013 Fusion Hybrid and C-MAX vehicles were no better than the Company's prior hybrid offerings. Outside of the laboratory, under real-world driving conditions, consumers who purchased a 2013 Fusion Hybrid or C-MAX hybrid found themselves consistently unable to get anywhere near the advertised 47 MPG. Ford knew that its 2013 Fusion Hybrid and C-MAX could not deliver 47 MPG under real-world driving conditions . . . ." ¶5.

- The representations that Ford made in its widespread marketing campaign "were false and misleading in that they left reasonable consumers with the overall impression that Ford's 2013 Fusion Hybrid and C-MAX did, in fact, deliver the 47 MPG and that they would be able to achieve these fuel economy figures under real world driving conditions." ¶68.

- "As Ford's rapid increase in hybrid market share reflects, consumers were in fact influenced by Ford's "47" campaign and reasonably believed that the Vehicles would deliver 47 MPG under normal, real-world driving conditions." ¶87.

- "Even though Ford knew that its 2013 Fusion Hybrid and C-MAX did not actually get anywhere near 47 MPG, it still chose to implement a massive "47 MPG" advertising campaign overstating the real world fuel economy of the Vehicles. And it continued the "47 MPG" campaign after buyers complained that the Vehicles actually deliver much lower mileage." ¶95.

- "As a result of Ford's misleading "47 MPG" campaign, buyers and lessees of 2013 Fusion Hybrid and C-MAX are stuck with cars that deliver substantially less fuel economy than they reasonably expected (and could have received by buying another hybrid). Their cars will each produce about a half ton more carbon dioxide per year, they will have to re-fuel more often, and they will incur additional fuel costs. In addition, because the desirability and market value of vehicles is so heavily dependent on fuel economy, their cars are worth less and cannot be re-sold as easily or for as much money." ¶103.

Plaintiffs' allegations describe deceptive and misleading conduct and are more than sufficient to state a claim for violations of the various state consumer protection laws.

Notably, the consumer protection statutes at issue are remedial in nature and should be liberally construed in favor of protecting consumers. *See, e.g.*, *New York v. Feldman*, 210 F. Supp. 2d 294, 301 (S.D.N.Y. 2002) (N.Y. Gen. Bus. Law § 349 "was intended to be broadly applicable, extending far beyond the reach of common law fraud"); *Trunzo v. Citi Mortg.*, 876 F. Supp. 2d at 541 (Pennsylvania's Unfair Trade Practices and Consumer Protection Law "should be liberally construed in order to effect its legislative goal of consumer protection"); *Wright v. Kia Motors America, Inc.*, No. Civ. 06-6212-AA, 2007 WL 316351, at *2 (D. Or. Jan. 29, 2007) (Oregon Unlawful Trade Practices Act is "intended to provide broad remedial consumer protection"); *Quinn*, 2013 WL 4007568, at *7 (Connecticut Unfair Trade Practices Act "is intended to be liberally construed in an effort to effectuate its public policy goals"); *Khoday v. Symantec Corp.*, 858 F. Supp. 2d 1004, 1011, 1116 (D. Minn. 2012) (stating that California's Consumer Legal Remedies Act and Minnesota's Consumer Fraud Act should be liberally construed); *Tandy v. Marti*, 213 F. Supp. 2d 935, 937 (S.D. Ill. 2002) (finding that the Illinois Consumer Fraud Act "is to be construed liberally to effects its purpose"). And, under the consumer protection laws at issue, whether a particular act or practice is deceptive is typically a question of fact, which is not appropriate for resolution on a motion to dismiss. *Quinn*, 2013 WL 4007568, at *7; *Hughes v. Ester C. Co.*, 930 F Supp. 2d 439, 467, 473 (E.D.N.Y. 2013).

Plaintiffs allege that Ford's advertising campaign was misleading, and it is premature to decide as a matter of law whether or not its statements are deceptive. Rather, given that Plaintiffs have adequately pleaded the elements of their consumer protection claims, including the misleading

statements at issue, Plaintiffs' exposure to those statements, causation, and damages, the Court should deny Ford's motion to dismiss those claims.

4. Plaintiffs' Common Law Claims Are Adequately Pled

a. Plaintiffs State a Claim for Common Law Fraud

Plaintiffs allege a straightforward common law fraud claim and, in doing so, have adequately alleged each element. To state a claim for common law fraud, a plaintiff must establish that the defendant made a "(1) a material representation or omission of fact; (2) made with knowledge of its falsity; (3) with an intent to defraud; and (4) reasonable reliance on the part of the plaintiff, (5) that causes damage to the plaintiff." *Terra Secs. Asa Konkursbo v. Citigroup, Inc.*, 740 F. Supp. 2d 441, 447-48 (S.D.N.Y. 2010); *Hughes*, 930 F. Supp. 2d at 472 (finding plaintiffs adequately pled claim for fraud (or intentional misrepresentation) with allegations that defendants promoted products as having qualities they did not possess).

In detailed allegations throughout the CAC, Plaintiffs allege that Ford engaged in a uniform, widespread marketing campaign in which it perpetuated fraudulent misrepresentations regarding the Vehicles' fuel economy, with the intent to defraud Plaintiffs, who reasonably relied upon those statements to their detriment. Indeed, in addition to identifying the specific marketing materials at issue, which were part of a broad scheme to defraud consumers, each Plaintiff specifically alleges the material misrepresentations to which they were exposed. *See* ¶¶ 13-40. Each Plaintiff also alleges that he or she would not have purchased the Vehicles had they known the Vehicles' could not achieve the advertised fuel economy or the accompanying savings, and that they sustained damages as a result in the form of additional fuel costs and loss of resale value. ¶¶8, 13-40.

These allegations, as set forth more fully above and in the CAC, amply state a claim for common law fraud.[10] *See, e.g.*, *Zito v. Leasecomm Corp.*, No. 02 Civ.8074(GEL), 2003 WL 22251352, at *28 (S.D.N.Y. Sept. 30, 2003) ("While as a general rule, it is indeed necessary for the time and place of a fraudulent representation to be specified in the complaint, this requirement has been relaxed where the complaint describes the 'nature and operation of the scheme in which the defendants are *alleged* to have participated.'").

Ford argues that Plaintiffs have not met the scienter element of a fraud claim. However, the scienter element of fraud does not require "great specificity," and is "sufficient if supported by facts giving rise to a strong inference of fraudulent intent." *Tribune Co. v. Purcigliotti*, 869 F. Supp. 1076, 1090 (S.D.N.Y. 1994). A complaint can meet this standard either by (1) alleging facts to show a defendant had both motive and clear opportunity to commit fraud, or by (2) alleging facts that establish strong circumstantial evidence of a defendant's conscious behavior. *Id.*

Here, Plaintiffs allege throughout the CAC that Ford knew that the Vehicles could not deliver the fuel economy it advertised, but that it nonetheless engaged in a widespread, deceptive advertising campaign for the purpose of increasing its sales and profits at the expense of consumers. ¶¶3, 5, 52, 68, 95, 97, 100, 101. Plaintiffs' allegations of scienter are more than sufficient under the express terms of Rule 9(b). *See id.*

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[10] In the face of an advertising campaign surrounded with deceptive representations that the Vehicles provide "real" car range of at least 570 miles on one tank of gas, Ford asserts the peculiar argument that Plaintiffs offer no plausible explanation as to how a fuel economy estimate can serve as a guarantee of "real world" fuel economy. Ford's argument misses the mark and ignores the clear and abundant allegations in the CAC that Ford's uniform, aggressive marketing campaign perpetrated a false impression about the fuel economy of the Vehicles.

b. Plaintiffs' Warranty Claims Are Adequately Pled

i. Plaintiffs' Breach of Express Warranty Claim Is Not Barred by Federal Law

Ford argues that Plaintiffs' breach of warranty claims must be dismissed because 49 U.S.C. § 32908(d) bars all warranty claims derived from EPA estimates 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. Def. Br. at 45 (citing *Paduano*, 169 Cal. App. 4th at 1467). Not only does *Paduano* not support Ford's argument, it directly contradicts it.

> [W]e disagree with Honda's contention that federal law entirely preempts Paduano's misrepresentation claims and/or that the statements Honda made in its advertising about the Civic Hybrid's fuel economy are, as a matter of law, accurate and not misleading. The federal law that regulates fuel economy estimates and labels does not preempt every lawsuit that challenges any statement an automobile manufacturer makes regarding fuel economy.

169 Cal. App. 4th at 1462-63. The court accordingly found that the "trial court should not have granted summary adjudication of Paduano's causes of action challenging Honda's advertising." *Id.* at 1463.

Similarly, in *True*, the court discussed the EPCA regulations regarding Monroney stickers and fuel economy booklets but held that "[n]othing in the EPCA or its accompanying regulations purports to regulate advertising of fuel economy beyond the requirements regarding these stickers and booklets." 520 F. Supp. 2d at 1181. The court recognized that the EPCA was created in part to "provide for improved energy efficiency of motor vehicles" and to "provide a means for verification of energy data to assure the reliability of energy data." *Id.* (citing 42 U.S.C. § 6201).

> Requiring the display of fuel efficiency information could further this Congressional purpose, i.e., it could help consumers make wiser choices in selecting a vehicle that uses less petroleum. But 15 U.S.C. § 1901 regulates in this field only to the extent of requiring display of a vehicle's fuel efficiency on a label affixed upon a vehicle and

> provision of an information booklet with comparative fuel efficiency ratings. Thus, a reasonable inference exists that Congress intended to preempt State regulation in these two areas, i.e., the labeling of vehicles and the mandated provision of an information booklet. ***It would be an unreasonable assumption, however, that Congress intended to preempt states from regulating false or misleading advertising of a vehicle's fuel efficiency and cost savings.***

Id.

In *True*, Honda (like Ford here) attempted to mischaracterize plaintiff's complaint as a challenge to EPA testing guidelines in order to bolster its preemption argument. But, the court rejected this tactic, noting that "Plaintiff's complaint does not challenge the EPA figures or the manner in which those figures are calculated," but instead "challenges the manner in which Defendant advertised the Honda Civic Hybrid in mediums other than the Monroney Sticker and information booklet." *Id.* The court observed:

> As no clear and manifest Congressional intent to regulate advertising exists, the Court must adhere to the presumption that Congress intended to leave the regulation of false advertising, and unfair business practices of auto manufacturers, to the state. In fact, allowing the States to regulate false advertising and unfair business practices perhaps may further the goals of the EPCA. Accordingly, California's regulation of false advertising does not stand as an "obstacle to the accomplishment and execution of the full purposes and objectives of Congress. . . . Plaintiff's claims are not preempted.

Id.

Ford argues that "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." Def. Br. at 45. To respond simply, as explained above, Plaintiffs' breach of express warranty claims do not rely on those representations. Rather, the claims relate to Ford's representations made beyond mere iteration of the EPA estimates. *See* Part II.A; ¶¶59-68.

Ford has failed to carry its burden to show that Plaintiffs' express warranty claims should be dismissed.

ii. Plaintiffs State a Viable Claim for Violations of the Federal Magnuson-Moss Warranty Act

The MMWA "is 'a remedial statute designed to protect the purchasers of consumer goods from deceptive warranty practices.'" *Avram v. Samsung Elecs. Am., Inc.*, No. 2:11-6973 (KM), 2013 WL 3654090, at *14 (D.N.J. 2013 July 11, 2013) (quoting *Miller v. Willow Creek Homes, Inc.*, 249 F.3d 629, 630 (7th Cir. 2001)).

Ford correctly states that Plaintiffs' claims under the MMWA that are based upon state warranties "stand or fall" with the underlying state warranty claims. Def. Br. at 46. Because Plaintiffs have adequately stated breaches of warranty in this case (*see* Part IV.E.4.b.i. & CAC ¶¶356-57 (express and implied warranties), Plaintiffs' MMWA claims also survive. *See Naiser v. Unilever United States, Inc.*, No. 3:13-CV-00395-JHM, 2013 WL 5460870, at *14 (W.D. Ky. Sept. 30, 2013).

Further, Plaintiffs adequately allege that Ford's written affirmations of fact made in its advertising campaign concerning the fuel efficiency of the Vehicles constituted a warranty for purposes of the MMWA that became a basis of the parties' bargain. *See, e.g.*, ¶356; *see* Part II.D. "A statement can amount to a warranty, even if unintended to be such by the seller, 'if it could fairly be understood . . . to constitute an affirmation or representation that the [product] possesse[s] a certain quality or capacity relating to future performance.'" *Avram*, 2013 WL 3654090, at *8 (citing *L.S. Heath & Son, Inc. v. AT & T Info. Sys., Inc.*, 9 F.3d 561, 570 (7th Cir. 1993)); *see id.* at *42. "[W]hether a given statement constitutes an express warranty is normally a question of fact for the jury." *Id.* at *8 (alteration in original). Such an affirmation of fact may also be made outside the confines of a warranty, such as the advertisements here. *See id.* at *9, *14 (finding that an Energy

Star logo is a warranty). As in *Avram*, Plaintiffs sufficiently allege that Ford made affirmations of fact relating to the Vehicles' fuel economy performance that formed part of the basis of the bargain when Plaintiffs purchased their respective Vehicles. *See id.* at *14. This is sufficient to uphold Plaintiffs' MMWA claims at this stage of the litigation. *See id.*

Ford argues that an MMWA claim requires a written warranty that promises (1) a specified level of performance over a (2) specified period of time, citing *In re Scotts EZ Seed Litig.*, No. 12-4727, 2013 WL 2303727, at *4 (S.D.N.Y. May 22, 2013), contending that Plaintiffs have failed to allege the "specified period of time" element. Unlike the plaintiffs in *Scotts EZ Seed*, however, Plaintiffs here adequately allege a warranty that promises a "specified level of performance" over a "specified period of time." For example, Plaintiffs allege throughout the CAC that the vehicles would only consume one gallon of gasoline over the specified period of time required to drive 47 miles. Plaintiffs also allege that the vehicles would only consume one tank of gas over the specified period of time required to drive 570 miles, or a round-trip between Los Angeles and Las Vegas. ¶¶65-66, 345.

Ford has not carried its burden to show Plaintiffs have not pleaded a MMWA claim.

c. Plaintiffs State a Claim for Unjust Enrichment

Ford attempts to fault Plaintiffs for not providing a state-by-state pleading in the CAC, yet only addresses the elements of New York law in its motion (in addition to raising narrow issues with respect to California and Florida law, which are addressed below). To recover on the theory of unjust enrichment under New York law, a plaintiff must "show that (1) defendant was enriched (2) at plaintiff's expense, and (3) that it is against equity and good conscience to permit defendant what is sought to be recovered." *In re Canon Cameras*, No. 05 Civ. 7233 (JSR), 2006 WL 1751245, at *1 (S.D.N.Y. June 23, 2006).

The CAC makes these exact allegations. ¶¶362-64. It is beyond dispute that Plaintiffs have alleged that they enriched Ford by purchasing and/or leasing the Vehicles. Indeed, the CAC alleges that Ford launched an aggressive nationwide advertising campaign for the Vehicles based on the misleading impression that consumers could achieve 47 MPG, and that Ford profited handsomely as a result of the success of that campaign. ¶¶4, 52-53. Plaintiffs have also established that this enrichment was at Plaintiffs' expense, as the CAC alleges that Plaintiffs would not have purchased the Vehicles, or would not have paid as much for them, if Ford had not misrepresented the Vehicles' fuel economy. Ford does not dispute that Plaintiffs' claims satisfy these elements.

Ford argues that the equities do not support the unjust enrichment claim. It would be unfair, however, for Ford to retain the profit it garnered from Plaintiffs' purchases due to its false or misleading advertisement. To support its position, Ford incorrectly asserts that Plaintiffs have not alleged they "conferred a benefit" on Ford. The weight of authority permits unjust enrichment claims where, as here, the a benefit was conferred on the defendant indirectly because of the defendant's unlawful conduct. *Waldman v. New Chapter, Inc.*, 714 F. Supp. 2d 398, 403-04 (E.D.N.Y. 2010) ("Today, New York law . . . merely requires that the plaintiff's relationship with a defendant not be 'too attenuated.' . . . [T]he indirect purchaser can assert such an unjust enrichment claim against the manufacturer of the *product* itself."); *see also In re Processed Egg Prods. Antitrust Litig.*, 851 F. Supp. 2d 867, 930 (E.D. Pa. 2012) ("Defendants' contention that 'Plaintiffs must prove that they *directly* conferred a benefit of Defendants' is misplaced as to New York law").

Relying on *National Casualty Company v. Vigilant Insurance Company*, Ford also attempts to persuade the Court that Plaintiffs' unjust enrichment claims must be dismissed because Plaintiffs did not plead that they performed a service for Ford at Ford's request and Ford did not assume an obligation to pay for such services. Def. Br. at 49-50. Ford's reliance on these requirements is

misplaced. *National Casualty Company* was a case that involved a dispute between two insurers regarding which one was responsible for payment of a client's litigation defense costs. 466 F. Supp. 2d 533, 536 (S.D.N.Y. 2006). The relationship between Plaintiffs and Ford – a vertical relationship between purchaser and manufacturer – is entirely different than the relationship, if any, at issue in *National Casualty*, which was purely horizontal in nature. 466 F. Supp. 2d 533, 536 (S.D.N.Y. 2006). Furthermore, *National Casualty*'s analysis, and the language cited by Ford, concerns unjust enrichment claims related to *services*, not the purchase of products. Def. Br. at 49.

Other sister courts have permitted unjust enrichment claims to go forward in contexts similar to those in the present case, that is, where the plaintiff did not pay money directly to a defendant but the defendant ultimately benefited from such a payment. *See, e.g., Hughes,* 930 F. Supp. 2d at 471 (E.D.N.Y. 2013) (sustaining claim for unjust enrichment against national manufacturer in connection with claims of false advertising); *In re TFT–LCD (Flat Panel) Antitrust Litig.*, No. M 07–1827, 2011 WL 4345446, at *4 (N.D. Cal. Sept. 15, 2011) (denying defendants' summary judgment motion on plaintiffs' unjust enrichment claims under Missouri law and agreeing "with plaintiffs that defendants need not have received the benefit directly from [the plaintiff]. Rather, [the plaintiff] must only show that defendants received a benefit and it came at his expense."); *In re Canon Cameras*, 2006 WL 1751245, at *2 (Illinois and Wisconsin claims); *In re Cardizem CD Antitrust Litig.*, 105 F. Supp. 2d 618, 668-71 (E.D. Mich. 2000) (upholding unjust enrichment claims under California, Illinois, Michigan, Minnesota, New York, and Wisconsin law, and noting that "[c]ontrary to Defendants' argument, there is no additional requirement that a benefit flow solely from Plaintiffs to Defendants. The courts do not define "benefit" as narrowly as Defendants urge.").

Ford argues that Plaintiffs cannot recover for unjust enrichment in Florida because Oldcorn did not purchase his C-MAX directly from Ford. Def. Br. at 48. Ford's arguments regarding

Plaintiffs' Florida unjust enrichment claim fails for similar reasons. Under Florida law, a direct benefit is not required, and to the extent it is, such a benefit exists when a downstream consumer purchases products. *See Williams v. Wells Fargo Bank N.A.*, No. 11–21233, 2011 WL 4368980, at *9 (S.D. Fla. Sept. 19, 2011) ("just because the benefit conferred by Plaintiffs on Defendants did not pass directly from Plaintiffs to Defendants—but instead passed through a third party—does not preclude an unjust-enrichment claim. Indeed, to hold otherwise would be to undermine the equitable purpose of unjust enrichment claims."). As the Southern District of Florida explained in *Romano v. Motorola, Inc.*:

> Defendant erroneously equates direct *contact* with direct *benefit* . . . . Plaintiff appropriately notes that Motorola, as the manufacturer of the Razr phone, marketed its product directly to consumers, but sold its product through an intermediary, i.e. a retail outfit. While the phone is ultimately sold through the retailer, Motorola is directly benefitted through profits earned from the sale of the phone. Therefore, while there was no direct *contact* between the manufacturer Motorola and Plaintiff, by purchasing the Razr phone, Plaintiff directly conferred a benefit on Motorola in the form of payment for the phone.

No. 07–CV–60517, 2007 WL 4199781, at *2 (S.D. Fla. Nov. 26, 2007).

Ford is also incorrect that California does not recognize an independent cause of action for unjust enrichment. While there are conflicting rulings on this issue, Plaintiffs respectfully submit that the more reasoned view is to recognize such a cause of action. *See In re Processed Egg Prods.*, 851 F. Supp. 2d at 913 (declining to dismiss California unjust enrichment claims because "California courts have not uniformly or definitively barred an independent cause of action for unjust enrichment"); *see also Ellis v. J.P. Morgan Chase & Co.*, No. 12-cv-03897-YGR, 2013 WL 2921799, at *23 (N.D. Cal. June 13, 2013) (upholding unjust enrichment cause of action under California law); *In re: Countrywide Fin. Corp. Mortg. Mktg. & Sales Practs. Litig.*, 601 F. Supp. 2d 1201, 1220-21 (S.D. Cal. 2009) (same).

Plaintiffs have stated a claim for unjust enrichment.

V. THE COURT SHOULD GRANT LEAVE TO AMEND DISMISSED CLAIMS

Plaintiffs request leave to amend their complaint should the Court dismiss any of their claims. "As a general principle, district courts should freely grant plaintiff leave to amend the complaint." *Nakahata v. New York-Presbyterian Healthcare Sys., Inc.*, 723 F.3d 192, 198 (2d Cir. 2013) (citing *Kleinman v. Elan Corp.*, 706 F.3d 145, 156 (2d Cir. 2013)). "When a motion to dismiss is granted, the usual practice is to grant leave to amend the complaint." *Ronzani v. Sanofi S.A.*, 899 F.2d 195, 198 (2d Cir. 1990). This is particularly true to the extent that Plaintiffs' allegations are evaluated under Rule 9(b), in which case leave to amend is "almost always" granted. *Luce v. Edelstein*, 802 F.2d 49, 56 (2d Cir. 1986).

Having reviewed the pleadings and Ford's arguments, Plaintiffs do not oppose dismissal of their claims for negligent misrepresentation (¶¶324-29), breach of contract (¶¶330-33), and breach of good faith and fair dealing (¶¶334-40) without prejudice at this time. Plaintiffs will evaluate whether to include those claims in an amended pleading. In the event Plaintiffs do not wish to pursue these claims, and Plaintiffs otherwise do not file an amended complaint, Plaintiffs will notify Ford and the Court of their intention not to pursue these claims.

VI. CONCLUSION

For all these reasons, as well as those provided at any oral argument, Plaintiffs respectfully submit that the Court deny Defendant's motion. Should the Court grant Defendant's motion in whole or in part, Plaintiffs respectfully request leave to amend.

DATED: January 21, 2014

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/s/ *Eric H. Gibbs*

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Plaintiffs Executive Committee

Exhibit A

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 12-800-GW(FFMx)	Date	April 23, 2012
Title	*Kehlie R. Espinosa v. Hyundai Motor America, et al.*		

Present: The Honorable	GEORGE H. WU, UNITED STATES DISTRICT JUDGE	
Javier Gonzalez	Wil Wilcox	
Deputy Clerk	Court Reporter / Recorder	Tape No.

Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
Richard D. McCune, Jr. Jae Kooj Kim	Shon Morgan

PROCEEDINGS: **DEFENDANT'S MOTION TO DISMISS FIRST AMENDED CLASS ACTION COMPLAINT (filed 03/12/12)**

The Court's Tentative Ruling is circulated and attached hereto. Court hears oral argument. For reasons stated on the record, Defendants' Motion is **TAKEN UNDER SUBMISSION.** Court to issue ruling.

: 03

Initials of Preparer JG

Espinosa, et al., v. Hyundai Motor Am., Case No. CV-12-0800
Tentative Ruling on Motion to Dismiss First Amended Complaint

I. Factual Background

Plaintiff Kehlie R. Espinosa ("Plaintiff"), on behalf of herself and all others similarly situated, brings the following claims against defendant Hyundai Motor America ("Defendant" or "Hyundai"): 1) Violation of Unfair Business Practices Act ("UCL") (Cal. Bus. & Prof. Code §§ 17200, *et seq.*); 2) Violation of False Advertising Laws ("FAL") (Cal. Bus. & Prof. Code §§ 17500, *et seq.*); 3) Violation of California's Consumer Legal Remedies Act ("CLRA") (Cal. Civ. Code §§ 1750, *et seq.*); 4) Fraud; 5) Negligent Misrepresentation; and 6) Deceit (Cal. Civ. Code § 1710).

As the basis of her claims, Plaintiff alleges in the First Amended Complaint ("FAC") that Hyundai engaged in a pervasive false advertising campaign whereby it claimed that a number of its vehicles, including the Elantra (which is the vehicle Plaintiff Espinosa purchased), get at least 40 miles per gallon ("MPG") in highway driving. FAC ¶ 4. Plaintiff alleges that Hyundai's vehicles, including the Elantra, actually achieve significantly less than 40 miles per gallon in normal highway driving conditions. *Id.*

Plaintiff alleges that Hyundai has falsely advertised the MPG attained by its cars by means of television, print and internet advertisements, as well as marketing materials such as banners and pamphlets provided to customers at retail locations. *Id.* ¶¶ 10, 14. The EPA is mandated to test vehicles and provide to manufacturers an estimated MPG (the "EPA estimate"), which the manufacturers are then mandated to display via a window sticker (a "Monroney sticker") placed on all cars viewed by potential purchasers. *See* Docket No. 17 at 22; 49 U.S.C. §§ 32902, *et seq.* The EPA has estimated that the Elantra achieves 40 MPG. FAC ¶ 17.

Plaintiff proposes a nationwide class defined as "[a]ll owners of 2010-2012 HYUNDAI models who purchased or leased their vehicles in the United States." *Id.* ¶ 31. Alternatively, Plaintiff proposes to represent a California class defined as, "[a]ll owners of 2010-2012 HYUNDAI models who purchased their vehicles in California." *Id.* ¶ 32.

Before the Court now is Defendant's motion to dismiss the FAC.

II. Analysis

A. Legal Standard

Under Rule 12(b)(6), a court is to (1) construe the complaint in the light most favorable to the plaintiff, and (2) accept all well-pleaded factual allegations as true, as well as all reasonable inferences to be drawn from them. *See Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir.), *amended on denial of reh'g*, 275 F.3d 1187 (9th Cir. 2001). Dismissal pursuant to Rule 12(b)(6) is proper only where there is either a "lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990); *Johnson v. Riverside Healthcare Sys., LP*, 534 F.3d 1116, 1121-22 (9th Cir. 2008); *see also Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 561-63 (2007) (dismissal for failure to state a claim does not require the appearance, beyond a doubt, that the plaintiff can prove "no set of facts" in support of its claim that would entitle it to relief).

However, the court need not accept as true "legal conclusions merely because they are cast in the form of factual allegations." *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1139 (9th Cir. 2003). In other words, a complaint does not "suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Ashcroft v. Iqbal,* 129 S.Ct. 1937, 1949 (2009) (quoting *Twombly*, 550 U.S. at 556). Thus, a plaintiff must also "plead 'enough facts to state a claim to relief that is plausible on its face.'" *Johnson*, 534 F.3d at 1122 (quoting *Twombly*, 550 U.S. at 570); *see also William O. Gilley Enters., Inc. v. Atlantic Richfield Co.*, 588 F.3d 659, 667 (9th Cir. 2009) (confirming that *Twombly* pleading requirements "apply in all civil cases"). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal,* 129 S.Ct. at 1949.

In its consideration of the motion, the court is limited to the allegations on the face of the complaint (including documents attached thereto), matters which are properly judicially noticeable and "documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading." *See Lee v. City of Los Angeles*, 250 F.3d 668, 688-89 (9th Cir. 2001); *Branch v. Tunnell*, 14 F.3d 449, 453-54 (9th Cir.), *cert. denied*, 512 U.S. 1219 (1994), *overruled on other grounds in Galbraith v. Cnty. of Santa Clara*, 307 F.3d 1119 (9th Cir. 2002); *see also Marder v. Lopez*, 450 F.3d 445, 448 (9th Cir. 2006) (indicating that a court may consider a document "on which the complaint 'necessarily relies' if: (1) the complaint refers to the document; (2) the document is central to the plaintiff's claim; and (3) no party questions the authenticity of the copy attached to the 12(b)(6) motion").

B. General principles applicable to all claims

The parties' briefing discloses that Plaintiff concedes many of Defendant's arguments with regards to the legal principles underpinning her claims. Since these arguments apply to all six causes of action, the Court would address them prior to examining whether Defendants have shown that any of the six causes of action fail to state a claim as currently pled.[1]

First, Plaintiff appears to have abandoned any allegations that the EPA Estimate of 40 MPG was itself inaccurately calculated, in that her opposition brief failed to address Defendant's well-taken argument that any such challenges would be barred by the doctrine of primary jurisdiction, where a court can decline to adjudicate an issue that is "within the special competence of an administrative agency." *See Clark v. Time Warner Cable*, 523 F.3d 1110, 1114 (9th Cir. 2008); Docket No; 17 at 21; *see also* FAC ¶ 28 (casting aspersions upon the accuracy of the EPA Estimate). Thus, the sufficiency of Plaintiff's allegations must be considered without regard to the allegations that the EPA Estimate is incorrect.

Second, Defendant's argument that Plaintiff's claims are preempted have some limited force. Any state regulation of disclosure of fuel economy is expressly preempted by federal law. 49 U.S.C. § 32919 ("a State or a political subdivision of a State may adopt or enforce a law or regulation on disclosure of fuel economy or fuel operating costs for an automobile covered by section 32908 only if the law or regulation is identical to that requirement"). Plaintiff's claims include allegations that

[1] Such treatment would accord with the structure of Defendant's motion, which largely consists of general legal principles seeking to undercut Plaintiff's theory of the case, rather than specific arguments concerning whether Plaintiff has properly pled each cause of action under the *Iqbal/Twombly* standard. *See generally* Docket No. 17.

Hyundai displayed the EPA estimates without disclosing the fact that the *actual* MPG achieved may be much lower. FAC ¶ 29. To the extent that Plaintiff's claims rest on Defendant's mere use of the EPA estimates and all of the related federally-mandated disclosures in their advertising and marketing materials, such claims are preempted. *See Gray v. Toyota Motor Sales, U.S.A.*, No. CV 08–1690 PSG (JCx), 2012 U.S. Dist. LEXIS 15992, at *16 (C.D. Cal. Jan. 23, 2012) ("the claims must fail [due to preemption] as they rely solely on advertisements that merely repeat the approved EPA mileage estimates, without any additional representations as to, for example, a consumer's ability to achieve those figures under normal driving conditions"). Similarly, any claims that rest on Hyundai's failure to disclose *more* than what is federally mandated must be preempted, given the text of the statute's preemption clause. *See* 49 U.S.C. § 32919; *see also Gray*, 2012 U.S. Dist. LEXIS 15992, at *20-21. However, to the extent that Plaintiff's claims rest on allegations that Hyundai "voluntarily made additional assertions, beyond the disclosure of the mileage estimates, that are untrue or misleading, and that federal law does not require, or even address, these additional assertions[,]" Plaintiff's claims are not preempted. *See Paduano v. Am. Honda Motor Co., Inc.*, 169 Cal.App.4th 1453, 1477 (2009).[2] Of course, to the extent that Plaintiff alleges Hyundai's noncompliance with of the relevant federal regulations as to the EPA Estimate and the disclosures that must accompany it, Plaintiff's claim that such activities are "unlawful" within the meaning of the UCL are not preempted. FAC ¶¶ 42, 43. Plaintiff concedes that preemption principles must narrow their claims according to the above parameters: "[As in *Paduano*,] Plaintiff is alleging affirmative misrepresentations of the estimated fuel economy and MPG of the Hyundai Elantra, not the disclosure of EPA estimates or anything regarding the Monroney stickers." Docket No. 19 at 18.

Third, Plaintiff does not offer any opposition to Defendant's argument that Plaintiff only has standing under the UCL and the CLRA to bring claims for a product she herself purchased, and such claims must be based on advertisements or marketing which she personally saw. *See* Docket No. 17 at 25; *see Johns v. Bayer Corp.*, No. 09CV1935 DMS (JMA), 2010 U.S. Dist. LEXIS 10926, at *13 (S.D. Cal. Feb. 9, 2010) (holding that a named plaintiff in a UCL/CLRA class action suit "cannot expand the scope of his claims to include a product he did not purchase or advertisements relating to a product that he did not rely upon"). Undisclosed in Defendant's briefing, however, is that many district courts have not construed the UCL's standing requirements to imply that a named plaintiff must base her claims only on products she actually purchased and misrepresentations she actually saw. *See, e.g., Wang v. OCZ Tech. Group, Inc.*, 276 F.R.D. 618, 632-33 (N.D. Cal. 2011) (summarizing split amongst the district courts as to this issue). Considering that Plaintiff has not offered any caselaw or argument to contradict Defendant's argument that this Court should follow the ample precedent that UCL/CLRA plaintiffs must base their purported class claims on products they personally purchased and misrepresentations they actually saw, the Court would accordingly follow this rubric when considering whether Plaintiff has sufficiently pled her UCL/CLRA claim such that she has standing. *See, e.g. Carrea v. Dreyer's Grand Ice Cream, Inc.*, No. C 10-01044 JSW, 2011 U.S. Dist. LEXIS 6371, at *7-8 (N.D. Cal. Jan. 10, 2011) (dismissing UCL claim for lack

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[2] "Federal district courts must follow the decisions of the California Courts of Appeal in the absence of contrary Ninth Circuit authority or 'convincing evidence that the California Supreme Court would hold otherwise.'" *Gray*, 2012 U.S. Dist. LEXIS 15992, at *20 (citing *Alvarez v. Chevron Corp.*, 656 F.3d 925, 932 n.7 (9th Cir. 2011)).

of standing when named plaintiff had not purchased the product at issue).

In sum, Plaintiff herself summarized the narrow nature of her claims: "whereas *Paduano* and its progeny stand for the proposition that there is nothing misleading in advertising EPA estimates themselves, the question at present is instead whether the advertisement of MPG ratings not apparently based on EPA estimates constitutes actionable affirmative misrepresentations where the vehicle actually achieves a materially lower fuel economy rating." Docket No. 19 at 13. Thus, the sufficiency of each claim must be tested according to whether it states a plausible claim for relief, given that only allegations of affirmative misrepresentations, only with regards to misrepresentations Plaintiff allegedly saw personally, and only in relation to the Elantra.

Plaintiff has pled allegations that she saw unspecified Hyundai television advertisements (FAC ¶ 9), visited the Hyundai website (FAC ¶ 10), viewed banners at a Hyundai dealership in Cerritos, CA (*id.*), spoke to a salesperson at said dealership (*id.*), was handed a brochure at the dealership (*id.*), and in all of these instances was allegedly exposed to the purported misrepresentation that the Elantra would attain 40 MPG, without any qualifying language or reference to EPA Estimates.[3] She further pleads that she "reasonably believed that the Elantra would achieve approximately 40 MPG in normal highway driving" (FAC ¶ 12) and "heavily relied on these representations when she decided to buy the 2012 HYUNDAI Elantra." FAC ¶ 13.

C. UCL, FAL, and CLRA claims

Defendant challenges Plaintiff's UCL, FAL and CLRA claims on a number of bases. First, Defendant half-heartedly asserts that the UCL's safe harbor provision would bar Plaintiff's claims, because the legislature allows (in fact requires) them to display EPA estimates. Docket No. 17 at 23. This argument misses the mark because Plaintiff in fact alleges Hyundai's use of the EPA Estimate, namely 40 MPG, without designating that figure as the EPA estimate and not accompanied by the federally-mandated disclosures. Second, Defendant asserts that Plaintiff's UCL, CLRA and FAL claims are subject to the heightened pleading standard of Rule 9(b), because they sound in fraud. *See* Docket No. 17 at 24. Plaintiff properly does not dispute that such standard applies.[4] However, the Court would find that the FAC is pled with sufficient particularity to meet this standard, because it contains the "who, what, when, where, and how of the misconduct charged." *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1125 (9th Cir. 2009). Plaintiff has identified the "what" as the affirmative misrepresentation that the Elantra can achieve 40 MPG in actual driving

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[3] The parties, in briefing and in documents submitted for judicial notice, hotly debate whether or not this representation was made in these various media; this, of course, is a factual dispute not properly addressed by the Court at the 12(b)(6) stage. See Docket No. 17 at 7, Docket No. 19 at 14-15; Docket No. 22 at 7-10. In particular, the parties' dispute over the precise contents of the banner Plaintiff alleges to have seen at the Cerritos dealership has no bearing on whether the allegations in the Complaint, if taken as true, properly state a claim for relief. Similarly, the Court need not address the objections each party raises to the other's Request for Judicial Notice (see Docket Nos. 20, 23, 24), because the documents submitted for judicial review were not relied upon in the Court's ruling on the instant matter, as they largely relate to factual disputes not properly taken into account when addressing the legal sufficiency of the FAC.

[4] *See Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1103 (9th Cir. 2003) ("A claim is grounded in fraud where the plaintiff alleges a unified course of fraudulent conduct and relies on that course of conduct as the basis of a claim").

conditions, and has pled the when/where/who elements in alleging that this misrepresentation was disseminated in television ads, by a banner at the Cerritos dealership, and by a dealership salesperson.[5] FAC ¶¶ 9-10. Defendants, perhaps recognizing that Plaintiff has amply pled all of the other components, argues that Plaintiff has failed to allege "how" she relied upon the alleged misrepresentations, "particularly in light of the numerous disclosures Hyundai provided at and before the point of sale." *See* Docket No. At 24. But this argument fails because the existence and numerosity of such disclosures is a matter of factual dispute as between the parties, who debate the contents of the banner at the Cerritos dealership, the sales pitch employed by the dealership staff, the sufficiency and location of the website's disclosures, and the contents of the television ad. *See* Docket No. 17 at 7. The Court would not find that Plaintiff has failed to *plead* a fraud claim merely because she has not *proven* that she relied upon all the purported misrepresentations she properly alleges to have viewed.

Given that Defendant has presented no other specific arguments alleging deficiencies in Plaintiff's UCL, FAL or CLRA claims other than the general principles outlined in section A *supra*, the Court would deny Defendants' motion to dismiss these three claims.

D. Fraud, negligent misrepresentation, and deceit claims

Similarly, Defendant offers one specific argument intended to persuade the Court to dismiss the next three of Plaintiff's claims (for fraud, negligent misrepresentation and deceit): Hyundai accuses Plaintiff of failing to allege any misrepresentation:

> Because plaintif [*sic*] lacks a basis to allege Hyundai's EPA mileage estimates are inaccurate and, as shown above, cannot otherwise sue over Hyundai's reference to those estimates in marketing, there is no actionable statement that could support plaintiff's fraud-based claims.

Docket No. 17 at 18. Again, Defendant ignores the fact that Plaintiff has alleged that Hyundai disseminated an advertising and marketing campaign that claimed the Elantra could achieve 40 MPG in real world conditions, and did not properly reference or disclaim the EPA Estimate. Thus this basis for dismissing these three common law claims is unavailing.[6]

Thus, while the Court would find that many of Defendant's arguments narrowing the scope of Plaintiff's claims are well-supported by legal authority and are not contested by Plaintiff, therefore rendering many of the allegations in the FAC irrelevant to the eventual outcome of the case, the Court cannot find at the current procedural juncture that Plaintiff has failed to sufficiently state a claim for relief on each of her causes of action. Even given that, as argued by Defendants, she can base her claims only on advertisements or marketing she actually saw, she can only base her claims

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[5] The Court would note that the FAC discloses that the brochure also allegedly containing such misrepresentation was contained as an exhibit to the FAC and in fact contains the federally-mandated language; since Plaintiff does not base her entire claim on the brochure, however, this is not fatal to Plaintiff's claims at the motion to dismiss stage. *See* FAC, Exh. 3 at 3.

[6] Defendant also claims to put forth an argument that Plaintiff has not plead justifiable reliance, but proceeds to instead argue that the properly pled reliance was not in fact justifiable, a matter not proper for disposition at the 12(b)(6) stage. *See* Docket No.17 at 18.

on affirmative misrepresentations that differ from the federally mandated EPA Estimate disclosures, and her claims are limited to the Elantra, Defendant has not presented arguments persuading the Court that Plaintiff has failed to state a claim for relief in any of her six causes of action.

III. Conclusion

For the above stated reasons, the Court would DENY Defendant's motion to dismiss the FAC.

Exhibit B

LINK: 7

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 11-06459 GAF (MRWx)	Date	March 9, 2012
Title	Yung Kim v. General Motors, LLC et al.		

Present: The Honorable	**GARY ALLEN FEESS**	
Renee Fisher	None	N/A
Deputy Clerk	Court Reporter / Recorder	Tape No.

Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
None	None

Proceedings: **(In Chambers)**

I. INTRODUCTION

Plaintiff Yung Kim brings this putative class action against Defendant General Motors, LLC ("GM"), alleging that GM engaged in a systematic and misleading advertising scheme in which EPA estimated mileage figures and numbers derived from these figures were represented as "actual, expected mileage under normal, real world driving conditions." (Docket No. 4, First Am. Compl. ("FAC") ¶ 25.) Kim brings a number of state law claims, including for violations of California's consumer protection and unfair competition laws, and for fraud. (Id. ¶¶ 39–68.) GM now moves, under Federal Rule of Civil Procedure 12(b)(6), to dismiss Plaintiff's amended complaint. (Docket No. 7.) For the reasons that follow, the Court concludes that the motion should be **GRANTED in part** and **DENIED in part**.

II. BACKGROUND

Plaintiff purchased a new, 2011 GMC Terrain crossover vehicle ("Terrain") on or about January 3, 2011, at a California GM dealership. (FAC ¶ 9.) Prior to his purchase, Plaintiff had viewed television commercials and print advertisements about the Terrain, read about the vehicle in various magazines, visited GM's website, and on several occasions visited the dealership where he was provided with brochures and information about the vehicle. (Id. ¶¶ 10–11.) Plaintiff was impressed with the "high gas mileage that the materials advertised the Terrain would achieve," and alleges that he was led, due to the nature of these advertisements, to believe that they were reflective of the mileage he would receive during "normal, real-world highway

LINK: 7

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 11-06459 GAF (MRWx)	Date	March 9, 2012
Title	Yung Kim v. General Motors, LLC et al.		

use." (Id. ¶ 11.)

Plaintiff cites three such representations or advertisements that led him to this belief. (Id.) The first, entitled "Going the Extra Mile to Make the Most Out of Every Inch," is from the 2011 Terrain's brochure. (Id.; FAC, Exs. 1–2.) The brochure states that the Terrain "has the best highway fuel economy in its class at 32 highway miles per gallon" and includes a chart with the language "UP TO 600 HWY Miles." (Id.) Next to this chart is a map outlining a route from Chicago, past Cleveland and Buffalo, to Rochester, New York, which Plaintiff alleges is more than a 600 mile trip. (Id.) The brochure also states that "the Terrain offers class-leading highway fuel economy without sacrificing performance . . . . [The] Terrain offers 32 EPA-estimated highway miles per gallon, and can go up to 600 highway miles on a single tank of gas." (Id.)

Second, Plaintiff cites another page of the 2011 Terrain brochure, where GM states that "AT 32 HIGHWAY MILES PER GALLON, WE GAVE IT BETTER FUEL ECONOMY THAN ANY SUV OR CROSSOVER," with the words "EPA estimated" in a fine print footnote. (Id. ¶ 11; FAC, Ex. 4.)

Third, Plaintiff cites to an advertisement from Road & Track magazine, which states "32 HWY MPG RATED, AVAILABLE POWER LIFTGATE, SEATING FOR 5 ADULTS. WE PROBABLY HAD YOU AT 32 MPG," and similarly relegates the words "EPA estimate" to a footnote. (Id. ¶ 11; FAC, Ex. 3.)

Plaintiff alleges that in light of these advertisements, he "reasonably believed that the Terrain would achieve approximately 32 miles per gallon and travel 600 miles on a single tank of gas during normal, real-world highway use," and that he therefore "heavily relied" on these representations in making his decision to buy the Terrain. (Id. ¶¶ 12–13.) However, after purchasing the vehicle, Kim "discovered that it consistently achieved gas mileage far below the advertised mileage under normal, real-world use," and that it "does not travel 600 miles on one tank of gas . . . ." (Id. ¶¶ 15–16.) Despite efforts to resolve the issue with the dealership, Kim was unable to achieve higher gas mileage. (Id. ¶ 14.)

Plaintiff cites to two additional statements and advertisements that, while not affecting his decision to purchase the vehicle, could reasonably have misled other members of the purported class. (Id. ¶ 26.) Plaintiff first points to a press release from June 1, 2011, entitled "May U.S. Retail Sales Rise 9 Percent on Demand for Fuel-Efficient Vehicles." (Id.) In reference to the Terrain and Chevrolet Equinox ("Equinox"), Don Johnson, GM's Vice President of United States Sales Operations, is quoted as saying that "[c]ustomers love the 610-mile range that our

LINK: 7

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

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compact crossovers provide and they get it without sacrificing capability or style." (Id.) Plaintiff also describes GM's Chevrolet website for its "Equinox" vehicle, which states that "[m]eticulous craftsmanship . . . and class-leading highway fuel economy (5, 6) sets Equinox apart from the rest. With 32 MPG highway and a highway driving range of up to 600 miles . . . ." (Id.) The only mention of an "EPA estimate" is found in a footnote in reference to "class-leading highway fuel economy," not "32 MPG highway," and, in order to view the footnote, the user must drag the mouse over the text entitled "view additional disclosures" at the bottom of the web page. (Id.) Finally, Plaintiff notes that a number of these advertisements do not disclose that the actual real world mileage "will vary." (Id.)

On the basis of these facts, Kim asserts six state law causes of action, for [1] violations of California Business & Professions Code section 17200 ("Unfair Competition Law" or "UCL"); [2] violations of Business & Professions Code section 17500 ("False Advertising Law" or "FAL"); [3] violations of California Civil Code section 1750 ("Consumer Legal Remedies Act" or "CLRA"); [4] fraud; [5] negligent misrepresentation; and [6] deceit, in violation of California Civil Code section 1710. (FAC ¶¶ 39–68.)

Defendant now moves to have the complaint dismissed, contending that Plaintiff's claims are preempted by federal law, and/or that they are inadequately pleaded. (Docket No. 8, Mem.) Although the parties often discuss the various misrepresentations interchangeably, for purposes of this motion the Court separates the purportedly false advertisements into three categories: [1] those that Plaintiff alleges do not adequately disclose the "EPA estimate" language; [2] those that fail to include the language "actual mileage will vary"; and [3] those that make representations concerning the vehicle's tank range, in particular the advertisement displaying a map outlining a route from Chicago to Rochester. With this framework in mind, the Court addresses Defendant's contentions in turn.

II.
DISCUSSION

A. LEGAL STANDARDS UNDER RULES 12(B)(6) AND 9(B)

A complaint may be dismissed if it fails to state a claim upon which relief can be granted. See Fed. R. Civ. P. 12(b)(6). On a motion to dismiss under Federal Rule of Civil Procedure ("F.R.C.P.") 12(b)(6), a court must accept as true all factual allegations pleaded in the complaint, and construe them "in the light most favorable to the nonmoving party." Cahill v. Liberty Mut. Ins. Co., 80 F.3d 336, 337–38 (9th Cir. 1996); see also Stoner v. Santa Clara County Office of Educ., 502 F.3d 1116, 1120–21 (9th Cir. 2007). Dismissal under Rule 12(b)(6) may be based on

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either (1) a lack of a cognizable legal theory, or (2) insufficient facts under a cognizable legal theory. SmileCare Dental Grp. v. Delta Dental Plan of Cal., Inc., 88 F.3d 780, 783 (9th Cir. 1996) (citing Robertson v. Dean Witter Reynolds, Inc., 749 F.2d 530, 534 (9th Cir. 1984)).

Under Rule 8(a)(2), a complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). The Supreme Court has interpreted this rule to allow a complaint to survive a motion to dismiss only if it "contain[s] sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. (citing Twombly, 550 U.S. at 556). "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct," the complaint has not sufficiently established that the pleader is entitled to relief. Id. at 1950.

A complaint generally need not contain detailed factual allegations, but "a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Twombly, 550 U.S. at 555 (citation, alteration, and internal quotations omitted). Similarly, a court need not "accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." Sprewell v. Golden State Warriors, 266 F.3d 979, 988 (9th Cir. 2001). That is, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions . . . . While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations." Iqbal, 129 S. Ct. at 1949–50; see also Warren v. Fox Family Worldwide, Inc., 328 F.3d 1136, 1139 (9th Cir. 2003).

Moreover, Rule 9(b) imposes heightened pleading requirements for claims of fraud, or claims that sound in fraud. See Fed. R. Civ. P. 9(b). A plaintiff "must state with particularity the circumstances constituting fraud," but can allege generally "[m]alice, intent, knowledge, and other conditions of a person's mind." Id. The particularity requirement "has been interpreted to mean the pleader must state the time, place and specific content of the false representations as well as the identities of the parties to the misrepresentation." Miscellaneous Serv. Workers, Drivers & Helpers, Teamsters Local No. 427 v. Philco-Ford Corp., 661 F.2d 776, 782 (9th Cir. 1981). In addition, the plaintiff must "set forth what is false or misleading about a statement, and why it is false." Rubke v. Capitol Bancorp Ltd., 551 F.3d 1156, 1161 (9th Cir. 2009) (internal quotations omitted). These requirements "ensure[] that allegations of fraud are specific enough to give defendants notice of the particular misconduct which is alleged to constitute the fraud charged so that they can defend against the charge and not just deny that they have done

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anything wrong." Semegen v. Weidner, 780 F.2d 727, 731 (9th Cir. 1985).

B. FEDERAL PREEMPTION

The Court first addresses Defendant's contention that all of Plaintiff's claims are preempted by federal law. In its motion, GM characterizes Plaintiff's claims as requiring the disclosure of additional facts "in order to ensure that the EPA fuel economy estimates did not deceive consumers." (Mem. at 21.) GM argues that such requirements are "expressly pre-empted by 49 U.S.C. § 32919 and, separately, conflict with the 'no warranty' provisions of 49 U.S.C. § 32908(d) and the FTC's interpretation of section 5 of the FTC Act. (Id.) In his opposition, Plaintiff avers that GM "erroneously attempts to re-frame" his claims as "challenging the EPA estimates themselves or requiring additional information than what is required under federal law." (Opp. at 4.) Plaintiff contends that, "to the contrary, [he] challenges GM advertisements which overstate MPG ratings, and then omit or fail to adequately disclose material disclaimers which are required to be disclosed by or consistent with federal law to advise customers of this fact," as well as "GM's advertisements which affirmatively misrepresent the mileage range of the vehicle on a single tank of gas." (Id.)

1. EXPRESS PREEMPTION

State law is pre-empted under the Supremacy Clause, U.S. Const., Art. VI, cl. 2, where "Congress . . . define[s] explicitly the extent to which its enactments pre-empt state law." English v. General Elec. Co., 496 U.S. 72, 78–79 (1990). "Pre-emption fundamentally is a question of congressional intent, and when Congress has made its intent known through explicit statutory language, the courts' task is an easy one." Id. (citing Shaw v. Delta Air Lines, Inc., 463 U.S. 85 (1983)).

a. 49 U.S.C. § 32919(a)

Defendant first contends that Plaintiff's claims are expressly preempted by 49 U.S.C. § 32919 because, if allowed to go forward, they would amount to "inconsistent state regulation of fuel economy or the disclosure of fuel economy." (Mem. at 21.)

Section 32919(a) states in relevant part that:

> When an average fuel economy standard prescribed under this chapter is in effect, a State or a political subdivision of a State may not adopt or enforce a law or regulation related to fuel economy standards or average fuel economy standards for automobiles

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> covered by an average fuel economy standard under this chapter.

49 U.S.C § 32919(a).

A California appellate court addressed this precise issue in Paduano v. American Honda Motor Co., Inc., 88 Cal.Rptr.3d 90 (2009). In that case, an owner of a Honda vehicle brought suit against the manufacturer under the UCL and CLRA for allegedly false and/or misleading statements concerning the automobile's fuel economy. Id. The court found that Section 32919(a) had no application to the plaintiff's claims, explaining that:

> These "standards" are not the same as the fuel economy estimates for each model of vehicle that are required to be posted on the Monroney label, pursuant to section 32908. Rather, the "standards" are exactly what the name suggests: the minimum efficiency benchmarks that automobile manufacturers must meet. In contrast, the EPA mileage estimates that are at issue in this case refer to the actual measurement of the fuel efficiency of a particular model of car—calculations that are used, among other purposes, to determine whether a manufacturer has met the applicable fuel economy standards for a particular year. Consequently, one cannot read Paduano's claims as seeking to impose or enforce a law "related to fuel economy standards or average fuel economy standards." (49 U.S.C. § 32919(a).) Enforcement of the UCL and/or CLRA in this case would not in any way "relate to" the imposition of minimum fuel efficiency performance standards on Honda or other vehicle manufacturers for a class, subclass, or fleet of vehicles. Thus, section 32919(a) of title 49 of the United States Code simply has no application in this case.

Id. at 109–110.

The Court finds the reasoning in Paduano persuasive, adopts that reasoning in this case, and concludes that Plaintiff's claims against GM are not preempted by Section 32919(a). The California statutes under which Plaintiff brings his claims have no relationship to the actual fuel efficiency standards which are regulated by that statute. Rather, Plaintiff's claims pertain largely to representations made by GM in characterizing what sort of fuel economy their vehicle achieves. Congress has in no way made clear in Section 32919(a) that it intended to preempt any law related to advertising or disclosure.

a. 49 U.S.C. § 32919(b)

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Defendant next contends that Plaintiff's claims are preempted by 49 U.S.C. § 32919(b), which states in relevant part that:

> When a requirement under section 32908 of this title is in effect, a State or a political subdivision of a State may adopt or enforce a law or regulation on disclosure of fuel economy or fuel operating costs for an automobile covered by section 32908 only if the law or regulation is identical to that requirement.

49 U.S.C. § 32919(b). Section 32908 requires car dealers to maintain a label, commonly referred to as a "Monroney" label, on every new vehicle, detailing, among other things, the fuel economy of the vehicle and estimated annual fuel costs. 49 U.S.C. § 32908(b)(1). Additionally, the dealers must make available a "fuel economy information booklet" for consumers. 49 U.S.C. § 32908(b)(1)(D), 32908(c)(1).

GM argues that "any state law that purports to create additional – and therefore not 'identical' – requirements regarding disclosure of EPA-mandated fuel economy estimates is preempted." (Mem. at. 21.) The court's analysis in Paduano is again instructive:

> Contrary to Honda's characterization of Paduano's UCL and CLRA claims, Paduano is not claiming that disclosing the EPA mileage estimates is, by itself, deceptive. Rather, Paduano maintains that Honda has voluntarily made additional assertions, beyond the disclosure of the mileage estimates, that are untrue or misleading, and that federal law does not require, or even address, these additional assertions. Paduano's claims are based on statements Honda made in its advertising brochure to the effect that one may drive a Civic Hybrid in the same manner as one would a conventional car, and need not do anything "special," in order to achieve the beneficial fuel economy of the EPA estimates. It is not, as Honda maintains, the disclosure of the EPA estimates that Paduano claims is deceptive per se. What Paduano is challenging is Honda's added commentary in which it alludes to those estimates in a manner that may give consumers the misimpression that they will be able to achieve mileage close to the EPA estimates while driving a Honda hybrid in the same manner as they would a conventional vehicle. Paduano does not seek to require Honda to provide "additional alleged facts" regarding the Civic Hybrid's fuel economy, as Honda suggests, but rather, seeks to prevent Honda from making misleading claims about how easy it is to achieve better fuel economy. Contrary to Honda's assertions, if Paduano were to prevail on his claims, Honda would not have to do anything differently with regard to its disclosure of the EPA mileage estimates.

88 Cal.Rptr.3d at 110. As the Paduano court further explained, "neither the UCL nor the CLRA is a law that is based 'on' disclosure of fuel economy or fuel operating costs; rather, the UCL and CLRA are both laws of general application that create a duty not to deceive . . . ." Id.

Here, as in Paduano, Plaintiff does not challenge the disclosure of the EPA estimate itself, nor does it focus on representations made on the Monroney label. (FAC ¶ 26; Opp. at 4.) As in Paduano, Plaintiff cites to additional statements, made in advertisements rather than on a Monroney label, that Plaintiff alleges could lead a reasonable consumer to believe that the vehicle is capable of achieving these EPA estimates under real world conditions. In other words, Plaintiff challenges GM's use of the EPA estimates in a way that may give consumers the mistaken impression that they are able to achieve real-world mileage and tank range derived from those figures.

Accordingly, the Court finds that the claims brought by Plaintiff are not expressly preempted by 42 U.S.C. §§ U.S.C. § 32919(a) or (b).

2. CONFLICT PREEMPTION

Defendant also contends that Plaintiff's claims must fail because they conflict with federal law and therefore "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress . . . ." (Mem. at 24) (citing Geier v. American Honda Motor Co., 529 U.S. 861, 873 (2000)).

Conflict preemption of a state law occurs when "compliance with both state and federal law is impossible, or when the state law stands as an obstacle to the accomplishment and execution of the full purposes and objective of Congress." United States v. Locke, 529 U.S. 89, 109 (2000)). "Congressional purpose," as the Supreme Court has noted, is the "ultimate touchstone" of the court's inquiry on conflict preemption. Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 541 (2001).

a. 49 U.S.C. § 32908

Defendant first argues that if "an EPA estimate included in a 'window sticker' is not a 'warranty' under federal or state law . . . then surely any claim that the mere inclusion of this same estimate in an advertisement is such a guaranty, warranty or promise flatly conflicts with federal law." (Mem. at 24.) As noted above, Section 32908 requires car dealers to maintain a label, commonly referred to as a "Monroney" label, on every new vehicle, detailing, among

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other things, the fuel economy of the vehicle and estimated annual fuel costs. 49 U.S.C. § 32908(b)(1).

Congress enacted the Energy Policy and Conservation Act (EPCA) in 1975 to address America's "chronic energy supply shortages, particularly petroleum supply shortages, experienced . . . in the early 1970's." H.R. Rep. No. 106-359, at 2 (1999). The EPCA was created, in part, to "provide for improved energy efficiency of motor vehicles" and to "provide a means for verification of energy data to assure the reliability of energy data." 42 U.S.C. § 6201.

In True v. American Honda Motor Co., Inc., a district court in this district considered an analogous conflict preemption argument. 520 F.Supp.2d 1175, 1180 (C.D. Cal. 2007). Like Kim, the plaintiff in True brought claims under the CLRA and UCL concerning allegedly false and deceptive advertisements made by Honda "regarding the fuel efficiency and cost savings of its Honda Civic Hybrid automobile." Id. at 1178. Honda argued that Section 32908 preempted the plaintiff's claims. The True court described the applicable federal laws as follows:

> Section 32908(b) of Title 49, U.S.C., requires automobile manufacturers to display Monroney Stickers, containing certain information, on each vehicle. Further, dealers are required to make available for prospective buyers a booklet containing information on a vehicle's fuel economy. 49 U.S.C. § 32908(c). EPA regulations require that the Monroney Stickers contain the phrase "your actual mileage will vary depending on how you drive and maintain your vehicle." 40 C.F.R § 600.307–08(b)(4).

True, 520 F.Supp.2d at 1175. The True court found that "[n]othing in the EPCA or its accompanying regulations purports to regulate advertising of fuel economy beyond the requirements regarding these stickers and booklets." Id. Significantly, the court concluded that "it would be an unreasonable assumption . . . that Congress intended to preempt states from regulating false or misleading advertising of a vehicle's fuel efficiency and cost savings." Id. In other words, the existence of the federal regulatory scheme does not preclude states from barring the misuse of EPA fuel efficiency data in advertising or other promotional materials.

The Paduano court agreed with the True court's analysis regarding conflict preemption:

> We agree with the True court that allowing states to regulate false advertising and unfair business practices may further the goals of the EPCA, and we reject Honda's claim that California's regulation of deceptive advertising somehow acts as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

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88 Cal.Rptr.3d at 114.

The Court concurs with the analysis and the conclusions drawn by the True and Paduano courts. 49 U.S.C. § 32908 plainly relates solely to Monroney Stickers and booklets that federal law requires be given to consumers. As in those cases, California's regulation of false advertising made in print media and elsewhere does not stand as an obstacle to the accomplishment and execution of these purposes and objectives. Indeed, it would seem to further those purposes.

b. FTC Regulations

Finally, GM contends that Plaintiff is seeking to penalize it "for making one rather than another of the two permitted choices" in advertising its vehicle's fuel economy, in conflict with 16 C.F.R. § 259.2. (Mem. at 24–25.) Section 259.2 permits automobile manufacturers "to advertise the EPA estimates and make the disclosures required by the FTC for that kind of advertising, or to advertise non-EPA estimates and make the much more onerous FTC-required disclosures for that kind of advertising." (Mem. at 25.)

While the FTC may regard the phrase "EPA estimate(s)" as the "minimum disclosure necessary to comply with [this regulation]" within all media platforms, see 16 C.F.R. § 259.2(a)(2) n. 5, nowhere does the FTC regulation prevent states from applying stricter disclosure standards. See True, 520 F. Supp. 2d at 1181 ("Nothing in the EPCA or its accompanying regulations purports to regulate advertising of fuel economy beyond the requirements regarding these stickers and booklets.") By contrast, the True court held that "[r]equiring the display of fuel efficiency information could further this Congressional purpose," rather than conflict with or stand as an obstacle to it. Id.

For the same reasons, the Court finds that the FTC regulation does not preempt Plaintiff's claims. As noted above, Plaintiff merely takes issue with the manner in which GM represents these EPA figures in various advertisements, which is not covered by, nor would it conflict with FTC regulations.

C. SUFFICIENCY OF ALLEGATIONS

1. RULE 9(B)

GM contends that because Plaintiff's asserts a cause of action for fraud, and because various of his other claims sound in fraud, Plaintiff must satisfy the heightened pleading

requirements of Rule 9(b). (Mem. at 14.)

Because it concludes that Plaintiff has satisfied Rule 9(b)'s heightened pleading requirements, the Court finds it unnecessary to address the Rule's applicability to Plaintiff's individual causes of action. Plaintiff has described various aspects of the allegedly fraudulent scheme in detail. He has alleged the "specific content of the false representations," describing and even attaching to his FAC the relevant advertisements and statements made therein. (FAC ¶ 11.) Plaintiff also explains why such representations were false or misleading, alleging that they led him and other consumers to believe that they could achieve such mileage under normal driving conditions. For instance, Plaintiff points to a GM advertisement stating that the Terrain can travel up to 600 miles on a single tank of gas, with an illustration of a route from Chicago to Rochester, which he alleges caused him to believe that he could actually achieve such fuel economy and range. (Id. ¶¶ 11–12.) Plaintiff has also alleged that Defendant was responsible for these misrepresentations, which were included in its own catalog and paid advertisements. (Id. ¶ 11.)

In short, the alleged misrepresentations are clearly described in the FAC, and the Court finds that Plaintiff's allegations are sufficiently detailed to "give defendant[] notice of the particular misconduct which is alleged to constitute the fraud charged so that [it] can defend against the charge and not just deny that it ha[s] done anything wrong." Semegen, 780 F.2d at 731. Accordingly, the Court finds that Plaintiff's allegations meet the heightened pleading standards of Rule 9(b).

2. LIKELIHOOD OF DECEPTION

The CLRA prohibits the use of "unfair methods of competition and unfair or deceptive acts or practices" in the sale of goods to any consumer. Cal. Civ. Code § 1770(a). The UCL prohibits any "unlawful, unfair or fraudulent business practice and unfair, deceptive, untrue or misleading advertising . . . ." Cal. Bus. & Prof. Code § 17200. The FAL prohibits any "unfair, deceptive, untrue, or misleading advertising." Cal. Bus. & Prof. Code § 17500.

To state a claim under the CLRA, FAL, and UCL, a plaintiff must allege facts showing "that members of the public are likely to be deceived." Ariz. Cartridge Remanufacturers Ass'n v. Lexmark Int'l, Inc., 421 F.3d 981, 985 (9th Cir. 2005). In determining whether members of the public are likely to be deceived, the Court must apply a "reasonable consumer" test. Williams v. Gerber Prods. Co., 523 F.3d 934, 938 (9th Cir. 2008) (applying the "reasonable consumer" test to claims brought under the UCL, FAL, and CLRA); Lavie v. Procter & Gamble Co., 129 Cal.Rptr.2d 486, 493–495 (2003) (applying the "reasonable consumer" test to claims

brought under the UCL and FAL). A UCL cause of action "may be based on representations to the public which are untrue," as well as those which are partly accurate, "but will nonetheless tend to mislead or deceive." Paduano, 88 Cal.Rptr.3d at 104 (citations omitted). In other words, a "perfectly true statement couched in such a manner that it is likely to mislead or deceive the consumer, such as by failure to disclose other relevant information," is actionable under the UCL." Id. (citations omitted). "Whether a practice is deceptive, fraudulent, or unfair is generally a question of fact which requires 'consideration and weighing of evidence from both sides . . . .'" Id. (citations omitted). However, "if the alleged misrepresentation, in context, is such that no reasonable consumer could be misled, then the allegation may . . . be dismissed as a matter of law." Haskell v. Time, Inc., 857 F.Supp. 1392, 1399 (E.D. Cal. 1994).

Because the rule for deceptive practices under the "fraudulent" prong of the UCL applies equally to misrepresentation-based claims under the CLRA, see Consumer Advocates v. Echostar Satellite Corp., 8 Cal.Rptr.3d 22, 29 (2003), courts have addressed these claims together. See Paduano, 88 Cal.Rptr.3d at 103–106 (analyzing CLRA and UCL claims together); see also Neu v. Terminix Intern., Inc., U.S. Dist. LEXIS 60505, 2008 WL 2951390, at *3–4 (N.D. Cal. July 24, 2008). Defendant also alludes to Plaintiff's failure to sufficiently plead "justifiable reliance," which is an element of Plaintiff's fraud and negligent misrepresentation claims. For purposes of the present analysis, the standards are similar enough to be treated together. See, e.g., McKinnis v. Kellogg USA, 2007 WL 4766060, at *5 (C.D. Cal. Sep. 19, 2007) ("Even assuming, arguendo, that the characteristics of the Froot Loops box constitute misrepresentations, Plaintiffs cannot establish justifiable reliance because, again, Plaintiffs cannot establish that the reasonable consumer would rely on these representations in assuming that Froot Loops contains actual fruit.")

As previously stated, the Court separates the purportedly misleading advertisements into three categories: [1] those that Plaintiff alleges do not adequately disclose the "EPA estimate" language; [2] those that fail to include the language "actual mileage will vary"; and [3] those that discuss "tank range" based on the EPA estimate, including an advertisement that translates that "tank range" into a distance and a map outlining a route from Chicago to Rochester. The Court addresses these representations in turn.

As to the first and second sets of advertisements, the Court finds that the allegations are insufficient to satisfy the standards articulated above. These advertisements either [1] state that the vehicle achieves "32 highway miles per gallon," but relegate the "EPA-estimated" disclosure to a footnote or smaller text on the same page (FAC ¶ 11); or [2] omit the words "actual mileage will vary" from the represented fuel economy (FAC ¶ 26).

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Such allegations are weaker than those rejected in Paduano, where the plaintiff complained of Honda's use of footnotes, including some on separate pages, to disclose that the Honda Civic's MPG rating was an EPA estimate. 88 Cal.Rptr.3d at 104. As in that case, GM has done nothing more than utilize footnotes to comply with disclosure rules under federal law. As the Paduano court held, "there is nothing false or misleading about [a manufacturer's] advertising with regard to its statements that identify the EPA fuel economy estimates . . . ." Id. at 1470. Moreover, the FTC Industry Guide governing fuel economy advertising affirmatively states that inclusion of the phrase 'EPA Estimate(s)' is sufficient without more to comply with the FTC's regulations. 16 C.F.R. § 259.2(a)(2). See, e.g., Lavie, 129 Cal.Rptr.2d at 494 ("FTC interpretation of the federal act has always been viewed as 'more than ordinarily persuasive' . . . in its construction of the breadth of the protection afforded consumers under the UCL . . . .") (citations omitted)). The Court agrees with Gray v. Toyota Motor Sales, U.S.A. which held that claims that "rely solely on advertisements that merely repeat the approved EPA mileage estimates, without any additional representations as to, for example, a consumer's ability to achieve those figures under normal driving conditions," must fail. 2012 U.S. Dist. LEXIS 15992, at *16 (C.D. Cal. Jan. 23, 2012) (citing Paduano, 88 Cal.Rptr.3d at 104–105) (emphasis added).

However, the Court finds that Plaintiff adequately states claims with respect to the third set of misrepresentations. Plaintiff complains of a statement in the 2011 Terrain brochure concerning the vehicle's ability to travel "up to 600 highway miles on a single tank of gas," which is placed next to a map that illustrates a route from Chicago to Rochester. (FAC ¶ 11.) Plaintiff not only takes issue with the 600 mile range, which he alleges the vehicle is incapable of reaching, but also contends that the distance from Chicago to Rochester is more than 600 miles. (Id. ¶¶ 4, 11, 15.) GM contends that the Terrain catalog "displays a calculation showing that the 600 mile projected driving range" is the EPA-estimated highway MPG (32) multiplied by the approximate capacity of the fuel tank (18.8 gallons). (Mem. at 11.) GM argues that this calculation "clearly" reflects the "approximate upper limit of the Terrain's driving range, not a warranty of 'real world' fuel economy or driving range." (Id.) Plaintiff, on the other hand, contends that GM "affirmatively misrepresents that the advertised MPG ratings can be attained in the real world under normal performance by advertising that the vehicle can travel 600 miles on a single tank of gas." (Opp. at 2.)

The Court finds that such statements, whether they be made through word or illustration, could mislead a "reasonable consumer." This representation falls precisely into the exception carved out by Gray and Paduano, because it implies that a consumer will be able to actually achieve the EPA fuel economy figures when driving in the real world. The brochure explicitly states that "the Terrain offers class-leading highway fuel economy without sacrificing

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performance," and represents that the Terrain "offers 32 EPA-estimated highway miles per gallon, and can go up to 600 highway miles on a single tank of gas," including a real world map to emphasize the point.

In Paduano, Honda included in its brochure a statement that a consumer could "[j]ust drive the Hybrid like you would a conventional car and save on fuel bills." 88 Cal.Rptr.3d at 119. In sustaining the plaintiff's UCL and CLRA claims, the court explained:

> Paduano maintains that Honda has voluntarily made additional assertions, beyond the disclosure of the mileage estimates, that are untrue or misleading, and that federal law does not require, or even address, these additional assertions. Paduano's claims are based on statements Honda made in its advertising brochure to the effect that one may drive a Civic Hybrid in the same manner as one would a conventional car, and need not do anything "special," in order to achieve the beneficial fuel economy of the EPA estimates.

Id. at 1477. In this case, Plaintiff similarly maintains that he reasonably relied on these "additional representations" made by GM as to tank range, which led him to believe that he could achieve those figures under normal driving conditions. Both parties agree that the purpose of EPA fuel economy estimates is to provide a consistent basis for comparing the fuel economy of competing vehicles relative to each other, and that such estimates are not designed to determine the actual expected mileage for a vehicle under "real world" driving conditions.[1] (FAC ¶ 20; Opp. at 1–2; Mem. at 4–5.) GM's attempt to blur the line between the calculation of mileage under the simulated EPA-estimate test and real world driving conditions is not persuasive, and is not supported by the case law.[2]

[1] For instance, a vehicle's EPA estimate for fuel economy is measured under controlled conditions in a laboratory, using special fuel, a professional driver, and a machine called a dynamometer which simulates the driving environment. (Mem. at 6; FAC ¶ 3.)

[2] Defendant's citation to Gray does not help its case. In Gray, two Toyota Prius owners sued the car manufacturer under the UCL, CLRA, and for fraudulent concealment, arguing that Toyota's failure to disclose the results of its internal fuel efficiency tests amounted to an actionable omission since it knew that the EPA mileage estimates were inaccurate. The court held that Toyota was not obligated to disclose that the Prius's actual mileage did not reach EPA estimates. 2012 U.S. Dist. LEXIS 15992 at *20–21. In reaching this decision, the court relied heavily on Paduano, which precluded Plaintiffs' UCL and CLRA claims "to the extent they are premised solely on representations regarding the Prius's EPA mileage estimates." Id. at *20. In the instant action, Plaintiff does not rely solely on representations regarding the Terrain's EPA mileage estimates, but on other statements which go beyond what GM is obligated to disclose. (See, e.g., FAC ¶ 12 ("Based on these representations, [Plaintiff] reasonably believed that the Terrain would . . . travel 600 miles on a single tank of gas during normal, real-world

LINK: 7

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 11-06459 GAF (MRWx)	Date	March 9, 2012
Title	Yung Kim v. General Motors, LLC et al.		

For these reasons, the Court finds that a reasonable consumer could be deceived by this third category of advertisements. Accordingly, as to these representations, the motion is **DENIED**.

III.
CONCLUSION

For the foregoing reasons, the Court **GRANTS in part** and **DENIES in part** Defendant's motion to dismiss. All claims are **DISMISSED** insofar as they rely on the first and second categories of representations discussed above. In all other respects, the motion is **DENIED**. The hearing on this motion presently scheduled for March 12, 2012 is **VACATED**.

IT IS SO ORDERED.

highway use.").) Moreover, Kim maintains that GM has affirmatively misrepresented the Terrain's expected fuel economy. (FAC ¶¶ 12, 15, 26–27; Opp. at 4, 11, 14, 17, 18, 20.) To the extent that Kim's claims are premised solely on representations regarding the Terrain's EPA mileage estimates, the Court finds that they are insufficient, as discussed above. (See FAC ¶ 12 ("[N]one of these advertisements provide any disclaimer that the actual gas mileage under normal, real world driving conditions will actually and substantially vary from the advertised gas mileage . . . .").)