Requested Hearing Date: March 11, 2019 at 10:00 a.m. (EDT)
Objection Deadline: March 4, 2019 at 4:00 p.m. (EST)

Paul M. Basta
Aidan Synnott
Kyle J. Kimpler
Sarah Harnett
Dan Youngblut
PAUL, WEISS, RIFKIND, WHARTON &
GARRISON LLP
1285 Avenue of the Americas
New York, New York 10019
Telephone: (212) 373-3000
Facsimile: (212) 757-3990

Arthur Steinberg
Scott Davidson
KING & SPALDING LLP
1185 Avenue of the Americas
New York, New York 10036
Telephone: (212) 556-2100
Facsimile: (212) 556-2222

Counsel for General Motors LLC

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re: MOTORS LIQUIDATION COMPANY, *et al.*, f/k/a General Motors Corp., *et al.*, Debtors.	Chapter 11 Case No. 09-50026 (MG) (Jointly Administered)

NOTICE OF HEARING ON GENERAL MOTORS LLC'S MOTION PURSUANT TO SECTION 105(a) OF THE BANKRUPTCY CODE TO (A) STAY PROCEEDINGS RELATING TO THE PROPOSED SETTLEMENT AND (B) GRANT RELATED RELIEF

PLEASE TAKE NOTICE that upon the annexed *General Motors LLC's Motion Pursuant to Section 105(a) of the Bankruptcy Code to (A) Stay Proceedings Relating to the Proposed Settlement and (B) Grant Related Relief* (the "Motion"), a hearing has been requested before the Honorable Martin Glenn, United States Bankruptcy Judge, in Room 523 of the United States Bankruptcy Court for the Southern District of New York, One Bowling Green, New York, New York 10004, on March 11, 2019, at 10:00 a.m. (EDT), or as soon thereafter as counsel may be heard.

PLEASE TAKE FURTHER NOTICE that any responses or objections to this Motion must be in writing, shall conform to the Federal Rules of Bankruptcy Procedure and the Local Rules of the Bankruptcy Court, and shall be filed with the Bankruptcy Court (a) electronically in accordance with General Order M-399 (which can be found at www.nysb.uscourts.gov) by registered users of the Bankruptcy Court's filing system, and (b) by all other parties in interest, on a CD-ROM or 3.5 inch disk, in text-searchable portable document format (PDF) (with a hard copy delivered directly to Chambers), in accordance with the customary practices of the Bankruptcy Court and General Order M-399, to the extent applicable, and served in accordance with General Order M-399 and on (i) Drinker Biddle & Reath LLP, attorneys for Wilmington Trust Company as GUC Trust Administrator, 1177 Avenue of the Americas, 41st Floor, New York, New York 10166 (Attn: Kristin K. Going, Esq. & Marita S. Erbeck, Esq.); (ii) FTI Consulting, as the GUC Trust Monitor, 3 Times Square, 9th Floor New York, NY 10036 (Attn: Conor Tully); (iii) Paul, Weiss, Rifkind, Wharton & Garrison LLP, attorneys for General Motors LLC, 1285 Avenue of the Americas, New York, New York 10019 (Attn: Paul M. Basta, Esq. & Kyle J. Kimpler, Esq.); (iv) King & Spalding LLP, attorneys for General Motors LLC, 1185 Avenue of the Americas, New York, New York 10036 (Attn: Arthur Steinberg, Esq. & Scott Davidson, Esq.); (v) the United

States Department of the Treasury, 1500 Pennsylvania Avenue NW, Room 2312, Washington, D.C. 20220 (Attn: Erik Rosenfeld); (vi) Vedder Price, P.C., attorneys for Export Development Canada, 1633 Broadway, 31th Floor, New York, New York 10019 (Attn: Michael J. Edelman, Esq. and Michael L. Schein, Esq.); (vii) Brown Rudnick LLP, designated counsel in the Bankruptcy Court for the Ignition Switch Plaintiffs and Certain Non-Ignition Switch Plaintiffs, Seven Times Square, New York, New York 10036 (Attn: Edward S. Weisfelner, Esq. & Howard S. Steel, Esq.); (vii) Stutzman, Bromberg, Esserman & Plifka, a Professional Corporation, designated counsel in the Bankruptcy Court for the Ignition Switch Plaintiffs and Certain Non-Ignition Switch Plaintiffs, 2323 Bryan Street, Suite 2200, Dallas, Texas 75201 (Attn: Sander L. Esserman, Esq.); (ix) Hagens Berman Sobol Shapiro LLC, co-lead counsel for the Ignition Switch Plaintiffs and certain Non-Ignition Switch Plaintiffs in the MDL Court, 1301 2nd Ave., Suite 2000, Seattle, WA 98101 (Attn: Steve W. Berman, Esq.); (x) Lieff Cabraser Heimann & Bernstein, LLP, co-lead counsel for the Ignition Switch Plaintiffs and certain Non-Ignition Switch Plaintiffs in the MDL Court, 275 Battery Street, 29th Floor, San Francisco, California 94111 (Attn: Elizabeth J. Cabraser, Esq.); (xi) Andrews Myers, P.C., counsel to certain Pre-Closing Accident Plaintiffs, 1885 St. James Place, 15th Floor, Houston, Texas 77056 (Attn: Lisa M. Norman, Esq. & T. Joshua Judd, Esq.); (xii) the Office of the United States Trustee for the Southern District of New York, U.S. Federal Office Building, 201 Varick Street, Room 1006, New York, New York 10014 (Attn: William K. Harrington, Esq.); and (xiii) Cole Schotz, P.C., counsel for Certain Ignition Switch Pre-Closing Accident Plaintiffs Represented by The Cooper Firm and Beasley, Allen, Crow, Methvin, Portis & Miles, P.C., 1325 Avenue of the Americas, 19th Floor, New York, New York 10019 (Attn: Mark Tsukerman, Esq.) so as to be received no later than March 4, 2019, at 4:00 p.m. (EST) (the "Objection Deadline").

PLEASE TAKE FURTHER NOTICE that if no objections are timely filed and served with respect to the Motion, New GM may, on or before the Objection Deadline, submit to the Court an order substantially in the form of the proposed order attached to the Motion, which order may be entered with no further notice or opportunity to be heard.

Dated: February 22, 2019
New York, New York

Paul M. Basta

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Aidan Synnott
Kyle J. Kimpler
Sarah Harnett
Dan Youngblut
PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, New York 10019
Telephone: (212) 373-3000
Facsimile: (212) 757-3990

Arthur Steinberg
Scott Davidson
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New York, New York 10036
Telephone: (212) 556-2100
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GENERAL MOTORS LLC'S MOTION PURSUANT TO SECTION 105(a) OF THE BANKRUPTCY CODE TO (A) STAY PROCEEDINGS RELATING TO THE PROPOSED SETTLEMENT AND (B) GRANT RELATED RELIEF

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

TO THE HONORABLE MARTIN GLENN,
UNITED STATES BANKRUPTCY JUDGE:

General Motors LLC ("New GM") submits this motion (the "Motion") and respectfully represents as follows.[1] On February 1, 2019, certain individuals asserting late-filed economic loss claims (the "Signatory Plaintiffs") filed the Rule 23 Motion.[2] At the same time, the GUC Trust (together with the Signatory Plaintiffs, the "Movants") filed the Rule 9019 Motion,[3] for approval of a proposed class-action settlement (the "Proposed Settlement"), which seeks to resolve both late-filed Rule 23 class claims and late-filed individual non-class claims. The Settlement Motions ask this Court to (1) preliminarily certify two nationwide limited fund settlement classes (the "Proposed Classes") of economic loss claimants (the "Plaintiffs") through an unprecedented "hybrid" limited fund, non-opt structure, (2) appoint class representatives and class counsel, and (3) approve and direct notice to the Proposed Classes and personal injury and wrongful death claimants, even if such individuals did not file claims (the "PIWD Plaintiffs"), all by March 11, 2019. For the reasons set forth below, New GM respectfully requests a stay of proceedings related to the Proposed Settlement and the Settlement Motions.

PRELIMINARY STATEMENT

1. The key issue before this Court is whether it should, within a few weeks, develop an extensive record sufficient to support a finding that it is **likely to certify two nationwide**

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[1] Capitalized terms not otherwise defined herein shall have the meanings given to them in the Rule 23 Motion.

[2] *The Economic Loss Plaintiffs' Motion to: (1) Extend Bankruptcy Rule 7023 to These Proceedings; (2) Approve the Form and Manner of Notice; (3) Grant Class Certification for Settlement Purposes Upon Final Settlement Approval; (4) Appoint Class Representatives and Class Counsel for Settlement Purposes; and (5) Approve the Settlement Agreement By and Among the Signatory Plaintiffs and the GUC Trust Pursuant to Rule 23* [Docket No. 14408] (the "Rule 23 Motion").

[3] *Motion of Motors Liquidation Company GUC Trust to Approve (I) The GUC Trust Administrator's Actions, (II) The Settlement Agreement By and Among the Signatory Plaintiffs and the GUC Trust Pursuant to Bankruptcy Code Sections 105, 363, and 1142 and Bankruptcy Rules 3002, 9014, and 9019, and (III) Authorize the Reallocation of GUC Trust Assets* [Docket No. 14409] (the "Rule 9019 Motion," and together with the Rule 23 Motion, the "Settlement Motions").

limited fund classes comprising, in the Movants' various estimations, somewhere between 9.5 million and 26 million individuals,[4] while the MDL Court, which has spent years developing a voluminous record, has **not yet certified even one statewide class**. New GM and the MDL economic loss plaintiffs (the "MDL Plaintiffs") have already completed briefing (the "MDL Briefing") on class certification (the "Class Certification Briefing"), summary judgment (the "Summary Judgment Briefing"), and *Daubert* (the "Daubert Briefing"). The Movants recently acknowledged that the MDL Court's rulings on the MDL Briefing are "anticipated by June 2019"[5] and may affect the "size, scope or composition of the classes" (and the cost of notice), thus requiring the parties to "engage in good faith negotiations" regarding the "impacted" provisions of the Proposed Settlement. (Settlement Agreement § 4.5.) But rather than wait for these "impacts," the Movants ask this Court to jump ahead of the MDL Court and move forward **now**. To accommodate the Movants' schedule, this Court would have to evaluate issues that have already been fully briefed in the MDL Court, for which rulings are anticipated by June 2019, and that bear directly on class certification (and other issues) in both courts. In addition, this Court would have to rule that it is **likely** that there will be two nationwide limited fund classes, even though differences in state law and controlling limited fund case law make this unlikely.

2. Recent amendments to Rule 23(e) dictate the standard by which the Court must determine whether to preliminarily certify the Proposed Classes. As amended, Rule 23(e) provides that "giving notice is justified by the parties' showing that the court will **likely** be able to . . . **certify the class for purposes of judgement** on the proposal." (FED. R. CIV. P. 23(e)(1)(B)(ii)

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[4] *Compare Tr. of Case Mgmt. Conference Before the Hon. Martin Glenn* (Dec. 20, 2018) ("Hr'g Tr. 12/20/2018") at 4-5 (noting that approximately 11.4 million vehicles are subject to the Recalls at issue involving between 11.4 and 26 million individuals, but that the number may substantially decrease based on rulings from the MDL Court); *with Tr. of Case Mgmt. Conference Before the Hon. Martin Glenn* (May 25, 2018) ("Hr'g Tr. 5/25/2018") at 24 ("[D]on't hold me to the exact numbers, but I think we're down to . . . nine-and-a-half million cars.").

[5] Plaintiffs' Letter dated 2/13/2019 [Docket No. 14424] ("Plaintiffs' Feb. 13 Letter").

(emphasis added).) Whether certification is likely is not a "sneak peek" that delays the hard work of class certification until a later date. Indeed, amended Rule 23(e) is a "more exacting" standard than before[6] and now makes clear that:

> The decision to give notice of a proposed settlement to the class is an **important event**. It should be based on a **solid record** supporting the conclusion that the proposed settlement will likely earn final approval after notice and an opportunity to object. . . . At the time they seek notice to the class, the proponents of the settlement should ordinarily **provide the court with all available materials** they intend to submit to support approval under Rule 23(e)(2) and that they intend to make available to class members.[7]

3. The mandatory process set forth by amended Rule 23(e) dovetails with two key Supreme Court cases. In *Amchem Prods., Inc.* v. *Windsor*, the Supreme Court held that class certification requires "undiluted, **even heightened**, attention in the settlement context." 521 U.S. 591, 620 (1997) (emphasis added).[8] In *Ortiz* v. *Fibreboard Corp.*, the Supreme Court noted that "certification of a mandatory settlement class, however provisional technically, effectively concludes the proceeding save for the final fairness hearing," and therefore requires "**rigorous adherence**" to Rule 23. 527 U.S. 815, 849 (1999) (emphasis added). As a result, parties settling limited fund classes "must present not only their agreement, but **evidence** on which the district court may ascertain the limit and the insufficiency of the fund, with support in **findings of fact** following a proceeding in which the **evidence is subject to challenge**." *Id.* (emphasis added). Notably, *Ortiz* also cautioned courts against "**uncritical adoption** . . . of figures agreed upon by

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6 *In re Payment Card Interchange Fee Litig.*, 2019 WL 359981, at *12 (E.D.N.Y. Jan. 28, 2019).

7 2018 Advisory Committee Notes to the 2018 Amendments to Federal Rule of Civil Procedure 23(e) (the "Rule 23(e) Adv. Comm. Notes") (emphasis added).

8 *Amchem* undermines the Signatory Plaintiffs' misleading statement that "a *settlement* class under Rule 23(e) . . . involves considerations different from a litigation class . . . ." (Plaintiffs' Feb. 13 Letter (emphasis in original).) *See also In re Motors Liquidation Co.*, 591 B.R. 501, 526 (Bankr. S.D.N.Y. 2018) ("Rule 23's standards for class certification—apart from consideration of whether the case would be manageable to try as a class action—are equally applicable and rigorous in the settlement context.") (citations omitted).

the parties in defining the limits of the fund and demonstrating its inadequacy." *Id.* at 848-54 (emphasis added).

4. In sum, to comply with amended Rule 23(e), *Amchem*, and *Ortiz*, this Court must develop by the March 11 hearing a "solid record" supported by "specific evidentiary findings" and conclude that the Movants will "likely" satisfy, on a final basis, each of the requirements under Rule 23(a), Rule 23(b), *Ortiz*, and Rule 23(e) with respect to the Proposed Classes. This is a gargantuan task, one that would require this Court to make specific and detailed findings regarding the likely outcome of critical threshold issues that are subsumed in the MDL Briefing and pending before the MDL Court. Even a cursory review of the MDL Briefing, attached hereto as Exhibits B through E, demonstrates the number and complexity of issues that bear on class certification in both courts, including, but not limited to, the following:

- **The aggregate liquidated amount of the Plaintiffs' claims**. Under *Ortiz*, the lodestar case on limited fund class action settlements, a limited fund class cannot be certified unless "the totals of the aggregated liquidated claims and the fund available for satisfying them, set definitely at the maximums, demonstrate the inadequacy of the fund to pay all claims." Here, the Proposed Settlement does not contemplate liquidation of any of the Plaintiffs' claims until the estimation stage, which occurs after final certification of the Proposed Classes. The Movants have also conceded that estimation (*i.e.*, liquidation) of the Plaintiffs' claims will be inextricably tied to the MDL Court's rulings on the MDL Briefing and other future rulings: "rulings on economic loss claims for each state that have been rendered by Judge Furman in the MDL Action have been and will continue to be taken into account when we get to the estimation phase." (Plaintiffs' Feb. 13 Letter.) Additionally, the Plaintiffs' claims are based on the methodologies and reports of their key expert, Stefan Boedeker, and will remain wholly unliquidated until the MDL Court rules on whether Boedeker's methodology satisfies *Daubert* and, even if it does, whether it proves class-wide damages. Similarly, the value of the Settlement Fund (the "limited" fund here), which may be zero, will be unknown until estimation (long after the Proposed Classes are supposed to be finally certified and the releases provided). This Court cannot find the likely amount of the Plaintiffs' unliquidated claims or the likely size of the "limited" fund without making findings that anticipate and preempt the MDL Court's rulings on the MDL Briefing.

- **Whether the Plaintiffs in the Proposed Classes share a common theory of recovery**. Under Rule 23(b)(1)(B), Rule 23(e)(2)(D), and *Ortiz*, the Plaintiffs must be "identified by a common theory of recovery [must be] treated equitably among themselves." *Ortiz*, 527 U.S. at 839. Although the Proposed Classes are nationwide classes, the Movants concede that the Plaintiffs assert claims under the laws of every state and D.C. for: "(i) fraudulent concealment; (ii) unjust enrichment, (iii) consumer protection claims; (iv) breach of the implied warranty of merchantability; and (v) negligence." (Rule 23 Motion ¶ 35.) Given that the claims in the Proposed Classes involve 255 different causes of action, six separate Recalls, and approximately 120 vehicle models, the Plaintiffs cannot have a common theory of recovery, particularly where the MDL Court has held that "subtle differences in state law can dictate different results for plaintiffs in different jurisdictions." *In re Gen. Motors LLC Ignition Switch Litig.*, 2016 WL 3920353, at *18 (S.D.N.Y. July 15, 2016). These issues are all presently in front of the MDL Court. Moreover, the MDL Court will rule on whether Boedeker's methodology (if admissible) proves class-wide (rather than individualized) damages. This Court cannot assess the likelihood that the Plaintiffs share a common theory of recovery under such facts without making findings that anticipate and preempt the MDL Court's rulings on the MDL Briefing. And if the Plaintiffs do not share a common theory of recovery, the Court cannot determine whether they are treated equitably among themselves.

- **The adequacy of the (as-yet unidentified) representatives of the Proposed Classes**. Under Rule 23(a)(3), the class representatives must have "typical" claims and defenses, and under Rules 23(a)(4) and 23(e)(2)(A), the representatives must adequately represent the interests of the class. Yet, the Movants have not identified any proposed class representatives. Even if they had, the likely "adequacy" of these as-yet-unidentified representatives raises myriad questions. If a proposed representative leased a vehicle subject to Recall 14V-355 (Impala Key Rotation) and asserts a claim under the Texas Deceptive Trade Practices Consumer Protection Act, is that representative's claim typical of a Plaintiff that owned a different model vehicle subject to Recall 14V-153 (Electronic Power Steering) asserting a negligence claim under Missouri common law? Can a representative asserting claims under the California Song-Beverly Consumer Warranty Act adequately represent the interests of Plaintiffs asserting unjust enrichment claims under Missouri or Texas common law? If New GM has unique defenses to the claims of the representatives, how can they adequately represent the Proposed Classes? Do differences among applicable state laws, causes of action, the various Recalls, and the many vehicle models at issue require subclasses (which, per Second Circuit law, must be decided for certification of any class action settlement) in order to comply with Rule 23(a) and *Ortiz*? Every one of these questions is before the MDL Court now. This Court cannot assess the likely answers to these questions without making findings that anticipate and preempt the MDL Court's rulings on the MDL Briefing.

- **The adequacy of the "relief" provided to the Proposed Classes**. Under Rule 23(e)(2)(C), the relief provided to the putative class members under the Proposed Settlement must be "adequate." The likely adequacy of the relief also raises myriad questions. Under Rule 23(e)(2)(C)(i), what are the costs, risks, and delay associated

with waiting a few months for key rulings from the MDL Court? Under Rule 23(e)(2)(C)(ii), what is the effectiveness of the proposed method of distributing relief to the class, which the Movants do not plan to share with this Court until after final certification? Under Rule 23(e)(2)(C)(iii), what are the terms of any proposed award of attorneys' fees, which will not be disclosed until after certification? How can the "adequacy" of the relief be considered at all without first knowing the liquidated amount of the Plaintiffs' claims and the amount of the Settlement Fund? This Court cannot assess the likely answers to these questions without making findings that anticipate and preempt the MDL Court's rulings on the MDL Briefing.

- **Whether millions of Plaintiffs lack Article III standing to assert claims**. Under Article III of the United States Constitution, the Plaintiffs must have suffered injuries-in-fact and have legally cognizable claims. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Otherwise, this Court has no subject-matter jurisdiction over the Plaintiffs and their claims, and thus lacks the power to certify the Proposed Classes. If the MDL Court rules Boedeker inadmissible under *Daubert*, that ruling would control here, and the Plaintiffs' claims would fail, thus depriving the Plaintiffs of Article III standing. Moreover, the MDL Court may soon rule that all (or some) of New GM's Recall repairs were effective and that, as a result, some (or all) of the Plaintiffs will not have any legally cognizable claims. This Court cannot assess whether the Plaintiffs have standing under Article III or whether New GM's Recall repairs fixed the alleged defects without making findings that anticipate and preempt the MDL Court's rulings on the MDL Briefing.

- **Whether there are common questions of law and fact in the Non-Ignition Switch Class**. Under Rule 23(a)(2), no class may be certified unless there are questions of law or fact common to the class. The Plaintiffs in the Non-Ignition Switch Class assert 255 different causes of action involving five separate Recalls. Some of the five Recalls are completely unrelated, which is why the MDL Plaintiffs have sought separate putative classes for each Recall in the Class Certification Briefing. If the MDL Plaintiffs needed separate statewide classes, how can millions of Plaintiffs be classified together here in the proposed nationwide Non-Ignition Switch Class? This Court cannot assess the likelihood that there are common questions of law and fact for the Non-Ignition Switch Class without making findings that anticipate and preempt the MDL Court's rulings on the MDL Briefing.

5. The Movants have failed to provide this Court with **any** record, let alone the required "solid record" on which it could determine any of the complex issues above that bear on whether certification of the Proposed Classes is likely. The Settlement Motions refer vaguely to the "Proffered Evidence," but the Movants have not presented any such "evidence" to this Court, and it appears that such evidence is simply material that is currently subject to challenge in the MDL Briefing. The Movants are left with two options. First, they can rely on the MDL Court's

record, which they acknowledge will continue to develop based on rulings on the MDL Briefing. Second, they can ask this Court to independently develop its own record.

6. Neither suggestion is tenable. Either way, the Movants ask this Court to predict rulings by the MDL Court and make specific findings that may conflict with the MDL Court's future rulings. Instead, this Court should stay proceedings relating to the Proposed Settlement pending the MDL Court's rulings on the issues raised in the MDL Briefing. Such rulings are inextricably tied to, and will provide controlling direction on, the findings this Court is required to make under Rule 23(e) to preliminarily certify the Proposed Classes.

7. The Movants seek to avoid confronting these difficult and clearly overlapping issues at the outset by suggesting that the Court can deal with them after having certified the Proposed Classes. According to the Movants, **after** the Proposed Settlement and Proposes Classes have been finally approved, this Court could somehow "decertif[y]" or "re-jigger[]" the Proposed Classes (Hr'g Tr. 12/20/2018 at 11) because the "Class members may be differently situated" at Stage Three requiring "additional or different subclasses" (Rule 23 Motion ¶ 117). Contrary to these assertions, however, consideration of these complex issues cannot be shelved until after the Proposed Classes have been finally certified. Among other things, whether the Proposed Classes can "likely" be certified as limited fund classes is wholly dependent on whether the Plaintiffs' claims will have been liquidated, and the limited fund will have been established, before any certification. Any suggestion that the myriad Rule 23 issues may be resolved piecemeal and in distinct stages is fundamentally flawed.

8. Moreover, the MDL Court has spent years developing an extensive record (which will be supplemented by rulings on the *Daubert* Briefing and the Summary Judgment Briefing) to **carefully consider all factual and legal issues that bear on class certification prior to the**

certification of any classes. Both proceedings involve many of the same vehicles, many of the same Recalls, many of the same legal issues, many of the same Plaintiffs, and the exact same experts. That the Plaintiffs seek certification of settlement classes under Rule 23(b)(1) rather than litigation classes under Rule 23(b)(3) does not justify a backwards process or minimize the substantial overlap between the two proceedings. The MDL Court has served for over four years as the lead court on these issues, and an attempt to reverse that course of dealing should be rejected.

9. In fact, the Movants have repeatedly acknowledged the overlap between issues in the MDL Court and issues in the Proposed Settlement, having:

- stated that the MDL Court's "**near-term decisions**" on the MDL Briefing will "dramatically impact the size of the universe" of class members (and thus notices that need to be sent) and will "be reflected in all of the proceedings that [this Court] will be asked to engage in" (Hr'g Tr. 12/20/2018 at 14-15);

- linked the fate of the Proposed Settlement to proceedings in the MDL Court, acknowledging that the MDL Court's summary judgment decision may affect "**the size, scope or composition of the classes**" (Settlement Agreement § 4.5);

- provided the GUC Trust with the unilateral right to terminate the Proposed Settlement Agreement if Co-Lead Counsel appeals the **MDL Court's** summary judgment decision (*Id.* § 10.2);

- dismissed the need to "develop an evidentiary record" in this Court because "the extensive record" in the MDL Court means there "is no need for this Court to retread **ground covered in the MDL Action**" (Plaintiffs' Feb. 13 Letter); and

- noted that "rulings on economic loss claims for each state that have been rendered by Judge Furman in the MDL Action **have been and will continue to be taken into account** when we get to the estimation phase" (*Id.*).

10. The Movants' request to have this Court approve a form of notice at the March 11 hearing is also premature. As recently as December 20, 2018, the Movants recognized that future rulings from the MDL Court "could very well implicate whether we're talking about 26 million registrations or 11- or 12-million registrations; a cost would be the 13 million or 7 million." (Hr'g Tr. 12/20/2018 at 6.) Although they still expect such rulings in a matter of months, the Movants

have decided to spend up to $13.72 million and send notice to potentially millions of individuals that may not be eligible class members. The Movants' approach of sending notice to everyone now only to sort out the details later cannot be squared with the Advisory Committee's declaration that "[t]he decision to give **notice** of a proposed settlement to the class is an **important event**" and the fact that "**a court asked to certify a settlement class will lack the opportunity**, present when a case is litigated, **to adjust the class** . . . ." *Amchem*, 521 U.S. at 620 (emphasis added).

11. Finally, as New GM will demonstrate in its forthcoming objection to the Settlement Motions, the Proposed Classes violate **every** requirement set forth in *Ortiz*. The Movants ask this Court to certify, under a hybrid limited fund theory, non-opt-out classes that are comprised of (1) wholly unliquidated claims that (2) share with non-class members (*i.e.*, all PIWD Plaintiffs, regardless of whether they filed claims) a "limited" fund that may never have any assets (3) by design excludes more than 95% of the GUC Trust's assets, even though (4) the confirmed Plan provides for pro rata distributions to holders of allowed general unsecured claims so that no Plaintiff could ever recover at the expense of other Plaintiffs. That the Proposed Settlement is an "adventurous application of Rule 23(b)(1)(B)" that *Ortiz* "counsel[ed] against" is a vast understatement, especially where the Supreme Court has made it "clear that the Advisory Committee did not contemplate that the mandatory class action codified in subdivision (b)(1)(B) would be used to aggregate unliquidated tort claims on a limited fund rationale." 527 U.S. at 843.

12. Accordingly, to avoid the serious and unnecessary risk of inconsistent rulings and waste of resources, and to accord appropriate deference to the MDL Court, New GM respectfully requests a stay of proceedings related to the Proposed Settlement. For the same reasons, New GM is simultaneously filing a motion to withdraw the reference (the "Motion to Withdraw"). For the avoidance of doubt, as New GM stated in its February 11, 2019 letter [Docket No. 14419], New

GM prefers the narrower stay relief requested herein, and any relief sought in the Motion to Withdraw would be unnecessary should this Court enter the Proposed Order or grant similar relief.

BACKGROUND

I. THE MDL 2543 LITIGATION.

13. In 2014, the Judicial Panel on Multidistrict Litigation established the multidistrict litigation proceeding (the "MDL") in the Southern District of New York under Judge Furman (the "MDL Court") to centralize proceedings on claims related to ignition switch and other alleged defects in vehicles manufactured by Old GM and New GM that are subject to certain recalls. The MDL Plaintiffs (many of whom are also Signatory Plaintiffs in this Court) include those who purchased or leased vehicles both before and after the sale of Old GM's assets to New GM, alleging economic harm and/or personal injuries purportedly caused by the defects.

14. More specifically, the Fifth Amended Consolidated Complaint (the "5ACC")[9] filed in November 2017 by the MDL Plaintiffs alleges economic loss class claims against New GM on behalf of those who purchased or leased certain Old GM or New GM vehicles. There has been substantial motion practice on the 5ACC, including the Class Certification Briefing (attached hereto as Exhibit B) for certification of alleged classes in California, Missouri, and Texas (the "Bellwether States"),[10] the Summary Judgment Briefing (Exhibit C) on a wide array of critical issues, the *Daubert* Briefing (Exhibit D) on admissibility of the parties' expert testimony, and ongoing supplemental letter briefing (Exhibit E) to address newly decided cases relevant to the myriad class certification issues. Given the intertwined nature of the issues, the MDL Court

[9] *In re Gen. Motors LLC Ignition Switch Litig.* [MDL ECF No. 4838] (S.D.N.Y. Nov. 27, 2017).

[10] The MDL Court has utilized briefing on the Bellwether States to provide the parties appropriate guidance as to how such issues may be resolved for other states. That same rationale underlies the stay requested herein, as the MDL Court's rulings will provide guidance to this Court, New GM, and the Movants.

scheduled proceedings so that issues raised in the Summary Judgment Briefing and the *Daubert* Briefing could be resolved simultaneously with the issue of certification.

II. THE PRIOR SETTLEMENT.

15. On May 3, 2018, the GUC Trust filed a motion in this Court seeking approval of a settlement (the "Prior Settlement"), which, like the Proposed Settlement here, purportedly resolved all of the Plaintiffs' claims.[11] The Prior Settlement sought to resolve class claims asserted under Rule 23(b)(3) without complying with Rule 23. The Plaintiffs filed a notice of amended Class Claims on April 24, 2018, with hundreds of pages of allegations regarding their (b)(3) class claims.[12] At the status conference on May 25, 2018, this Court requested briefing on the "gating issue" of whether the Prior Settlement required compliance with Rule 23 and noted that "[i]f the issue was whether . . . economic loss classes should be certified, and that issue is in the process of being briefed in discovery or whatever before Judge Furman, I'm strongly disinclined to try and jump the gun and decide the issue before Judge Furman does." (Hr'g Tr. 5/25/2018 at 22.) Following a hearing on July 19, 2018, this Court held that the Prior Settlement required compliance with Rule 23. *In re Motors Liquidation Co.*, 591 B.R. 501 (Bankr. S.D.N.Y. 2018).

III. THE PROPOSED SETTLEMENT.

16. On February 1, 2019, the Movants filed the Settlement Motions. Like the Prior Settlement, the Proposed Settlement seeks to settle all the Plaintiffs' and PIWD Plaintiffs' claims

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[11] *See Motion of Motors Liquidation Company GUC Trust to Approve (I) The GUC Trust Administrator's Actions and (II) The Settlement Agreement By and Among the Signatory Plaintiffs and the GUC Trust Pursuant to Bankruptcy Code Sections 105, 363, and 1142 and Bankruptcy Rules 3002 and 9019 and to (III) Authorize the Reallocation of GUC Trust Assets* [Docket No. 14293] (May 3, 2018). On January 18, 2018, this Court ruled that a still earlier unexecuted settlement agreement that was negotiated by Plaintiffs and the GUC Trust was not enforceable. *See In re Motors Liquidation Co.*, 580 B.R. 319, 364 (Bankr. S.D.N.Y. 2018).

[12] *See Amended Exhibits A and B to Motion For An Order Granting Authority To File Late Class Proofs Of Claim, Dkt. No. 13806* [Docket No. 14280] (Apr. 24, 2018) (the "Proposed Class Claims").

(regardless of whether such claims were filed), which the GUC Trust allegedly continues to believe "could" or "may" in the aggregate exceed $10 billion. (Rule 9019 Motion ¶ 50(d).)

17. Unlike the Prior Settlement, the Plaintiffs no longer assert class claims under Rule 23(b)(3) (though the Proposed Class Claims are still predicated on Rule 23(b)(3)). Instead, the centerpiece of the Proposed Settlement is certification of the Proposed Classes, *i.e.*, two nationwide non-opt-out "limited fund" classes pursuant to Rule 23(b)(1)(B) (or Rule 23(b)(1)(A) in the alternative).[13] The first of the two Proposed Classes is for those owners and lessees of vehicles asserting late-filed economic loss claims against the GUC Trust related to the Delta Ignition Switch Defect (Recall No. 14V-047) (such putative class, the "Ignition Switch Class"). (Rule 23 Motion ¶ 41.) Notably, the Plaintiffs in the Ignition Switch Class are all asserting claims against New GM on a theory of successor liability in the MDL Court, which likewise requires proof of Old GM's liability. The second of the two Proposed Classes is for those owners and lessees of vehicles asserting late-filed economic loss claims against the GUC Trust related to various Non-Ignition Switch Defects (Recall Nos. 14V-355, 14V-394, 14V-400, 14V-118, and 14V-153) (together with Recall 14V-047, the "Recalls") (such putative class, the "Non-Ignition Switch Class"). (Rule 23 Motion ¶ 41.) The Movants are unclear as to how many members are intended to be in the Proposed Classes. While they state there were approximately 11.4 million Old GM vehicles involved in the Recalls, they seek to send notice to multiple owners of the same vehicle. At the same time, the Signatory Plaintiffs recognize that (a) based on MDL rulings already made, it has been determined that many of the 11.4 million vehicle owners have not suffered damages, and (b)

[13] The Movants' alternative Rule 23(b)(1)(A) theory does not work as a matter of law because "[c]ourts in this Circuit have repeatedly recognized that certification under Rule 23(b)(1)(A) is limited to claims for equitable relief." *See Toney–Dick* v. *Doar*, 2013 WL 5295221, at *4 (S.D.N.Y. Sept. 16, 2013) (citing as examples a utility acting toward customers, a government imposing a tax, and a riparian owner using water that would otherwise flow to the downriver owners) (citations omitted). As a result, this Motion focuses on the Movants' request to certify the Proposed Classes under Rule 23(b)(1)(B).

based on the MDL Briefing, a substantial number of the Old GM vehicle owners may not have suffered damages. For example, as part of the MDL Briefing, the MDL Court has been asked to determine whether millions of individuals who disposed of their vehicles prior to the Recalls (and before disclosure of the alleged defects in their vehicles) have incurred an economic loss or have a valid claim of some sort. (Rule 23 Motion ¶ 10; Hr'g Tr. 12/20/2018 at 6.) The Proposed Settlement also seeks to resolve all claims by PIWD Plaintiffs (regardless of whether they filed claims), many of whom are also MDL Plaintiffs, even though the PIWD Plaintiffs who support the Proposed Settlement are not part of either of the two Proposed Classes and will recover from the same "limited" fund that is for the Proposed Classes.

18. The Proposed Settlement also seeks to resolve the claims of "Pre-Closing Accident Plaintiffs," defined broadly in the agreement as "plaintiffs asserting personal injury or wrongful death clams based on or arising from an accident that occurred before the closing Date involving an Old GM vehicle that was later subject to [the same recalls specified in connection with the economic loss claims]." (Settlement Agreement, Preamble ¶ S.) A subset of such plaintiffs are represented by counsel who signed the agreement, and these 442 plaintiffs are specifically identified in the agreement, and expressly included in the Release Provision. (*See* Settlement Agreement § 5.3.)[14] However, the proposed settlement provides that the Adjustment Shares will be distributed to "Plaintiffs," defined to include "Pre-Closing Accident Plaintiffs" (*i.e.*, including all persons asserting pre-closing personal injury/wrongful death claims). (*See* Settlement

[14] Of the 442 plaintiffs specifically identified in the agreement, 152 are eligible for settlements based on agreements in principle reached with New GM in the last several months. Of the remaining 290 named in the agreement, 245 filed or attempted to file proofs of claims in the Bankruptcy Court (albeit well after the deadline set forth in this Court's December 2016 Scheduling Order), and 45 have never even attempted to file claims in this Court. Of the 245 individuals who filed claims in this Court, 136 of them have also filed the same claims in the MDL Court.

Agreement § 2.5.) Furthermore, it appears that the claims of *all* Pre-Closing Accident Plaintiffs are being released, regardless of whether they have asserted claims.[15]

19. The Movants envision three primary "stages" of proceedings with respect to the Proposed Settlement. (Rule 23 Motion ¶ 116.)

20. *First*, the Movants ask this Court to preliminarily approve the Proposed Settlement and certify the Proposed Classes under Rule 23(e) ("Stage One"). (Rule 9019 Motion ¶ 53; Rule 23 Motion ¶ 116.) Thereafter, the GUC Trust will ask the Court for authorization to spend up to $13.72 million for a "state of the art notice program." The Movants anticipate that the hearing to approve this relief will occur on March 11, and that the actual notice will be mailed a few weeks thereafter. (Hr'g Tr. 12/20/2018 at 11.) After an unstated period of time (presumably months), the Movants will then seek the Court's final certification of the Proposed Classes and approval of the Proposed Settlement, which includes full releases (with no opt out provision) for the GUC Trust and certain non-parties (*i.e.*, the GUC Trust Beneficiaries, the Avoidance Action Trust, and the defendants in the term loan litigation).

21. *Second*, the Movants intend, only after the releases have been obtained, to pursue an estimation ("Stage Two") of the Plaintiffs' and PIWD Plaintiffs' claims. (Rule 9019 Motion ¶ 9.) The procedures for Stage Two (which determine what relief, if any, is available to the Plaintiffs) will presumably be spelled out in the Estimation Motion, which was not filed concurrently with the Settlement Motions. (Rule 9019 Motion ¶ 9.) The Movants acknowledge

[15] As New GM will describe in more detail in its forthcoming objection to the Settlement Motions, the Rule 23 Motion and its exhibits contain different, conflicting definitions with respect to the PIWD Plaintiffs purportedly covered by the Agreement, which (at least in the proposed notices) appear to improperly release the claims of **all** PIWD Plaintiffs, regardless of whether they have asserted claims or are signatories to the Proposed Settlement. *See, e.g.*, Rule 23 Motion Ex. C, Final Order ¶ 9 (release applies to "All Plaintiffs"); Ex. D, Short Form Notice (the Settlement includes 'Affected Persons' in the United States who, prior to July 10, 2009, bought or leased certain Old GM vehicles or suffered personal injury or wrongful death in an accident involving certain Old GM vehicles."); Ex. G, Long Form Notice at 5 ("Under the Settlement, each Affected Person will be deemed to have forever waived and released (the 'Waiver') any claims . . . .").

that the Stage Two estimation proceeding will leave the Plaintiffs and PIWD Plaintiffs with **no recovery** at all if this Court's estimation proceeding, which will be guided by the MDL Court's rulings, does not trigger the Adjustment Shares (even though 95% of the GUC Trust's assets, and assets in the Avoidance Action Trust, could be available to the Plaintiffs and PIWD Plaintiffs but for the Proposed Settlement). (*See, e.g.*, Rule 23 Motion Ex. D.) Thus, it is not until Stage Two (or later)—after the Proposed Classes have been finally certified and the comprehensive releases granted—that any of the Plaintiffs' claims become liquidated and the number of Adjustment Shares (if any) in the Settlement Fund becomes known.

22. *Third*, the Movants anticipate seeking this Court's approval of "allocation and distribution procedures" ("Stage Three"). (Rule 23 Motion ¶ 116.) Stage Three will therefore determine how to allocate the value (if any) in the Settlement Fund among the Proposed Classes and the PIWD Plaintiffs, and will be "guided by, and flow from, the Court's determinations in the estimation proceedings." (Rule 23 Motion ¶ 117.) Such allocation may require "additional or different subclasses [to] be created at [Stage Three], if necessary." (Rule 23 Motion ¶ 117.) Accordingly, although virtually nothing is disclosed about such allocation procedures, the Movants concede that events in Stage Three may undo any certification obtained in Stage One. (*See* Hr'g Tr. 12/20/2018 at 11 ("There is a possibility . . . that the class could be decertified, re-jiggered."); *but see Amchem*, 521 U.S. at 620 ("[A] court asked to certify a **settlement class will lack the opportunity, present when a case is litigated, to adjust the class** . . . .") (emphasis added).)

JURISDICTION

23. With respect to New GM's request for a stay, (i) this Court has subject-matter jurisdiction to consider and determine the relief requested pursuant to 28 U.S.C. § 1334; (ii) this is a core proceeding pursuant to 28 U.S.C. § 157(b); and (iii) venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

RELIEF REQUESTED

24. Pursuant to section 105(a) of title 11 of the United States Code (the "Bankruptcy Code"), New GM requests an order, substantially in the form of the proposed order attached hereto as Exhibit A (the "Proposed Order") granting a stay of proceedings related to the Proposed Settlement and the Settlement Motions and such other relief as is just and proper. Alternatively, New GM requests a stay of proceedings related to the Proposed Settlement pending the MDL Court's resolution of New GM's Motion to Withdraw.

ARGUMENT

I. PRELIMINARY APPROVAL UNDER RULE 23(e) REQUIRES THIS COURT TO HAVE A SUITABLE BASIS IN THE RECORD AT THE MARCH 11 HEARING TO FIND THAT IT CAN LIKELY CERTIFY THE PROPOSED CLASSES.

A. Amended Rule 23(e) Sets Forth the Process the Movants Must Follow and the Record this Court Must Have to Preliminarily Certify the Proposed Classes.

25. To provide the Plaintiffs and PIWD Plaintiffs with notice of the Proposed Settlement, the Movants must obtain preliminary approval of the Proposed Settlement under Rule 23(e), which sets forth the mandatory process for approving a settlement class and states:

> (e) SETTLEMENT, VOLUNTARY DISMISSAL, OR COMPROMISE. The claims, issues, or defenses of a certified class--or a class proposed to be certified for purposes of settlement--may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:
>
> * * *
>
> (B) *Grounds for a Decision to Give Notice.* The court must direct notice in a reasonable manner to all class members who would be bound by the proposal if giving notice is justified by the parties' showing that the court will ***likely*** be able to:
>
> (i) approve the proposal under Rule 23(e)(2); and
>
> (ii) certify the class for purposes of judgment on the proposal.

26. On December 1, 2018, Rule 23(e) was amended to "alter the standards that guide a court's preliminary approval analysis." *In re Payment Card*, 2019 WL 359981, at *11. Specifically, the standard for such approval is now "more exacting than the prior requirement." *Id.* at *12. Thus, Rule 23(e) now makes clear that a court reviewing a proposed class action settlement "must **assess** whether the parties have **shown** that the court will **likely** be able to grant final approval and **certify the class**." *Id.* at *12, n.21 (emphasis added); *see also Hays* v. *Eaton Grp. Attorneys, LLC*, 2019 WL 427331, at *3 (M.D. La. Feb. 4, 2019) ("The recent amendment to Rule 23(e) makes **clear** that its procedural safeguards apply to a 'class proposed to be certified for purposes of settlement' and requires the Court to **conclude** that it will **likely** be able, after final hearing, to certify the class.") (emphasis added). Even before the changes to Rule 23(e), however, courts had an "independent responsibility to ensure that the requirements of Rule 23(a) and (b) have been met." *See Oladapo* v. *Smart One Energy, LLC*, 2017 WL 5956907, at *8-11 (S.D.N.Y. Nov. 9, 2017) (concluding "[o]n the present record" that it "cannot recommend that the Class be preliminarily certified for settlement purposes," where, among other things, the movants had not presented "one iota" of evidence on the numerosity, typicality, and commonality requirements); *De Leon* v. *Bank of Am., N.A.*, 2011 WL 13137935, at *3 (M.D. Fla. Aug. 31, 2011) ("[T]he Court finds that the evidence and legal authority presented is insufficient . . . until the requirements for class certification are met, preliminary approval of the Settlement Agreement would be premature.").

27. Under amended Rule 23(e), therefore, the Movants must provide this Court with a "solid record" sufficient to determine that "the court will *likely* be able to" both (a) certify the Proposed Classes under Rule 23(a), Rule 23(b)(1)(B) (or Rule 23(b)(1)(A) in the alternative), and applicable law and (b) pursuant to Rule 23(e)(2), find that the Proposed Settlement is "fair,

reasonable, and adequate." The criteria that bear on whether a class settlement is fair, reasonable, and adequate include, among other things, whether representatives and counsel have adequately represented the class, whether the relief provided under the settlement is adequate, and whether the proposal treats class members equitably relative to each other. And even if "both parties desire settlement, this Court is not at liberty to merely rubberstamp approval." *See Eaton Grp. Attorneys, LLC*, 2019 WL 427331, at *8 (applying amended Rule 23(e)).

28. The Advisory Committee Notes to amended Rule 23(e) reinforce the holdings in *Amchem* and *Ortiz*. In *Amchem*, the Supreme Court made clear that class certification requires "undiluted, **even heightened**, attention in the settlement context." *Amchem* 521 U.S. at 620 (emphasis added). In *Ortiz*, the Supreme Court held that threshold limited fund issues should be evaluated "**independent of the agreement** of defendants and conflicted class counsel . . . following a proceeding in which the **evidence is subject to challenge**" rather than the "**uncritical adoption** . . . of figures agreed upon by the parties in defining the limits of the fund and demonstrating its inadequacy." *Id.* at 848-53. Rule 23(e) combines and reinforces these holdings:

> The decision to give notice of a **proposed settlement** to the class is an **important event**. It should be based on a **solid record** supporting the conclusion that the proposed settlement will likely earn final approval after notice and an opportunity to object. . . . **At the time they seek notice to the class, the proponents of the settlement should ordinarily provide the court with all available materials they intend to submit to support approval under Rule 23(e)(2)** and that they intend to make available to class members. (Rule 23(e) Adv. Comm. Notes (emphasis added).)

29. Rule 23(e) goes further: "if a class has not been certified, the [settling] parties must ensure that the court has a basis for concluding that it likely will be able, after the final hearing, to certify the class. . . . [T]he court cannot make the decision regarding the prospects for certification without **a suitable basis in the record**." (Rule 23(e) Adv. Comm. Notes (emphasis added).) Moreover, under amended Rule 23(e), a court can direct notice to the class "**only after**

determining that the prospect of class certification and approval of the proposed settlement justifies giving notice." (Rule 23(e) Adv. Comm. Notes (emphasis added).)

30. In short, Rule 23(e) requires this Court to develop a "solid record" **now** to support the likelihood of certification of the Proposed Classes. It cannot simply be deferred until after the preliminary approval stage. The Movants concede that proceedings in the MDL Court will impact the scope and viability of the Proposed Settlement, but they also take the position that any decisions from the MDL "will be reflected by necessity as part of the estimation proceedings." (Hr'g Tr. 12/20/2018 at 15; *accord* Plaintiffs' Feb. 13 Letter.) This is backwards, clearly at odds with the Advisory Committee Notes, and conflicts with the approach adopted by the MDL Court to not defer consideration of issues raised in the Summary Judgment Briefing and the *Daubert* Briefing until after certification. The rulings from the MDL Court, even if they relate to damages or affect the Stage Two estimation, **also** bear directly on this Court's mandatory assessment under Rule 23(e) of the likelihood of class certification in connection with preliminarily approving the Proposed Settlement. The Movants' position also directly conflicts with *Ortiz* and *Amchem*, which prohibit the Movants from punting such questions to estimation at Stage Two (although their impermissible desire to punt explains the Movants' admission that their Proposed Classes may have to be "decertified" and "re-jiggered" during Stage Three). (Hr'g Tr. 12/20/2018 at 11; Rule 23 Motion ¶ 117 ("Class members may be differently situated" at Stage Three requiring "additional or different subclasses").)

B. This Court's Determination of the Prospects for Certification Requires Analysis of the Likelihood that the Movants' Proposed Classes Satisfy All Aspects of Rule 23 and Related Certification Prerequisites.

31. As demonstrated by the MDL Briefing, certification of a class (whether pursuant to a limited fund theory or otherwise), requires the Movants to "actually *prove*—not simply plead—that their proposed class satisfies each requirement of Rule 23 . . . ." *Halliburton Co.* v. *Erica P.*

John Fund, Inc., 573 U.S. 258, 275 (2014) (emphasis in original). Further, it makes no difference that Movants are "settling" class certification issues. Notwithstanding the well-established principle that certification of settlement classes requires the same scrutiny as certification of litigation classes, the Signatory Plaintiffs have repeatedly stated that the two standards are "a lot different." (Hr'g Tr. 12/20/2018 at 7; *see also* Plaintiffs' Feb. 13 Letter (arguing that there was no overlap with the MDL Court because "Your Honor is being asked to consider a *settlement* class under Rule 23(e), which involves considerations different from a litigation class . . . ." (emphasis in original).) However, a court "[c]onfronted with a request for settlement-only class certification" must apply "**undiluted, even heightened, attention** in the settlement context." *Amchem*, 521 U.S. at 620. This Court also recognized that "Rule 23's standards for class certification—apart from consideration of whether the case would be manageable to try as a class action—are equally applicable and rigorous in the settlement context." *In re Motors Liquidation Co.*, 591 B.R. 501, 526 (Bankr. S.D.N.Y. 2018) (citation omitted).[16]

1. This Court's Rule 23(e) Determination of the Prospects for Certification Requires Analysis of the Likelihood that the Movants' Proposed Classes Satisfy Rule 23(a) and Certification Prerequisites.

32. "To qualify for class certification," the Movants "must first demonstrate that" the Proposed Classes satisfy the "four requirements of Rule 23(a)." *In re Deutsche Bank AG Securities Litig.*, 2018 WL 4771525, at *4 (S.D.N.Y. Oct. 2, 2018). Rule 23(a) provides as follows:

> (a) PREREQUISITES. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:
>
> (1) the class is so numerous that joinder of all members is impracticable;
>
> (2) there are questions of law or fact common to the class;

[16] *See also Schoenbaum* v. *E.I. Dupont De Nemours & Co.*, 2009 WL 4782082, at *12 (E.D. Mo. Dec. 8, 2009 (denying approval of a proposed class settlement, noting that settlement "does not justify less rigorous—and potentially less accurate—class certification proceedings . . . .").

> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
>
> (4) the representative parties will fairly and adequately protect the interests of the class.

33. In addition to Rule 23(a)'s express prerequisites (numerosity, commonality, typicality, and adequacy of representation), the Movants must also establish that the alleged injuries in the Proposed Classes can be shown by common evidence because "no class may be certified that contains members lacking Article III standing," which requires each member-Plaintiff to "have suffered an 'injury in fact.'" *Denney* v. *Deutsche Bank AG*, 443 F.3d 253, 264 (2d Cir. 2006). In fact, because all class members must have a cognizable legal injury, a court determining the propriety of class certification may also need to assess the merits of the underlying claims. "[W]hen a claim cannot succeed as a matter of law, the Court should not certify a class on that issue." *In re Beacon Assocs. Litig.*, 2012 WL 1372145, at *2 (S.D.N.Y. Mar. 19, 2012) (citation omitted). As set forth below, these precise issues are being decided by the MDL Court.

2. This Court's Rule 23(e) Determination of the Prospects for Certification Also Requires Analysis of the Likelihood that the Movants' Proposed Classes Satisfies Rule 23(b)(1)(B) and *Ortiz*.

34. Next, the Movants "must demonstrate that" the Proposed Classes satisfy "Rule 23(b) in one of three ways." *Deutsche Bank*, 2018 WL 4771525, at *4. The Movants seek to certify the Proposed Classes under Rule 23(b)(1), which provides as follows:

> (b) TYPES OF CLASS ACTIONS. A class action may be maintained if Rule 23(a) is satisfied and if:
>
> (1) prosecuting separate actions by or against individual class members would create a risk of:
>
> > (A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or

> (B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;

35. Because the Movants seek to certify the Proposed Classes as limited fund classes under Rule 23(b)(1)(B), *Ortiz* controls. Pursuant to *Ortiz*, a fund is "limited" only if: (1) "the totals of the aggregated **liquidated** claims and the fund available for satisfying them, set definitely at the maximums, demonstrate the inadequacy of the fund to pay all claims," (2) "the **whole** of the inadequate fund [is] to be devoted to the overwhelming claims," and (3) "the claimants identified by a **common** theory of recovery [are] treated **equitably** among themselves." *Ortiz*, 527 U.S. at 838-39 (emphasis added). As set forth below, issues raised in the MDL Briefing will impact this Court's assessment of the likelihood that these necessary characteristics are satisfied.

36. Although this Court's evaluation of the likelihood that the Proposed Settlement satisfies the first and third criteria of *Ortiz* depends on rulings from the MDL Court, the Proposed Settlement on its face violates the second criterion—that the "the whole of the inadequate fund . . . be devoted to" the Plaintiffs' class claims. Here, the proposed limited fund is an unprecedented hybrid, because the limited fund (if any) would be available not only (i) to the proposed Rule 23 economic loss classes (*i.e.*, the Proposed Classes) but also to (ii) non-class claimants (*i.e.*, the PIWD Plaintiffs, regardless of whether they have filed claims). *See Ortiz* v. *Fibreboard Corp*., 827 U.S. 815, 864-65 (1999) ("Assuming, arguendo, that a mandatory, limited fund rationale could under some circumstances be applied to a settlement class of tort claimants, it would be essential that the fund be shown to be limited independently of the agreement of the parties to the action, and **equally essential under Rules 23(a) and (b)(1)(B) that the class include all those with claims unsatisfied at the time of the settlement negotiations**, with intraclass conflicts addressed by recognizing independently represented subclasses.") (emphasis added).

II. TO SATISFY RULE 23(E), THIS COURT MUST DEVELOP A SOLID RECORD THAT WOULD SIGNIFICANTLY OVERLAP WITH THE MDL COURT.

37. In order to satisfy Rule 23(e)'s requirements and find that the Proposed Classes are likely to be certified, the Court must address various legal and factual issues that have already been briefed in the MDL Court. For this reason, this Court should stay proceedings relating to the Proposed Settlement to await any rulings from the MDL Court that impact the determinations this Court must make as to whether, among other things: (1) the Proposed Classes likely satisfy Rule 23(b)(1)(B) and *Ortiz* and its progeny; (2) the proposed representatives (currently unidentified) likely assert typical and common claims and are otherwise likely to be adequate representatives; (3) the relief provided to the Plaintiffs is likely to be adequate; (4) millions of Plaintiffs lack Article III standing or are otherwise unable to assert legally cognizable claims; (5) the Plaintiffs classified together in the Ignition Switch Class have sufficiently related legal and factual issues to avoid the need for subclasses or separate classes, considering many of them had the newer, non-"defective" ignition switch originally installed in their vehicle, but their vehicle was subject to the Recall because there was some uncertainty as to whether a relatively small number had their vehicle repaired with the older, "defective" ignition switch, and (6) the millions of Plaintiffs classified together in the proposed Non-Ignition Switch Class based on five Recalls have sufficiently related legal and factual issues to avoid the need for subclasses or separate classes.

A. This Court Must Find it Likely that the Proposed Classes Satisfy Certain Necessary Conditions of Limited Fund Classes Set Forth in *Ortiz*.

38. The Movants here seek to certify the Proposed Classes under Rule 23(b)(1)(B) as "limited fund classes." Accordingly, to apply the Rule 23(e) standard to the Proposed Settlement, this Court must find at the requested March 11 hearing that it can likely certify the Proposed Classes under the requirements set forth by the Supreme Court in *Ortiz*. Determining that these requirements are likely met necessarily requires evaluating issues squarely before the MDL Court.

1. This Court Cannot Determine Whether it Is Likely that the Value of the Liquidated Claims Exceeds the Value of the Settlement Fund Without Considering Issues Being Decided in the MDL Court.

39. One necessary characteristic of a limited fund class that is better assessed after the MDL Court rules on the MDL Briefing is that the "totals of the aggregated **liquidated claims** and the fund available for satisfying them, set definitely at the maximums, demonstrate the inadequacy of the fund to pay all claims." *Ortiz*, 527 U.S. at 838 (emphasis added). Therefore, this Court must find that the Plaintiffs have asserted liquidated claims and that the likely value of the aggregated **liquidated** claims asserted by the Plaintiffs exceeds the likely value of the proposed Settlement Fund, which will not become known until the estimation stage. To make a finding as to the liquidated amount of the Plaintiffs' claims and the value of the Settlement Fund, this Court would have to speculate on March 11 as to the outcome of estimation (Stage Two), when the Plaintiffs' claims become liquidated and the value of the Settlement Fund becomes known. The Movants are therefore asking this Court to certify classes first and then determine later whether the requirements of class certification have been met. The Court cannot make even these speculative findings, however, without also predicting the outcome of the MDL proceedings.

40. First, the Movants have already conceded that "the key rulings on economic loss claims for each state that have been rendered by Judge Furman in the MDL Action have been and will continue to be taken into account by the Settlement Parties when we get to the estimation phase." (Plaintiffs' Feb. 13 Letter.) For this Court to determine the liquidated amount of the Plaintiffs' claims and the value of the Settlement Fund, as it is required to do under *Ortiz* and amended Rule 23(e), the Court must necessarily consider the outcome of the estimation phase, which depends on "key rulings" from the MDL Court. Therefore, whether the Court concludes on March 11 that it is likely that the Plaintiffs' claims will be liquidated in the aggregate amount of

$0, $96 billion,[17] or any other amount, the Court will necessarily be guessing at the MDL Court's "key rulings" that bear on the liquidation of the Plaintiffs' claims (including, but not limited to, upcoming rulings on the effectiveness of New GM's Recall repairs and the validity and applicability of the Plaintiffs' various state law causes of action under 51 separate jurisdictions). The Movants have neither identified these key rulings nor submitted any evidence regarding the likely outcome of these key rulings.

41. Second, the liquidated amount of the Plaintiffs' claims, which then dictates the value (if any) of the Settlement Fund, depends entirely on whether the "Proffered Evidence" (which appears to be nothing more than materials from the MDL Court) is admissible under *Daubert* and can demonstrate a class-wide injury. The centerpiece of the Proffered Evidence appears to be Boedeker's conjoint survey methodology. The Plaintiffs would have no claims without Boedeker, as Boedeker's report is their "proof" that the "fund is wholly inadequate to satisfy these claims" as required by *Ortiz*. (Rule 23 Motion ¶ 107.) And if Boedeker's opinions are not admissible or fail to reliably demonstrate legally cognizable damages that are measurable on a class-wide (rather than individualized) basis (issues presently before the MDL Court), then the Plaintiffs have no evidence to support any liquidation of their claims. Simply put, this Court cannot find that it can "likely" certify proposed limited fund classes without, among other things, making a detailed finding on the likely outcome of estimation at Stage Two, and this Court cannot do that without a full *Daubert* analysis.[18]

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[17] If Boedeker's report (which was not submitted to this Court in connection with the Settlement Motions) continues to use "median damages" estimates that range from $88 to $8,094 per vehicle, total aggregate damages for 11.96 million vehicles could range from between $1 billion to $96 billion—an absurdly imprecise range that is the antithesis of a "liquidated" amount.

[18] *See, e.g.*, *In re Nickels Midway Pier, LLC*, 450 B.R. 58, 66-67 (D.N.J. 2011) (remanding issue because of bankruptcy court's failure, as part of a claims estimation proceeding, to "conduct[] a . . . *Daubert* analysis of the admissibility of the expert reports and testimony of [the experts]" and noting that "nothing . . . supports a

42. This same reasoning underscores why courts routinely resolve *Daubert* issues prior to or in connection with certification issues. *See In re Blood Reagents Antitrust Litig.*, 783 F.3d 183, 187 (3d Cir. 2015) (citing cases adopting that approach); *see also Wal-Mart Stores, Inc.* v. *Dukes*, 564 U.S. 338, 354 (2011) ("doubt[ing]" a court's "conclu[sion] that *Daubert* did not apply to expert testimony at the certification stage of class-action proceedings."). Pre-certification resolution of *Daubert* issues is particularly critical in the limited fund context because, according to one treatise, "after *Ortiz*, no decision . . . has certified a 'limited fund' class involving unliquidated damages, while numerous courts have either denied (b)(1)(B) certification or decertified (b)(1)(B) classes that had been certified under pre-*Ortiz* law." (McLaughlin on Class Actions § 5:10 (Oct. 2018).) As shown in the *Daubert* Briefing, the MDL Court will address the *Daubert* issues before certification. Importantly, the rulings on Boedeker go beyond the Bellwether States and affects the claims of **all** Plaintiffs. Because "plaintiff[s] cannot rely on challenged expert testimony, when critical to class certification, to demonstrate conformity with Rule 23 unless the plaintiff also demonstrates, and the trial court finds, that the expert testimony satisfies the standard set out in *Daubert*." *In re Blood Reagents*, 783 F.3d at 187.

43. Instead of waiting for the MDL Court's critical rulings which bear on the viability of the Plaintiffs' claims, however, the Movants ask this Court to defer consideration of the admissibility of expert testimony to Stage Two (estimation) when the Proposed Classes will have already been finally certified and releases granted. But the admissibility of Boedeker under *Daubert* and the determination of what Boedeker's report proves (if anything) are critical to demonstrating the existence of both injury and damages, without which the Plaintiffs have no

conclusion that a Bankruptcy Court may estimate claims based on potentially unreliable expert evidence, over the expression objection of a party").

claims to certify. Because limited fund classes require proof of the amount of liquidated claims prior to certification, the MDL Court's rulings on these issues unquestionably impact the Movants' likelihood of certifying the Proposed Classes.

2. This Court Cannot Determine Whether it Is Likely that the Proposed Classes Comprise Plaintiffs Sharing a Common Theory of Recovery Without Considering Issues Being Decided in the MDL Court.

44. Another necessary characteristic of a limited fund class that is better assessed after the MDL Court rules on the MDL Briefing is that the class members must share a "common theory of recovery" and be "treated equitably among themselves." *Ortiz*, 527 U.S. at 839. To apply Rule 23(e) to the Proposed Settlement, this Court must have a suitable basis in the record at the March 11 hearing to determine that both of the Proposed Classes contain only Plaintiffs who share a "common theory of recovery" and are "treated equitably among themselves." And to the extent that the Plaintiffs do not share a common theory of recovery or would not be treated equitably among themselves, then the Court would need to create subclasses at the preliminary approval stage. *See Amchem*, 521 U.S. at 620 ("[A] court asked to certify a settlement class will lack the opportunity, present when a case is litigated, to adjust the class, informed by the proceedings as they unfold."). Indeed, "where differences among members of a class are such that subclasses must be established, **we know of no authority that permits a court** to approve a settlement . . . on the basis of consents by members of a unitary class, some of whom happen to be members of the distinct subgroups." *In re Payment Card Interchange Fee Litig*, 827 F.3d 223, 235 (2d Cir. 2016) (internal quotations omitted). Moreover, limited fund class certification often requires subclasses represented by separate and independent counsel.[19]

[19] *See Ortiz*, 527 U.S. at 864 (requiring class to include "all those with claims unsatisfied at the time of the settlement negotiations, with intra-class conflicts addressed by recognizing independently recognized subclasses"); *see also In re Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Prod. Liab. Litig.*, 1999 WL 782560, at *9 (E.D. Pa. Sept. 27, 1999) ("To the extent that the causation analysis would be different for those with valvular damage

45. For this Court to find at the March 11 hearing that the Plaintiffs share a common theory of recovery and are treated equitably among themselves, it must, at the very least, canvass the laws of 51 jurisdictions as well as the facts relating to six different Recalls involving approximately 120 different vehicle models. By way of example only, with respect to the Non-Ignition Switch Class, this Court must find it likely that the claims of Plaintiffs who owned a new 2004 Chevrolet Monte Carlo subject to Recall 14V-355 (Impala Key Rotation Recall) under the Alaska Unfair Trade Practices and Consumer Protection Act share a "common theory of recovery" with Plaintiffs who leased a 2004 Chevrolet Malibu subject to Recall 14V-153 (Electronic Power Steering Recall) under the South Carolina Regulation of Manufacturers, Distributors, and Dealers Act, and Plaintiffs who owned a used 2008 Buick Enclave subject to Recall 14V-118 (Side Impact Airbag Recall) under the law of warranty of implied merchantability in North Dakota.

46. These determinations are necessary because, to the extent differences among applicable state laws and the factual circumstances of the various Recalls require the creation of subclasses within the Non-Ignition Switch Class, the Court must find that it can likely certify such subclasses at the March 11 hearing. *See In re Gen. Motors LLC Ignition Switch Litig.*, 2016 WL 3920353, at *18 (S.D.N.Y. July 15, 2016) ("[T]he Court will separately address each claim with respect to each jurisdiction, as subtle differences in state law can dictate different results for plaintiffs in different jurisdictions."). If the MDL Plaintiffs need separate classes for each of the Recalls (which is their approach in the MDL Class Certification Briefing and an issue that will be further clarified by the MDL Court's rulings on the MDL Briefing), then similarly situated

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as opposed to the more rare PPH condition, there is a fundamental difference in the theory of liability and the grounds for recovery between these two classes . . . The individual question of whether a class member ingested Pondimin and for how long is one that would complicate the claims administration process and, absent a costly individual causation analysis, it would be difficult to ensure that those with a common theory of recovery are treated equitably among themselves.").

Plaintiffs in this Court would also need classes. Pursuant to *Ortiz*, 527 U.S. at 864, any such subclasses would likely require separate counsel, and pursuant to *Amchem*, 521 U.S. at 620, the need for subclasses must be evaluated now. But notwithstanding *Ortiz*, *Amchem*, Rule 23(e), and their own admission that "Class members may be differently situated," the Movants ask this Court to defer consideration of the need for "additional or different subclasses" until the allocation stage, *i.e.*, **well after** this Court has already certified two nationwide classes. (Rule 23 Motion ¶ 117.)

47. As reflected in the Class Certification Briefing and the Summary Judgment Briefing attached as Exhibits B and C, the MDL Court has already begun this strenuous process by requesting substantial briefing on the laws of the Bellwether States. In fact, it should give this Court considerable pause that the Plaintiffs seek nationwide classes, even though the MDL Plaintiffs are pursuing statewide classes for the Bellwether States because the MDL Court has already identified distinctions among state laws that make nationwide classes impossible.[20]

48. For this Court to preliminarily determine, pursuant to Rule 23(e) and *Ortiz*, that all Plaintiffs share a "common theory of recovery," and that all Plaintiffs will be treated equitably without needing subclasses, this Court will need to make findings regarding the "subtle differences in state law [which] can dictate different results for plaintiffs in different jurisdictions." *In re Gen. Motors LLC Ignition Switch Litig.*, 2016 WL 3920353, at *18. The MDL Court has already begun to analyze those differences, however, and its rulings with respect to the Bellwether States (and other future filings) will provide controlling direction for this Court.

[20] *See, e.g., In re Gen. Motors LLC Ignition Switch Litig.*, 2016 WL 3920353, at *16 (S.D.N.Y. July 15, 2016) (dismissing MDL Plaintiffs' proposed nationwide RICO claim); *id.* at *18 ("[D]espite the repetition it entails—the Court will separately address each claim with respect to each jurisdiction, as subtle differences in state law can dictate different results for plaintiffs in different jurisdictions."); *see generally In re Gen. Motors LLC Ignition Switch Litig.*, 2017 WL 2839154 (S.D.N.Y. June 30, 2017) (analyzing common law and statutes in various states).

B. This Court Cannot Find it Is Likely that the Proposed Class Representatives Adequately Represent the Proposed Classes Without Considering Issues Being Decided in the MDL Court.

49. Even assuming that nationwide classes without any subclasses are appropriate (an assumption largely foreclosed by rulings from the MDL Court), this Court must still have a "suitable basis" in the record at the March 11 hearing to determine that each of the proposed class representatives "fairly and adequately protect the interests of the class." (FED. R. CIV. P. 23(a)(4).) A proposed representative is more likely to be adequate if he or she has a typical claim susceptible to common class-wide proof, so the "requirements [commonality and typicality] therefore also tend to merge with the adequacy-of-representation requirement . . . ." *Wal-Mart Stores*, 564 U.S. at 349 n.5. Rule 23(e)(2)(A) similarly requires an upfront evaluation of whether "the class representatives and class counsel have adequately represented the class." Accordingly, this Court's evaluation of the adequacy of the proposed representatives invokes issues arising under Rule 23(a)(2) (commonality), Rule 23(a)(3) (typicality), and Rules 23(a)(4) and (e)(2)(A) (adequacy of representation).

50. Because the "adequacy of the representation of the class is the **linchpin** to securing the preclusive effect of the class proceedings as to absent members" (McLaughlin on Class Actions § 4:26 (Oct. 2018) (emphasis added)), it is remarkable that the Proposed Settlement does not even identify the representatives of the Proposed Classes. Therefore, at present, this Court has **zero basis**—let alone a "suitable basis" or a "solid record"—to evaluate the likelihood that it will find the proposed representatives to be adequate.[21]

[21] The Rule 23 Motion defines the "Ignition Switch Class Representatives" as the "prospective class representatives for the Ignition Switch Plaintiffs" and the "Non-Ignition Switch Class Representatives" as the "prospective class representatives for the Non-Ignition Switch Plaintiffs" (Rule 23 Motion p. 1.) To add to the confusion, the Ignition Switch Class Representatives and the Non-Ignition Switch Class Representatives are together defined as the "Economic Loss Plaintiffs," a term that is defined in the Settlement Agreement to include all putative members of the Proposed Classes. (Settlement Agreement Preamble § S.b.) Section 2.67 of the Settlement Agreement

51. But assuming for the moment that the proposed representatives are simply the named claimants in the Proposed Class Claims filed before the Prior Settlement, seven of the named claimants in the Proposed Class Claims are also proposed class representatives in the MDL Court, where New GM has argued that such individuals are subject to unique defenses or otherwise assert claims that are not typical of the proposed statewide classes. To the extent that the MDL Court rules that any of the individuals who may be class representatives here cannot adequately represent the MDL classes, it is hard to fathom how they could adequately represent any of the Proposed Classes in these proceedings.

52. The Rule 23(a) elements of commonality and typicality, which (as noted above) necessarily inform whether the proposed representatives are adequate, are also already fully briefed and set to be decided by the MDL Court with respect to the Bellwether States. The rulings for the Bellwether States, combined with any other certification proceedings that may occur in the MDL Court, will determine how many class representatives are necessary to ensure the adequate representation that Rules 23(a) and 23(e) require. That number could be as few as two (one for each of the two Proposed Classes) or could be significantly more (if variations in state law and the number of Recalls at issue, among other things, create a need for subclasses). The MDL Court will also decide other issues relating to the adequacy of representation, including whether individuals are capable of being adequate representatives of classes if they, among other things: (a) disposed of their vehicles prior to the Recalls, (b) cannot show a manifest defect and thus have no claims as a matter of law (a ruling the MDL Court has already made with respect to eight states),

provides that the proposed class representatives are identified on Schedule 3 thereto, but Schedule 3 instead appears to identify three PIWD Plaintiffs represented by two specific law firms.

(c) testified that they did not factor safety into purchase decisions, or (d) cannot demonstrate that their vehicles were unmerchantable.

53. In the absence of rulings from the MDL Court, this Court would be forced to establish a suitable record to determine whether the unidentified proposed representatives are likely adequate, an inquiry rendered even more difficult by the fact that the named claimants in the Proposed Class Claims do not come from all 51 applicable jurisdictions. The Proposed Class Claims, for example, list Frances Howard of Jackson, Mississippi as a named claimant, but do not include any named claimants from certain other states (*e.g.*, Alaska). As a result, this Court would have to find it likely at the March 11 hearing that Ms. Howard (or some other claimant in the Proposed Class Claims) is an adequate representative of the Plaintiffs from Alaska because, among other things, her claims under Mississippi law are typical of claims under Alaska law (including for claims relating to different Recalls). The Movants have failed to provide this Court with any basis—let alone a suitable basis grounded in fact and law—to make such a determination. The MDL Court's rulings will fill in at least some of the gaps left by the Movants' omissions.

54. Of course, without knowing the identities of the proposed representatives, it is hard to say precisely how rulings from the MDL Court will impact this Court's mandated assessment under Rule 23(e). But this Court can only benefit from the MDL Court's rulings on the foregoing issues, all of which bear on whether the proposed representatives (once known) are likely adequate.

C. This Court Cannot Find it Is Likely that the Relief Provided to the Plaintiffs in the Proposed Classes Is Adequate Without Considering Issues Being Decided in the MDL Court.

55. To apply Rule 23(e) to the Proposed Settlement, this Court must have a "suitable basis" in the record at the March 11 hearing to determine that the relief provided to the Plaintiffs under the Proposed Settlement is adequate. (FED. R. CIV. P. 23(e)(2)(C).) Therefore, to determine that the relief is likely adequate, this Court must predict the outcome of the Stage Two estimation

procedure as well as the allocations in Stage Three, which, of course, depend on an allocation methodology that the Movants promise to provide at some later date. Predicting the outcome of the Stage Two estimation procedure, however, necessarily entails predicting the outcome of the MDL Court's ruling on the admissibility of Boedeker's expert reports and damages analysis, along with myriad other issues raised in the MDL Briefing.

56. For their part, the Movants effectively concede that this Court cannot evaluate the adequacy of relief at the March 11 hearing without further rulings from the MDL Court. First, the proposed notice forthrightly states that there is "no guarantee that the claims estimate order will require New GM to issue **any** shares," even though the Plaintiffs "will be prevented from pursuing [their] own lawsuit" because of the non-opt-out release. (Rule 23 Motion Ex. D (emphasis added).) Here, the proposed notice provides neither this Court nor the notice recipients of critical information such as whether the notice recipient is eligible to make a claim for, much less receive, any compensation from the Adjustment Shares. The likelihood of a notice recipient being an eligible claimant who can receive Adjustment Shares depends entirely on future rulings from this Court (through Stage Two estimation and Stage Three allocation) **and** the MDL Court.

57. Second, the Signatory Plaintiffs readily admit that the adequacy of the relief in the Proposed Settlement is tied to future MDL Court rulings: "[a]ny merits-based issues that the [MDL Court] has previously made or will make in the future will be reflected by necessity as part of the estimation proceedings." (Hr'g Tr. 12/20/2018 at 15.) The Signatory Plaintiffs reiterated this position in their letter to the court on February 13, 2019, noting that such rulings "will be taken into account at the estimation proceeding stage." (Plaintiffs' Feb. 13 Letter.) Moreover, the Signatory Plaintiffs stated confidently that rulings on the MDL Briefing are "anticipated by June 2019" and in any event are "very likely" to be issued "long before the estimation proceedings

begin." (Plaintiffs' Feb. 13 Letter.) It is impossible to predict today the output of the Stage Two estimation hearing without engaging in pure speculation. But without even an inkling as to that output, this Court has no suitable basis in the record to determine that the relief provided for millions of Plaintiffs is "likely" to be adequate and sufficient to justify the mandatory releases proposed to be binding on millions of individuals.

58. In addition, Section 4.5 of the Settlement Agreement provides that if the MDL Court "issues an Opinion or Order on [the Summary Judgment Briefing] . . . that impacts the size, scope or composition of the classes of Economic Loss Plaintiffs, the Parties shall, within five (5) business days . . . engage in good faith negotiations regarding the applicable provisions of this Settlement Agreement impacted by said decision." This provision would be wholly unnecessary if, as counsel to the Signatory Plaintiffs stated, the Proposed Classes and the proposed MDL classes "don't overlap" and the impact of such rulings could simply be deferred to estimation. (Hr'g Tr. 12/20/2018 at 7.) Instead, Section 4.5 is an acknowledgement by the Movants that the Summary Judgment Briefing directly impacts the relief available to the Proposed Classes, and that they (and this Court) will have no insight into the adequacy of that relief prior to the MDL Court's rulings.

59. Furthermore, two termination rights afforded to the GUC Trust in the Settlement Agreement cement the connection between the Proposed Settlement and the Summary Judgment Briefing before the MDL Court. First, the GUC Trust may unilaterally terminate the Settlement Agreement if the Preliminary Approval Order is not entered on or before September 15, 2019, more than six months after the requested hearing date. (Settlement Agreement § 10.2(a).) This termination right clearly anticipates that this Court may wait for relevant developments in the MDL Court. Second, the GUC Trust may unilaterally terminate the Settlement Agreement if Co-Lead Counsel appeals the MDL Court's summary judgment decision. (Settlement Agreement

§ 10.2(b).) Again, this termination right, which could make the Preliminary Approval Order advisory, would be pointless if events in the MDL Court were unrelated to approval of the Proposed Settlement. It is hard to square these termination rights based purely on developments in the MDL Court with the Signatory Plaintiffs' insistence that the Proposed Settlement "does not involve substantial overlap with proceedings before the MDL Court." (Plaintiffs' Feb. 13 Letter.)

60. Accordingly, this Court cannot evaluate whether the relief in the Proposed Settlement is likely adequate without evaluating the likely outcome of the Stage Two estimation here, which, by the Movants' own design, is inextricably bound to the MDL Court's rulings.

D. This Court Cannot Find it Is Likely that the Millions of Plaintiffs Have Article III Standing Without Considering Issues Being Decided in the MDL Court.

1. This Court Must Have a Suitable Basis in the Record at the March 11 Hearing to Find it Likely that the Constitutional Issues in Boedeker's Methodology Will Be Resolved in Favor of the MDL Plaintiffs.

61. To apply Rule 23(e) to the Proposed Settlement, this Court must have a "suitable basis" in the record at the March 11 hearing to determine that the Proposed Classes do not contain Plaintiffs who lack Article III standing, an issue that the MDL Court is poised to decide. Even if this Court was comfortable that Boedeker satisfied the *Daubert* standard—an issue that required months of briefing from New GM and the MDL Plaintiffs—this Court must also grapple with whether Boedeker's analysis shows that the Plaintiffs satisfy the "irreducible constitutional minimum of standing" under Article III. *See Lujan*, 504 U.S. at 560 (noting that a plaintiff must have an injury in fact). In a class action, this means that the "class must … be defined in such a way that *anyone* within it would have standing" and "no class may be certified that contains members lacking Article III standing." *Denney*, 443 F.3d at 264 (2d Cir. 2006). As a result, preliminary approval of the Proposed Settlement requires this Court to assess whether the Proposed Classes likely contain non-negligible numbers of Plaintiffs without standing to bring claims.

62. Among other things, as discussed in the Class Certification Briefing and *Daubert* Briefing, Boedeker's "conjoint survey" methodology shows that between 26.6% and 39.1% of the proposed class members—*i.e.*, millions of people—have no injury. This is fatal to any effort to certify any classes because Rule 23 does not permit certification of classes where there is no "common evidence to show all class members suffered some injury." *Sykes* v. *Mel S. Harris & Assocs. LLC*, 780 F.3d 70, 82 (2d Cir. 2015) (citations omitted). Evaluating such a "conjoint survey" approach must therefore take place prior to certification. For instance, in *Opperman* v. *Path, Inc.*, 2016 WL 3844326, at *14 (N.D. Cal. July 15, 2016), the court rejected the plaintiffs' attempt to "prove" the class members' value of privacy in smartphone applications with a conjoint survey, noting that "[n]o damages number arising from this model will apply to all class members, particularly since some of the class members, by this measure, will not have been injured at all."[22]

63. Similarly, individual differences in reliance frequently defeat class certification. In the *Ford Ignition Switch* litigation, for instance, plaintiffs argued that a defective ignition switch found in vehicles had a propensity to short circuit and cause smoke or fires in over 2,000 vehicles. *In re Ford Motor Co. Ignition Switch Prods. Liab. Litig.*, 174 F.R.D. 332, 336-37 (D.N.J. 1997). The *Ford* plaintiffs moved to certify classes with fraudulent concealment and state consumer fraud claims. *Id.* at 338. The court denied certification because of individual differences in reliance and causation, noting that the "plaintiffs must persuade the finder of fact that disclosure of the allegedly dangerous nature of the ignition switches would have affected the purchaser's decision whether to purchase the vehicle. Obviously, this determination could not be accurately and fairly made on a class-wide basis . . . ." *Id.* at 346.

[22] Other courts have similarly rejected a proposed "single formula capable of assessing all damages among class members" based on "averages" where such a formula ignored "vast differences" in the circumstances facing each plaintiff. *Fleischman* v. *Albany Med. Ctr.*, 2008 WL 2945993, at *7 (N.D.N.Y. July 28, 2008).

64. The MDL Court did not postpone resolution of these issues until after class certification precisely because such issues are fundamental to establishing that the MDL Plaintiffs have Article III standing, a prerequisite for certification of classes containing millions of putative class members' claims. These critical, Constitutional concerns are just as relevant for the Plaintiffs and for this Court's determination under Rule 23(e) of the likelihood of certifying the Proposed Classes. In fact, the Movants ask this Court to confront the issue by stating in the Preliminary Approval Order that the Court has "subject matter . . . jurisdiction over the Classes." (Preliminary Approval Order ¶ 4.) Because substantial numbers of Plaintiffs have no standing under Article III, this Court cannot exercise subject-matter jurisdiction over their claims (or the Proposed Classes under which their claims are purportedly subsumed).

65. Accordingly, to apply Rule 23(e) to the Proposed Settlement, this Court would not only have to find it likely (with a suitable basis in the record at the March 11 hearing) that Boedeker's methodology is admissible under *Daubert*, but also that such methodology does not necessarily imply that vast numbers of Plaintiffs lack Article III standing and therefore cannot be included in the Proposed Classes. The challenges to Boedeker's methodology raise Constitutional issues that cannot be "estimated" and must be carefully considered by this Court and the MDL Court. Because the MDL Court will soon rule on the MDL Briefing, however, there is no need for this Court to leapfrog the MDL Court on assessing these Constitutional issues.

2. This Court Must Have a Suitable Basis in the Record at the March 11 Hearing to Find it Likely that New GM's Recall Repairs Do Not Preclude the Plaintiffs' Claims.

66. Two critical issues in the Summary Judgment Briefing are whether New GM's recall repairs were effective and, if they were effective, whether such repairs negate the MDL Plaintiffs' claims. As the MDL Court stated in a recent opinion, "many, if not most (or even all) states would factor such evidence [of post-sale mitigation] into the analysis" of whether the MDL

Plaintiffs have suffered any cognizable damages. *In re Gen. Motors LLC Ignition Switch Litig.*, 2018 WL 1638096, at *2 (S.D.N.Y. Apr. 3, 2018). As a result, the "viability of Plaintiffs' claims for benefit-of-the-bargain damages is likely to turn on the question of whether New GM actually fixed" the alleged defects through the Recalls. *Id.* "[W]hen a claim cannot succeed as a matter of law, the Court should not certify a class on that issue." *In re Beacon Assocs. Litig.*, 2012 WL 1372145, at *2. To frame the issue into Constitutional terms, a Plaintiff for whom New GM provided a successful Recall repair likely does not have Article III standing to be a member of the Proposed Classes.

67. To apply Rule 23(e) to the Proposed Settlement, therefore, this Court must review the comprehensive, peer-reviewed testing regime that the MDL Court is already reviewing to determine the efficacy of New GM's Recall repairs. The Virginia Tech Transportation Institute ("VTTI"), an independent and well-respected engineering organization, concluded that New GM's testing regime was "robust" and "acceptable" for assessing the condition regarding inadvertent key rotation. By asking this Court to determine that it can likely certify the Proposed Classes **now**, the Plaintiffs effectively ask this Court to also determine that the conclusions reached by VTTI (which, if true, would force the Movants to substantially reorganize the Proposed Classes) are likely false.

68. The Signatory Plaintiffs admit that the effectiveness of New GM's Recall repairs will be "taken into account at the estimation proceeding stage" (Plaintiffs' Feb. 13 Letter), but the MDL Court's resolution of this disputed issue is critical to determining whether the Plaintiffs have legally cognizable claims (and thus standing under Article III) at all, an issue that must be evaluated prior to this Court preliminarily certifying the Proposed Classes. These issues will be resolved by rulings from the MDL Court, which the Signatory Plaintiffs "anticipate[] by June 2019." (Plaintiffs' Feb. 13 Letter.) This Court should not permit the Plaintiffs to leapfrog the

MDL Court, which will rule on the effectiveness of New GM's Recall repairs in due course, particularly where the MDL Plaintiffs have conceded the effectiveness of at least New GM's Recall repair for Recall 14V-153 (power steering), which is part of the Proposed Settlement.[23]

E. This Court Cannot Find it Is Likely that the Claims in the Non-Ignition Switch Class Satisfy the Commonality Requirement Set Forth in Rule 23(a)(2) Without Considering Issues Being Decided in the MDL Court.

69. To apply Rule 23(e) to the Proposed Settlement, this Court must have a "suitable basis" in the record at the March 11 hearing to determine that the claims in the Non-Ignition Switch Class (which arise under five separate Recalls) likely share "questions of law or fact common to the class" even though the MDL Plaintiffs have established separate classes for each Recall in the MDL Court. Under Rule 23(a)(2), there must be "questions of law or fact common to the class." "What matters to class certification . . . is not the raising of common 'questions'—even in droves—but, rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers." *Wal-Mart Stores*, 564 U.S. at 350 (citations omitted). While the commonality requirement was "widely perceived to lack teeth before the Supreme Court's decision in *Wal–Mart*," that changed when *Wal-Mart* "grafted the following requirements onto rule 23(a)(2): (i) that the common question is central to the validity of each claim that the proposed class brings; and (ii) that the common question is capable of a common answer." *Abraham* v. *WPX Energy Prod., LLC*, 322 F.R.D. 592, 642 (D.N.M. 2017).

70. Here, the Non-Ignition Switch Class classifies together Plaintiffs asserting state law causes of action under 51 jurisdictions regarding five different Recalls affecting many different

[23] *See* Exhibit C-2 (MDL Plaintiffs' Opp. to GM's Summ. Judg. Motion) at 4 n.1 ("Regarding Recall Nos. 14v188 (side-impact airbags) and 14v153 (power steering) . . . Plaintiffs acknowledge that the evidence now demonstrates that the remedies offered under those recalls are effective in repairing the defects.").

vehicle models. The alleged defects and Recalls vary significantly. Some involve ignition switch rotation, while others do not. Some involve alleged airbag non-deployment, while others do not. That the Movants identified only a few potentially common issues of law and fact (Rule 23 Motion ¶ 81) is unsurprising given that the MDL Plaintiffs have sought different classes for each Recall, implicitly conceding that the different Recalls negate "the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation." *Wal-Mart Stores*, 564 U.S. at 350. In any event, the MDL Court will soon rule on the propriety of the Bellwether State classes, which rulings must be taken into account for evaluating the Proposed Settlement to ensure that only claims satisfying the commonality requirement are lumped into the same class or subclass. Because the MDL Court is making progress on this issue, a stay is warranted.

III. THE MOVANTS CONCEDE THE OVERLAP WITH THE MDL PROCEEDINGS.

71. The overlap between issues that this Court must consider when developing a suitable record and issues that will likely be decided soon by the MDL Court is sufficient to warrant a stay. And to dispel any lingering doubts, the Movants' Settlement Motions and the letter filed by the Signatory Plaintiffs on February 13, 2019, confirm the overlap.

72. First, neither counsel for the Signatory Plaintiffs nor counsel for the GUC Trust responded to the Court's statement at the December 20, 2018 status conference that "the notion of the stay seems almost moot because ***he's*** [Mr. Weisfelner's] suggesting that the class certification doesn't go forward here until Judge Furman has decided the summary judgment motions." (Hr'g Tr. 12/20/2018 at 34.) If the Movants intended then for certification to proceed prior to the MDL Court's decisions, they should have corrected the record.

73. But putting that aside, the Settlement Agreement is tied in multiple ways to the MDL Court's rulings on the Summary Judgment Briefing. Such impacts cannot just "be taken into account . . . when we get to the estimation phase." (Plaintiffs' Feb. 13 Letter.) Instead, the

Settlement Agreement provides that such rulings may affect "the size, scope or composition of the ***classes***." (Settlement Agreement § 4.5 (emphasis added).) Perhaps the most notable aspect of the Plaintiffs' February 13 letter was its failure to address Section 4.5 of the Settlement Agreement, which codifies the link between the Proposed Classes and rulings from the MDL Court (as New GM discussed in its February 11 letter to this Court). Additionally, the Movants state that: (i) "rulings by Judge Furman in the MDL Action" led to "refined estimates of the amount of damages" (Rule 23 Motion ¶ 40); (ii) "[e]xtensive discovery regarding the Plaintiffs' claim has been completed in the MDL Action" (Rule 23 Motion ¶ 53); (iii) Co-Lead Counsel adequately represent the Proposed Classes because of their work "in the MDL Court for over four years" (Rule 23 Motion ¶ 88); (iv) the Proposed Settlement was reached by "Parties who have been litigating these issues for years in the MDL Action" (Rule 23 Motion ¶ 131); and (v) "Magistrate Judge Cott as mediator in the MDL Action" will assist Stage Three (Rule 23 Motion ¶ 148).

IV. THIS COURT SHOULD NOT ORDER AN EXTENSIVE AND EXPENSIVE NOTICE CAMPAIGN FOR A CLASS ACTION SETTLEMENT THAT WILL SOON BE DRAMATICALLY RESHAPED BY THE MDL COURT'S RULINGS.

74. Setting aside the overwhelming overlap with the MDL Court, New GM respectfully submits that authorizing and directing a very expensive nationwide notice campaign is unwise without a "solid record" to support the Proposed Classes. At the December 20, 2018 status conference, counsel to the Signatory Plaintiffs admitted that the MDL Court's "near-term decisions" will "dramatically impact the size of the universe" of class members (in addition to "be[ing] reflected in all of the proceedings that [this Court] will be asked to engage in"). (Hr'g Tr. 12/20/2018 at 14-15.) The scope or composition of the Proposed Classes may also change because whether the Proposed Classes "include prior owners of the same vehicles or prior lessees of the same vehicles[,] is [an] issue that, among others, is up for determination by Judge Furman." (Hr'g Tr. 12/20/2018 at 7.)

75. Therefore, all parties agree that the MDL Court's rulings have—and will continue to have—a significant impact on who is entitled to receive notice of the Proposed Settlement. The Movants' acknowledgement of the overlap traces back (at the very least) to the May 25, 2018 status conference, where counsel to the Signatory Plaintiffs noted that the MDL Court's *prior* rulings had already reduced the number of vehicles at issue in the Recalls from 11.4 million to 9.5 million. (Hr'g Tr. 5/25/2018 at 24.) Now, the Plaintiffs appear to have abandoned this concession and suggest that the MDL Court's *pending* "summary judgment ruling could very well implicate whether we're talking about 26 million registrations or 11- or 12 million registrations; a cost would be the 13 million or 7 million. We expect that ruling fairly soon." (Hr'g Tr. 12/20/2018 at 6.) It is clear that counsel has no idea today whether the approximate number of notices is 9.5 million, 11 million, 12 million, 26 million, or some other number—a range of approximately **16.5 million**. To be fair, New GM agrees with at least two statements made by counsel at the December 20 status conference: (1) "depending on what Judge Furman ultimately rules," there could be a "dramatic[] impact [on] the size of the universe, **therefore who gets noticed**, **therefore the cost of notice**" (Hr'g Tr. 12/20/2018 at 9, 14 (emphasis added)); and (2) "[i]t makes sense to most of us that we ought to be awaiting" decisions from the MDL Court "before we blow **X number of millions of dollars on costs of notice**" (Hr'g Tr. 12/20/2018 at 14-15 (emphasis added)).

76. The risk of a wasteful notice campaign is at the heart of Rule 23(e)(1)(B), which states that the court should only direct notice if "giving notice is justified by the parties' **showing** that the court will **likely** be able to . . . **certify** the class . . ." (emphasis added). The Advisory Committee Notes amplify the link between the decision to approve notice and the prospects for certification: "[t]he decision to give notice of a proposed settlement to the class is an **important event**. It should be based on a **solid record** . . . ." (emphasis added). If a court rubber-stamped

preliminary certification, but later exercised "undiluted, **even heightened**, attention" (as required by *Amchem*, 521 U.S. at 620) and found that certification was not appropriate, the notice campaign would have been a waste. Such a result here would harm the Plaintiffs and PIWD Plaintiffs (many of whom may not end up in the Proposed Class; in the end, Plaintiffs may well become hopelessly confused by a prematurely sent and inaccurate notice), the GUC Trust (which would have wasted up to $13.72 million on ineffective notice), and this Court (which would have wasted its time).

77. In light of the above, New GM respectfully submits that this Court should not authorize an extensive and expensive notice program until, at the very least, the MDL Court issues rulings that New GM and the Movants agree impact the number of notice recipients.

V. THIS COURT'S ORDER OF A STAY OF PROCEEDINGS RELATED TO THE PROPOSED SETTLEMENT PENDING THE MDL COURT'S RULINGS WILL NOT PREJUDICE ANY PARTY.

78. "[T]the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the cases on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis* v. *N. Am. Co.*, 299 U.S. 248, 254 (1936). The court should enter a stay if it will "promote judicial economy, avoidance of confusion and possible inconsistent results without working an undue hardship or prejudice against the plaintiff." *In re Hagerstown Fiber Ltd. P'ship*, 277 B.R. 181, 199 (Bankr. S.D.N.Y. 2002) (citations omitted). A "broad stay" is particularly appropriate where "there [are] common questions of fact . . . , or when the [other proceeding is] likely to dispose of issues common to the claims" in the two proceedings. *In re S.W. Bach & Co.*, 425 B.R. 78, 98 (Bankr. S.D.N.Y. 2010). Bankruptcy courts routinely decide to "hold one lawsuit in abeyance to abide the outcome of another which may substantially affect it or be dispositive of the issues." *See In re Rosenblum*, 545 B.R. 846, 874 (Bankr. E.D. Pa. 2016) (staying numerous matters in the debtor's bankruptcy, including plan confirmation, pending

outcome of state litigation that, although not "the dipositive factor . . . will certainly impact this Court's determination" of a pending motion).[24]

79. Additionally, pursuant to 11 U.S.C. § 105(a), the Court may "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions" of the Bankruptcy Code. It is unsurprising, therefore, that bankruptcy courts in this district routinely issue stays pursuant to section 105(a). *See, e.g.*, *In re Lehman Bros. Holdings Inc.*, Case No. 08-13555 (SCC), ECF No. 42417 (Bankr. S.D.N.Y. Jan. 31, 2014) (order continuing previously granted stays of certain avoidance actions to allow alternative dispute resolution process to unfold); *In re Delphi Corp.*, Case No. 05-44481 (RDD), ECF No. 9105 (Bankr. S.D.N.Y. Aug. 16, 2007) (order authorizing stay of approximately 740 avoidance actions and granting other related relief).

80. Here, a stay of proceedings related to the Proposed Settlement will not prejudice any party. The MDL Court is already positioned to decide both: (1) identical or substantially similar Rule 23(a) class certification issues; and (2) other key factual, legal, and expert issues that directly bear on this Court's assessment of the likelihood of class certification. As a result, the MDL Court's rulings will affect the scope and viability of the Proposed Classes and the fate of the Proposed Settlement. And even if this Court could move at warp speed to build a record sufficient to preliminarily certify the Proposed Classes, it is hard to justify duplicative proceedings and the concomitant risk of inconsistent rulings where the Movants anticipate the MDL Court's rulings will come in a few months.

81. The proposed stay does not prejudice the Plaintiffs. Co-Lead Counsel has already confirmed that the Plaintiffs' entitlement to any recoveries depends on "merits-based issues that

[24] *Accord In re MF Global Holdings, Ltd.*, 464 B.R. 619, 623-24 (Bankr. S.D.N.Y. 2012) (Glenn, J.) (using power to "stay or dismiss a [duplicative] suit"); *In re Bird*, 229 B.R. 90, 95 (Bankr. S.D.N.Y. 1999) (noting that an adversary proceeding may be "suspended until such time as it were more likely that its adjudication would not be an empty gesture").

the [MDL Court] has previously made or will make in the future [that] will be reflected by necessity as part of the estimation proceedings." (Hr'g Tr. 12/20/2018 at 15.) Thus, the Plaintiffs will not be prejudiced by a stay of proceedings related to the Proposed Settlement pending such rulings, which they anticipate before June 2019. In fact, failure to wait for the MDL Court's rulings may significantly prejudice the Plaintiffs because, if the MDL Court issues rulings after the Proposed Settlement is approved on a final basis that make it very unlikely that the aggregate value of the Plaintiffs' and PIWD Plaintiffs' claims will be sufficient to trigger the Adjustment Shares, the Plaintiffs and PIWD Plaintiffs (regardless of whether they have asserted claims or support the Proposed Settlement) will have already released their claims. And where such rulings are "anticipated by June 2019" and "very likely" to be issued "long before the estimation proceedings begin," a stay of proceedings does not prejudice any Plaintiff. (Plaintiffs' Feb. 13 Letter.)

82. The proposed stay also does not prejudice the GUC Trust or the GUC Trust Beneficiaries. The GUC Trust's right to terminate the Settlement Agreement based on this Court's failure to enter the Preliminary Approval Order does not arise until September 15, 2019, indicating that the Movants were aware of the possibility of a stay at the time they executed the Proposed Settlement. (Settlement Agreement § 10.2(a).) If the GUC Trust truly believed that a stay would be prejudicial, it would have insisted upon a termination right that vests much closer to the hearing date of March 11, 2019 rather than September 15, 2019.

83. Conversely, it is easy to see the prejudice that may result from *not* granting a stay of proceedings related to the Proposed Settlement. Absent such a stay, there is substantial risk that decisions made by this Court in connection with the Proposed Settlement will be inconsistent with past or future rulings from the MDL Court. For example, while the Movants seek to have this Court approve the Proposed (*nationwide*) Classes of Plaintiffs, the MDL Plaintiffs have abandoned

efforts to certify nationwide classes and instead are seeking to certify *statewide* classes in the MDL Court.[25] This inconsistency is particularly puzzling given that the Plaintiffs and the MDL Plaintiffs assert claims based on *identical* state law-based economic loss theories. Here, if the MDL Court rules that the MDL Plaintiffs cannot satisfy the Rule 23(a) certification prerequisites for even one of the three Bellwether States, for example, then it would seem highly unlikely (if not impossible) for this Court to find that the Proposed (nationwide) Classes satisfy Rule 23(a). A similar concern animated denial of a proposed class-action settlement in *Schoenbaum* v. *E.I. Dupont De Nemours & Co.*, where the court noted that proceeding simultaneously with settlement certification and litigation certification "would only serve to draw out this litigation further and could potentially lead to inconsistent results." 2009 WL 4782082, at *16 (E.D. Mo. Dec. 8, 2009).

84. Here, if the MDL Court issues rulings after this Court certifies the Proposed Classes (either preliminarily or finally) that cast doubt on (or preclude) the certification of the Proposed Classes or require subclasses to comply with Rule 23, the Movants will need to re-notice the millions of Plaintiffs bound to the mandatory, non-opt-out Proposed Settlement. The proposed notice is expensive, and no party will benefit from having to redo a notice campaign.

85. For their part, the Movants concede that the certification of classes they seek in the near term from this Court accomplishes basically nothing. As counsel stated at the December 20, 2018 status conference: "it's possible . . . that we may very well have to – and I don't know the exact methodology – **decertify the original settlement class[and] re-certify subclasses to take**

[25] Indeed, given variations in underlying state law, the MDL Court *has already* reached conclusions that effectively preclude nationwide classes. *See, e.g., In re Gen. Motors LLC Ignition Switch Litig.*, 2016 WL 3920353, at *16 (S.D.N.Y. July 15, 2016) (dismissing MDL Plaintiffs' proposed nationwide RICO claim); *id.* at *18 ("In their briefs, the parties largely addressed these claims together on an issue-by-issue basis. By contrast—and despite the repetition it entails—the Court will separately address each claim with respect to each jurisdiction, as subtle differences in state law can dictate different results for plaintiffs in different jurisdictions."); *see generally id.*; *In re Gen. Motors LLC Ignition Switch Litig.*, 257 F.Supp.3d 372 (S.D.N.Y. 2017) (analyzing the different common law and statutes in various states).

into account people's different expectation levels." (Hr'g Tr. 12/20/2018 at 13 (emphasis added).) Likewise, the Rule 23 Motion states that "Class members may be differently situated in the third stage (approval of allocation and distribution procedures), [so] additional or different subclasses can be created at that time, if necessary." (Rule 23 Motion ¶ 117.) In fact, the Movants expressly acknowledge that the Settlement Agreement itself may change if the MDL Court "issues an Opinion or Order on [New GM's summary judgment motion] . . . that impacts the size, scope or composition of the classes of Economic Loss Plaintiffs . . . ." (Settlement Agreement § 4.5 (in such case, "the Parties shall, within five (5) business days . . . engage in good faith negotiations regarding the applicable provisions of this Settlement Agreement impacted by said decision").)

86. In light of such positions, the Movants should not ask this Court for preliminary certification of the Proposed Classes *now* while simultaneously acknowledging that the Proposed Classes may change in "size, scope or composition" or need to be "decertif[ied]" and "re-jiggered" based on rulings from the MDL Court. Post-hoc reconfiguration of settlement classes is not permitted without essentially restarting the certification process.[26] As a result, New GM agrees with the Movants that "we ought to be awaiting" such "near-term" rulings from the MDL Court "before we blow X number of millions of dollars on costs of notice for people that Judge Furman has decided" may not be included in the Proposed Settlement. (Hr'g Tr. 12/20/2018 at 14-15.)

87. Ultimately, every affected party will be potentially prejudiced if proceedings go forward on parallel tracks. The GUC Trust risks spending $13.72 million on notice up to 26 million individuals, many or all of which may not be putative class members following the MDL

[26] *See Amchem*, 521 U.S. at 620 ("[A] court asked to certify a settlement class will lack the opportunity, present when a case is litigated, to adjust the class, informed by the proceedings as they unfold."); *accord In re Motor Fuel Temp. Sales Prac. Litig.*, 2011 WL 4431090, at *7 (D. Kan. Sept. 22, 2011) (rejecting argument by settling parties that notice need not be redone where previously noticed settlement involved one class with five representatives and restructured settlement involved 21 subclasses with 17 new representatives).

Court's rulings. The Plaintiffs and PIWD Plaintiffs (including those who have not asserted claims or signed the Proposed Settlement) risk releasing their rights under a non-opt-out class settlement before they know what—if anything—they stand to gain under the Proposed Settlement. Finally, all parties (and the Court) bear the risk of inconsistent adjudications of key issues that arise in both courts and the concomitant waste of private and judicial resources that duplicative litigation entails. Where all parties acknowledge that the proceedings in the MDL Court and this Court are inextricably intertwined, there is no reason to assume these risks, and a stay should be issued.

CONCLUSION

88. The Movants' desire to push forward with the Proposed Settlement in this Court now, notwithstanding whether critical near-term rulings from the MDL Court will impact this Court's review of the Proposed Settlement under Rule 23(e), is an inefficient and potentially conflicting path forward. This Court should decline the invitation and should instead stay proceedings relating to the Proposed Settlement. As the Movants concede, and the Settlement Motions and Settlement Agreement reflect, rulings from the MDL Court will provide persuasive if not dispositive guidance on the Plaintiffs' ability to satisfy the requirements of Rule 23 or other aspects of class certification. These class certification issues cannot be delayed until the later stages of the Proposed Settlement, as preliminary approval under Rule 23(e) requires this Court to assess the likelihood of class certification **now**. In circumstances where judicial economy is served and no prejudice results to any party, a stay is appropriate.

* * *

WHEREFORE, New GM respectfully requests for all of the reasons stated above that this Court (a) grant the proposed stay as described herein and in the Proposed Order (or, in the alternative, a stay pending the MDL Court's determination of the Motion to Withdraw) and (b) grant such other and further relief as is just and proper.

Dated: February 22, 2019
New York, New York

Paul M. Basta

Paul M. Basta
Aidan Synnott
Kyle J. Kimpler
Sarah Harnett
Dan Youngblut
PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, New York 10019
Telephone: (212) 373-3000
Facsimile: (212) 757-3990

Arthur Steinberg
Scott Davidson
KING & SPALDING LLP
1185 Avenue of the Americas
New York, New York 10036
Telephone: (212) 556-2100
Facsimile: (212) 556-2222

Counsel for General Motors LLC

EXHIBIT A

FORM OF PROPOSED ORDER

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re: MOTORS LIQUIDATION COMPANY, *et al.*, f/k/a General Motors Corp., *et al.*, Debtors.	Chapter 11 Case No. 09-50026 (MG) (Jointly Administered)

[PROPOSED] ORDER GRANTING STAY OF PROCEEDINGS RELATED TO THE PROPOSED SETTLEMENT PURSUANT SECTION 105(a) OF THE BANKRUPTCY CODE

Upon *General Motors LLC's Motion Pursuant to Section 105(a) of the Bankruptcy Code to (A) Stay Proceedings Relating to the Proposed Settlement and (B) Grant Related Relief* (the "Motion"),[1] dated February 22, 2019; and the Court having jurisdiction to consider the Motion and the relief requested therein under 28 U.S.C. §§ 157 and 1334 and the *Amended Standing Order of Reference M-431*, dated January 31, 2012; and consideration of the Motion and the relief requested therein being a core proceeding pursuant to 28 U.S.C. § 157(b); and venue being proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409; and due and proper notice of the Motion having been provided in accordance with the procedures set forth in that certain *Sixth Amended Order Pursuant to 11 U.S.C. § 105(a) and Fed. Bankr. P. 1015(c) and 9007 Establishing Notice and Case Management Procedures* [Docket No. 10183]; and it appearing that no other or further notice need be provided; and a hearing having been held to consider the relief requested in the Motion; and the Court having found and determined that the relief sought in the Motion is in the best interests of all parties and that the legal and factual bases set forth in the Motion establish just

[1] Capitalized terms used but not defined herein shall have the meanings ascribed to them in the Motion.

cause for the relief granted herein; and after due deliberation and sufficient cause appearing therefor, it is

ORDERED that objections to the Motion are hereby overruled; and it is further

ORDERED that the Motion is granted as set forth herein; and it is further

ORDERED that proceedings in this Court relating to the Proposed Settlement or any relief otherwise sought in connection with the Settlement Motions are hereby stayed until further order of this Court;

ORDERED that notice of the Motion as provided therein shall be deemed good and sufficient notice of such Motion; and it is further

ORDERED that this Court retains jurisdiction with respect to all matters arising from or related to the implementation of this order.

Dated: _____ 2019
New York, New York

THE HONORABLE MARTIN GLENN
UNITED STATES BANKRUPTCY JUDGE

EXHIBIT B

MDL CLASS CERTIFICATION BRIEFING

EXHIBIT B-1

ECONOMIC LOSS PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION TO CERTIFY BELLWETHER CLASSES IN CALIFORNIA, MISSOURI, AND TEXAS

[MDL ECF NO. 5846] (FILED JULY 20, 2018)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE: GENERAL MOTORS LLC IGNITION SWITCH LITIGATION	No. 14-MD-2543 (JMF)
This Document Relates to: ALL ACTIONS	

ECONOMIC LOSS PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION TO CERTIFY BELLWETHER CLASSES IN CALIFORNIA, MISSOURI, AND TEXAS

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

I. INTRODUCTION

Under Fed. R. Civ. P. 23(b)(3), the Economic Loss Plaintiffs seek certification of six bellwether Classes under California law, eight Classes under Missouri law, and five Classes under Texas law. Because all elements of Rule 23(a) and (b)(3) are satisfied, the Court should certify the proposed Classes.

Rule 23(a)(1) numerosity is present because each proposed Class is comprised of thousands of owners or lessees of Class Vehicles, making joinder impracticable. *See infra* at 7-10. There are many common questions of law and fact arising from the uniform defects, GM's knowledge thereof, and GM's uniform omissions, thus satisfying Rule 23(a)(2) commonality. The uniform defects demonstrated by GM's documents and Plaintiffs' experts, and the defects' impact on each Class, give rise to common questions for all Plaintiffs and Class members. *See infra* at 10-11.

Rule 23(a)(3)'s typicality requirement is also satisfied. Plaintiffs' claims are typical of the claims of all Class members because GM subjected each Class member to the same common omissions and uniform defects. Plaintiffs and the Classes thus seek redress via common legal claims and remedial theories arising out of the same course of GM conduct. *See infra* at 11-12. And Rule 23(a)(4)'s adequacy of representation requirement is fulfilled because Plaintiffs' interests are fully aligned with the Classes they seek to represent, and Plaintiffs are represented by well-qualified counsel who meet the requirements of Rule 23(g) and are diligently prosecuting the claims on behalf of each Class. The interests of Plaintiffs and Class members are co-extensive given that each Plaintiff, like each Class member, has a strong interest in proving GM's liability and obtaining redress. *See infra* at 13-14.

Plaintiffs are entitled to certification under Rule 23(b)(3) because common issues of law or fact predominate over questions affecting individual Class members, and class treatment is

superior to other methods of adjudication. Common issues predominate because the salient legal and factual questions in this case will be resolved with proof common to all Plaintiffs and members of each Class. Within each Class, Class Vehicles suffer unifying defects subject to common recall notices; GM was aware of the alleged defects at the time the vehicles were sold; GM had a duty to disclose its knowledge but failed to do so; and the facts that GM failed to disclose were material. This evidence is essential to every Class member's effort to establish liability and every Class member's entitlement to relief. *See infra* at 14-27.

Predominance is buttressed by the nature of the common proof required to calculate Class loss and restitution. Benefit-of-the-bargain losses for the Classes will be calculated based on a widely-accepted conjoint analysis that reliably estimates the lesser amount that consumers would have paid for their GM vehicles had the consumers known of the defect. Lost time damages will also be calculated using a common formula expertly applied to reliably quantify such damages on a class-wide basis. *See infra* at 27-33.

Class treatment is superior under Rule 23(b)(3) because nearly all Class members have claims that are too small to litigate individually, and, indeed, the courthouse doors will be closed to almost all of these consumers unless a Class is certified. GM has spared no expense in defending Plaintiffs' claims, leaving no stone unturned and fighting every issue, no matter how inconsequential. No consumer can prove this case without the pooling of resources offered by the class mechanism. Further, adjudicating claims in a single proceeding before this Court, which is already intimately familiar with the subject matter of this case, is much more efficient than a multiplicity of suits here and elsewhere that would unduly burden the judicial system. A class action is a superior method of adjudicating Plaintiffs' claims. *See infra* at 33-35.

Plaintiffs' case will rise or fall on common proof, that is, on facts common to most if not all members of each proposed Class. Each recall has its own Class, and the glue that binds all Class members together is GM's conduct towards each Class as a whole. Each recall involved the same GM internal investigation; the same presentation to the GM committee responsible for initiating a recall; the same description of the defect condition, root cause, and the effect of the defect; the same recall notice; and the same purported remedy. Given this common evidentiary focus, and because all required elements of Fed. R. Civ. P. 23(a) and (b)(3) are satisfied, the Court should certify the proposed Classes and Subclasses.

II. SUMMARY OF FACTS

As the Court is aware, the record in this case is lengthy. For years, GM sold cars that it knew contained serious safety defects. It endangered its customers and shielded the truth from the public and the government until finally issuing in 2014 historic recalls of millions of affected vehicles. The recalls are themselves admissions that the affected vehicles were defective when sold—a unifying theme that binds all members of a given Class together. Rather than provide a detailed recitation of the facts here, Plaintiffs respectfully refer the Court to the concurrently filed Offer of Proof. We briefly summarize the facts, by recall, below.

A. Recall 14v047 (Delta Ignition Switch Defect).

In February and March 2014, GM recalled more than two million cars containing the defect known as the Delta Ignition Switch Defect. The nature of the defect was such that the ignition switch would unexpectedly move from the "run" position to the "accessory" or "off" position, thereby resulting in a "loss of electrical system," including power brakes, power steering, and airbags. General Motors Company (Old GM) knew about this defect as early as 1999,[1] as did GM

[1] Regarding whether GM can be liable based on knowledge it inherited from Old GM and Old GM employees, the Bankruptcy Court has ruled that "[a]ny acts by New GM personnel, or knowledge of New GM personnel (including

from day one of its existence, yet both companies continued to sell cars containing the defective switch. *See* Offer of Proof §§ II.B, II.G.

B. Recall 14v355.

In June 2014, GM issued Recall No. 14v355 for cars containing another ignition-switch defect. Like the ignition switches included in Recall No. 14v047, the ignition switch in the 14v355 vehicles would unexpectedly move from the "run" position to the "accessory" or "off" position, thereby resulting in a loss of engine power, power braking and steering, and airbags. Although Old GM had knowledge of this defect in 2002 given Old GM's cross-platform knowledge, Old GM certainly knew about this defect and its dangerous consequences no later than early 2005. Accordingly, GM knew of this defect from the very first day of its existence on July 10, 2009. Despite that knowledge, GM knowingly sold cars containing the defect and allowed them to remain on the road until the 2014 recall. Offer of Proof §§ II.C, II.G.

C. Recall 14v394.

GM issued yet another recall (14v394) for an ignition switch defect. Like the switches giving rise to the other ignition switch recalls, the switch would unexpectedly move from the "run" position to the "accessory" or "off" position, thereby resulting in a loss of engine power, power braking and steering, and airbags. Although Plaintiffs submit that Old GM had knowledge of this defect in 2002 given Old GM's cross-platform knowledge, there can be no question that Old GM knew about this defect and its dangerous consequences by no later than 2007, and GM knew about

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knowledge that any of them might have acquired while previously working at Old GM) may … be imputed to New GM …. Likewise, to the extent, as a matter of nonbankruptcy law, knowledge may be imputed as a consequence of documents in a company's files, documents in New GM's files may be utilized as a predicate for such knowledge, even if they first came into existence before the sale from Old GM to New GM." *In re Motors Liquidation Co.*, 541 B.R. 104, 143 (Bankr. S.D.N.Y. 2015). As set forth in the Offer of Proof and the exhibits cited therein, GM's knowledge is based in part on its post-bankruptcy knowledge and in part on knowledge and documents it inherited from Old GM.

the defect from its inception on July 10, 2009. But despite that knowledge, GM knowingly sold cars containing the defects until it recalled those cars in June 2014. *See* Offer of Proof §§ II.D, II.G.

D. Recall 14v400.

In June 2014, GM issued Recall No. 14v400 and recalled millions of cars containing yet another ignition switch defect where the ignition switch would unexpectedly move from the "run" position to the "accessory" or "off" position, thereby resulting in a loss of engine power, power braking and steering, and airbags. Although Old GM had knowledge of this defect in 2002 given Old GM's cross-platform knowledge, Old GM certainly knew about this defect and its dangerous consequences no later than January 2003, and GM knew about the defect from its inception on July 10, 2009. But despite that knowledge, GM did not recall the vehicles until 2014. *See* Offer of Proof §§ II.E, II.G.

E. Recall 14v346 (Knee-to-Key Defect).

In June 2014, GM recalled Camaros containing the defect known as the Knee-to-Key Defect, with effects identical to those in the other ignition switch recalls: the ignition switch would unexpectedly move from the "run" position to the "accessory" or "off" position, thereby resulting in a loss of engine power, power braking and steering, and airbags. GM knew about this defect and its dangerous consequences no later than January 2010. But despite that knowledge, GM knowingly sold cars containing the defect until it recalled those cars in 2014. *See* Offer of Proof §§ II.F, II.G.

F. Recall 14v118 (Side Airbag Defect).

In March 2014, GM recalled cars containing the defect known as the Side Airbag Defect. This defect involved corrosion and wear in the wiring harness connectors on a car's side airbags, which could cause a dashboard light to illuminate indicating a problem with the airbag, and, over

time, deteriorate so that the airbags would not function in a collision. Old GM was aware of this problem by 2007 at the latest. But despite possessing that knowledge from the first day of its existence on July 10, 2009, GM knowingly sold cars containing the Side Air Bag Defect and did not recall them until 2014. *See* Offer of Proof § II.I.

G. Recall 14v153 (Power Steering Defect).

In 2014, GM recalled cars that had a Power Steering Defect, which caused vehicles to suddenly lose power steering while driving, thus increasing the risk of a crash. *Id.* Old GM knew about this defect as early as 2004, and GM knew about it from its inception on July 10, 2009. But despite that knowledge, GM knowingly sold cars containing the defect and did not recall them until 2014. *See* Offer of Proof § II.J.

III. APPLICABLE LEGAL STANDARDS

Class actions are an essential tool for adjudicating cases involving multiple claims that involve similar factual and/or legal inquiries and that are too modest to warrant prosecuting individually. In crafting Rule 23, "the Advisory Committee had dominantly in mind vindication of 'the rights of groups of people who individually would be without effective strength to bring their opponents into court at all.'" *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997). Class actions thus give voice to plaintiffs who "would have no realistic day in court if a class action were not available." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985). Class actions also serve an important deterrent function: "The public at large . . . benefit[s] from a class action and expeditious adjudication of the issues involved, since class actions reinforce the regulatory scheme by providing an additional deterrent beyond that afforded either by public enforcement or by single-party private enforcement." *In re Folding Carton Antitrust Litig.*, 75 F.R.D. 727, 733 (N.D. Ill. 1977) (citations and quotations omitted).

The party seeking certification must provide evidentiary proof that Rule 23's requirements are satisfied. *Dandong v. Pinnacle Performance Ltd.*, 2013 U.S. Dist. LEXIS 150259, at *11 (S.D.N.Y. Oct. 17, 2013) (Furman, J.).[2] In assessing a motion for class certification, the Court conducts a "rigorous analysis" and may consider merits questions, but only to the extent that those questions are relevant in determining whether all of the requirements of Rule 23 are satisfied. *Id.* (quoting *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013)). "[T]he office of a Rule 23(b)(3) certification ruling is not to adjudicate the case; rather, it is to select the metho[d] best suited to adjudication of the controversy fairly and efficiently." *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 460 (2013).

IV. THE PROPOSED CLASSES SATISFY THE REQUIREMENTS OF RULE 23(a)

A. The members of the Classes are so numerous that joinder is impracticable.

Rule 23(a) requires that the members of the Class be so numerous that joinder of all members is impracticable. "[I]mpracticable" does not mean impossible, and "Plaintiffs are not obligated to prove the exact class size to satisfy numerosity." *Cross v. 21st Century Holding Co.*, 2004 WL 307306, at *1 (S.D.N.Y. Feb. 18, 2004). Instead, the courts "may rely on reasonable inferences drawn from the available facts in order to estimate the size of the class." *In re NASDAQ Market-Makers Antitrust Litig.*, 169 F.R.D. 493, 509 (S.D.N.Y. 1996). "[C]ourts are instructed to consider all the circumstances surrounding the case, not merely the number of potential class members," and "'[r]elevant considerations include judicial economy arising from the avoidance of a multiplicity of actions, geographic dispersion of class members, financial resources of class

[2] *See also Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 811 (7th Cir. 2012) (party seeking class "bear[s] the burden of showing that a proposed class satisfies the Rule 23 requirements . . . but they need not make that showing to a degree of absolute certainty"); *In re U.S. Foodservice Inc. Pricing Litig.*, 729 F.3d 108, 117 (2d Cir. 2013) (Rule 23 requirements satisfied where each is shown by a preponderance of the evidence).

members, the ability of claimants to institute individual suits, and requests for prospective injunctive relief which would involve future class members.'" *Brooklyn Ctr. for Indep. of the Disabled v. Bloomberg*, 290 F.R.D. 409, 418 (S.D.N.Y. 2012) (Furman, J.) (quoting *Robidoux v. Celani*, 987 F.2d 931, 935 (2d Cir. 1993)). Courts often presume numerosity where it is reasonably inferred that the class contains 40 members or more. *Bloomberg*, 290 F.R.D. at 417-18 (citing *Consol. Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995)). The Second Circuit does not have a so-called "administrative feasibility" requirement and only requires "that a class be defined using objective criteria that establish a membership with definite boundaries." *In re Petrobras Sec. Litig.*, 862 F.3d 250, 264 (2d Cir. 2017).[3]

The numerosity requirement is satisfied. The Classes are defined with objective criteria and definite boundaries: each Class simply requires ownership or lease during a specified time period of a vehicle covered by the relevant recall (with an added manifestation requirement in Texas), and subclasses, where they exist, are defined around a specific legal claim.[4] Registration data obtained by GM demonstrates that each Class has thousands of members. More specifically, reliable estimates of the number of registrations by recall and bellwether state, taken from industry standard registration data, are:[5]

[3] The Second Circuit calls this a "modest threshold requirement" that "will only preclude certification if a proposed class definition is indeterminate in some fundamental way." *Id.* at 269.

[4] Subclasses are proposed, where Class representation exists, for implied warranty because the law generally requires the vehicle be purchased or leased as a new vehicle. *See generally* Motion.

[5] *See* Offer of Proof § II.M (citing Mr. Boedeker's Damages Estimates Based on Currently Available Data).

Recall	Registrations		
	California	Missouri	Texas
14v047	79,782	39,680	119,956
14v346	40,976	7,859	58,127
14v355	84,582	55,186	145,098
14v394	33,904	8,786	48,458
14v400	124,162	84,045	187,540
14v118	53,065	27,266	97,872
14v153	37,732	25,036	69,794
Totals	**454,203**	**248,258**	**726,845**

If the Court certifies any classes, GM has agreed to provide information that will precisely identify the members of the certified class(es), and this data will also be used to provide Class members with direct mail notice and to refine damages calculations.[6]

The Texas Classes have the added requirement that a vehicle malfunction related to the defect at issue manifested. Class members can self-identify by submitting sworn declarations that a manifestation has occurred consistent with the objectively described class, that is, an ignition switch-related malfunction for the ignition switch classes and a power steering-related malfunction for the power steering class. Consistent with the rationale of *Petrobas*, courts have allowed class membership to be determined by self-identification. *See, e.g.*, *Belfiore v. Proctor & Gamble Co.*, 311 F.R.D. 29 (E.D.N.Y. 2015) (certifying class of consumers who purchased a particular product that had uniform packaging); *In re Scotts EZ Seed Litig.*, 304 F.R.D. 397, 407 (S.D.N.Y. 2015) (certifying class of consumers who purchased seeds with "50% thicker" claim because requiring proof-of-purchase in all cases would effectively result in no consumer class actions for low-cost products); *Ebin v. Kangadis Food Inc.*, 297 F.R.D. 561, 567 (S.D.N.Y. 2014) (certifying class of purchasers of bottles of olive oil that had the same label); *Allen v. Hyland's Inc.*, 300 F.R.D. 643, 658-59, 672 (C.D. Cal. 2014) (class of purchasers of homeopathic products); *Boundas v.*

[6] The Parties' agreement is triggered upon termination of any Rule 23(f) appeal of a class-certification decision.

Abercrombie & Fitch Stores, Inc., 280 F.R.D. 408, 417 (N.D. Ill. 2012) (certifying class of gift card purchasers even though some would have to self-identify); *In re MTBE Prods. Liab. Litig.*, 209 F.R.D. 323, 337 (S.D.N.Y. 2002) (certifying class of all individuals in particular states who had a contaminated well because the "class definition refers only to objective criteria").

B. Numerous common issues exist because the focus is on GM's common course of conduct.

The commonality inquiry asks whether "there are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). Commonality exists when the claims are '"capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.'" *Bloomberg*, 290 F.R.D. at 418 (quoting *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011)). Commonality is "not demanding" and is met if at least one issue is common to the class. *Id.* In automobile defect cases, commonality is often found based upon a common question concerning the existence of a defect. For instance, proposed representatives of a class of purchasers of vehicles with alleged alignment defects "easily satisf[ied] the commonality requirement" because all of their claims "involve[d]," among other things, "the same alleged defect," which was "found in vehicles of the same make and model." *Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168, 1172 (9th Cir. 2010).[7] Importantly, "variation among class members in their motivation for purchasing the product, the factual circumstances behind their purchase, or the price that they paid does not defeat the relatively 'minimal' showing required to establish commonality." *Ries v. Ariz. Beverages USA*

[7] *See also, e.g.*, *Keegan v. Am. Honda Motor Co.*, 284 F.R.D. 504, 524 (C.D. Cal. 2012) (finding commonality relating to uniform rear suspension defect, noting that "[t]he fact that some vehicles have not yet manifested premature or excessive tire wear is not sufficient, standing alone, to defeat commonality"); *Chamberlan v. Ford Motor Co.*, 223 F.R.D. 524, 526 (N.D. Cal. 2004) (finding commonality when Ford knew but concealed the risk that intake manifolds would prematurely crack); *Carriuolo v. Gen. Motors Co.*, 823 F.3d 977, 989 (11th Cir. 2016) (commonality satisfied where plaintiffs alleged "consistent" theories of liability and damages for all class members, and where GM inaccurately communicated vehicle safety ratings "allow[ing] it to command a price premium").

LLC, 287 F.R.D. 523, 537 (N.D. Cal. 2012) (citing *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998)).

The relatively low commonality hurdle is satisfied here. Within each Class, the claims of all members involve the *same* common defect that was the subject of a unifying recall notice. Additional common issues include: whether GM was aware of and concealed the defects; whether GM's omissions were material; whether GM engaged in fraudulent concealment, violated consumer protection statutes, and breached implied warranties; whether GM's law violations harmed Plaintiffs and the members of the Classes; and what relief, if any, are Plaintiffs and the Classes entitled to. Proof of GM's knowledge of the defects, for example, will focus solely on GM's conduct and will necessarily be common—indeed, identical—for each member of each Class. "These issues, which can be resolved on a class-wide basis, are indeed central to the validity of the claims in this litigation," *Dandong*, 2013 U.S. Dist. LEXIS 150259, at *13, and the commonality requirement is thus met.[8]

C. Plaintiffs' claims are typical of those of other members of the Classes because the claims arise from a common course of conduct and are pled under common legal theories.

Rule 23(a)(3) requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." The commonality and typicality requirements of Rule 23(a)

[8] *See also Wolin*, 617 F.3d at 1172 (commonality threshold "easily satisfied" based on several core, common issues, including: "1) whether the [vehicles'] alignment geometry was defective; 2) whether Land Rover was aware of this defect; 3) whether Land Rover concealed the nature of the defect; 4) whether Land Rover's conduct violated the Michigan Consumer Protection Act or the Florida Deceptive and Unfair Trade Practices Act; and 5) whether Land Rover was obligated to pay for or repair the alleged defect pursuant to the express or implied terms of its warranties."); *Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 962 (9th Cir. 2005) (examples of common issues included "(1) whether the design of the plastic intake manifold was defective; (2) whether Ford was aware of alleged design defects; (3) whether Ford had a duty to disclose its knowledge; (4) whether it failed to do so; (5) whether the facts that Ford allegedly failed to disclose were material; and (6) whether the alleged failure to disclose violated the CLRA"); *Motley v. Jaguar Land Rover N. Am., LLC*, 2012 Conn. Super. LEXIS 2701, at *11 (Conn. Super. Ct. Nov. 1, 2012) ("[T]he claims of the plaintiffs here all have the same 'glue' holding the questions and answers together for the class claims. All prospective class members own or lease the same vehicle models, allege the same factory defect, allege the same policy by Land Rover, and allege the same warranty at issue.").

tend to merge, and "typicality 'is satisfied when each class member's claim arises from the same course of events and each class member makes similar legal arguments to prove the defendant's liability.'" *Dandong*, 2013 U.S. Dist. LEXIS 150259, at *13-14 (quoting *Sykes v. Mel Harris & Assocs., LLC*, 285 F.R.D. 279, 287 (S.D.N.Y. 2012)). Typicality does not require "that the situations of the named representatives and the class members be identical," *In re Veeco Instruments, Inc. Sec. Litig.*, 235 F.R.D. 220, 238 (S.D.N.Y. 2006) (citation omitted), and typicality is usually satisfied "irrespective of minor variations in the fact patterns underlying individual claims." *Robidoux v. Celani*, 987 F.2d 931, 937 (2d Cir. 1993); *see also Marisol A. v. Giuliani*, 126 F.3d 372, 367-77 (2d Cir. 1997) (affirming typicality finding where plaintiffs alleging deprivation of child welfare services suffered "broad range of injuries").

Typicality is readily satisfied in cases like this one, where "all class members are alleged to have suffered injury as a result of the same conduct by [GM]." *Doyle v. Chrysler Grp. LLC*, 2014 WL 7690155, at *7 (C.D. Cal. Oct. 9, 2014). Plaintiffs' claims here arise from a common course of conduct and common legal theories: GM engaged in unfair and deceptive conduct in violation of consumer protection laws, committed fraudulent concealment, and breached implied warranties by selling vehicles with known, concealed defects. Further, Plaintiffs' vehicles have the same defect as all other vehicles in the particular Class for which Plaintiffs are proposed representatives. Because each Class member's claims arise from the same course of GM's conduct, and each Class member makes similar (if not identical) legal arguments to prove GM's liability, the typicality requirement is satisfied.[9]

[9] *See, e.g.*, *Wolin*, 617 F.3d at 1175 (typicality satisfied because plaintiffs alleged that they, like all class members, were injured by the vehicles' common alignment defect, and plaintiffs sought recovery under the same legal theories as the class); *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 599 (3d Cir. 2012) ("When a class includes purchasers of a variety of different products, a named plaintiff that purchases only one type of product satisfies the typicality requirement if the alleged misrepresentations or omissions apply uniformly across the different product types."); *Motley*, 2012 Conn. Super. LEXIS 2701, at *15 (plaintiffs' claims are typical because they "arise from the same conduct and alleged factory defect, and each class member would present similar legal arguments to prove Land

D. Plaintiffs and their counsel will adequately represent the interests of the Classes.

Rule 23(a)(4) requires the class representatives to "fairly and adequately protect the interests of the class." The Court "must inquire as to whether '(1) the plaintiff's interests are antagonistic to the interest of other members of the class and (2) plaintiff's attorneys are qualified, experienced, and able to conduct the litigation." *Dandong*, 2013 U.S. Dist. LEXIS 150259, at *21 (quoting *Cordes & Co. Fin. Servs., Inc. v. A.G. Edwards & Sons, Inc.*, 502 F.3d 91, 99 (2d Cir. 2007)). The named Plaintiffs need not have expert knowledge of the details of the case and are entitled to rely on the expertise of their counsel. *Id.* (citing *In re Omnicom Grp., Inc. Sec. Litig.*, 2007 U.S. Dist. LEXIS 31963 (S.D.N.Y. Apr. 30, 2007)).

First, there are no potential intra-class conflicts here and no hint of antagonism between the claims of the proposed Class representatives and the members of the proposed Classes. Plaintiffs are members of the Classes they seek to represent, and have suffered economic loss from the same defects as members of the proposed Classes. All of them seek to hold GM responsible for the legal violations that GM has committed.

Second, Plaintiffs' testimony and the record establish their adequacy. All Plaintiffs have actively participated in the litigation by producing Fact Sheets and documents, providing written discovery responses, providing testimony in a deposition, and communicating with their counsel.[10] Plaintiffs have demonstrated a basic understanding of the nature of their claims and their duties as

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Rover's liability; namely that they suffered damages as a result of a common factory defect of which Land Rover was aware of . . . ."); *Daffin v. Ford Motor Co.*, 458 F.3d 549, 552 (6th Cir. 2006) (Daffin's claim is typical "because the class members' theory is that Ford breached its express warranty by providing vehicles with defectively designed throttle body assemblies, causing Daffin and other class members to receive vehicles worth less than vehicles that conform to the promises allegedly contained in the warranty agreement. Daffin is typical because her car has the same defective throttle body assembly as the other class members.").

[10] *See* Declaration of Steve W. Berman in Support of Bellwether Class Certification Motion (Berman Decl.), Exs. 552-78 (excerpts of Plaintiff deposition testimony).

class representatives and have remained "at least somewhat active in monitoring the litigation." *Dandong*, 2013 U.S. Dist. LEXIS 150259, at *22.

Third, in retaining Mr. Berman and Ms. Cabraser, Plaintiffs have employed counsel with the qualifications, experience, and resources necessary to prosecute this case to a successful resolution. Both attorneys have recovered billions of dollars in class litigation on behalf of consumers and have specific experience in pursuing auto defect-related class claims.[11] Each participated in a competitive leadership application process during which they established, and this Court recognized, their qualifications, experience, and commitment to this litigation. And, based on the litigation history of this case, it is evident that Mr. Berman, Ms. Cabraser, and their respective firms have conducted this litigation vigorously and effectively and have demonstrated their willingness to devote ample and substantial resources to prosecute the Class claims. Rule 23(a)(4) is satisfied.

V. THE COURT SHOULD CERTIFY THE BELLWETHER CLASSES UNDER RULE 23(b)(3)

Certification is warranted under Rule 23(b)(3) because "the questions of law or fact common to class members predominate over any questions affecting only individual members," and "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy."

A. Common issues of fact and law predominate because legal and factual questions will be resolved with proof common to all Plaintiffs and Class members.

A common question "is one where 'the same evidence will suffice for each member to make a prima facie showing [or] the issue is susceptible to generalized class-wide proof.'" *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1045 (2016) (quoting 2 WILLIAM B. RUBENSTEIN,

[11]Berman Decl., ¶¶ 3-20 & Exs. A-B; Declaration of Elizabeth J. Cabraser in Support of Bellwether Class Certification Motion (Cabraser Decl.), ¶¶ 2-6.

NEWBERG ON CLASS ACTIONS § 4:50, at 196-97 (5th ed. 2012) ("NEWBERG")). In contrast, an individual question "is one where 'members of a proposed class will need to present evidence that varies from member to member.'" *Id.* The predominance inquiry asks "whether the common, aggregation-enabling issues in the case are *more prevalent or important* than the non-common, aggregation-defeating, individual issues." *In re Petrobas Sec. Litig.*, 862 F.3d at 270 (quoting *Tyson Foods*, 136 S. Ct. at 1045)). The "analysis is 'more [] qualitative than quantitative,'" *id.* at 271 (quoting NEWBERG at 197), and "[c]lass-wide issues predominate if resolution of some of the legal or factual questions . . . can be achieved through generalized proof, and if these particular issues are more substantial than the issues subject only to individualized proof." *Moore v. PaineWebber, Inc.*, 306 F.3d 1247, 1252 (2d Cir. 2002).

Common issues will predominate the trial of Plaintiffs' claims. As the Offer of Proof demonstrates, the key evidence necessary to establish Plaintiffs' claims is common to Plaintiffs and all members of each Class—they all seek to prove, among other things, that GM's vehicles within each Class have a common defect and that GM's conduct was uniformly wrongful. The evidence changes little if there are 100 Class members or millions: either way, Plaintiffs would, for instance, present the *same* evidence that GM was aware of the defects and concealed them and that GM caused economic loss to Plaintiffs and the members of the Classes. In the words of the Second Circuit, these common issues—and more—'"are more prevalent or important than the non-common, aggregation-defeating, individual issues.'" *In re Petrobas Sec. Litig.*, 862 F.3d at 270

(quoting *Tyson Foods*, 136 S. Ct. at 1045). Courts often find that such issues predominate in auto defect class actions,[12] as the following count-by-count analysis highlights.[13]

1. Plaintiffs will prove with common evidence that GM violated California, Missouri, and Texas consumer protection statutes.

a. Common issues predominate for the California consumer statute claims.

Plaintiffs seek to certify claims under the California Consumer Legal Remedies Act, CAL. CIV. CODE § 1750 (CLRA), and the California Unfair Competition Law, CAL. BUS. & PROF. CODE § 17200 (UCL). The CLRA forbids "unfair methods of competition and unfair or deceptive acts or practices undertaken by any person in a transaction intended to result or that results in the sale or lease of goods or services to any consumer." CAL. CIV. CODE § 1770(a). An omission is actionable under the CLRA where it is either "contrary to a representation actually made by the defendant, or an omission of a fact the defendant was obliged to disclose." *Daugherty v. Am. Honda Motor Co.*, 144 Cal. App. 4th 824, 835 (2006). An obligation to disclose arises '"when the defendant had exclusive knowledge of material facts not known to the plaintiff; … when the

[12] *See, e.g.*, *Wolin*, 617 F.3d at 1173 (common issues predominate such as whether Land Rover was aware of and had a duty to disclose the defect and violated consumer protection laws); *Keegan*, 284 F.R.D. at 532-34 (predominance found under UCL and CLRA based on common evidence of the nature of the defect, the defect's impact on vehicle safety, Honda's knowledge, and what Honda disclosed to consumers); *Parkinson v. Hyundai Motor Am.*, 258 F.R.D. 580, 596-97 (C.D. Cal. 2008) (predominating common issues under the CLRA and UCL include defendant's knowledge of the alleged defect, whether it had a duty to disclose and did so, whether the alleged failure to disclose was material to a reasonable consumer; and whether the conduct violated the CLRA and UCL); *Chamberlan v. Ford Motor Co.*, 223 F.R.D. at 526-27 (common questions predominate such as "whether the design of the plastic intake manifold was defective, whether Ford was aware of the alleged design defects, whether Ford had a duty to disclose its knowledge, whether it failed to do so, whether the facts that Ford allegedly failed to disclose were material, and whether the alleged failure to disclose violated the CLRA"), *petition denied*, 402 F.3d 952 (9th Cir. 2005); *Rosen v. J.M. Auto Inc.*, 270 F.R.D. 675, 681-82 (S.D. Fla. 2009) (the "critical issue of whether the [airbag system] was defective is common to all putative class members" and "predominates over the individual issues"); *Carriuolo*, 823 F.3d at 989 (predominance satisfied where plaintiffs alleged "consistent" theories of liability and damages for all class members, including whether GM inaccurately communicated vehicle safety ratings "allow[ing] it to command a price premium"); *Gen. Motors Corp. v. Bryant*, 285 S.W.3d 634, 639 (Ark. 2008) (whether defect existed in class vehicles and "whether or not General Motors concealed that defect are predominating questions.").

[13] For purposes of discussing the predominance of common issues, Plaintiffs group their claims into five categories below: (i) statutory consumer fraud claims; (ii) fraudulent concealment claims; (iii) claims for fraudulent concealment of the right to file a bankruptcy claim; (iv) implied warranty claims; and (v) causation and damages.

defendant actively conceals a material fact from the plaintiff; and … when the defendant makes partial representations but also suppresses some material fact.'" *In re GM LLC Ignition Switch Litig.*, 2016 U.S. Dist. LEXIS 92499, at *169 (S.D.N.Y. July 15, 2016) ("*GM Ignition Switch Litig. I*") (quoting *Falk v. GMC*, 496 F. Supp. 2d 1088, 1095 (N.D. Cal. 2007)).[14]

The UCL prohibits "unlawful, unfair or fraudulent business act[s] or practice[s]." CAL. BUS. & PROF. CODE § 17200; *GM Ignition Switch Litig. I*, 2016 U.S. Dist. LEXIS 92499, at *158-59. The "unlawful" prong prohibits practices that are forbidden by any law, and borrows violations of other laws and treats them as actionable. *Id.* at *158; *Saunders v. Superior Court*, 27 Cal. App. 4th 832, 838 (1994). "Unfair" means "conduct that threatens an incipient violation of an antitrust law, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." *In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices, & Prods. Liab. Litig.*, 754 F. Supp. 2d 1145, 1175 (C.D. Cal. 2010) ("*Toyota I*") (quoting *Cel-Tech Commc'ns v. Los Angeles Cellular Tel. Co.*, 20 Cal. 4th 163, 187 (1999)). A "fraudulent" business practice is "one that is likely to deceive the public and may be based on representations that are untrue," *id.* (citing *McKell v. Wash. Mut., Inc.*, 142 Cal. 4th 1457, 1471 (2006)); *GM Ignition Switch Litig. I*, 2016 U.S. Dist. LEXIS 92499, at *158, as well as those that "may be accurate on some level, but will nonetheless tend to mislead or deceive." *McKell*, 142 Cal. 4th at 1471. The inquiry is objective, and turns on whether a "reasonable consumer" is likely to be deceived. *Id.* Because the UCL focuses on defendant's conduct, rather than the plaintiff's damages, '"relief under the UCL is available without individualized proof of deception, reliance, and injury.'" *Stearns v. Ticketmaster Corp.*, 655 F.3d 1013, 1021 (9th Cir. 2011) (quoting *In re Tobacco II Cases*, 46 Cal. 4th 298, 320 (2009));

[14] The test for actionable omissions under the UCL is the same. *Id.* at *163.

see also Keegan, 284 F.R.D. at 533-34; *Parkinson v. Hyundai Motor Am.*, 258 F.R.D. 580, 596-97 (C.D. Cal. 2008).

Common issues predominate for Plaintiffs' California consumer protection statute claims. Using evidence common to all Class members within each proposed Class, Plaintiffs will prove a violation of the CLRA by demonstrating: (i) Class Vehicles suffer from a unifying defect subject to a common recall notice (*see, e.g.*, Offer of Proof §§ II.B-J); (ii) GM was aware, or should have been aware, of the alleged defects (Offer of Proof §§ II.B-K); (iii) GM had a duty to disclose its knowledge but failed to do so; and (iv) the facts that GM allegedly failed to disclose were material (*see, e.g.*, Offer of Proof § II.L). Similarly, the same common proof will predominate for Plaintiffs' UCL claims, which Plaintiffs will establish by showing that GM committed unlawful practices (violations of the CLRA and the National Highway Transportation Safety Act), engaged in practices that are likely to deceive (failing to disclose known defects), and committed unfair acts (distributing vehicles with known safety defects offends established public policy).

The CLRA and UCL claims are also suitable for class-wide resolution because causation and materiality are considered under an objective standard. Under the CLRA, causation can be established class-wide by demonstrating the materiality of an omission, which gives rise to an inference of reliance. *See, e.g.*, *Keegan*, 284 F.R.D. at 530-31; *Stearns*, 655 F.3d at 1022-23; *In re POM Wonderful LLC Mktg. & Sales Practices Litig.*, 2012 U.S. Dist. LEXIS 141150, at *17 (C.D. Cal. Sept. 28, 2012); *Guido v. L'Oreal USA, Inc.*, 2013 WL 3353857, at *11 (C.D. Cal. July 1, 2013) ("Since materiality concerns objective features of allegedly deceptive advertising, not subjective questions of how it was perceived by each individual consumer, whether an omission is material presents a common question of fact suitable for class litigation.") (citing *Mass. Mut. Life Ins. Co. v. Superior Court*, 97 Cal. App. 4th 1282, 1294 (2002)). Materiality "is judged by an

objective reasonable person standard," focusing on the defendant's conduct, which "can be determined relative to the class as a whole." *Ehret v. Uber Techs., Inc.*, 148 F. Supp. 3d 884, 920 (N.D. Cal. 2015).

Likewise, reliance and causation are not required for a UCL claim not based on misrepresentations and false advertising, *Galvan v. KDI Distrib.*, 2011 U.S. Dist. LEXIS 127602, at *28 (C.D. Cal. Oct. 25, 2011); *Medrazo v. Honda of N. Hollywood*, 205 Cal. App. 4th 1, 12 (2012), moreover, a presumption of reliance arises, as here, when the misrepresentation is material. Once the class representative's reliance is established, "the UCL does not require individualized proof of causation and injury for absent class members." *Galvan*, 2011 U.S. Dist. LEXIS 127602, at *31.

In considering class certification of CLRA and UCL claims in an auto defect case, the Ninth Circuit held that the district court had erred in its predominance analysis by "concluding that individualized proof was required on the question of the existence of a defect and on the question of materiality." *Edwards v. Ford Motor Co.*, 603 F. App'x 538, 540 (9th Cir. 2015). Because materiality is governed by an objective "reasonable person" standard, the same inquiry is made for every class member. *Id.* at 541. It follows, the Court reasoned, that "a finding that the defendant has failed to disclose information that would have been material to a reasonable person who purchased the defendant's product gives rise to a rebuttable inference of reliance as to the class." *Id.* (citing *Mass. Mut.*, 97 Cal. App. 4th at 1292-93).[15]

[15] *See also Falco v. Nissan N. Am., Inc.*, 2016 U.S. Dist. LEXIS 46115, at *24 (C.D. Cal. Apr. 5, 2016) ("Common proof can be used to establish the elements of the CLRA claim, such as whether Nissan had a duty to disclose the alleged defect, whether there was an unreasonable safety risk, and whether consumers would find such omission material in their transaction."); *Banks v. Nissan N. Am., Inc.*, 301 F.R.D. 327, 335 (N.D. Cal. 2013) ("[W]hile it is true that some vehicles' defects may have manifested in different ways, the issues of (1) whether Nissan was aware of the alleged defect, (2) whether Nissan had a duty to disclose its knowledge, and (3) whether Nissan violated consumer protection laws when it failed to do so, are common to the class and predominate over any individual issues.").

Under both the UCL and the CLRA, pure omissions about safety are necessarily uniform.[16] The record here justifies an inference of common reliance. The Court has already held that a safety defect is "material" for purposes of alleged UCL and CLRA violations, *GM Ignition Switch Litig. I*, 2016 U.S. Dist. LEXIS 92499, at *169,[17] making a finding of class-wide causation and reliance appropriate. *See also Yamada v. Nobel Biocare Holding AG*, 275 F.R.D. 573, 578 (C.D. Cal. 2011) (finding that no reasonable class member would have purchased and used the product had he been aware of the alleged defect); Offer of Proof § II.L (outlining substantial proof of materiality). Accordingly, the related issues of whether GM had a duty to disclose the existence of the defects, whether GM failed to disclose them, and whether the information was material to a reasonable consumer are all common to each California Class as a whole, and predominate over any individual issue any California Class member may face.

Plaintiffs' proposed Special Verdict Forms for the California consumer statute claims are attached as **Exhibit A**.

b. Common issues predominate for the Missouri Merchandising Practices Act claim.

To show a violation of the Missouri Merchandising Practices Act (MMPA), Plaintiffs must establish that they purchased or leased a vehicle for personal, family, or household purposes and suffered an ascertainable loss of money or property as a result of an act declared unlawful by MO. REV. STAT. § 407.020(1). *Hope v. Nissan N. Am., Inc.*, 353 S.W.3d 68, 82 (Mo. Ct. App. 2011).

[16] *See, e.g.*, *Keegan*, 284 F.R.D. at 531, 533 (for the CLRA claim, "Defendants allegedly provided the same information to the entire class, i.e., no information, concerning the possibility of the [defect]"; regarding the UCL claim, "all class members received the same information from defendants regarding the purported defect—which is to say, no information concerning the possibility of premature and excessive tire wear").

[17] *See also id.* at *165 ("And the concealed defect unquestionably implicated a safety issue and would have affected a reasonable person's decision to purchase a car—making the omission material."); *id.* at *171 ("And a defect that can cause a car to suddenly switch off plainly implicates safety, and thus constitutes a 'material' fact that would cause a consumer to behave differently if she knew of it."); *Toyota I*, 754 F. Supp. 2d at 1173-74.

Section 407.020(1) prohibits the "act, use or employment by any person of any deception, fraud, false pretense, false promise, misrepresentation, unfair practice or the concealment, suppression, or omission of any material fact in connection with the sale or advertisement of any merchandise in trade or commerce." MO. REV. STAT. § 407.020(1).[18] "Concealment" of a material fact is "any method, act, use or practice which operates to hide or keep material facts from consumers." MO. CODE REGS. tit. 15, § 60-9.110(1). "Suppression" of a material fact is "any method, act, use or practice which is likely to curtail or reduce the ability of consumers to take notice of material facts which are stated." MO. CODE REGS. tit. 15, § 60-9.110(2). "Omission" of a material fact is "any failure by a person to disclose material facts known to him/her, or upon reasonable inquiry would be known to him/her." MO. CODE REGS. tit. 15, § 60-9.110(3). "Reliance and intent that others rely upon such concealment, suppression or omission are not elements of concealment, suppression or omission." MO. CODE REGS. tit. 15, § 60-9.110(4).

A "material fact" is "any fact which a reasonable consumer would likely consider to be important in making a purchasing decision, or which would be likely to induce a person to manifest his/her assent, or which the seller knows would be likely to induce a particular consumer to manifest his/her assent, or which would be likely to induce a reasonable consumer to act, respond

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[18] A practice is "unfair" if it: "(1) offends any public policy as it has been established by the Constitution, statutes or common law of this state, or by the Federal Trade Commission, or its interpretive decisions *or* (2) is unethical, oppressive, or unscrupulous; *and* (3) presents a risk of, or causes, substantial injury to consumers." *Schuchmann v. Air Servs. Heating & Air Conditioning, Inc.*, 199 S.W.3d 228, 233 (Mo. Ct. App. 2006) (emphasis in original); MO. CODE REGS. tit. 15, § 60-8.020(1). Proof of deception fraud, or misrepresentation is not required to prove unfair practices. MO. CODE REGS. tit. 15, § 60-8.020(2).

"Deception" is "any method, act, use, practice, advertisement or solicitation that has the tendency or capacity to mislead, deceive or cheat, or that tends to create a false impression." MO. CODE REGS. tit. 15, § 60-9.020(1). "Reliance, actual deception, knowledge of deception, intent to mislead or deceive, or any other culpable mental state such as recklessness or negligence, are not elements of deception . . . ." MO. CODE REGS. tit. 15, § 60-9.020(2).

"Fraud" includes "any acts, omissions or artifices which involve falsehood, deception, trickery, breach of legal or equitable duty, trust, or confidence, and are injurious to another or by which an undue or unconscientious advantage over another is obtained." MO. CODE REGS. tit. 15, § 60-9.040(1). It is not limited to common law fraud or deceit or even finite rules, "but extends to the infinite variations of human invention." MO. CODE REGS. tit. 15, § 60-9.040(2).

or change his/her behavior in any substantial manner." MO. CODE REGS. tit. 15, § 60-9.010(1)(C). The Court has recognized that, where a plaintiff alleges omission of material fact, "he or she must show that the defendant knew or reasonably should have known the material fact, and failed to disclose it to consumers." *GM Ignition Switch Litig. I*, 2016 U.S. Dist. LEXIS 92499, at *210 (citing *Hope*, 353 S.W.3d at 82). Proof of defendant's knowledge, however, is not required for concealment or suppression claims. *Plubell v. Merck & Co.*, 289 S.W.3d 707, 713 n.4 (Mo. Ct. App. 2009). The MMPA specifically authorizes class actions where an unlawful practice "has caused similar injury to numerous other persons." MO. REV. STAT. § 407.025.2.

Plaintiffs will prove violations of the MMPA by using the same common evidence used to prove violations of the California consumer statutes. *See*, *supra*, at Section V.A.1.a. Courts have found that common issues predominate in product defect class actions involving MMPA claims. *See, e.g.*, *Hope*, 353 S.W.3d at 84-85 (upholding certification of MMPA omission claims because evidence focused on Nissan's conduct in failing to disclose defect and noting that the class period could be revised or subclasses used if the court later found that Nissan's knowledge of the defect evolved over time); *Plubell*, 289 S.W.3d at 713 (common issues predominated because the central issue was whether Merck failed to disclose and concealed Vioxx's safety risks, an issue "at the core of the case" and common to all class members); *Flynn v. FCA US LLC*, 2018 U.S. Dist. LEXIS 111963, at *39 (S.D. Ill. July 5, 2018) ("For omission-based consumer protection claims [including the MMPA], whether Defendants knew the vehicles were defective and engaged in unlawful practices poses a common question that predominates over individual questions that may arise."). Plaintiffs' proposed Special Verdict Forms for the MMPA claims are attached as **Exhibit B**.

c. Common issues predominate for the Texas Deceptive Trade Practices—Consumer Protection Act claim.

The Texas Deceptive Trade Practices-Consumer Protection Act (DTPCPA) prohibits an "unconscionable action or course of action," TEX. BUS. & COM. CODE § 17.50(a)(3), defined as "an act or practice which, to a consumer's detriment, takes advantage of the lack of knowledge, ability, experience, or capacity of the consumer to a grossly unfair degree." TEX. BUS. & COM. CODE § 17.45(5). As the Court has recognized, "'a plaintiff must show that the defendant took advantage of his lack of knowledge and the resulting unfairness was glaringly noticeable, flagrant, complete and unmitigated.'" *In re GM LLC Ignition Switch Litig.*, 257 F. Supp. 3d 372, 449 (S.D.N.Y. 2017) ("*GM Ignition Switch Litig. II*") (quoting *Washburn v. Ford*, 521 S.W.3d 871 (Tex. App. 2017)). Further, as the Court held, a violation of the Texas DTPCPA is proven by showing that "the defendant engaged in false, misleading or deceptive acts" and "these acts constituted a producing cause of the [plaintiff's] damages." *Id.* at 448-49 (citation omitted). Deceptiveness is subject to common proof. *See Spradling v. Williams*, 566 S.W.2d 561, 562-63 (Tex. 1978) (upholding jury instruction that "[f]alse, misleading or deceptive" act or practice means "an act or series of acts which has the capacity or tendency to deceive an average or ordinary person, even though that person may have been ignorant, unthinking or credulous"). The Texas DTPCPA's causation requirement is also susceptible to class-wide proof. *See In re ConAgra Foods, Inc.*, 90 F. Supp. 3d 919, 1016-17 (C.D. Cal. 2015) (citing *Henry Schein, Inc. v. Stromboe*, 102 S.W.3d 675, 693 (Tex. 2002)). Like other state consumer fraud statutes, the Texas DTPCPA allows class-wide inference of reliance or causation where the omitted information would have affected consumers' purchasing decisions. *See Brazil v. Dell Inc.*, 585 F. Supp. 2d 1158, 1164-65 (N.D. Cal. 2008) (explaining that reliance and materiality are treated similarly under both the Texas DTPCPA and California CLRA).

By using the same common evidence used to prove violations of the California consumer statutes, Plaintiffs will prove that GM's omission of material fact and knowledge of the numerous defects was unconscionable in violation of the Texas DTPCPA. *See*, *supra*, at Section V.A.1.a. Plaintiffs' proposed Special Verdict Forms for the Texas DTPCPA claims are attached as **Exhibit C**.

2. Plaintiffs will prove with common evidence that GM fraudulently concealed the defects from the Classes, and common issues will predominate for Plaintiffs' fraudulent concealment claims.

In California, fraudulent concealment occurs when there is "(1) a misrepresentation (false representation, concealment, or nondisclosure); (2) knowledge of falsity (or scienter); (3) intent to defraud, i.e., to induce reliance; (4) justifiable reliance; and (5) resulting damage." *GM Ignition Switch Litig. I*, 2016 U.S. Dist. LEXIS 92499, at *172 (quoting *Toyota I*, 754 F. Supp. 2d at 1189). A duty to disclose must exist, "which arises under the same circumstances as in the UCL and CLRA contexts," *id.*, as discussed above. Under Missouri law, "'[t]o recover for fraudulent concealment, plaintiffs must prove that defendants had a duty to disclose the concealed information,'" and such a duty arises "'when one party has superior knowledge of information not within the fair and reasonable reach of the other party.'" *Id.* at *215 (quoting *In re Gen. Motors Corp. Anti-Lock Brake Prods. Liab. Litig.*, 966 F. Supp. 1525, 1535 (E.D. Mo. 1997)).

Plaintiffs will prove fraudulent concealment with the same common evidence used to prove GM's violations of consumer statutes, namely (i) Class Vehicles within each Class suffer from a unifying defect subject to the same recall; (ii) GM was aware, or should have been aware, of the alleged defects; (iii) GM had a duty to disclose its knowledge but failed to do so; and (iv) the facts that GM failed to disclose were material. As with the California CLRA claim, reliance is presumed or inferred based on the materiality of the concealment, *Vasquez v. Superior Court*, 4 Cal. 3d 800, 814 n.9 (1971); *Occidental Land, Inc. v. Superior Court*, 18 Cal. 3d 355, 363 (1976); *Wilner v.*

Sunset Life Ins. Co., 78 Cal. App. 4th 952, 962-963 (2000); *Danzig v. Grynberg & Assocs*., 161 Cal. App. 3d 1128, 1138-1139 (1984), and a concealed fact is material if it would influence a reasonable person's judgment or conduct. *In re Tobacco II Cases*, 46 Cal. 4th 298, 326 (2009). And this Court has recognized that courts in the Second Circuit "have held that reliance may be proved through circumstantial evidence that plaintiffs would not have purchased a product but for a defendant's uniform . . . omissions about that product," including where—like here—the omissions were "so fundamental" that it is "hard to imagine" that they would not have influenced the purchase decision. *Dandong*, 2013 U.S. Dist. LEXIS 150259, at *28, *30 (certifying common law fraud claim); *see also Moore*, 306 F.3d at 1253 ("fraud claims based on uniform misrepresentations . . . are appropriate for class certification because the standardized misrepresentations may be established by generalized proof"). In addition, Plaintiffs will use common evidence to establish that GM intended to deceive consumers by failing to disclose material information regarding the defects.

Plaintiffs' proposed Special Verdict Forms for their fraudulent concealment claims are attached as **Exhibit D**.

3. Plaintiffs will prove with common evidence that GM fraudulently concealed the right to file a claim against Old GM in bankruptcy, and common issues will predominate for this claim.

In September 2009, the Bankruptcy Court entered a Bar Date Order, establishing November 30, 2009, as the deadline for proof of claims to be filed against Old GM (the Bar Date). *In re Motors Liquidation Co*., 829 F.3d 135, 147 (2d Cir. 2016). From the day GM came into existence on July 10, 2009, it was well aware of the Delta Ignition Switch Defect, yet it concealed its knowledge and, consequently, members of the Delta Ignition Switch Defect Bankruptcy Classes did not know of their right to file bankruptcy claims before the Bar Date. GM's "Day One" awareness, resulting from the transfer of knowledge and personnel from Old GM to GM, will be

proved using evidence common to all Class members.[19] As the Bankruptcy Court found, "at least 24 Old GM personnel (all of whom were transferred to New GM), including engineers, senior managers and attorneys, were informed or otherwise aware of the [Delta Ignition Switch] Defect prior to the Sale Motion, as early as 2003." *In re Motors Liquidation Co*., 529 B.R. 510, 538 (Bankr. S.D.N.Y. 2015).[20] This common evidence will be used to establish the elements of fraudulent concealment under California and Missouri law, as outlined above in Section V.A.2.

Plaintiffs' proposed Special Verdict Forms for their claims of fraudulent concealment of the right to file a claim against Old GM in bankruptcy are attached as **Exhibit E**.

4. Plaintiffs will prove with common evidence that GM breached implied warranties and violated the Magnuson-Moss Warranty Act, and common issues will predominate for Plaintiffs' implied warranty claims.

The elements of breach of implied warranty under the California Song-Beverly Consumer Warranty Act are: (i) plaintiff bought/leased consumer goods manufactured by defendant; and (ii) the consumer goods were not of the same quality as those generally acceptable in the trade or were not fit for the ordinary purposes for which such goods are used. *See* CAL. CIV. CODE § 1791.1(a)(1), (2); *Isip v. Mercedes-Benz USA, LLC*, 155 Cal. App. 4th 19, 26 (2007).[21] "Significantly, the relevant inquiry focuses on whether the product was defective at the time it was sold." *GM Ignition Switch Litig. I*, 2016 U.S. Dist. LEXIS 92499, at *177 (citing *Cholakyan v. Mercedes-Benz USA, LLC*, 796 F. Supp. 2d 1220, 1243 (C.D. Cal. 2011)).

[19] This same common evidence will be used in support of Plaintiffs' successor liability claims on behalf of the Missouri Delta Ignition Switch Defect Successor Liability Class.

[20] The Bankruptcy Court also found that, "[a]s of June 2009, when the entry of the Sale Order was sought, Old GM had enough knowledge of the Ignition Switch Defect to be required . . . to send out mailed recall notices to owners of affected Old GM vehicles." *Id.* at 524. GM necessarily had this same knowledge from day one of its existence.

[21] Plaintiffs only seek certification of implied warranty-based claims under California law.

Selling vehicles with defects constitutes a breach of implied warranty, and Plaintiffs will prove with evidence common to the California implied warranty-related Subclasses that the relevant vehicles within each recall were defective. The breach of implied warranty claim thus rises or falls predominantly on common proof. *See, e.g.*, *Wolin*, 617 F.3d at 1173 ("Common issues predominate such as whether [defendant] was aware of the existence of the alleged defect, [and] whether [defendant] had a duty to disclose its knowledge….") (citing *Chamberlan*, 402 F.3d at 962)).[22] And because the Court has already recognized that the claims for violations of the Magnuson-Moss Warranty-Federal Trade Commission Act (MMA) rely on the claims for implied warranty under state law, *GM Ignition Switch Litig. I*, 2016 U.S. Dist. LEXIS 92499, at *154, Plaintiffs will offer the same common proof in support of the MMA claims.

Plaintiffs' proposed Special Verdict Forms for the MMA and implied warranty claims are attached as **Exhibit F**.

5. Plaintiffs will use common evidence to prove causation and the amount of damages, and Plaintiffs' damages models satisfy the *Comcast* standard.

At the class certification stage, Plaintiffs '"must be able to show that their damages stemmed from the defendant's actions that created the legal liability,'" *Sykes v. Mel S. Harris & Assocs. LLC*, 780 F.3d 70, 88 (2d Cir. 2015) (quoting *Leyva v. Medline Indus. Inc.*, 716 F.3d 510, 514 (9th Cir. 2013)), and that damages are capable of measurement on a class-wide basis. *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1433 (2013); *see id*. at 1435 ("The first step in a damages study is the translation of the legal theory of the harmful event into an analysis of the economic impact of that event."). The existence of some individualized damage issues does not defeat

[22] *See also Keegan*, 284 F.R.D. at 537 (in California, "if defendants can demonstrate that the design specification requiring 1.5 degrees of negative camber is not 'substantially certain' to result in the excessive and premature tire wear about which plaintiffs complain, they will prevail. If plaintiffs, on the other hand, can demonstrate that the specification is substantially certain to result in premature and excessive tire wear that renders the vehicles unfit for driving, they will prevail. The breach of implied warranty claim is therefore susceptible of common proof[.]").

predominance when damages can be modeled based on a measure of common proof. *Sykes*, 780 F.3d at 88; *see also Shahriar v. Smith & Wollensky Rest. Grp., Inc.*, 659 F.3d 234, 253 (2d Cir. 2011) (common issues predominate when liability can be determined class-wide despite the existence of individualized damage issues); *Little v. Kia Motors of Am., Inc.*, 2018 WL 3446734, at *7-9 (N.J. Sup. Ct. July 18, 2018) (jury properly estimated class damages using common evidence; precise calculations not required). Plaintiffs' experts present two models for measuring class-wide damages—one for loss of the benefit-of-the-bargain, and another for consequential damages in the form of lost time.

a. Plaintiffs will prove Class-wide benefit-of-the-bargain loss using common evidence.

The Court has found that Plaintiffs adequately pled economic loss in the form of loss of the benefit-of-the-bargain, explaining: "The gravamen of the benefit-of-the-bargain defect theory is that Plaintiffs who purchased defective cars were injured when they purchased for *x* dollars a New GM car that contained a latent defect; had they known about the defect, they would have paid fewer than *x* dollars for the car (or not bought the car at all), because a car with a safety defect is worth less than a car without a safety defect." *GM Ignition Switch Litig. I*, 2016 U.S. Dist. LEXIS 92499, at *113.[23] In other words, the "theory compensates a plaintiff for the fact that he or she overpaid, *at the time of sale*, for a defective vehicle." *GM Ignition Switch Litig. I*, 2016 U.S. Dist.

[23] *See also In re Toyota Motor Corp.*, 790 F. Supp. 2d 1152, 1163 (C.D. Cal. 2011) ("Plaintiffs bargained for safe, defect-free vehicles, but instead received unsafe, defective vehicles. A vehicle with a defect is worth less than one without a defect. The overpayment for the defective, unsafe vehicle constitutes the economic-loss injury . . . ."); *id.* at 1165 ("[A]ll Plaintiffs suffered an economic loss at the time of purchase because they received a defective vehicle. The fact that Plaintiffs discovered this defect after the time of purchase is of no moment. The economic loss was present from the beginning.").

LEXIS 92499, at *126 (emphasis added).[24] The law in each bellwether state recognizes benefit-of-the-bargain damages and measures those damages at the time of sale.[25]

On behalf of the Classes and Subclasses seeking restitution and damages, Plaintiffs will prove loss of benefit-of-the-bargain at the time of sale using common evidence in the form of a choice-based conjoint analysis conducted by Plaintiffs' expert, Stefan Boedeker. Mr. Boedeker is an economist with extensive experience conducting conjoint analysis, and similar conjoint studies that he has conducted have been accepted and relied on by federal courts in similar consumer litigation. *See, e.g.*, *In re Myford Touch Consumer Litig.*, 291 F. Supp. 3d 936, 968-73, 978 (N.D. Cal. 2018) (denying summary judgment based on alleged failure of class-wide damages and denying *Daubert* challenge to Boedeker's choice-based conjoint analysis measuring how consumers valued the vehicle component under four scenarios in which they were provided varying levels of information about the defect and Ford's knowledge thereof); *In re Dial Complete Mktg. & Sales Practices Litig.*, 320 F.R.D. 326, 331-33 (D.N.H. 2017) (certifying class and rejecting *Daubert* challenge to Boedeker conjoint analysis establishing market-determined price premium associated with purported germ killing properties of soap).

Conjoint analysis is one of the most widely-used quantitative methods of market research. The analysis involves asking a group of consumers to complete surveys concerning particular qualities of products, and the values they assign to those particular qualities, and then analyzing

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[24] As to whether a malfunction resulting from the defect later occurred, "several circuit courts have held that an economic, point-of-sale injury is not erased just because the purchaser was lucky enough to avoid the effects of the alleged misrepresentations or omissions." *In re Amla Litig.*, 282 F. Supp. 3d 751, 767 (S.D.N.Y. 2017) (citing *Wolin*, 617 F.3d at 1173)).

[25] *See, e.g.*, *Pulaski & Middleman, LLC v. Google, Inc.*, 802 F.3d 979, 989 (9th Cir. 2015) (California UCL and CLRA claims); *Isip v. Mercedes-Benz USA, LLC*, 65 Cal. Rptr. 3d 695, 698, 700 (Cal. App. 2007) (breach of warranty); *Schoenlein v. Routt Homes, Inc.*, 260 S.W.3d 852, 854 (Mo. Ct. App. 2008) (Missouri MMPA claims); *Heberer v. Shell Oil Co.*, 744 S.W.2d 441, 443 (Mo. 1988) (fraud-based claims); MO. REV. STAT. § 400.2-714(2) (warranty damages); *Fazio v. Cypress/GR Houston I, L.P.*, 403 S.W.3d 390, 396 (Tex. App. 2013); *Arthur Andersen & Co. v. Perry Equip. Corp.*, 945 S.W.2d 812, 817 (Tex. 1997).

the survey results to create an approximation of how the market values a particular aspect of a product. *See* Offer of Proof § II.M; *see also TV Interactive Data Corp. v. Sony Corp.*, 929 F. Supp. 2d 1006, 1020 (N.D. Cal. 2013) (Conjoint analysis is "a type of survey or market research, which, at the most general level, conceptualizes products as bundles of attributes, treating price as an attribute. . . . Conjoint analysis uses customer surveys to determine 'values' for each attribute. By choosing among multiple bundles of attributes, survey participants make implicit tradeoffs one would make in real-world purchasing decisions.").

Numerous courts across the country, including this Court, have accepted choice-based conjoint analysis as a reliable methodology for calculating price premiums on a class-wide basis in consumer class actions. *See, e.g.*, *Apple Inc. v. Samsung Elecs. Co.*, 735 F.3d 1352, 1368 (Fed. Cir. 2013) (finding abuse of discretion in district court's failure to consider plaintiff's expert's conjoint analysis, explaining that "there may be a variety of ways to show that a feature drives demand, including with evidence that a feature significantly increases the desirability of a product incorporating that feature"); *Sanchez-Knutson v. Ford Motor Co.*, 310 F.R.D. 529, 539 (S.D. Fla. 2015) (relying on conjoint analysis damage model to certify class); *In re Scotts EZ Seed Litig.*, 304 F.R.D. at 413-15 (accepting testimony that expert "will isolate the premium associated with the 50% thicker claim using one of three statistical methods: hedonic regression, a contingent valuation study, or a conjoint analysis"); *Khoday v. Symantec Corp.*, 93 F. Supp. 3d 1067, 1082 (D. Minn. 2015) (certifying class and accepting conjoint model that valued specific product feature); *In re ConAgra*, 90 F. Supp. 3d at 1022-32 (proposed conjoint analysis was "sufficiently reliable to be used in calculating class-wide damages," and, therefore, satisfied *Comcast* as part of a hybrid damages methodology); *Guido v. L'Oreal, USA, Inc.*, 2014 U.S. Dist. LEXIS 165777 (C.D. Cal. July 24, 2014) (admitting conjoint analysis of price premium in mislabeled cosmetics

case); *In re Toyota Motor Corp. Hybrid Brake Mktg., Sales Practices & Prods. Liab. Litig.*, 2012 WL 4904412, at *3-4 (C.D. Cal. Sep. 20, 2012) ("hedonic regression, contingent valuation, and discrete choice, are generally accepted, have been tested, and are part of peer-reviewed studies"); *see also Dzielak v. Whirlpool Corp.*, 2017 U.S. Dist. LEXIS 39232, at *77 (D.N.J. Mar. 17, 2017) (denying *Daubert* challenge to conjoint analysis determining the value of washing machine's "Energy Star" feature); *TV Interactive Data Corp.*, 929 F. Supp. 2d at 1019-20 (admitting conjoint analysis to determine reasonable royalty rate in patent dispute); *Microsoft Corp. v. Motorola Mobility, Inc*., 904 F. Supp. 2d 1109, 1120 (W.D. Wash. 2012) (admitting conjoint analysis survey in patent dispute and finding that criticisms of the conjoint analysis went "to issues of methodology, survey design, reliability, . . . [and] critique of conclusions, and therefore go to the weight of the survey rather than admissibility") (citation omitted).

Consistent with this precedent, Mr. Boedeker surveyed consumers in order to estimate how their willingness to pay for a GM car would have changed if they had known, at the point of sale, about the defects at issue in this case. *See* Offer of Proof § II.M. Based on responses from consumers and his analysis of those responses, Mr. Boedeker concluded that the "non-disclosure of defects caused class members to overpay for their vehicles, leading to class-wide damages." *Id.* He found that consumers would have paid less for a GM vehicle that they knew contained a defect *even if there was already a recall in place and the repairs would be immediate*, and the impact is greater the longer the time to recall. *Id.* The amount by which consumers "overpaid" for their vehicles because of their lack of knowledge of the particular concealed defect in their vehicles constitutes their damages, and Mr. Boedeker has calculated median economic loss per vehicle for each defect under a variety of scenarios considering time-to-recall and the possibility of personal injury and death (not surprisingly, economic losses are highly correlated with the chance of

specific injury or death, as well as the time elapsed between the manufacturer's knowledge of the defect and the recall). *Id.* Class-wide economic losses can be calculated by applying the median economic loss per vehicle to the number of vehicles at issue in each recall. *Id.* (citing Ex. 215 at ¶¶ 177-78; Ex. 216).[26]

Mr. Boedeker's model translates Plaintiffs' "legal theory of the harmful event into an analysis of the economic impact of that event," which is all that is required at class certification. *Comcast*, 133 S. Ct. at 1435; *see also Vaccarino v. Midland Nat'l Life Ins. Co.*, 2014 WL 572365, at *10-13 (C.D. Cal. Feb. 3, 2014) (*Comcast* requires only that Plaintiffs' damages model "not measure damages 'unrelated' to [P]laintiffs' claim").

b. Plaintiffs will prove Class-wide consequential damages using common evidence.

In addition to suffering damages by overpaying for their vehicle, Class members have also suffered consequential damages in the form of the time and expense of taking the vehicles to GM dealerships for the relevant recall repairs. The Court has recognized that some states recognize "lost time" as a valid theory of consequential damages. *In re GM LLC Ignition Switch Litig. II*, 257 F. Supp. 3d at 398. California, Missouri, and Texas are such states.[27]

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[26] For the Delta Ignition Switch Bankruptcy Classes in California and Missouri, which pursue claims for fraud by concealment of the right to file a claim against Old GM in bankruptcy, the damages are the amounts that the Class members would have recovered had they timely filed a claim in Old GM's Bankruptcy. This amount will be calculated on a class-wide basis from Mr. Boedeker's findings, which set forth the amount of the Class members' overpayment for their defective vehicles. They will then recover the same percentage of that amount that they would have recovered had they been paid out of the General Unsecured Creditors' Trust Fund.

[27] *See, e.g.*, *In re Chatterley*, 2005 WL 6960176, at *4 (B.A.P. 9th Cir. May 23, 2005) (citing Cal. Civ. Code § 3343 as an example of California law "codif[ying] existing case law relating to damages arising from lost time" as "'additional' or 'consequential' damages"); *Von Brimer v. Whirlpool Corp.*, 536 F.2d 838, 847 (9th Cir. 1976) (California law allows lost time damages for malicious prosecution claims); *Seymour v. House*, 305 S.W.2d 1, 3 (Mo. 1957) (Missouri law recognizes loss-of-time damages in personal injury actions); *Arnold v. Alton R. Co.*, 154 S.W.2d 58, 62 (Mo. 1941) (affirming award of damages including "special damages for 'loss of time and earnings'"); *Tex. Disposal Sys. Landfill, Inc. v. Waste Mgmt. Holdings, Inc.*, 219 S.W.3d 563, 581 n.19 (Tex. App. 2007) (under Texas law, special damages include "lost time value").

The time and costs associated with obtaining recall repairs made necessary by GM's concealment of known defects include scheduling an appointment; driving to the dealership (in some instances multiple times); meeting with the dealer's service writer to discuss the repair; arranging and engaging in transportation when the vehicle was left at the dealership during the repair or spending time waiting at the dealership during the repair; and driving the vehicle back home or to work after the recall was performed. *See* Offer of Proof § II.N (citing Ex. 218, Manuel Report at 6-7). On an interim basis subject to GM producing vehicle-level data if relevant classes are certified, Plaintiffs' expert, Dr. Ernest Manuel, has estimated these damages on a vehicle-by-vehicle basis using, among other data points, GM data identifying each vehicle that received a recall repair; vehicle registration Zip Code data and dealership addresses to estimate drive-times; GM's own recall bulletins that estimate repair times; and average local hourly wages. *See* Offer of Proof § II.N (citing Ex. 218, Manuel Report at 7-15). The consequential damages estimate is a vehicle-by-vehicle "ground up" calculation providing "a common methodology to measure and quantify damages on a class-wide basis." *Behrend v. Comcast Corp*., 655 F.3d 182, 207 (3d Cir. 2011). Therefore, the methodology yields a highly reliable measurement of lost time.

B. A Class action is a superior method of adjudicating this dispute.

A class action must be superior to other available methods of fair and efficient adjudication. Fed. R. Civ. P. 23(b)(3). "'[T]he purpose of the superiority requirement is to assure that the class action is the most efficient and effective means of resolving the controversy.'" *Wolin*, 617 F.3d at 1175 (quoting 7AA CHARLES WRIGHT, ARTHUR MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 1779, at 174 (3d ed. 2005)). Rule 23(b)(3)'s non-exclusive factors are: "(A) the class members' interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or

against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action." Fed. R. Civ. P. 23(b)(3). Each factor is satisfied here.

With respect to factors (A) and (C), the value of the claims is simply too low to incentivize many Class members to litigate their claims individually, particularly in light of GM's resources, and weighs in favor of concentrating the claims in a single forum. *Sykes v. Mel Harris & Assocs. LLC*, 285 F.R.D. 279, 294 (S.D.N.Y. 2012) ("the class members' interests in litigating separate actions is likely minimal given their potentially limited means with which to do so and the prospect of relatively small recovery in individual actions"). This is especially true here given the high cost of marshalling the evidence necessary to litigate the claims at issue, the disparity in resources between the typical class member and a well-funded, litigation-savvy defendant like GM, and the scorched-earth litigation strategy that GM is employing.[28] Not only will individual resources be spared with class certification, but already-strapped judicial resources will also be conserved.[29]

Co-Lead Counsel for the Economic Loss Plaintiffs have already devoted significant resources to this class litigation, engaged in multiple rounds of briefing on motions to dismiss, summary judgment and discovery issues; taken depositions of hundreds of GM witnesses and experts and defended hundreds of depositions of Plaintiffs and experts; orchestrated a labor-

[28] *See also Wolin*, 617 F.3d at 1176 (finding that the amount of damages suffered by each class member is not large and that forcing individual vehicle owners to litigate their cases is an inferior method of adjudication); *see also Keegan*, 284 F.R.D. at 549 ("The funds required to marshal the type of evidence, including expert testimony, that will be necessary to pursue these claims against well-represented corporate defendants would discourage individual class members from filing suit when the expected return is so small."); *Hartless v. Clorox Co.*, 273 F.R.D. 630, 639 (S.D. Cal. 2011) (observing that cost of securing expert testimony would render individual lawsuits cost prohibitive); *Bryant*, 285 S.W.3d at 644 (number of proposed class members whose "meritorious claims might go unaddressed" absent class certification is "a factor in determining superiority).

[29] *See Wolin*, 617 F.3d at 1176 ("It is far more efficient to litigate this . . . on a classwide basis rather than in thousands of individual and overlapping lawsuits."); *Parkinson*, 258 F.R.D. at 597 (finding a class action superior when the burden on the judiciary would be significant and unnecessary, given the existence of multiple common questions); *Hartless*, 273 F.R.D. at 639 (observing that "multiple individual claims could overburden the judiciary").

intensive written-discovery and document-review effort; presented Plaintiffs' vehicles to GM for inspection; retained experts; and engaged in significant motion practice on other issues. No individual litigant pursuing a purely economic loss case could invest the same resources.

Factor (B)—the extent and nature of any similar litigation—also favors class certification. Numerous class action lawsuits based on the same facts at issue here have been filed against GM. Through the MDL process, those cases were transferred to this Court and are part of this consolidated litigation (in addition to the personal injury cases). That the MDL Panel chose this Court to be the transferee court is one indication that having a single case—as opposed to multiple cases—makes sense.

The final superiority factor—manageability—focuses on whether '"the complexities of class action treatment outweigh the benefits of considering common issues in one trial. . . ."' *McKenzie v. Fed. Express Corp.*, 275 F.R.D. 290, 302 (C.D. Cal. 2011) (quoting *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1192 (9th Cir. 2001)). The question is whether multiple individual lawsuits would be more manageable than a class action, and not whether trying the class claims is easy. *Klay v. Humana, Inc.*, 382 F.3d 1241, 1273 (11th Cir. 2004). Indeed, this fourth factor "will rarely, if ever, be in itself sufficient to prevent certification." *Id.* at 1272; *see also In re Visa Check/Master Money Antitrust Litig.*, 280 F.3d 124, 140 (2d Cir. 2001) (refusal to certify a class solely on grounds of manageability is disfavored and "should be the exception rather than the rule"). Here, Plaintiffs do not foresee any serious manageability problems and certainly none that make thousands of individual actions a better alternative. As discussed in more detail above, and in Plaintiffs' accompanying Offer of Proof and the proposed Special Verdict Forms, the salient issues in this case will be resolved based upon common proof. Simply put, this case can be tried in an efficient manner. "Here, substituting a single class action for numerous trials in a matter

involving substantial common legal issues and factual issues susceptible to generalized proof will achieve significant economies of 'time, effort and expense, and promote uniformity of decision.'" *In re U.S. Foodservice Inc. Pricing Litig.*, 729 F.3d at 130 (quoting Fed. R. Civ. P. 23 Advisory Committee's Notes); *see also Keegan*, 284 F.R.D. at 550-51 (finding that certifying three separate state subclasses under the laws of California, Florida and New York was manageable).

VI. PROPOSED TRIAL PROCEDURE

Plaintiffs envision a single trial. Plaintiffs will first present their case-in-chief, submitting common evidence of GM's wrongdoing, class-wide injury, and total damages, then GM may present whatever defenses it wishes to advance. Plaintiffs will then present their rebuttal case. The Court will enter a verdict based on Special Verdict Forms that take into account the elements of Plaintiffs' claims under California, Missouri, and Texas law. The attached proposed Special Verdict Forms demonstrate that trial of this action will be manageable.

If a verdict is returned for GM, judgment dismissing the bellwether claims with prejudice would enter. If a verdict for the Bellwether Classes results, judgment decreeing the appropriate relief would enter, in addition to a judgment in a total, single monetary sum to be entered on behalf of each Class and Subclass for damage. A post-judgment administrative proceeding will follow, in which checks to each individual Class member will be distributed.[30]

VII. CONCLUSION

Plaintiffs have demonstrated that they satisfy all of the elements of Rule 23(a) and (b)(3). The class action mechanism is not only the best and most efficient way to adjudicate the Class

[30] If is common for courts to have follow-on proceedings regarding damages allocation, even if they involve individualized damage proceedings. *See, e.g.*, *Carnegie v. Household Int'l, Inc.*, 376 F3d 656, 661 (7th Cir. 2004); *Bell Atl. Corp. v. AT&T Corp.*, 339 F.3d 294, 306 (5th Cir. 2003); 3 CONTE & NEWBERG, NEWBERG ON CLASS ACTIONS, § 9:53 at 429-30 (4th ed. 2002) (collecting cases); 7B CHARLES A. WRIGHT, ARTHUR R. MILLER & MARY K. KANE, FEDERAL PRACTICE AND PROCEDURE § 1781 (2d ed. 1986).

members' claims in this case, it is also the only viable method of doing so. For all of the foregoing reasons, Plaintiffs respectfully request that the Court grant their motion to certify the Bellwether Classes.[31]

DATED: July 20, 2018

HAGENS BERMAN SOBOL SHAPIRO LLP

By: */s/ Steve W. Berman*
Steve W. Berman
steve@hbsslaw.com
Sean R. Matt
sean@hbsslaw.com
Andrew M. Volk
andrew@hbsslaw.com
HAGENS BERMAN SOBOL SHAPIRO LLP
1918 Eighth Avenue, Suite 3300
Seattle, WA 98101
Telephone: (206) 623-7292
Facsimile: (206) 623-0594

DATED: July 20, 2018

LIEFF CABRASER HEIMANN & BERNSTEIN, LLP

By: */s/ Elizabeth J. Cabraser*
Elizabeth J. Cabraser
ecabraser@lchb.com
Rachel Geman
rgeman@lchb.com
275 Battery St., 29th Floor
San Francisco, CA 94111
Telephone: (415) 956-1000
Facsimile: (415) 956-1008

Co-Lead Counsel with Primary Focus on Economic Loss Cases

[31] Plaintiffs will file with their reply papers a Proposed Order Granting Plaintiffs' Motion for Class Certification, Appointing Class Representatives and Appointing Class Counsel.

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above document was served upon the attorney of record for each other party through the Court's electronic filing service on July 20, 2018, which will send notification of such filing to the e-mail addresses registered.

/s/ Steve W. Berman
Steve W. Berman

EXHIBIT A

PLAINTIFFS' PROPOSED SPECIAL VERDICT FORMS

CALIFORNIA CONSUMER PROTECTION STATUTES

Set forth below are suggested interrogatories that would be presented on Special Verdict Forms at Trial. This form is meant to be illustrative only, and not comprehensive. Plaintiffs may suggest changes to the special interrogatories herein. Moreover, the absence of any claim or state from the classes and subclasses suggested below is not intended to constitute a waiver of any claims currently, or in the future, brought in this action.

A. LIABILITY

Plaintiffs claim that GM violated California's Consumer Legal Remedies Act, CAL. CIV. CODE § 1750.

Do you find by a preponderance of the evidence the following:

(i) Were Plaintiffs' vehicles sold with characteristics, uses, benefits, or qualities that a reasonable consumer would not believe they had, in the form of a safety defect about which GM knew or should have known?

Yes ☐ No ☐

(ii) Were Plaintiffs' vehicles, when sold, of a particular standard, quality, or grade that a reasonable consumer would not believe they were, in that they contained a safety defect about which GM knew or should have known?

Yes ☐ No ☐

If you answered "Yes" to (i) and/or (ii), above, go to "iii." If you answered "No" to ***both*** *(i) and (ii),* ***Stop.***

(iii) Would the information mentioned in (i) and/or (ii), above have been material to a reasonable consumer?

Yes ☐ No ☐

If you answered "Yes" to (iii), above, go to "iv." If you answered "No" to (iii), ***Stop.***

(iv) Did Plaintiffs suffer damages as a result of GM's conduct?

Yes ☐ No ☐

B. DAMAGES

Have Plaintiffs proved by a preponderance of the evidence the amount of damages suffered by Plaintiffs and the California Classes and Subclasses?

Yes ☐ No ☐

If "yes," complete the following blank: The [Court/Jury] finds actual damages for Plaintiffs and the California Classes and Subclasses in the amount of $_____. (If you answered "no," do not complete the blank.).

CALIFORNIA'S UNFAIR COMPETITION LAW ("UCL")

C. LIABILITY

Plaintiffs claim that GM violated California's Unfair Competition Law ("UCL"), CAL. BUS. & PROF. CODE § 17200.

Do you find by a preponderance of the evidence the following:

(i) Did GM engage in an unlawful business act or practice?

Yes ☐ No ☐

(ii) Did GM engage in an unfair business act or practice?

Yes ☐ No ☐

(iii) (a) Did GM engage in a fraudulent business act or practice by concealing or failing to disclose safety defects in Plaintiffs' vehicles which GM knew about or should have known about?

Yes ☐ No ☐

If you answered "Yes," go to (iii)(b). If you answered "No," skip (iii)(b) and (iii)(c).

(b) Did GM have a duty to disclose material information to potential purchasers of its vehicles?

Yes ☐ No ☐

If you answered "Yes," go to (iii)(c). If you answered "No," skip (iii)(c).

(c) Would the information concealed or not disclosed by GM have been material to a reasonable consumer?

Yes ☐ No ☐

*If you answered "Yes" to (i), (ii) or **all** of (iii)(a)-(iii)(c), above, go to (iv). If you answered "No" to (i), (ii), and **any** of (iii)(a)-(iii)(c), then you should **Stop.***

(iv) As a result of GM's conduct, did Plaintiffs lose money or property?

Yes ☐ No ☐

D. RESTITUTION

Have Plaintiffs proved by a preponderance of the evidence the amount of restitution necessary to restore Plaintiffs and the California Classes and Subclasses' lost money or property?

Yes ☐ No ☐

If "yes," complete the following blank: The Court awards restitution to Plaintiffs and the California Classes and Subclasses in the amount of $_____. (If you answered "no," do not complete the blank.)

EXHIBIT B

PLAINTIFFS' PROPOSED SPECIAL VERDICT FORM

MISSOURI MERCHANDISING PRACTICES ACT CLAIM

Set forth below are suggested interrogatories that would be presented on Special Verdict Forms at Trial. This form is meant to be illustrative only, and not comprehensive. Plaintiffs may suggest changes to the special interrogatories herein. Moreover, the absence of any claim or state from the classes suggested below is not intended to constitute a waiver of any claims currently, or in the future, brought in this action.

A. LIABILITY

Plaintiffs claim that GM violated the Missouri Merchandising Practices Act, MO. REV. STAT. § 407.020(1).

Do you find by a preponderance of the evidence the following:

(i) Did GM engage in deception or fraud in connection with the sale or advertisement of Plaintiffs' vehicles by concealing or failing to disclose safety defects in Plaintiffs' vehicles which GM knew about or should have known about?

Yes ☐ No ☐

(ii) Did GM engage in any false pretense or misrepresentation in connection with the sale or advertisement of Plaintiffs' vehicles by concealing or failing to disclose safety defects in Plaintiffs' vehicles which GM knew about or should have known about?

Yes ☐ No ☐

(iii) Did GM engage in any unfair practice in connection with the sale or advertisement of Plaintiffs' vehicles by failing to disclose safety defects in Plaintiffs' vehicles when GM knew or should have known of the defects?

Yes ☐ No ☐

(iv) Did GM conceal any material fact in connection with the sale or advertisement of Plaintiffs' vehicles?

Yes ☐ No ☐

(v) Did GM suppress any material fact in connection with the sale or advertisement of Plaintiffs' vehicles?

Yes ☐ No ☐

(vi) Did GM omit any material fact in connection with the sale or advertisement of Plaintiffs' vehicles?

Yes ☐ No ☐

*If you answered "Yes" to **any** of (i)-(vi) above, go to (vii). If you answered "No" to **all** of (i)-(vi) above, then you should **Stop.***

(vii) As a result of GM's conduct, did Plaintiffs suffer an ascertainable loss?

Yes ☐ No ☐

B. DAMAGES

Have Plaintiffs proved by a preponderance of the evidence the amount of the money necessary to restore Plaintiffs' and the Missouri Classes' ascertainable losses?

Yes ☐ No ☐

If "yes," complete the following blank: The Court awards damages to Plaintiffs and the Missouri Classes in the amount of $_____. (If you answered "no," do not complete the blank.).

EXHIBIT C

PLAINTIFFS' PROPOSED SPECIAL VERDICT FORM

TEXAS DECEPTIVE TRADE PRACTICES CONSUMER PROTECTION ACT CLAIM

Set forth below are suggested interrogatories that would be presented on Special Verdict Forms at Trial. This form is meant to be illustrative only, and not comprehensive. Plaintiffs may suggest changes to the special interrogatories herein. Moreover, the absence of any claim or state from the classes suggested below is not intended to constitute a waiver of any claims currently, or in the future, brought in this action.

A. LIABILITY

Plaintiffs claim that GM violated the Texas Deceptive Trade Practices—Consumer Protection Act, TEX. BUS. & COM. CODE §§ 17.46(b), 17.50(a)(3).

Do you find by a preponderance of the evidence the following:

(i) Did GM engage in an unconscionable course of action in connection with the sale of Plaintiffs' vehicles by concealing or failing to disclose safety defects in Plaintiffs' vehicles which GM knew about or should have known about at the time of the sale of Plaintiffs' vehicles?

Yes ☐ No ☐

(ii) Did GM fail to disclose information concerning Plaintiffs' vehicles with the intent to induce consumers to purchase or lease the vehicles?

Yes ☐ No ☐

(iii) Apart from (i) or (ii), above, did GM engage in false, misleading or deceptive acts by concealing or failing to disclose safety defects in Plaintiffs' vehicles which GM knew about or should have known about at the time of the sale of Plaintiffs' vehicles?

Yes ☐ No ☐

*If you have answered "Yes" to **any** of (i)-(iii) above, proceed to (iv). If you have answered "No" to **all** of (i)-(iii) above,* **Stop**.

(iv) As a result of GM's conduct, did Plaintiffs suffer economic damage?

Yes ☐ No ☐

B. DAMAGES

Have Plaintiffs proved by a preponderance of the evidence the amount of economic damages suffered by Plaintiffs and the Texas Classes?

Yes ☐ No ☐

If "yes," complete the following blank: The Court awards damages to Plaintiffs and the Texas Classes in the amount of $_____. (If you answered "no," do not complete the blank.)

EXHIBIT D

PLAINTIFFS' PROPOSED SPECIAL VERDICT FORM

FRAUDULENT CONCEALMENT CLAIMS

Set forth below are suggested interrogatories that would be presented on Special Verdict Forms at Trial. This form is meant to be illustrative only, and not comprehensive. Plaintiffs may suggest changes to the special interrogatories herein. Moreover, the absence of any claim or state from the classes and subclasses suggested below is not intended to constitute a waiver of any claims currently, or in the future, brought in this action.

CALIFORNIA AND MISSOURI

A. LIABILITY

Plaintiffs claim that GM has violated the law of fraudulent concealment.

Do you find by a preponderance of the evidence the following:

(i) Did GM have a duty to disclose material facts in connection with the sale or lease of Plaintiffs' vehicles?

Yes ☐ No ☐

(ii) Did GM knowingly make a false representation concerning material information in connection with the sale or lease of Plaintiffs' vehicles?

Yes ☐ No ☐

(iii) Did GM knowingly conceal material information in connection with the sale or lease of Plaintiffs' vehicles?

Yes ☐ No ☐

(iv) Did GM knowingly fail to disclose material information in connection with the sale or lease of Plaintiffs' vehicles?

Yes ☐ No ☐

*If you answered "Yes" to **any or all*** of (ii)-(iv), above, continue on to (v), below. If you answered "No" to ***all*** of (ii)-(iv), above, **Stop.**

(v) Did GM act with the intent to defraud Plaintiffs (i.e., did GM intend that Plaintiffs act in reliance on GM's false representation, concealment or nondisclosure?)

Yes ☐ No ☐

(vi) As a result of GM's conduct, did Plaintiffs suffer economic damage?

Yes ☐ No ☐

B. DAMAGES

Have Plaintiffs proved by a preponderance of the evidence the amount of economic damages suffered by Plaintiffs, the California Classes and Subclasses [Missouri Classes]?

Yes ☐ No ☐

If "yes," complete the following blank: The Court awards damages to Plaintiffs and the California Classes and Subclasses [Missouri Classes] in the amount of $_____. (If you answered "no," do not complete the blank.)

EXHIBIT E

PLAINTIFFS' PROPOSED SPECIAL VERDICT FORM

CLAIMS FOR FRAUDULENT CONCEALMENT OF THE RIGHT TO FILE A CLAIM AGAINST OLD GM IN BANKRUPTCY

Set forth below are suggested interrogatories that would be presented on Special Verdict Forms at Trial. This form is meant to be illustrative only, and not comprehensive. Plaintiffs may suggest changes to the special interrogatories herein. Moreover, the absence of any claim or state from the classes suggested below is not intended to constitute a waiver of any claims currently, or in the future, brought in this action.

CALIFORNIA AND MISSOURI

A. LIABILITY

Plaintiffs claim that GM has violated the law by fraudulently concealing the Plaintiffs' right to file a claim in Old GM's bankruptcy.

Do you find by a preponderance of the evidence the following:

(i) Did GM have a duty to disclose material facts concerning Plaintiffs' vehicles?

Yes ☐ No ☐

(ii) Did GM knowingly conceal material information concerning Plaintiffs' vehicles at any time during the period from July 10, 2009-November 30, 2009 (the deadline for filing proof of claims in Old GM's bankruptcy)?

Yes ☐ No ☐

(iii) Did GM knowingly fail to disclose material information concerning Plaintiffs' vehicles at any time during the period from July 10, 2009-November 30, 2009 (the deadline for filing proof of claims in Old GM's bankruptcy)?

Yes ☐ No ☐

*If you answered "Yes" to **either** (ii) or (iii), above, continue on to (iv), below. If you answered "No" to **both** (ii) and (iii), above, **Stop.***

(iv) Did GM act with the intent to defraud Plaintiffs (*i.e.*, did GM intend that Plaintiffs act or fail to act in reliance on GM's concealment or nondisclosure?)

Yes ☐ No ☐

(v) Did GM's conduct prevent Plaintiffs from filing a proof of claim in GM's bankruptcy before the November 30, 2009 deadline?

Yes ☐ No ☐

(vi) As a result of GM's conduct, did Plaintiffs suffer economic damage?

Yes ☐ No ☐

B. DAMAGES

Have Plaintiffs proved by a preponderance of the evidence the amount of economic damages suffered by Plaintiffs, the California and Missouri Delta Ignition Switch Defect Bankruptcy Classes?

Yes ☐ No ☐

If "yes," complete the following blank: The Court awards damages to Plaintiffs and the California and Missouri Delta Ignition Switch Defect Classes in the amount of $_____. (If you answered "no," do not complete the blank.)

EXHIBIT F

PLAINTIFFS' PROPOSED SPECIAL VERDICT FORM

CLAIMS FOR BREACH OF IMPLIED WARRANTY AND VIOLATIONS OF THE MAGNUSON-MOSS WARRANTY ACT

Set forth below are suggested interrogatories that would be presented on Special Verdict Forms at Trial. This form is meant to be illustrative only, and not comprehensive. Plaintiffs may suggest changes to the special interrogatories herein. Moreover, the absence of any claim or state from the subclasses suggested below is not intended to constitute a waiver of any claims currently, or in the future, brought in this action.

CALIFORNIA

A. LIABILITY

Plaintiffs claim that GM has violated California's Song-Beverly Consumer Warranty Act, CAL. CIV. CODE §§ 1791.1 and 1792 by selling or leasing them vehicles that did not have the quality that a buyer would reasonably expect.

Do you find by a preponderance of the evidence the following:

(i) Did GM sell or lease Plaintiffs' vehicles that, at the time of purchase or lease, would not pass without objection in the automotive trade?

Yes ☐ No ☐

(ii) Did GM sell or lease Plaintiffs' vehicles that, at the time of purchase or lease, were not fit for the ordinary purpose for which vehicles are used?

Yes ☐ No ☐

(iii) Did GM sell or lease Plaintiffs' vehicles that, at the time of purchase or lease, were not adequately labeled?

Yes ☐ No ☐

*If you answered "Yes" to **any or all** of (i)-(iii), above, continue on to (iv), below. If you answered "No" to **all** of (i)-(iii), below, **Stop.***

(iv) As a result of GM's conduct, did Plaintiffs suffer economic damage?

Yes ☐ No ☐

B. DAMAGES

Have Plaintiffs proved by a preponderance of the evidence the amount of economic damages suffered by the California Subclasses?

Yes ☐ No ☐

If "yes," complete the following blank: The Court awards damages to Plaintiffs and the California Subclasses in the amount of $_____. (If you answered "no," do not complete the blank.)

CALIFORNIA: MAGNUSON-MOSS WARRANTY ACT

A. LIABILITY

Plaintiffs claim that GM violated the Magnuson-Moss-Warranty Act, 15 U.S.C. § 2301 by breaching its implied warranty that accompanied Plaintiffs' vehicles when they bought or leased them.

Do you find by a preponderance of the evidence the following:

(i) Did GM sell or lease Plaintiffs' vehicles that, at the time of purchase or lease, would not pass without objection in the automotive trade?

Yes ☐ No ☐

(ii) Did GM sell or lease Plaintiffs' vehicles that, at the time of purchase or lease, were not fit for the ordinary purpose for which vehicles are used?

Yes ☐ No ☐

(iii) Did GM sell or lease Plaintiffs' vehicles that, at the time of purchase or lease, were not adequately labeled?

Yes ☐ No ☐

*If you answered "Yes" to **any or all** of (i)-(iii), above, continue on to (v), below. If you answered "No" to **all** of (i)-(iii), above, **Stop.***

(iv) As a result of GM's conduct, did Plaintiffs suffer economic damage?

Yes ☐ No ☐

B. DAMAGES

Have Plaintiffs proved by a preponderance of the evidence the amount of economic damages suffered by Plaintiffs and the California Subclasses?

Yes ☐ No ☐

If "yes," complete the following blank: The Court awards damages to Plaintiffs and the California Subclasses in the amount of $_____. (If you answered "no," do not complete the blank.)

EXHIBIT B-2

DEFENDANT GENERAL MOTORS LLC'S AMENDED MEMORANDUM IN OPPOSITION TO ECONOMIC LOSS PLAINTIFFS' MOTION TO CERTIFY BELLWETHER CLASSES IN THE STATES OF CALIFORNIA, MISSOURI, AND TEXAS

[MDL ECF NO. 6132] (FILED OCTOBER 2, 2018)

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

IN RE:	)	
GENERAL MOTORS LLC IGNITION SWITCH LITIGATION	)	No. 14-MD-2543 (JMF) No. 14-MC-2543 (JMF)
This Document Relates To All Actions	)	Hon. Jesse M. Furman

DEFENDANT GENERAL MOTORS LLC'S AMENDED MEMORANDUM IN OPPOSITION TO ECONOMIC LOSS PLAINTIFFS' MOTION TO CERTIFY BELLWETHER CLASSES IN THE STATES OF CALIFORNIA, MISSOURI, AND TEXAS

Richard C. Godfrey, P.C.
Andrew B. Bloomer, P.C.
KIRKLAND & ELLIS LLP
300 N. LaSalle
Chicago, IL 60654-3406
Phone: 312-862-2000
Fax: 312-862-2200
richard.godfrey@kirkland.com
andrew.bloomer@kirkland.com

Attorneys for Defendant General Motors LLC

TABLE OF CONTENTS

Page

TABLE OF CONTENTS (CONT'D)

Page

TABLE OF CONTENTS (CONT'D)

Page

TABLE OF CONTENTS (CONT'D)

Page

TABLE OF CONTENTS (CONT'D)

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES (CONT'D)

Page(s)

TABLE OF AUTHORITIES (CONT'D)

Page(s)

TABLE OF AUTHORITIES (CONT'D)

Page(s)

TABLE OF AUTHORITIES (CONT'D)

Page(s)

TABLE OF AUTHORITIES (CONT'D)

Page(s)

TABLE OF AUTHORITIES (CONT'D)

Page(s)

TABLE OF AUTHORITIES (CONT'D)

Page(s)

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Page(s)

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Page(s)

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TABLE OF AUTHORITIES (CONT'D)

Page(s)

TABLE OF AUTHORITIES (CONT'D)

Page(s)

TABLE OF AUTHORITIES (CONT'D)

Page(s)

TABLE OF AUTHORITIES (CONT'D)

Page(s)

TABLE OF AUTHORITIES (CONT'D)

Page(s)

Statutes

TABLE OF AUTHORITIES (CONT'D)

Page(s)

Other Authorities

Rules

INTRODUCTION

Plaintiffs seek to certify broad classes of differently situated purchasers and lessees of Old GM and New GM vehicles who were not injured. Their proposed classes concern seven different recalls involving millions of different vehicles with different vehicle systems, field histories, field actions, and repair remedies. Lacking market evidence or any other legally cognizable injuries, plaintiffs' experts purport to calculate "benefit-of-the-bargain" damages that do not attempt to compensate class members for any difference in market values, but rather seek to quantify post-purchase risks of vehicle malfunctions that never materialized. Plaintiffs' economic damages methodology contravenes benefit-of-the-bargain law in the bellwether states and does not satisfy plaintiffs' burden under *Comcast Corp. v. Behrend* to proffer damages consistent with liability theories. 569 U.S. 27 (2013). In addition, any trial of plaintiffs' liability claims would necessarily require highly individualized, plaintiff-specific inquiries, including reliance and causation. The many individual fact issues will swamp any purported common issues, making any class trial unmanageable. Manageability problems will be exacerbated because New GM has unique factual and legal defenses to many claims brought by differently situated putative class members, including for successor liability or bankruptcy fraud. In short, no proposed class can be certified.

First, **there are no class-wide or common injuries in this case.** The factual differences in whether each putative class member has any injury or damages predominate over any alleged common issues. Plaintiffs seek benefit-of-the-bargain damages, claiming that they overpaid at purchase or lease for Old GM or New GM vehicles because of undisclosed defects. State law and this Court's prior opinions require that any such injuries or damages be calculated by the difference in market price, if any, between a vehicle with and without the various safety defects.

Plaintiffs, however, do not rely on market data to show class-wide injury or damages. Instead, plaintiffs and their experts turned to internet surveys of respondents who were asked

whether they would be willing to pay for hypothetical "scenarios" of "safety" feature options and other "information revealed at point of purchase / lease." Setting aside the admissibility of this work under Rule 702, the proffered damages methodology does not prove benefit-of-the-bargain damages for any class of new or used vehicle purchasers or lessees. Among other deficiencies, plaintiffs' surveys do not generate the market values for vehicles with disclosed safety defects, or the differences between prices putative class members actually paid and the market values of vehicles with disclosed defects. Moreover, plaintiffs' survey data shows that 26.6% to 39.1% of respondents have no injury or damages under plaintiffs' theory. Rule 23, Article III, the Rules Enabling Act, and Second Circuit precedent all bar certifying a class without common injuries.

Furthermore, New GM's experts demonstrate that the market prices of the GM vehicles at issue did not systematically decline after the 2014 recalls. This lack of a systematic market price decline refutes any claim that the putative classes overpaid for their vehicles and confirms that plaintiffs cannot prove common injury. If plaintiffs' theory that a known safety defect would drive down prices had merit, then used GM vehicle prices would have gone down across-the-board after the 2014 recall announcements, especially after the very public ignition switch recall. But they did not. This lack of a statistically valid systematic decline in market prices in the real world refutes plaintiffs' damages methodology that is predicated on subjective post-purchase risk assessments from hypothetical survey data.

The lack of injury is exacerbated by plaintiffs' proposed classes including putative members who sold, traded-in, or disposed of their vehicles before the 2014 recalls. None of these individuals have economic losses under the law of this case. Plaintiffs' alleged "lost time" damages depend upon individual fact issues, such as whether each putative class member had his or her vehicle repaired and whether the time spent having repairs performed caused the plaintiff to

lose earnings. Finally, whether each putative Texas class member's vehicle manifested a defect turns on individual facts—as confirmed by the evidence for each Texas named plaintiff.

Second, **factual differences in whether each putative class member can prove liability predominate over any alleged common issues.** Plaintiffs' Missouri consumer protection claim requires proof of causation, and their other consumer protection and fraudulent concealment claims require proof of both causation and reliance. Expert evidence and named plaintiffs' testimony establishes that putative class members had different reasons for purchasing their vehicles, with many not mentioning safety as a reason for purchase, or consulting numerous different sources, with many not considering information from New GM. Whether each putative class member can prove reliance and/or causation is an individual fact issue.

Other important individual fact issues predominate over any common ones, including:

- Differences in New GM's knowledge concerning the recall conditions over time and across the numerous, different, and changing vehicle models;
- Differences in whether each plaintiff purchased a New GM or Old GM vehicle, with the latter being subject to additional defenses;
- Differences in each California putative class member's experience with their vehicles, to determine if each vehicle was unmerchantable under implied warranty law;
- Differences among Texas putative class members regarding their experience and sophistication, on which plaintiffs' Texas consumer protection claims depend; and
- Differences in whether plaintiffs alleging New GM fraudulently concealed bankruptcy claims against Old GM can show they had a meritorious underlying claim against Old GM and relied on New GM's alleged omissions from July 10 to November 30, 2009 in not filing claims against Old GM.

Third, the named plaintiffs are not typical of the proposed classes nor adequate class representatives. New GM's Motion for Summary Judgment, Dkt. 5858-60, demonstrates that no named plaintiff has valid claims, precluding plaintiffs from representing any class. For example, certain named plaintiffs cannot recover under this Court's prior orders, such as those who sold or

disposed of their vehicles before the recalls, or those who purchased 2008 and later Cobalt/Ion vehicles who cannot prove that their vehicle's original ignition switch was replaced with a faulty one. Even if summary judgment is not entered against each named plaintiff's claims, they are subject to unique defenses preventing them from being typical. Factual differences among the named plaintiffs confirm this lack of typicality. Finally, nearly all named plaintiffs are inadequate class representatives because admit they have given counsel complete discretion, they do not make strategic decisions, and they have no role in settlement.

Fourth, no class action is superior or manageable under the facts here. Numerous courts have held that a recall is superior to a class action in resolving claims. This principle applies here, where plaintiffs have no proof of a systematic decline in market prices and the recalls remedied the issues. New GM Summ. J. Memo. at 13-19. Moreover, plaintiffs' attempt to resolve 23 classes and subclasses involving 7 different recalls and numerous different claims, vehicles, and facts in a single trial would confuse any jury and be hopelessly unmanageable.

Fifth, **plaintiffs' proposed class definitions are legally and constitutionally impermissible.** As defined, plaintiffs' proposed classes include numerous putative members with no injury and no claim, such as those who sold or disposed of their vehicles before the recall announcements, or those who—based on plaintiffs' expert's survey data—did not overpay for their vehicles. Such overbroad classes cannot be certified.

BACKGROUND

A. Plaintiffs Seek To Certify 23 Separate Classes Involving 7 Different Recalls.

1. The 7 Recalls At Issue Involve Different Vehicles, Different Components, Different Factual Backgrounds, Different Alleged Defects, And Different Remedies.

Plaintiffs here seek unprecedented classes based on seven recalls involving more than 160 different vehicle makes and models manufactured over 17 years by two companies (implicating

bankruptcy or successor liability issues) with different components, systems, alleged defects, and recall remedies:

Recall No.	Short Name	Vehicles	GM Platforms	Alleged Defect
14v047	Delta Ignition Switch / Service Parts (for MY 2008 and later)	2005-2010 Chevrolet Cobalt 2006-2011 Chevrolet HHR 2007-2010 Pontiac G5 2007-2010 Saturn Sky 2003-2007 Saturn Ion 2006-2010 Pontiac Solstice	Delta	Low-torque, Knee-key
14v400	Malibu	1997-2005 Chevrolet Malibu 1998-2002 Oldsmobile Intrigue 1999-2004 Oldsmobile Alero 1999-2005 Pontiac Grand Am 2000-2005 Chevrolet Impala 2000-2005 Chevrolet Monte Carlo 2004-2008 Pontiac Grand Prix	Epsilon N Car P90 W Car MS-2000	Low-torque
14v355	Impala	2000-2005 Cadillac Deville 2005-2009 Buick Lacrosse 2006-2007 Chevrolet Monte Carlo 2006-2011 Buick Lucerne 2006-2011 Cadillac DTS 2006-2013 Chevrolet Impala 2014 Chevrolet Impala Limited (U.S. Fleet)	H Car K Car W Car	Low-torque, Knee-key
14v394	CTS	2003-2014 Cadillac CTS 2004-2006 Cadillac SRX	Sigma	Low-torque, Knee-key
14v346	Camaro	2010-2014 Chevrolet Camaro	Zeta	Knee-key
14v118	SIAB	2008-2013 Buick Enclave 2008-2013 GMC Acadia 2009-2012 Chevrolet Traverse 2008-2010 Saturn Outlook	Lambda	Side airbag service light
14v153	EPS Assist	2004-2006 Chevrolet Malibu Maxx 2004-2007 Saturn Ion 2004-2006, 2007-2009 Chevrolet Malibu 2005-2009 Pontiac G6 2008-2009 Saturn Aura 2009-2010 Chevrolet HHR 2010 Chevrolet Cobalt	Delta Epsilon	Power steering assist

The vehicle models and component parts at issue significantly differ. Two of the recalls, 14v118 (“Side Impact Airbag” or “SIAB”) and 14v153 (“Electronic Power Steering Assist” or “EPS Assist”), involve two separate component systems which in turn are entirely different

component systems from the other five recalls.

The other five recalls vary, as the ignition system in each recall is for different vehicles and is comprised of different components and ignition switches, resulting in different recall remedies. Ex. 1, 2/23/18 Fedullo Rpt. at 24; Ex. 2, GM-MDL2543-301838188 at 206.[1] The vehicles in each recall have material differences in the circumstances under which the key may unintentionally rotate and the specific remedy varied due to mechanical design differences, such as chassis and interior compartment design, suspension, and ignition switch and system design. Ex. 1, 2/23/18 Fedullo Rpt. at 25-26; *see also* New GM Memo. in Supp. of Mot. to Exclude Stevick and Loudon, Dkt. 5855, at 3-6. Plaintiffs' defect claims also vary among those five recalls (*e.g.*, the Camaro Recall does not include a claim that the ignition key has a low torque, whereas the Malibu Recall does not include a claim that the ignition can inadvertently rotate through knee-key contact), rendering each recall distinct. *Compare* Pls. Offer of Proof at Section I.F.2 *with id.* at Section I.E.2. Plaintiffs' alleged knee-key defect depends upon multiple variables, including the driver's height and weight, proximity of the driver's knee to the key, angle of the key head, and angle of the leg when seated. Pls. Offer of Proof ¶¶ 25, 27; Ex. 1, 2/23/18 Fedullo Rpt. at 25; Ex. 3, VTTI Report (GM-MDL2543-301432431) at 581-592.

These components changed with vehicle models over time. The ignition switch for model year ("MY") 2008 and later vehicles subject to Recall No. 14v047 (the "Service Part Vehicles") had a higher torque resistance than earlier vehicles subject to the same recall. Pls. Offer of Proof ¶ 13; Ex. 4, 11/10/17 Stevick Rpt. at 23. Similarly, the EPS recall involved two different platforms

[1] Citations to Exhibits A through F are to the charts regarding the named plaintiffs attached to this memorandum. All other record citations are to the concurrently filed Declaration of R. Allan Pixton. All record and legal citations omit internal quotation marks, citations, footnotes, brackets, and other modifications unless otherwise indicated.

(Epsilon and Delta), two unique issues (torque sensor and EPS motor), and two separate recall remedies (torque sensor replacement and motor replacement). Ex. 5, 2/23/18 Hakim Rpt. at 4. Even within the two different systems involved in the EPS Recall, the root causes and fixes differed. *Id.* at 4-5 (three different root causes in the Epsilon EPS system); *id.* at 5 (identifying a different root cause in the Delta EPS system).

2. Plaintiffs' Allegations Show That New GM's Knowledge Of The Various Recall Conditions Differed By Vehicle And Time Period.

New GM's knowledge of conditions leading to any of the seven different recalls evolved over time. Plaintiffs claim New GM knew of alleged defects "from the very first day of its existence on July 10, 2009" (Pls' Offer of Proof, ¶¶ 8, 41, 54, 68), but the record evidence shows that New GM's knowledge differed over time, giving rise to dynamic field histories, warranty claims, customer satisfaction actions, and other remedial actions, ultimately leading to recalls in 2014. *E.g.*, Ex. 6, GM-MDL2543-401952506 (March 2010 email regarding customer complaints related to CTS vehicles); Ex. 7, GM-MDL2543-401964941 (investigation related to stalling for CTS vehicles opened in April 2012); Ex. 8, 12/2/15 A. Hendricks Dep. Tr. at 103-119 (detailing the different steps taken in 2012 to investigate issues related to stalling for CTS vehicles); Ex. 9, GM-MDL2543-401961908 at 920 (evaluating the data for CTS vehicles in Spring 2012); *id.* at 926 (closing the investigation related to CTS vehicles in November 2013).

New GM's knowledge of the SIAB recall condition also changed after July 9, 2009. Pls. Offer of Proof ¶¶ 96-98. Starting in January 2010, New GM reviewed airbag connector issues for the 2010 Malibu and Pontiac G6, and determined a root cause was excessive wear. Ex. 10, GM-MDL2543-304843468 at 12. This was confirmed by further investigation in the fall of 2010. *Id.* at 77. New GM launched a second investigation in September 2010 resulting in a Customer Satisfaction Bulletin. Ex. 11, GM-MDL2543-304843740. In the fall of 2013, New GM launched

a further investigation of the SIAB wiring harness in certain MY2008-2013 vehicles. Ex. 12, GM-MDL2543-300767863.

Similarly, New GM's knowledge of the EPS Assist recall condition evolved in the post-July 9, 2009 period. New GM and NHTSA examined EPS complaints in January 2010. Pls. Offer of Proof ¶ 105. In March 2010, New GM's EFADC presentation showed incident rates for the Chevrolet HHR and Ion were "lower and not consistent with the Cobalt," so Cobalt vehicles were not included in New GM's field action. Ex. 5, 2/23/18 Hakim Rpt. at 6. New GM acquired additional information from communications with NHTSA and New GM during 2010 to 2012. Pls. Offer of Proof ¶ 106.; Ex. 5, 2/23/18 Hakim Rpt. at 7. Plaintiffs' allegations also depend on different actions taken by New GM and GM Canada in late 2010, 2011, and mid-2012. Pls. Offer of Proof ¶¶ 107-109.

B. Plaintiffs' Alleged Classes And Claims.

Plaintiffs seek separate classes for each recall and state. Pls. Mot. at 1-12; Pls. Memo at 36. They also seek classes or subclasses for Missouri and California alleging New GM fraudulently concealed alleged defects, such that Old GM vehicle owners could not timely file claims in Old GM's bankruptcy ("Bankruptcy-Claim-Fraud"), successor liability claims for Missouri, and implied warranty claims in California. *Id*. at 4-5, 9-10. In total, plaintiffs seek the certification of 23 separate classes and subclasses. Pls. Mot. at 1-12; Pls. Memo at 36.

Plaintiffs assert different types of claims for each state. For California, plaintiffs seek to certify Consumers Legal Remedies Act ("CLRA"), Unfair Competition Law ("UCL"), and fraudulent concealment claims for all plaintiffs, and Song-Beverly Consumer Warranty Act ("SBA"), and Magnuson-Moss Warranty Act ("MMWA") claims for plaintiffs who bought new vehicles. Pls. Mot. at 1. For Missouri, plaintiffs seek to certify Missouri Merchandising Practices Act ("MMPA") and fraudulent concealment claims. *Id*. at 5-6. For Texas, plaintiffs seek to certify

Deceptive Trade Practices Consumer Protection Act ("DTPA") claims of only those owners who experienced a manifest defect. *Id*. at 10-12.

C. Plaintiffs And Absent Putative Class Members.

The named plaintiffs and their basic information are listed on Exhibit A. The named plaintiffs differ in many respects, and those individual differences multiply when considering the legal elements of the claims that putative class members are making in the bellwether states.

Differences in why plaintiffs bought their vehicles: As shown in Exhibit B, plaintiffs' reasons for purchasing their vehicles vary widely. Mario Stefano had a history of purchasing Camaros. Kenneth Robinson had a friend at Old GM who could provide a price discount. Crystal Hardin bought a Cobalt because of an advertisement showing it racing a Corvette. Shenyesa Henry emphasized the vehicle's "undentable panels."[2] Lisa Simmons explained "I'm more into color and shapes than the maker or whatever else." Plaintiffs were motivated by price, gas mileage, or purchasing a new car, American-made, similar to vehicles they had previously driven, and myriad other reasons. *See* Exhibit B. New GM's expert Wayne Hoyer, Professor of Marketing at University of Texas at Austin, conducted surveys that included putative class members and found that "Owners / lessees of Recalled GM Vehicles report many different main reasons for making their purchase / lease decisions, and the combination of those reasons varies across different individuals," and that they "rank[] those reasons differently in terms of importance to their decisions." Ex. 13, 2/23/18 Hoyer Rpt. ¶ 76.

Differences in safety as a reason for buying their vehicles: Named plaintiffs differ in whether safety was a purchase reason. Chimen Basseri, David Padilla, Ronald Robinson, Martio

[2] Texas named plaintiffs Shenyesa Henry and Lisa Simmons are not proposed class representatives. New GM cites to their facts to illustrate differences among putative class members.

Stefano, Gareebah Al-ghamdi, and Lisa McClellan did not discuss safety when asked why they purchased their vehicles. Plaintiffs who mentioned safety differed about whether it was one of a few factors or was part of a list of considerations. *See* Exhibit B. Professor Hoyer's survey establishes that "safety is very infrequently cited by owners / lessees of Recalled GM Vehicles as a main purchase or lease reason, and this varies across individuals in how it is ranked in terms of its importance (or lack of importance) to purchase or lease decisions." Ex. 13, 2/23/18 Hoyer Rpt. ¶ 76.

Differences in information considered before purchasing their vehicles: Plaintiffs such as Mario Stefano bought their vehicles on "impulse." Kimberly Brown, Ramirez Esperanza, Crystal Hardin, and Lisa McClellan did not do any research beforehand. David Padilla relied on the independent dealer's salesperson's recommendation. Kenneth Robinson, Gareebah Al-ghamdi, and Dawn Fuller relied on the advice of friends or family. Orosco Santiago and Michelle Thomas considered third-party sources such as reviews in magazines or internet sites. Patricia Barker and Christopher Tinen claim they relied on information from Old GM or New GM, such as advertisements, brochures, and websites. *See* Exhibit C. Professor Hoyer's survey showed that "Recalled GM Vehicle owners / lessees (including putative class members) typically identified multiple information sources to be influential on their decisions, reported a wide variety of influential information sources, and ranked the importance of influential information sources differently." Ex. 13, 2/23/18 Hoyer Rpt. ¶ 24.

Differences in whether and how plaintiffs considered New GM advertisements: Most named plaintiffs testified they did not see any New GM advertisements before purchasing their vehicles. Of the minority who allegedly saw ads, some could not remember their content. Others testified they did not rely on the ads, or did not think the ads were false or misleading. The few

named plaintiffs who recall seeing an Old GM or New GM ad and claimed that it influenced their decision-making each saw different ads containing different messages. *See* Exhibit D. The "share of those who may have considered GM marketing communications was generally small and varied across the [survey] samples," from a range of 6.7% in the Texas sample of putative class members to 22.1% for California. Ex. 13, 2/23/18 Hoyer Rpt. ¶ 87.

Differences in vehicle sellers: Some plaintiffs purchased their vehicles from an independent dealer affiliated with Old GM or New GM. Others bought from non-GM dealerships, used car lots, or private sellers. *See* Exhibit E.

Differences in purchase prices: Plaintiffs paid widely varying prices, especially given the predominance of used vehicle purchasers in the putative classes. Deloris Hamilton bought a used 12-year-old 2000 Oldsmobile Alero for $3,500 and Gareebah Al-ghamdi bought a used 2004 Impala for $12,999. By contrast, Orosco Santiago bought a new 2010 Camaro for $28,000 and Christopher Tinen bought a new 2010 GMC Acadia for $32,080.27. *See* Exhibit F; *see also* Ex. 14, 2/23/18 Willig Rpt. ¶¶ 17-19 (differences in prices paid for GM at-issue vehicles with same characteristics varied by around 22% for new vehicles and 48% for used vehicles).

Differences in buying new versus used vehicles: Fifteen named plaintiffs purchased new vehicles, while fourteen purchased used vehicles. Plaintiffs also differ in whether they own a vehicle manufactured by Old GM or New GM. *See* Exhibit A.

Differences in buyers' experiences with their vehicles: Named plaintiffs Brad Akers and Patrice Witherspoon have driven their vehicles nearly 200,000 miles without any evidence of incidents caused by a recall condition. Michelle Thomas drove over 100,000 miles before claiming that the ignition switch rotated out of position, while Dawn Fuller drove for almost 100,000 miles without experiencing an incident. Other plaintiffs claim to have experienced multiple incidents

with their vehicles, whether recall-related or not. *See* Exhibit A; *see also* New GM Summ. J. Memo. at 52-54.

Differences among Texas plaintiffs regarding manifest defect: Dawn Fuller does not allege that her vehicle experienced any manifestation of the recall condition. Ex. 15, 11/20/17 D. Fuller Dep. at 74:5-10. Plaintiffs such as Gareebah Al-ghamdi, Lisa McClellan, and Michael Graciano do not have any evidence that their ignition keys rotated. Ex. 16, 5/5/17 G. Al-ghamdi Dep. at 100:11-101:9; Ex. 17, 5/4/17 L. McClellan Dep. at 112:11-13; Ex. 18, 5/1/17 M. Graciano Dep. at 79:14-23, 81:5-11; *see also* New GM Summ. J. Memo. at 24-25.

D. The Market Prices And Market Shares Of The Recalled GM Vehicles Did Not Systematically Decrease After The Recalls.

Plaintiffs allege that the putative class overpaid for Old GM and New GM vehicles because they were not advised of an existing safety defect at purchase. *E.g.*, 5ACC ¶ 1596. If this assertion were accurate, the prices of the GM vehicles at issue should have fallen across-the-board after the widely publicized 2014 recall announcements. But that is not what happened.

New GM's experts analyzed both the market prices and market shares of the vehicles at issue before and after the 2014 recalls. Robert Willig, Professor of Economics and Public Affairs Emeritus at Princeton University, showed that vehicles of the same make, model, and trim sold for widely varying retail prices due to individualized factors. Ex. 14, 2/23/18 Willig Rpt. ¶ 12-27. Moreover, retail prices of different recalled vehicles changed over time in heterogeneous ways. *Id.* ¶ 9(b). Plaintiffs' expert Sanford Weisberg acknowledges that retail prices of comparable vehicles vary widely, in part because of individual factors specific to buyers and sellers. Ex. 19, 5/18/18 Weisberg Rebuttal Rpt. ¶ 14; 7/9/18 S. Weisberg Dep. at 53. Whether New GM's conduct resulted in class-wide price impacts depends on prices of the individual at-issue GM vehicles, not average prices of aggregated groups of vehicles. Ex. 14, 2/23/18 Willig Rpt. ¶¶ 12-13.

Professor Willig also showed that the recalls did not lead to a systematic class-wide decline in the prices of individual at-issue GM vehicles following the 2014 recalls. Because vehicle market values depreciate, New GM's experts examined "whether the prices of at-issue GM vehicles declined on a class-wide basis after the recalls by more than would otherwise have occurred without any recall." *Id.* ¶¶ 32-33. Professor Willig studied the movements in retail prices of individual at-issue GM vehicles in comparison with movements in benchmarks comprised of non-GM vehicles in the same segment and model year before and after the 2014 recalls. *Id*. ¶¶ 30-33. His analysis establishes "that more than 90% of at-issue GM vehicles did not have statistically significant price declines relative to their benchmarks in the first two years after their recalls." *Id.* ¶ 9. Indeed, prices of about 40% of at-issue GM vehicles increased relative to their benchmarks following the recalls with near 100% probability. *Id.*[3]

Bradford Cornell, Visiting Professor of Financial Economics at Caltech, employed a different method and different data to study market prices and arrived at a similar finding. Professor Cornell constructed "synthetic control" benchmarks using wholesale auction price data from a combination of vehicles that best tracked the price of the relevant vehicle before the 2014 recalls. Ex. 21, 2/23/18 Cornell Rpt. ¶ 36-38. He then compared to those benchmarks the prices of the recalled vehicles after the recall announcements. *Id.* ¶¶ 38-41. Professor Cornell found "no

[3] Willig has demonstrated the robustness of these results by showing that they do not materially change following multiple extensions to his baseline analysis, including: (a) examining only used vehicles sold in the first three months and the first six months after the recalls, a time during which only 4% and 10% of used at-issue vehicles were repaired prior to their sale, which demonstrates the absence of class-wide post-recall price declines even for unrepaired at-issue GM vehicles, Ex. 14, 5/7/18 Willig Rpt., Appendix B - Technical App'x Tables 9-14 at Table 13; (b) adjusting for pre-recall relative price trends, which demonstrates that pre-recall price trends are not driving Willig's results, Ex. 14, 8/13/18 Willig Sur-Rebuttal Rpt., ¶ 37; (c) removing all non-GM vehicles subject to non-at-issue recalls from the analysis, which shows Willig's results are not driven by the presence of recalled vehicles in the benchmark population, Ex. 14, 8/13/17 Willig Sur-Rebuttal Rpt. ¶ 44(f)).

systematic decline in the prices of recalled GM vehicles relative to their synthetic benchmarks in the post-recall period." *Id.* ¶ 41; *see also id.* ¶ 44.

Dominique Hanssens, Distinguished Professor of Marketing at the UCLA Anderson School of Management, prepared visual plots of sales and market shares over time and constructed a market response model to statistically assess determinants of sales and market shares. Ex. 22, 2/23/18 Hanssens Rpt. ¶¶ 40-50, 51-59; 67-83. Both reflect no consistent drop in sales or market shares for Buick, Cadillac, GMC, or Chevrolet brands after the 2014 recalls, nor any systematic declines in market shares for recalled models continuously produced before and after the recalls. *Id.* Professor Hanssens separately found that New GM vehicle price promotions did not change relative to competitors after the recalls, further confirming the lack of New GM vehicle price declines. Ex. 23, Hanssens Rpt. Ex. 31-32.

These market-based results reflect that safety recalls "are a commonplace occurrence, involving the great majority (approximately 82%) of the thousands of model/model-years combinations in service in the U.S. in 1996-2017." Ex. 24, 2/23/18 Marais Rpt. ¶ 25. The "recall rate across all manufacturers was 1,115 recalls per 1,000 vehicles sold over the three decades period from 1985 to 2016 (i.e., an average of more than one recall per vehicle sold)." Ex. 21, 2/23/18 Cornell Rpt. ¶ 19. Vehicle purchasers understand this: when asked whether the manufacturer of their new vehicle would issue a safety recall, only 16% of survey respondents believed a recall was "extremely unlikely." Ex. 25, 2/23/18 Keller Rpt. ¶ 115. The possibility of a safety defect is why vehicles have warranties and owner manuals provide information about reporting safety defects to New GM and NHTSA. Ex. 26, 2/23/18 Jason Rpt. at 10-11.

ARGUMENT

Plaintiffs "wishing to proceed through a class action must actually *prove*—not simply plead—that their proposed class satisfies each requirement of Rule 23, including (if applicable)

the predominance requirement of Rule 23(b)(3)." *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2412 (2014) (emphasis in original). "[C]ertification is proper only if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied." *Wal-Mart Stores, Inc v. Dukes*, 564 U.S. 338, 351 (2011). "Rule 23(b)(3)'s predominance criterion is even more demanding that Rule 23(a)." *Comcast*, 569 U.S. at 34.

"In evaluating a motion for class certification, the district court is required to make a definitive assessment of Rule 23 requirements, notwithstanding their overlap with merits issues, and must resolve material factual disputes relevant to each Rule 23 requirement." *Levitt v. J.P. Morgan Secs., Inc.*, 710 F.3d 454, 464-65 (2d Cir. 2013); *see also In re Initial Public Offerings Secs. Litig.*, 471 F.3d 24, 41-42 (2d Cir. 2006) (describing class certification requirements). "[D]isputes between experts must be resolved if necessary to the Rule 23 analysis." *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, 299 F. Supp. 3d 430, 471 (S.D.N.Y. 2018) (citing *In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d at 42). "The Rule 23 requirements must be established by at least a preponderance of the evidence." *Levitt*, 710 F.3d at 464-65.

Seeking only Rule 23(b)(3) certification, plaintiffs must prove "that the questions of law or fact common to class members predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3). "The predominance inquiry is a core feature of the Rule 23(b)(3) class mechanism, and is not satisfied simply by showing that the class claims are framed by the common harm suffered by potential plaintiffs." *In re Petrobras Secs.*, 862 F.3d 250, 270 (2d Cir. 2017). "An individual question is one where 'members of a proposed class will need to present evidence that varies from member to member,' while a common question is one where 'the same evidence will suffice for each member to make a prima facie showing or the issue is susceptible to generalized class-wide proof.'" *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036,

1045 (2016). "Where individualized questions permeate the litigation, those fatal dissimilarities among putative class members make use of the class-action device inefficient or unfair." *Id*.

"Failure to satisfy the predominance requirement, especially in automotive defect cases, has often been the reason courts have denied certification." *Martin v. Ford Motor Co.*, 292 F.R.D. 252, 271 (E.D. Pa. 2013). This case should be added to that long list of vehicle defect cases denying certification for lack of predominance, given the multiple factual determinations arising out of seven recalls involving 160 different model vehicles.

I. INDIVIDUAL ISSUES REGARDING FACT OF INJURY AND DAMAGES PREDOMINATE OVER ANY COMMON QUESTIONS.

A. Individual Issues Predominate For Plaintiffs' Alleged Benefit-Of-The-Bargain Damages.

"The gravamen of the benefit-of-the-bargain defect theory is that Plaintiffs who purchased defective cars were injured when they purchased for *x* dollars a New GM car that contained a latent defect; had they known about the defect, they would have paid fewer than *x* dollars for the car (or not bought the car at all), because a car with a safety defect is worth less than a car without a safety defect." *In re Gen. Motors LLC Ignition Switch Litig.*, 2016 WL 3920353, at *7 (S.D.N.Y. July 15, 2016) ("*TACC MTD Opinion")*; *see also, e.g.*, 5ACC ¶ 1596. California,[4] Missouri,[5] and Texas[6] require that benefit-of-the-bargain damages compare the actual price paid to the allegedly

[4] *See In re NJOY, Inc. Consumer Class Action Litig*., 120 F. Supp. 3d 1050, 1118, 1120-22 (C.D. Cal. 2015); *Saavedra v. Eli Lilly & Co*., 2014 WL 7338930, at *3-7 (C.D. Cal. Dec. 18, 2014); *Werdebaugh v. Blue Diamond Growers*, 2014 WL 7148923, at *8 (N.D. Cal. Dec. 15, 2014); *Bagdasarian v. Gragnon*, 192 P.2d 935, 940-41 (Cal. 1948).

[5] *See Larabee v. Eichler*, 271 S.W.3d 542, 548 (Mo. 2008); *Smith v. Tracy*, 372 S.W.2d 925, 938-39 (Mo. 1963); *In re Davenport*, 491 B.R. 911, 921 (Bankr. W.D. Mo. 2013); *see also Peterson v. Cont'l Boiler Works, Inc.*, 783 S.W.2d 896, 900 (Mo. 1990).

[6] *See Town E. Ford Sales, Inc. v. Gray*, 730 S.W.2d 796, 801-03 (Tex. App. 1987); *see also GJP, Inc. v. Ghosh*, 251 S.W.3d 854, 888-89 (Tex. App. 2008).

defective vehicle's market price if the defect had been disclosed. *See also* New GM Summ. J. Memo. at 20 & nn. 10-12; *Saavedra v. Eli Lilly & Co.*, 2014 WL 7338930, at *4 (C.D. Cal. Dec. 18, 2014) ("[T]he typical benefit-of-the bargain claim relies on a difference in fair market value (i.e. the amount that a willing buyer and willing seller would both accept) between the product as represented and the product actually received."); Dan B. Dobbs, Paul T. Hayden & Ellen M. Bublick, THE LAW OF TORTS § 689 (2d ed.) ("benefit of the bargain measure" of damages is "based on market value").

1. Prices And Sales Of Recalled Vehicles Did Not Systematically Decline.

As described in Background Section D, the market evidence establishes no single price for recalled vehicles and no systematic class-wide decline in recalled vehicle prices. Without such evidence, plaintiffs cannot show—on a class or any other basis—the differences between the prices paid and the market price with the disclosed defects, which is what they must prove under each bellwether state's law. As plaintiffs cannot establish the **fact of injury** by common proof for all class members, no class can be certified. *See Sykes v. Mel S. Harris & Assocs. LLC*, 780 F.3d 70, 82 (2d Cir. 2015) ("The plaintiffs must ... show that they can prove, through common evidence, that all class members were ... injured by the alleged conspiracy. ... [W]e do expect the common evidence to show all class members suffered some injury."); *McLaughlin v. American Tobacco Co.*, 522 F. 3d 215, 228 (2d Cir. 2008) (Where "losses cannot be shown by common evidence because they constitute an inherently individual inquiry ... plaintiffs cannot meet their burden of showing that injury is amenable to common proof.").[7]

[7] *See also Tyson*, 136 S. Ct. at 1053 (C.J. Roberts) (concurring) ("if there is no way to ensure that the jury's damages award goes only to injured class members, that award cannot stand."); *Gilmore v. Ally Fin. Inc.*, 2017 WL 1476596, at *7 (E.D.N.Y. Apr. 24, 2017); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 334 (S.D.N.Y. 2003); *Janes v. Triborough Bridge & Tunnel Auth.*, 889 F. Supp. 2d 462, 466 (S.D.N.Y. 2012); *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244, 252 (D.C. Cir. 2013); *Harnish v. Widener Univ. Sch. of Law*, 833 F.3d 298, 313 (3d Cir. 2016); *Newton v. Merrill*

Plaintiffs' attempts at analyzing market data (which plaintiffs offer only in rebuttal to New GM's experts, Ex. 27, Boedeker 2nd Rpt. ¶ 289) confirm that the recalls did not cause any systematic change in the recalled vehicles' market prices. Applying plaintiffs' regression analysis to prices of individual at-issue GM vehicles demonstrates that "[p]ost-recall prices of 94.7% of at-issue GM vehicles were not below [by a statistically significant amount] the level that would be expected if they had not been recalled." Ex. 14.F, 8/13/18 Willig Sur-Rebuttal Rpt. ¶ 25.[8] Indeed, "there is nearly 100% probability that post-recall prices of at least 45% of at-issue GM vehicles were *higher* than would be expected if they had not been recalled." *Id*. ¶¶ 11, 25.[9] Professor

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Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 189 (3d Cir. 2001); 2 MCLAUGHLIN ON CLASS ACTIONS § 8:16 (14th ed. 2017) ("Accordingly, certification is not permissible where it relies on a damages model under which gross or aggregate damages would be calculated and awarded without considering whether each class member had a valid claim, thereby risking that the defendant would be liable for damages that it was not proved to have caused, or that some class members would recover damages that do not correspond to the true value of their claims.").

[8] Plaintiffs do not dispute that their regression analysis is unreliable because it fails to satisfy what is known as the "common trends" assumption, a condition their own expert describes as "the most critical" condition for reliability of such analyses. Ex. 126, 6/1/18 Boedeker Supp. Rpt. re Willig ¶ 9; Ex. 28, 4th Boedeker Rpt. ¶ 45 (acknowledging that Willig contends that Boedeker's analysis "is unreliable because it fails to satisfy the 'common trends' assumption" and then failing to contest this contention). In contrast, as noted on page 13 n.3, Willig employed several robustness tests of his analysis of post-recall prices, which showed that his results "do not change materially when pre-recall relative price trends are explicitly considered." Ex. 14 8/13/18 Willig Sur-Rebuttal Report ¶ 37.

[9] The appropriate test for class certification is the one Professor Willig's conducted which examines whether the prices of each individual vehicle at issue declined post-recall relative to appropriate benchmark vehicles, not whether on average, the prices of highly aggregated groups of heterogeneous vehicles at issue declined, as plaintiffs assert. *E.g., Fleischman v. Albany Med. Ctr.*, 2008 WL 2945993, at *7 (N.D.N.Y. July 28, 2008) (rejecting class plaintiffs' expert's proposed "single formula capable of assessing all damages among class members" based on "averages" because the formula ignored "vast differences" in individual plaintiff's circumstances); Ex. 28, Boedeker 4th Rpt. at 22. In addition, plaintiffs' critiques of the low power of Professor Willig's tests are flawed because they (i) rely on vehicle price changes showing little dispersion, which Professor Willig demonstrated is not the case, (ii) require the ratio of vehicle prices before and after the recall to be normally distributed, which it is not, and (iii) are based on a coding error by Dr. Weisberg. Ex. 14, 8/13/18 Willig Sur-Rebuttal ¶ 50.

Moreover, Professor Willig's test establishes there is no systematic negative effect of GM's recalls on prices of each individual at-issue vehicle. Claims by plaintiffs' rebuttal expert, Dr. Sanford Weisberg, are irrelevant because they are based upon incorrect assumptions, improper averaging and a mis-statement of

Cornell's analysis rejected plaintiffs' putative expert Boedeker's median loss values (discussed in Section I.A.2.) with 95% confidence for the vast majority of the more than 160 recalled GM vehicle model types. Ex. 21, 8/13/18 Cornell Sur-Rebuttal ¶¶ 22-32. "The results of [Professor Cornell's] synthetic control analysis demonstrate to a high degree of statistical confidence that Mr. Boedeker's new survey results are inconsistent with marketplace evidence and thus not reliable or an accurate measure of economic losses incurred by potential classes." *Id*. ¶ 3. Even with plaintiffs' improper adjustments[10] to Professor Hanssens' market response model, plaintiffs' analysis fails to show uniform post-recalls market share declines. Ex. 22, 8/13/18 Hanssens Sur-Rebuttal Rpt. ¶¶ 17-20. When Professor Hanssens corrected for plaintiffs' improper adjustments, he found that New GM sales and market shares did not decline following the recalls. *Id*. ¶¶ 5-7.

2. Plaintiffs' Experts Cannot Satisfy Class Certification Requirements.

Without market evidence to support a finding of injury as required by bellwether state law, plaintiffs turned to Stefan Boedeker, who has no Ph.D. Boedeker purported to conduct a "choice-based conjoint analysis" based on survey data. Plaintiffs later hired Dr. Joshua Gans to bolster Boedeker's analysis. To understand why plaintiffs' experts cannot show the fact of injury by common proof, class-wide injury, or any benefit-of-the-bargain damages, one must first understand the surveys they performed and the various conclusions they make:[11]

Step 1: Boedeker hired a company to administer internet-based surveys in California,

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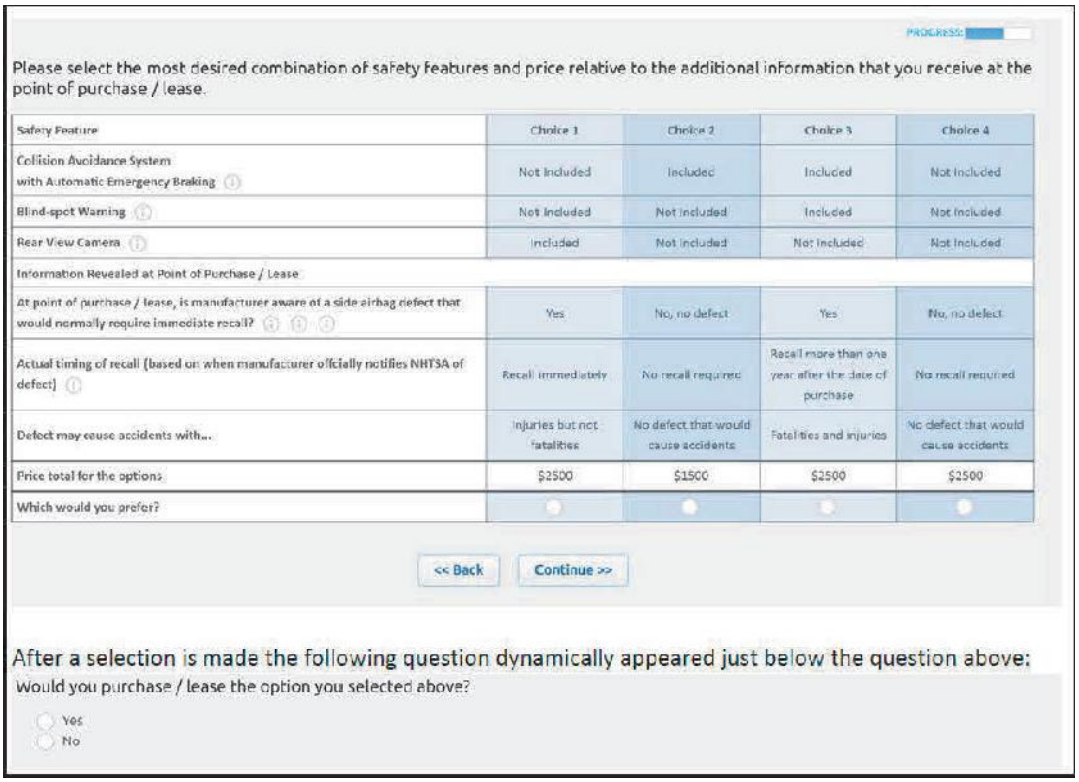
Dr. Willig's test. Ex. 38, 7/9/18 Weisberg Dep. at 180, 185-186, 224-225; Ex. 19, 8/31/18 Weisberg Reply Rpt. re Willig ¶ 3; Ex. 14, 8/13/18 Willig Sur-Rebuttal Rpt. ¶ 49.

[10] Mr. Boedeker's adjustments to Professor Hanssens' model either create econometric issues (collinearity) or are inconsistent with prior marketing literature and lead to model misspecification. *See* Ex. 22, 8/13/18 Hanssens Sur-Rebuttal Rpt. ¶¶ 10, 15.

[11] Further description of Boedeker's methodology is in Ex. 29.B, 8/13/18 Rossi Sur-Rebuttal Rpt. to Boedeker at 25-34; Ex. 30.B,8/13/18 List Sur-Rebuttal Rpt. ¶¶ 24-25; Ex. 30.A, 2/23/18 List Rpt. ¶ 36.

Missouri, and Texas. Boedeker developed original MDL conjoint survey results, but bases his current damages estimates on a rebuttal report survey for all recalls except for the Delta Ignition Switch Recall (No. 14v047). Ex. 31, Boedeker 3rd Rpt. ¶ 4. For the 14v047 Recall, he selected the results from the conjoint survey in the litigation against New GM brought by the Orange County District Attorney ("OCDA"). *Id.* ¶¶ 4-5. None of Boedeker's surveys concerned actual vehicles, but instead involved combinations of hypothetical add-on "scenarios" or "packages" of "safety features" (arbitrarily chosen by Boedeker) and "information revealed at point of purchase / lease" regarding defects, recall timing, and injury risks. Survey respondents were asked to choose among such combinations at hypothetical prices made up by Boedeker without any market or empirical study, as shown in the example below (drawn from his rebuttal MDL conjoint survey):



Please select the most desired combination of safety features and price relative to the additional information that you receive at the point of purchase / lease.

Safety Feature	Choice 1	Choice 2	Choice 3	Choice 4
Collision Avoidance System with Automatic Emergency Braking	Not Included	Included	Included	Not Included
Blind-spot Warning	Not Included	Not Included	Included	Not Included
Rear View Camera	Included	Not Included	Not Included	Not Included
Information Revealed at Point of Purchase / Lease				
At point of purchase / lease, is manufacturer aware of a side airbag defect that would normally require immediate recall?	Yes	No, no defect	Yes	No, no defect
Actual timing of recall (based on when manufacturer officially notifies NHTSA of defect)	Recall immediately	No recall required	Recall more than one year after the date of purchase	No recall required
Defect may cause accidents with...	Injuries but not fatalities	No defect that would cause accidents	Fatalities and injuries	No defect that would cause accidents
Price total for the options	$2500	$1500	$2500	$2500
Which would you prefer?	○	○	○	○

<< Back Continue >>

After a selection is made the following question dynamically appeared just below the question above:

Would you purchase / lease the option you selected above?

○ Yes
○ No

Step 2: Based on survey respondent's choices, Boedeker computed "part-worth utilities"[12]

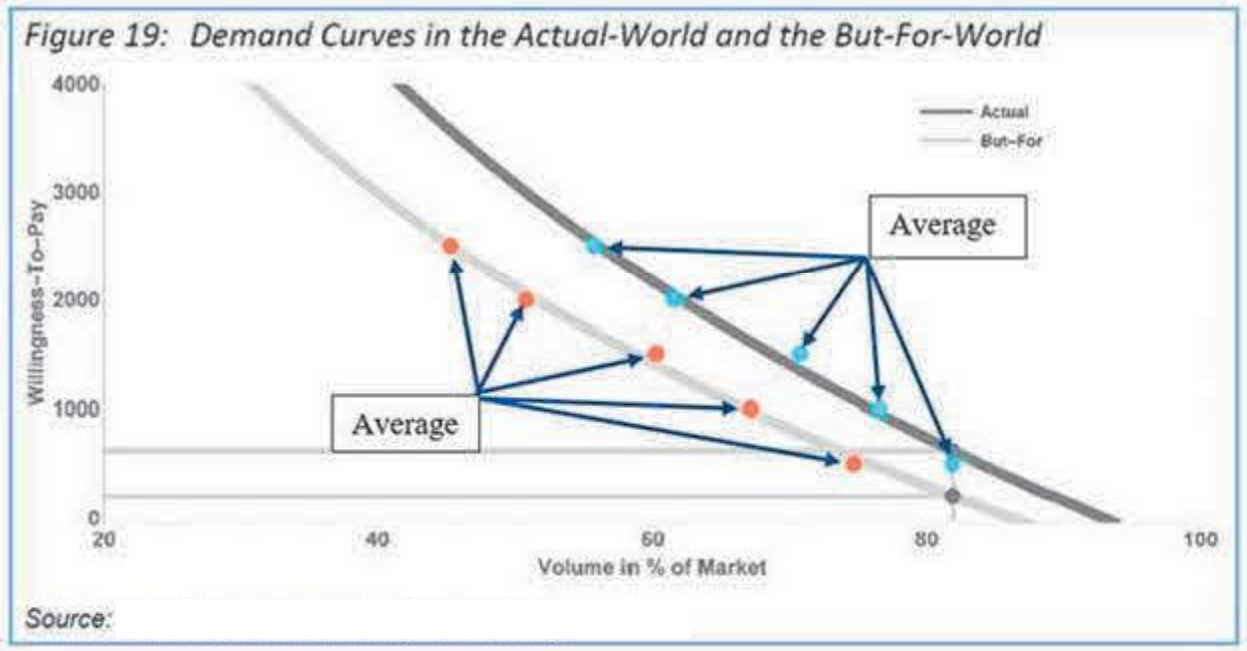
[12] Conjoint expert Prof. Rossi explains that a "part-worth is a measure of utility of each attribute-level combination. For example, each survey and conjoint screen included the rear camera attribute (with levels

measuring the "subjective value" to each individual survey respondent of each hypothetical package attribute (*e.g.*, rearview camera, and package price) and recall scenario (*e.g.*, ignition switch defect, disclosed at the point of purchase with an immediate recall). Ex. 32, Boedeker 1st Rpt. ¶¶ 26, 101-104, 107.

Step 3: For each hypothetical combination of attributes, recall scenario, and each of the five arbitrary package price points ($500, $1,000, $1,500, $2,000, and $2,500) that he made up for his survey, Boedeker summed the part-worths for each respondent to calculate the probability that individual respondent would purchase that hypothetical package at that price.

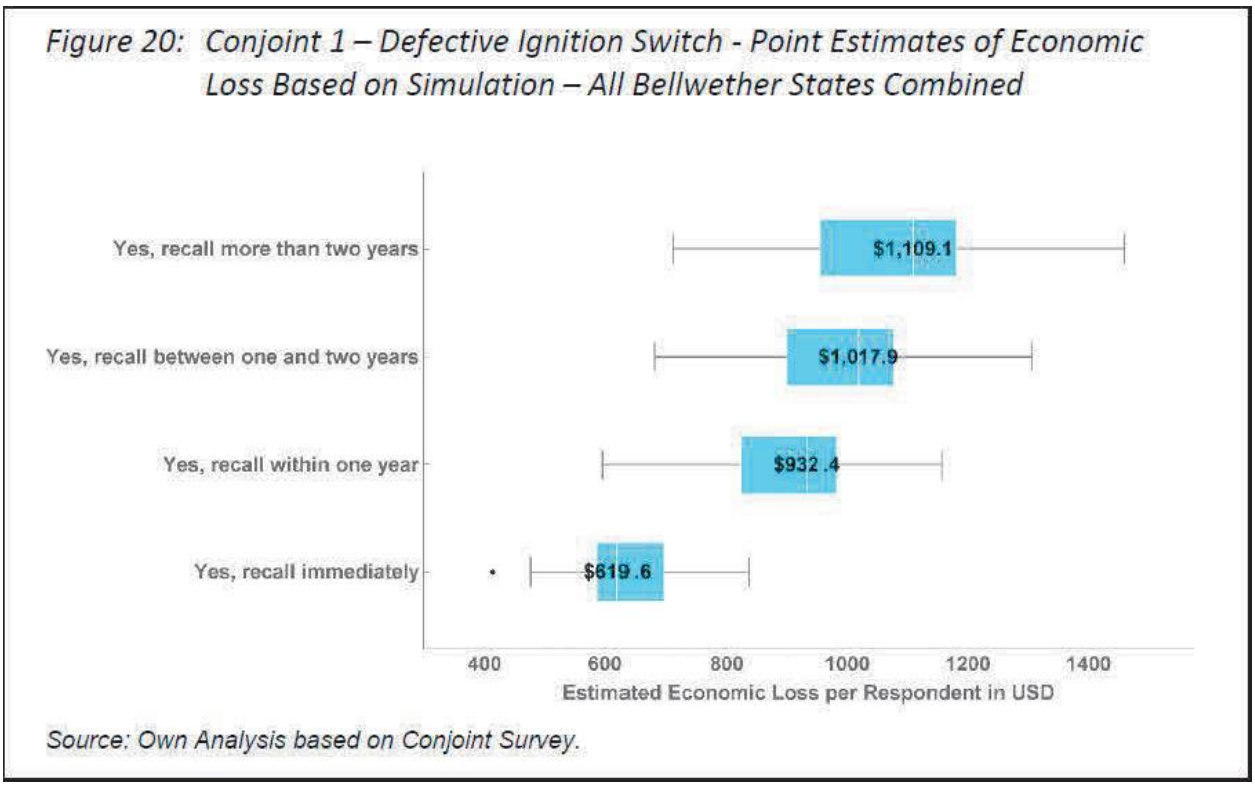
Step 4: For each hypothetical combination of attributes, recall scenario and each of his five arbitrary package price points, Boedeker calculated (a) the overall **average** probability that respondents would purchase that hypothetical package at that price (orange dots in the figure below), and (b) the overall **average** probability that respondents would purchase a defect-free version of that hypothetical package at that price (blue dots). Ex. 33, 2/6/18 Boedeker Dep. at 450:11-451:13; Ex. 34, 7/5/18 Boedeker Dep. at 276:2-278:3; Ex. 32, Boedeker 1st Rpt., Figure 19. This is how Boedeker determined the ten points used to construct the "willingness to pay" demand curves in his Figure 19. As we indicate with arrows in the figure below, **these ten points are all "averages" across all survey respondents.**

'included' or 'not included'). A part-worth for the camera attribute is a number for each respondent that measures the value of this attribute on what economists call a utility scale. … Since these part-worths are person-specific, you cannot say anything about the part-worths of consumers outside of the sample." Ex. 29.A, 2/23/18 Rossi Rpt. at 32-33.



Step 5: Based on these ten averaged data points, Boedeker used regression analysis to construct the demand curves shown in the figure (the light gray and dark gray lines above). Ex. 34, 7/5/18 Boedeker Dep. at 278:9-279:24. This regression is itself a form of averaging the ten averaged data points.

Step 6: Boedeker calculated the difference between the two average-based demand curves at each of his five arbitrary price points. Ex. 34, 7/5/18 Boedeker Dep. at 283:19-286:11. For each hypothetical recall scenario (*e.g.*, "recall immediately," or "recall more than one year after date of purchase") in each Boedeker conjoint analysis, he calculated a set of five such differences in average willingness-to-pay for each of eight possible hypothetical packages of safety features (*e.g.*, all three safety features included, only one safety feature included, etc.) and labeled these differences "Economic Loss[es]." Corresponding to each hypothetical recall scenario, he then summarized the 40 differences in box plots as shown in the example below (drawn from Boedeker's initial MDL conjoint survey):



Ex. 32, Boedeker 1st Rpt. at 45 (Fig. 20). Boedeker's rebuttal surveys included nine distinct recall timing/injury disclosure scenarios, each summarized by a box plot representing 40 differences in average willingness-to-pay. Ex. 30B, 8/13/18 List Sur-Rebuttal Rpt. ¶¶ 44-48. Boedeker's OCDA conjoint survey included multiple recall disclosure scenarios, each summarized by a box plot representing 80 differences in average willingness-to-pay. *Id.*

Step 7: Boedeker applied yet another level of **averaging**: for each set of 40 or 80 differences in average-based demand curves representing a specific recall disclosure scenario, he selects the **median** value of the 40 or 80 distinct differences to serve as a single common damages number for all class vehicles receiving that recall. Ex. 33, 2/6/18 Boedeker Dep. 62:23-63:12, 67:19-68:18. For example, Boedeker proposes that if the but-for scenario is such that "if the consumer is told at the point of purchase that the ignition switch is defective and will be recalled immediately, the median of the estimated economic loss per vehicle is $619.6," which is the

median of 40 differences of average-based demand curves. Ex. 32, Boedeker 1st Rpt. ¶ 119.

Each such median "economic loss" value calculated by Boedeker is effectively an average (Step 7) based on an average (Step 5) of averages (Step 4). Boedeker invites the Court to select from these medians and offers "illustrative" "damages estimates" based on the median values. *Compare* Ex. 27, Boedeker 2nd Rpt. ¶ 736 *with* Ex. 31, Boedeker 3rd Rpt. ¶ 2. Boedeker admits this process yields an aggregate damages number and he has not analyzed how any damages amount would apply to any individual putative class members. Ex. 34, 7/5/18 Boedeker Dep. at 193:5-16; *see also id*. ("I have not done any allocation to individuals as you suggest, plaintiffs or class members."); Ex. 35, 6/27/2018 Gans Dep. at 358:5-22 ("I have not analyzed the allocation of damages, of the aggregate of damages in this class and who should get what.").

After New GM's experts submitted their reports explaining the many problems with Boedeker's damages construct, plaintiffs hired Dr. Gans. The only additional work performed by Dr. Gans was his request of Boedeker's staff to change the baseline for comparison from a hypothetical defect-free scenario to a scenario that involved disclosing the defect at the point of purchase and then recalling the vehicle immediately. Ex. 36, Gans Rpt. ¶ 56; Ex. 37, 6/28/18 Gans Dep. at 552:12-554:14. This resulted in a lower set of damages estimates, though these calculations inherit the same methodological flaws as Boedeker's calculations. Ex. 36, Gans Rpt. ¶ 56; Ex. 37, 6/28/18 Gans Dep. at 552:12-554:14, 613:10-20; *see also* New GM's Motion to Exclude the Opinions of Dr. Joshua Gans.

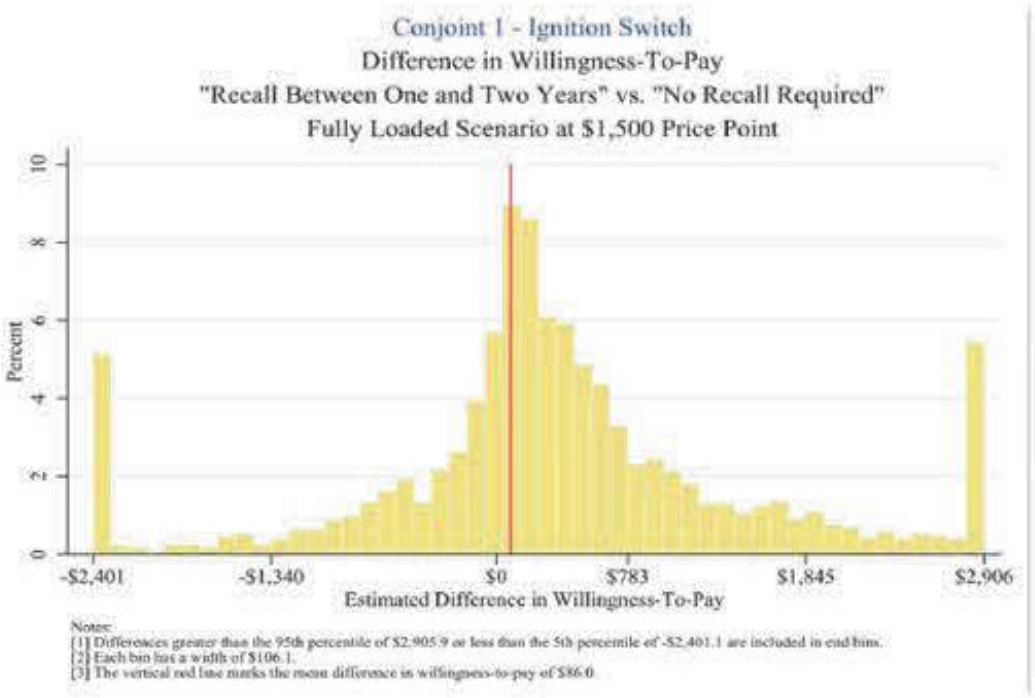
3. Boedeker's Methodology Violates Article III, Due Process, And The Rules Enabling Act.

Boedeker's and Dr. Gans' opinions should be excluded for the reasons explained in New GM's contemporaneously filed *Daubert* motions, including because Boedeker's surveys yield unreliable and unrealistic results. Separately, Boedeker's methodology violates fundamental legal

rules by compensating putative class members who have no injury and no standing. Boedeker's methodology is based upon each consumer's preferences and "willingness to pay," which admittedly vary among individuals. Ex. 33, 2/6/18 Boedeker Dep. 278.[13]

The graphic below from New GM expert Dr. Peter Rossi's report illustrates how the disparity in respondent preferences leads to enormous variations in willingness-to-pay differentials for Boedeker's packages of features with and without defects:

Figure 4.



Ex. 29.B, 8/23/18 Rossi Sur-Rebuttal Rpt. to Boedeker at 40. Under Boedeker's methodology, all

[13] Dr. Peter Rossi, who developed the Hierarchical Bayesian Choice-Based Conjoint method used in the software Boedeker employed, agrees that "WTP is fundamentally an individual specific measure and has to be assessed on an individual-by-individual basis." Ex. 29.A, 2/23/18 Rossi Rpt. at 6; *id.* at 11, 38; *see also, e.g.*, *id.* at 6, 8, 13-14 ("Moreover, there are likely to be some purchasers of recalled GM vehicles whose reduction in utility measured by WTP is zero or near zero.").

putative class members whose estimated willingness-to-pay is $0 or less (*i.e.*, all survey respondents at or to the left of the $0 in the above figure) would have been willing to pay the same price for the packages if the defect had been disclosed and therefore have no injury or damages. *Id*. at 39-43 (A "very large fraction of respondents [putative class members] were not injured even if you accept Mr. Boedeker's biased and unreliable survey as the basis of this conclusion."). **Similarly, after reviewing Boedeker's data, New GM's expert Dr. John List found that between 26.6% and 35.6% (MDL conjoint) and 29.4% and 39.1% (rebuttal MDL conjoint) of respondents in each of Boedeker's surveys had no injury because they would be willing to pay the same amount or more in scenarios with disclosed defects as compared to the same scenario with no defects.** Ex. 30, 2/23/18 List Rpt. ¶¶ 116-18; Ex. 30.B, 8/13/18 List Rpt. ¶¶ 55-59 & App. 5; *see also* Ex. 29, 2/23/18 Rossi Rpt., Appendix E at 71-83. The same no-injury findings apply to Boedeker's OCDA conjoint surveys. Ex. 29.B, 8/13/18 Rossi Sur-Rebuttal Rpt. to Boedeker at 8-9 & Figures 3-6.

Under Boedeker's methodology, and depending on which of his surveys is chosen, fully one quarter to well over one-third of the putative class members have no injury, no damages, and no claim. According to Boedeker, such buyers are "risk friendly ... they still don't care about the recall and maybe they had an experience where cars were recalled that they owned." Ex. 33, 2/6/18 Boedeker Dep. at 237:4-8. Plaintiffs' expert Weisberg agrees, explaining that "for any particular buyer, it could be that there was no impact from the recall, it could be that the recall impacted the price by causing somebody to pay a higher price, or it could be that the recall impacted the price by causing that individual to pay a lower price." Ex. 38, 7/9/18 Weisberg Dep. at 183:19-184:6.

a. No Class Can Be Certified Where, As Here, Plaintiffs' Data Shows Many Putative Class Members Have No Injury.

The law prohibits certifying a class with such large numbers of uninjured members. *First*, Rule 23 does not permit certification without "common evidence to show all class members suffered some injury."[14] *Sykes*, 780 F.3d at 81-82; *see also McLaughlin.*, 522 F. 3d at 228; *In re Fluidmaster*, 2017 WL 1196990, at *31, 58-59 (N.D. Ill. Mar. 31, 2017).[15] Conjoint surveys that do not prove injury for all class members cannot support certification. In *Opperman v. Path, Inc.*, plaintiffs sought to use a conjoint survey to establish the value of privacy in smartphone applications. 2016 WL 3844326, at *14 (N.D. Cal. July 15, 2016). *Opperman* rejected plaintiffs' proposed class-wide damages methodology: "No damages number arising from this model will apply to all class members, particularly since some of the class members, by this measure, will not have been injured at all—*i.e.*, they would have not have required any premium to allow Path to access their contacts, because they don't attach any value to them." *Id.* Similarly, *Fleischman v. Albany Med. Ctr*. rejected class plaintiffs' expert's proposed "single formula capable of assessing all damages among class members" based on "averages" as it ignored "vast differences" in individual plaintiffs' circumstances. 2008 WL 2945993, at *7 (N.D.N.Y. July 28, 2008).

Second, Article III requires injury in fact. *See Lujan v. Defenders of Wildlife*, 504 U.S.

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[14] The issue here is not just that "damages are not capable of measurement on a classwide basis." *Roach v. T.L. Cannon Corp.*, 778 F.3d 401, 408-09 (2d Cir. 2015). Boedeker purports to prove that each individual class member suffered an injury and damages. Ex. 32, Boedeker 1st Rpt. ¶ 22 ("The non-disclosure of defects **caused** class members to overpay for their vehicles, leading to class-wide damages.") (emphasis added). His own survey data proves just the opposite.

[15] *See also Saavedra*, 2014 WL 7338930, at *8 (rejecting under *Daubert* the use of a conjoint analysis to calculate benefit-of-the-bargain class-wide damages based on a difference in value theory in part because it "is unclear to the Court why any individual is harmed when she purchases a product that the average person (but not necessarily the purchaser) subjectively overvalues because of a misrepresentation. … This argument is akin to relying on proof of the personal injuries incurred by the average car accident victim to show that a particular car accident caused that same amount of harm to a particular victim. Neither argument rests on a sound causal nexus."); *Contramano v. United Techs. Corp. & Palm Beach Aggregates, LLC*, 2018 WL 2047468, at *19 (S.D. Fla. May 2, 2018) ("The Court agrees that Kilpatrick cannot reliably

555, 560 (1992); *Golden Hill Paugussett Tribe of Indians v. Weicker*, 39 F.3d 51, 58 (2d Cir. 1994). The "class must … be defined in such a way that anyone within it would have standing" and "no class may be certified that contains members lacking Article III standing." *Denney v. Deutsche Bank AG*, 443 F. 3d 253, 264 (2d Cir. 2006); *see also Sykes*, 780 F.3d 70; *McLaughlin*, 522 F. 3d at 228; *Calvo v. City of New York*, 2018 WL 1633565, at *2 (S.D.N.Y. Apr. 2, 2018); *Calvo v. City of New York*, 2017 WL 4231431, at *3 (S.D.N.Y. Sept. 21, 2017); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 334 (S.D.N.Y. 2003). Boedeker's survey data shows that 26.6% to 39.1% of the proposed class members have no injury, precluding certification for this reason alone.

Third, any class certified based on Boedeker's methodology would violate the Rules Enabling Act and the Supreme Court's *Amchem* decision. The Rules Enabling Act provides that the Federal Rules "shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect." 28 U.S.C. § 2072; *see also Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 613 (1997). Boedeker's methodology would impermissibly "enlarge" the rights of the 26.6% to 39.1% of putative class members who suffered no injury and would have no claim under substantive law. *See, e,g,*, *Fleischman*, 2008 WL 2945993, at *7 ("Plaintiffs' proposed damages calculation would offend both the Rules Enabling Act and the Due Process Clause. Aggregating the award compounds the

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use sales trend analysis to determine a single percentage diminution for the entire proposed class area, containing almost 18,000 properties (15,000 under the secondary definition proposed), and that the mass appraisal methodology proposed by him simply does not fit under the facts of this case. The affected community is not remarkably homogeneous, as he originally claimed, but rather includes a wide variety and scale of homes (equestrian farms, up-scale villas, simple ranch houses) of various ages, sizes and conditions – diverse properties which are not logically impacted in the same way by the alleged environmental stigma which Plaintiffs contend attaches by virtue of their general proximity to contaminated properties at the UTC site or at localized areas within the Acreage.").

risk of inaccuracies in both initial payment and subsequent allocation.").

Fourth, Boedeker's methodology violates New GM's due process rights to defend against claims based on individual evidence where putative class members have a zero or negative willingness-to-pay, resulting in no injury. New GM has "the right to raise individual defenses against each class member." *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 191-92 (3d Cir. 2001).[16] As plaintiffs' expert Weisberg admitted, an "average … could … give you a total dollar amount of damages, but it can't tell you which particular members of the class incurred the damages and which didn't." Ex. 38, 7/9/18 Weisberg Dep. at 91:4-14. New GM cannot be "forced to defend against a fictional composite without the benefit of deposing or cross-examining the disparate individuals behind the composite creation." *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 345 (4th Cir. 1998); *see also In re Graphics Processing Units Antitrust Litig.*, 253 F.R.D. 478, 493 (N.D. Cal. 2008) ("If data points are lumped together and averaged before the analysis, the averaging compromises the ability to tease meaningful relationships out of the data"); *Fluidmaster*, 2017 WL 1196990, at *31, 58-59 (rejecting price premium theory based on willingness-to-pay because "some consumers may place no value on a 10-year warranty and thus lose nothing in this bargain."). If Boedeker's methodology and opinions were permitted, New GM's "right [] to challenge the allegations of individual plaintiffs [would be] lost, resulting in a due process violation." *McLaughlin*, 522 F.3d at 231-33.

[16] *See also Dukes*, 564 U.S. at 367 ("a class cannot be certified on the premise that [defendant] will not be entitled to litigate its statutory defenses to individual claims"); *Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 319 (4th Cir. 2006) (in analyzing class certification, court must protect the "right of the defendant to present facts or raise defenses that are particular to individual class members").

b. Individually Negotiated Prices Also Cause Individual Fact-Of-Injury Questions To Predominate.

Boedeker asserts that his method somehow calculates a difference in the "average price" component of vehicle prices that applies to all putative class members. Ex. 32, Boedeker 1st Rpt. ¶¶ 65, 113; Ex. 27, Boedeker Resp. Rpt. ¶¶ 39-40; Ex. 36, 11/10/17 Gans Rpt. ¶ 31. Boedeker's assertion is without merit. Boedeker does not calculate any market price, which is required by law and necessary to show a class-wide impact. And his own survey data shows that putative class members have widely varying preferences; 26.6% to 39.1% of those surveyed would be willing to pay the same amount or more even if the defects had been disclosed, and thus have no injury.

But even if (contrary to law and fact) Boedeker's averaged willingness-to-pay numbers based on hypothetical scenarios were "average prices," many alleged class members have no injury because vehicle prices are individually negotiated. Professor Willig showed that for the same make, model, and trims of vehicles, the difference between minimum and maximum retail prices was around 22 percent for new vehicles and 48 percent for used vehicles. Ex. 14, 2/23/18 Willig Rpt. ¶¶ 16-19. Plaintiffs' experts agree "that not all consumers pay the same price for identical vehicles," and the prices paid for the same vehicle could vary by thousands of dollars. Ex. 19, 5/18/18 Weisberg Rep. ¶¶ 13, 16 18; *see also* Ex. 38, 7/9/18 Weisberg Dep. at 51:21-53:7; Ex. 35, 6/27/18 Gans Dep. at 358:23-359:7. Because of the individually negotiated prices paid for vehicles, some plaintiffs might pay the same amount or even more after the disclosure of a safety defect and recall than before. Ex. 38, 7/9/18 Weisberg Dep. at 97:6-17. Thus, many buyers will have no injury or damages because they would pay the same price with or without a defect, even if (contrary to the actual market data in this case) there is a drop in the so-called "average price" component of the individualized prices consumers pay. Ex. 29, 2/23/18 Rossi Rpt. at 38-43; Ex. 29.B, 8/13/18 Rossi Sur-Rebuttal Rpt. to Boedeker at 8-9 & Figures 3-6; Ex. 30, 2/23/18 List Rpt.

¶¶ 113-19; List Sur-Rebuttal ¶¶55-59 & App'x 5-6.

That Boedeker's supposed difference in "average price" cannot establish class-wide injury is further demonstrated by how he applies the same damages number regardless of the vehicle's make, model, trim, options or whether it was new or used, or leased or purchased. Prices paid by named plaintiffs show significant variation. Deloris Hamilton bought a used 12-year-old 2000 Oldsmobile Alero for $3,500; Gareebah Al-ghamdi bought a used 2004 Impala for $12,999; and Orosco Santiago bought a new 2010 Camaro for $28,000. Ex. 39, 3/13/17 D. Hamilton Dep. at 24:20-25:2; 95:18-23; Ex. 15, 5/5/2017 G. Al-ghamdi Dep. at 26:2-4; Ex. 47, 3/9/17 S. Orosco Dep. at 49:18-50:13. Yet under Boedeker's "illustrative" damages estimate, all vehicles subject to the ignition system recalls (besides Delta Ignition Switch vehicles) have the same median "economic loss" amount of $966. This estimate, which would award Santiago 3.5% of his purchase price while Al-ghamdi receives 27.6%, ignores the record evidence and defies market realities. Ex. 31, Boedeker 3rd Rpt. Tables 1-3; *see also* Ex. 40, 7/6/18 Boedeker Dep. at 483:19-484:2 ("I have not done any analyses specific to—to the whatever that quote was, the brand, make, and trim and so forth. So I don't have an opinion about that as of now."). Boedeker's imposition of the same "economic loss" for all vehicles confirms that his methodology is an artificial construct that does not reflect any actual prices putative class members would have paid, or injury or damages allegedly suffered, if any defects had been disclosed. Ex. 24.C,8/14/18 Marais Sur-Rebuttal ¶ 34.

Where, as here, individual negotiations factor into the prices consumers pay, benefit-of-the-bargain damages claims "cannot be properly resolved as part of a class action." *Schmidt v. Bassett Furniture Indus.*, 2011 WL 67255, at *5 (E.D. Wis. Jan. 10, 2011) ("Thus, calculating the market price and sales price for particular pieces of furniture requires an individualized analysis.");

see also In re New Motor Vehicles Canadian Exp. Antitrust Litig., 522 F.3d 6, 29 (1st Cir. 2008) (rejecting plaintiffs' reliance "on an inference that any upward pressure on national pricing would necessarily raise the prices actually paid by individual consumers" for vehicles because "[t]oo many factors play into an individual negotiation to allow [such] an assumption").

4. Boedeker's Methodology Does Not Fit Plaintiffs' Legal Theory, Violating *Comcast*.

Comcast requires that "any model supporting a plaintiff's damages case must be consistent with its liability case." 569 U.S. at 35. "If the model does not even attempt to do that, it cannot possibly establish that damages are susceptible of measurement across the entire class for purposes of Rule 23(b)(3)." *Id.*; *see also Roach v. T.L. Cannon Corp.*, 778 F.3d 401, 407 (2d Cir. 2015).

Conjoint-based damage methodologies such as Boedeker's fail under *Comcast* where the survey design and analysis do not satisfy plaintiffs' alleged measure of damages. *See Townsend v. Monster Beverage Corp.*, 303 F. Supp. 3d 1010, 1049 (C.D. Cal. 2018) (denying certification because Boedeker's conjoint survey's use of unimportant attributes "render[ed] it useless for the purpose of determining price premiums attributable to the challenged statements"); *Davidson v. Apple, Inc.*, 2018 WL 2325426, at *23 (N.D. Cal. May 8, 2018) (denying certification because Boedeker's survey measured the wrong smartphone defect scenarios and made assumptions contrary to named plaintiff testimony).[17]

[17] *See also Fluidmaster*, 2017 WL 1196990, at *27-31 (denying certification because conjoint analysis failed to measure the relevant difference in a product's "failure propensity"); *Opperman v. Kong Techs., Inc.*, 2017 WL 3149295, at *10-12 (N.D. Cal. July 25, 2017) (denying certification because proposed conjoint survey would measure the "value of security of privacy broadly" rather than the value of specific allegedly misrepresented features); *Opperman*, 2016 WL 3844326, at *13-15 (rejecting conjoint analysis because "[n]o damages number arising from this model will apply to all class members...[i]t may be that the average damages that Dr. Fishkind's model would predict will be very close to the damages actually suffered by every class member, but there is no way of knowing this. It is equally or more likely that his model would overcompensate some class members, while undercompensating others."); *In re NJOY, Inc. Consumer Class Action Litig.*, 2016 WL 787415, at *4-5, *8 (denying certification because conjoint analysis model "only look[ed] to the demand side of the market equation," "completely ignore[d] the price for which [the defendant] is willing to sell its products," and "focus[ed] on a consumer's subjective

a. Boedeker's Economic Loss Theory Contradicts Plaintiffs' Benefit-of-the-Bargain Theory of Damages.

Benefit-of-the-bargain damages require calculating market prices. *See* authorities cited at page 16-17 & nn. 4-6. But plaintiffs and Boedeker reject measuring benefit-of-the-bargain damages based on market prices determined by actual supply and demand. Ex. 32, 11/10/17 Boedeker 1st Rpt. ¶ 61. Instead, they measure damages based on a but-for price that "GM would have needed to charge to sell the same quantity of vehicles to the same buyers." Ex. 27, 5/18/18 Boedeker 2nd Rpt. ¶ 68; *id.* ¶¶ 32(a), 40, 98, 492, 502-503, 560, 568; Ex. 32, 11/10/17 Boedeker 1st Rpt. ¶¶ 65, 67; Ex. 33, 2/6/18 Boedeker Dep. at 270:3-9, 289:8-16, 297:7-17, 298:6-299:2.[18] Boedeker asserts that "the new price in the but-for world" is determined by "the consumer who actually bought the vehicle with the undisclosed defect and who, when fully informed, has the lowest [willingness-to-pay]" for that vehicle. Ex. 27, 5/18/18 Boedeker 2nd Rpt. ¶ 502; *see also*

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valuation" thus "not permit[ting] the court to calculate the *true market price* of N–JOY cigarettes absent the purported misrepresentations and omissions."); *Saavedra*, 2014 WL 7338930, at *3-7 (denying certification because conjoint analysis measured a difference in how "the average consumer subjectively values" a product, not "benefit of the bargain" damages based "on a difference in fair market value (i.e. the amount that a willing buyer and willing seller would both accept) between the product as represented and the product actually received."); *Adams v. Target Corp.*, 2014 WL 12558858, at *2-3 (C.D. Cal. Nov. 25, 2014) (denying certification because proposed conjoint would "average results across several products" thus ignoring "distinctions among products" and because the attribute tied to plaintiffs' theory—"sized as advertised"—is "not a [product] feature…in any normal sense" and "conjoint analysis is not effective when the features that it focuses on are artificial because the analysis does not reflect real-world consumer behavior").

[18] *See also* Ex. 41, 8/31/18 Gans Sur-Rebuttal ¶ 14 ("What Mr. Boedeker and I are proposing…involves consumers having a WTP that reflects the defect with all of those consumers choosing to buy the product regardless.") (emphasis added); Ex. 36, 5/17/18 Gans Rpt. ¶ 23.

In fact, Boedeker's actual purported "economic loss" calculations are inconsistent with this own theory, and make no effort to determine the price "GM would have needed to charge to sell the same quantity of vehicles to the same buyers" or the "lowest willingness-to-pay" of any original purchasers. Ex. 29.B,8/13/18 Rossi Sur-Rebuttal Rpt. to Boedeker at 11. Instead, Boedeker's methodology looks at differences in demand for packages of safety features rather than vehicles, fails to account for any willingness-to-sell those packages, and merely simulates the difference in demand curves controlling for the "same quantity" of safety packages, not the "same buyers."

Ex. 33, Boedeker 2/6/2018 Dep. at 270:3-9, 289:8-16, 297:7-17, 298:6-299:2.

Boedeker's theory is "clearly an overcompensation" because it measures damages for all consumers based on the subjective preferences of the purchaser who least wants to buy the product knowing of a defect, not the price determined by the market. Ex. 29.B, 8/13/18 Rossi Sur-Rebuttal Rpt. to Boedeker at 11-12. Boedeker does not even attempt to measure a difference in market prices that the putative class members would have paid. As a result, his methodology is incompatible with plaintiffs' benefit-of-the-bargain theory. *See In re NJOY, Inc. Consumer Class Action Litig.*, 2016 WL 787415, at *4-5 (C.D. Cal. Feb. 2, 2016) (denying certification under *Comcast* for failing to account for willingness-to-sell in price premium damage calculations); *Saavedra*, 2014 WL 7338930, at *3-7 (same); s*ee also* Ex. 42, 8/13/18 McFadden Sur-Rebuttal Rpt. ¶ 3(c); Ex. 29.B, 8/13/18 Rossi Sur-Rebuttal Rpt. to Boedeker at 10.

b. Boedeker's Calculations Have No Supply Analysis And Do Not Prove Market Prices.

Boedeker acknowledges that market prices are determined by the intersection of supply and demand where consumer willingness-to-pay (demand) matches a seller's willingness-to-accept (supply). Ex. 32, Boedeker 1st Rpt. ¶¶ 34-43. But Boedeker admits that he has not estimated supply curves for the packages of safety features used in his surveys and does not know the supply for such packages in the real world. Ex. 34, 7/5/18 Boedeker Dep. at 238:21-239:14, 295:3-23. He made no effort to assess willingness to sell vehicles or safety packages. Ex. 40, 7/6/18 Boedeker Dep. 462:11-18; Ex. 37, 6/28/18 Gans Dep. 429:2-8. Because willingness to sell is an essential ingredient for determining a market price, Boedeker cannot determine market prices as the law requires. *See NJOY*, 2016 WL 787415, at *4-5; *Saavedra*, 2014 WL 7338930, at *3-7.

Instead of analyzing willingness to sell, Boedeker makes a penalty-based "fixed supply" assumption incapable of calculating "market prices." Ex. 27, 5/18/18 Boedeker 2nd Rpt. at. 5; Ex.

43, 2/7/18 Boedeker Dep. at 374:15-376:13; Ex. 42, 2/23/18 McFadden Rpt. ¶ 17-18; Ex. 30, 2/23/18 List Rpt. ¶ 34-40; Ex. 29, 2/23/18 Rossi Rpt. at 8, 11-14. Such a "penalty" has no basis in the law of benefit-of-the-bargain damages, which are meant to compensate rather than punish. Ex. 42, 8/13/18 McFadden Sur-rebuttal to Boedeker Rpt. ¶¶ 7, 11.

c. Boedeker Measures The Impact Of Disclosures On The Willingness-To-Pay For Safety Feature Packages, Not The Price Of Vehicles.

Boedeker's surveys address various packages of safety features, not vehicles as required by plaintiffs' theory. Ex. 40, 7/6/18 Boedeker Dep. at 427:12-15. His surveys do not include other vehicle features relevant to consumers, nor describe the potential vehicle to which his safety features are to be added. Ex. 44, Transportation Study (screenshots) (11.10.17); Ex. 45, Multi-State Transportation Survey Screenshots (5.14.18). Boedeker admits that his surveys do not simulate the trade-offs consumers make when purchasing vehicles.[19] Ex. 32, Boedeker 1st Rpt. 93; Ex. 27, 6/27/18 Boedeker 2nd Rpt. ¶ 657; *see also* Ex. 30, 2/23/18 List Rpt. ¶¶ 97-99.

"[N]one of the hypothetical markets in Mr. Boedeker's three conjoint studies are close enough to the real market for vehicles with various options packages to provide evidence on the impact of safety features and defect disclosure on vehicle demand, let alone but-for equilibrium market prices for the vehicles."[20] Ex. 42, 8/13/18 McFadden Sur-Rebuttal ¶ 16. Because Boedeker's conjoint analysis does not measure consumer demand for vehicles or the impact of

[19] Ex. 35, 6/27/18 Gans Dep. 242:20-23 ("Q. So Boedeker doesn't do demand curves for cars; he does demand curves for safety packages; fair? A. Yes."); *id.* at 242:12-16.

[20] *See also* Ex. 42, 8/13/18 McFadden Sur-Rebuttal ¶ 16 ("Moreover, Mr. Boedeker does not provide—either in his conjoint study or through other data—evidence that there is a dollar-for-dollar relationship between: (i) what his conjoint analysis finds to be the reduced value of options in a vehicle with a disclosed defect, and (ii) the reduction (if any) in the threshold price at which consumers would choose to buy their GM vehicles after disclosure of the defect."); Ex. 42, 2/23/18 McFadden Rpt. ¶ 37; Ex. 29.A, 2/23/18 Rossi Rpt. at 19; Ex. 29.B, 8/13/18 Rossi Sur-Rebuttal Rpt. to Boedeker at 4; Ex. 30.A, 2/23/18 List Rpt. ¶¶ 97-100.

defect disclosures on vehicle prices, it cannot establish plaintiffs' alleged damages. *See Townsend*, 303 F. Supp. 3d at 1051 (Boedeker's use of attributes untethered to consumer preferences for the overall product rendered "it useless for the purpose of determining price premiums attributable to the challenged statements"); *Fluidmaster*, 2017 WL 1196990, at *27-31 (denying certification because conjoint analysis failed to measure difference in product's "failure propensity"); *see also Hughes v. The Ester C Co.*, 317 F.R.D. 333, 341-43, 354-55 (E.D.N.Y. 2016), *reconsideration denied sub nom. Hughes v. Ester C. Co.*, 320 F.R.D. 337 (E.D.N.Y. 2017) (denying certification because conjoint analysis could not "isolate the premium attributable to Plaintiffs' theory of the case, namely, that consumers paid more for the Products due to the representation"); Mem. of Law in Supp. of General Motors LLC's Motion to Exclude the Opinions of Stefan Boedeker, Section II.

d. Boedeker Does Not Measure The Impact Of Disclosures On Used Vehicle Purchases Or Vehicle Leases.

Half of the named plaintiffs purchased a used GM vehicle, as did 72% of the proposed classes. *See* page 11; Ex. 14.E, 5/7/18 Willig Rpt., App'x B, Table 9. Boedeker's decision to measure the impact of disclosures on packages of safety features does not apply to used vehicle purchases. Plaintiffs' experts acknowledge that any economic loss is likely to vary between new and used car buyers. Ex. 38, Weisberg 7/9/18 Dep. 45:25-46:12 ("[I]f an analysis is done only of newer vehicles, there is—it's possible an analysis based on newer vehicles can be applied to older vehicles, and it's possible that they can't, and you can't assume that it could be applied to older vehicles without some sort of demonstration of that.").[21] Boedeker's survey offered safety features

[21] Ex. 35, Gans 6/27/18 Dep. at 388:24-389:5 ("Q. And you would agree with me, though, that the -- the determination of economic loss could -- the amount of economic loss could vary, depending on whether it's new or used, right? A. The amount to particular use cases could vary, even if, you know, we were able to assess an average across all of them."); Ex. 28, Boedeker 4th Sur-Rebuttal Rpt. ¶ 141.

that could only be offered in new vehicles and not be added as an aftermarket option[22] and he admits that his purchasing scenario—involving the addition of safety features to a vehicle—does not reflect the process of buying a used car. Ex. 34, Boedeker 7/5/18 Dep. at 410:3-11; *see also* Ex. 42, 8/13/18 McFadden Sur-Rebuttal to Boedeker Rpt. ¶ 15. Boedeker's methodology cannot measure the impact of defect disclosures on used car purchasers. *See Townsend*, 303 F. Supp. 3d at 1049.

Nor does Boedeker's methodology apply to leased vehicles, despite those vehicles being included in plaintiffs purported classes. Lessees contract for vehicles for a limited time, and any economic impact would differ from buyers. Ex. 14, 2/23/18 Willig Rpt. ¶ 55. Moreover, leases vary amongst themselves based on the vehicle's expected residual value, the length of the lease, and other contract terms. *Id.* Determining whether each lessee was injured would require an individual analysis of his or her lease terms and other factors. *Id.* But Boedeker does not address lessees and completely fails to show any injury, much less a common injury, for lessees.

e. Boedeker's Disclosure Scenarios Conflict With Plaintiffs' Defect Disclosure Theory.

Plaintiffs allege that New GM failed to disclose specific defects. 5ACC ¶¶ 45-49, 55-262 (alleging that every plaintiff "would not have purchased the vehicle or would have paid less for it had they known about the defect in the vehicle"). Rather than measure the impact of a defect disclosure on consumer preferences, Boedeker's conjoint surveys measure the impact of the disclosure of other information, including how long after a purchase a recall repair might occur, the probability of a "malfunction" caused by the defect, the potential harm that could result from

[22] *See* Ex. 44, 2/6/18 Dep. Ex. 7, November 2017 Survey Screenshots ; Ex. 46, Dee Ann Durbin, Adding Safety Technology to an Older Car) (*cited in* Ex. 27, Boedeker 2nd Rpt. ¶ 419(b), n.445) ("automatic braking isn't available as an aftermarket option").

the defect, and whether "at the point of purchase" the "manufacturer is aware of" a "defect that would normally require immediate recall." Ex. 44, MDL Conjoint Screenshots; Ex. 45, Rebuttal MDL Conjoint Screenshots. Thus Boedeker measured the impact of disclosures that are not the basis of plaintiffs' legal claims.[23] *Davidson*, 2018 WL 2325426, at *23 (rejecting Boedeker's conjoint analysis in part because survey used improper disclosure scenarios).

f. Boedeker Measures The Impact Of Disclosures On Consumers Who Unrealistically Expect Defect-Free Vehicles.

Boedeker's methodology measures his purported economic loss as the difference in demand for a vehicle that consumers "believe to be defect free" compared to a "vehicle where the defect was disclosed at the point of purchase." Ex. 32, 11/10/17 Boedeker 1st Rpt. ¶ 113; Ex. 27, 5/18/18 Boedeker 2nd Rpt. ¶¶ 103, 552; Ex. 28, Boedeker 4th Rpt. ¶ 22; *see also* Boedeker *Daubert* Motion, at I.B.[24] Boedeker has no empirical support for his defect-free assumption,[25] and it conflicts with named plaintiffs' testimony[26] and with the fact that safety recalls are "a commonplace occurrence, involving the great majority (approximately 82%) of the thousands of

[23] In addition, nowhere do plaintiffs allege that New GM could have disclosed the information used in Boedeker's surveys at the time of putative class member purchases. *See, e.g., TACC MTD Opinion*, 2016 WL 3920353, at *32–33 (discussing Missouri law) (plaintiffs "must show that the defendant knew or reasonably should have known the material fact, and failed to disclose it to consumers."). Moreover such disclosures are not required under federal regulations governing recalls. *See, e.g.*, 49 U.S.C. § 30119 and 49 C.F.C. § 577.1 *et seq*.

[24] Ex. 35, 6/27/18 Gans Dep. at 328:5-12 ("As Mr. Boedeker has explained, he was estimating changes in demand that were associated with putting to consumers that they were getting a defect-free vehicle versus knowingly getting a vehicle with defects. That's how the survey was described and I believe that is relevant information properly used for this case."); *id.* at 328:14-19.

[25] Ex. 33, 2/6/18 Boedeker Dep. at 99:4-17 (Boedeker has "not done any separate studies that would test specifically consumers' perceptions of defects or recalls.").

[26] *See, e.g.*, Ex. 47, 3/9/17 S. Orosco Dep. at 89:9-90:1; Ex. 48, 3/23/17 B. Akers Dep. at 70:24- 71:5; Ex. 49, 5/9/17 K. Robinson Dep. at 61:8-11; Ex. 50, 3/21/17 R. Robinson Dep. at 64:21-25; Ex. 51, 4/14/17 M. Stefano Dep. at 80:20-81:12; Ex. 52, 4/13/17 C. Tinen Dep. at 91:14-92:6; Ex. 53, 5/31/17 P. Witherspoon Dep. at 114:10-115:2; Ex. 16, 5/5/17 G. Al-ghamdi Dep. at 44:1:4, 9-13; Ex. 18, 5/1/17 M. Graciano Dep. at 110:24-111:13.

model/model-year combinations" of vehicles in service. Ex. 24, 2/23/18 Marais Rpt. ¶ 25; *see also* Ex. 26, 2/23/18 Jason Rpt. at 10-11 (collecting evidence contradicting Boedeker's defect-free assumption); Background Section D. When asked whether the manufacturer of their new vehicle would issue a safety recall to fix a defect, only 16% of survey respondents believed a recall was "extremely unlikely." Ex. 25, 2/23/18 Keller Rpt. ¶ 115. While Boedeker claims that consumer expectations regarding recalls are "irrelevant" to his study, Ex. 27, 5/18/18 Boedeker 2nd Rpt. ¶ 378, prices paid in the real world depend on consumer expectations. Ex. 29, 2/23/18 Rossi Rpt. 43-44; Ex. 24, 2/23/18 Marais Rpt. ¶ 56-60.

Boedeker's measure of damages is based on an unrealistic assumption that they expected defect-free vehicles. Boedeker's method thus fails under *Comcast. See, e.g.*, *Fluidmaster*, 2017 WL 1196990, at *27-31 (rejecting conjoint analysis that failed to account for fact that "even a non-defective product would still have a propensity to fail sometimes" and inclusion of an attribute promising no failure "provides no insight into the value of the product that consumers ultimately received"); *see also Davidson*, 2018 WL 2325426, at *23 (rejecting Boedeker's conjoint analysis in part based on assumptions contrary to plaintiff testimony).

g. Boedeker's Damages Estimates Compensate For Alleged Post-Sale Risk Of Injury, Not Overpayment At The Time of Sale.

Boedeker's damages methodology would impermissibly compensate putative class members for an alleged post-sale risk of harm that never materialized in the real world. Boedeker claims that "[a]fter being overcharged for their initial purchase price, the economic loss to class members grows at least until the actual recall occurs." Ex. 32, 11/10/17 Boedeker 1st Rpt. at ¶¶ 22, 134; Ex. 27, 5/18/18 Boedeker 2nd Rpt. ¶ 223 (Consumers "**had to drive the vehicle bearing the risk of the defect for as long as they did in the actual world** before the defective vehicle would be recalled.") (emphasis added); *id.* ¶ 730 ("[T]he longer GM waited to recall the vehicles

… the larger the economic loss to the consumer"). Dr. Gans admits that Boedeker's methodology is based on a "theory of harm that between purchase and recall purchasers of at-issue vehicles were driving around at a greater degree of risk." Ex. 36, 5/17/18 Gans Rpt. ¶ 53. This "theory of harm" conflicts with plaintiffs' benefit-of-the-bargain theory alleging plaintiffs "overpaid, **at the time of sale**, for a defective vehicle, and thus fails under *Comcast*." *TACC MTD Opinion*, 2016 WL 3920353, at *7 (emphasis added); Pls. Memo at 28.

h. Boedeker's Methodology Would Lead To Both Overcompensation And Double Recoveries.

As Judge Easterbrook has explained, "[i]f tort law fully compensates those who are physically injured, then any recoveries by those whose products function properly mean excess compensation." *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1017 (7th Cir. 2002). A tort system allowing buyers who suffer no personal injuries to "collect damages on the theory that the risk of failure made" a product less valuable would "overcompensate[] buyers and lead[] to excess precautions" by manufacturers. *Id.*[27] Boedeker's methodology results in both overcompensation and double recoveries, because: (1) he would compensate for the **risk** of physical injury, while

[27] *Bridgestone/Firestone*, 288 F.3d at 1017 n.1 ("Consider an example. Defendant sells 1,000 widgets for $10,000 apiece. If 1% of the widgets fail as the result of an avoidable defect, and each injury creates a loss of $50,000, then the group will experience 10 failures, and the injured buyers will be entitled to $500,000 in tort damages. That is full compensation for the entire loss; a manufacturer should not spend more than $500,000 to make the widgets safer. Suppose, however, that uninjured buyers could collect damages on the theory that the risk of failure made each widget less valuable . . . This would both overcompensate buyers as a class and induce manufacturers to spend inefficiently much to reduce the risks of defects. A consistent system—$500 in damages to every buyer, or $50,000 in damages to every injured buyer—creates both the right compensation and the right incentives. A mixed system overcompensates buyers and leads to excess precautions."); *see also Harris v. Nortek Glob. HVAC LLC*, 2016 WL 4543108, at *5 (S.D. Fla. Jan. 29, 2016) ("Judge Easterbrook of the Seventh Circuit notably explained that a mixed system of class compensation—for those who had been physically injured in addition to those whose products had functioned properly—would lead to overcompensation and perverse incentives."); *Jasper v. Abbott Labs., Inc.*, 834 F. Supp. 2d 766, 774 (N.D. Ill. 2011) ("If tort law fully compensates those who are physically injured, then any recoveries by those whose products function properly mean excess compensation.") (citing *Bridgestone/Firestone*, 288 F.3d at 1017).

(2) nearly all class members did not experience any personal injury and those that did have had the opportunity to assert personal injury claims. Moreover, plaintiffs' proposed economic loss classes do not even exclude individuals with alleged personal injuries and/or who received compensation.[28] *See* Pls. Mot. at 1-12.

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With no model showing fact of injury for each putative class member, much less common fact of injury or class-wide damages, plaintiffs "cannot show Rule 23(b)(3) predominance: Questions of individual damage calculations will inevitably overwhelm questions common to the class." *Comcast*, 569 U.S. at 34.[29]

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[28] The problems noted by Judge Easterbrook would exist even if plaintiffs had excluded personal injury plaintiffs from the class, but their inclusion makes matters worse.

[29] The class cases cited in plaintiffs' brief at pages 30-31 are inapplicable and involve some combination of: (1) products for which there is little if any price negotiation (e.g., cooking oil or "Scotts EZ Seed"); (2) conjoint analyses that included actual market prices for the product at issue, as opposed to the Boedeker conjoint involving scenarios for which no real-world market prices exist; (3) no discussion of whether the state laws at issue required proof of market price or willingness to sell at that price; (4) cases in which plaintiffs offered willingness to sell evidence for the products at issue, as opposed to here where Boedeker does not consider willingness to sell at any of his conjoint prices; and/or (5) proposed conjoint analyses that had been described in general but not actually carried out when the Court ordered class certification. *See, e.g.*, *In re Scotts EZ Seed Litig.*, 2017 WL 3396433, at *8, 16 (S.D.N.Y. Aug. 8, 2017) (granting in part and denying in part *Daubert* and summary judgment motions where expert used "actual Scotts EZ Seed price data" in the surveys, and "plaintiffs cite[d] several categories of evidence addressing" defendant's "willing[ness] to sell" at a lower price); *Dzielak v. Whirlpool Corp.*, 2017 WL 1034197, at *5, 12 (D.N.J. Mar. 17, 2017) (denying *Daubert* challenge to conjoint analysis that "compared the values for the Washers (represented as costing being $300 and $500) with and without the Energy Star logo;" expert incorporated "retail market prices into his analysis" and "did consider what retailers actually charged putative class members"; court did not address whether California, Texas, or Missouri law required consideration of willingness to sell); *Sanchez-Knutson v. Ford Motor Co.*, 181 F. Supp. 3d 988, 996 (S.D. Fla. 2016) (survey respondents were asked to choose between versions of actual product at issue, including "$45,000 purchase price for Ford Explorers"; no discussion of whether California, Texas, or Missouri law require proof of market price or willingness to sell at that price); *Khoday v. Symantec Corp.*, 93 F. Supp. 3d 1067, 1082 (D. Minn. 2015) (permitting conjoint analysis without addressing whether state law required determination of market price or consideration of willingness to sell at that price); *In re ConAgra Foods, Inc.*, 90 F. Supp. 3d 919, 945 (C.D. Cal. 2015) (expert used "data from various spreadsheets and reports reflecting historical price, cost, profit and attribute information for Wesson Oils and competitor brands"; court approved the use of conjoint in conjunction with a hedonic regression analysis that accounted for "supply and market factors"); *Guido v. L'Oreal, USA, Inc.*, 2014 WL 6603730, at *10 (C.D. Cal. July 24, 2014) (expert relied on two proposed methodologies, including one that relied on "running regressions on historical marketing

5. Boedeker's Averaging Methodology Is Not Permitted Under Supreme Court Precedent And Applicable Law.

As explained in Section I.A.2,, Boedeker's methodology uses multiple levels of averaging to obscure that his data shows that many class members have no injury and thus no claim. In addition to the reasons previously discussed, plaintiffs' reliance on Boedeker's averaging methodology fails because plaintiffs may not use aggregate or representative data in a class action unless such evidence could be used by a plaintiff in an individual case. *See Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1046, 1048-49 (2016). *Tyson* allowed use of representative evidence, but only because individual, plaintiff-specific evidence was unavailable. *Id*. at 1047. The Court limited its holding to the FLSA claims at issue in that case; "the fairness and utility of statistical methods in contexts other than those presented here will depend on facts and circumstances particular to those cases." *Tyson*, at 1049.

Tyson forecloses plaintiffs' use of Boedeker's averaging methodology in this case. *Tyson* requires that the relevant facts be sufficiently similar among the plaintiffs such that a representative subset could be probative for an individual plaintiff's claim. *Id.* *Tyson* reaffirmed *Dukes*, 564 U.S. 338, which barred use of sample evidence to establish liability where the employees were not similarly situated and "none of them could have prevailed in an individual suit by relying on depositions detailing the ways in which other employees were discriminated against by their particular store managers." 136 S. Ct. at 1048. Here, an individual plaintiff could not prove injury and damages for his or her particular vehicle by relying on an average of survey respondents'

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data"; conjoint analysis was proposed, but not yet performed, as additional methodology in which "surveys here could ask consumers to choose between [hairstyling products] that differed in price"; not addressing whether state law required consideration of willingness to sell); *see also* Memorandum of Law in Support of General Motors LLC's Motion to Exclude the Opinions of Stefan Boedeker at 38-42 & n. 78 (distinguishing additional cases).

willingness-to-pay for a hypothetical scenario divorced from the actual price paid, make, model, trim, options, and other features of his vehicle. *See, e.g.*, *Espenscheid v. DirectSat USA, LLC*, 705 F.3d 770, 774-75 (7th Cir. 2013) ("To extrapolate from the experience of the 42 to that of the 2341 would require that all 2341 have done roughly the same amount of work, including the same amount of overtime work, and had been paid the same wage. No one thinks there was such uniformity."); *Opperman*, 2016 WL 3844326, at *14; *Arnold v. Directv, LLC*, 2017 WL 1251033, at *7 (E.D. Mo. Mar. 31, 2017). Instead, as this Court has explained, benefit-of-the-bargain damages must be measured by vehicle-specific "variables … such as age, mileage, technical features, consumer preference, and even paint color." *TACC MTD Opinion*, 2016 WL 3920353, at *7. Because Boedeker's methodology could not be used in an individual case, *Tyson* holds that it cannot be used for a class.

Nor does the result in *Tyson* aid plaintiffs here. *Tyson* did not involve a proposed class where plaintiffs' data shows that 26.6% to 39.1% of the putative members have no injury, and nothing in *Tyson* undercuts case law holding that no such class can be certified. Moreover, unlike the FLSA, state law here requires proof of the difference between each vehicle's purchase price and its market value if the alleged defect had been disclosed. *See* pages 16-17 & nn. 4-6. As plaintiffs do not use the market value of any vehicle to determine damages, they have no claim under the bellwether states' laws. Finally, while plaintiff-specific evidence was unavailable in *Tyson*, the information necessary to calculate any benefit-of-the-bargain damages here are the price and characteristics of plaintiffs' own vehicles, which are readily available.

6. Plaintiffs' "Proposed Trial Procedure" Confirms That Plaintiffs Cannot Meet Their Burden of Proving the Requirements of Rule 23.

Plaintiffs contend that if a verdict is in their favor a "single monetary sum [is] to be entered on behalf of each Class and Subclass for damage. A post-judgment administrative proceeding will

follow, in which checks to each individual Class member will be distributed." Pls. Memo. at 36. The Second Circuit, however, has rejected this sort of reverse-engineered method of determining fact of injury and calculating damages:

> [S]uch an aggregate determination is likely to result in an astronomical damages figure that does not accurately reflect the number of plaintiffs actually injured by defendants and that bears little or no relationship to the amount of economic harm actually caused by defendants. … Roughly estimating the gross damages to the class as a whole and only subsequently allowing for the processing of individual claims would inevitably alter defendants' substantive right to pay damages reflective of their actual liability.

McLaughlin, 522 F.3d at 231-33.

Plaintiffs also fail to explain how their proposed post-judgment proceedings would work. They do not have a plan for excluding from the jury's verdict any damages that would be paid to uninjured class members (equal to about 25-40% of the putative classes according to Boedeker's data), used car purchasers (which Boedeker admits are different), or vehicle lease holders (which Boedeker did not study at all). Nor do they describe how to allocate the "single monetary sum" to individual class members. *See* page 24 (Boedeker and Dr. Gans admitting they have not done any analysis of how to allocate any aggregate judgement). Plaintiffs "trial procedure" is no plan at all, and fails to comply with Rule 23. *See Ohio Pub. Employees Ret. System v. Fed. Home Loan Mortg. Corp*., 2018 WL 3861840, at *19 (N.D. Ohio Aug. 14, 2018) ("When a class plaintiff presents a damages model that is vague, indefinite, and unspecific, or simply asserts ... that there are unspecified 'tools' available to measure damages, the model amounts to 'no damages model at all,' and the class cannot be certified."); *In re ConAgra Foods, Inc*., 302 F.R.D. 537, 552 (C.D. Cal. 2014) ("Although the methodologies he describes may very well be capable of calculating damages in this action, [plaintiffs' economic expert] has made no showing that this is the case.").[30]

[30] Nor can plaintiffs leave such questions for after trial: "[t]he possibility of post-certification procedural tailoring does not attenuate the [court's] obligation to take a 'close look' at predominance when assessing the motion for certification." *See Petrobras*, 862 F.3d at 274; *see also Windham v. Am. Brands, Inc.*, 565

B. Individual Differences Predominate Regarding Whether Putative Class Members Incurred Any Alleged Benefit-Of-The-Bargain Damages.

"The Court previously held that Plaintiffs who sold their vehicles at an allegedly still-inflated value before a defect became public did not have valid claims for economic loss because they had suffered no damages." Opinion re Order No. 131 Issues, Dkt. 6028, at 11. Plaintiffs "who disposed of their vehicles before the recall could not have realized any 'diminished value' because they did not own the defective vehicles when the recalls were announced," and could not have benefit-of-the-bargain damages. *In re Gen. Motors LLC Ignition Switch Litig.*, 257 F. Supp. 3d 372, 403 (S.D.N.Y. 2017) (*"FACC MTD Opinion")*; *see also In re Gen. Motors LLC Ignition Switch Litig.*, 2017 WL 3443623, at *2 (S.D.N.Y. August 9, 2017). Nor could such plaintiffs have "lost time" by taking their vehicles in for recalls, since repairs were not available until after plaintiffs disposed of their vehicles.

Whether each putative class member has incurred any economic losses is an individual issue. Plaintiffs' proposed classes include all putative class members who "bought or leased" a vehicle "at some point during the time period July 10, 2009 through" the particular recall announcement at issue. Pls. Mot. at 1-12. However, "over 25% of the at-issue vehicles had multiple owners within each of the Bellwether states" between July 2009 and the date of each applicable recall. Ex. 22, 8/13/18 Hanssens Sur-Rebuttal Rpt. ¶ 23 & Ex. 14. Plaintiffs' proposed classes therefore over-include masses of persons who disposed of their vehicles—whether by resale or other means—before the 2014 recall announcements and who have no recoverable

F.2d 59, 70 (4th Cir. 1977) ("[W]here the court finds... that there are serious problems now appearing, it should not certify the class merely on the assurance of counsel that some solution will be found."); *Fort Worth Emps.' Ret. Fund v. J.P. Morgan Chase & Co.*, 301 F.R.D. 116, 142 (S.D.N.Y. 2014); *Sicav v. James Jun Wang*, 2015 WL 268855, at *6 (S.D.N.Y. Jan. 21, 2015).

economic losses under the law of this case, and thus no claims.[31] Section I.A.3.

C. Proving Alleged "Lost Time" Damages Is An Individual Issue.

Whether any plaintiff can recover lost time damages requires an individual analysis. Consistent with the Court's holding that "forty-one of the contested states limit lost time damages to lost income or earnings," Opinion re Order No. 131 Issues, Dkt. 6028, at 62. California, Missouri, and Texas do not allow "lost time" without lost income. *See* New GM's Summ. J. Memo. at 27-29.[32] None of plaintiffs' cases suggest that lost time can be recovered without lost income. Pls. Memo. at 32 n.27. Indeed, *Seymour v. House* explains that "a plaintiff claiming personal injuries may prove a resulting loss of time, **and a consequent loss of personal earnings or wages** as an item of special damages," and denies lost time damages where plaintiff could not show his "lost earnings." 305 S.W.2d 1, 3-5 (Mo. 1957) (emphasis added).

Whether any plaintiff lost income due to completing a recall repair is a classic individual fact issue. *First*, if a putative class member did not have the repairs performed, he or she cannot have lost time damages. Various named plaintiffs have no claim for lost time because they either disposed of their vehicles before the 2014 recalls (Kenneth Robinson, Christopher Tinen, and Lisa McClellan)[33] or chose not to have the repairs performed (Santiago Orosco, Deloris Hamilton,

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[31] All the claims at issue require proof of actual damages. New GM. Summ J. Memo. at 31-32. Even if some claims did not require actual damages, intra-class conflicts could arise if some putative class members could recover economic losses without proof of injury, but others had to prove actual damages.

[32] *E.g.*, *Dugas v. Starwood Hotels & Resorts Worldwide, Inc.*, 2016 WL 6523428, at *11 (S.D. Cal. Nov. 3, 2016); *Lueras v. BAC Home Loans Servicing, LP*, 163 Cal. Rptr. 3d 804, 829 (Cal. Ct. App. 2013); *Ford v. St. Louis Metro. Towing, L.C.*, 2010 WL 618491, at *13 (E.D. Mo. Feb. 18, 2010); *Messina v. Prather*, 42 S.W.3d 753, 764 (Mo. Ct. App. 2001); *Valley Nissan, Inc. v. Davila*, 133 S.W.3d 702, 713 (Tex. App. 2003); *Bossier Chrysler Dodge II, Inc. v. Rauschenberg*, 201 S.W. 3d 787, 810 (Tex. App. 2006), *rev'd in part on other grounds*, 238 S.W. 3d 376 (Tex. 2007).

[33] Ex. 49, 5/9/17 K. Robinson Dep. at 65:25-66:5; Ex. 52, 4/13/17 C. Tinen Dep. at 70:23-71:1; 95:13-96:1; Ex. 17, 5/4/17 L. McClellan Dep. at 106:3-22.

Gareebah Al-ghamdi, and Dawn Bacon).[34] New GM's Summ. J. Memo. at 26.[35] Other putative class members likewise have not had repairs performed, and determining who has is an individual issue. Ex. 54, 5/11/18 Manuel Reply Rpt. ¶ 32; *see also* Ex 14 4/20/18 Willig Rpt. ¶¶ 25-26.

Second, for putative class members who had their vehicles repaired, whether they lost earnings is an individual issue. New GM has the right to present evidence contesting the existence or amount of any lost income, including whether there was any mitigation of such lost income. *See* Ex. 14.C, 4/20/18 Willig Rpt. ¶¶ 53, 63. Whether each putative class member would have performed "household work" during the time their vehicle was repaired and the value of that work are additional individual questions. Opinion re Order No. 131 Issues, Dkt. 6028, at 75.

Third, whether each vehicle owner "lost time" because of the recall repair is an individual issue. Approximately 14-15% of vehicle owners had the recall repairs performed during the same dealership visit for unrelated repairs or routine service, as named plaintiff Kellie Cereceres did. Ex. 14.C, 4/20/18 Willig Rpt. ¶¶ 25-26, 43; Ex. 55, 12/18/17 K. Cereceres Dep. at 31:6-15, 52:22-53:16. Others dropped the vehicle off on the way to or from work; had a relative or friend take the vehicle in for repairs; or worked, shopped, or otherwise productively used their time during the repair. Ex. 14.C, 4/20/18 Willig Rpt. ¶ 61; Ex. 24.B, 4/18/18 Marais Supp. Rpt. ¶¶ 15-18.

Fourth, plaintiffs' expert Ernest Manuel cannot show class-wide lost time. Manuel's

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[34] Ex. 47, 3/9/17 S. Orosco Dep. at 115:1-118:6; Ex. 56, Delano Chevrolet Buick GMC Invoice at ELPLNTFF00011445; Ex. 39, 3/13/17 D. Hamilton Dep. at 114:5-25; Ex. 16, 5/5/17 G. Al-ghamdi Dep. at 30:5-7, 32:1-3; Ex. 57, 3/28/17 D. Bacon Dep. at 88:14-89:14; 91:7-17.

[35] Nor is ascertaining whether a putative class member had the recall performed a simple task. Orosco alleges that he had the recall performed, but he has no evidence to support that claim, and a 2014 service receipt from his dealership states that his daughter (who had brought the vehicle in for service) declined the recall repair. Ex. 47, 3/9/17 S. Orosco Dep. at 115:1-118:6; Ex. 56, Delano Chevrolet Buick GMC Invoice at ELPLNTFF00011445. Similar individual evidence would be necessary to determine which putative class members had the recall performed.

opinions should be excluded for the reasons in New GM's *Daubert* Motion. If considered, Manuel provides no method for distinguishing among class members who lost income from those who did not, or who had the recall performed as compared to those who did not, or who "lost" time from having the recall performed versus using that time for personal or productive reasons. Ex. 14.C, 4/20/18 Willig Rpt. ¶ 61; Ex. 24.B, 4/18/18 Marais Supp. Rpt. ¶¶ 15-18.

Moreover, Manuel uses averages of local wages, travel distances, and repair time to calculate lost time damages, but plaintiffs do not cite any case law allowing such averages. Pls. Memo. at 33. Instead, lost time damages are determined by looking at the wages or income that each particular individual supposedly lost. *See* New GM's Summ. J. Memo. at 27-29. Vehicle owners with zero wages—*e.g.*, those who are unemployed, retired, or students—have no lost time damages. *See also* Ex. 14.C, 4/20/18 Willig Rpt. ¶¶ 49-51, 64. New GM is entitled to present evidence on each putative class member's wage rate, travel distance, and time waiting while the recall repair was performed and cannot be deprived of this right through composites or averages. *See Dukes*, 564 U.S. at 367; *Newton*, 259 F.3d at 191-92; *Broussard*, 155 F.3d at 345.

These individual variations in the fact of injury and damages for lost time claims predominate over any supposed common issues, precluding certification of plaintiffs' claims for lost time damages. *See* authorities at page 16-17 & nn. 4-6.

D. For Texas, Plaintiffs' Class Definition Is Improper And Individual Proof Of Manifest Defect Predominates Over Any Alleged Common Issues.

A "manifest defect is a necessary element of a DTPA claim." *FACC MTD Opinion*, 257 F. Supp. at 452. Whether a person's vehicle manifested a defect can only be proven through an individual analysis, such as (1) if the vehicle owner alleges manifestation of a recall condition (as opposed to alleging some other issue unrelated to the recalls); (2) if the owner can prove a stall, or loss of power steering for the EPS Assist recall; and (3) if the plaintiff can prove that the stall or

power steering loss occurred because of recall condition instead of the various other reasons a vehicle might stall or lose power.

Because individual evidence is necessary, Texas and other courts deny certification where manifestation is required. *See Gen. Motors Corp. v. Garza*, 179 S.W.3d 76, 81-82 (Tex. App. 2005) (denying certification because whether and when vehicle owners experienced pulsation from brake defect and whether pulsations resulted from defect or another cause required individual evidence); *In re Ford Motor Co. Ignition Switch Prods. Liab. Litig.*, 174 F.R.D. 332 (E.D. La. 1997) (denying certification because whether alleged ignition switch defect causing fires had manifested in vehicles and whether fires were caused by the defect were individual issues); *Maloney v. Microsoft Corp.*, 2012 WL 715856, at *7 (D.N.J. Mar. 5, 2012); *Mahtani v. Wyeth*, 2011 WL 2609857, at *8 (D.N.J. June 30, 2011).[36]

Plaintiffs cannot avoid this result by defining their Texas classes to include only those "whose vehicles had an ignition switch related malfunction." Pls. Memo. at 9. *First*, "classes that are defined in terms of success on the merits—so-called 'fail-safe classes'—… are not properly defined". *Mullins v. Direct Digital, LLC*, 795 F.3d 654, 660 (7th Cir. 2015) (collecting cases). The Second Circuit has described ascertainability as "'allowing the Court to readily identify Class members without needing to resolve the merits of Plaintiffs' claims.'" *Petrobras*, 862 F.3d at 267 (quoting *Charron v. Pinnacle Grp. N.Y. LLC*, 269 F.R.D 221, 229 (S.D.N.Y. 2010)); *see also Eng-Hatcher v. Sprint Nextel Corp.*, 2009 WL 7311383, at *7 (S.D.N.Y. Nov. 13, 2009); MANUAL FOR COMPLEX LITIGATION § 21.222 (4th ed. 2018 update) ("The order defining the class should avoid

[36] *Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168, 1173 (9th Cir. 2010) indicated that "proof of manifestation of a defect is not a prerequisite to class certification," but that case involved Florida and Michigan consumer protection statutes, which this Court has concluded do not require a manifest defect. *TACC MTD Opinion*, 2016 WL 3920353, at *25-27; *FACC MTD Opinion*, 257 F. Supp. 3d at 423-24.

… terms that depend on resolution of the merits (e.g., persons who were discriminated against)"). Plaintiffs' Texas class definition impermissibly requires the Court to make a merits determination of manifest defect to ascertain who is in the class.

Second, plaintiffs cannot ignore individual differences among class members' claims through their class definition. In *Petrobras*, plaintiffs sought to certify a class of purchasers of a company's stock that did not trade on a United States exchange. 862 F.3d at 256-57. Under the securities laws, such purchasers could have a claim only if they purchased in a "domestic transaction." *Id.* Accordingly, the plaintiffs defined their class to include only those who purchased securities in "domestic transactions." *Id.* The Second Circuit held that whether securities had been purchased in a domestic transaction was a predominant individual fact question and vacated certification. *Id.* at 272-74. Similarly, in *In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig.*, plaintiffs defined their class to include only plaintiffs who owned property with wells that contained a detectable level of an allegedly hazardous chemical called MTBE. 209 F.R.D. 323, 335 (S.D.N.Y. 2002). Judge Scheindlin denied certification because of differences in "the level of contamination that the named plaintiffs allege" and the "task inherent in ascertaining the class members also renders this case unmanageable." *Id.* at 344, 348. Under *Petrobras* and *MTBE*, determining whether each putative class member experienced manifestation is a predominant individual issue, precluding certification.

Third, putative class members cannot use "self-identification" to avoid the lack of ascertainability or predominance. Pls. Memo. at 9. The "Rules Enabling Act forbids interpreting Rule 23 to abridge, enlarge or modify any substantive right." *Dukes*, 564 U.S. at 367. "A plaintiff in a typical case is not allowed to establish an element of a defendant's liability merely by completing an affidavit swearing the element is satisfied, and this should be no different for a class

action." *In re Bisphenol-A (BPA) Polycarbonate Plastic Prods. Liab. Litig.*, 2011 WL 6740338, at *8 (W.D. Mo. Dec. 22, 2011). Moreover, plaintiffs' proposed "self-identification" would abrogate New GM's right to discovery and to raise individual fact defenses against each class member, which the law does not allow. *Dukes*, 564 U.S. at 367; *Newton*, 259 F.3d at 191-92; *Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 319 (4th Cir. 2006).

The cases plaintiffs cite regarding "self-identification" do not support their position. Pls. Memo. at 9. Those cases conclude only that putative class members can submit declarations that they purchased a product; none use self-identification to satisfy merits requirements. Furthermore, unlike the straightforward task of stating whether a consumer purchased a product, determining whether a vehicle manifested any of the defects at issue is complex. Courts have refused to certify classes where putative class members would submit affidavits claiming their vehicle had a defect. *E.g.*, *In re Ford Motors Co. Vehicle Paint Litig.*, 182 F.R.D. 214 (E.D. La. 1998). Named plaintiffs' own circumstances confirm the need for individual inquiry and evidence. *See* page 12. Indeed, even where a vehicle owner alleges that a stall occurred, plaintiffs' putative expert Stevick admits that "moving stalls are something that can happen in all vehicles," and occur for a "variety of reasons," such as "running out of gas," "[b]ad spark plugs," a "[b]ad ignition cable," or a "[c]logged EGR valve." Ex. 58, 9/28/15 G. Stevick Dep. at 165:4-166:16. These named plaintiff differences and the need for individual-specific facts will be multiplied thousands-fold when considering all Texas putative class members, and thus predominate over any common questions.

II. INDIVIDUAL ISSUES REGARDING LIABILITY PREDOMINATE OVER ANY COMMON QUESTIONS.

A. Individual Differences In Reliance And Causation Predominate For Consumer Fraud And Common Law Fraud Claims.

Courts frequently deny certification because reliance and causation are individual questions permeating the class. In *McLaughlin v. American Tobacco Co.*, plaintiffs brought a

RICO fraud claim alleging that tobacco companies had misrepresented that "Light" cigarettes were healthier than regular cigarettes. 522 F.3d 215, 220 (2d Cir. 2008). The cigarette companies had engaged in a common course of conduct and used a uniform marketing campaign to misrepresent that Light cigarettes were healthier. *Id.* at 223. But "proof of misrepresentations—even widespread and uniform misrepresentation—only satisfies half of the equation; the other half, reliance on the misrepresentation, cannot be the subject of general proof." *Id.* "Individualized proof is needed to overcome the possibility that a member of the purported class purchased Lights for some reason other than the belief that Lights were a healthier alternative—for example, if a Lights smoker was unaware of that representation, preferred the taste of Lights, or chose Lights as an expression of personal style." *Id.* (collecting cases); *see also In re Initial Pub. Offerings Secs. Litig.*, 471 F.3d 24, 42 (2d Cir. 2006) ("establishing reliance individually by members of the class would defeat the requirement of Rule 23 that common questions of law or fact predominate over questions affecting only individual members"); *Moore v. PaineWebber*, 306 F.3d 1247, 1255 (2d Cir. 2002) (a common course of conduct could not establish predominance because "each plaintiff must prove that he or she personally received a material misrepresentation, and that his or her reliance on this misrepresentation was the proximate cause of his or her loss").

Individual differences in reliance likewise preclude certification in cases alleging that a vehicle manufacturer concealed defects. In *Ford Ignition Switch*, plaintiffs alleged a defective ignition switch found in 23-25 million vehicles had a propensity to short circuit and caused smoke or fires in over 2,000 vehicles, including when driving. 174 F.R.D. at 336-37. Plaintiffs moved to certify claims including fraudulent concealment and violation of state consumer fraud statutes. *Id.* at 338. *Ford Ignition Switch* denied certification because of individual differences in reliance and causation: "plaintiffs must persuade the finder of fact that disclosure of the allegedly

dangerous nature of the ignition switches would have affected the purchaser's decision whether to purchase the vehicle. Obviously, this determination could not be accurately and fairly made on a class-wide basis, especially when even under plaintiffs' version of the facts the chance of these ignition switches ever causing a fire is relatively slim." *Id.* at 346-47.

Similarly, in *Chin v. Chrysler Corp.*, plaintiffs alleged that Chrysler failed to disclose that its vehicle lines were equipped with a "dangerously defective" anti-lock braking system ("ABS") that could fail over time, leading to a NHTSA investigation resulting in Chrysler recalling the vehicles. 182 F.R.D. 448, 450-52 (D.N.J. 1998). *Chin* denied class certification because of individual issues including reliance and causation: "Plaintiffs must persuade the finder of fact that disclosure of the allegedly dangerous nature of the ABS systems would have affected the purchaser's decision whether to purchase the vehicle." *Id.* at 456; *see also, e.g.*, *Mazza v. Am. Honda Motor Co., Inc.*, 666 F.3d 581, 595-96 (9th Cir. 2012); *Ford Vehicle Paint*, 182 F.R.D. 214, 220; *Sanneman v. Chrysler*, 191 F.R.D. 441, 453 (E.D. Pa. 2000).

1. Reliance And Causation Are Individual Issues For Consumer Purchases Such As Vehicles.

Contrary to plaintiffs' argument, reliance cannot be presumed under the facts here. *McLaughlin* rejected using the presumption of reliance that applies to securities traded in efficient markets, *see Basic Inc. v. Levinson*, 485 U.S. 224 (1988), for consumer products such as cigarettes. 522 F.3d at 224. The Second Circuit explained "a financial transaction does not usually implicate the same type or degree of personal idiosyncratic choice as does a consumer purchase." *Id.* at 225 n.7; *see also* 1 MCLAUGHLIN ON CLASS ACTIONS § 5:55 (14th ed. 2017). This Court's opinion in *Dandong v. Pinnacle Performance Ltd*. involved the purchase of financial instruments and quoted this statement from *McLaughlin*. 2013 WL 5658790, at *9 (S.D.N.Y. Oct. 17, 2013) (Furman, J.) (emphasis added); Pls. Memo. at 25. Plaintiffs also cite *Moore*, 306 F.3d at 1253, Pls. Memo. at

25, but *McLaughlin* explains that reliance is an individual issue that predominates even where there are uniform misrepresentations if putative class members had diverse reasons for buying a product, 522 F.3d at 223.

Mirroring *McLaughlin*, cases involving allegedly concealed vehicle defects have consistently rejected presumptions of reliance or arguments that reliance can be shown through common evidence. *E.g.*, *Mazza*, 666 F.3d at 596 (rejecting presumption of reliance where putative class members "were exposed to quite disparate information from various representatives of the defendant"); *Ford Vehicle Paint*, 182 F.R.D. at 220-21 (undertaking state law analysis and determining "that the vast majority of states have never adopted a rule allowing reliance to be presumed in common law fraud cases, and some states have expressly rejected such a proposition"); *Chin*, 182 F.R.D. at 452.

2. Each Bellwether State Requires Proof Of Reliance Or Causation For Plaintiffs' Consumer Fraud And Common Law Fraud Claims.

Plaintiffs' consumer protection and common law fraud claims in all three bellwether states require individual proof of reliance and causation, and plaintiffs' Missouri MPA claim requires individual proof of causation. Contrary to plaintiffs' arguments, reliance or causation requirements cannot be presumed or shown through common evidence.

a. California Requires Individual Proof Of Reliance.

i. Reliance Is Required For Plaintiffs' UCL Claims.

Plaintiffs must prove reliance to recover under the UCL. Before November 2, 2004, UCL claims did not require individual proof of reliance, injury, or damages. *Hall v. Time Inc.*, 158 Cal. App. 4th 847, 852 (2008). On that date, Proposition 64 amended the UCL to require that plaintiffs prove they have "suffered injury in fact" and "lost money or property as a result of such unfair competition." *Id.*

Proposition 64's "language imposes an actual reliance requirement on plaintiffs prosecuting a private enforcement action under the UCL's fraud prong." *In re Tobacco II Cases*, 46 Cal. 4th 298, 306, 326 (2009). This reliance requirement applies to all allegations based in fraud, regardless of whether the plaintiff pleads misrepresentations or omissions.[37] *Avritt v. Reliastar Life Ins. Co.*, 615 F.3d 1203, 1034-35 (8th Cir. 2010) (reliance required for UCL claims alleging that defendant did not disclose its method for crediting interest to annuity policies); *Doe v. Successfulmatch.com*, 2014 WL 1494347, at *2, 5 (N.D. Cal. Apr. 16, 2014) (where "critical allegation is that Defendant fraudulently and deceptively failed to disclose that profiles" created on one dating site could be viewed on others, plaintiff was required to prove reliance on omissions to state UCL claim).[38]

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[37] Reliance is required regardless of the UCL prong at issue: "A consumer's burden of pleading causation in a UCL action should hinge on the nature of the alleged wrongdoing rather than the specific prong of the UCL the consumer invokes." *Durell v. Sharp Healthcare*, 183 Cal. App. 4th 1350, 1363 (2010); *Sud v. Costco Wholesale Corp.*, 229 F. Supp. 3d 1075, 1082-83 (N.D. Cal. 2017); *Chang v. Fage USA Dairy Industry, Inc.*, 2016 WL 5415678, *7 n.8 (E.D.N.Y. 2016); *Laster v. T–Mobile USA, Inc.*, 2009 WL 4842801, at *5 n. 1 (S.D. Cal. Dec. 14, 2009), *vacated on other grounds*, 466 F. App'x 613 (9th Cir. 2012).

[38] *See also Myers v. BMW of N. Am., LLC*, 2016 WL 5897740, *6 (N.D. Cal. Oct. 11, 2016) (plaintiff was required to allege actual reliance on omissions for UCL claims based on defective vehicle key remote); *Backhaut v. Apple, Inc.*, 74 F. Supp. 3d 1033, 1047-48 (N.D. Cal. 2014); *In re Yahoo! Inc. Customer Data Sec. Breach Litig.*, 2017 WL 3727318, *29-30 (N.D. Cal. Aug. 30, 2017); *Stewart v. Electrolux Home Prods., Inc.*, 304 F. Supp. 3d 894, 910 (E.D. Cal. 2018).

Plaintiffs' claim that reliance and causation are not required unless the UCL claim is based on misrepresentations or false advertising is legally incorrect. Pls. Memo. at 19. Plaintiffs cite *Medrazo v. Honda of N. Hollywood*, 205 Cal. App. 4th 1, 12 (2012), but the California appellate court subsequently admitted that it "went too far in *Medrazo*" and confirmed that reliance is required for fraud-based allegations under the UCL. *Veera v. Banana Republic, LLC*, 6 Cal. App. 5th 907, 919 (2016). Plaintiffs' only other authority is a district court case involving a "strict liability" statute rather than fraud. *Galvan v. KDI Distribution Inc.*, 2011 WL 5116585, at *9 (C.D. Cal. Oct. 25, 2011). Plaintiffs' claims here are paradigmatic fraud claims alleging that New GM omitted material information. *E.g.*, 5ACC ¶¶ 14-18.

ii. Absent Class Members Need To Prove Individual Reliance For UCL Claims.

Plaintiffs' assertion that the UCL does not require individual proof of causation and injury for absent class members likewise is incorrect. Pls. Memo. at 19. While *Tobacco II* held in a California state court class action that absent class members need not prove individual reliance to have statutory standing in the context of tobacco companies' decades-long advertising campaign, 46 Cal. 4th at 315-16, that ruling does not support plaintiffs' argument.

First, *Tobacco II* addressed whether Proposition 64's **standing** requirements apply to absent class members, not what absent class members must prove on the merits. *E.g.*, *Tobacco II*, 46 Cal. 4th at 306 (stating "that standing requirements are applicable only to the class representations"); *id.* at 315-16, 319; *see also Cohen v. DIRECTV, Inc.*, 178 Cal. App. 4th 966, 980-81 (2009) (*Tobacco II's* ruling regarding absent class members was "for purposes of standing"). *Tobacco II* compared the UCL's standing requirement to Article III standing. 46 Cal. 4th at 319. Under Article III, "standing in no way depends on the merits of the plaintiff's" claim. *Warth v. Seldin*, 422 U.S. 490, 500 (1975).

As the California appellate court held in *Cohen*, standing to bring a UCL claim is separate from whether individual absent class members can succeed on the claim's merits, which is relevant for determining whether the certification requirements of commonality and predominance are satisfied. 178 Cal. App. 4th at 981. "We see no language in *Tobacco II* which suggests to us that the Supreme Court intended our state's trial courts to dispatch with an examination of commonality when addressing a motion for class certification." *Id.*

Cohen affirmed denial of class certification in a case under the UCL (and CLRA) because of individual difference in reliance among absent class members: "the trial court's concerns that the UCL and the CLRA claims … would involve factual questions associated with their reliance on DIRECTV's alleged false representations was a proper criterion for the court's consideration when examining 'commonality' …, even after *Tobacco II*." *Id.*; *see also Davis-Miller v. Auto. Club of S. Cal.*, 201 Cal. App. 4th 106, 123-24 (2011); *Tucker v. Pac. Bell Mobile Servs.*, 208 Cal. App. 4th 201, 227-28 (2012).[39]

Second, plaintiffs' interpretation of *Tobacco II* violates Article III standing requirements and should not govern in federal court. To "the extent that *Tobacco II* holds that a single injured plaintiff may bring a class action on behalf of a group of individuals who may not have had a cause of action themselves, it is inconsistent with the doctrine of standing as applied by federal courts." *Avritt*, 615 F.3d at 1034. A "named plaintiff cannot represent a class of persons who lack the ability to bring a suit themselves." *Id.* The Second Circuit follows the same rule that a class "must therefore be defined in such a way that anyone within it would have standing." *Denney*, 443 F.3d

[39] *See also Knapp v. AT&T Wireless Servs., Inc.*, 195 Cal. App. 4th 932, 945 (Cal. App. Ct. 2011); *Santamarina v. Sears Roebuck & Co.*, 2016 WL 1714226, at *8 (Cal. App. Ct. Apr. 26, 2016); *Avritt*, 615 F.3d at 1033-34; *Campion v. Old Republic Home Prot. Co., Inc.*, 272 F.R.D. 517, 535 (S.D. Cal. 2011); *Tucker*, 208 Cal. App. 4th at 227-28; *Jones v. ConAgra Foods, Inc.*, 2014 WL 2702726, at *14 (N.D. Cal. June 13, 2014); *Hobbs v. Brother Int'l Corp.*, 2016 WL 4734394, *3-6 & n.1 (C.D. Cal. Sept. 8, 2016).

at 263-64.[40] Whatever *Tobacco II's* impact on class actions in California state court, federal courts must evaluate whether absent class members can prove a claim, which requires proof of actual reliance under the UCL.

Third, *Tobacco II* involved an "extensive and long-term advertising" campaign by tobacco companies uniformly denying that cigarette smoking caused diseases such that all smokers could be presumed to have received that message. 46 Cal. 4th at 327-28. Courts have distinguished *Tobacco II* where those conditions have not been met. In *Mazza*, plaintiffs brought UCL claims alleging that Honda had misrepresented and omitted information about its vehicles' braking system. 666 F.3d at 585, 587. Plaintiffs relied on *Tobacco II* to argue that differences in reliance should not be considered for absent class members, but the Ninth Circuit "agree[d] with Honda's contentions that the misrepresentations at issue here do not justify a presumption of reliance." *Id.* at 595. "*Tobacco II's* holding was in the context of a 'decades-long' tobacco advertising campaign where there was little doubt that almost every class member had been exposed to defendants' misleading statements, and defendants were not just denying the truth but representing the opposite." *Id.* at 596. Because not all Honda buyers might have been exposed to the advertising campaign, *Tobacco II's* presumption did not apply. *Id.*

Mazza's holding expressly applies to alleged omissions as well as misrepresentations. "For everyone in the class to have been exposed to the omissions … it is necessary for everyone in the class to have viewed the allegedly misleading advertising." *Id.*; *see also Philips v. Ford Motor*

[40] *See also Cummings v. Connell*, 402 F.3d 936, 944 (9th Cir. 2005); *Williams v. Mohawk Indus. Inc.*, 568 F.3d 1350, 1360 (11th Cir. 2009); *Oshana v. Coca-Cola Co.*, 472 F.3d 506, 514-15 (7th Cir. 2006); 1 MCLAUGHLIN ON CLASS ACTIONS § 5:59 (14th ed. 2017) ("Moreover, in California state court, absent class members need not satisfy the UCL's standing requirements, including 'injury in fact' and reliance. In federal court, however, standing principles of constitutional dimension require that only persons who have suffered injury and otherwise have a UCL claim be included in a class.").

Co., 2016 WL 7428810, at *15 (N.D. Cal. Dec. 22, 2016) (rejecting plaintiffs' argument that *Mazza* was inapplicable to claims based on omissions: "the holding in *Mazza* cannot be so limited; *Mazza* itself involved alleged omissions as well as allegedly misleading advertising").[41]

As explained in Section II.A.3.a., expert evidence and the named plaintiff's own testimony establish that they were exposed to a variety of different advertising and information, with many never seeing any New GM advertising or representations at all. Under these facts, *Tobacco II* cannot be used to avoid analyzing individual issues of causation and reliance.[42]

b. California Requires Individual Proof Of Reliance For CLRA And Common Law Fraud Claims.

Plaintiffs do not dispute that reliance is required under the CLRA and for common law fraud. *E.g.*, *Princess Cruise Lines, Ltd. v. Superior Court*, 179 Cal. App. 4th 36, 46 (2009); *Durell v. Sharp Healthcare*, 183 Cal. App. 4th 1350, 1362-63, 1366-67 (2010); *Mirkin v. Wasserman*, 858 P.2d 568, 573-74 (Cal. 1993).

Plaintiffs instead seek to avoid individual reliance determinations by claiming there is an

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[41] *See also Martinez v. Welk Group, Inc.*, 2012 WL 2888536, at *6 (S.D. Cal. July 13, 2012) (denying certification based on a class-wide omission because "individual inquiries would be necessary to determine what Welk represented or omitted to each class member. Therefore, reliance may not be presumed for all putative class members, whether via an alleged misrepresentation or an alleged omission."); *Lucas v. Breg, Inc.*, 212 F. Supp. 3d 950, 969 (S.D. Cal. 2016); *Rodman v. Safeway, Inc.*, 2014 WL 988992, at *11 (N.D. Cal. Mar. 10, 2014); *In re First Am. Home Buyers Prot. Corp. Class Action Litig.*, 313 F.R.D. 578, 605-06 (S.D. Cal. 2016).

[42] Plaintiffs' assertion that relief under the UCL is available without individual proof of deception, reliance, and injury fails under this state and federal case law. Pls. Memo. at 17-18. *Tobacco II* holds that after Proposition 64, plaintiffs must prove actual reliance. As for absent class members, cases such as *Stearns v. Ticketmaster Corp.*, 655 F.3d 1013, 1021 (9th Cir. 2011), *Keegan v. Am. Honda Motor Co., Inc.*, 284 F.R.D. 504 (C.D. Cal. 2012), and *Parkinson v. Hyundai Motor Am.*, 258 F.R.D. 580 (C.D. Cal. 2008), did not consider how California state cases have held that *Tobacco II* applies only to standing and does not apply in the absence of a decades-long, extensive advertising campaign. Moreover, *Stearns* recognizes that individual issues would predominate in a UCL claim if class members "were exposed to quite disparate information from various representatives of the defendant," which is the case here as explained in Section II.A.3.a. 655 F.3d at 1020.

"inference" of reliance if the omissions are material, but this argument fails. Pls. Memo. at 18, 24-25. *First*, the California Supreme Court in *Mirkin* rejected plaintiffs' argument that reliance could be shown by pleading "material misrepresentations to the class, plus action consistent with reliance thereon." 858 P.2d at 575. Instead, an inference or reliance arises only "*when the same material misrepresentations have actually been communicated to each member of a class . . . .*" *Id.* (emphasis in original). *Mirkin* clarified that the cases plaintiffs cite for a presumption of reliance, such as *Vasquez v. Superior Court*, 4 Cal. 3d 800 (1971), and *Occidental Land, Inc. v. Superior Court*, 18 Cal. 3d 355 (1976), Pls. Memo. at 24-25, apply only where uniform misrepresentations are made to all putative class members.[43]

In accord with *Mirkin*, cases applying California law have rejected presumptions or inferences of reliance for either omissions or misrepresentations where, as here, consumers received disparate information. *See, e.g.*, *Mazza*, 666 F.3d at 587, 595-96 (rejecting presumption of reliance for CLRA as well as UCL claims where plaintiffs were exposed to disparate information and omissions); *Campion*, 272 F.R.D. at 536 ("Where a class of consumers may have seen all, some, or none of the advertisements that form the basis of a plaintiff's suit, an inference of common reliance or liability is not permitted. Furthermore, courts are reticent to extend an inference of reliance to 'mixed' cases, i.e. those involving allegations of material omissions and

[43] *Mirkin's* holding likewise applies to other cases plaintiffs cite involving uniform misrepresentations concerning a financial investment, where profit is the only reason for the purchase. *E.g.*, *Wilner v. Sunset Life Ins. Co.*, 78 Cal. App. 4th 952, 960-63 (2000) (defendant defrauded plaintiffs into reducing cash or cumulative value of life insurance policies through common misrepresentations); *Danzig v. Jack Grynberg & Assocs.*, 161 Cal. App. 3d 1128, 1133-34 (1984) (common misrepresentations made to defraud putative class members into investing in limited partnership interests); *Mass. Mutual Life Ins. Co. v. Superior Court*, 97 Cal. App. 4th 1282 (2002) (case concerning uniform misrepresentation regarding guaranteed financial return on insurance policy). Indeed, *Mass. Mutual* confirms that "an inference will not arise where the record will not permit it" such as where individuals would have varying views on whether they believed the defendant's misrepresentations, were misled by them, or have different views on materiality. *Id.* at 1294-95 (discussing *Caro v. Procter & Gamble Co.*, 18 Cal. App. 4th 644 (1993)).

misrepresentations.").[44]

Second, reliance cannot be inferred where the evidence shows different reasons for purchase. In the *In re Vioxx Class Cases*, plaintiffs alleged that defendant concealed adverse health risks in the drug Vioxx, and that they would not have purchased Vioxx had they known of these risks. 180 Cal. App. 4th 116, 122-23 (Cal. App. Ct. 2009). The California appellate court held that a class-wide inference of reliance and materiality could not be presumed for CLRA claims, despite plaintiffs' arguments that "there can be nothing more material than an increased risk of death." *Id.* at 133. The court relied on evidence such as that some plaintiffs would use Vioxx if it were still available, patients received information from a variety of sources which could override reliance on the defendant's statements, and each consumer had his or her own particular preferences and characteristics. *Id.* at 134; *see also Johnson v. Harley-Davidson Motor Co. Grp. LLC*, 285 F.R.D. 573, 576, 581 (E.D. Cal. 2012) (denying certification of UCL and CLRA claims based on engine heat presenting an unreasonable risk of burns where "there are numerous individualized issues as to whether the reasonable consumer purchasing one of Defendants' motorcycles would find the excessive heat material"); *Webb v. Carter's, Inc.*, 272 F.R.D. 489, 502-03 (C.D. Cal. 2011) (denying certification of UCL and CLRA claims that defendant's toxic clothing injured children because "a consumer's response to a warning will vary based on many factors including, but not limited to, the perceived likelihood of severe or moderate injury, whether the warning provides information that is substantially new, whether the information conflicts with

[44] *See also Gonzalez v. Proctor & Gamble Co.*, 247 F.R.D. 616, 624 (S.D. Cal. 2007); *Davis-Miller*, 201 Cal. App. 4th at 125-26; *Tucker*, 208 Cal. App. 4th at 222-25; *Sotelo v. MediaNews Grp., Inc.*, 207 Cal. App. 4th 639, 656 (2012); *Knapp v. AT&T Wireless Services, Inc.*, 195 Cal. App. 4th 932, 945-46 (2011); *Friedman v. Old Republic Home Prot. Co., Inc.*, 2015 WL 9948093, at *4 (C.D. Cal. May 18, 2015); *In re First Am. Home Buyers Prot. Corp. Class Action Litig.*, 313 F.R.D. 578, 604-05 (S.D. Cal. Feb. 22, 2016); *Darisse v. Nest Labs, Inc.*, 2016 WL 4385849, at *6 (N.D. Cal. Aug. 15, 2016).

his/her previous experience"); *Reynante v. Toyota Motor Sales USA, Inc.*, 2018 WL 329569, at *5 (Cal. App. Ct. Jan. 9, 2018) (even if a customer was misled by Prius's fuel calculator, "this does not necessarily mean that the calculation caused the customer to purchase the vehicle," and "[i]ndividual inquiry would be necessary to determine whether it was the fuel calculator that induced his purchase").[45] Courts also have denied certification because putative class members may have considered information from third party sources. *E.g.*, *Howard v. GC Servs., Inc.*, 2015 WL 5163328, at *9-10 (Cal. App. Ct. Sept. 3, 2015) (class-wide reliance on misrepresentations in debt collection letters could not be presumed where consumer received communications from a variety of sources); *Nunes v. Toshiba Am. Info. Sys., Inc.*, 2016 WL 5920345, at *8 (C.D. Cal. June 23, 2016) (issues of materiality required individualized inquiry because evidence demonstrated that consumers purchased televisions "based on a variety of factors, including their own research, speaking with sales people, comparison shopping, or recommendations from family, friends, or co-workers"). As described in Section II.A.3.b., buying a vehicle is one of the most idiosyncratic purchases a consumer can make.[46]

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[45] *See also Fine v. ConAgra Foods, Inc.*, 2010 WL 3632469, at *1, 4 (C.D. Cal Aug. 26, 2010) (denying certification of UCL and CLRA claims based on harmful ingredient in microwave popcorn where "class that would likely include people with varying rationales behind their purchases—many who would, as Defendant points out, purchase popcorn based on factors like flavor or brand"); *Safaie v. Jacuzzi Whirlpool Bath, Inc.*, 2008 WL 4868653, at *8-9 (Cal. App. Ct. Nov. 12, 2008); *Allen v. DaimlerChrysler Motors Co. LLC*, 2007 WL 2774440, at *8 (Cal. App. Ct. Sept. 25, 2007); *Fairbanks v. Farmers New World Life Ins. Co.*, 197 Cal. App. 4th 544, 565 (2011); *Withers v. eHarmony, Inc.*, 2010 WL 11520198, at *5 (C.D. Cal. June 2, 2010); *Broadbent v. Internet Direct Response*, 2011 WL 13217499, at *4-5 (C.D. Cal. Feb. 2, 2011); *Thurston v. Bear Naked, Inc.*, 2013 WL 5664985, at *8 (S.D. Cal. July 30, 2012); *Baghdasarian v. Amazon.com, Inc.*, 2009 WL 4823368, at *6 (C.D. Cal. Dec. 9, 2009), *aff'd*, 458 F. App'x 622 (9th Cir. 2011); *Deitz v. Comcast Corp.*, 2007 WL 2015440, at *6-7 (N.D. Cal. July 11, 2007); *Algarin v. Maybelline, LLC*, 300 F.R.D. 444, 457 (S.D. Cal. 2014); *Chow v. Neutrogena Corp.*, 2013 WL 5629777, at *2 (C.D. Cal. Jan. 22, 2013); 1 MCLAUGHLIN ON CLASS ACTIONS § 5:55 (14th ed. 2017) ("The existence of individualized issues of causation, reliance, and knowledge will preclude certification where class members' decisions to enter into a transaction with defendant could be explained by considerations other than reliance on defendant's alleged misrepresentations.").

[46] Plaintiffs' inference of reliance cases are inapplicable and distinguishable, as they involved a uniform misrepresentation made to all class members where the evidence did not show idiosyncratic reasons for the

In sum, California law regarding reliance and causation is similar to the Second Circuit. Where, as here, putative class members received disparate information about a product or might purchase the product for different reasons, reliance and causation require individual proof.

c. California Requires Proof That Each Plaintiff Would Have Been Aware Of The Disclosure And Behaved Differently To Prove Reliance On Omissions.

Under California law "to show actual reliance, whether based on an affirmative misrepresentation or a material omission, Plaintiffs must demonstrate that the misrepresentation or omission was an immediate cause of the injury-causing conduct." *Sud v. Costco Wholesale Corp.*, 229 F. Supp. 3d 1075, 1083 (N.D. Cal. 2017) (collecting cases). Plaintiffs must "show that the misrepresentation or omission was a substantial factor in their decision making process." *Id.*; *see also Rojas-Lozano v. Google, Inc.*, 159 F. Supp. 3d 1101 (N.D. Cal. 2016).

To show reliance on omissions, each putative class member in California must prove that

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purchase. *E.g.*, *Edwards v. Ford Motor Co.*, 603 F. App'x 538 (9th Cir. 2015) (short, summary decision that does not consider what representations consumers saw or whether they had differing motivations for their purchases); *Stearns*, 655 F.3d at 1022-24 (defendant made uniform misrepresentation on website and decision acknowledges that if motivations for accepting website offer differed then class certification may not have been appropriate); *Keegan*, 284 F.R.D. at 531 (failing to consider whether consumer received different misrepresentations or have different motivations for purchase; notably, holding that the alleged omission could be material only if it was likely to manifest: "to show that defendants' omissions was material, plaintiffs must demonstrate that the alleged design defect is likely to manifest in premature tire wear in class vehicle of the type pled in the complaint" because "only with such proof" could a jury "find that defendants' omission was material"); *Guido v. L'Oreal, USA, Inc.*, 2013 WL 3353857, at *11, 16 (C.D. Cal. July 1, 2013) (case involved uniform information and omissions being provided to the class through product packaging, where court did not consider different motivations for purchasing product; courts denied certification of California class because of lack of evidence "demonstrating a gap between the true market price of Serum and its historical market price"); *Yamada v. Nobel Biocare Holding AG*, 275 F.R.D. 573, 578 (C.D. Cal. 2011) (defendant made identical misrepresentations and omissions to all class members regarding dental implants, and no rational class member would have purchased dental implants given that implants failed and caused bone damage). Indeed, one of plaintiffs' cases involved a class based on a defendant misrepresenting that its juice provided health benefits where the court decertified the class based on differences among consumer motivations in purchasing juice. *In re POM Wonderful LLC Mktg. & Sales Pracs. Litig.*, 2014 WL 1225184, at *4 (C.D. Cal. Mar. 25, 2014) ("where, as here, consumers buy a product for myriad reasons, damages resulting from the allegations misrepresentations will not possibly be uniform or amenable to class proof"); *see also id.* at *5-6 & nn. 6, 9.

(1) "had the omitted information been disclosed one would have been aware of it" and (2) he or she would have "behaved differently." *Mirkin*, 858 P.2d at 574; *see also Webb*, 272 F.R.D. at 502; *Sud*, 229 F. Supp. at 1083; *Hindsman v. Gen. Motors LLC*, 2018 WL 2463113, at *13 (N.D. Cal. June 1, 2018); *Myers v. BMW of N. Am., LLC*, 2016 WL 5897740, at *6 (N.D. Cal. 2016).

d. Missouri Requires Individual Proof Of Causation For MMPA Claims And Reliance For Common Law Fraud.

Under the MMPA, each plaintiff and putative class member must prove he or she "suffers an ascertainable loss of money or property … as a result of" a practice prohibited by the MMPA. Mo. Rev. Stat. § 407.025.1. "[C]ausation is a necessary element of an MMPA claim," as is injury. *Owen v. Gen. Motors Corp.*, 533 F.3d 913, 922 (8th Cir. 2008); *White v. Just Born, Inc.*, 2018 WL 3748405, at *3 (W.D. Mo. Aug., 7, 2018).

"A plaintiff who 'did not care' about an allegedly misleading marketing practice … was not injured by the practice" and thus cannot show causation or injury. *Bratton Hershey Co.*, 2018 WL 934899, at *2 (W.D. Mo. Feb. 1, 2018); *see also White*, 2018 WL 3748405, at *3. In reversing certification based on Coca-Cola's concealment of saccharin in its fountain drinks, the Missouri Supreme Court held that those who would continue to drink Diet Coke "if they knew it contained saccharin … ***suffered no injury***." *State ex rel. Coca-Cola Co. v. Nixon*, 249 S.W.3d 855, 862 (Mo. 2008) (emphasis in original). Similarly, summary judgment was granted in a case alleging Old GM concealed a vehicle defect where plaintiffs did not offer "any evidence that they would not have purchased their Tahoe had GM told them of the potential defect." *Owen*, 2007 WL 1655760, at *5, *aff'd*, 533 F.3d 913; *see also Bratton*, 2018 WL 934899, at *2. As *Coca-Cola* demonstrates, Missouri courts have rejected MMPA certification because of individual issues in proving causation and injury. *See also BPA*, 2011 WL 6740338, at *1-2 (denying certification because whether class members could show they would not have bought cups if they had known

of presence of BPA was an individual issue).

Plaintiffs argue that reliance is not required under the MMPA, but ignore that individual causation and injury must be proven for each plaintiff. Pls. Memo. at 21-22. Similarly, in the cases plaintiffs cite certifying MMPA classes, the courts did not consider, and the defendants apparently did not argue, the need for individual analysis of causation and injury under the Missouri Supreme Court's *Coca-Cola* decision—which controls and governs. *Id.* at 21-22.[47] That decision is now Missouri law, and requires individual proof, plaintiff by plaintiff.

For common law fraudulent concealment, Missouri requires proof of reliance, as well as individual causation and damages—again on an individual, plaintiff-by-plaintiff basis. *Triggs v. Risinger*, 772 S.W.2d 381, 384 (Mo. Ct. App. 1989); *Prof'l Laundry Mgmt. Sys., Inc. v. Aquatic Techs., Inc.*, 109 S.W.3d 200, 206 (Mo. Ct. App. 2003). The "test of whether a plaintiff relied upon a misrepresentation is simply whether the representation was a material factor influencing final action." *Stein v. Novus Equities Co.*, 284 S.W.3d 597, 603 (Mo. Ct. App. 2009); *Grossoeheme v. Cordell*, 904 S.W.2d 392, 397 (Mo. Ct. App. 1995).

While plaintiffs claim that reliance can be presumed based on materiality, they cite only California and Second Circuit case law for that proposition. Pls. Memo. at 24-25. Not only are those cases distinguishable for the reasons described in Sections II.A.1 and II.A.II.A.2.a-b., but under Missouri law "fraud is never presumed." *Evergreen Nat'l Corp. v. Carr,* 129 S.W.3d 492, 496 (Mo. Ct. App. 2004); *Prof'l Laundry*, 109 S.W.3d at 206.

e. Texas Requires Individual Proof Of Causation And Reliance For DTPA Claims.

[47] To the extent *Plubell v. Merck & Co., Inc.*, can be interpreted as suggesting that causation or injury need not be proven under the MMPA, it contradicts the Missouri Supreme Court decision in *Coca-Cola* (as well as subsequent case law) and should not be followed. 289 S.W.3d 707, 714 (Mo. Ct. App. 2009).

"Generally, to prevail on a DTPA claim, a plaintiff must establish that: . . . the defendant engaged in false, misleading, deceptive, or unconscionable acts upon which the plaintiff relied to his detriment." *Moore v. Panini Am.*, 2016 WL 7163899, at *3 (Tex App. Nov. 7, 2016); *Cruz v. Andrews Restoration, Inc.*, 364 S.W.3d 817, 823-24 (Tex. 2012) (under DTPA, a "consumer loses without proof that he relied to his detriment on the deceptive act"); *Henry Schein, Inc. v. Stromboe*, 102 S.W.3d 675 (Tex. 2002); *Peltier Enters. v. Hilton*, 51 S.W.3d 616, 623-24 (Tex. App. 2000) (under unconscionability prong of DTPA there "must be a showing of what the consumer could have or would have done if he had known about the information").

Reliance and causation under the DTPA cannot be presumed. *McManus v. Fleetwood Enters., Inc.*, 320 F.3d 545, 549 (5th Cir. 2003). The Texas Supreme Court held in a DTPA case that "the 20,000 class members in the present case are held to the same standards of proof of reliance—and for that matter all the other elements of their claims—that they would be required to meet if each sued individually." *Henry Schein*, 102 S.W.3d at 693. The defendants had made "substantially similar" misrepresentations to the class, yet the Texas Supreme Court reversed certification because common evidence regarding reliance was lacking. *Id.* at 686-87, 694. The court explained that "there is, for example, significant evidence that purchasers relied on recommendations from colleagues and others rather than any statements made directly or indirectly by Schein" in holding that individual issues of reliance predominated. *Id.* at 694.

Later Texas cases confirm that while *Henry Schein* "did not entirely preclude class actions in which reliance was an issue, ... it did make such cases a near-impossibility." *Fid. & Guar. Life Ins. Co. v. Pina*, 165 S.W.3d 416, 423 (Tex. App. 2005); *Tex. S. Rentals, Inc. v. Gomez*, 267 S.W.3d 228, 237 (Tex. App. 2008) (same). Even where a defendant made material, uniform representations, Texas courts deny certification where reliance is required. *Pina*, 165 S.W.3d at

424-25; *Ford Motor Co. v. Ocanas*, 138 S.W.3d 447, 450 (Tex. App. 2004).[48]

Under Texas law, reliance "is a thought process or one step in a larger thought process; it can be shown only by demonstrating the person's thought processes in reaching the decision." *Pina*, 165 S.W.3d at 423. Reliance cannot be proven without showing "what the consumer could have or would have done if he had known about the information." *Peltier*, 51 S.W.3d at 623-24. Texas courts regularly reject DTPA or fraud claims where plaintiffs rely on third party statements. *See Henry Schein*, 102 S.W.3d at 694; *McLaughlin v. Northstar Drillings Techs., Inc.*, 138 S.W.3d 24, 30 (Tex. App. 2004); *Bowles v. Mars, Inc.*, 2015 WL 3629717, at *4 (S.D. Tex. June 10, 2015).

3. The Individual Factual Determinations Required For Reliance And Causation Predominate Over Any Common Issues.

a. Reliance And Causation Cannot Be Presumed.

Under the facts of this case, reliance and causation cannot be presumed under federal law, California law (under *Tobacco II* or otherwise), or any other bellwether states' laws because the proposed classes did not receive uniform representations or omissions and (as described in the next subsection) vehicle purchases are based on idiosyncratic and widely varying reasons. Most plaintiffs—including Santiago Orosco, David Padilla, Deloris Hamilton, Cynthia Hawkins,

[48] Plaintiffs do not cite any Texas cases holding that reliance can be inferred, instead citing two California federal district court cases. Pls. Opp. at 23. Remarkably, *In re ConAgra Foods*, cites *Henry Schein* to conclude that reliance and causation can be proven class-wide when appropriate, even though the Texas appellate courts concluded that *Henry Schein* makes such proof a "near-impossibility." 90 F. Supp. 3d 919, 1016-17 (C.D. Cal. 2015). *ConAgra's* summary analysis does not cite any other Texas case law regarding reliance, and in particular does not cite any authority suggesting—notwithstanding cases such as *Pina* and *Ocanas*—that Texas infers reliance from materiality. *Id.*

Brazil v. Dell Inc., a choice-of-law case which also struck plaintiffs' class allegations, conducted a similarly cursory review of Texas law. 585 F. Supp. 2d 1158, 1164-65 (N.D. Cal. 2008). Moreover, *Brazil* concluded that Texas and California law were similar in part because "California courts will reject a presumption of reliance where the same omission has not been communicated to each class member." *Id.* at 1165. *Brazil* thus reinforces that California would not recognize a presumption of reliance under the facts here. And neither *Brazil* nor *ConAgra* is a substitute for Texas law as applied by Texas courts.

Kenneth Robinson, Mario Stefano, Gareebah Al-ghamdi, Dawn Fuller, Michael Graciano, and Lisa McClellan—testified they did not see or did not rely on New GM advertisements or materials before buying their vehicles. Ex. D. The few who allege they did were exposed to a wide variety of materials from New GM that varied by individual plaintiff. *Id*.

Expert evidence confirms that putative class members received disparate information, if any. Surveys of GM vehicle purchasers show that 82% avoided television car commercials and 66% avoided radio car commercials. Exhibit No. 25, 2/23/18 Keller Rpt. ¶¶ 49, 52. Moreover, few New GM ads had a main theme of safety—only 2.2% of ads before the recalls had safety as a main theme, and only 16.5% included any mention of safety or safety-related features. *Id*. ¶¶ 94-95. The small portion of New GM advertisements that concerned safety varied in their messages. *Id*. ¶ 95.

Whether each putative class member (1) saw or heard any New GM representations or ad; and (2) if so, whether that representation or ad had a safety-related message, depend on individual evidence. And whether any representations influenced a purchase or lease decision depends on each plaintiff's individual facts and circumstances. With no uniform misrepresentation, reliance cannot be presumed. Likewise, *Tobacco II* does not apply as there is no "'decades-long' … advertising campaign where there was little doubt that almost every class member had been exposed to defendants' misleading statements, and defendants were not just denying the truth but representing the opposite." *Mazza*, 666 F.3d at 596. To the contrary, most named plaintiffs admitted they were not exposed to any New GM ads, let alone false or misleading ads. Ex. D.

b. Reliance And Causation Are Individual Issues.

Buying a vehicle is precisely the "type or degree of personal idiosyncratic choice" that precludes any presumption of reliance. *McLaughlin*, 522 F.3d at 225 n.7; *see also* Ex. 25, 2/23/18 Keller Rpt. ¶ 17. This point is magnified in this case where plaintiffs' sprawling classes involve 7

recalls, 160 different models, and millions of vehicles. Indeed, courts deny certification where defendants allegedly concealed safety defects because of individual differences in reliance or causation.[49] The law, expert evidence, and named plaintiffs' facts demonstrate individual issues as to whether New GM's alleged omissions caused each putative class member's supposed injuries or were relied upon.

i. Differences In Why Named Plaintiffs and Putative Class Members Purchased Their Vehicles.

"[P]urchasing or leasing a car is a complex, multifaceted decision that varies considerably from one consumer to the next." Ex. 13, 2/23/18 Hoyer Rpt. ¶ 76. New GM's expert Professor Wayne Hoyer conducted nationwide, California, and Texas surveys of owners and lessees of the at-issue vehicles (including putative class members) to ask their main reasons for buying or leasing their vehicles and the information sources they considered.[50] *Id*. ¶¶ 40-59. Safety or safety-related features were mentioned as a main reason for purchase by only 3.4% of the nationwide sample, 6.7% of the Texas sample, and 2.3% of the California sample. *Id*. ¶ 63.

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[49] For example, the *Ford Ignition Switch* court denied certification where defective ignition switches caused smoke or fire in over 2,000 vehicles, including during driving: "plaintiffs must persuade the finder of fact that disclosure of the allegedly dangerous nature of the ignition switches would have affected the purchaser's decision whether to purchase the vehicle. Obviously, this determination could not be accurately and fairly made on a class-wide basis, especially when even under plaintiffs' version of the facts the chance of these ignition switches ever causing a fire is relatively slim." 174 F.R.D. at 346-47. *Chin* likewise held that "Plaintiffs must persuade the finder of fact that disclosure of the allegedly dangerous nature of the ABS systems would have affected the purchaser's decision whether to purchase the vehicle." 182 F.R.D. at 456. *Vioxx Class Cases* rejected plaintiffs' argument that "there can be nothing more material than an increased risk of death," finding that individual issues predominated based on consumer preferences and differences in consumers' information sources. 180 Cal. App. 4th at 133-34. *See also Mazza*, 666 F.3d at 595-96 (rejecting presumption of reliance and vacating certification in case alleging that Honda failed to disclose safety defects in its braking system); *Johnson*, 285 F.R.D. at 576, 581; *Webb*, 272 F.R.D. at 502; *Fine*, 2010 WL 3632469, at *1, 4.

[50] In contrast, plaintiffs' experts conducted no survey or other empirical study of the reasons putative class members purchased or leased their GM vehicles, and, indeed, never asked any plaintiffs or alleged class members about their purchase/lease decisions. E.g., Ex. 76, 2/7/18 Goldberg Dep. at 31-32, 44-45, 47; Ex. 59, 4/20/17 OCDA Goldberg Dep. at 104-09, 111, 23; Ex. 60, 6/26/18 Goldberg Dep. at 383-84, 398.

Moreover, owners and lessees of different brands differed in the extent to which they reported safety or safety-related features as a main purchase or lease reason. Owners of Buick and Cadillac vehicles cited safety somewhat more frequently than owners of Pontiac, GMC, or Oldsmobile vehicles. Ex. 13, 2/23/18 Hoyer Rpt. ¶ 73. In addition, the role of safety or safety-related features as a main purchase or lease reason differed depending on whether the vehicle was purchased or leased—no lessee in the nationwide sample mentioned safety or safety-related features as a reason for their lease decision. *Id*. ¶ 72.

Instead, in the nationwide sample, 59.4% of the sample mentioned "Price or Deal," 38.0% mentioned "Overall Design and Styling," and 20.5% mentioned "Gas Mileage," with various other reasons such as "Riding Comfort," "Previous Experience," "Condition," "Engine Performance," and "Dealer" all ranking above safety and safety-related features. *Id*. ¶ 61 & Ex. 1 (California and Texas samples largely tracked the nationwide sample).[51]

Even when directly asked about safety, vehicle buyers express varying opinions on its importance. In a different survey, advanced safety features were rated "very unimportant" by 16% of survey respondents, "unimportant" by another 11%, and "neither important nor unimportant" by 26%. Ex. 61, Rauschenberger Rpt. at 6.

Putative class members responding to Professor Hoyer's survey also vary widely in how they ranked the importance of the reasons they considered, including safety. Ex. 13, 2/23/18 Hoyer Rpt. ¶¶ 66-70. Other surveys demonstrate that consumers further differ in how they incorporate

[51] In addition to Hoyer's survey, other sources such as a 2016 JD Power survey report that consumers rely on many different reasons unrelated to safety in purchasing vehicles, such as exterior styling, previous brand model, and experience, ride and handling, price or payment, fuel economy/range, and interior comfort. Ex. 25, 2/23/18 Keller Rpt. ¶¶ 69-70. Indeed, one study of new vehicle purchasers found that half of respondents chose the type of vehicle they wanted first before considering safety. Ex. 61, 2/23/18 Rauschenberger Rpt. at 6.

safety into their decision-making process for vehicles purchases and leases. Ex. 25, 2/23/18 Keller Rpt. ¶¶ 80-86; *see also* Ex. 22, 2/23/18 Hanssens Rpt. ¶¶ 89-94.

How putative class members would react to disclosures is another individual issue. Studies establish that people have difficulty predicting how they or others will react to safety-related disclosures and consistently overestimate safety-related behavior. Ex. 61, 2/23/18 Rauschenberger Rpt. at 4. "These findings illustrate that one cannot simply assume reliance upon, or modified behavior in response to, disclosures from manufacturers." *Id*. at 4; *see also* Ex. 30, 2/23/18 List Rpt. ¶ 44; Ex. 42, 2/23/18 McFadden Rpt. ¶¶ 25-28.

These empirical findings are confirmed by the named plaintiffs, whose testimony illustrates the diversity of factors individuals consider important in buying vehicles. Chimen Basseri, David Padilla, Crystal Hardin, Ronald Robinson, Mario Stefano, Gareebah Al-ghamdi, and Lisa McClellan did not mention safety as a reason when asked why they decided to purchase their vehicles. Each of these named plaintiffs gave different reasons for their purchase, such as Padilla relying on the independent dealer salesperson's recommendation[52] or Stefano buying because he and his wife have "always enjoyed Camaros." Ex. B.[53]

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[52] New GM cannot be held liable for statements or conduct by dealerships. *E.g.*, *Williams v. Yamaha Motor Corp., U.S.A.*, 2015 WL 13626022, at *6 & n.9 (C.D. Cal. Jan. 7, 2015); *State ex rel. Bunting v. Koehr*, 865 S.W.2d 351, 354 (Mo. 1993); *Causey v. Sewell Cadillac-Chevrolet, Inc.*, 394 F.3d 285, 290 (5th Cir. 2004); *see also* New GM. Summ. J. Memo. at 42-43 & n.30.

[53] The named plaintiffs in this paragraph, and others as shown on Exhibit B, did not mention safety as a purchase reason when asked open-ended questions about why they bought their vehicles. On re-direct, plaintiffs' counsel used leading questions to have plaintiffs answer that they would not have purchased the vehicle if they had known of the alleged defects. Counsel's tactics cannot avoid that reliance and causation are individual issues. *First*, that plaintiffs' counsel asked each named plaintiff this question shows that it represents an individual issue. How every other putative class member would answer can be determined only through taking each one's testimony. *Second*, improper leading questions cannot change that when various named plaintiffs were asked why they purchased each vehicle, they did not rely on safety. *See, e.g.*, Fed. R. Evid. 611(c); *Rylott-Rooney v. Alitalita-Linee Aeree Italiane SpA*, 2009 WL 37817, at *2-3 (S.D.N.Y. Jan. 6, 2009); *Newton v. City of New York*, 640 F. Supp. 2d 426, 444-45 (S.D.N.Y. 2009). *Third*,

Of the named plaintiffs who did mention safety, some identified only a few other factors, with those factors varying among the named plaintiffs. In addition to mentioning safety, Kellie Cereceres noted she had a favorable experience previously renting a Traverse, Sylvia Benton said she was looking for a gas saver, and Brad Akers wanted a vehicle his grandmother could get into and out of easily. Ex. B at 1-2, 4. Other named plaintiffs mentioned several factors in addition to safety, such as Michelle Thomas who wanted a car that was new, spacious, with a smooth ride, for the right price, and selected a Buick LaCrosse because she had rented them in the past and her family members had positive experiences with Buicks. Ex. B at 4.

Moreover, some plaintiffs chose not to have the recall repairs performed even after they were notified of the recalls. Florida named plaintiff Harvey Sobelman has not had the repair performed on his 2014 Camaro because he "liked the [key] fob." Ex. 62, 3/29/17 H. Sobelman Dep. at 105:10-109:20. Instead, he has taken his keys off the fob and drives his Camaro without the repairs, testifying that he "wasn't concerned about" any safety risks and "didn't give it a thought."[54] *Id.* Santiago's daughter declined the recall repair on his 2010 Camaro when she brought it in for service, and the vehicle has not been repaired. Ex. 47, 3/9/2017 S. Orosco Dep. at 15:1-118:6; Ex. 56, Delano Chevrolet Buick GMC Invoice at ELPLNTFF00011445.

The record in this case, including expert evidence and the named plaintiffs' testimony, proves that the extent to which putative class members considered safety in buying a vehicle varied

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the Second Circuit in *McLaughlin* held that asking cigarette smokers whether they would prefer a safer cigarette to a less safe one could not constitute common evidence of reliance. 522 F.3d at 225 n.6.

[54] *See also* Ex. 62, 6/2/17 R. Berg Dep. at 31:15-32:13 (Pennsylvania named plaintiff Raymond Berg did not have repair as of mid-2017, admitted there was no reason he had not had his vehicle repaired, and said "other things, like, kept that from being top priority"); Ex. 63, 5/5/17 R. Naquin Dep. at 59:6-12 (Louisiana named plaintiff Raymond Naquin did not have repair as of mid-2017 because his wife used the vehicle and would not leave it with him to have the remedy performed).

greatly. Whether each putative class member relied on an alleged safety defect non-disclosure and how that disclosure would have affected their purchase or lease decisions requires individual evidence, predominating over any alleged common issues.

ii. Differences In The Information Putative Class Members Considered And Relied Upon.

Owners and lessees of recalled GM vehicles also considered a wide variety of information before acquiring their new or used vehicles. Ex. 13, 2/23/18 Hoyer Rpt. ¶ 85. In a nationwide sample, 27.8% cited "Third-Party Sources" (such as Consumer Reports, newspapers, other professional reviews, as well as mechanics and current vehicle owners), 27.2% cited "Dealer Sources," and 21.3% cited "Internet" as information sources that influenced their purchase or lease decisions. *Id*. ¶ 85; *see also* Ex. 25, 2/23/18 Keller Rpt. ¶¶ 24, 28.

By contrast, only 12.7% relied on "Manufacturer Sources" such as New GM's website or its ads. Ex. 13, 2/23/18 Hoyer Rpt. ¶ 87. Similarly, only 6.7% of Texas respondents and 22.1% of California respondents considered information from New GM. *Id*. ¶ 87 & Ex. 7. These low percentages are consistent with research showing that a substantial majority of consumers are generally skeptical of manufacturers' advertising. Ex. 61, 2/23/18 Rauschenberger Rpt. at 8.

As with the different reasons for their vehicle purchases, individual consumers varied in how influential each information source was. Ex. 13, 2/23/18 Hoyer Rpt. ¶¶ 90-91. "[P]utative class members generally considered multiple and many different information sources influential when making their purchase or lease decisions, and … the importance putative class members assigned to each of those information sources varied from individual to individual." *Id*. ¶ 93; *see also* Ex. C.

Named plaintiffs and putative class members that were influenced by sources other than New GM cannot show reliance or causation. The bellwether states hold that plaintiffs who relied

on other sources such as dealer representatives, friends, or family cannot prove causation or reliance. *See* pages 62, 67. Determining whether each class member considered information from New GM versus other sources can be determined only through individual fact inquiries.

Individual differences in the information putative class members considered, if any, is especially important for California, which requires proof that "had the omitted information been disclosed one would have been aware of it." Section II.A.2.c. As shown by Professor Hoyer's survey, the majority of putative class members (as well as many named plaintiffs, *see* Ex. C) did not consider New GM information and hence would have been unlikely to learn of any safety defect disclosures. This applies with even greater force for used vehicle purchasers (72% of putative class members) who purchased from non-New GM-affiliated dealerships. *See Butler v. Porsche Cars N. Am., Inc.*, 2017 WL 1398316, at *11 (N.D. Cal. Apr. 19, 2017) (noting that "a class member who purchased a used Class Vehicle from a third party may not have interacted with a Porsche representative *at all* prior to purchase, and indeed may not have viewed *any* material or advertisements from Porsche") (emphases in original); *Hindsman*, 2018 WL 2463113, at *13; Ex. 14.E, 5/7/18 Willig Rpt., App'x B, Table 9. Whether each putative class member would have been aware of any New GM disclosures requires an individual fact inquiry.

iii. The Lack Of Market Shifts After The Recall Announcements Is "Compelling Evidence" That Vehicle Owners Cannot Prove Reliance Or Causation.

Under Second Circuit precedent, the lack of any class-wide shifts in the recalled vehicles' prices or shift in their market shares confirms that most putative class members' purchase decisions would not have been affected if the recall conditions had been disclosed earlier. In *McLaughlin*, an institute published Monograph 13 disclosing that Light cigarettes were not safer than regular ones, leading to the *McLaughlin* plaintiffs' suit. *Id.* at 220-21. In reversing certification because causation and reliance were individual issues, *McLaughlin* relied on Monograph 13's lack of effect

on Lights' price or market share:

> [E]ach plaintiff in this case could have elected to purchase light cigarettes for any number of reasons, including a preference for the taste and a feeling that smoking Lights was "cool." Indeed, the fact that the market did not shift away from light cigarettes after the publication of Monograph 13 is compelling evidence that plaintiffs had other, non-health-related reasons for purchasing Lights.

Id. at 226; *see also id.* at 227 ("Given the lack of an appreciable drop in demand or price of light cigarettes after the truth about Lights was revealed in Monograph 13, plaintiffs' argument that defendants' misrepresentation caused the market to shift and the price of Lights to be inflated fails as a matter of law.").

As in *McLaughlin*, New GM's 2014 recalls did not have a class-wide effect on the prices of recalled vehicle or cause the markets to shift away from the recalled vehicles. *See* Background Section D and Section I.A.1. Under *McLaughlin*, this is "compelling evidence" that putative class members' purchase decisions would not have been affected by earlier disclosure of the recall conditions, and thus plaintiffs cannot prove reliance or causation on a class-wide basis.

4. No Misrepresentation Claims Can Be Certified.

Although the 5ACC alleges misrepresentations for consumer protection claims, plaintiffs do not appear to seek certification based on misrepresentations. Pls. Memo. at 18, 22, 24. No such claims could ever be certified. *E.g.*, *Moore*, 306 F.3d at 1255; *Mazza*, 666 F.3d at 595-96.

First, plaintiffs must have seen or heard the alleged misrepresentation at issue. *E.g.*, *Durell v. Sharp Healthcare*, 183 Cal. App. 4th 1350, 1363 (2010); *Solano v. Landamerica Commonwealth Title of Fort Worth, Inc.*, 2008 WL 5115294, at *9-10 (Tex. App. Dec. 4, 2008); *Williams v. HSBC Bank USA, N.A.*, 467 S.W.3d 836, 845 (Mo. Ct. App. 2015); *see also* New GM Summ. J. Memo. at 40-41 & nn. 27-29. Many named plaintiffs did not see any New GM ads or other materials before buying their vehicles, or cannot remember what the ads said or even if they were from New GM. *See* Ex. D. No uniform misrepresentations were made to all consumers, and neither reliance

nor causation can be shown class-wide.

Second, whether plaintiffs believed the statements they saw or heard were false or misleading is an individual issue. Some named plaintiffs who recalled seeing New GM ads admitted that the statements were not false, untrue, or misleading. Ex. D; New GM Summ. J. Memo. at 42. Claims cannot be based on statements that are not false or misleading. *E.g.*, *Consumer Advocates v. Echostar Satellite Corp.*, 113 Cal. App. 4th 1351, 1360-62 (2d Dist. 2003); *Sims v. Kia Motors Am., Inc.*, 2014 WL 12558249, at *1, 7 (C.D. Cal. Mar. 31, 2014).

Third, whether plaintiffs relied on any New GM statements or whether such statements caused injury is an individual issue. Various named plaintiffs denied relying on any New GM advertising. Ex. D. For example, David Padilla testified that "[n]obody tells me which [car] to buy. I make my own choice." Ex. 64, 2/17/17 D. Padilla Dep. at 27:1-2. Surveys of owners and lessees of recalled GM vehicles show that 87% nationwide, 93.3% in Texas, and 77.9% in California did not identify New GM advertisements as influencing their purchase or lease decisions. Ex. 13, 2/23/18 Hoyer Rpt. ¶ 24.

Fourth, whether a statement is actionable presents another individual question. Statements that are puffery are not actionable as a matter of law. *See Echostar*, 113 Cal. App. 4th at 1353; *Autohaus, Inc. v. Aguilar*, 794 S.W.2d 459, 462 (Tex. App. 1990); *Williams v. United Techs. Corp.*, 2015 WL 7738370, at *8 (W.D. Mo. Nov. 30, 2015); *see also* New GM Summ. J. Memo. at 43-46. Statements that are true also are not actionable. *See Echostar*, 113 Cal. App. 4th at 1360; *Sims*, 2014 WL 12558249, at *7.

B. Individual Differences In New GM's Knowledge Predominate Over Any Common Issues.

1. Plaintiffs' Claims Depend on New GM's Knowledge Over Time.

Other than for the pre-MY2008 Delta Ignition Switch recalls, New GM did not have

sufficient knowledge of safety defects to recall the other vehicles before the 2014 recalls. New GM's knowledge of the alleged safety defects is an essential element of plaintiffs' consumer protection and common law fraud claims. One critical series of questions for trial, therefore, is what did New GM know about each of the other recall conditions when putative class members acquired their vehicles at various points in time from July 10, 2009 until the recalls were announced in 2014. The record evidence demonstrates that New GM's knowledge of dynamic field conditions evolved and changed over time for each recall and included many different vehicle models, rendering uncommon the issues for which plaintiffs broadly seek certification.

California requires proof of defendant's knowledge for UCL, CLRA, and common law fraud claims. *Wilson v. Hewlett-Packard Co.*, 668 F.3d 1136, 1145 (9th Cir. 2012); *In re Ford Tailgate Litig.*, 2015 WL 7571772, at *10-11 (N.D. Cal. Nov. 25, 2015).[55] Texas likewise requires proof of a defendant's knowledge for DTPA claims. *Prudential Ins. Co. of Am. v. Jefferson Assocs., Ltd.*, 896 S.W.2d 156, 162 (Tex. 1995); *Washburn v. Sterling McCall Ford*, 521 S.W.3d 871, 876 (Tex. App. 2017).

Missouri also requires proof of defendant's knowledge for MMPA claims based on omission of a material fact. *TACC MTD Opinion*, at *33; Pls. Memo. at 22; s*ee also Hope v. Nissan N. Am.*, 353 S.W.3d 68, 85 (Mo. Ct. App. 2011); *Budach v. NIBCO, Inc.*, 2015 WL 6870145, at *5 (W.D. Mo. Nov. 6, 2015). While plaintiffs argue that the defendant's knowledge is not required for claims based on "concealment" or "suppression," Pls. Memo. at 22, those claims require the defendant to make actionable representations to the public. In *Hope*, the defendant

[55] *See also Resnick v. Hyundai Motor Am., Inc.*, 2016 WL 9455016, at *12 (C.D. Cal. Nov. 14, 2016); *Klein v. Earth Elements*, 59 Cal. App. 4th 965, 968-70 (1st Dist. 1997); *Mathison v. Bumbo*, 2008 WL 8797937, at *12 (C.D. Cal. Aug. 18, 2008); *Conroy v. Regents of Univ. of Cal.*, 203 P.3d 1127, 1136 (Cal. 2009).

affirmatively represented that its vehicles were "luxury vehicles." 353 S.W.3d at 84. In *Plubell v. Merck & Co., Inc.*, the defendant denied the results of an industry-sponsored study showing that its drug Vioxx increased the risk of hypertension and stroke. 289 S.W.3d 707, 711 (Mo. Ct. App. 2009). Plaintiffs do not rely on any such affirmative misrepresentations here, and doing so would create additional individual issues. *See* Section II.A.4.

Given that consumer protection and common law fraud claims depend on what the defendant knew at the time of sale, differences in a defendant's knowledge over time create differences in what each individual plaintiff could prove about a defendant's knowledge when that plaintiff bought the product. An owner who purchased a vehicle at the end of 2013 would be able to rely on evidence of New GM's knowledge in 2010 to 2013, while an owner who purchased at the end of 2009 would not.

Accordingly, courts deny certification in vehicle and other product defect cases where the defendant's knowledge varied over time. *E.g.*, *Sanneman*, 191 F.R.D. at 453 ("Because knowing concealment is a required element of Plaintiff's fraud claims, Defendant's knowledge would have to be determined for each time period at issue. Clearly, Defendant's knowledge would not be class-wide."); *Ford Vehicle Paint*, 182 F.R.D. at 220 ("[T]here is evidence that Ford's state of knowledge was not uniform over the period in issue and that certain of its alleged 'concealing' activities occurred in 1992, which could not have affected plaintiffs' purchasing 1990 model-year vehicles. When defendant's conduct means different things for different class members, trying the issue of its liability for that conduct on an aggregated basis is problematic.").

In *Ford Motor Co. v. Sheldon*, plaintiffs alleged that paint peeled in various MY 1984-1993 Ford vehicles. 113 S.W.3d 839, 843 (Tex. App. 2003). *Sheldon* held that the defendant's knowledge "will involve individual determinations":

> The evidence might show that Ford had knowledge of a paint defect on a certain date and not before. This finding would prohibit recovery of damages for vehicles that were painted before this date. The evidence might also show that Ford became aware of a paint-peeling problem on some models and not others, or became aware of a paint-peeling problem at different times for different models.

Id. at 849 ("Because of the fluid nature of when and if Ford had knowledge of the alleged defect, resolving that issue will depend on individual considerations and proof, further evidence that this action is unsuitable for class treatment.").

Similarly, in considering MMPA claims involving bubbling defects on dashboards, *Hope* explained that "Nissan contends that because it has been determined that Nissan had different levels of knowledge regarding the bubbling issue over the class period as defined, no class-wide proof exists over the entire class for all class members. This is a pertinent observation." 353 S.W.3d at 84-85. Many consumers would not be able to recover "because they purchased their vehicles from Nissan before Nissan had knowledge of the bubbling defect."[56] *Id.*; *BPA*, 2011 WL 6740338, at *5 ("Class-wide evidence cannot be used to show what Defendants knew or should have known because their knowledge and the available information about BPA changed during the class period."). These principles apply with even more force here as plaintiff seek to certify classes involving not just one recall condition, but seven different ones.

2. New GM's Knowledge Varied Across Recalls And Over Time.

New GM's knowledge of field conditions and issues differed across vehicle lines and varied over time:

Service Parts Recall: MY 2008 and later vehicles in Recall No. 14v047 (the "Service Part Vehicles") were manufactured with a non-defective switch that differed from the earlier,

[56] While *Hope* suggested that the class could be split into sub-classes based on differences in Nissan's knowledge, or that members could be excluded from the class, 353 S.W.3d at 85, this approach of "certify now, worry later" is impermissible in federal court. *See* pages at 14-16.

faulty switch. The Court previously held that Service Parts Vehicles "were not manufactured with the faulty ignition switch, but which could have been repaired at some point using the faulty ignition switch. Accordingly, if they [Service Parts Vehicle plaintiffs] are ultimately to succeed on their claims with respect to the ignition switch, they will have to show that their cars in fact contained that defect." *TACC MTD Opinion*, 2016 WL 3920353, at *20 n.15. Whether each putative Service Parts Vehicle class member had his or her ignition switch replaced, and if so, whether it was replaced with a faulty switch, is an individual issue on which their claims depend, thus predominating over any common issues.

Plaintiffs contend that the Service Parts Vehicles are defective regardless of whether the switch was replaced. Pls. Offer of Proof ¶ 14. Not only does this argument contradict the Court's *TACC MTD* Opinion, it also creates numerous individualized issues. Plaintiffs allege that the Delta Ignition Switch recall involves two defects: a low-torque defect and a knee-key defect. *Id.* ¶¶ 7, 20, 23. With respect to plaintiffs' alleged low-torque defect, the torque of the ignition switch increased starting in MY 2008 vehicles, creating a significant difference with the MY 2007 and earlier vehicles. Pls. Offer of Proof ¶ 13; Ex. 4, 11/10/17 Stevick Rpt. at 23. Further, the key design for these vehicles was modified in 2010, altering the dynamics with respect to inadvertent rotation that may be caused by any low-torque switch. Pls. Offer of Proof ¶ 13. As to plaintiffs' alleged knee-key defect, plaintiffs' technical expert admits that "there is a difference from vehicle to vehicle regarding how susceptible it is to key rotation from knee-key interaction." Ex. 65, 11/24/15 Stevick Dep. at 574:5-9. Plaintiffs' knee-key defect claim relies on details as minute as how far each driver adjusts the seat forward or backward in their vehicle. Pls. Offer of Proof ¶ 27. VTTI, an independent automotive engineering organization, detailed the numerous highly specific factors that must be taken into account when evaluating the potential for inadvertent knee-key

rotation. Ex. 3, VTTI Rpt. at 581-592. Thus, evidence of New GM's knowledge regarding the alleged knee-key defect varies not only by vehicle but also depends on what drivers reported.

Impala Recall: Plaintiffs allege that the Impala recall involves two defects: a low-torque defect and a knee-key defect. For the alleged low-torque defect, in 2007 a smaller key ring was introduced for Cadillac vehicles, and was used with the MY2006-2011 Cadillac DTS vehicles subject to the Impala recall. Ex. 66, GM-MDL2543-301838317. This smaller key ring would alter the dynamics with respect to inadvertent rotation that may be caused by any low-torque switch, creating different evidence regarding whether and when New GM learned of the recall condition in the Cadillac DTS vehicles. For the alleged knee-key defect, vehicles vary on how susceptible they are to rotation from knee-key interaction (Ex. 65, 11/24/15 Stevick Dep. at 574:5-9), again showing that New GM's purported knowledge of this alleged defect varied vehicle by vehicle. *See also* Ex. 3, VTTI Rpt. at 581-592.

Malibu Recall: Plaintiffs allege that the Malibu recall involves a single defect: a low-torque defect. However, the alleged defect involved in the Malibu recall involved four different ignition switches, all with different torque specifications. Ex. 67, 2/23/2017 B. Thompson Dep. at 42:23-43:15. Even assuming the ignition switch torque is the relevant measurement (which New GM disputes), MY2004-2008 Pontiac Grand Prix vehicles contained an ignition switch with a torque specification of 13-22 N-cm, whereas MY2003-2003 Grand Am, MY2002-2003 Oldsmobile Aleros, and MY2002-2003 Chevrolet Malibus contained an ignition switch with a torque specification of 10-19 N-cm. *Id.* at 56:17-21; 58:19-59:5. These differences create individual issues regarding New GM's knowledge for each of the four different ignition switches, especially given the torque specification differences.

CTS Recall: Plaintiffs allege that the CTS recall involves two defects: a low-torque defect

and a knee-key defect. For the alleged low-torque defect, plaintiffs admit that MY2008 and later Cadillac CTS vehicles had a different switch than prior ones. Pls. Offer of Proof ¶ 56. And the key system was redesigned in January 2010 and thereafter used in Cadillac CTS vehicles from December 2010 through MY2014 Cadillac CTS vehicles. *Id.* ¶ 57. For the alleged knee-key defect, vehicles vary on how susceptible they are to rotation from knee-key interaction. Ex. 65, 11/24/15 Stevick Dep. at 574:5-9; *see also* Ex. 3, VTTI Rpt. at 581-592. In addition, New GM conducted an investigation from 2012 to 2013 related to the potential for inadvertent rotation in Cadillac CTS vehicles, resulting in New GM having different knowledge at different points in time. *E.g.* Ex. 6, GM-MDL2543-401952506 (March 2010 email regarding customer complaints); Ex. 7, GM-MDL2543-401964941 (investigation related to stalling opened in April 2012); Ex. 8, 12/2/15 A. Hendricks Dep. Tr. at 103-119 (detailing the different steps taking in 2012 to investigate issues related to stalling); Ex. 9, GM-MDL2543-401961908 at 920 (evaluating the data as it existed in Spring 2012); *id.* at 926 (closing the investigation in November 2013).

Camaro Recall: Plaintiffs allege that the Camaro recall involves one defect: a knee-key defect. But all parties agree that a knee-key defect allegation depends on numerous factors that change on a vehicle-by-vehicle and individual-by-individual basis, *e.g.* the cabin configuration, the seat configuration, and the height and weight of the driver. Ex. 65, 11/24/15 Stevick Dep. at 574:5-9; Ex. 3, VTTI Rpt at 581-592. Plaintiffs also ignore that there is no evidence that New GM had knowledge of the alleged defect at issue in the Camaro Recall prior to 2014. Indeed, plaintiffs' Offer of Proof relies solely on a limited number of NHTSA complaints, vehicle owner questionnaires (VOQs), and customer complaints that do not mention key rotation at all, let alone identify a potential knee-key defect. Pls. Offer of Proof ¶¶ 79-80; *see* Dkt. 4065 at 15 (excluding NHTSA complaints as providing notice of a defect). Plaintiffs' proffer proves the point: New

GM's knowledge necessarily varied as each complaint was received, and thus creates important individual issues about New GM's knowledge of the defect in the Camaro recall.

EPS Assist Recall: Plaintiffs rely on various actions taken by New GM between 2010 and 2012, and correspondence between New GM and NHTSA in 2010 to allege New GM had knowledge of the issue that led to the EPS Assist recall. Pls. Offer of Proof ¶¶ 105-109. These differences in New GM's knowledge are exacerbated by the EPS Assist recall involving vehicles from two different platforms (Epsilon and Delta) with two different problems (torque sensor and EPS motor) and two different recall remedies (torque sensor replacement or motor replacement). Ex. 5, 2/23/18 Hakim Rpt. at 4. And, even within the two different systems involved in the EPS Assist recall, there were different root causes with different fixes. *Id.* at 4-5 (identifying three different root causes in the Epsilon EPS system); *id.* at 5 (identifying an entirely different root cause in the Delta EPS system).

SIAB Recall: The vehicles involved in the SIAB recall have two different connectors: a JST connector for MY2008-2011 vehicles and a Tyco connector for MY2011-2013 vehicles. Ex. 68, 2/23/18 Churchwell Rpt. at 6. Not only were the connectors different, the root issue was also different and unrelated: JST connectors experienced higher than expected corrosion due to moisture or seat movement, whereas the Tyco connectors had crimps and voids in the connector terminals. *Id.* at 7. There were different potential remedies: the MY2008-2011 was remedied through Customer Satisfaction Campaign 10085, which involved a different remedy than the remedy for the SIAB recall. *Id.* at 12-13. New GM monitored warranty data during 2012-2014 and initiated numerous different investigations, including one of the MY2011-2013 vehicles that was separate from the investigation of the MY2008-2011 vehicles. *Id.* The ongoing investigations create differences as to New GM's knowledge for different vehicles over different time periods

and thus render class certification inappropriate. *E.g.*, *Sheldon*, 113 S.W.3d at 849.

C. Whether Each Putative Class Member Purchased An Old GM Or New GM Vehicle Is An Important Individual Fact Difference.

Whether each plaintiff purchased an Old GM or New GM vehicle is dispositive for their consumer protection and fraudulent concealment claims. As explained in New GM's Summary Judgment Memorandum, New GM does not have a duty to disclose, under the different state laws at issue, to Old GM vehicle purchasers, with whom it had no transactions. *E.g.*, *LiMandri v. Judkins*, 60 Cal. Rptr. 2d 539, 543 (Cal. Ct. App. 1997); *Bohac v. Walsh*, 223 S.W.3d 858, 865 (Mo. Ct. App. 2007); *Myre v. Meletio*, 307 S.W.3d 839, 844 (Tex. App. 2010); New GM Summ. J. Memo. at 56-59. California and Texas also hold that an asset purchaser (such as New GM) does not have a duty to warn the customers of an asset seller (such as Old GM) of alleged defects. *E.g.*, *Burroughs v. Precision Airmotive Corp.*, 93 Cal. Rptr. 2d 124, 136 (Cal. App. Ct. 2000); *Jones v. SIG Arms, Inc.*, 2001 WL 1617187, at *3-4 (Tex. App. Dec. 19, 2001); New GM Summ. J. Memo. at 59-61. Without both a duty to disclose and a duty to warn, a plaintiff cannot maintain consumer protection claims based on omissions or fraudulent concealment claims. *TACC MTD Opinion*, 2016 WL 3920353, at *20-22; *Terry v. Mercedes-Benz, USA, LLC*, 2007 WL 2045231, at *5 (Tex. App. July 18, 2007); *DePeralta v. Dlorah, Inc.*, 2012 WL 4092191, at *7 (W.D. Mo. Sept. 17, 2012); New GM Summ. J. Memo. at 56-59. The Court and parties will need to determine for each putative class member which company manufactured his or her vehicle, an individual issue.

Similarly, used vehicle purchasers cannot bring a Song-Beverly Act claim. Pls. Memo. at 8 n.4; New GM Summ. J. Memo. at 62. Indeed, plaintiffs seek separate classes consisting only of those who purchased new vehicles for their SBA claims. Pls. Mot. at 2-5. As explained in Section I.D., regardless of how plaintiffs have defined the class, examining whether each plaintiff bought their vehicle new or used is another individual issue.

D. Plaintiffs Cannot Demonstrate Commonality, Much Less That Common Issues Predominate, For Their Song-Beverly Act Claims.

Breach of implied warranty under the SBA requires proof that the vehicle is not "merchantable." *TACC MTD Opinion*, 2016 WL 3920353, at *23. "Merchantable" under the SBA has the same meaning as under the Uniform Commercial Code ("UCC"). *See Am. Suzuki Motor Corp., v. Superior Court*, 44 Cal. Rptr. 2d 526, 528 n.2 (Cal. App. Ct. 1995). "Merchantability" is an individual issue, not a common one, for two reasons.

First, courts in California and elsewhere "have consistently held that an automobile that was driven for years without problems was merchantable and fit for its ordinary use at the time of sale." *Szymczak v. Nissan N. Am., Inc.*, 2011 WL 7095432, at *11 (S.D.N.Y. Dec. 16, 2011); *see also Skeen v. BMW of N. Am., LLC*, 2014 WL 283628, at *16 (D.N.J. Jan. 24, 2014).

This rule applies where plaintiffs allege that the vehicle has a latent, safety-related defect. In *American Suzuki*, plaintiffs alleged that the Suzuki Samurai had "an unacceptable risk of a deadly roll-over accident." 44 Cal. Rptr. 2d at 528. But because "the vast majority of the Samurais sold to the putative class did what they were supposed to do for as long as they were supposed to do it, we conclude that these vehicles remained fit for their ordinary purpose." *Id.* at 531. California courts have rejected SBA claims where "Plaintiffs' car operated for four years without apparent problem, easily satisfying any implied warranty that might attach as a matter of law." *Larsen v. Nissan N. Am.*, 2009 WL 1766797, at *6 (Cal. Ct. App. June 23, 2009); *see also Avedisian v. Mercedes-Benz USA, LLC*, 43 F. Supp. 3d 1071, 1079 (C.D. Cal. 2014) (vehicle was merchantable where plaintiff drove it for approximately 4.5 years and 65,000 miles, despite peeling chrome cutting plaintiffs' hands).

Thus, whether a plaintiff can prove that a vehicle was not merchantable under the SBA depends on individual facts such as (1) how many miles the plaintiff has driven the vehicle, (2)

how many years the plaintiff has driven the vehicle, (3) whether the plaintiff has had any incident caused by a recall condition, (4) how many problems a plaintiff has had caused by the recall condition, and (5) how many miles and years were on the vehicle when each alleged problem occurred. In this case, facts vary widely among plaintiffs and individual class members. Some vehicle owners—such as named plaintiffs Brad Akers and Patrice Witherspoon—have driven their vehicles nearly 200,000 miles without any evidence of incidents or issues caused by the recall conditions. Ex. A. Other vehicle owners might allege they experienced multiple incidents shortly after purchasing the vehicle. Determining these facts, and thus whether each vehicle is merchantable, cannot be done through common evidence.

California courts have denied class certification because of the individual fact issues required to assess and determine merchantability. In *American Honda Motor Co. v. Superior Court*, the plaintiff sought to certify a class of Acura owners because of a latent defect where the vehicles would "pop out" of third gear while the vehicle was running. 199 Cal. App. 4th 1367, 1369 (2011). No class could be certified because of differences among vehicles, particularly that "at least some, if not most, of the affected vehicles sold in 2002 to 2004 were outside of the four-year, 50,000-mile warranty period by the time Lee filed suit in 2008 and had not reported any third gear problems." *Id.* at 1377; *see also Torres v. Nissan N. Am. Inc.*, 2015 WL 5170539, at *4-5 (C.D. Cal. Sept. 1, 2015). This Court should reach the same conclusion.

Second, "in the case of automobiles, the implied warranty of merchantability can be breached only if the vehicle manifests a defect that is so basic it renders the vehicle unfit for its ordinary purpose of providing transportation." *Am. Suzuki*, 44 Cal. Rptr. at 529. Accordingly, implied warranty claims have been dismissed where the plaintiff continued to drive the vehicle after it malfunctioned. In *Beck v. FCA US LLC,* the plaintiff brought SBA and other claims

alleging that certain Dodge models had a defective gearshift system indicating that vehicles were in "park" when they were not, presenting a safety hazard because the vehicles could roll away. 273 F. Supp. 3d 735, 741, 744 (E.D. Mich. 2017). Even though the plaintiff had experienced a rollaway incident, "as FCA correctly points out, there is no indication in the complaint that, despite the safety concerns, he has actually stopped driving his vehicle. The lack of such an allegation warrants dismissal of his implied warranty claims." *Id.* at 762; *Beck v. FCA US LLC*, 2018 WL 3359100, at *2 (E.D. Mich. July 10, 2018) (denying motion to reconsider dismissal of implied warranty claims because "in those cases cited by the Court, the continued use of the vehicle was clearly the predominant factor considered"); *Tae Hee Lee v. Toyota Motor Sales, U.S.A., Inc.*, 992 F. Supp. 2d 962, 980 (C.D. Cal. 2014) (dismissing implied warranty claim because "Plaintiffs have not alleged that they stopped using their vehicles"); *see also Kent v. Hewlett–Packard Co.*, 2010 WL 2681767, at *4 (N.D. Cal. July 6, 2010). Whether each plaintiff stopped driving his or her vehicle after learning of a recall is another individual issue.

E. Individual Issues Predominate For Texas DTPA Unconscionability Claims.

Plaintiffs' attempt to certify a Texas DTPA unconscionability class, Pls. Memo. at 23-24, is likewise unavailing. This claim presents individual issues regarding each vehicle owner's sophistication and experience. The DTPA's unconscionability prong requires proof that the defendant took "advantage of the [plaintiff's] lack of knowledge, ability, experience, or capacity of the consumer to a grossly unfair degree." Tex. Bus. & Com. Code § 17.45(5); *see also Peltier*, 51 S.W.3d at 623.

The "unconscionable-act-or-course-of-action element of a DTPA section 17.50 unconscionability claim requires proof of each consumer's knowledge, ability, experience, or capacity." *Lon Smith & Assocs., Inc. v. Key*, 527 S.W.3d 604, 624 (Tex. App. 2017). "Because the unconscionable-act-or-course-of-action element of a DTPA section 17.50 unconscionability

claim requires proof of each consumer's knowledge, ability, experience, or capacity, courts generally refuse to certify DTPA unconscionability claims for class treatment." *Id.* (collecting cases). In a case alleging that vehicle dealerships received undisclosed kickbacks from banks, the Texas appellate court denied certification of a DTPA unconscionability claim because "there would need to be some showing of each customer's 'knowledge, ability, experience, or capacity.' A plaintiff with knowledge about indirect lending or with years of experience in the car-selling business would not be able to show that Peltier did anything that was 'unconscionable.'" *Peltier*, 51 S.W.3d at 624.

Diais v. Land Rover Dallas, L.P., a non-class case, illustrates how unconscionability is an individual fact inquiry. 2016 WL 1298392 (Tex. App. Apr. 4, 2016). In *Diais*, the plaintiff bought a vehicle with a defective engine that would cause the vehicle not to move, make knocking noises, and not accelerate over 30 miles per hour. *Id.* at *1-2. When the dealership would not refund his purchase price, the plaintiff sued alleging DTPA unconscionability. *Id.* at *2. The Texas appellate court rejected this claim based on plaintiff being a "sophisticated businessman" who had negotiated and purchased several new cars in the past and had talked with family members in the car business about the vehicle. *Id.* at *5.

In this case, unconscionability would turn on factors specific to the experiences and sophistication of each vehicle owner. These include (1) the person's experience in buying vehicles; (2) whether they consulted family or friends in the automobile business; (3) their overall sophistication, including their work history; (4) their experience concerning defects and recalls for previously owned vehicles; and (5) the extent they were aware that vehicles could be recalled. *See also* New GM Summ. J. Memo. at 65-66. As in *Peltier* and *Lon Smith*, these individual inquiries predominate over any alleged common issues.

F. Individual Issues Predominate For The Bankruptcy-Claim-Fraud Counts.

Individual issues predominate for the California and Missouri Bankruptcy-Claim-Fraud counts. *First*, a plaintiff can recover on a bankruptcy claim only if they have a meritorious underlying action against the debtor. *See* 11 U.S.C. § 502(b)(1); *Travelers Cas. & Sur. Co. of Am. v. Pacific Gas & Elec. Co.*, 549 U.S. 443, 450 (2007); *In re Chateaugay Corp.*, 53 F.3d 478, 497 (2d Cir. 1995). Whether each putative Bankruptcy-Claim-Fraud class member could recover on a bankruptcy claim against Old GM depends on whether they could state an underlying claim against Old GM between by November 30, 2009 (the deadline for filing a bankruptcy claim against Old GM), such as for consumer protection or fraudulent concealment. For the reasons explained in the preceding Sections, whether the putative Bankruptcy-Claim-Fraud class members had a meritorious claim against Old GM is an individual fact inquiry. Whether each vehicle consumer can prove injury and damages, reliance and causation, Old GM's knowledge at the time the consumer purchased the vehicle, or that their vehicle was not merchantable (for SBA claims) can be determined only by examining the evidence for each particular consumer, predominating over any alleged common issues.

Second, the Bankruptcy-Claim-Fraud plaintiffs' counts are based on fraudulent concealment, which raises its own set of individual fact issues. Fraudulent concealment requires proof of reliance and causation. Reliance cannot be presumed because the Bankruptcy-Claim-Fraud plaintiffs were not exposed to any uniform misrepresentation by New GM. *See* Section II.A.3.a. Whether putative class members even knew that Old GM had filed for Chapter 11 such that they could have filed claims is an individual issue. If from July 10 to November 30, 2009 a vehicle owner had not known that Old GM had filed for Chapter 11, he or she would not have known to file a bankruptcy claim, regardless of whether New GM disclosed the recall conditions in Old GM vehicles. Named plaintiffs Patricia Barker and Esperanza Ramirez were not even aware

that Old GM had filed for Chapter 11 in 2009. Ex. 69, 2/27/17 P. Barker Dep. at 230:4-9; Ex. 70, 3/03/17 E. Ramirez Dep. at 188:8-22.

A separate individual issue is whether putative class members knew during July 10 to November 30, 2009 that they could file claims in Old GM's bankruptcy. If putative class members lacked such knowledge, New GM's non-disclosure could not have injured them, as such class members would not have filed claims even if they received disclosures.

Finally, even if a putative class member during the period July 10 to November 30, 2009 knew that Old GM had filed for Chapter 11, and knew that they could file a claim in the bankruptcy, individuals may have chosen not to file a claim if the recall conditions had been disclosed. Filing a claim would have required the individual to to timely file a proof of claim against Old GM in anticipation of receiving a speculative recovery in the future that may be only a fraction of the asserted claim amount. If an individual would not have filed a claim against Old GM even if New GM had disclosed the recall conditions during July 10 to November 30, 2009, then the nondisclosure could not have caused the individual any damages. Thus, whether each putative class member can produce evidence that they knew of Old GM's Chapter 11 proceeding, knew they could file a claim, and actually would have filed a claim are all individual issues predominating over any common questions.

III. NAMED PLAINTIFFS ARE NEITHER TYPICAL NOR ADEQUATE CLASS REPRESENTATIVES.

"Typicality requires that the disputed issues of law or fact occupy essentially the same degree of centrality to the named plaintiff's claim as to that of other members of the proposed class." *Mazzei v. Money Store*, 829 F.3d 260, 272 (2d Cir. 2016); *see generally Rapcinsky v. Skinnygirl Cocktails, L.L.C.*, 2013 WL 93636, at *5-6 (S.D.N.Y. Jan. 9, 2013). A "class representative must be part of the class and possess the same interest and suffer the same injury as

the class members." *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 156 (1982).

A. Named Plaintiffs Do Not Have Legally Viable Or Typical Claims.

If a named plaintiff cannot state a claim against the defendant, then he or she cannot have typical claims and or be a class representative. *E.g.*, *East Tex. Motor Freight Sys. Inc. v. Rodriguez*, 431 U.S. 395, 403-04 (1977); *Smook v. Minnehaha Cty.*, 457 F.3d 806, 814 (8th Cir. 2006); *La Mar v. H & B Novelty & Loan Co.*, 489 F.2d 461, 466 (9th Cir. 1973); *Salgado v. Piedmont Capital Corp.*, 534 F. Supp. 938, 953 (D.P.R. 1981).

As explained in New GM's Motion for Summary Judgment, each named plaintiff's claims fail for multiple reasons. Without a representative, no class can be certified. Even if the Court partially grants New GM summary judgment as to certain claims, such an outcome would further confirm the lack of typicality and predominance by illustrating that the viability of an individual claim turns on unique facts or different laws.

Independently, the facts establishing a lack of predominance demonstrate that "no claim is typical of another in the sense of providing common answers, and leaves the 'class' no more than a diverse and unmanageable aggregation of individual claims, better dealt with separately." *Football Ass'n Premier League Ltd. v. YouTube, Inc.*, 297 F.R.D. 64, 68 (S.D.N.Y. 2013); *see also Beck v. Maximus, Inc.*, 457 F.3d 291, 296 (3d Cir. 2006); *Romberio v. UnumProvident Corp.*, 385 F. App'x 423, 431 (6th Cir. Jan. 12, 2009).

B. Various Named Plaintiffs Are Subject To Unique Defenses.

"[C]lass certification is inappropriate where a putative class representative is subject to unique defenses which threaten to become the focus of the litigation." *Baffa v. Donaldson, Lufkin & Jenrette Secs. Corp.*, 222 F.3d 52, 59 (2d Cir. 2000); *Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 903 F.2d 176, 180 (2d Cir. 1990). "In assessing the typicality of the plaintiff's claims, the court must pay special attention to unique defenses that are not shared

by the class representatives and members of the class." *Spann v. AOL Time Warner, Inc.*, 219 F.R.D. 307, 316 (S.D.N.Y. 2003). If a plaintiff's "problems could become the focus of cross-examination and unique defenses at trial," then he or she is not an appropriate class representative. *In re NYSE Specialists Secs. Litig.*, 240 F.R.D. 128, 144 (S.D.N.Y. 2007); *see also Savino v. Computer Credit, Inc.*, 164 F.3d 81, 87 (2d Cir. 1998); *Kline v. Wolf*, 702 F.2d 400, 402-03 (2d Cir. 1983). "[T]he defendant need not show at the certification stage that [a] unique defense will prevail, only that it is meritorious enough to require the plaintiff to devote considerable time to rebut the unique defense." *In re Digital Music Antitrust Litig.*, 321 F.R.D. 64, 97 (S.D.N.Y. 2017).

1. Named Plaintiffs With Direct Claims Are Atypical.

Various named plaintiffs are subject to unique defenses or have claims that are otherwise not typical of their putative class. *First*, Kenneth Robinson, Christopher Tinen, and Lisa McClellan each disposed of their vehicles before the recalls and thus do not have any benefit-of-the-bargain-damages. *FACC MTD Opinion*, 257 F. Supp. 3d at 403; *see also In re Gen. Motors LLC Ignition Switch Litig.*, 2017 WL 3443623, at *2 (S.D.N.Y. August 9, 2017); New GM Summ. J. Memo. at 26-27. These three named plaintiffs are not typical because they will have an incentive to avoid benefit-of-the-bargain damages and instead develop alternate damages theories to save their claims. *See Falcon v. Philips Elecs. N. Am. Corp.*, 304 F. App'x 896, 897 (2d Cir. Nov. 5, 2008); *McKernan v. United Techs. Corp.*, 120 F.R.D. 452, 454 (S.D.N.Y. 1998).

Second, four Texas named plaintiffs are subject to the unique defense that they cannot show a manifest defect, an essential element of their DTPA claims:

- Dawn Fuller does not claim that her 2008 Impala experienced any kind of stall or other manifestation. Ex. 15, 11/20/17 D. Fuller Dep. at 74:5-10.
- Gareebah Al-ghamdi testified that she experienced stalls but that either her ignition was in the "on" position and did not rotate, or that she did not know the position and thus had no evidence of rotation. Ex. 16, 5/5/17 G. Al-ghamdi Dep. at 100:11-101:9.

- Michael Graciano did not experience any stalls in his 2007 Cobalt, but instead relies on his then-fiancee's daughter's hearsay that she once lost power steering and the breaks did not work. Ex. 18, 5/1/17 M. Graciano Dep. at 79:14-23, 81:5-11. Graciano's claim thus is subject to a unique defense that his alleged manifestation is based on hearsay, and also that he has no evidence of key rotation. *Id.*

- Lisa McClellan, the proposed representative for the Texas Power Steering Defect Class, does not allege that she lost power steering assist. Ex. 17, 5/4/17 L. McClellan Dep. at 112:11-13.

See New GM Summ. J. Memo. at 24-25. Indeed, because they cannot prove manifestation, these plaintiffs are not even members of the alleged classes they purport to represent.

Third, various named plaintiffs are subject to unique defenses regarding lack of reliance and causation, and thus do not have typical consumer protection or common law fraud claims:

- Chimen Basseri and David Padilla testified that they purchased their vehicles because they liked the particular car or based on the dealership's salesman's recommendation, respectively, not because of safety. Ex. B at 1, 3-4.

- Padilla and Orosco did not view any New GM materials before purchasing their vehicles, and Basseri purchased from a non-New GM-affiliated dealer unlikely to pass on such information. Thus, Padilla, Orosco, and Basseri cannot show they would have been aware of any information disclosed about the defect as required under California law. *See* Section II.A.1.c.; Ex. B at 1, 3-4.

- Ronald Robinson did not list safety as a reason for his purchase, but instead relied on the vehicle's low mileage and price. Ex. B at 6.

- Mario Stefano bought his Camaro because he and his wife have long enjoyed Camaros and owned them for many years. Ex. B at 6.

- Gareebah Al-ghamdi did not cite safety as a reason for buying her vehicle, chose not to have the recall repaired, and relied on her family and stepfather rather than New GM. Ex. B at 7.

- Lisa McClellan likewise did not mention safety as a reason for buying her vehicle, but instead made her purchase because of her car's low mileage, appearance, and being American-made. Ex. B at 8.

See, e.g., *Newman v. RCN Telecom Servs., Inc.*, 238 F.R.D. 57, 64 (S.D.N.Y. 2006); New GM Summ. J. Memo. at 34-40.

Fourth, named plaintiffs who bought used Old GM vehicles are subject to unique defenses

because New GM has neither a duty to disclose nor a duty to warn them under state law. *See* Section II.C.; New GM Summ. J. Memo. at 56-61. Accordingly, all named plaintiffs who bought Old GM vehicles—Orosco Santiago, Mitchell Thomas, Brad Akers, Deloris Hamilton, Gareebah Al-ghamdi, Dawn Bacon, Dawn Fuller, Michael Graciano, and Lisa McClellan—do not have claims typical of the classes they seek to represent.

Fifth, California named plaintiffs who drove their vehicles for years or tens of thousands of miles before having any significant problems, or who continued to drive their vehicles after the recall conditions were disclosed in 2014, are subject to unique defenses that they cannot show that their vehicles are unmerchantable:

- Chimen Basseri has driven her vehicle over four years and 26,000 miles without experiencing a shut off or other similar incident. Ex. 71, 11/22/17 C. Basseri Dep. at 38:9-13, 44:9-12, 55:22-25, 57:1-5, 68:24-69:21.

- Kellie Cereceres has driven her vehicle for more than 80,000 miles over five years and claims only that her airbag light briefly flickered, without any evidence that this was related to the recall condition, much less that it made her vehicle unmerchantable. Ex. 55, 12/18/17 K. Cereceres Dep. at 40:1-14, 44:19-46:15.

- Santiago Orosco drove his vehicle 145,000 miles over seven years before selling it without ever experiencing a shut off incident. Ex. 47, 3/9/17 S. Orosco Dep. at 48:3-10, 49:10-17, 52:18-21; 101:9-15; 105:6-15. Orosco claims his daughter told him she experienced a single shut-off, but this is hearsay creating another evidentiary defense and this one incident is not sufficient to show a lack of merchantability, especially where Orosco continued driving the vehicle. *Id.* at 102:8-19.

- David Padilla drove his 2010 Cobalt for over 20,000 miles before trading it in, without experiencing a stall or shut off. Ex. 64, 2/17/17 D. Padilla Dep. at 65:25-66:9, 66:24-67:4; Ex. 72, Padilla PFS Q 37.

See Section II.D.; New GM Summ. J. Memo. at 50-54.

Sixth, plaintiffs who bought Service Parts Vehicles cannot recover unless they prove that their vehicles were repaired using a faulty switch. *See TACC MTD Opinion*, 2016 WL 3920353, at *20 n.15; Section II.B.2.; New GM Summ. J. Memo. at 32-33. None of the five named plaintiffs who owned Service Parts Vehicles—Chimen Basseri, David Padilla, Kenneth Robinson, Brad

Akers, and Cynthia Hawkins—have any evidence that their ignition switches were replaced prior to the 2014 recalls, much less that they were replaced with a faulty switch. Thus, each of them is subject to a unique defense—indeed, none of them have claims at all—and they cannot serve as class representatives.

Seventh, Brad Akers' claims are atypical because he alleges lost earnings from having his vehicle repaired. A plaintiff must prove lost earnings to recover for "lost time." *See* Section I.C.; New GM Summ. J. Memo. at 27-30. Almost none of the named plaintiffs allege they lost earnings, and plaintiffs do not have any evidence regarding putative class members. *See* Section I.C. Akers' claims are not typical because he can focus on recovering lost time damages, while other putative class members will need to focus on different types of damages.

2. Named Plaintiffs With Bankruptcy-Claim-Fraud Counts Are Atypical.

Various Bankruptcy-Claim-Fraud named plaintiffs are subject to unique defenses or are otherwise atypical. *First*, fraudulent concealment requires proof of reliance, and in California that proof includes showing that the plaintiff would behaved different if the information had been disclosed. *See* Section II.A.2.c. Patricia Barker and Esperanza Ramirez were not even aware that Old GM had filed for Chapter 11 in 2009, and thus would not have known to file claims in Old GM's bankruptcy even if the defects had been disclosed. Ex. 69, 2/27/17 P. Barker Dep. at 230:4-9; Ex. 70, 3/03/17 E. Ramirez Dep. at 188:8-22.

Second, William Rukeyser owns a Service Parts Vehicle but does not allege that his switch was replaced. Ex. 73, W. Rukeyser Vehicle Package at GM-MDL2543-305117907; Ex. 74, Rukeyser PFS at Q45. As with other Service Parts Vehicle owners, he cannot recover without proof that his switch was replaced with a faulty one.

C. The Process By Which Plaintiffs' Counsel Selected The Named Plaintiffs Confirms That They Are Not Typical Of Any Putative Class.

Named plaintiffs arise from putative class counsels' multi-year attempt to find representatives for these no injury classes. That process of selection confirms the lack of typicality, however. Thus, plaintiffs' counsel used internet advertising and a website called TopClassActions.com ("TCA") to solicit clients. Docket No. 3963. Of the many millions of potential class members nationwide, only approximately 3,500 responded affirmatively to counsel's solicitations by filling out a form on the TCA website. Ex. 20, Pixton Decl. ¶ 4. These 3,500 are less than .1% of the putative class members nationwide. This decision in response to a solicitation to apply to become a plaintiff by filling out a form on the TCA website creates the first level of filtering, as it is evidence that the respondents are different from all other putative class members since they are more likely to believe their cars are defective and that they have been damaged. Yet even for this self-selected less-than-.1%, approximately 53% of the respondents who wanted to sue told plaintiffs' counsel through TCA that their vehicles did not experience any defect. *Id*. The other 47% asserted their vehicles had a defect, but generally did not identify this supposed "defect" and, when they did, often described an issue unrelated to the recalls forming that basis of plaintiffs' claims. *Id*.

Plaintiffs' counsel then selected as their clients those who they believed were the best of the few putative class members who filled out the TCA form. *Id*. This use of TCA creates the second layer of filtering. Counsel were able to screen out respondents with no claims, weaker claims, or claims with unique individualized issues, resulting in named representatives who would best suit their needs.

The third step plaintiffs' counsel used to filter out those putative class members involved the litigation itself. A total of 273 plaintiffs have joined at least one of the various consolidated complaints, but only 213 plaintiffs were named in the 5ACC, with 22 included "solely for the

purpose of preserving their claims on appeal." *E.g.*, 5ACC ¶¶ 64, 249. Fifty plaintiffs from the three bellwether states have joined at least one consolidated complaint, but 21 (42%) have dropped out or been dismissed. Eleven of the twenty-seven plaintiffs for whom Lead Counsel seek appointment as class representatives—specifically Chimen Basseri, Kellie Cereceres, Crystal Hardin, Michelle Thomas, Brad Akers, Delores Hamilton, Kenneth Robinson, Mario Stefano, Christopher Tinen, Gareebah Al-ghamdi, and Dawn Bacon—were recruited through TCA. Ex. 20, Pixton Decl. ¶ 4. In short, even the small group of plaintiffs carefully selected by plaintiffs' counsel to be named representatives have experienced significant attrition to eliminate any plaintiff whose facts and circumstances illustrate the lack of typicality as well as the lack of predominant commonality. *See In re Digital Music Antitrust Litig.*, 2015 WL 13678846, at *4 (S.D.N.Y. 2015) (denying motion to remove certain named plaintiffs and add others because "Plaintiffs cannot cherry-pick their Proposed Class Representatives after examining what discovery would reveal in order to create a more uniform class.").

Finally, the named plaintiffs selected by counsel, who are not typical of the class, also lack any ability to fairly and adequately represent the proposed classes. "[I]n analyzing whether a putative class representative is adequate, a court must determine whether the party is simply lending his name to a suit controlled entirely by the class attorney." *Beck v. Status Game Corp.*, 1995 WL 422067, at *6 (S.D.N.Y. July 14, 1995); *Sanchez v. Wal-Mart Stores, Inc.*, 2009 WL 1514435, at *3 (E.D. Cal. May 28, 2009). A "class is entitled to an adequate representative, one who will check the otherwise unfettered discretion of counsel in prosecuting the suit." *Beck*, 1995 WL 422067, at *6 (collecting cases). Moreover, "a putative class representative is inadequate when the putative representative has demonstrated lack of familiarity with the class-action suit." *Beck*, 1995 WL 422067, at *6; *see also Burton v. Chrysler Group LLC*, 2012 WL 7153877, at *7

(D.S.C. 2012). As shown in Exhibit F, the named plaintiffs' testimony demonstrates that they have given their lawyers complete discretion, have no involvement in strategic decisions or settlement, and many do not understand their responsibility as proposed class representatives.[57] All putative class representatives listed on Exhibit F are inadequate and cannot represent any class.

IV. PLAINTIFFS' PROPOSED CLASSES ARE NEITHER SUPERIOR NOR MANAGEABLE.

"The superiority requirement reflects the goal of class actions to achieve economies of time, effort and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness." *Adkins v. Morgan Stanley*, 307 F.R.D. 119, 141 (S.D.N.Y. 2015). "Four other factors—individual control of litigation, prior actions involving the parties, the desirability of the forum, and manageability—should also be considered in making these determinations." *Id.* "Of the four factors that inform the Court's predominance and superiority inquiries, manageability is, by far, the most critical concern in determining whether a class action is a superior means of adjudication." *Id.* at 142.

A. New GM's Recalls Are A Superior Method Of Resolving Plaintiffs' Claims.

A class is not superior when a vehicle manufacturer offers a recall to cure any alleged defects. "The Court is convinced that … the administrative remedy provided by NHTSA, including recall of vehicles for inspection and/or repair, is more appropriate than civil litigation seeking equitable relief and money damages in a federal court." *Chin*, 182 F.R.D. at 463-64; *see also Daigle v. Ford Motor Co.*, 2012 WL 3113854, at *5-6 (D. Minn. July 31, 2012) ("Despite the

[57] For example, Mario Stefano testified that he does not "make any decisions to what happens in the lawsuit. I simply tell what I know and what's about to happen to me and what has happened to me." Ex. F at 6-7. When David Padilla was asked if he knew about his responsibilities as a class representation, he answered "No, I don't—that's out of my league." *Id.* at 4. When Michael Graciano was asked if he knows "anything about the claims of the class members that you propose to represent" he replied, "No." *Id*. at 8-9.

possibility that certain class members will not be fully reimbursed through the recall, the Court nonetheless finds that the recall weighs against a finding that a class action is a superior method of adjudication of the claims asserted in this case."); *Ford Ignition Switch*, 174 F.R.D. at 353 ("the administrative remedy provided by NHTSA, including recall of vehicle for inspection and/or repair, is more appropriate than civil litigation seeking money damages in a federal court"); *Johnson*, 285 F.R.D. at 584 (collecting cases); *Ortiz v. Ford Motor Co.*, 909 So. 2d 479, 481-82 (Fla. Dist. Ct. App. 2005).

New GM's voluntary recalls are a superior method of resolving vehicle owners' claims. New GM has offered to repair each vehicle free of charge to the owner. Such repairs cure the defects and provide plaintiffs with what they were entitled to and give them the benefit of their bargain. Recalls are a superior method especially where plaintiffs have no class-wide evidence that the market value of their vehicles decreased as required under the bellwether states' laws, but are only seeking compensation for historical risks of malfunctions that never occurred.

B. Plaintiffs Are Adequately Incentivized To Pursue Any Meritorious Individual Claims.

While plaintiffs assert that the value of their claims is too small to incentivize class members to litigate their claims individually, Pls. Memo. at 34, courts in similar cases hold that individual claims are sufficient because plaintiffs can obtain statutory damages, attorney's fees, or punitive damages. *E.g.*, *Sanneman*, 191 F.R.D. at 456; *Rosen v. Chrysler Corp.*, 2000 WL 34609135, at *15 (E.D. Mich. July 18, 2000).

Plaintiffs here are seeking a substantial amount of compensatory damages for each putative class member —a median alleged economic loss of $9,274 for the Delta Ignition Switch recall vehicles, $966 for the other recalls involving the ignition system; $936 for EPS assist; and $839 for SIAB. Ex. 31, Boedeker Damages Estimates Based on Currently Available Data at 3.

Moreover, plaintiffs and putative class members seek "reasonable attorneys' fees" that are commonly available under consumer protection statutes and can allow plaintiffs to recover the costs of litigation even if the monetary value of their claims is small. 5ACC, Prayer for Relief ¶¶ F. Plaintiffs also seek "statutory damages," "exemplary damages," "statutory penalties," and "reasonable attorneys' fees, costs, and pre-judgment and post-judgment interest." 5ACC, Prayer for Relief ¶¶ C-F. These potential recoveries would provide any vehicle owner who believes he or she has a meritorious claim with more than a sufficient incentive to pursue that individual claim against New GM. Any individual claims, in short, are not small value claims.

C. Plaintiffs' Proposed Classes And Trial Plan Are Not Manageable.

"Plaintiffs envision a single trial" of 23 separate classes and subclasses applying the differing laws of 3 states; involving 7 distinct recalls involving 160 different vehicle models; under 7 counts, each with their own varying elements; and with diverse bases for claims against New GM, such as direct liability, successor liability, and novel Bankruptcy-Claim-Fraud counts. Pls. Memo. at 36; Pls. Mot. at 1-13. Any jury would be hopelessly confused by attempting to apply so many different legal standards to the different facts of each recall, which would be compounded by determining the individual facts for each named plaintiff.[58]

First, a jury would have to consider that the bases of plaintiffs' claims vary among direct, successor liability, and Bankruptcy-Claim-Fraud counts. Each basis will require a jury to consider

[58] *See, e.g., Hardings v. Tambrands*, 165 F.R.D. 623, 630-32 (D. Kan. 1996) ("The potential for numerous different subclasses weighs against a finding of predominance of common issues" as well as manageability, especially where differing jury instructions would be required for each state's law: "The court finds that the advantages of a class action do not outweigh the problems of case manageability and jury confusion."); *Bouder v. Prudential Fin., Inc.*, 2013 WL 246848, at *5 (D.N.J. Jan. 18, 2013) ("The number of individual State Subclasses that exist here, coupled with the potential for individualized inquiry, … the Court foresees significant difficult[y] in how this case will be managed and in how it will play out before a jury at trial."); *Road Hog Trucking, LLC v. Hilmar Cheese Co., Inc.*, 2016 WL 6125677, at *3 (N.D. Tex. Oct. 19, 2016); *see also Walsh v. Ford Motor Co.*, 130 F.R.D. 260, 277 (D.D.C. 1990).

different facts and legal questions. For example, successor liability plaintiffs must provide evidence on the successor liability factors, which will be irrelevant to all other plaintiffs and claims. *In re Gen. Motors LLC Ignition Switch Litig.*, 2017 WL 6509256, at *5-6 (S.D.N.Y. Dec. 19, 2017). What evidence can be considered for each basis also varies. Plaintiffs with direct claims could rely on New GM's conduct before the putative class member's purchase plus what New GM knew about the knowledge of Old GM personnel or in Old GM files, while Bankruptcy-Claim-Fraud plaintiffs would be limited to what New GM knew between July 10 to November 30, 2009 about the knowledge of Old GM personnel or in Old GM files.

Second, plaintiffs' claims differ by state. A jury would have to consider whether vehicles were merchantable under California law, but not Missouri or Texas. The jury would have to consider whether common law fraud could be proven under California and Missouri law, but not Texas. Plaintiffs' consumer protection claims also vary by state. The UCL has three separate prongs not shared by any other statute, *id.* at *19; the CLRA contains a general standard with unique provisions, *id.* at *21, the MMPA contains yet a different standard with specific elements such as "an ascertainable loss of money or property," *id.* at *33; while the Texas DTPA unconscionability prong requires that New GM took advantage of plaintiff's lack of sophistication, *FACC MTD Opinion*, 257 F. Supp. 3d 372, 449. The UCL, CLRA, and DTPA require both causation and reliance, while the MMPA requires causation. Each state uses a different test for causation and reliance. *See* Sections II.A.2.c-e. Applying so many different legal standards across different claims will be an insurmountable and confusing task for any jury. *See Woodard v. Fidelity Nat'l Title Ins. Co.*, 2008 WL 5737364, at *6 (D.N.M. Dec. 8, 2008); *Shoots v. iQor Holdings US Inc.*, 325 F.R.D. 253, 269 (D. Minn. 2018); *Ramthun v. Bryan Career College-Inc.*, 93 F. Supp. 3d 1011, 1021 (W.D. Ark. 2015).

Third, plaintiffs seek to adjudicate the merits of 7 different recalls in one trial. Both across and within recalls, unintended key rotation vehicles showed material differences in the circumstances under which the key may rotate. *See* Section II.B.2. Consequently, the specific remedy implemented also differed due to mechanical design differences such as chassis and interior compartment design, suspension, and ignition switch and system design. Combining all 5 separate key rotation recalls, and the differing facts for all recalls, in one trial creates a likelihood that the jury will confuse the separate recalls with the pre-MY2008 Delta Ignition Switch recall.

SIAB and EPS Assist recalls are unrelated to the ignition recalls, or each other. Neither involves ignition switch rotation. Old GM and New GM repeatedly changed vehicle parts to address the SIAB and EPS Assist recall conditions. Pls. Offer of Proof ¶¶ 92, 94-98, 103-07.

Given the above, common questions would not predominate at the trial involving so many disparate vehicles, field histories, recalls and purchase or lease conditions. *See*, *e.g.*, *Ford Ignition Switch*, 174 F.R.D. at 342; *In re GM Dex-Cool Prods. Liab. Litig.*, 241 F.R.D. 305, 326 (S.D. Ill. 2007) (collecting cases). "The district court's use of subclasses did not solve the problem [that the class claims were based on widely divergent facts]. Subclasses are not a substitute for compliance with Rule 23." *See*, *e.g.*, *Sprague v. Gen. Motors Corp.*, 133 F.3d 388, 399 & n.9 (6th Cir. 1998).

Finally, plaintiffs argue that their trial plan should be compared to the alternatives, Pls. Memo. at 35; yet, in point of fact, more manageable alternatives exist—NHTSA's recall process and individual consumer protection act claims.

V. PLAINTIFFS' PROPOSED CLASSES ARE OVERBROAD AND IMPROPER.

Rule 23 is partly "designed to protect absentees by blocking unwarranted or overbroad class definitions." *Amchem*, 52 U.S. at 620. A class definition is overbroad where a significant portion of the putative members cannot recover from the defendant. *E.g.*, *Mayo v. UBS Real Estate Secs., Inc.*, 2012 WL 4361571, at *5 (W.D. Mo. Sept. 21, 2012) ("Plaintiff's proposed class

definition includes numerous borrowers who lack standing, therefore the Court may not certify the class."); *Circle Click Media LLC v. Regus Mgmt. Group LLC*, 2015 WL 6638929, at *12 (N.D. Cal. Oct. 30, 2015) ("Plaintiffs' proposed class definitions are therefore overbroad insofar as they encompass" agreements that disclosed allegedly improper fees); *Monteferrante v. Williams-Sonoma, Inc.*, 241 F. Supp. 3d 264, 270-71, 274 (D. Mass. 2017).

Plaintiffs' proposed classes here are overbroad for two reasons. *First*, the proposed classes contain persons who purchased their vehicles after July 10, 2009 but sold or otherwise disposed of their vehicles before the 2014 recalls. The Court has repeatedly held that such plaintiffs have no economic loss claim; nor could they have any claim for lost time incident to the recalls. *See* Section I.B. "[O]ver 25% of the at-issue vehicles had multiple owners within each of the Bellwether states" between July 2009 and the date of each applicable recall. Ex. 22, Hanssens Sur-Rebuttal Rpt. ¶ 23 & Ex. 14. *Second*, under plaintiffs' expert Boedeker's own survey data, 26.6% to 39.1% of the putative class members have no injury, no damages, and no claim. *See* Section I.A.3. Plaintiffs' proposed classes cannot be certified as they consist of large numbers of putative members with no injury and no claim.

CONCLUSION

Decisions from the Second Circuit and this district reject certification where there is no class-wide proof of injury, or reliance is an individual issue, or causation is an individual issue, or named plaintiffs are subject to unique defenses. *E.g.*, *McLaughlin v. American Tobacco Co.*, 522 F.3d 215, 222-28 (2d Cir. 2008) (Walker, J.) (reversing certification where "reliance … cannot be the subject of general proof," causation "would require individualized proof," and fact of injury likewise was "an inherently individual inquiry"); *Johnson v. Nextel Commc'ns Inc.*, 780 F.3d 128, 148 (2d Cir. 2015) (Lynch, J.) (vacating certification where "liability for a significant bloc of the class members and damages for the entire class must be decided on an individual basis"); *Levitt v.*

J.P. Morgan Secs., Inc., 710 F.3d 454, 465-70 (2d Cir. 2013) (Livingston, J.) (reversing certification where plaintiffs "cannot employ a classwide presumption of reliance" and "nor, therefore, can Plaintiffs satisfy the predominance requirements of Rule 23(b)(3).").[59] In this case,

[59] *In re Initial Public Offerings Secs. Litig.*, 471 F.3d 24, 41-42 (2d Cir. 2006) (Newman, J.) (vacating certification where plaintiffs could not establish presumption of reliance and thus "individual questions of reliance would predominate over common questions"); *Arkansas Teachers Ret. Sys. v. Goldman Sachs Grp., Inc.*, 879 F.3d 474, 484 (2d Cir. 2018) (Wesley, J.) (vacating certification and noting that requiring plaintiffs to prove actual reliance "dooms the predominance of class-wide issues"); *Mazzei v. Money Store*, 829 F.3d 260, 272-73 (2d Cir. 2016) (Jacobs, J.) (affirming decertification where evidence showed that proving element of privity was not subject to class-wide evidence); *Moore v. PaineWebber*, 306 F.3d 1247, 1255 (2d Cir. 2002) (Sotomayor, J.) (holding "that a common course of conduct is not enough to show predominance" where they were individual questions regarding what misrepresentations each putative class member received); *In re Petrobras Secs.*, 862 F.3d 250, 270-75 (2d Cir. 2017) (Garaufis, J.) (vacating certification where "domestic transactions" requirement of securities fraud claims required individual evidence); *Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 903 F.2d 176, 179 (2d Cir. 1990) (Pierce, J.) (affirming denial of class certification where named plaintiff was "subject to several unique defenses"); *Kline v. Wolf*, 702 F.2d 400, 402-03 (2d Cir. 1983) (Mansfield, J.) (denying certification as plaintiff was an inadequate class representative because of mistaken testimony); *Falcon v. Philips Elecs. N. Am. Corp.*, 304 F. App'x 896, 897 (2d Cir. Nov. 5, 2008) (per curiam) (plaintiff's "disposal of the television set, standing alone, was sufficient to support the District Court's exercise of discretion" in finding that plaintiff was not an adequate representative); *In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig.*,, 209 F.R.D. 323, 349-50 (S.D.N.Y. 2002) (Scheindlin, J.) ("courts deny certification where individualized issues of fact abound"); *In re Avon Anti-Aging Skincare Creams & Prod. Mktg. & Sales Practices Litig.*, 2015 WL 5730022, at *4 (S.D.N.Y. Sept. 30, 2015) (Oetken, J.) (denying certification where there were "material variations in the representations made and the kinds or degrees of reliance by the persons to whom they were addressed"); *Freeland v. AT & T Corp.*, 238 F.R.D. 130, 152 (S.D.N.Y. 2006) (Cole, J.) (denying certification where "proof, even though made on a classwide basis, cannot establish injury to each individual class member"); *Fort Worth Emps.' Ret. Fund v. J.P. Morgan Chase & Co.*, 301 F.R.D. 116, 142 (S.D.N.Y. 2014) (Oetken, J.) (denying certification because "without assurance beyond [plaintiffs' proffered expert]'s say-so, the Court cannot conclude that there is a damages model that will permit the calculation of damages on a classwide basis"); *Sicav v. James Jun Wang*, 2015 WL 268855, at *6 (S.D.N.Y. Jan. 21, 2015) (Engelmayer, J.) (denying certification where "plaintiffs have not shown or explained, concretely, how damages would be calculated"); *Calvo v. City of New York*, 2017 WL 4231431, at *3-4, 7 (S.D.N.Y. Sept. 21, 2017) (Caproni, J.) (denying certification where some putative class members were not injured and thus lacked standing); *Royal Park Investments SA/NV v. U.S. Bank Nat'l Ass'n*, 2018 WL 4007285, at *8 (S.D.N.Y. Aug. 14, 2018) (Marrero, J.) (denying certification where individualized inquiry into each plaintiff's standing would predominate over common issues); *Kottler v. Deutsche Bank AG*, 2010 WL 1221809, at *3 (S.D.N.Y. Mar. 29, 2010) (Crotty, J.) (denying certification and noting "[r]eliance and causation are inherently individualized elements and generally not susceptible to common proof"); *Football Ass'n Premier League Ltd. v. YouTube, Inc.*, 297 F.R.D. 64, 68 (S.D.N.Y. 2013) (Stanton, J.) (denying certification despite common issues pertaining to defendants' conduct where plaintiffs' claims presented individual factual issues); *McCracken v. Best Buy Stores, L.P.*, 248 F.R.D. 162, 169 (S.D.N.Y. 2008) (Chin, J.) (denying certification on predominance grounds where there were "material variations" in the manner in which plaintiffs were induced to subscribe to sales offer); *Pelman v. McDonald's Corp.*, 272 F.R.D. 82, 95 (S.D.N.Y. 2010) (Pogue, J.) (denying certification where individualized causation issues would predominate); *Spann v. AOL Time Warner, Inc.*, 219 F.R.D. 307,

all of these challenges exist, combining to form a multiplicity of individual issues, uncommon facts, flawed damages methodologies, and substantive problems with plaintiffs' proposed classes. No class has ever been certified under such circumstances, and this case should not be the first.

316-21 (S.D.N.Y. 2003) (Cote, J.) (denying certification on typicality and adequacy grounds where named plaintiffs were subject to individual defenses); *McKernan v. United Techs. Corp.*, 120 F.R.D. 452, 454 (S.D.N.Y. 1998) (Nevas, J.) (where named plaintiffs had sold their defective helicopters, "they cannot be said to have claims typical of the class they seek to represent," which included current owners); *Newman v. RCN Telecom Servs., Inc.*, 238 F.R.D. 57, 64 (S.D.N.Y. 2006) (Marrero, J.) (named plaintiff was not typical where he alleged class was induced to subscribe to defendant's internet service because of speed, and he personally switched to save money not for speed); *In re Digital Music Antitrust Litig.*, 321 F.R.D. 64, 98 (S.D.N.Y. 2017) (Preska, J.) (denying certification where affirmative defense is "meritorious enough to require Plaintiffs to devote considerable time to its rebuttal"); *Royal Park Investments SA/NV v. Deutsche Bank Nat'l Tr. Co.*, 2017 WL 1331288, at *4 (S.D.N.Y. Apr. 4, 2017) (Nathan, J.) (denying certification where defined class was impermissibly broad and not ascertainable); *Feinstein v. Firestone Tire & Rubber Co.*, 535 F. Supp. 595, 606 (S.D.N.Y. 1982) (Haight, J.) (denying certification where "plaintiffs so tailored the class claims in an effort to improve the possibility of demonstrating commonality" which "was purchased at the price of presenting putative class members with significant risks of being told later that they had impermissibly split a single cause of action"); *Beck v. Status Game Corp.*, 1995 WL 422067, at *6 (S.D.N.Y. July 14, 1995) (Edelstein, J.) (denying certification where named plaintiffs did not check the unfettered discretion of plaintiffs' attorneys).

Respectfully submitted,

Dated: September 21, 2018

/s/ Richard C. Godfrey, P.C.

Richard C. Godfrey, P.C.
Andrew B. Bloomer, P.C.
KIRKLAND & ELLIS LLP
300 N. LaSalle
Chicago, IL 60654-3406
Phone: 312-862-2000
Fax: 312-862-2200
richard.godfrey@kirkland.com
andrew.bloomer@kirkland.com

Attorneys for Defendant General Motors LLC

CERTIFICATE OF SERVICE

I hereby certify that on October 2, 2018, I electronically filed the foregoing using the CM/ECF system which will serve notification of such filing to the email of all counsel of record in this action.

By: /s/ *Andrew B. Bloomer, P.C.*
Andrew B. Bloomer, P.C.

Exhibit A

EXHIBIT A: LIST OF NAMED PLAINTIFFS

PLAINTIFFS WITH ALL CLAIMS

Name	Vehicle	Recall(s)	Purchase Info	Warr-anty	Still Own	Miles Driven	Claims Manifest Defect	Claims Lost Earnings
California								
Basseri, Chimen	2011 Chevrolet HHR	14v047 (Cobalt/Ion Ignition Switch)	3/5/2013 (Used)	Y	Y	26,000 (37,000 at purchase)	N	N
Cereceres, Kellie	2012 Chevrolet Traverse	14v118 (SIAB)	6/18/2012 (New)	Y	Y	80,000	Y	N
Orosco, Santiago	2010 Chevrolet Camaro (Old GM)	14v346 (Camaro Key Rotation)	8/1/2009 (New)	Y	N - Sold August 2016	145,000	Y	N/A (No recall repair)
Padilla, David	2010 Chevrolet Cobalt (New GM)	14v047 (Cobalt/Ion Ignition Switch) 14v153 (EPS)	April 2010 (New)	Y	N - Sale date unknown	20,000	Y	N
Thomas, Michelle	2005 Buick Lacrosse	14v355 (Key Rotation)	12/9/2010 (Used)	N	Y	121,000 (72,000 at purchase)	Y	N
Missouri								
Akers, Brad	2009 Chevrolet HHR (Old GM)	14v047 (Cobalt/Ion Ignition Switch) 14v153 (EPS)	Nov 2009 (New)	Y	Y	177,777	Y	Y
Hamilton, Deloris	2000 Oldsmobile Alero	14v400 (Key Rotation)	2/24/2012 (Used)	N	N - Gifted 4/1/2016	165,000 total (including prior owner)	N	N/A (No recall repair)
Hawkins, Cynthia	2010 Chevrolet Cobalt (New GM)	14v047 (Cobalt/Ion Ignition Switch) 14v153 (EPS)	7/23/2013 (Used)	N	Y	48,000 (52,000 at purchase)	N	N

Name	Vehicle	Recall(s)	Purchase Info	Warr-anty	Still Own	Miles Driven	Claims Manifest Defect	Claims Lost Earnings
Robinson, Ronald	2010 Chevrolet Impala	14v355 (Key Rotation)	June 2011 (Used)	N	Y	80,000 (25,000 at purchase)	N	N
Stefano, Mario	2011 Chevrolet Camaro	14v346 (Camaro Key Rotation)	5/14/2013 (Used)	Y	Y	25,000 (32,000 at purchase)	Y	N
Tinen, Christopher	2010 GMC Acadia (New GM)	14v118 (SIAB)	2/22/2010 (New)	Y	N - Sold April 2012	52,000	Y	N/A (No recall repair)
Texas								
Al-ghamdi, Gareebah	2004 Chevrolet Impala	14v400 (Key Rotation)	9/7/2009 (Used)	N	N - Sold April 2017	100,000 (80,000 at purchase)	Y	N/A (No recall repair)
Bacon, Dawn	2006 Cadillac CTS	14v394 (Cadillac Key Rotation)	Sept 2012 (Used)	N	Y	40,000 (160,000 at purchase)	Y	N/A (No recall repair)
Fuller, Dawn	2008 Chevrolet Impala	14v355 (Key Rotation)	12/17/2011 (Used)	Y	Y	95,000 (79,630 at purchase)	N	N
Graciano, Michael	2007 Chevrolet Cobalt	14v047 (Cobalt/Ion Ignition Switch)	10/17/2011 (Used)	N	Y	58,000 (44,000 at purchase)	Y	N
McClellan, Lisa	2005 Chevrolet Malibu Maxx	14v153 (EPS)	11/22/2010 (Used)	N	N - Sold April 2012	Under 10,000 (60,000 at purchase)	Y	N/A (No recall repair)

SUCCESSOR LIABILITY PLAINTIFFS

Name	Vehicle	Recall(s)	Purchase Info	Warr-anty	Still Own	Miles Driven	Claims Manifest Defect	Claims Lost Earnings
Missouri								
Robinson, Kenneth	2008 Pontiac G5	14v047 (Cobalt/Ion Ignition Switch)	9/7/2008 (New)	Y	N - Sold May 2013	88,000	Y	N/A (No recall repair)
Witherspoon, Patrice	2006 Saturn Ion	14v047 (Cobalt/Ion Ignition Switch)	2005 (New)	Y	Y	165,000	Y	N

BANKRUPTCY-CLAIM-FRAUD PLAINTIFFS

Name	Vehicle	Recall(s)	Purchase Info	Warranty	Still Own	Claims Manifest Defect
California						
Patricia Barker	2005 Saturn Ion	14v047 (Cobalt/Ion Ignition Switch)	March, 2005 (New)	Y	Y	Y
Michael & Sylvia Benton	2005 Chevrolet Cobalt	14v047 (Cobalt/Ion Ignition Switch)	1/10/2009 (Used)	N	Y	Y
Kimberly Brown	2006 Chevrolet HHR	14v047 (Cobalt/Ion Ignition Switch)	1/7/2007 (New)	Y	Y	Y
Crystal Hardin	2005 Chevrolet Cobalt	14v047 (Cobalt/Ion Ignition Switch) 14v153 (EPS)	5/17/05 (New)	Y	Y	Y
Javier Malaga	2006 Chevrolet Cobalt	14v047 (Cobalt/Ion Ignition Switch)	12/8/06 (Used)	Y	N - Sold July 30, 2016	N
Winifred Mattos	2007 Pontiac G5	14v047 (Cobalt/Ion Ignition Switch)	April 2007 (New)	Y	Y	N
Esperanza Ramirez	2007 Saturn Ion	14v047 (Cobalt/Ion Ignition Switch)	3/13/07 (New)	Y	Y	N
William Rukeyser	2008 Chevrolet Cobalt	14v047 (Cobalt/Ion Ignition Switch)	9/4/08 (New)	Y	Y	N

Name	Vehicle	Recall(s)	Purchase Info	Warranty	Still Own	Claims Manifest Defect
Texas						
Shenyesa Henry	2004 Saturn Ion	14v047 (Cobalt/Ion Ignition Switch)	2003 (New)	Y	N - Donated 2016	Y
Lisa Simmons	2007 Saturn Ion	14v047 (Cobalt/Ion Ignition Switch)[1]	2007 (New)	Y	Y	N

[1] The Barker, Henry, and Simmons plaintiffs' vehicles also were subject to the EPS Assist recall, but those recalls are not part of their Bankruptcy Claim Fraud counts, which are limited to claims based on the Delta Ignition Switch recall. 5ACC ¶ 959.

Exhibit B

EXHIBIT B: NAMED PLAINTIFFS' REASONS FOR PURCHASE

Name	
California	
Barker, Patricia	• "I went in [to the dealership] specifically to replace a [Saturn SL1] that had saved my life. I even sent a letter to Saturn about the accident. I would never have bought that car, if that guy had said, well, you know, it's an okay car, but it will get you around. I told him specifically I wanted a car that was as safe as that Saturn and as reliable as that Saturn, okay? . . . The gentleman that sold me the car -- I'm fine -- told me the car I was buying was safe, well built, reliable, easy maintenance, all the things I was looking for that I had in the SL1. If I'd had any doubts I never would have purchased that car." (Ex. 69, 2/27/17 P. Barker Dep. Tr. at 178:9-24)
Basseri, Chimen	• "Q. How did you decide to buy a 2011 HHR from Valencia of Nissan of Valencia? Sorry. A. I was looking through the cars.com, you know, locally, but that's the only place that there was a 2011 white HHR, and we wanted to buy that car because we wanted to buy the car. You know, me and my fiancé, we liked the car. Q. It was a cool-looking car, right? A. Yeah, it is. Q. It has like a muscle car look from a bygone era, right? A. Yeah. It looks like the old Nomads, Chevy Nomads, and it's an SUV. It's a nice car." (Ex. 71, 11/22/17 C. Basseri Dep. Tr. at 109:2-14)
Benton, Michael	• The salesman told the Bentons the vehicle "was a dependable car, good gas saver, and that's what we wanted since I had to drive 80 miles a day, and based on that, we bought it. … He -- he said it was a safe car. … Gas efficient." (Ex. 116, 2/28/17 M. Benton Dep. Tr. at 66:2-21)
Benton, Sylvia	• "Q. And why did you decide to purchase the Cobalt? A. Because the salesperson said it was a good car to drive. We wanted something reliable that was a good price for us, since we had just went through bankruptcy. So we needed a car that was safe and reliable." (Ex. 122, 2/28/17 S. Benton Dep. Tr. at 48:11-17)

7

Name	
	• "We're looking for a car that's -- that's a gas saver, safe, and a nice – nice little car. That's it." (*Id.* at 50:23-25)
Brown, Kimberly	• "Q. [T]he reasons you purchased this particular HHR is because [plaintiff's husband] liked the car and that you were told it was a good, safe, reliable car, and because it was good on gas mileage; is that right? A. Yes." (Ex. 87, 4/24/17 K. Brown-Shipley Dep. Tr. at 35:7-17)
Cereceres, Kellie	• "Both Ms. Cereceres and her husband were loyal GM customers, and, initially, they were very impressed with the Traverse after renting one for a weekend a few years ago. . . . [They] chose this vehicle, in part, because its safety and reliability was important to them." (Ex. 55, 12/18/17 K. Cereceres Dep. Tr. at 26:17-27:11)
Hardin, Crystal	• "Yes, I did purchase [the Cobalt] in April of 2005. Why? The ad on television caught my eye and I wanted a new vehicle." … "Q. So you saw a TV ad where the Cobalt was racing a new Corvette on a racetrack and the Cobalt won? A. Uh-huh. Q. And that's why you bought the vehicle? A. Yeah. … What I found to be catchy is you have such a classic car, being the Corvette, to the new snazzy car, and the way that they just for me put the classic with the new and had the new win just kind of made me feel important. That was what drew me to buy the car Q. Okay. Were you looking at any other vehicles other than the Cobalt when you purchased it? A. No. The ad sold me." (Ex. 131, 3/2/17 C. Hardin Dep. Tr. at 124:8-125:6)
Malaga, Javier	• Q. "Any why did you buy the subject vehicle? A. I needed some new wheels for – I was changing jobs, and I was supposed to be doing some sales. So I needed some reliable, safety wheels, you know, to be able to take potential customers, go visit them and maybe take them

7

Name	
	to business lunches. So I thought I needed – my car was really run down, so I needed something different." (Ex. 132, 3/24/17 J. Malaga Dep. Tr. at 50:16-24)
Mattos, Winifred	• "I wanted something new, something safe, something with … better mileage than what I was driving, and it was a pretty-looking car . . . [W]e were talking about getting an American-made car … ." (Ex. 89, 3/3/17 W. Mattos Dep. Tr. at 28:20-29:6) • "I was just interested in getting an American-made car." (*Id.* at 29:7-11)
Orosco, Santiago	• "My daughter wanted the car, and once a young lady makes up her mind, it really doesn't make a difference what you think. . . . [S]he saw a Camaro, brand new Camaro, and that's all it took once she saw it on the showroom floor. . . . [I]t was cool, those were her words. . . . She just -- she just had Camaro in her eyes, that was it." (Ex. 47, 3/9/17 S. Orosco Dep. Tr. at 53:23-55:14) • Safety was "one of [plaintiff's] concerns" when picking out a vehicle for purchase, but "safety was not one of [plaintiff's daughter's] concerns." (*Id.* at 56:6-11.)
Padilla, David	• "Q. When you purchased the 2010 Chevy Cobalt why did you pick that car over the other two or three? A. Told me it is a good buy. He says, 'It is in good shape.' It wasn't. Later I found out, but he told me it was and I believed him. But he was honest. He said, 'Get it in here.' He says, 'There is something wrong with it.' … Q. Do you recall specifically what [the dealer's salesperson] told you about the Chevy Cobalt when you spoke with him on the day that you purchased it? A. No. I really -- I liked it and I bought it. I didn't ask no questions on it. … Q. How much time did you spend shopping around before you purchased the Cobalt?

7

Name	
	A. Not much time. When [the dealer's salesperson] called me he had the car there. I liked it. I went and bought it. Q. Maybe a couple of days? A. I didn't do no shopping for that one. I -- I purchased it when he suggested it." (Ex. 64, 2/17/17 D. Padilla Dep. Tr. at 29:17-23, 30:10-14, 31:19-25)
Ramirez, Esperanza	• "I wanted an affordable car . . . and I wanted a safe car. . . . Something I did not mechanically -- have to fix. . . . I specifically said I needed to -- to have a car that would last me. . . . Reliable." (Ex. 70, 3/3/17 E. Ramirez Dep. Tr. at 59:21-60:14)
Rukeyser, William	• "Q. Okay. Mr. Rukeyser, why did you buy the subject vehicle? A. "… [Based] on a number of factors, including advertising that we had seen in a number of media, having driven a similar model, a rental vehicle for work, and on the basis of advertising that was put in front of me, including GM Websites or Website pages, it appeared that were were getting a car of -- of the size that we wanted that was going to be safe and reliable and would provide good commuting and pleasure driving." (Ex. 137, 3/17/17 W. Rukeyer Dep Tr. at 83:18-84:4) • "[W]e wanted a four-door . . . vehicle for ease of getting in and out, one that was safe and reliable, had decent gas mileage, and that would provide us good service both for commuting and pleasure driving." (*Id.* at 84:5-13)
Thomas, Michelle	• "Q. Why did you buy the LaCrosse in 2010? A. I bought the LaCrosse, one, because I needed a new car; two, I had did some research through some advertisements that I'd seen, and I liked how it was spacious on the inside, a smooth ride, and from what I had saw, they were safe and reliable forms of transportation. And I found one for the right price, so I bought it." (Ex. 138, 3/21/17 M. Thomas Dep. Tr. at 36:13-37:7)
Missouri	
Akers, Brad	• "I ended up just sticking with a 2009 Chevy HHR because I knew [plaintiff's grandmother] could get into it. That was one of the reasonings. And one of the other reasonings was because of the salesperson at the dealership was . . . kind of touting or bragging about the safety features that the HHR had versus maybe the Kia Sportage. So that was another contributing factor was not only what the dealership said but I had also I believe seen an advertisement in some auto magazine in a doctor's office while I was waiting about the different ratings of cars,

7

Name	
	and the Chevy HHR seemed to rate safety-wise a little higher than a few other cars I was possibly considering that my grandma could ride in." (Ex. 48, 3/23/17 B. Akers Dep. Tr. at 49:20-50:21)
Hamilton, Deloris	• "I was looking for a nice car. I was trying to save gas -- car that would save my gas. . . . I was looking for a good condition car, mechanical wise, that I would have any problems, anything breaking down on me, like transmission or motor." (Ex. 39, 3/13/17 D. Hamilton Dep. Tr. at 85:1-20) • Hamilton "took [the dealer salesperson's] word that it was safety, that was one-owner. He said it was old lady car. Old lady car, you going to jump on that, it's good, dependable car." (*Id.* at 89:6-8) • Hamilton also purchased the vehicle because "it was a safety [sic] and it was in good mechanical condition," her "experience testing driving it," so "I can get me around," because it "[s]aved on gas," and "was in good mechanical condition." (*Id.* at 89:11-90:9)
Hawkins, Cynthia	• "[W]hen I saw that car, I'm like that is the car that we should get because it had four doors; it was family-oriented; it was -- that's the reason why I picked that car." (Ex. 99, 3/24/17 C. Hawkins Dep. Tr. at 34:12-15) • Q. So the Cobalt was kind of the first vehicle you saw that struck your eye. A. Yes." (*Id.* at 34:22-24) • "I wanted it to be safe and reliable[.]" (*Id.* at 87:2-13)
Robinson, Kenneth	• "Q. Why did you purchase the subject vehicle in particular? • A. We had a friend that we went to church with . . . he worked at GM, and at that time they had like a -- GM was offering to the people who worked at GM at the manufacturing company that made the cars like an incentive for like their friends, their family. . . . [I]t was like three to $500. . . . And so we went, checked it out." (Ex. 49, 5/9/17 K. Robinson Dep. Tr. at 39:6-18) • Plaintiff purchased the vehicle based on its "color, it was red," its "safety features on the car, about the air bags, about how safe it was," "about the steering . . . how good the steering is," and "gas mileage." (*Id.* at 40:4-20)

7

Name	
Robinson, Ronald	• "Q. What were you looking for when you went to Enterprise to purchase a vehicle in June of 2011?" A. I was looking for low mileage and what I would consider a decent price." (Ex. 50, 3/21/17 R. Robinson Dep. Tr. at 59:23-60:3)
Stefano, Mario	• "Q. Mr. Stefano, why did you buy the subject vehicle? A. Because it is a vehicle that my wife and I enjoy. We've always enjoyed Camaros. It was everything that she wanted in a car, we thought, and the dealership is somewhere that we frequent for buying our vehicles. So this is our second one buying from there, and our daughter's bought one from there, and you just kind of make a habit of buying from the same place." (Ex. 51, 4/14/17 M. Stefano Dep. Tr. at 55:18-56:2) • Plaintiff and his wife were looking specifically for a Camaro that was black or silver, with a certain sized motor, a sunroof, leather, heated seats, the "rally package," remote start, a switchblade key, adjustable seats, adjustable steering wheel, and a stereo package. (*Id.* at 50:7-18; 59:17-60:8)
Tinen, Christopher	• "Q. Why did you buy the subject vehicle? A. Number one I would say was dependability from a -- I can go out and start every day and not have any questions or concerns, so dependability. Number two, safety. The ratings on the car were touted by this dealer and others to have a great safety record. Third was serviceability. Because it's a GM product, I know I could get it -- if I was in some other city doing a sales call, odds are if I needed service, I could get some serviceability." (Ex. 52, 4/13/17 C. Tinen Dep. Tr. 40:11-24) • "Q. Which features were you looking for in purchasing the subject vehicle? A. One I recall was the tow package, that there was a tow package. This car was outfitted to be able to tow. Q. Anything else that was nonnegotiable, you had to have in the vehicle? A. Nothing that come to mind that was, that it was critical." (*Id.* at 38:20-39:3)
Witherspoon, Patrice	• "Q. Why did you purchase the 2006 Saturn ION? A. I was looking for a larger vehicle for me and my minor daughter, a four door. I was also looking for a US vehicle due to the parts. I figured that would be easier if I had to get a part serviced if it was an American-made,

7

Name	
	US vehicle. I was also looking for safe and reliable vehicle to get to and from work and to transport my daughter to and from school, as well as her various activities such as dance." (Ex. 53, 5/31/17 P. Witherspoon Dep. Tr. at 86:17-87:7)
Texas	
Al-ghamdi, Gareebah	• "Q. Now, with respect to the Impala that you bought, what made you decide to buy a vehicle at that time in 2009? A. My previous vehicle that I had was no longer in working order. I needed something reliable to get to work and school." (Ex. 16, 5/5/17 Al-ghamdi Dep. Tr. at 32:13-18) • Al-ghamdi also was influenced by mothers and cousins owning Chevrolets. (*Id.* at 33:2-15)
Bacon, Dawn	• "Q. Can you tell me why you purchased this particular CTS? A. Well, there are several reasons. One, because it was my grandmother's. Two, because it was supposed to be a safe vehicle. And I liked -- I liked the look of the car." (Ex. 57, 3/28/17 D. Bacon Dep. Tr. at 36:15-20)
Fuller, Dawn	• Plaintiff "chose this vehicle in part because the vehicle safety and reliability were important to her." (Ex. 15, 11/20/17 D. Fuller Dep. Tr. at 33:2-16)
Graciano, Michael	• "Nothing in specific we were trying to search for. Just something decent, reliable and safe[.]" (Ex. 18, 5/1/17 M. Graciano Dep. Tr. at 56:19-57:1) • Graciano testified that by "decent, reliable and safe" he meant that the vehicle was "in good shape" without "a bunch of dents or discoloration"; "something newer"; "something reliable and safe"; "low mileage, good running quality"; a positive perception of the GM brand; and the vehicle having "side impact airbags," "antilock brakes," a "remote start," "traction control," and "had never been in a wreck." (*Id.* at 57:2-61:8) • "We were trying to look for something around [$10,000]." (*Id.* at 61:4-16)
Henry, Shenyesa	• "Q. Can you explain to me why you ended up purchasing the 2004 Saturn? A. The initial reason, because of the undentable panels. So I thought that was pretty cool and different view on that. So I purchased it for that purpose."

7

Name	
	• Also, the "vehicle was fairly inexpensive." (Ex. 139, 3/27/17 S. Henry Dep. Tr. at 36:22-37:18)
McClellan, Lisa	• Plaintiff was looking for "something that was reliable, that could get me to work and back and that I could afford." (Ex. 17, 5/4/17 L. McClellan Dep. Tr. at 40:14-19) • "It had low miles on it." (*Id.* at 28:19-21) • "I just kind of like to stay with American[.]" (*Id.* at 44:14-19)
Simmons, Lisa	• "Q. Why did you choose to buy a 2007 Saturn Ion as opposed to any other vehicle in the market in 2007? A. I had previously developed a rapport with the salesman. He was the same salesman who sold me the silver Saturn, the approximately 2000, 2001 model. And so that's why I chose that particular -- actually, the color of the vehicle was red, and I'm more into color and shapes than the maker or whatever else. So that's just it. So I trusted his opinion." (Ex. 140, 6/21/17 L. Simmons Dep. Tr. at 75:13-25)

Exhibit C

EXHIBIT C: INFORMATION SOURCES NAMED PLAINTIFFS CONSIDERED

Name	
California	
Barker, Patricia	• "At the dealership when purchasing the car, I saw [JD Power] awards about the safety and reliability of GM vehicles displayed prominently in the waiting room." (Ex. 69, 2/27/17 P. Barker Dep. Tr. at 172:19-173:9) • At the dealership, Barker saw two or three promotional posters and a looped set of TV advertisements, but does not recall their specific content and "[is] not claiming they were false." (*Id.* at 173:12-177:14) • "The gentleman that sold me the car [] told me the car I was buying was safe, well built, reliable, easy maintenance, all the things I was looking for that I had in the [Saturn] SL1." (*Id.* at 178:19-22)
Basseri, Chimen	• "I was looking through the cars.com, you know, locally." (Ex. 71, 11/22/17 C. Basseri Dep. Tr. at 109:2-5) • "I saw several general advertisements from GM both on television and online guaranteeing good, reliable cars. . . . I can't remember [the content of any of those advertisements]." (Id. at 106:16-25)
Benton, Michael	• M. Benton did not do "any shopping or investigation on the Internet" or "any kind of research at all" before purchasing the vehicle. (Ex. 116, 2/28/17 M. Benton Dep. Tr. at 57:8-15) • "The only thing we went by was what we were -- the commercials that we saw on TV about the Chevy, you know, and its reliability and safety." (*Id.* at 57:15-17) • "The salesman [] was telling us how good the car was . . . That it was a dependable car, good gas saver, and that's what we wanted[.]" (*Id.* at 66:2-21)
Benton, Sylvia	• S. Benton "had seen ads on the Cobalt," but did not "[review] anything on the internet or review any magazines or periodicals or documents." (Ex. 122, 2/28/17 S. Benton Dep. Tr. at 47:24-48:10) • "[T]he salesperson said it was a good car to drive." (*Id.* at 48:11-17)
Brown, Kimberly	• Plaintiff "[does not] recall reviewing or seeing any advertisements or brochures related to the HHR prior to purchasing the HHR" and "did not look up any information on the HHR on the Internet before purchasing the car." (Ex. 87, 4/24/17 K. Brown-Shipley Dep. Tr. at 35:24-36:6)

Name	
	• Plaintiff's husband "liked the car." (*Id.* at 32:20-25)
Cereceres, Kellie	• After Plaintiff "saw several Traverse advertisements come on," she said "[t]hat's the vehicle I'm going to get," but she does not recall the content of those advertisements. (Ex. 55, 12/18/17 K. Cereceres Dep. Tr. at 94:21-96:4)
Hardin, Crystal	• Plaintiff "didn't do any price comparisons on the Cobalt prior to purchasing it" and "didn't do [] any online research" or any other research." (Ex. 131, 3/2/17 C. Hardin Dep. Tr. at 140:8-142:17) • Plaintiff "saw a TV ad where the Cobalt was racing a new Corvette on a racetrack and the Cobalt won[.]" (*Id.* at 124:8-11)
Malaga, Javier	• Plaintiff "did [not] do any online research to compare the brands" or "spend any time gathering information on potential vehicles to purchase before visiting the car dealership[.]" (Ex. 95, 3/24/17 J. Malaga Dep. Tr. at 57:6-12)
Mattos, Winifred	• Plaintiff "hadn't done any research on the G5" before purchase. (Ex. 89, 3/3/17 W. Mattos Dep. Tr. at 30:5-12) • "And during this process I contacted my mechanic and told him what I was going to, and he said call me and let me know and I'll help you through it, which he did." (*Id.* at 26:12-22)
Orosco, Santiago	• Plaintiff consulted Consumer Reports when researching the vehicle purchase, but did not reference any other consumer guides, did not "do any online research to compare the vehicles [he was] considering purchasing," and "never visited the Chevrolet or the General Motors website prior to purchasing the subject vehicle." (Ex. 47, 3/9/17 S. Orosco Dep. Tr. at 63:8-67:3) • Plaintiff recalls the salesman stating, "[T]his is one of the safest cars you can get for your daughter and is very reliable. We redesigned the old Camaro and made the new Camaro better and safer." (*Id.* at 73:25-74:13)
Padilla, David	• "Q. The only sort of research that you did before you decided to buy the Cobalt -- A. No, I never been that way. I drove it. I liked it and I have never -- I have never asked anything about the engine. I trust the people. Let's put it that way." (Ex. 64, 2/17/17 D. Padilla Dep. Tr. at 32:6-11)

Name	
	• Plaintiff did not "ever review any brochures about the Cobalt, did not "review any information about the Cobalt that might have been in car magazines," and did not review "any GM ads" or "any information provided by GM on the Internet" before purchasing the vehicle. (*Id.* at 32:12-33:5.) • An independent dealer's salesperson "told [Plaintiff] it is a good buy." (*Id.* at 29:17-23)
Ramirez, Esperanza	• Plaintiff did not "do any research about the 2007 Saturn ION[.]" (Ex. 70, 3/3/17 E. Ramirez Dep. Tr. at 152:11-14) • A salesperson "brought up the Saturn ION and said to me that that was a good car and it would -- it would last, you know, it was a good car." (*Id.* at 60:21-61:2)
Rukeyser, William	• "I certainly looked at -- at advertising and company Websites. I don't know if you'd call that research. But I -- I certainly looked online, at print advertising, and also I wasn't looking for it, but I certainly was exposed to broadcast advertising as well." (Ex. 137, 3/17/17 W. Rukeyser Dep. Tr. at 89:13-21)
Thomas, Michelle	• In addition to consulting Kelley Blue Book, "I looked online on craigslist; looked through my e-mail, if I had ads from any car companies; looked at Autotrader. And that's all. . . . I needed a car fast, so I didn't really have time to, like, do anything else." (Ex. 138, 3/21/17 M. Thomas Dep. Tr. at 45:15-46:16) • "My boyfriend's brother had a Buick LaCrosse, and I liked it. And my grandmother, before she passed away, she had a Buick. It wasn't a LaCrosse, but she did have a Buick." (*Id.* at 73:4-19)
Missouri	
Akers, Brad	• Plaintiff "[doesn't] recall the specific statements that [the salesperson] made" about safety features; he also recalls seeing an unspecified auto magazine advertisement that listed safety ratings and "focused my mind on looking at [the HHR]." (Ex. 48, 3/23/17 B. Akers Dep. Tr. at 51:23-52:13; 55:10-56:20) • A salesperson "was kind of touting or bragging about the safety features that the HHR had versus maybe the Kia Sportage." (*Id.* at 50:6-13)
Hamilton, Deloris	• Plaintiff is "not claiming that [she] relied on any advertisements or marketing materials by New GM when [she] purchase[d] [her] 2000 Alero." (Ex. 39, 3/13/17 D. Hamilton Dep. Tr. at 137:15-19)

Name	
	• "[B]efore purchasing the vehicle [plaintiff] had done no research on this vehicle" (*Id.* at 84:3-7) • A salesperson told Plaintiff the 2000 Alero was a "good" and "reliable" vehicle. (*Id.* at 85:1-13)
Hawkins, Cynthia	• Plaintiff looked at Kelley Blue Book "[f]or gas mileage" and possibly a JD Power publication, but "didn't look at any General Motors brochures or materials about vehicle" or the Chevrolet Web site. (Ex. 99, 3/24/17 C. Hawkins Dep. Tr. at 48:6-24) • Plaintiff "ha[d] a conversation with the salesperson about the Cobalt." (*Id.* at 35:13-17)
Robinson, Kenneth	• Plaintiff relied on the recommendation of a friend who allegedly worked at GM because "we figured he worked with GM and he would know, if you work for a company you know what's good and what is bad." (Ex. 49, 5/9/17 K. Robinson Dep. Tr. at 42:2-5) Plaintiff "did not do any [other] research on the vehicle" and did not rely on any GM advertisements. (*Id.* at 47:22-24, 113:13-19) • A salesperson told Plaintiff and his wife "about the safety features on the car." (*Id.* at 40:4-16)
Robinson, Ronald	• Prior to purchasing the vehicle, plaintiff "viewed e-mail advertising highlighting the quality of the GM product," but does not know there was "anything untruthful in that advertising." (Ex. 50, 3/21/17 R. Robinson Dep. Tr. at 33:22-34:12) • Plaintiff consulted with his brother-in-law regarding the vehicle's price and "[m]aybe Kelley Blue Book and maybe some of the online car, used car sites." (*Id.* at 36:5-9, 60:18-23)
Stefano, Mario	• Plaintiff did no research before purchasing the vehicle and characterized the purchase as "[c]ompletely impulse." (Ex. 51, 4/14/17 M. Stefano Dep. Tr. at 61:24-62:23)
Tinen, Christopher	• Plaintiff believes certain unspecified GM advertisements "touting the dependability and performance" of GM vehicles "helped in validating my research and all the other personal touches in research." (Ex. 52, 4/13/17 C. Tinen Dep. Tr. at 117:14-118:5) • "I did some preliminary research in the Sunday paper about car prices. I also did some research on the Internet with regards to dependability, features and benefits," including the GM Web site. (*Id.* at 29:25-30:6)

Name	
	• Plaintiff conducted research in the newspaper, Kelley Blue Book, dealership websites, and visited at least one auto show. (*Id.* at 29:24-30:6, 31:4, 46:8-12, 47:4-10, 50:17-51:1) • A salesperson told Plaintiff about the vehicle's "performance [], dependability, fuel efficiency, safety backed by a warranty and the dealership." (*Id.* at 58:16-21)
Witherspoon, Patrice	• Plaintiff "mostly [on] the advertisements that were running at the time about the Saturn made me look into Saturn, and then also I did comparisons to other four-door vehicles in terms of cost." (Ex. 53, 5/31/17 P. Witherspoon Dep. Tr. at 87:8-17) • Plaintiff also conducted online research using "Google searches" and the Old GM Web site. (*Id.* at 102:16-104:6) • A salesperson told Plaintiff the vehicle was "safe." (*Id.* at 60:5-17)
Texas	
Al-ghamdi, Gareebah	• Plaintiff's family's experience owning Chevrolet vehicles "influence[d] [her] decision to go Impala[.]" (Ex. 16, 5/5/17 G. Al-ghamdi Dep. Tr. at 33:2-15) • Plaintiff's research consisted of "browsing online" and visiting dealerships with her stepfather. (*Id.* at 34:3-36:13)
Bacon, Dawn	• Plaintiff "did not do any type of research into either the price or other features of the Cadillac prior to purchasing it," though does recall visiting the Cadillac Web site and seeing advertisements indicating the CTS was "first in its class for safety." (Ex. 57, 3/28/17 D. Bacon Dep. Tr. at 30:13-22, 42:24-43:21)
Fuller, Dawn	• Plaintiff "didn't do any research" or "rely[] on any GM advertisements" because she was "relying on [her] stepfather's recommendation." (Ex., 15 11/20/17 D. Fuller Dep. Tr. at 85:25-86:8)
Graciano, Michael	• Plaintiff did not "do any kind of research" before purchasing the vehicle. (Ex. 18, 5/1/17 M. Graciano Dep. Tr. at 67:10-12) • A salesperson told Plaintiff the Cobalt was "a good, safe, reliable vehicle for a teenager." (*Id.* at 64:19-23)

Name	
Henry, Shenyesa	• "Prior to purchasing the Saturn, [plaintiff] did [not] do any type of research" and relied on advertisements regarding "undentable side panels" on the Saturn. (Ex. 139, 3/27/17 S. Henry Dep. Tr. at 37:19-38:5, 38:17-39:13)
McClellan, Lisa	• Plaintiff "didn't do any research prior to going to the dealership" and did not otherwise "review any Websites, publications, anything of that kind regarding cars[.]" (Ex. 17, 5/4/17 L. McClellan Dep. Tr. at 41:3-5, 41:20-42:2)
Simmons, Lisa	• Plaintiff "didn't do any research on the Saturn Ion prior to purchasing it" and "didn't review any GM advertisements or brochures that lead[*sic*] [her] to buy the 2007 Saturn Ion." (Ex. 140, 6/21/17 L. Simmons Dep. Tr. at 85:5-11) • A salesperson told Plaintiff the Ion was "safe and reliable." (*Id.* at 49:5-18)

Exhibit D

EXHIBIT D: NAMED PLAINTIFFS' REVIEW OF ADVERTISEMENTS

Name	Saw Advertisements?	Relied on Advertisements?	Alleges Advertisements Were Misleading?
California			
Barker, Patricia	• Ms. Barker alleges that when she was at the dealership purchasing the subject vehicle, she saw two awards issued by JD Power. When asked what the awards said, she responded "I honestly couldn't tell you. I know that it was an award for some kind of superior -- superior safety and something, I think it was integrity, but I couldn't tell you word for word" *(Id.* at 174:14-18). She did not recall what vehicle the awards were for, saying "No. I would take a leap of faith and say Saturn." (Ex. 69, 2/27/17 P. Barker Dep. Tr. at 174:21-14) • She also testified that the dealership "also had a television screen up there and it would have a running loop…this car is rated so and so,…General Motors received this award for the…safety and reliability of the car." (*Id.* at 173:5-18) When asked which products were on the commercials, she said "GM pickup trucks. I think the Cobalt was involved in there.	• Not addressed	• With regard to the dealership advertisements, Ms. Barker testified "I'm not claiming they were false. (*Id.* at 177:11-14) • With regard to Saturn television advertisements she alleges to have seen, Ms. Barker testified "I'm not saying that the commercials…were false. I'm saying they were predicated on falsehoods…. All I can tell you is if I see this, it's intended to make me believe the car's safe, okay? It's my belief that the people who put that commercial together or the dealership that had them on believed that the car was safe." (*Id.* at 182:25-183:8) • Regarding whether the vehicles actually received the JD Power award, Ms. Barker said "That's not false. They did receive the JD Power pick." (*Id.* at 183:11-15) • When asked if there was anything in the advertisements she claims is false, she replied "Yes. The car's unsafe." (*Id.* at 184:3-6)

Name	Saw Advertisements?	Relied on Advertisements?	Alleges Advertisements Were Misleading?
	They talked about the Saturn, the Impala, I guess. Off the top of my head, I don't remember exactly." (*Id.* at 175:25-176:5) When asked what she recalled about what the advertisements said, she replied "I don't remember specifically. I wasn't in the -- I wasn't in the market for a Cobalt or Impala." (*Id.* at 176:10-14) • Ms. Barker testified that she also saw two or three posters at the dealership, the first of which said "Something about being awarded, what's that, Road & Track award for safety for the Saturn." (*Id.* at 176:20-24). She did not recall what it said, nor did she remember what the second or third poster said. (*Id.* at 176:25-177:10)		
Basseri, Chimen	• When asked about the content of the "general advertisements from GM both on television and online guaranteeing good, reliable cars," Ms. Basseri responded "I can't remember." (Ex. 71, 11/22/17 C. Basseri Dep. Tr. at 106:12-25)	• Ms. Basseri alleges that she relied on the advertisements "[b]ecause they were talking about what a good car it was and how good the programs that they had for it were, you know, the different campaigns they have or whatever, and that's what kind of -- and I had had a Ford previously. I had nothing but problems with	• When asked "[y]ou do not allege that any of the general advertisements you saw from GM were false or misleading, correct?" Ms. Basseri answered "That's correct." (*Id.* at 108:16-24)

Name	Saw Advertisements?	Relied on Advertisements?	Alleges Advertisements Were Misleading?
		that, so I thought I would try a Chevy." (*Id.* at 108:1-7)	
Benton, Michael & Sylvia	• Ms. Benton indicated that she had "seen ads on the Cobalt" before she purchased the vehicle. (Ex. 122, 2/28/17 S. Benton Dep. Tr. at 47:24-48:2) • Mr. Benton alleges that "in the weeks and months leading up to us buying the car" "[t]he only thing we went by was what we were -- the commercials that we saw on TV about the Chevy, you know, and its reliability and safety." (Ex. 116, 2/28/17 M. Benton Dep. Tr. at 57:15-23) • With regard to the content of the commercials he saw, Mr. Benton testified they were "[a]bout their safety ratings and the economy, good on gas, and…overall safety rating…that it was number one." (M. Benton. at 57:24-58:5). When asked if he could recall a specific statement, he said "No. It's really popped into my mind that it was safe and it was gas -- you know,	• Not addressed for Mr. Benton • When asked "you're not aware of any allegation regarding marketing or advertising in the Fourth Amended Consolidated Complaint on which you claim to have relied" Ms. Benton responded "I can't remember right now." (Ex. 122, S. Benton at 61:12-17)	• When asked "Is there a specific statement that you recall seeing in these advertisements that you now claim was an untrue statement?" he answered "Its safety and reliability as a car in whole." (M. Benton at 59:7-11). Mr. Benton agreed that the specific statement he recalls from the advertisement was that the Chevrolet brand "was the consumers' number on pick for safety and reliability." (Ex. 116 M. Benton at 60:14-61:6)

Name	Saw Advertisements?	Relied on Advertisements?	Alleges Advertisements Were Misleading?
	economy efficient." (M. Benton at 58:6-11) • When asked if the advertisement "didn't refer to the Cobalt specifically" he answered "No, sir." (M. Benton at 60:23-25)		
Brown, Kimberly	• When asked "[d]o you recall reviewing or seeing any advertisements or brochures related to the HHR prior to purchasing the HHR?" Ms. Brown answered "No." (Ex. 87, 4/24/17 K. Brown Dep. Tr. at 35:24-36:6) • When asked "you don't recall reviewing or seeing any GM advertisements prior to purchasing this car; is that correct?" she answered "[t]hat's correct." (*Id.* at 41:2-5) • Ms. Brown subsequently noted in her deposition that she saw a poster of an HHR in the dealership, but when asked whether she had "any recollection of what thatposter actually said," she responded "I -- no. I can't. I can't picture it in my mind." (*Id.* at 122:1-123:3)	• Not Addressed	• Not Addressed

Name	Saw Advertisements?	Relied on Advertisements?	Alleges Advertisements Were Misleading?
Cereceres, Kellie	• Ms. Cereceres testified that she saw television advertisements related to the Traverse, but testified "I don't remember what was exactly stated." (Ex. 55, 12/18/17 K. Cereceres Dep. Tr. at 95:1-7) • Ms. Cereceres reviewed a brochure for the Chevrolet Traverse prior to purchasing the vehicle. (*Id.* at 88:4-13)	• Ms. Cereceres testified that the Traverse brochure "greatly" affected her purchase decision "because of the safety issues that were in it -- and, again, it's not in front of me…but at the time when we purchased it, I loved all the safety issue components in it, because I drive it, and I have children in the car and their friends in the car, and so I can't specifically tell you what was in there, and I apologize." (*Id.* at 91:5-24)	• When counsel noted "you don't remember what was said in them; right? So my -- my question is: You are not claiming that there was something specifically stated in those commercials that was not true…correct?" Ms. Cereceres responded "yes." (*Id.* at 95:21-96:4) • When asked "Sitting here today, you cannot point to anything in that brochure that wasn't true, to the best of your knowledge; correct?" Ms. Cereceres responded "Because it's not in front of me, correct." (*Id.* at 91:5-8)
Hardin, Crystal	• Ms. Hardin testified that she purchased the 2005 Cobalt because "[t]he ad on television caught my eye and I wanted a new vehicle. (Ex.__, 3/2/17 C. Hardin Dep. Tr. at 123:11-14) The advertisement showed a Cobalt racing, and beating, a new Corvette on a racetrack, and Ms. Hardin testified that "[w]hat I found to be catchy is you have such a classic car, being the Corvette, to the new snazzy car, and the way that they just for me put the classic with that new and had the new win just kind of made me feel important. That was what drew me to buy the car…The	• Referring to the advertisement where the Corvette raced the Cobalt, Ms. Hardin testified that "it was the advertisement that sold me on the car." (Id. at 143:1-3). She testified that she "did not rely on any other advertisements." (*Id.* at 146:16-21).	• When asked "[t]he advertisement that you saw of the Cobalt and the Corvette on the racetrack, is there anything in that ad that you believe was not true?" Ms. Hardin said "No." (*Id.* at 145:19-22)

Name	Saw Advertisements?	Relied on Advertisements?	Alleges Advertisements Were Misleading?
	ad sold me." (*Id.* at 124:8-125:6)		
Malaga, Javier	• Mr. Malaga testified that "[t]he Cobalt itself was never promoted very much by Chevrolet for whatever reason, but I seem to remember some advertising where they would show, you know, the Chevrolet pickups, and they would have a lineup of all their models, Chevrolet, this, this, basically that." (Ex. 95, 3/24/17 J. Malaga Dep. Tr. at 142:23-143:3) • He testified that the advertisement "show[ed] them lined up. I guess there was some sort of a campaign sale going on." (*Id.* at 143:11-13). When asked if the ad related to the cost of the vehicle, he said "Yeah, well, in general, you know, reminding people that Chevrolet is there, come and see our cars." (*Id.* at 143:14-19) • When asked about the messaging of the advertisement, Mr. Malaga said "I can remember seeing the picture of the cars in a semicircle, 'Chevrolet runs	• When asked how the advertisement affected his purchase decision, Mr. Malaga responded "It really didn't." (*Id.* at 145:11-20	• Not addressed.

Name	Saw Advertisements?	Relied on Advertisements?	Alleges Advertisements Were Misleading?
	deep' or something like that, but the exact nature, I didn't pay much attention to it." (*Id.* at 144:21-145:1) • He does not recall "viewing any advertisements specifically related to the Chevrolet Cobalt." (*Id.* at 143:20-23) • He does not recall anything specific from that advertisement relating to the safety of General Motors vehicles." (*Id.* at 146:17-20)		
Mattos, Winifred	• When asked if there was "[a]ny advertising on the G5 that you were focused on" prior to the purchase of her vehicle, Ms. Mattos answered "No." (Ex. 89, 3/3/17 W. Mattos Dep. Tr. at 30:13-15)	• N/A	• N/A
Orosco, Santiago	• When asked if he "review[ed] any GM advertisements or brochures that led [him] to buy the subject vehicle," Mr. Orosco answered "No." (Ex. 47, 3/9/17 S. Orosco Dep. Tr. at 72:4-6)	• N/A	• N/A
Padilla, David	• When asked whether he reviewed any brochures about the Cobalt, Mr. Padilla	• N/A	• N/A

Name	Saw Advertisements?	Relied on Advertisements?	Alleges Advertisements Were Misleading?
	answered "No." (Ex. 64 , 2/17/17 D. Padilla Dep. Tr. at 32:12-14) • When asked whether he reviewed any GM ads before purchasing the Cobalt, Mr. Padilla answered "No. No." (*Id.* at 32:25-33:2)		
Ramirez, Esperanza	• Ms. Ramirez testified that she saw television advertisements "about the Saturn brand" prior to purchasing the subject vehicle, and that "[t]here were different advertisements. There was always the family, the going to the dealer, and then showing the family going and them telling them how safe the care was, you know, just the typical driving. You would see the – the commercial of families going to get -- purchase the car and doing the every day family errands, and drving your kids around…" (Ex. 70, 3/03/17 E. Ramirez Dep. Tr. at. at 48:7-49:10) • She also testified that she "specifically remember[s] seeing Saturn advertisements in Time, Newsweek, and	• When asked why she purchased another Saturn, Ms. Ramirez stated "the advertisements and everything for the new Saturn were still kind of giving you the feeling of like this brand is the continued safe, family car…." (*Id.* at 47:23-48:6).	• Not Addressed

Name	Saw Advertisements?	Relied on Advertisements?	Alleges Advertisements Were Misleading?
	People magazines." (*Id.* at 50:22-51:1) • Ms. Ramirez testified that she didn't remember the specific model vehicles in the advertisements, and when asked "[s]o none of these ads, as best you can recall, were specific to the Saturn ION, correct?" she responded "Yeah, I don't remember. I just remember the brand." (*Id.* at 51:22-52:3) • Ms. Ramirez alleges that she purchased the 2007 ION because she saw advertisements about the safety of the Saturn brand, although she does not recall whether any related specifically to the Ion. (*Id.* at 48:1-6; 51:25-52:3)		
Rukeyser, William	• Mr. Rukeyser alleges that he viewed GM advertisements on the radio, on television, and in print. (Ex. 137, 3/17/17 W. Rukeyser Dep. Tr. at 159:7-161:13) • Mr. Rukeyser testified that he did not believe he could identify the advertisements if he saw them again, and remembered the content being	• When asked if he "believe[d] that those ads did in fact influence[d] [his] decision," Mr. Rukeyser answered "Sure." (*Id.* at 163:1-4). When asked if he "remember[ed] any specific representations in any of these ads that were objectively false" he said "The way I recall them, these were	• When asked whether any substance of the advertisement he reviewed was false, he answered "In retrospect?...Certainly. Claims to safety and reliability were proven to be untruthful." (*Id.* at 163:5-11)

Name	Saw Advertisements?	Relied on Advertisements?	Alleges Advertisements Were Misleading?
	"basically that the Cobalt was a good, solid, reliable, safe family vehicle." (*Id.* at 162:1-12)	general claims." (*Id.* at 163:17-164:14).	
Thomas, Michelle	• Michelle Thomas alleges that she saw email advertisements "about how, you know, it's a nice drive. I don't know verbatim, but…, they're reliable, safety ratings, or something of that sort. And I felt comfortable with buying it." (Ex. 138, 3/21/17 M. Thomas Dep. Tr. at 74:25-75:7) • Ms. Thomas also alleges receiving mailings, testifying that they covered generally "the same thing. It's reliable, safe, it's by Buick. That's pretty much it." (*Id.* at 77:5-7) • She also alleges she saw commercials related to the Buick LaCrosse. (*Id.* at 74:19-24) • With regard to whether she saw advertisements about the 2005 Buick LaCrosse, she testified "specifically, no. I mean, I probably did see them, but I don't remember, like, specifically if it said 2005	• Not Addressed	• Not Addressed

Name	Saw Advertisements?	Relied on Advertisements?	Alleges Advertisements Were Misleading?
	Buick LaCrosse." (*Id.* at 77:21-78:1) • When asked "you don't remember any specific advertisement that referred to the – to safety or reliability, correct?" she answered "correct." (*Id.* at 84:20-23)		
Missouri			
Akers, Brad	• Mr. Akers testified that he saw an advertisement in an automotive magazine: "It had like checkmarks on different safety ratings, and to the best of my knowledge, since I had the HHR, it really focused my mind on looking at it." (Ex. 48, 3/23/17 B. Akers Dep. Tr. at 55:10-56:8) • He did not recall whether it was an advertisement or an article, and when asked "[s]o you don't remember one way or another whether it was an advertisement by General Motors or Kia or somebody else?" he responded "That I do not." (*Id.* at 56:9-15)	• Not Addressed	• Not Addressed
Hamilton, Deloris	• When asked "you're not claiming that you relied on any advertisements or marketing materials by New	• When asked "you're not claiming that you relied on any advertisements or marketing materials by New	• N/A

Name	Saw Advertisements?	Relied on Advertisements?	Alleges Advertisements Were Misleading?
	GM when you purchased your 2000 Alero, correct?" Ms. Hamilton responded "Correct." (Ex. 39, 3/13/17 D. Hamilton Dep. Tr. at 137:15-19)	GM when you purchased your 2000 Alero, correct?" Ms. Hamilton responded "Correct." (Ex. 39, 3/13/17 D. Hamilton Dep. Tr. at 137:15-19)	
Hawkins, Cynthia	• When asked "to the best of your knowledge, you didn't look at any General Motors brochures or materials about the vehicle?" she responded "No." (Ex. 99, 3/24/17 C. Hawkins Dep. Tr. at 48:18-24)	• N/A	• N/A
Robinson, Kenneth	• When asked "[d]o you recall reviewing any particular General Motors advertisements prior to purchasing the subject vehicle?" Mr. Robinson answered "No." (Ex. 49, 5/9/17 K. Robinson Dep. Tr. at 113:13-16)	• When asked "[d]id you rely on any advertisements when you purchased the subject vehicle?" Mr. Robinson answered "No." (*Id.* at 113:17-19).	• N/A
Robinson, Ronald	• Mr. Robinson alleges that email and television advertisements highlighting the Impala's "quality" positively impacted his decision to purchase the vehicle. (Ex. 50, 3/21/17 R. Robinson Dep. Tr. at 33:22-34:2) • Mr. Robinson also alleged that he saw television	• Mr. Robinson testified that he "was attracted to [the Impala] because of the advertisement of seeing the GM products; the price looked decent." (*Id.* at 55:23-56:2) • When asked how the television ads affected his purchase decision, Mr.	• When asked "to the best of your knowledge and recollection, was there anything untruthful in that advertising?" regarding the email advertisements, Mr. Robinson responded "Not as far as I know." (*Id.* at 34:3-8). When asked "those ads were true?" he responded "As far as I know." (*Id.* at 34:9-12) • Regarding the television advertisements, Mr. Robinson

Name	Saw Advertisements?	Relied on Advertisements?	Alleges Advertisements Were Misleading?
	advertisements from GM. (*Id.* at 62:5-10) When asked to describe these advertisements he said "The only thing that stands out in my mind, that at GM we make good products; we stand behind our products." (*Id.* at 63:6-16). He also recalled an advertisements with Tiger Woods, but did not recall which line of products he was advertising. (*Id.* at 63:12-20)	Robinson responded "I felt comfortable." (*Id.* at 64:4-8).	testified that he believed GM was untruthful about "In my opinion, the quality of the GM product." (62:22-25)
Stefano, Mario	• When asked about specific advertisements relating to GM prior to his purchase of the subject vehicle, Mr. Stefano testified that "I don't remember if that was then. It was the -- that little old lady that said, Is that a Buick? That's a GM one. Yeah, I remember that one. I don't know if that was at that time or not. It could have been later." (Ex. 51, 4/14/17 M. Stefano Dep. Tr. at 115:4-14)	• When asked "Did General Motors advertisements have any effect on you decision to purchase the subject vehicle" Mr. Stefano answered "No." • (*Id.* at 115:23-116:)	• Not Addressed
Tinen, Christopher	• Prior to purchasing the subject vehicle, Mr. Tinen recalls viewing "a TV commercial by General Motors touting the dependability and performance. It was a generic one, as I recall, and again, these were all pieces to	• When asked if the advertisements affected his purchase decision, Mr. Tinen said "I think they were all reinforcements of the questions I was seeking as it relates to trust, brand, buying America, fuel economy,	• When asked if there were "any specific representations in any ads that you reviewed that were not true to the best of your knowledge" Mr. Tinen answered "Again, I believe if it's being said on the airwaves,

Name	Saw Advertisements?	Relied on Advertisements?	Alleges Advertisements Were Misleading?
	reinforce the trust I had in General Motors. So that influenced – I'm cognizant of it". (Ex. 52, 4/13/17 C. Tinen Dep. Tr. at 117:10-24) • Mr. Tinen testified that he didn't "remember[safety-related representations] specifically, but it certainly reinforced safety as a topic." (*Id.* at 118:15-20) • Mr. Tinen also testified that "there was obviously the buy American -- there was the Case for Clunkers, so there was kind of a buy American push, as I recall, and that's a main part of what I recall. (*Id.* at 119:12-21) • He also recalled "[t]here were a lot of sound bites. I can't recall anything specific, but I certainly felt that there was a big emphasis by GM and many of the brands to buy a new GM vehicle." (*Id.* at 120:16-24) • He did not recall whether the advertisements he saw referenced the GMC Acadia. (*Id.* at 119:3-5)	safety. All the things that we've mentioned today, I believe those were all sound bites somehow being reinforced by the messages." (*Id.* at 121:6-11) • When asked if he relied on those advertisements, he answered "Certainly" (*Id.* at 121:19-20). However, when asked "Were there any particular representation in these advertisements that you can recall relying on?" he answered "No." (*Id.* at 122:1-3)	there's some basis of truth." (*Id.* at 122:15-21)

Name	Saw Advertisements?	Relied on Advertisements?	Alleges Advertisements Were Misleading?
Witherspoon, Patrice	• Ms. Witherspoon testified that "I remember a specific commercial where it showed the Saturn ION and it had different things like hitting the vehicle, like a baseball bat, shopping cart ran into it. It was just different items. That was the whole gimmick to show that the car would be durable and not be able to cause harm to it easily. That's the one specific commercial I remember. (Ex. 53, 5/31/17 P. Witherspoon Dep. Tr. at 54:19-55:5)	• When asked "how that ad affected your purchase decision" Ms. Witherspoon answered "I just offhand remembered that one ad specifically, the commercial, and that made me think, oh, that's cool, let me look into the Saturn." (*Id.* at 106:1-8)	• When asked whether she could "identify any statements in those television advertisements that you claim are either not true or are misleading" Ms. Witherspoon responded "I can't recall any statements, no." (*Id.* at 54:12-18) • When asked "what was not true or misleading about the images of a shopping cart hitting the car or a baseball bat hitting the car" Ms. Witherspoon answered "[b]ecause the implied is that it's a safe vehicle and it wasn't." (*Id.* at 55:14-20)
Texas			
Al-ghamdi, Gareebah	• When asked "did you ever review or receive any advertising from GM or Chevy for the Impala?" Ms. Al-ghamdi answered "No." (Ex. 16, 5/5/17 G. Al-ghamdi Dep. Tr. at 36:6-13)	• N/A	• N/A
Bacon, Dawn	• Ms. Bacon testified that she saw a television advertisement that said the CTS was "rated first in its class for safety." (Ex. 57, 3/28/17 D. Bacon Dep. Tr. at 30:13-22) • She believes she saw "[m]aybe two" advertisements related to the CTS. Regarding	• When asked "did those advertisements have any impact on your decision to purchase the 2006 CTS?" Ms. Bacon said "I remembered in the back of my mind that they were safe, supposed to be safe for their class. I remembered -	• When asked "[d]o you have any reason to believe that when the advertisements that you saw discussing that it was best in its class in safety came out, that it wasn't actually ranked best in its class in safety?" she answered "No." (*Id.* at 46:13-24)

Name	Saw Advertisements?	Relied on Advertisements?	Alleges Advertisements Were Misleading?
	the content of the first: "the car was driving very fast with -- I believe there were -- I believe there were maybe other cars, too, that weren't -- I don't know if they were Cadillacs. But it was, like, on a mountain, and it was saying that it was rated first in class in safety -- first in its class in safety." (*Id.* at 35:13-25). She did not remember the content of the second advertisement. (*Id.* at 36:1-4) • Ms. Bacon also testified that "There was a DVD and a brochure that came with the car that was made available to me, and I looked at it." (*Id.* at 43:25-44:6)	- I Mean, I thought about that." (*Id.* at 36:5-11)	
Fuller, Dawn	• When asked "you were not relying on any GM advertisements when you purchased the vehicle; you were relying on your stepfather's recommendation, correct?" Ms. Fuller answered "Correct." (Ex. 15, 11/20/17 D. Fuller Dep. Tr. at 85:25-86:8)	• N/A	• N/A
Graciano, Michael	• Mr. Graciano was asked "do you remember receiving any kind of like marketing	• N/A	• N/A

Name	Saw Advertisements?	Relied on Advertisements?	Alleges Advertisements Were Misleading?
	materials about the 2007 Cobalt, brochures, advertisements, anything like that?" he responded "No." (Ex. 18, 5/1/17 M. Graciano Dep. Tr. at 133:22-134:1)		
Henry, Shenyesa	• Ms. Henry recalls seeing advertisements where "one of the key points that they were talking about was the undentable side panels. I know that for sure. Aside from that else they said on that commercial, I tuned all that out. I didn't hear anything else but 'undentable side panels.'". ((Ex. 139, 3/27/17 S. Henry Dep. Tr. at at 36:22-40:3) • When asked if she recalled seeing any other form of advertisement or brochures about the Saturn Ion prior to purchase, Ms. Henry said "[o]utside of the commercial, no. If there were, I didn't pay attention to them." (*Id.* at 39:23-40:3) • When asked whether she remembered anything else about the commercials other than the fact that it advertised undentable side panels, she	• Ms. Henry testified that she purchased the vehicle because of the undentable side panels and because "[t]he vehicle was fairly inexpensive." She said she heard about the undentable panels from TV. (*Id.* at 36:22-37:14)	• Not Addressed

Name	Saw Advertisements?	Relied on Advertisements?	Alleges Advertisements Were Misleading?
	answered "I don't." (*Id.* at 42:17-20)		
McClellan, Lisa	• When asked "[d]id you look at any advertising leading up to your purchase of this car?" Ms. McClellan answered "No.". (Ex. 17, 5/4/17 L. McClellan Dep. Tr. at 47:3-5)	• N/A	• N/A
Simmons, Lisa	• When asked "[y]ou didn't review any GM advertisements or brochures that lead you to buy the 2007 Saturn Ion, correct?" Ms. Simmons responded "Not that I recall, no." (Ex. 140, 6/21/17 L. Simmons Dep. Tr. at at 85:8-11)	• N/A	• N/A

Exhibit E

EXHIBIT E: NAMED PLAINTIFFS' PURCHASE INFORMATION

Name	Place of Purchase	Type of Seller	Purchase Price
California			
Barker, Patricia	• Russ Thor Saturn (Torrrance, CA)(Ex. 69, 2/27/17 P. Barker Dep. Tr. at 173:2-4)	• GM-Affiliated Dealer	• $15,109.65 (*Id.* at 59:24-60:8)
Basseri, Chimen	• Nissan of Valencia (Valencia, CA) (Ex. 71, 11/22/17 C. Basseri Dep. Tr. at 38:9-13)	• Non-GM Dealer	• $13,778.06 (*Id.* at 89:3-5) • $16,333, including financing. (*Id.* at 76:3-10)
Benton, Michael & Sylvia	• Ideal Auto Sales (Barstow, CA) (Ex. 116, 2/28/17 M. Benton Dep. Tr. at 10:10-14, 55:7-8)	• Non-GM Dealer	• $12,568.30 (*Id.* at 54:8-10)
Brown, Kimberly	• Rally Automotive (Palmdale, CA) (Ex. 87, 4/24/17 K. Brown Dep. Tr. at 27:8-11)	• GM-Affiliated Dealer	• "With the finances, it was like $26,000" (*Id.* at 27:14-20)
Cereceres, Kellie	• Maita Chevrolet (Elk Grove, CA) Ex. 101, 12/18/17 K. Cereceres Dep. Tr. at 26:17-27:11)	• GM-Affiliated Dealer	"Q And it shows a total cash price on the vehicle for -- of $40,212; correct? A Yes. Q And that included a cash price of the vehicle of $39,420; correct? A Yes. Q And a cash price accessory of $795; correct? A Yes." (*Id.* at 66:8-15)
Hardin, Crystal	• Chase Chevrolet (Stockton, CA) (Ex.131, 3/2/17 C. Hardin Dep. Tr. at 62:6-12)	• GM-Affiliated Dealer	• "About $20,000" (*Id.* at 80:6-10)

Name	Place of Purchase	Type of Seller	Purchase Price
Malaga, Javier	• Carson Toyota (Carson, CA) (Ex. 132, 3/24/17 J. Malaga Dep. Tr. at 42:23-25)	• Non-GM Dealer	• $15,979.08 (*Id.* at 150:4-8) • The dealership "wanted 15. I wanted to pay 10" (*Id.* at 48:13-18) • $20,582.96 with financing (*Id.* at 150:16-151:13)
Mattos, Winifred	• Hooman Chevrolet (Culver City, CA) (Ex. 89, 3/03/17 W. Mattos Dep. Tr. at 89:9-15)	• GM-Affiliated Dealer	• 20,000 (*Id.* at 89:8-19)
Ramirez, Esperanza	• Saturn of Torrance (Torrance, CA) (Ex. 70, 3/03/17 E. Ramirez Dep. Tr. at 214:17-25)	• GM-Affiliated Dealer	• $16,700 (*Id.* at 164:24-165:7)
Rukeyser, William	• Sanborn Chevrolet (Lodi, CA). (Ex. 137, 3/17/17 W. Rukeyser Dep. Tr. at 38:12-15)	• GM-Affiliated Dealer	• Approximately $18,000 (*Id.* at 79:21-80:3)
Orosco, Santiago	• Ed Dena's Auto Center (Dinuba, CA) (Ex. 47, 3/9/17 S. Orosco Dep. Tr. at 52:18-21)	• GM-Affiliated Dealer	• "The sticker price was $28,000, and I think the finance charges were like, 3-, $4,000 on top of that, so I'm thinking about $32,000 roughly, okay. Give or take a thousand or two." (*Id.* at 50:10-13)
Padilla, David	• Chase Chevrolet (Stockton, CA) (5ACC ¶ 68) • "Chevrolet Dealership here in Stockton" (Ex. 64, 2/17/17 D. Padilla Dep. Tr. at 23:18-19)	• GM-Affiliated Dealer	• Plaintiff does not remember (*Id.* at 33:24-25) • $21,690.27 (5ACC ¶68)
Thomas, Michelle	• Sun Motor Group (El Cerrito, CA) (Ex. 138, 3/21/17 M. Thomas Dep. Tr. at 32:4-12)	• Non-GM Dealer	• $7,500 or $7,800 (*Id.* at 53:22-54:3)

Name	Place of Purchase	Type of Seller	Purchase Price
			• "Originally, I think he wanted like, 9,000 for it or something. And then I told him I only wanted to pay, like, 7,500 or 7." (*Id.* at 50:22-51:3)
Missouri			
Akers, Brad	• Auffenberg Chevrolet (Farmington, MO) (Ex. 48, 3/23/17 B. Akers Dep. Tr. at at 39:10-13)	• GM-Affiliated Dealer	• Approximately $21,800 (*Id.* at 36:13-15)
Hamilton, Deloris	• 94 Auto (St. Charles, MO) (Ex. 39, 3/13/17 D. Hamilton Dep. Tr. at 25:3-9)	• Non-GM Dealer	• $3,500 (*Id.* at 93:18-20)
Hawkins, Cynthia	• South County Auto Center (Weldon Spring, MO) (Ex. 99, 3/24/17 C. Hawkins Dep. Tr. at 27:1-5)	• Non-GM Dealer	• $12,920 (Mo EL Dep Ex. 34, at ELPLNTFF00008126)
Robinson, Kenneth	• Westfall O'Dell dealership (Excelsior Springs, MO) (Ex. 49, 5/9/17 K. Robinson Dep. Tr. at 42:6-8)	• Non-GM Dealer	• Approximately $13,000-$14,000 (*Id.* at 37:7-9)
Robinson, Ronald	• Enterprise Leasing (Ex. 50, 3/21/17 R. Robinson Dep. Tr. at 34:13-15)	• Non-GM Dealer	• Approximately $16,000 (*Id.* at 55:10-12)
Stefano, Mario	• Dave Sinclair Automotive (St. Louis, MO) (Ex. 51, 4/14/17 M. Stefano Dep. Tr. at 43:16-44:1)	• GM-Affiliated Dealer	• $25,286 (Not including $10,000 credit for trade-in) (*Id.* at 44:2-45:25)

Name	Place of Purchase	Type of Seller	Purchase Price
Tinen, Christopher	• Bommarito Buick GMC (Ellisville, MO) (Ex. 52, 4/13/17 C. Tinen Dep. Tr. at 53:12-25)	• GM-Affiliated Dealer	• $32,080.27 (*Id.* at 29:19-21)
Witherspoon, Patrice	• Saturn of Blue Springs (Blue Springs, MO) (Ex. 53, 5/31/17 P. Witherspoon Dep. Tr. at 88:23-89:4)	• GM-Affiliated Dealer	• Approximately $16,828 (*Id.* at 45:16-46:7)
Texas			
Al-ghamdi, Gareebah	• Auto Expo used car lot (San Antonio, TX) (Ex. 16, 5/5/17 G. Al-ghamdi Dep. Tr. at 20:2-24)	• Non-GM Used Car Lot	• $12,999 (*Id.* at 20:7-8)
Bacon, Dawn	• She purchased it from her former stepfather, who is a car salesman. (Ex. 103, 3/28/17 D. Bacon Dep. Tr. at 22:13-23)	• Private Sale	• $10,000 (*Id.* at 25:1-3)
Fuller, Dawn	• Moritz Kia (Fort Worth, TX) (Ex. 15, 11/20/17 D. Fuller Dep. Tr. at 30:9-18)	• Non-GM Dealer	• $9,895 (*Id.* at 88:17-24)
Graciano, Michael	• Holt Chrysler Jeep Dodge (Arlington, TX) (Ex. 18, 5/1/17 M. Graciano Dep. Tr. at 66:18-20)	• Non-GM Dealer	• Approximately $11,600 (*Id.* at 123:1-7)
Henry, Shenyesa	• Saturn of Plano (Plano, TX) (Ex. 139, 3/27/17 S. Henry Dep. Tr. at 28:18-29:3)	• GM-Affiliated Dealer	• $17,000 (*Id.* at 33:20-22)

Name	Place of Purchase	Type of Seller	Purchase Price
McClellan, Lisa	• La Fiesta Auto Sales (Pasadena, TX) (Ex. 17, 5/4/17 L. McClellan Dep. Tr. at 27:12-23)	• Non-GM Dealer	• $10,000-$12,000 (*Id.* at 32:3-7)
Simmons, Lisa	• Saturn of Amarillo (Amarillo, TX) (Ex. 140, 6/21/17 L. Simmons Dep. Tr. at 49:5-18)	• GM-Affiliated Dealer	• $15,590 (*Id.* at 67:19-22)

Exhibit F

EXHIBIT F: NAMED PLAINTIFFS' TESTIMONY SHOWING THEY ARE INADEQUATE REPRESENTATIVES

Name	
California	
Basseri, Chimen	• When asked if she has "given [her] lawyers complete discretion and power to make all decisions affecting and relating to this lawsuit," Basseri said "Yes." (Ex. 71, 11/22/17 C. Basseri Dep. Tr. at 34:14-17) • When asked if, as a class representative, she has "any role or involvement in a decision to enter into settlement negotiations" or any role "in the decision as to whether settlement is appropriate for the class," she answered "No." (*Id.* at 121:6-16) • When asked at her deposition whether she would "need to speak to someone else about how the [delta ignition switch defect] class is defined" as well as "who's in the class, how the class is defined," Basseri answered "Yes." (*Id.* at 37:17-38:8) • When asked whether her claims "with respect to [her] car not being able to turn on" "are typical of other people who are in the class" she answered "I don't know." (*Id.* at 120:7-12) • She believes she represents "[a]ll the plaintiffs. All the people that have vehicles with the defective ignition." (*Id.* at 129:4-9).
Benton, Michael	• When asked if he gave his attorneys "the discretion and the power to make all decisions affecting [him] in this lawsuit" M. Benton answered "My attorneys, yes." (Ex. 116, 2/28/17 Michael Benton Dep. Tr. at 167:21-24)
Benton, Sylvia	• When asked if she had given her lawyers "complete discretion and power to make all decisions regarding [her] concerning this lawsuit" S. Benton answered "Yes." (Ex. 122, 2/28/17 Sylvia Benton Dep. Tr. at 96:7-11) • When asked how the class she seeks to represent is defined, S. Benton said "I don't recall right now" (*Id.* at 97:6-9) and said that she did not remember which vehicles were in the class, other than the Cobalt (*Id.* at 97:16-18).
Brown, Kimberly	• When asked if she has "given [her] attorneys the discretion to control the day-to-day activities in this class-action lawsuit" and to make strategic decisions related to the lawsuit she answered "Yes." (Ex. 87, 4/24/17 Kimberly Brown Dep. Tr. at 140:25-141:13)

Name	
	• When asked if she could identify "any pleadings or court filings [she] reviewed related to this case" she answered "No, not offhand." (*Id.* at 140:6-9) • Brown does not think she read any portion of the operative complaint, and does not recall ever receiving it. (*Id.* at 114:6-19) • When asked if she believes the class she represents is limited to "individuals who own HHRs that have problems with their car shutting off or steering issues" she answered "Yes." (*Id.* at 136:21-24) • She did not know if she represents individuals who purchased their vehicles outside of California. (*Id.* at 136:25-137:5) • Brown does not know what damages she is claiming in this case. (*Id.* at 141:19-21)
Cereceres, Kellie	• With regard to whether she exercises control or supervision of her lawyers, Cereceres said "I trust that they are taking care of all the legal end of -- of what the responsibility is." (Ex. 55, 12/18/17 K. Cereceres Dep. Tr. at 108:22-109:20) • She further testified "I want to say 'no'" when asked whether one of her responsibilities as a class representative is to make strategic decisions. (*Id.* at 108:22-109:20) • When asked during her deposition whether she could define what the "side airbag defect class is", Cereceres testified "that would be someone [sic] to ask somebody else." (*Id.* at 26:10-15.) • Cereceres does not know which models or years are affected by the side airbag class. (*Id.* at 112:19-22)
Hardin, Crystal	• When asked if "one of [her] responsibilities to exercise control or supervision of [her] lawyers" she said "No." (Ex. 131, 3/2/17 C. Hardin Dep. Tr. at 262:14-16) • When asked if she has "any responsibility as a class representative to make strategic decisions for the litigation" she answered "No." (*Id.* at 262:25-263:3) • When asked at her deposition whether she had "any familiarity whatsoever with how any of these proposed classes are defined within the complaint," she responded "I don't know." (Ex. 131, 3/2/17 C. Hardin Dep. Tr. at 60:18-21)

Name	
	• When asked "if [her] claims are typical of members of the class that [she] want[s] to represent" she answered "I don't know." (*Id.* at 265:14-16)
Malaga, Javier	• "When asked if "one of [his] responsibilities [is] to control or supervise [his] lawyers" Malaga said "No, not to my knowledge." (Ex. 132, 3/24/2017 J. Malaga Dep. Tr. at 153:18-24) • When asked if one of his responsibilities is "to make strategic decisions about the direction of this lawsuit." he answered "No." (*Id.* at 153:18-24) • When asked if he has "any involvement in whether or not to enter into settlement agreements" he said "Not to my knowledge." (*Id.* at 153:25-154:3) • Malaga testified that he does not know which classes he seeks to represent, how many classes there are in the lawsuit, what the classes represent, how many named plaintiffs there are, or if his claims are typical of the other named plaintiffs in this matter. (*Id.* at 159:15-160:3) When asked what he knows about the classes he seeks to represent, Malaga answered "Nothing." (*Id.* at 160:15-17) • When asked "if all of the plaintiffs in this lawsuit are seeking the same sort of damages" he answered "I don't know." (*Id.* at 167:17-20)
Mattos, Winifred	• Mattos testified that she "is "not really sure actually" about what it means to be a class representative, and that she "can't say that [she] know[s] for sure" what her responsibilities would be as a class representative. (Ex. 89, 3/03/17 W. Mattos Dep. Tr. at 98:25-99:22). • She does not know what class she is seeking to represent, nor does she know the contours of the class. (*Id.* at 102:13-103:8). • When Mattos was asked at her deposition whether she had "any idea" what was meant by the description in the Fifth ACC of the classes she purports to represent, she answered "I can't say I do exactly." (*Id.* at 87:8-24)
Orosco, Santiago	• Orosco testified that he had given his lawyers complete discretion and power to make decisions regarding the lawsuit. (Ex. 47, 3/9/17 S. Orosco Dep. Tr. at 159:23-160:3)

Name	
	• When asked about whether he has any involvement about decisions to enter into settlement negotiations, he responded "I think that that is something that would have to be up to my attorneys." (*Id.* at 170:21-25). • Regarding whether he understood his responsibilities to other plaintiffs, Orosco stated that "I'm representing them, but as far as having responsibilities for them, no," noting that "I'm not certain of what it all entails" (*Id.* at 167:24-168:10). • Orosco did not read the operative complaint prior to its filing. (*Id.* at 34:11-13)
Padilla, David	• Padilla testified that he does not know what it means to be a class representative, and when asked if he knew about his duties and responsibilities as a representative, he testified "No. I don't -- that's out of my league." (Ex. 64, 2/17/17 D. Padilla Dep. Tr. at 71:11-18) • Padilla testified that he has never "seen the written complaint in this case before" and that he does not remember if he reviewed it before it was filed. (*Id.* at 78:20-79:3)
Ramirez, Esperanza	• When asked if she has "not done anything to exercise control or supervision over the decisions [her] lawyers are making in this lawsuit" she said "correct." (Ex. 70, 3/03/17 E. Ramirez Dep. Tr. at 180:1-4) • When asked if she could say "what the Delta ignition switch defect, Magnuson-Moss and implied warranty successor liability subclass is" she answered "no," despite being a putative representative of those classes. (*Id.* at 162:2-5) She believes that she will be representing "maybe a hundred" people in this lawsuit. (*Id.* at 183:19-23) • Ramirez did not read the operative complaint until she did so to prepare for her deposition. (*Id.* at 159:18-25)
Rukeyser, William	• When asked if one of his responsibilities as a putative class representative is to make strategic decisions about the lawsuit, he answered that it "not [his] understanding" (Ex. 137, 3/17/17 W. Rukeyser Dep. Tr. at 173:10-16) • He does not know how many classes he seeks to represent, whether he would only represent owners of Cobalt vehicles, how many individuals he would be presenting, or if he would represent both individuals who have and have not had experienced issues with their ignition switches. (179:24-180:20). When asked whether it was his obligation to know "who is similarly situated in this lawsuit" he responded "I think that's the job of the court." (*Id.* at 184:16-19) • Rukeyser testified that he did not review the operative complaint until 2017. (*Id.* at 150:6-9)

Name	
	• Rukeyser testified that he discards documents that he receives from his attorneys. (*Id.* at 176:9-16)
Missouri	
Akers, Brad	• Akers testified that he does not have any role in whether to enter into settlement negotiations, or any role in deciding whether settlement is appropriate for the class. (Ex. 48, 3/23/17 B. Akers Dep. Tr. at 185:1-22)
Hamilton, Deloris	• When asked whether "in terms of the claims [she is] asserting in this lawsuit [her] attorneys are making all the decisions about those claims" she answered "yes." (Ex. 39, 3/13/17 D. Hamilton Dep. Tr. at 158:17-22) • Hamilton testified that she has only reviewed one paragraph of the operative complaint, and she reviewed it for the first time on the day of her deposition. (*Id.* at 149:24-151:1)
Hawkins, Cynthia	• When asked what she has done to perform her role as putative class representative, Hawkins testified "I would say just by being here as a representative" and that she has provided some documentation, but that she has not done anything else to participate as a class representative. (Ex. 99, 3/24/17 C. Hawkins Dep. Tr. at 93:14-19; 94:22-95:5) • Hawkins testified that she has not weighed in on any strategic decisions in the lawsuit. (*Id.* at 95:6-9). • When asked about her decision making role in whether to enter settlement negotiations, she testified "No, I'm not an expert. I'm just giving my testimony here. I don't know what happens next or what my part will be.' (*Id.* at 95:14-21). • When asked whether she seeks to represent purchasers of new vehicles, Hawkins said "I don't exactly know everyone that's in the lawsuit or in the class action. I don't know everyone who's involved. I don't know their particulars." (*Id.* at 100:2-7) • Similarly, when asked if her claims are typical of the class members she seeks to represent, Hawkins said "I don't know the members so I don't know. All I know what the problem I had [sic]." (*Id.* at 101:22-102:1) • When asked if her damages are typical of the classes she seeks to represent, Hawkins said "I think it could be more. I had a problem where it wasn't getting fixed. . . . Mine could be typical or atypical." (*Id.* at 103:3-12) She agreed that she did not know one way or the other. (*Id.* at 103:13-15)

Name	
Robinson, Kenneth	• With respect to how he has fulfilled his responsibilities as a class representative, K. Robinson testified that he has "kept up somewhat on the lawsuit" but "that's about it." (Ex. 49, 5/9/17 K. Robinson Dep. Tr. at 116:25-117:4) • He testified that it is not his responsibility to exercise control or supervision over his lawyers, or to make any strategic decisions with respect to the lawsuit. (*Id.* at 118:3-14). • K. Robinson testified that his obligation to absent class members is "to stay in touch with the lawyers, for the lawyers to stay in touch with me, stay up on what's going on with the suit, the paperwork, and stuff like that." (*Id.* at 121:4-14). • K. Robinson believes that he seeks to represent individuals who have had problems with the Delta ignition switch vehicles, but said he has "no way of knowing" whether his problems were typical of the class members. (*Id.* at 126:4-16). He does not know about any other classes in the lawsuit. (*Id.* at 126:25-127:2) • K. Robinson does not know the types of damages that other plaintiffs are seeking. (*Id.* at 135:4-6)
Robinson, Ronald	• R. Robinson believes that his sole responsibility as a class representative is to "be truthful." (Ex. 50, 3/21/17 R. Robinson Dep. Tr. at 120:5-23.) • Other than gathering documents and preparing for and sitting for his deposition, he has not done anything else to participate in this case. (*Id.* at 120:19-23). • When asked if he could define the low-torque ignition switch defect class, R. Robinson answered "Truthfully, no" (Ex. 50, 3/21/17 R. Robinson Dep. Tr. at 104:18-105:8) • He does not know whether the lawsuit involves one class or numerous classes. (*Id.* at 106:1-5) Similarly, he does not know which vehicles belong to which class, or what the differences are between classes. (*Id.* at 106:6-12).
Stefano, Mario	• Stefano said that he does not "make any decisions to what happens in the lawsuit. I simply tell what I know and what's about to happen to me and what has happened to me." (Ex. 51, 4/14/17 M. Stefano Dep. Tr. at 122:3-9) • When asked whether he has any role in the decision to enter into settlement negotiations, he stated "No, none whatsoever." (*Id.* at 122:10-13) • Stefano testified that he believes he represents all drivers of Chevrolet vehicles, and that he does not know what his responsibilities are as a putative class representative (*Id.* at 120:6-14). When asked to describe the class he

Name	
	represents, he responded "I wouldn't know how to even phrase that. Anyone that's bought a car that has the ignition that GM installed with the bad ignition, I mean, I'm not an expert on that, so I couldn't tell you who would be affected by that, but I imagine any one of the many millions of cars that they recalled." (*Id.* at 126:12-19) • When asked if his claims are typical of the class, Stefano testified that "I don't know because I haven't spoken with anyone. I don't know anyone else in the claim [sic]." (*Id.* at 127:6-9). • When asked if he seeks to represent other classes in this lawsuit, Stefano said "I know what's wrong with my vehicle, and I know what's affected my vehicle, so if I'm talking about another vehicle that doesn't have the same defect as mine, then I would be misrepresenting someone else which would do them no justice whatsoever. So I shouldn't be speaking about someone that isn't in my class." (*Id.* at 127:10-20). • When asked about whether he seeks to represent individuals who have never had problems with their ignition switch, he testified that "I have no idea. I couldn't answer that. I don't know." (*Id.* at 128:20-24) • When asked if all members of the alleged class seek the same type of damages, he responded "I would have no knowledge of that." (*Id.* at 131:19-22)
Tinen, Christopher	• Tinen testified that it is not his responsibility as a putative class representative to make strategic decisions with respect to the lawsuit, and that he does not have any role in the decision to enter into a settlement. (Ex. 52, 4/13/17 C. Tinen Dep. Tr. at 127:23-128:3) • Tinen believes he represents five classes, comprised of GM owners affected by "side airbag, the three different ignition issues, and power steering." (*Id.* at 131:3-13; 134:24-135:5). • Tinen testified that he does not know if his experience is typical of other people he seeks to represent, and that "I don't think it matters." (*Id.* at 134:1-6) • Tinen testified that he does not know what types of damages other plaintiffs are seeking, nor does he know if all members of the alleged classes are seeking the same types of damages. (*Id.* at 138:3-8).
Witherspoon, Patrice	• Witherspoon testified that she could not say what makes and model years are in the putative classes, or what differences there are between them. (Ex. 53, 5/31/17 P. Witherspoon Dep. Tr. at 52:22-53:3)

Name	
Texas	
Al-ghamdi, Gareebah	• Al-ghamdi testified that it is not her responsibility as a class representative to exercise control or supervision of the attorneys, to make strategic decisions about how to pursue the case, or to decide whether settlement is appropriate. (Ex. 16, 5/5/2017 G. Al-ghamdi Dep. Tr. at 144:15-25). She testified that she has not been consulted about any of those issues. (*Id.* at 145:1-2)
Bacon, Dawn	• Bacon testified that she has delegated strategic decision-making to her lawyers, and that she has not taken any steps in attempt to supervise her lawyers. (Ex. 57, 3/28/17 D. Bacon Dep. Tr. at 128:23-129:6) • Bacon's understanding is that she represents plaintiffs affected by "three ignition switch recall…problems. And two airbag problems. And there was another one, but I can't remember what it is." (*Id.* at 140:15-21.) When asked if she could identify what other cars the class members have that she represents, Bacon testified "I just know they're made by GM. I just – I really don't know what other cars. I can barely keep up with my own car stuff. So I know there are several…I don't even know if they are all GM, but I know there is several." (*Id.* at 141:5-15) • When asked about the damages that other plaintiffs are seeking, she testified "Do I know what they are seeking? No, I don't." (*Id.* at 152:5-9).
Fuller, Dawn	• Fuller does not believe that she has a responsibility as a putative class representative to exercise control or supervision of her lawyers, to make strategic decisions, or to have any involvement in a decision to enter into settlement negotiations. (Ex. 151, 11/20/17 D. Fuller Dep. Tr. at 101:11-20) • Fuller testified that she only read the paragraph of the operative complaint related to her own situation, and agreed that she would not be able to talk about any other paragraph. (*Id.* at 27:17-28:5) • Fuller testified that she "can't specify the exact cars" that would be in the low torque ignition switch defect class. (*Id.* at 29:17-30:2)
Graciano, Michael	• When asked if one of his responsibilities as a putative class representative is to make strategic decisions about how the case is conducted, Graciano said "No. Because I'm just – I mean, I'm only for me. I can't speak on anybody else's behalf." (Ex. 18, 5/1/2017 M. Graciano Dep. Tr. at 166:18-23)

Name	
	• He similarly testified that his role in the decision to accept a settlement as appropriate for the class he represents is "to accept it" and that "[t]hat would probably have to be up to my attorney" and "I believe just tell the lawyer I agree." (*Id.* at 167:6-23) • When asked if he knows "anything about the claims of the class members that you propose to represent" Graciano replied, "No." (*Id.* at 169:23-170:1) • Graciano testified that he is not aware of the damages sought by other plaintiffs in this case. (*Id.* at 171:15-18)
McClellan, Lisa	• When asked if her claim as a putative representative of the power steering class is typical, she responded "I don't know. I don't know if that would be typical or not." (Ex. 17, 5/4/17 L. McClellan Dep. Tr. at 153:2-6) • When asked about the damages sought by putative ignition switch class members who sold their vehicles before the recall and never experienced the defect, McClellan testified "I wouldn't know." (*Id.* at 167:5-168:7)

EXHIBIT B-3

ECONOMIC LOSS PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF MOTION TO CERTIFY CALIFORNIA, MISSOURI, AND TEXAS BELLWETHER CLASSES

[MDL ECF NO. 6181] (FILED OCTOBER 19, 2018)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE: GENERAL MOTORS LLC IGNITION SWITCH LITIGATION	No. 14-MD-2543 (JMF)
This Document Relates to: ALL ACTIONS	

ECONOMIC LOSS PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF MOTION TO CERTIFY CALIFORNIA, MISSOURI, AND TEXAS BELLWETHER CLASSES

[REDACTED VERSION]

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

I. INTRODUCTION

Plaintiffs' case will rise or fall on common proof at the merits stage. Each recall has its own Class, and the glue that binds all Class members together is GM's conduct towards each Class as a whole. Each recall: involved the same GM internal investigation; the same presentation to the GM committee responsible for initiating a recall; the same description of the defect condition, root cause, and the effect of the defect; the same recall notice; and the same purported remedy.

GM ignores these factual commonalities, and focuses its opposition on a few arguments: that Plaintiffs and the Class were not all injured (*false*—the common damages model shows every Plaintiff and Class member overpaid because the entire demand shifted for all regardless of individual willingness-to-pay differences and notwithstanding the red herring that GM's unscientific methodologies attempted but failed to show the recalls did not have a stigma effect); that the reliance and/or causation requirements of certain legal claims defeat predominance (*false*—the omissions were objectively fraudulent and material); and that Plaintiffs' claims are atypical for a variety of reasons (*false*—most of these arguments are common merits defenses confusingly repackaged as typicality challenges). GM also improperly attempts to re-litigate issues on which it already lost, such as whether a recall moots the claims. Given that the common evidentiary focus in this case is on GM's conduct and how it impacted each Class in its entirety, and because Fed. R. Civ. P. 23(a), (b), and (g)[1] are satisfied, the Court should certify the proposed Classes and Subclasses.

[1] GM does not challenge numerosity, commonality, or Class Counsel's adequacy.

II. PLAINTIFFS SATISFY THE ADEQUACY AND TYPICALITY REQUIREMENTS

A. Plaintiffs will adequately represent the interests of the Classes.

The primary Rule 23(a)(4) inquiry is whether the plaintiff's interests are antagonistic to those of the class. *Dandong v. Pinnacle Performance Ltd.*, 2013 U.S. Dist. LEXIS 150259, at *21 (S.D.N.Y. Oct. 17, 2013). Plaintiffs' opening brief demonstrated that no such antagonism exists because Plaintiffs are members of the Classes they seek to represent, have suffered economic loss from the same defects, and seek to hold GM responsible for its legal violations. GM fails to even discuss *Dandong*'s adequacy test, let alone rebut it.

Instead, in a single paragraph GM challenges the adequacy of all Plaintiffs (except Barker and Thomas) by contending that they have not honored their duties as Class representatives. GM Br. at 97-98.[2] Not surprisingly, courts view with skepticism the motives of defendants who feign concern for the well-being of class members through adequacy challenges, likening them to "a fox, although with a pious countenance, ... tak[ing] charge of the chicken house." *Eggleston v. Chicago Journeymen Plumbers' Local Union No. 130*, 657 F.2d 890, 895 (7th Cir. 1981) (citation omitted). While Plaintiffs are required to have some familiarity with the case, *People United for Children, Inc. v. City of New York*, 214 F.R.D. 252, 264-66 (S.D.N.Y. 2003), and be "at least somewhat active in monitoring the litigation," *Dandong*, 2013 U.S. Dist. LEXIS 150259, at *22,[3] Plaintiffs need not be experts in the details of the case and are entitled to rely on their counsel. *Dandong*, 2013 U.S. Dist. LEXIS 150259, at *21 (citing *In re Omnicom Grp., Inc. Sec. Litig.*, 2007 U.S. Dist. LEXIS 31963 (S.D.N.Y. Apr. 30, 2007)). "[C]ourts tend to deny certification of

[2] Plaintiffs' opening brief established proposed Class Counsel's adequacy under Rule 23(a)(4) and (g), and GM does not challenge the adequacy of Plaintiffs' counsel.

[3] *See also Harrison v. Great Springwaters of Am., Inc.*, 1997 U.S. Dist. LEXIS 23267, at *22 (E.D.N.Y. June 18, 1997) (plaintiff should show "some basic knowledge of the lawsuit" and capability to make "intelligent decisions based upon his lawyers' advice") (quoting *Kaplan v. Pomerantz*, 131 F.R.D. 118, 122 (N.D. Ill. 1990)).

a class representative on the basis of inadequate knowledge or credibility only if the problems alleged call the validity of the plaintiffs' entire case into question." *Harrison*, 1997 U.S. Dist. LEXIS 23267, at *18.

Each Plaintiff understands his or her role as a proposed Class representative, and all have been active participants by providing information to, and otherwise communicating with, counsel. *See* Appendix A (Plaintiffs' testimony). GM's perfunctory challenge fails; Plaintiffs have diligently exercised their duties as proposed Class representatives and are adequate.[4]

B. Plaintiffs' claims are typical of the Classes' claims because they arise from a common course of conduct and proceed under common legal theories.

GM's typicality challenge under Rule 23(a)(3) magnifies irrelevant differences among the Plaintiffs, erroneously questions their capacity to represent others, and conjures conflicts that do not exist. GM Br. at 91-97. GM's arguments fail. Plaintiffs have typical claims because Plaintiffs' and each Class member's claims arise from the same course of GM's conduct, and each makes similar (if not identical) legal arguments to prove GM's liability for unfair and deceptive conduct, fraudulent concealment, and breach of implied warranties. *See Dandong*, 2013 U.S. Dist. LEXIS 150259, at *13-14; *Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168, 1175 (9th Cir. 2010); *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 599 (3d Cir. 2012); *Motley v. Jaguar Land Rover N. Am., Inc.*, 2012 Conn. Super. LEXIS 2701, at *15 (Conn. Super. Ct. Nov. 1, 2012).

[4] GM's cases are inapposite. Unlike the proposed representatives in *Beck v. Status Game Corp.*, 1995 U.S. Dist. LEXIS 9978 (S.D.N.Y. July 13, 1995)—who did not even know how they had become plaintiffs or who all the defendants were, and who had never communicated with the attorneys before the case was filed (*id.* at *13-21)—all Plaintiffs here have actively participated in the litigation through discovery, have been communicating with their counsel, and have demonstrated a basic understanding of the nature of their claims and duties. *Burton v. Chrysler Grp., LLC*, 2012 U.S. Dist. LEXIS 186720, at *22 (D.S.C. Dec. 21, 2012), is inapposite because, unlike here, the plaintiffs did not have the same defect as the class or suffer the same injury. The plaintiff in *Sanchez v. Wal-Mart Stores, Inc.*, 2009 U.S. Dist. LEXIS 48428, at *9-10 (E.D. Cal. May 28, 2009), was inadequate for failing to join personal injury class claims with the economic loss claims. *Sanchez* is poorly reasoned and out of step with Ninth and Second Circuit law given courts' general reluctance to certify personal injury claims under Rule 23.

1. Unique defenses, even if they exist, do not render Plaintiffs' claims atypical.

While "[a] court will deny class certification where a class representative may be subject to a unique defense that would 'pose an unacceptable risk of drawing attention away from the central issues in [the] litigation,'" *In re Pfizer Inc. Sec. Litig.*, 282 F.R.D. 38, 45 (S.D.N.Y. 2012) (quoting *In re Omnicom Grp., Inc. Sec. Litig.*, 2007 WL 1280640, at *5 (S.D.N.Y. Apr. 30, 2007)), no Second Circuit case has suggested that the mere existence of purported "unique" defenses defeats typicality. In fact, the Second Circuit has explained that even where there *are* unique defenses, the rule exists only to "protect the plaintiff class—not to shield defendants from potentially meritorious suit and has generally been applied only where a full defense is available against an individual plaintiff's action." *Id.* (quoting *In re Parmalat Sec. Litig.*, 2008 WL 3895539, at *5 (S.D.N.Y. Aug. 21, 2008)). Even if GM's purported defenses implicated individualized fact questions, GM does not explain why litigating them would distract from the central issues in the litigation or "require considerable time and effort to rebut." *Lapin v. Goldman Sachs & Co.*, 254 F.R.D. 168, 180 (S.D.N.Y. 2008). Any individual questions that may exist are "peripheral" to Plaintiffs' case, and "a representative may satisfy the typicality requirement even though that party may later be barred from recovery by a defense particular to him that would not impact other class members." *In re Nat. Gas Commodities Litig.*, 231 F.R.D. 171, 184 (S.D.N.Y. 2005) (quoting *In re Sumitomo Copper Litig.*, 182 F.R.D. 85, 95 (S.D.N.Y. 1998)); *see also McIntire v. China MediaExpress Holdings, Inc.*, 38 F. Supp. 3d 415, 425 (S.D.N.Y. 2014) (proposed class representatives satisfied typicality requirement despite existence of factual questions that implicated unique non-reliance defenses).

GM purports to identify eight ways in which certain Plaintiffs are subject to unique defenses or are otherwise atypical, GM Br. at 92-95, but—even if viable—the defenses are not

"unique," because they will affect Plaintiffs and similarly situated Class members alike, thereby highlighting Plaintiffs' typicality.

Plaintiffs' damages model applies to all Plaintiffs and Class members. GM incorrectly argues that benefit-of-the-bargain damages do not exist for those who sold their vehicles before the recalls (Pre-Recall Plaintiffs). GM Br. at 92. But benefit-of-the-bargain damages are measured *at the time of purchase*. *See* Dkt. No. 6059 (SJ Opp.) at 37-38. Plaintiffs' damages model demonstrates that all Plaintiffs and Class members overpaid for their cars at the point of sale as a result of GM's deceptive and fraudulent concealment of known safety defects. *See* SJ Ex. 43 (Plaintiffs' itemized damages).[5] Pre-Recall Plaintiffs, like all Class members, seek the amount of that overpayment and make the same arguments to hold GM liable, making their claims typical. *See*, *e.g.*, *Banks v. Nissan N. Am., Inc.*, 301 F.R.D. 327, 334 (N.D. Cal. 2013) (former owners' claims typical of current owners' claims because all claims arise from the same scheme).[6] GM has not shown how one pre-recall seller differs from another for this purpose.

Each Texas Plaintiff experienced defect manifestation. In arguing that the Texas Plaintiffs' claims are atypical because the defect did not manifest in their cars (GM Br. at 92-93),[7] GM ignores ample evidence to the contrary. *See* SJ Ex. 177 at 59:8-10, 70:7-10, 80:2-13, 81:20-

[5] All "Ex. __" references cited herein are to the Declaration of Steve W. Berman in Support of Economic Loss Plaintiffs' Motion to Certify Bellwether Classes in California, Missouri, and Texas (Dkt. No. 5848). All "SJ Ex. __" references cited herein are to the Declaration of Steve W. Berman in Support of: (1) Plaintiffs' Statement of Undisputed Material Facts Pursuant to Local Rule 56.1 in Support of Plaintiffs' Opposition to GM's Motion for Summary Judgment Against the Bellwether Economic Loss Plaintiffs; and (2) Plaintiffs' Response to Defendant General Motors LLC's Statement of Undisputed Material Facts in Support of Its Motion for Summary Judgment (Dkt. Nos. 6071-6072).

[6] In any event, it is well-settled that "[t]he extent to which damages may differ among individual class members is not alone sufficient to defeat class certification," *Koppel v. 4987 Corp.*, 191 F.R.D. 360, 367 (S.D.N.Y. 2000), unless individual damage questions create "a conflict which goes to the heart of the lawsuit." *In re AM Int'l, Inc. Sec. Litig.*, 108 F.R.D. 190, 196 (S.D.N.Y. 1985). GM cites *McKernan v. United Techs. Corp.*, 120 F.R.D. 452, 455 (D. Conn. 1988), where the plaintiffs were atypical because they admitted that the helicopter central to the litigation was "no longer unsafe"—an admission diametrically at odds with the interests of other class members. GM cannot point to any conflict going "to the heart of the lawsuit" here.

[7] GM does not challenge Texas Plaintiff Dawn Bacon's defect manifestation.

22, 168:21-169:9 (recounting Gareebah Al-ghamdi's 20 vehicle shutdowns); SJ Ex. 184 at 33:11-23; 55:2-11 (Dawn Fuller experienced 10-15 switch malfunctions); SJ Ex. 193 (Michael Graciano's fiance's daughter had five or six shutdowns); SJ Ex. 196 at 69:7-10, 70:7-9, 73:20-74:6, 82:3-10, 85:21-86:1, 94:4-11, 95:14-18, 101:23-102:3, 109:12-25, and SJ Ex. 197 (Lisa McClellan had at least 50 stalling events). Because the Texas Classes are defined by reference to a vehicle malfunction, the Texas Plaintiffs have claims that are typical of the Texas Class members. Further, the manifestation inquiry does not render any Plaintiffs' claims atypical. *See Wolin*, 617 F.3d at 1175 ("Typicality can be satisfied despite different factual circumstances surrounding the manifestation of the defect."); *Daffin v. Ford Motor Co.*, 458 F.3d 549, 553 (6th Cir. 2006) (same).

GM does not have unique reliance and causation defenses, because safety was material to all Plaintiffs. All Plaintiffs testified that safety was material to their decision to purchase their GM cars, *see* Appendix B, and, contrary to GM's suggestion (*see* GM Br. at 93), this is all that is required to objectively demonstrate reliance in this omissions case. *See infra* Section III.A; SJ Opp. at 55-60. On this issue (and all others), Plaintiffs and each Class member will make similar legal arguments using the same evidence to prove GM's liability, making Plaintiffs' claims typical.

The Used-Car Purchasers' claims are typical. GM contends that Plaintiffs who bought Old GM vehicles are subject to unique defenses because GM has neither a duty to disclose nor a duty to warn them under state law. GM Br. at 94. Not so. GM cannot escape liability to those who purchased defective Old GM cars *after* GM's inception (Used-Car Purchasers). The bellwether states do *not* restrict consumer-fraud liability solely to those who manufactured or sold the vehicles. Instead, especially given GM's duty to monitor and repair the cars under the TREAD Act, *and* because GM's conduct caused Plaintiffs' economic losses, Used-Car Plaintiffs have

viable claims typical of all Used-Car Purchasers. *See* SJ Opp. at 46-59. But even if GM's liability defense succeeds, the defense applies *equally* to all Used-Car Purchasers.

Plaintiffs' proof of unmerchantability will mirror the proof for the implied warranty subclasses. GM contends that California Plaintiffs who drove their vehicles without problems are subject to unique defenses because their vehicles were not unmerchantable. GM Br. at 94. Yet under California law, safety defects render vehicles unfit for their ordinary purpose and thus breach the implied warranty of merchantability. *See* SJ Opp. at 62-63; Section III.D, *infra*. While the presence of a safety defect is enough to make their vehicles unmerchantable, California Plaintiffs Basseri, Cereceres, Orosco, and Padilla suffered malfunctions related to the admitted defects.[8]

Because all Service Part Vehicles (SVPs) are defective, Plaintiffs who bought SVPs have claims typical of all Class members. GM asserts that the five Plaintiffs who owned SVPs—cars built after the hidden modification of the original low-torque Delta Ignition Switch—cannot serve as representatives because they can't prove that replacement switches are defective. GM Br. at 94-95. However, GM is liable to *all* who acquired SVPs because the common evidence shows that the modified switch was also defective. *See* SJ Opp. at 44-46. The SVP Plaintiffs' claims rise or fall on the same evidence as that of the claims of the Class members, making the claims typical.

Lost-time damages are available to all Plaintiffs who had recall service performed on their vehicles. GM says that Missouri Plaintiff Brad Akers' claims are atypical because he alleges lost earnings. GM Br. at 95. (Missouri is the only one of the three bellwether states where lost income must be demonstrated on the merits to recover for lost time damages. *See* SJ Opp. at 40-44.) That Mr. Akers has shown now what other Missouri Plaintiffs will show later does not render

[8] *See* SJ Ex. 57 at 43:12-25, 126:12-128:11, SJ Ex. 63 (Basseri); SJ Ex. 85 at 28:9-29:20 (Cereceres); SJ Ex. 101 at 80:18-23, 102:9-103:25, 198:21-199:14, SJ Ex. 203 (Orosco); SJ Ex. 110 at 47:3-14, 49:17-22, 53:1-5, 64:5-7 (Padilla).

him atypical.[9] Thus, Mr. Akers, as well as California and Texas Plaintiffs Barker, Basseri, Benton, Cereceres, Hardin, Malaga, Mattos, Padilla, Ramirez, Rukeyser, Thomas, Fuller, and Graciano, are typical representatives who lost time as a result of the recall procedures (*see* Appendix C), making their claims typical of all Class members who responded to the recalls.[10]

The bankruptcy-claim fraud Plaintiffs have claims that are typical of the claims of the Delta Ignition Switch Defect Bankruptcy Classes. GM contends that Plaintiffs Barker and Ramirez have atypical claims because they were not aware of Old GM's bankruptcy in 2009 and thus would not have known to file claims in the bankruptcy. GM Br. at 95. But this argument underscores the rationale for the claim: had GM given notice to all potential claimants of the existence of the defects, Plaintiffs' Barker and Ramirez would have been able to take action. *See In re Motors Liquidation Co*., 2018 WL 2416567, at *12 (S.D.N.Y. May 29, 2018) (GM's improper concealment of its knowledge of defect damaged Plaintiffs "because they could not file timely proofs of claim"). Thus, the bankruptcy-fraud claim arises from the same course of events as the claims of all members of the proposed Delta Ignition Switch Defect Bankruptcy Classes, and they will all make the same legal arguments to prove GM's liability, thereby ensuring typicality. *See Dandong*, 2013 U.S. Dist. LEXIS 150259, at *13-14.[11]

[9] Indeed, the fact that Mr. Akers has lost earnings renders him a particularly adequate representative.

[10] And even if Akers' claim was atypical, GM fails to show or even argue how it might "become the focus of the litigation." *Daniels v. City of New York*, 198 F.R.D. 409, 419 (S.D.N.Y. 2001). At most, it would present little more than an "ancillary issue[] that must be resolved, but will not overshadow the primary claims in this litigation." *Id*.

[11] GM's arguments about proof of reliance are equally unavailing. California and Missouri Plaintiffs are not required to make individualized showings of reliance where the omission is material, and concealed safety defects in vehicles are material. *See* SJ Opp. at 55-60, 69. And Plaintiffs have testified that safety was material to their purchase decision. *See* Appendix B. This is all that is required under California and Missouri law to objectively demonstrate the required reliance. *See infra* Section III.A. GM also asserts that William Rukeyser does not have claims typical of the Bankruptcy Class because the ignition switch in his SVP was not replaced prior to recall, GM Br. at 95, but, as discussed above, Mr. Rukeyser need not submit such proof because the switches in all SVPs are defective.

2. Class Counsel's efforts to protect the interests of the putative Classes do not render any Class representative atypical.

In a novel and wholly unsupported argument, GM maintains that Plaintiffs' counsel "cherry picked" a group of atypical Class representatives. GM Br. at 96-97. GM fails to explain why the common-sense steps that Plaintiffs' counsel took to identify putative Class members and representatives from among scores of consumers injured by the revelations of GM's wrongdoing makes the individual Plaintiffs atypical. Nor does GM cite any authority supporting its novel argument.[12] The process that GM attacks, in which proposed Class Counsel properly filtered respondents in order to protect the putative Classes, was exactly what counsel should do given the Plaintiff attrition resulting from Court orders on successive motions to dismiss and the passage of time.[13] Rather than undermining typicality, this process ensured that "each class member's claim . . . arise[s] from the same course of events," and that "each class member . . . make[s] similar legal arguments." *Dandong*, 2013 U.S. Dist. LEXIS 150259, at *2. The Court should reject GM's unsupported argument that filtering proposed Class representatives in order to bring forward the most qualified representatives able to pursue the broadest scope of relief for all Class members makes the representatives atypical, especially when GM does not challenge the adequacy and performance of proposed Class Counsel.[14]

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[12] Tellingly, the sole case GM cites, *In re Digital Music Antitrust Litig.*, 2015 WL 13678846 (S.D.N.Y. Mar. 2, 2015), does not concern typicality. Instead, the court in that case conditionally denied plaintiffs' request to remove certain proposed class representatives so that they did not have to respond to discovery. *Id.* at *4-5.

[13] As the Court is aware, the scope of the economic loss case has shifted over four-and-a-half years of litigation. Many Plaintiffs were dismissed or removed from later iterations of the operative complaint because their claims were no longer viable after dispositive rulings or now fell outside the parameters of the proposed Classes.

[14] GM's discussion of the TCA process is misleading. GM incorrectly asserts that Plaintiffs Basseri, Cereceres, Hardin, Thomas, Akers, Hamilton, Robinson, Stefano, Tinen, Al-ghamdi, and Bacon "were recruited through TCA." GM Br. at 97. GM assumes they all contacted Hagens Berman via the TCA website simply because each of them submitted the online form that was posted on both the TCA and Hagens Berman websites. But, as GM was told, it is not possible to determine from which website the form was submitted, absent Plaintiff's confirmation. But most submissions likely came via the Hagens Berman website because TCA stopped its advertising campaign after one month (even though TCA mistakenly left the Hagens Berman form on its website). Of the Plaintiffs GM identifies, only four testified that they did in fact visit the TCA website (Akers, Bacon, Thomas, and Hamilton).

III. COMMON ISSUES REGARDING LIABILITY PREDOMINATE OVER INDIVIDUAL QUESTIONS

A. Questions of reliance and causation predominate in this omissions case.

Plaintiffs' claims under the bellwether states' laws depend on the same facts and evidence: that GM alone knew its vehicles had serious safety defects material to consumers' purchase decisions, and that GM concealed this information, thereby harming all purchasers and lessees who overpaid. In its efforts to defeat Plaintiffs' strong showing of predominance, GM mischaracterizes Plaintiffs' uniform material omission claims as misrepresentation claims or "mixed" misrepresentation/omissions and also mischaracterizes the law of the bellwether jurisdictions as requiring proof of (implicitly subjective) individualized reliance and "causation." GM Br. at 52-67. Plaintiffs bring only Class *omission* claims, and the law of California, Missouri, and Texas allows Plaintiffs to recover on their omissions claims by proving that the omitted information is material *without* individualized proof of reliance. The common questions as to whether GM failed to disclose safety defects and whether that information would be material to a reasonable consumer powerfully support Rule 23(b)(3) predominance.[15]

1. California law does not require proof of individual reliance for absent class members in material omissions cases.

GM misstates the law regarding reliance for Plaintiffs' California Consumer Legal Remedies Act, CAL. CIV. CODE § 1750 (CLRA), Unfair Competition Law, CAL. BUS. & PROF. CODE § 17200 (UCL), and fraudulent concealment claims.[16] Plaintiffs may establish reliance on a

[15] GM relies heavily on the substantive law of *other* jurisdictions it perceives to be more favorable and argues that predominance cannot be found under *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215 (2d Cir. 2008), where the Second Circuit reversed certification of federal RICO claims concerning deceptive advertising of "light" cigarettes. *See*, *e.g.*, GM Br. at 68, 74-75. GM's willingness to misstate the law is striking, as the California Supreme Court came to the *opposite* conclusion in *In re Tobacco II Cases*, 46 Cal. 4th 298, 325 (2009), where it held that the same "light" tobacco claims *should* be certified under California law. The same claims were *also* certified under the MMPA. *Craft v. Philip Morris Co., Inc.*, 190 S.W.3d 368, 384 (Mo. Ct. App. 2005).

[16] For their UCL claim, Plaintiffs need *not* show reliance at all. *See*, *e.g.*, *Galvan v. KDI Distrib.*, 2011 WL 5116585, at *9 (C.D. Cal. Oct. 25, 2011) ("A UCL violation that is not based on a 'fraud theory involving false

Class-wide basis by proving that the concealed safety defects were material to a reasonable consumer in an objective test that will yield the same result for each California Class member. *See* Plfs. Op. Br. at 18-20 (collecting cases). Because materiality "is judged from the perspective of a reasonable consumer," *Daniel v. Ford Motor Co*., 806 F.3d 1217, 1226 (9th Cir. 2015), the "inquiry … is the same for every class member, [and] a finding that the defendant has failed to disclose information that would have been material to a reasonable class member who purchased the defendant's product gives rise to a rebuttable presumption of reliance as to the class." *Edwards v. Ford Motor Co.*, 603 F. App'x 538, 541 (9th Cir. 2015) (reversing denial of certification of UCL and CLRA claims involving failure to disclose a known defect). The same analysis applies to the fraudulent concealment claims. *See Falk v. GMC*, 496 F. Supp. 2d 1088, 1099 (N.D. Cal. 2007). And "defects that create 'unreasonable safety risks' are considered material." *Daniel*, 806 F.3d at 1225 (collecting cases). For *all* the California omission claims then, "reliance" and "causation" issues will be resolved under an objective "reasonable customer" standard, rendering the claims ideal for class treatment.

In the face of this clear precedent, GM argues that (i) the 2004 amendments to the UCL in Proposition 64 effectively ended class actions under the UCL by imposing a class-wide individualized reliance and "causation" requirement, and (ii) this same "requirement" somehow transferred to CLRA and common law fraud claims as well. GM Br. at 56-63. GM is wrong. Proposition 64 "decidedly did not change the California rule 'that relief under the UCL is available without individualized proof of deception, reliance and injury.'" *Stearns v. Ticketmaster Corp.*,

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advertising and misrepresentations to consumers' does not require a showing of reliance or causation.") (citing *In re Tobacco II*, 46 Cal. 4th at 325). GM's claim to the contrary based on *Veera v. Banana Republic, LLC*, 6 Cal. App. 5th 907 (2016), and *Medrazo v. Honda of N. Hollywood*, 205 Cal. App. 4th 1, 12 (2012), is without merit because those cases, unlike here, address whether reliance is required for a UCL claim based on *misrepresentations*.

655 F.3d 1013, 1020 (9th Cir. 2011) (quoting *In re Tobacco II*, 46 Cal. 4th at 320), and such also remains the law in CLRA and common-law fraud claims in California.[17]

GM's cases rejecting class certification where class members were exposed to varying advertisements or communications (or where courts found differences in laws to predominate) are unavailing because, as explained above, those are not the facts of this case. *See Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 596 (9th Cir. 2012) (vacating class certification where "the limited scope of … advertising ma[de] it unreasonable to assume that all class members viewed it");[18] *Campion v. Old Republic Home Prot. Co.*, 272 F.R.D. 517, 536 (S.D. Cal. 2011) (UCL false advertising claim); *Howard v. GC Servs., Inc.*, 2015 WL 5163328, at *10 (Cal. Ct. App. Sept. 3, 2015) (unpublished, not precedential opinion under a misrepresentation theory); *Cohen v. DIRECTV, Inc.*, 178 Cal. App. 4th 966, 969 (2009) (false advertising case);[19] *see also Sud v. Costco Wholesale Corp.*, 229 F. Supp. 3d 1075 (N.D. Cal. 2017) (alleged misrepresentations regarding labor conditions in the shrimp supply chain), *aff'd*, 731 F. App'x 719 (9th Cir. 2018); *Rojas-Lozano v. Google, Inc.*, 159 F. Supp. 3d 1101 (N.D. Cal. 2016) (alleged misrepresentations regarding the purpose of Google's user-authentication technology). Instead, Plaintiffs claims here

[17] While GM cites *Mirkin v. Wasserman*, 5 Cal. 4th 1082 (1993), for the proposition that an inference of reliance is unavailable for Plaintiffs' claims (GM Br. at 60), *Mirkin* holds just the opposite: "to prove reliance on an omission," "[o]ne need only prove that, had the omitted information been disclosed one would have been aware of it and behaved differently." *Id.* at 1093.

[18] GM misleadingly asserts that "*Mazza's* holding expressly applies to alleged omissions as well as misrepresentations." GM Br. at 58-60. In fact, *Mazza* was a *mixed* misrepresentations and omissions case in which the plaintiffs alleged that Honda (i) *misrepresented* the characteristics of its braking system *and* (ii) omitted or failed to disclose material information concerning the system's limitations. *Mazza*, 666 F.3d at 585, 587. Under those circumstances, the court found that "[f]or everyone in the class to have been exposed to the omissions … it is necessary for everyone in the class to have viewed the allegedly misleading advertising." *Id.* at 596. In other words, and in stark contrast to this case, the omissions in *Mazza* were only misleading to those who had seen the advertising. *Id. Mazza* does not overturn *Tobacco II*, nor could it.

[19] Other courts have rejected *Cohen* to the extent that it "might be read to require individualized evidence of class members' reliance," because that would be "inconsistent with *In re Tobacco II*…." *Greenwood v. Compucredit Corp.*, 2010 WL 4807095, at *5 (N.D. Cal. Nov. 19, 2010); *accord In re Dial Complete Mktg. & Sales Practices Litig.*, 312 F.R.D. 36 n.13 (D.N.H. 2015).

center on uniform *omissions* of fact, and not even GM asserts that anyone was told about, or should have been on notice of, the defects.

Similarly off-point are GM's cases rejecting a class-wide presumption of reliance and materiality where the misrepresentation—as opposed to omission—did not implicate safety issues, and thus materiality was not satisfied as a matter of law (as it is here). *See*, *e.g.*, *Pierce-Nunes v. Toshiba Am. Info. Sys., Inc.*, 2016 WL 5920345, at *7 (C.D. Cal. June 23, 2016) (finding "lack of uniformity" in product labeling); *Fine v. ConAgra Foods, Inc.*, 2010 WL 3632469, at *1, 4 (C.D. Cal. Aug. 25, 2010) (addressing materiality of allegedly false press release that most class members had never seen); *Reynante v. Toyota Motor Sales USA, Inc.*, 2018 WL 329569, at *1 (Cal. Ct. App. Jan. 9, 2018) (unpublished, not precedential opinion addressing allegedly false online advertising regarding fuel economy).

GM's cases involving safety-related omissions are also distinguishable. In *Webb v. Carter's, Inc.*, which involved the risk of skin irritation from clothing, the defendant introduced "persuasive" expert testimony that consumers would not likely notice or respond to warnings of the risk. 272 F.R.D 489, 502-03 (C.D. Cal. 2011). But here, Plaintiffs' common evidence demonstrates that the entire demand curve would have shifted had warnings been given. *See* Section IV.A, *infra*. *In re Vioxx Class Cases*, 180 Cal. App. 4th 116 (2009), does not apply because it involved numerous individual issues, including physician prescribing behavior and each individual patient's medical needs and history. *Johnson v. Harley-Davidson Motor Co. Grp., LLC*, 285 F.R.D. 573, 579-80 (E.D. Cal. 2012), is likewise inapposite because there was no common method of demonstrating a design defect and there were "literally zero complaints" about the issue. The same cannot be said about GM's ignition switch, steering, and airbag defects.

GM fares no better with its argument that "reliance cannot be inferred where the evidence shows different reasons for purchase." GM Br. at 61. GM's "proof" that "buying a vehicle is one of the most idiosyncratic purchases a consumer can make," *id.* at 62, consists of nothing more than its allegation that safety is *not* material to the Plaintiffs and the Classes.[20] *See* GM Br. at 68-69. Plaintiffs' evidence to the contrary creates an over-arching Class-wide issue on the question of materiality. *See*, *e.g.*, Offer of Proof at § II.L (outlining substantial proof of materiality); Appendix B (safety material to named Plaintiffs). GM's attempt to parlay a common factual dispute on the materiality of safety to car purchasers into alleged "individual issues" is the very same strategy recently rejected in *Broomfield v. Craft Brew Alliance*, *Inc.*, 2018 WL 4952519 (N.D. Cal. Sept. 25, 2018), where the court found that the defendant's attacks on whether plaintiffs' evidence "sufficiently proves materiality" actually *supported* a finding of predominance because the "question at this stage is not whether Plaintiffs have successfully proven materiality, but rather whether the materiality inquiry is a common question susceptible to common proof that helps to establish predominance." *Id.* at *11; *see also* ***Hadley v. Kellogg Sales Co.***, 324 F. Supp. 3d 1084, 2018 WL 3954587, at *21 (N.D. Cal. Aug. 17, 2018) (even if plaintiff failed to provide sufficient evidence of deception and materiality, "that failure has no bearing on whether common questions will predominate over individual questions"); *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 568

[20] Citing Plaintiff testimony and a survey conducted by Professor Wayne Hoyer, GM highlights numerous factors that consumers commonly consider in their vehicle purchase and lease decision. GM Br. at 69-71. But because vehicle safety is material to all Plaintiffs and Class members, other purchase factors are simply irrelevant to the issues in this case. Further, Prof. Hoyer's survey is severely flawed because he used open-ended questions in an unreliable memory test that asked respondents to report purely from memory the factors that influenced a vehicle purchase decision that occurred anywhere from four to 20 years ago. And he employed flawed and incomplete questions that only asked respondents about the *main* reasons for purchasing a vehicle, which failed to account for all factors that influenced purchase decisions that respondents may not have characterized as the "main" reason. But even had Dr. Hoyer designed a reliable survey, *it has little bearing on the central issue of the materiality of safety given Hoyer's own admissions that safety is important to* ***all*** *vehicle drivers*. *See* Plaintiffs' Memorandum in Opposition to GM's Motion to Exclude the Opinions of Dr. Marvin Goldberg at 14-16 (incorporated herein by this reference).

U.S. 455, 481 (2013) ("even a definitive rebuttal on the issue of materiality would not undermine the predominance of questions common to the class").

2. Missouri law does not require proof of individual reliance or causation.

While GM properly concedes that proof of individualized reliance is not required in material omission claims under the Missouri Merchandising Practices Act (MMPA), it nonetheless argues that "individualized" reliance issues preclude certification in Missouri because Plaintiffs must prove "causation." GM Br. at 64-65. But a material omission is, by definition, one that *causes* the reasonable consumer to act to her detriment based on the omission. *See*, *e.g.*, *Star Indem. & Liab. Co. v. Cont'l Cement Co., LLC*, 2013 WL 1442456, at *16 (E.D. Mo. Apr. 9, 2013) (an omission "is material if it would likely affect the conduct of a reasonable man with respect to his transaction with another") (common-law fraud).[21] Here, proof that the undisclosed defects were material to a reasonable consumer *and* that consumers overpaid as a result establishes reliance, causation, and injury on a Class-wide basis.

Courts have found that common issues predominate in product defect class actions involving MMPA claims. Plfs. Op. Br. at 22 (citing *Hope v. Nissan N. Am., Inc.*, 353 S.W.3d 68, 81-82 (Mo. Ct. App. 2011), *Plubell v. Merck & Co.*, 289 S.W.3d 707, 716 (Mo. Ct. App. 2009), and *Flynn v. FCA US LLC*, 2018 U.S. Dist. LEXIS 111963, at *23-24 (S.D. Ill. July 5, 2018)). GM's primary response to these authorities is to cite *State ex rel. Coca-Cola Co. v. Nixon*, 249 S.W.3d 855 (Mo. 2008), for the proposition that MMPA claims cannot be certified because consumers must provide individualized proof of causation and injury. GM Br. at 64. The case

[21] The Court considers "the elements of [Plaintiffs'] MMPA and common law fraud claims together" because "both sound in fraudulent concealment." *In re GM LLC Ignition Switch Litig.*, 2016 WL 3920353 at *34 (S.D.N.Y. Feb. 20, 2016) (citing *Pollard v. Remington Arms Co.*, 2013 WL 3039797, at *3-5 (W.D. Mo. June 17, 2013)). Contrary to GM's contentions, Plaintiffs do *not* argue that "fraud is . . . presumed." GM Br. at 65. They merely argue that the Missouri Classes can recover with Class-wide proof of fraudulent concealment and benefit-of-the-bargain damages.

involved claims that Coca-Cola deceptively misled consumers into believing that fountain Diet Coke is identical to Diet Coke when the former contained saccharin while the latter did not. The court found the proposed class over-broad and not ascertainable because the "alleged injury was based on a *subjective preference* against saccharine." *Coca-Cola*, 249 S.W.3d at 863 (emphasis added).[22] Yet, the *Coca-Cola* court noted the appropriateness of certification where the alleged injury is "based on an *objective* characteristic." *Id.* (citing *Craft*, 190 S.W.3d at 375) (emphasis added). Because the hidden safety defects are decidedly objective characteristics, *Coca-Cola* does not help GM, and predominance is readily established.

GM's other authorities are no more helpful. In *Owen v. GMC*, 533 F.3d 913, 924 (8th Cir. 2008), plaintiffs "presented no evidence from which a jury reasonably could conclude that their loss was the result of the alleged defect that GM failed to disclose." Here, in contrast, Mr. Boedeker's conjoint analysis presents proof that all Class members suffered benefit-of-the-bargain damages at the moment of purchase. *See Craft*, 190 S.W.3d at 385 ("class members could prove recoverable damages on a uniform, class-wide basis under the benefit of the bargain rule"); *accord Hope*, 353 S.W.3d at 83 ("benefit-of-the-bargain" rule "applicable in MMPA cases to meet the element of ascertainable loss").[23]

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[22] The instant case—in which *only* GM had knowledge of the latent defects at issue—is also distinguishable from GM's cases in which consumers knew (or could have known) of the alleged misrepresented information. *See In re Bisphenol-A (BPA) Polycarbonate Plastic Prods. Liab. Litig.*, 2011 WL 6740338, at *1-2 (W.D. Mo. Dec. 22, 2011) ("consumers who knew about BPA and purchased Defendants' products anyway suffered no injury"); *Bratton v. Hershey Co.*, 2018 WL 934899, at *2 (W.D. Mo. Feb. 16, 2018), and *White v. Just Born, Inc.*, 2018 WL 3748405, at *4 (W.D. Mo. Aug. 7, 2018), are to the same effect: plaintiffs with pre-purchase knowledge of the alleged fraud are not injured by the fraud. Here, there is no dispute that *no Class members* were aware of the defects at issue.

[23] None of GM's remaining cases are class actions or remotely similar to the facts of this case. *See Triggs v. Risinger*, 772 S.W.2d 381 (Mo. Ct. App. 1989) (affirming grant of summary judgment on fraud claim brought by several land purchasers); *Prof'l Laundry Mgmt. Sys., Inc. v. Aquatic Techs., Inc.*, 109 S.W.3d 200 (Mo. Ct. App. 2003) (reversing grant of summary judgment on misrepresentation claim brought by single plaintiff); *Stein v. Novus Equities Co.*, 284 S.W.3d 597 (Mo. Ct. App. 2009) (affirming dismissal of claims brought by several property owners against real estate developer); *Grossoehme v. Cordell*, 904 S.W.2d 392 (Mo. Ct. App. 1995) (affirming grant of summary judgment stemming from the failure of a drunk driver to pay restitution to a victim as part of his criminal sentence);

3. The Texas Plaintiffs meet the predominance requirement for their DTPA claims, which are based on material omissions.

While GM leans heavily on *affirmative misrepresentation* cases under the DTPA holding that certification is "a near-impossibility," GM Br. at 66 (quoting *Fid. & Guar. Life Ins. Co. v. Pina*, 165 S.W.3d 416, 423 (Tex. App. 2005)), GM ignores that in *omissions* claims the "reliance" requirement is satisfied where the defendant withholds material information "with the intent of inducing the consumer to engage in a transaction" and "the consumer would not have entered into the transaction had the information been disclosed." *E.g.*, *Patterson v. McMickle*, 191 S.W.3d 819, 827 (Tex. Ct. App. 2006). Because Plaintiffs here can establish both the materiality of the omissions and the fact of damage on a Class-wide basis, predominance is satisfied and Plaintiffs' DTPA claims can be certified. *See In re ConAgra Foods, Inc.*, 90 F. Supp. 3d 919, 1018 (C.D. Cal. 2015) (certifying DTPA claims based, in part, on survey evidence of materiality).

B. Company knowledge is a quintessentially common issue, even if it changes over time.

GM contends that alleged differences in GM's knowledge of the defects over time predominate over common issues for Plaintiffs' consumer protection and fraud claims, GM Br. at 76-84, but GM is wrong because determining whether GM had exclusive knowledge of the facts concerning the defects will be established with proof common to all Class members.

Common proof establishes that, for all recalls other than 14v346, GM knew about the defects from day one of the company's existence (and for Recall 14v346, GM knew of the defect no later than January 2010). Plfs. Op. Br. at 3-6.[24] Common proof also demonstrates that GM

Evergreen Nat'l Corp. v. Carr, 129 S.W.3d 492 (Mo. Ct. App. 2004) (affirming trial verdict in favor of land sellers in dispute with developer).

[24] [redacted]

accrued all of Old GM's knowledge from the first day of GM's existence on July 10, 2009, by operating the automaker business of Old GM, inheriting Old GM files, retaining key Old GM engineering and legal personnel, and discharging GM's duties under the TREAD Act. Plfs. SJ Stmt. of Facts (Dkt. No. 6061) at ¶¶ 319-50.[25] Common issues relating to GM's knowledge predominate because they spring from a central inquiry: what GM knew and when it knew it.[26] All Plaintiffs and members of a putative Class will use the *same* evidence of GM's conduct to answer that central inquiry.

Because the proof focuses on the carmaker's conduct in auto defect class actions, courts commonly find that common issues predominate in regard to the defendants' knowledge. *See*, *e.g.*, *Wolin*, 617 F.3d at 1173 ("[c]ommon issues predominate such as whether Land Rover was aware of the existence of the alleged defect, whether [it] had a duty to disclose its knowledge and whether it violated consumer protection laws when it failed to do so"); *Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 962 (9th Cir. 2005) ("whether Ford was aware of alleged design defects" was plainly a common issue); *Daniel v. Ford Motor Co.*, 2016 U.S. Dist. LEXIS 130745, at *21 (E.D. Cal. Sept. 23, 2016) ("The court can determine what defendant knew about the alleged defect, when it knew what, and at what point that knowledge was no longer exclusive once for all class

[redacted]

[25] *See also In re Motors Liquidation Co.*, 541 B.R. 104, 143 (Bankr. S.D.N.Y. 2015) (Old GM knowledge is imputed to GM).

[26] Tellingly, despite the recalls constituting an admission that the vehicles are defective, GM never says *when* it first knew that the vehicles included in any given recall were defective; for each recall, it merely offers a cursory review of a few facts, some of which are contested. GM Br. at 79-84. GM does not argue that so-called evolving knowledge is an impediment to certification of the bulk of claims arising under Recall No. 14v047. But GM's discussion of the Delta ignition switch defect in the Service Part Vehicles subject to Recall No. 14v047 is highly misleading for the reasons discussed in Section II.B, *infra*, and at SJ Opp. at 44-46. In any event, the issues that GM raises will be resolved at trial via evidence common to all members of the 14v047-related Classes.

members."); *Falco v. Nissan N. Am., Inc.*, 2016 U.S. Dist. LEXIS 46115, at *24 (C.D. Cal. Apr. 5, 2016) (common evidence used to prove Nissan's knowledge); *Banks*, 301 F.R.D. at 335 (common issues predominate, such as whether Nissan was aware of the defect); *Parkinson v. Hyundai Motor Am.*, 258 F.R.D. 580, 596 (C.D. Cal. 2008) (predominating common questions include Hyundai's knowledge of the alleged defect).[27]

While Plaintiffs agree that GM's knowledge of the defects is an element of their statutory and common law fraud claims under California and Texas law, GM's interpretation of Missouri law is incorrect.[28] GM Br. at 77-78. Proof of GM's knowledge is not necessary for MMPA claims based on concealment or suppression. *Plubell*, 289 S.W.3d at 713 n.4. For Plaintiffs' omission claims under the MMPA, scienter is required, but the standard is whether the defendant knew or *would have known* based on reasonable inquiry about the concealed fact. *Hope*, 353 S.W.3d at 84 (citing *Plubell*, 289 S.W.3d at 713 n.4). Even so, *Hope* upheld class certification of MMPA omission claims, finding that the evidentiary focus would be on Nissan's conduct in failing to disclose the defect—evidence common to the class as a whole. *Id.* at 85. Nissan's evolving knowledge was not a reason to deny certification, because the class period could be revised or subclasses used "to accommodate differences in the level of scienter at different times." *Id.*[29]

As in *Hope* and *Plubell*, common issues relating to GM's knowledge predominate over any individual issues because the legality of GM's conduct is common to all putative Class members.

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[27] *Cf. Keegan v. Am. Honda Motor Co.*, 284 F.R.D. 504, 533 (C.D. Cal. 2012) ("the UCL's focus [is] on the defendant's conduct, rather than the plaintiff's damages, in service of the statute's larger purpose of protecting the general public against unscrupulous business practices" (quoting *In re Tobacco II Cases*, 46 Cal. 4th at 312).

[28] GM does not argue that knowledge is an element of the California Plaintiffs' claims for breach of implied warranty, because it is not. *See* CAL. CIV. CODE § 1791.1(a)(1), (2); *Isip v. Mercedes-Benz USA, LLC*, 155 Cal. App. 4th 19, 26 (2007). Plaintiffs only seek certification of implied warranty-based claims under California law.

[29] *Hope* cited with approval *Plubell*, where the court certified a class of Vioxx purchasers bringing MMPA claims against Merck for, among other things, Merck's failure to disclose Vioxx's risks. Like *Hope*, the *Plubell* court emphasized that the "central issue" in the suit was whether Merck had violated the MMPA by failing to disclose, and concealing, Vioxx's safety risks—an inquiry that was common to all class members. *Id.* at 713.

The fact finder will determine when GM knew, or should have known, of the defects. To the extent that any of those dates falls before some of the model years included in a given Class, the Court can later alter the Class definition to conform to proof at trial; this possibility is not a reason to deny certification. *See*, *e.g.*, Fed. R. Civ. P. 23(c)(1)(C) ("An order that grants or denies class certification may be altered or amended before final judgment."); *In re LIBOR-Based Fin. Instruments Antitrust Litig*., 299 F. Supp. 3d 430, 602-03 (S.D.N.Y. 2018) (explaining that "Rule 23(c) contemplates that class certification is not a one-shot process" and that courts should "reassess . . . class rulings as the case develops" (quoting *Amara v. CIGNA Corp*., 775 F.3d 510, 520 (2d Cir. 2014)); *Butler v. Sears, Roebuck & Co*., 727 F.3d 796, 798 (7th Cir. 2013) (class certification rulings "are tentative and can be revisited by the district court as changed circumstances require"); *In re Zurn Pex Plumbing Prods. Liab. Litig*., 644 F.3d 604, 613 (8th Cir. 2011) ("A court's rulings on class certification issues may . . . evolve" per Rule 23(c)(1)(C)).[30] GM's knowledge of the various defects is a prototypically predominant common issue that will be established by evidence common to all members of each Class.

C. Questions relating to whether Class members had Old GM or GM vehicles do not predominate.

GM contends that an individual issue exists as to whether each putative Class member has an Old GM or GM vehicle, GM Br. at 84, although GM does not explain how such an issue would predominate over common ones. As Plaintiffs established in opposing GM's summary judgment

[30] GM's defective car paint cases—*Ford Motor Co. v. Sheldon*, 113 S.W.3d 839, 843 (Tex. Ct. App. 2003), *Sanneman v. Chrysler, Corp.*, 191 F.R.D. 441, 449-50 (E.D. Pa. 2000), and *In re Ford Motor Co. Vehicle Paint Litig.*, 182 F.R.D. 214, 220 (E.D. La. 1998)—are inapposite because there were hundreds of different kinds of paint and paint processes, a detailed physical examination of each vehicle was required to assess whether the paint was defective, and paint failure rates were influenced by many factors, including plaintiffs' use of the vehicles. Not so here, where GM has admitted that defects exist in discrete parts and where vehicle inspections are not needed to confirm the admitted defects. Further, the courts' treatment of defendants' evolving knowledge was curt (*Sheldon* and *Sanneman* simply cited *Ford Vehicle Paint* and no other authorities for the proposition, while *Ford Vehicle Paint* cited no case at all), and out of step with Second Circuit authority calling for the use of manageability tools such as flexible class periods and/or subclasses.

motion, people who bought defective Old GM cars after GM's inception on July 10, 2009 have valid claims against GM because GM alone had *knowledge* of the defects in the cars at issue, the *duty* to disclose and remedy those defects under the Safety Act, and the *ability* to forestall the economic losses incurred by all those who overpaid for the defective vehicles. Contrary to GM's repeated contentions, the bellwether jurisdictions do not require that a consumer enter into a transaction with the defendant in order to bring a consumer protection or fraudulent concealment claim, and no case holds that a plaintiff must make out a failure to warn claim in order to remedy consumer fraud. *See* SJ Opp. at 46-55. Accordingly, both Old GM and GM purchasers are properly included in Plaintiffs' proposed Classes,[31] so there will be no need to determine who made the vehicles. But even if GM's argument were to prevail, purchasers and lessees of Old GM vehicles can be easily identified (via the vehicle-level data that GM will provide post-certification) and excluded—hardly a predominating individual issue preventing certification.

D. Common issues predominate for Plaintiffs' Song-Beverly Act claims.

Contending that common issues do not predominate for Plaintiffs' Song-Beverly Act claims, GM says that Plaintiffs and the Class must prove whether and when they stopped using their cars and how many miles they drove without suffering a catastrophic safety failure. GM Br. at 85-87. But GM misstates Plaintiffs' burden under CAL. CIV. CODE § 1791; the Court has already held that "the relevant inquiry focuses on whether the product was defective *at the time it was sold*." *GM Ignition Switch Litig.*, 2016 WL 3920353, at *23 (emphasis added); *see also Cholakyan v. Mercedes-Benz USA, LLC*, 796 F. Supp. 2d 1220, 1243 (C.D. Cal. 2011) (the implied warranty of merchantability is breached "by the existence of the unseen defect, not by its subsequent

[31] Plaintiffs have conceded that only those who purchased New GM vehicles can bring claims under the Song-Beverly Act; that fact poses no negative implications for class certification.

discovery"); *Isip v. Mercedes-Benz USA, LLC*, 155 Cal. App. 4th 19, 24 (2007) (vehicle is merchantable only if it is "in safe condition and substantially free of defects").[32] Merchantability at sale is a common question, *Wolin*, 617 F.3d at 1173, because common evidence shows that GM was aware of the defects, and *all* Class vehicles were defective, rendering *all* unsafe for driving.

GM's reliance on *Am. Suzuki Motor Corp. v. Superior Court*, 37 Cal. App. 4th 1291 (1995), is misplaced because GM ignores the Court of Appeal's later clarification in *Isip* that the product must be "in a safe condition and substantially free of defects." 155 Cal. App. 4th at 27. Further, the *American Suzuki* court rejected certification because the risk posed by the defect at issue was too low to render the vehicles unfit "for their ordinary purpose." *Am. Suzuki*, 37 Cal. App. 4th at 1294; *see also Linder v. Thrifty Oil Co.*, 23 Cal. 4th 429, 442 (2000) (*American Suzuki* found "that the vast majority of the products remained fit for their ordinary purpose").[33]

Likewise, GM's cases involving vehicle durability, *de minimis* risk of injury, or declining product *performance*—as opposed to safety risks—are unavailing. *See*, *e.g.*, *Larsen v. Nissan N. Am., Inc.*, 2009 WL 1766797, at *2 (Cal. Ct. App. June 23, 2009) (unpublished and not precedential non-class case involving premature failure of ignition component); *Avedisian v. Mercedes-Benz USA, LLC*, 43 F. Supp. 3d 1071, 1078 (C.D. Cal. 2014) (finding the alleged chrome defect injury "so *de minimis* as to not raise any safety concern"); *Am. Honda Motor Co., Inc. v. Superior Court*, 199 Cal. App. 4th 1367, 1369 (2011) (transmission performance issue); *Torres v. Nissan N. Am., Inc.*, 2015 WL 5170539, at *1 (Sept. 1, 2015) (same); *Kent v. Hewlett-Packard*

[32] GM's non-California cases contravening these principles are inapposite. *See*, *e.g.*, *Skeen v. BMW N. Am., LLC*, 2014 WL 283628, at *16 (D.N.J. Jan. 24, 2014) (applying New Jersey law); *Szymczak v. Nissan N. Am., Inc.*, 2011 WL 7095432, at *11 (S.D.N.Y. Dec. 16, 2011) (applying New York law).

[33] *Tae Hee Lee v. Toyota Motor Sales, U.S.A., Inc.*, 992 F. Supp. 2d 962, 979-80 (C.D. Cal. 2014), is not persuasive because it relies on *American Suzuki* without any discussion of *Isip*. So too is the out-of-state case *Beck v. FCA US LLC*, 273 F. Supp. 3d 735 (E.D. Mich. 2017), which does not reference *Isip*'s California's standard for Song-Beverly implied warranty claims.

Co., 2010 WL 2681767, at *2 (N.D. Cal. July 6, 2010) (computer crashes). Common evidence shows that the defects, which GM has admitted impact vehicle safety, are sufficiently severe such that GM breached the implied warranty of merchantability under the Song-Beverly Act.

E. Unconscionability under the Texas DTPA does not present individual issues because no Class members were aware of the defects.

GM mistakenly argues that the Court must review each Class member's "sophistication and experience," GM Br. at 87, and therefore cannot certify Plaintiffs' Texas DTPA claims based on an "unconscionable action or course of action" under TEX. BUS. & COM. CODE § 17.50(a)(3). An "unconscionable" practice is one that "takes advantage of the lack of knowledge . . . of the consumer to a grossly unfair degree." TEX. BUS. & COM. CODE § 17.45(5). Common evidence shows that *only* GM had knowledge of the defects, and had GM disseminated this knowledge, the price for its cars would have been lower; hence, GM "t[ook] advantage of the lack of knowledge" of *all* purchasers and lessees "to a grossly unfair degree." *Id.*; *see also In re GM LLC Ignition Switch Litig.*, 257 F. Supp. 3d 372, 449 (S.D.N.Y. 2017) (complaint "sufficiently alleges that New GM's practice of promoting its vehicles as safe and reliable, *despite its knowledge of numerous alleged defects*, 'took advantage of [the plaintiffs'] lack of knowledge' such that 'the resulting unfairness was glaringly noticeable, flagrant, complete and unmitigated.'") (emphasis added).

GM's authorities are inapposite. Because the DTPA claim in *Lou Smith & Assocs., Inc. v. Key* depended on the plaintiffs' knowledge of Texas insurance law, insurance adjusting, and roofing repair contracting, the court found debilitating individual issues. 527 S.W.3d 604, 610-12, 623-25 (Tex. Ct. App. 2017). Here, in stark contrast, Class members' were uniformly unaware of the defects in their cars. Were this a case about automotive financing like *Peltier Enters., Inc. v. Hilton*, 51 S.W.3d 616, 619-620 (Tex. Ct. App. 2000), then individual inquiries into each

consumer's sophistication might be necessary.[34] Here, however, GM's supposed individual questions—regarding, *inter alia*, "experience in buying vehicles," whether class members consulted "family or friends in the automotive business," "work history," and knowledge that vehicles in the United States could *hypothetically* be subject to future recalls for unknown reasons—do *not* bear on the stark knowledge disparity between GM and *all* Class members.

F. Common issues predominate for Plaintiffs' "bankruptcy fraud" claims.

GM mischaracterizes the California and Missouri Plaintiffs' claims of fraudulent concealment of the right to file a claim against Old GM in bankruptcy as a misrepresentation claim when it is actually an omission (or *concealment*) claim. GM Br. at 89-90. While GM contends that Plaintiffs must prove exposure to a "uniform misrepresentation" by GM (GM Br. at 89), the Court has correctly noted that Plaintiffs actually assert that "GM improperly concealed its knowledge" of the Delta Ignition Switch Defect and thereby prevented Plaintiffs from timely filing proofs of claim and partaking in the spoils of Old GM's bankruptcy. *Motors Liquidation*, 2018 WL 2416567, at *12. Class members were, of course, all subjected to the same concealment of the defect in their cars. Accordingly, the predominating common questions surrounding the bankruptcy fraud claims include: (i) was GM aware of the Delta Ignition Switch Defect between the date of its inception on July 10, 2009 and the Bar Date of November 30, 2009; (ii) did GM conceal its knowledge of the defect; and (iii) did GM's concealment of the defect prevent the classes from timely-filing class proofs of claim? These core common questions predominate, as they "are *more prevalent or important* than the non-common, aggregation-defeating, individual

[34] Nor is *Diais v. Land Rover Dallas, L.P.*, 2016 WL 1298392, at *7 (Tex. Ct. App. Apr. 4, 2016), instructive, because that non-class case turned on whether a dealership had falsely represented that a particular Land Rover—with visible "paint blemishes" and body "scratches"—was actually a new vehicle. *Id.* at *1, 5.

issues." *In re Petrobas Sec. Litig.*, 862 F.3d 250, 270 (2d Cir. 2017) (quoting *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1045 (2016)) (emphasis added).

The other alleged "individual issues" flagged by GM are not compelling. GM correctly notes that—assuming Plaintiffs prevail on the claim that GM concealed the defect and thereby prevented them from timely filing claims in Old GM's bankruptcy—Plaintiffs must then prove underlying claims against Old GM. *See* GM Br. at 89. But as Plaintiffs have demonstrated throughout this brief, common questions predominate for those claims. And GM's assertion that each Class member would have to prove "that they knew of Old GM's bankruptcy" and "knew they could file a claim" is simply false (and ignores that lack of notice was a due process violation). Regardless of whether Class members were aware of these facts *when they were unaware of the defect in their cars*, it is undisputed that as soon as the Delta Ignition Switch Defect became public, a tsunami of litigation instantly followed. *See In re Motors Liquidation Co.*, 529 B.R. 510, 521 (Bankr. S.D.N.Y. 2015). A jury could easily find the same thing would have happened in 2009, leading to promptly filed class claims. Common issues predominate Plaintiffs' "bankruptcy fraud" claims, and they should be certified.

IV. COMMON ISSUES REGARDING FACT OF INJURY AND DAMAGES PREDOMINATE OVER INDIVIDUAL QUESTIONS

A. Common issues predominate for Plaintiffs' alleged benefit-of-the-bargain damages.

1. Post-recall vehicle prices are not relevant to benefit-of-the-bargain damages.

Citing Drs. Cornell, Hanssens, and Willig, who purported to examine how the "market" responded to the 2014 recalls,[35] GM contends that Plaintiffs cannot prove Class-wide injury because prices and sales of the recalled vehicles did not systematically decline after the recalls

[35] *See* Dkt. Nos. 6110-11, 6114-15, and 6118-19 for motions to strike the opinions and testimony of these experts, which Plaintiffs incorporate herein by this reference.

began. GM Br. at 12-14, 16-19. But GM purports to test damages at the wrong point in time, because the "benefit-of-the-bargain defect theory compensates a plaintiff for the fact that he or she overpaid, *at the time of sale*, for a defective vehicle." *GM Ignition Switch Litig.*, 2016 WL 3920353, at *10 (emphasis added); SJ Opp. at 37-38.[36] Neither post-recall prices nor GM's 2014 market share are relevant to whether unsuspecting consumers overpaid for GM vehicles when, at the point of sale, they bought vehicles with safety defects that GM intentionally hid.[37]

a. The post-recall data—when properly interpreted—confirms the negative impact of the recalls.

In addition to the fatal timing error that renders inappropriate and irrelevant an examination of post-recall prices, significant methodological flaws undermine the conclusions of GM's experts. Dr. Cornell misapplied a still-developing methodology called Synthetic Control Analysis (SCA) that he conceded lacks a testing standard. But even if the auto market were suitable for analysis by the black-box SCA algorithm, Dr. Cornell (i) violated central precepts of SCA by using polluted data, which prevents drawing inferences from a comparison of the pre- and post-recall worlds, and (ii) constructed the data in such a way that it *could not pick up price declines of the magnitude seen here*. Dkt. No. 6111 at 1-13. Dr. Willig started by discarding *more than 98% of the data* to engineer a tiny, admittedly unrepresentative sample of GM vehicles. He then created a novel, unsupported "difference in differences" test, jettisoning a standard regression analysis and refusing

[36] *Cf. GM Ignition Switch Litig.*, 257 F. Supp. 3d at 401 (rejecting the argument that GM's post-sale misconduct could be considered a cause of Old GM purchaser damages because "Plaintiffs' injury, if any, *was complete at the time of sale*, and thus is not attributable to New GM's conduct") (emphasis added). The Court also held that benefit-of-the-bargain damage analysis does *not* consider the alleged post-sale fact of diminution of value. *GM Ignition Switch Litig.*, 2016 WL 3920353, at *10.

[37] *See* Ex. 215 at ¶¶ 13, 17-20, 72-83, 102-104, 123-124, 140-148, 184, 189-196, 305 (addressing all three experts and explaining the reasons for the analytic gap between the moment of purchase and the world post-recall); Berman Reply Decl., Ex. 22 at ¶¶ 5, 49-54 (Cornell analysis did not address the correct measure of economic loss).

to control for pricing factors.[38] Dkt. No. 6119 at 1-12. For his part, Dr. Hanssens did not even examine price declines.[39]

Corrected versions of the tests that GM's experts conducted demonstrate that GM vehicle prices and volume did in fact fall, suggesting exactly the sort of stigma effect that even Dr. Cornell envisioned. *See* Dkt. No. 6111 at 11-12 (discussing a statistically significant negative effect on recalled GM vehicle prices post-recall and noting that the majority of the model types decreased relative to their synthetic benchmarks following the recalls); Dkt. No. 6119 at 9-11 (applying standard methods for determining statistical significance to a more meaningful sample of the Willig data shows that GM car prices fell relative to benchmarks in a range from 5% to 10%); Dkt. No. 6115 at 2 n.4 ("the Hanssens model reveals a significant fall off in GM sales post recall").[40] In other words, when corrected, the data used by GM's experts is consistent with the common-sense notion that consumers care about safety, and that GM car sellers would have had to charge less for defective cars had the truth been revealed. Because the car prices would have decreased in the but-for world, *all* consumers overpaid in the actual world.[41] Thus, GM's post-recall

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[38] Dr. Willig refused to aggregate data, and Dr. Weisberg, Emeritus Professor of Statistics, responded to that choice in a manner that GM repeatedly has used out of context. Dr. Weisberg explained that "basing a separate analysis on each vehicle hopelessly confounds any effect due to the recalls with buyer, seller, and condition effects." SJ Ex. 47 at ¶¶ 1, 5. Rather than "agreeing" with the legal conclusion that irrelevant recall effects—which GM's experts did not properly measure—were too heterogeneous to form a class, the language GM cites was part of Dr. Weisberg's description *of the problems with Dr. Willig's methods*. GM also ignores another crucial point: there is only negligible, unexplained variation in pricing, and Dr. Willig's assertions of pricing variation were misleading and wrong. Dkt. No. 6119 at 3-10.

[39] Plaintiffs recognize that expert disputes typically belong to the jury but submit that these experts' conclusions are entitled to *no* weight. Plaintiffs respectfully refer the Court to the *Daubert* briefs and to the relevant rebuttal expert reports of Dr. Weisberg, Dr. Manuel, and Mr. Boedeker.

[40] *See also* Ex. 215 at ¶ 346 & Tables 24 and 25, ¶¶ 308-45.

[41] Simply because, according to GM's unscientific analyses, one GM vehicle type may have suffered a post-recall price decline relative to its non-GM benchmarks, and another GM vehicle type may have experienced *more* or *less* of a decline (or no decline at all) relative to benchmarks, does not alter the basic fact that every Class member overpaid *at purchase*.

analyses—if considered at all—in no way undermine that common evidence will answer common questions, including as to the fact of injury.

b. GM's cases support Plaintiffs.

GM's own cases also support common impact. *Sykes v. Mel S. Harris & Assocs. LLC*, 780 F.3d 70, 88 (2d Cir. 2015), reconfirms that individual differences in damages do not defeat commonality or predominance, especially when "the evidence necessary to make out such damages claims, while individual, is easily accessible." In such instances, "individual damages considerations do not threaten to overwhelm the litigation." *Id.* Nor must damages be proven at class certification; all that is required "is that the plaintiffs must be able to show that their damage stemmed from the defendant's actions that created the legal liability." *Id.* (internal citations omitted).[42] This means that even if the damages inquiry here *were* a brand diminution analysis by car model (which it is not), individual damages issues would still not predominate.

Another of GM's primary authorities further explains the difference between what must be shown at *certification* and what must be shown on the merits. In *Tyson Foods*, the court said that the possibility that some in the class were uninjured did not impede certification, and that ancillary issues of allocation and award size are premature. 136 S. Ct. 1036 at 1049; *see also* Section IV.A.3, *infra*.[43] While somewhat academic in this case where all Class members overpaid, GM's focus on

[42] GM also relies on an antitrust law cited in the background section of *Sykes* to imply that Plaintiffs in this non-antitrust case must show antitrust injury, which is incorrect.

[43] Notably, the *Tyson* defendants, in addition to misstating Rule 23 principles, also rejected science—much as GM's experts do here. The *Tyson* defendants and their *amici* attacked an analysis that devised the average time a class member worked off the clock and lodged a larger attack on principles of statistical aggregation, falsely claiming that it was a substitute for proof rather than actual proof. As a group of economists, including a Nobel Laureate, explained in an *amicus* brief, "[r]igorous empirical analysis—including the use of average, sampled, and statistical data—is a staple of economics and many other scientific disciplines." *Tyson Foods, Inc. v. Bouaphakeo*, 2015 WL 5766316, at *2 (Sept. 29, 2015) (*amicus* brief). "It is also beyond question that multiple regression analysis is used routinely and reliably in many litigation settings, including class actions," and "[t]o cast doubt on these methods . . . is to misapprehend the world of economics and science in a troubling and extraordinary way." *Id*. Here, GM's experts cast doubt on these standard and well-accepted methods. *Id.* at *3.

this topic warrants clarification; even if this Court were to determine that not every Class member was injured, a class is still appropriate.

2. Plaintiffs' common injury evidence satisfies Rule 23.

GM contends that Plaintiffs cannot show Class-wide injury by common proof (GM Br. at 19-24), but GM's argument is based on a deeply flawed description of Mr. Boedeker's work. Plaintiffs' opening brief and opposition to GM's *Daubert* motion to exclude Mr. Boedeker's opinions (the Boedeker *Daubert* Opp.) explain that Mr. Boedeker's conjoint analysis "takes survey responses and, in combination with a market simulation, translates them into dollar values for individual features or groups of features offered in a car, including whether the car is defective." Ex. 214 at ¶ 14. "Once those dollar values are determined, the demand curve for a car without defects can be compared to the demand curve for a car with undisclosed defects to estimate how much consumers were overcharged (if at all) when they bought cars that had the undisclosed defects." *Id*. at ¶ 15.

Rather than acknowledge this comparison of demand curves for vehicles with and without buyer knowledge of the undisclosed defects in order to determine the economic losses, GM misrepresents the expert work. *First*, GM falsely mischaracterizes the surveys as not considering "actual vehicles" and as presenting "hypothetical prices made-up by Boedeker without any market or empirical study…." GM Br. at 20. In fact, survey respondents were screened to include actual participants in the market for GM vehicles generally who directly stated their preferences for attributes with which they were presented. Ex. 215 at ¶¶ 672, 710. And as GM knows, but ignores, Mr. Boedeker explained that his price increments are supported by data from Consumer Reports, Edmunds, Forbes, Mitchell International, Inc., and Mobileye. Ex. 215 at ¶ 442. Further, to the extent GM implies that hypothetical safety packages are improper, it ignores its own conjoint studies that ask about hypothetical features (with hypothetical prices), as discussed more fully in

Plaintiffs' *Daubert* Opposition.[44] Indeed, conjoint analysis is designed to test hypotheticals. *See*, *e.g.*, *Price v. L'Oreal USA, Inc.*, 2018 WL 3869896, at *10 (S.D.N.Y. Aug. 15, 2018) ("Conjoint Analysis relies on data produced by surveys with hypothetical product-feature and price variations, conducted specifically for the purposes of evaluating a specific product to tease out the value to consumers of a particular product feature.").

Second, GM falsely asserts that "Boedeker summed the part-worths for *each* respondent to calculate the probability that *individual* respondents would purchase that hypothetical package at that price." GM Br. at 21 (emphasis added). In fact, to create Class-wide demand curves, he used survey responses to calculate the *share of all respondents* who would buy a given package for a given defect scenario and price; he does *not* calculate the probability that any particular survey respondent would buy any particular package. Ex. 214 at ¶ 116. GM misleadingly and incorrectly focuses on each respondent, rather than on the demand curves that apply to *all* Class members. As Mr. Boedeker explains, GM's experts mischaracterize his model "as an individual 'willingness-to-pay' approach. This characterization is wrong because individual willingness-to-pay is used to define a demand curve but *not to quantify economic losses*. An individual consumer's willingness-to-pay does not enter the economic loss calculation…." Ex. 215 at ¶ 23.

Third, in a similar attempt to make it appear that Mr. Boedeker merely measures individual willingness-to-pay without more, GM falsely claims that he calculates the "**average** probability" that respondents would choose the option packages with and without knowing about the defects at

[44] [redacted] *See* Declaration of Steve W. Berman in Support of: 1) Economic Loss Plaintiffs' Reply Memorandum in Support of Motion to Certify Bellwether Classes in California, Missouri, and Texas; and 2) Oppositions to GM's *Daubert* Motions to Exclude the Opinions of Boedeker, Gans, Goldberg, and Manuel ("Berman Reply Decl."), Ex. 2 (GM-MDL2543-402633685), at Row 1.

issue. GM Br. at 21. In fact, Mr. Boedeker derived demand curves (*not* averages of individual responses), using a regression of probability of purchases on prices across *all* respondents.[45] This results in demand curves, *not* averages, with and without the respondents' knowledge of defects, which enables him to measure the downward shift in the demand curve that would have occurred but for GM's alleged wrongs.[46] Based on this analysis, he selects the median economic loss estimate as the difference in demand curves calculated from across the different combinations of safety packages and recall scenarios.[47] And this provides Class-wide evidence, based on demand curves and *not* averages, that all Class members suffered economic losses.

3. Mr. Boedeker's methodology is consistent with Article III, due process, and the Rules Enabling Act.

Continuing its misleading attack, GM asserts that the (overstated) variation in willingness-to-pay by survey respondents in Mr. Boedeker's survey implicates standing, violates the Rules Enabling Act, and impinges on GM's due process rights. GM Br. at 24-32. But, as discussed immediately above, GM's arguments fail because they are predicated on a fundamental (and

[45] *See*, *e.g.*, Ex. 215 at ¶ 398 ("Nor is the 'one numerical figure' in the Boedeker Report an average (or median) taken from all individual respondent's WTP as the List Report seems to suggest. Rather, that figure is selected from the results of *market simulations that calculate the aggregate demand curve* for the actual and but-for worlds. The simulations begin by first estimating the share of the entire market (i.e., the share of all respondents) that would purchase a Safety Package with and without the defect at 5 possible price points. Because there are 8 possible combinations of Safety Features and 5 possible price points, *there are 40 market demand simulations performed for each defect and recall scenario*.") (emphasis added); *see also* Ex. 214 at ¶ 107 ("Step 2: Using the *mixed-logit model*, we then perform market simulations that construct, for every choice combination that the survey respondents saw, the demand curves for the actual-world (undisclosed defects) and the but-for-world (disclosed defects)." (emphasis added).

[46] *See*, *e.g.*, *id.* ("Step 3: By comparing the demand curves for the actual-world and the but-for world, we can then quantify the drop (if any) in consumer demand and the corresponding economic loss that the purchasers experienced because they were unaware at the point of purchase that the vehicle they purchased has a defect that requires an immediate recall.").

[47] *See*, *e.g.*, Ex. 214 at ¶ 118 ("The results are displayed as a box-plot ... [that] summarizes the data for the economic loss distribution for all the market simulations…. The number at the center of each solid blue box shows the respective median economic loss."); *see also*, Ex. 215 at ¶ 398 ("The Boedeker economic loss model then selects the median price discount from these market demand simulations of all possible Safety Feature/price point combinations.").

intentional) misstatement of the relevance of variation in willingness-to-pay in the Boedeker model: Mr. Boedeker used "individual willingness-to-pay . . . to define a demand curve but *not* to quantify economic losses." Ex. 215 at ¶ 23 (emphasis added).[48] Nor does the model violate GM's due process rights by "averaging." Contrary to GM's contention, Mr. Boedeker did not average individual's willingness-to-pay but instead calculated price points for all 40 permutations of feature packages and defect scenarios, then estimated demand curves with and without consumer knowledge of the defects, which enabled him to measure the downward shift in the demand curve that would have occurred but for GM's wrongs.[49]

All Class members were thus injured because they all overpaid for their cars, regardless of individual willingness-to-pay, which belies GM's standing arguments (GM Br. at 27-29); GM can only argue that many Class members have no injury by misrepresenting Mr. Boedeker's methodology. But even if there were uninjured Class members, as there are in many cases, it would not implicate standing issues in this Circuit, as GM's own authority makes clear. *See*, *e.g.*, *Denney v. Deutsche Bank AG*, 443 F.3d 253, 263-64 (2d Cir. 2006) ("[P]assive members need not make any individual showing of standing, because the standing issue focuses on whether the plaintiff is properly before the court, not whether represented parties or absent class members are properly before the court.") (citing Herbert B. Newberg & Alba Conte, 1 NEWBERG ON CLASS

[48] In addition to mischaracterizing Mr. Boedeker's work, GM falsely—and frankly rather outrageously—says that Plaintiffs' expert Dr. Weisberg agreed with GM's mischaracterization of the Boedeker model. GM Br. at 26. *This is untrue*. Dr. Weisberg did not study harm at purchase, did not opine on or even read Mr. Boedeker's work, and instead focused on assessing Dr. Willig's work. Dr. Weisberg demonstrated that Dr. Willig's purported post-recall price analysis was unscientific and useless. Dkt. No. 6118 at 2 (Willig *Daubert*); SJ Ex. 47; SJ Ex. 201.

[49] In any event, averaging is not inherently unreliable in class actions, and the possibility of differently injured (or uninjured) class members does not preclude class certification. And GM fails to identify *what* individual defenses it has, why they are relevant *at the certification stage*, why they are not simply *additional common issues*, and why they are not merely a battle-of-the-experts dispute over whether Mr. Boedeker's model shows that all Class members were injured. GM's vague invocation of individual damages, followed by a citation to inapposite out-of-circuit cases or cases involving different methodologies and laws, does not show an actual due process issue.

ACTIONS § 2.7 (4th ed. 2002)); *see also*, *e.g.*, *Dover v. British Airways, PLC (UK)*, 2017 WL 1251083, at *1 (E.D.N.Y. Mar. 31, 2017) (certifying a class in which all members were exposed to wrongful fuel surcharge, even though a small portion of the class may not have actually paid a higher charge), *leave to appeal denied*, 2017 WL 2590319 (2d Cir. June 14, 2017); *Roach v. T.L. Cannon Corp.*, 778 F.3d 401, 405 (2d Cir. 2015) (individual damages issues do not preclude certification).

GM misstates Mr. Boedeker's work in an attempt to distort the fact that Mr. Boedeker determined Class-wide economic losses based on demand curves, not individual's willingness-to-pay. Thus, GM's heavy reliance on cases where only a willingness-to-pay analysis was used is misplaced. *See*, *e.g.*, *Saavedra v. Eli Lilly & Co.*, 2014 WL 7338930 (C.D. Cal. Dec. 18, 2014). Nor is *Opperman v. Path, Inc.*, 2016 WL 3844326 (N.D. Cal. July 15, 2016), persuasive. While the class there included persons who could not have been injured by the wrongful conduct, in this case, "all class members were exposed to the same disclosure—that is no disclosure at all—and purchased the allegedly defective product. Although all class members may not prevail on the merits of their claims, plaintiffs' proposed classes do not include members 'who, by definition, *could not* have been injured.'" *In re Lenovo Adware Litig.*, 2016 WL 6277245, at *15 (N.D. Cal. Oct. 27, 2016) (quoting *Moore v. Apple Inc.*, 309 F.R.D. 532, 542 (N.D. Cal. 2015)).[50]

In similar contexts, when defendants seek to defeat class certification by invoking subjective differences in class members' views of the worth of a defective product (whether described as differences in willingness-to-pay or otherwise), courts explain that the proper inquiry looks at the benefit of the bargain, which is distinct. In other words, "the damages sought by the

[50] *Opperman* is inapposite for an additional reason: the plaintiff said it wanted to put an "inherent value" on privacy without showing that the demand curve for the product would change.

[Plaintiffs] are not rooted in the alleged defect of the product as such, but in the fact that they did not receive the benefit of their bargain." *McManus v. Fleetwood Enters., Inc.*, 320 F.3d 545, 552 (5th Cir. 2003). While GM argues that Plaintiffs suffered individualized injury tied to their views of safety, this is not what Mr. Boedeker models—he models damages based on a price reflecting "the fact that they did not receive the benefit of their bargain." *Id.* As such, Plaintiffs seek only objective "overpayment" damages that are well-established, *see In re IKO Roofing Shingle Prods. Liab. Litig.*, 757 F.3d 599, 602-603 (7th Cir. 2014) (overpayment damages are objective), and their damages are not related to individual Plaintiffs' subjective considerations. *See generally In re Optical Disk Drive Antitrust Litig.*, 2016 WL 467444, at *9 (N.D. Cal. Feb. 8, 2016) (explaining, in antitrust context, that "Defendant's focus on the subjective desires of individual consumers is misplaced, and is not supported by legal precedent requiring any such approach").[51]

GM falsely asserts that Mr. Boedeker "applies the same damages number regardless of the vehicle's make, model, trim, options or whether it was new or used, or leased or purchased." GM Br. at 30. As GM knows, Mr. Boedeker testified repeatedly that he calculated median economic losses per Class vehicle, and that he was not opining as to how those median amounts should be allocated. *See*, *e.g.*, Berman Reply Decl., Ex. 3 at 140:3-9 ("The median amount is used to calculate class wide damages [which] has to be allocated in whatever the judge [or trier of fact-finds to be an equitable way to make the class members whole."). He also explained that median damages could be "allocated using information like … the age of the vehicle." Berman Reply

[51] GM's repeated mantra that Class members whose willingness to pay was the same as it was in the real world were not injured (or that those who do not care about safety were not injured) is baseless because there is no subjective component to damages for overpayment. Put another way, if an individual purchases $200 worth of a product and is only given $150 worth of a product, she is damaged by $50 regardless of her personal feelings about the matter. *See*, *e.g.*, *United States v. Anchor Mortg. Corp.*, 711 F.3d 745, 749 (7th Cir. 2013) ("Basing damages on net loss is the norm in civil litigation. If goods delivered under a contract are not as promised, damages are the difference between the contract price and the value of what arrives.").

Decl., Ex. 4 at 390:23-25. Under that allocation methodology, the damages for a purchaser of a used vehicle would not be the full median amount. This belies GM's assertion that plaintiffs Hamilton, Al-ghambi, and Santiago would all receive $966 under Boedeker's analysis, even though two of them bought used vehicles.[52] In short, there is no basis for GM's false complaint about Mr. Boedeker's supposed "imposition of the same 'economic loss' for all vehicles…." GM Br. at 30.

4. Boedeker's methodology fits Plaintiffs' legal theory and is consistent with *Comcast*.

GM erroneously contends that Mr. Boedeker's analysis is inadmissible under *Comcast Corp. v. Behrend*, 569 U.S. 27 (2013). GM Br. at 32-41. As the Second Circuit has explained, "We have since interpreted *Comcast* as precluding class certification 'only ... because the sole theory of liability that the district court determined was common in that antitrust action, overbuilder competition, was a theory of liability that the plaintiffs' model indisputably failed to measure when determining the damages for that injury.'" *Waggoner v. Barclays PLC*, 875 F.3d 79, 105-106 (2d Cir. 2017) (citation and internal quotation marks omitted), *cert. denied*, 138 S. Ct. 1702 (2018). Thus, the issue under *Comcast* is whether Mr. Boedeker's model indisputably fails to measure Plaintiffs' theory of liability.[53] GM fails to shoulder this burden and mischaracterizes Mr. Boedeker's analysis; the Boedeker model is a tight fit with Plaintiffs' theory of damage.

[52] GM's math is wrong, even assuming (falsely) that Mr. Boedeker opined that each should get $966. Ms. Al-ghambi would receive 7.4% of her purchase price, not 27.6%.

[53] *See Waggoner*, 875 F.3d at 106 (damages model directly measured the alleged harm "by examining the drop in price that occurred when the New York Attorney General's action revealed ongoing problems related to Barclays' management"); *In re U.S. FoodService Inc. Pricing Litig.*, 729 F.3d 108, 123 n.8 (2d Cir. 2013) (damage model directly linked Plaintiffs with their "underlying theory of classwide liability (that the misrepresentations on the invoices caused overpayments) and is therefore in accord with the Supreme Court's recent decision in *Comcast*….").

a. Mr. Boedeker's methodology fits Plaintiffs' damages theory.

Contrary to GM's contention, *see* GM Br. at 33-34, Mr. Boedeker's analysis precisely fits Plaintiffs' benefit-of the bargain damage theory. As this Court has explained, the "gravamen of the benefit-of-the-bargain defect theory is that Plaintiffs who purchased defective cars were injured when they purchased for *x* dollars a New GM car that contained a latent defect; had they known about the defect, they would have paid fewer than *x* dollars for the car (or not bought the car at all), because a car with a safety defect is worth less than a car without a safety defect." *GM LLC Ignition Switch Litig.*, 2016 WL 3920353, at *7; *see also* Boedeker *Daubert* Opp. at 32-41.

Mr. Boedeker measures *exactly* the lost benefit of the bargain, as described by this Court, by analyzing "the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as represented." Ex. 214 at ¶ 10.[54] He assessed "the 'benefit of the bargain' buyers were led to believe they had received with the purchase of a particular defect-free GM vehicle compared to what they actually received when the GM vehicle had a defect that was not disclosed at the point of purchase." *Id*. at ¶ 103.[55]

This is the methodology used in *Price v. L'Oreal USA, Inc.*, 2018 WL 3869896, at *10, where the court rejected defendants' mischaracterization of the price premium model: "Defendants assert that Dr. Dubé's model fails to satisfy *Comcast* because it does not calculate a price premium. This argument is rejected because the model … calculates as damages the

[54] Specifically, the "estimated drop in demand and associated drop in new market equilibrium price using this method is derived from the utility that respondents gain from purchasing a vehicle with an undisclosed defect which they believe to be defect-free compared to obtaining an otherwise identical vehicle where the defect was disclosed at the point of purchase." *Id.* at ¶ 113.

[55] *See also* Ex. 215 at ¶ 68 ("[T]he economic loss model in the Boedeker Report estimates the amount GM's customers would have paid when they purchased or leased vehicles had GM not hidden the safety defect. GM vehicle owners' damage in this case is the difference between the market price GM vehicle owners paid in the actual world and the true market price that GM would have needed to charge to sell the same quantity of vehicles to the same buyers had the defects known to GM been disclosed.").

difference between what Plaintiffs thought they were getting and what they actually got when they purchased the Challenged Products." Similarly, in *In re MyFord Touch Consumer Litig.*, 2016 WL 7734558, at *16 (N.D. Cal. Sept. 14, 2016), the court rejected a *Comcast* challenge to the Boedeker methodology, explaining that his conjoint analysis "will allow the fact finder to calculate the diminution in value of Plaintiffs' vehicles" as a result of a faulty "infotainment" system.

GM's erroneous argument to the contrary rests on the false premise that Mr. Boedeker did not account for GM's "willingness-to-sell." *See id.* at 33-35 & n.18 (referring to "willingness to sell" or "willingness-to-accept (supply)" six times). In fact, numerous courts have denied motions to exclude testimony by Mr. Boedeker on the ground that he keeps supply steady. *See Broomfield*, 2018 WL 4952519, at *18-20; *In re Dial Complete Mktg. & Sales Practices Litig.*, 320 F.R.D. 326, 336 (D.N.H. 2017); *In re MyFord Touch Consumer Litig.*, 291 F. Supp. 3d 936, 971 (N.D. Cal. 2018); *Davidson v. Apple, Inc.*, 2018 WL 2325426, at *22 (N.D. Cal. May 8, 2018). And other courts have found that holding supply fixed in conducting a conjoint analysis is permissible. *See Fitzhenry-Russell v. Dr. Pepper Snapple Grp.*, 2018 WL 3126385, at *8 (N.D. Cal. June 26, 2018); *Hadley*, 2018 WL 3954587, at *13; *In re Lenovo*, 2016 WL 6277245, at *21. Those same courts uniformly distinguish the two cases cited by GM[56] on the ground that the experts in those cases did not consider supply *at all*. *See Broomfield*, 2018 WL 4952519, at *19; *MyFord Touch*, 291 F. Supp. 3d at 970 n.25; *Dial*, 320 F.R.D. at 334; *Fitzhenry-Russell*, 2018 WL 3126385, at *8; *Davidson*, 2018 WL 2325426, at *22; *In re Lenovo*, 2016 WL 6277245, at *21.

GM also mischaracterizes Mr. Boedeker's analysis when it claims he "measures the impact of disclosures on the willingness-to-pay for safety feature packages, not the price of vehicles."

[56] *Saavedra v. Eli Lilly & Co.*, 2014 WL 7338930, at *5 (C.D. Cal. Dec. 18, 2014), and *In re NJOY, Inc. Consumer Class Action Litig.*, 120 F. Supp. 3d 1050, 1118 (C.D. Cal. 2015).

GM Br. at 35 (capital letters omitted). As Plaintiffs explain in detail in their Boedeker *Daubert* Opposition, Mr. Boedeker measures the impact of the nondisclosure of defects on the value of Class vehicles. His survey asks about various option packages, and his conjoint analysis uses those survey responses to measure the impact of those options on car value, not the value of safety options. The diminished value due to GM's nondisclosure of defects, when subtracted from each Class vehicle's selling price, establishes the vehicle price in the but-for world in which GM told the truth about the defects at issue.

GM focuses on screenshots from Mr. Boedeker's surveys and incorrectly asserts that "Boedeker measured the impact of disclosures that are not the basis of plaintiffs' legal claims." GM Br. at 38. GM's fixation on screenshots is misleading and misplaced, because it ignores how Mr. Boedeker used responses from those surveys to perform market simulations that "quantify the drop (if any) in consumer demand and the corresponding economic loss that the purchasers experienced because they were unaware at the point of purchase that the vehicle they purchased has a defect that requires an immediate recall." Ex. 215 at ¶ 107. That analysis fits Plaintiffs' theory of damages.[57]

[57] GM cites several cases without making any effort to show how the fact-intensive holdings in those cases supposedly apply to Mr. Boedeker's methodology in *this* action. The Boedeker Daubert Opposition explains why many of GM's cases are inapposite, including *Townsend v. Monster Bev. Corp.*, 303 F. Supp. 3d 1010 (C.D. Cal. 2018), and *In re Fluidmaster, Inc. Water Connector Components Prods. Liab. Litig.*, 2017 WL 1196990 (N.D. Ill. Mar. 31, 2017). GM's remaining cases are also inapposite, as other courts have found in rejecting *Comcast* challenges to conjoint analyses that establish price premiums. *See In re Arris Cable Modem Consumer Litig.*, 2018 WL 3820619, at *27 (N.D. Cal. Aug. 10, 2018) ("Unlike in *Comcast*, *Davidson*, *Opperman*, and parts of *MyFord Touch*, where the damages models did not track the theories of liability, here 'Plaintiffs propose measuring damages that are directly attributable to their legal theory of the harm[,]' and the conjoint survey attempts to measure how much less consumers would pay for a Modem with … performance issues. To the extent that Defendant asserts that the conjoint survey overstates the magnitude or frequency of the performance issues, that is a merits argument about the proper amount of damages, not a mismatch between Plaintiffs' damages model and theory of liability.") (citation omitted).

b. GM's other *Comcast* arguments go to the merits of Mr. Boedeker's methodology, not to whether it fits Plaintiffs' theory of damages.

GM makes additional, incorrect arguments that go to the merits of Mr. Boedeker's methodology, not whether it violates *Comcast*. In *Pirnik v. Fiat Chrysler Autos., N.V.*, 2018 WL 3130596, at *5 (S.D.N.Y. June 26, 2018), this Court rejected a *Comcast* challenge to a damages model, because it was "sufficiently consistent" with "Plaintiffs' theory of the case … that Defendants' alleged misrepresentations about FCA's compliance with safety and emissions regulations inflated the value of its stock." The Court explained that "to the extent Defendants' argument is that Plaintiffs' model fails to account for factual evidence of varied inflation . . . goes to the merits of whether Plaintiffs can accurately demonstrate price impact and goes beyond the Rule 23 inquiry." *Id*.[58] GM falls into the same trap as did the defendant in *Pirnik*.

First, GM erroneously claims that "Boedeker's measure of damages is based on an unrealistic assumption that [consumers] expected defect-free vehicles." GM Br. at 39. As Plaintiffs explain in their Boedeker *Daubert* Opposition at 21-23, Mr. Boedeker does no such thing. Instead, he analyzed whether consumers would expect to be told that GM *knew at the time of purchase* that the vehicles they bought contained defects that were unknown to the public. His surveys plainly reflect that theory of liability. *See* Ex. 215 at ¶¶ 634-35.

Second, GM incorrectly argues that Mr. Boedeker's "methodology would impermissibly compensate putative class members for an alleged post-sale risk of harm that never materialized,"

[58] *See also Waggoner*, 875 F.3d at 106 ("Finally, we are not persuaded by the Defendants' argument that class certification was improper under *Comcast* because the Plaintiffs' damages model failed to account for variations in inflation over time. *Comcast* does not suggest that damage calculations must be so precise at this juncture. To the contrary, *Comcast* explicitly states that '[c]alculations need not be exact.' 569 U.S. at 35, 133 S.Ct. 1426. Thus, even accepting the Defendants' premises that inflation would have varied during the class period in this case and that such variation could not be accounted for, the Defendants' argument fails."); *Morales v. Kraft Foods Grp., Inc.*, 2017 WL 2598556, at *22 (C.D. Cal. June 9, 2017) (even if the damages model "did not correctly quantify Plaintiffs' *harm*, they are not inconsistent with the proffered theory of *liability*") (emphasis in original).

GM Br. at 39, and that he "would compensate for the **risk** of physical injury, while … nearly all class members did not experience any personal injury and those that did have had the opportunity to assert personal injury claims." GM Br. at 40-41. As explained in detail in their Boedeker *Daubert* Opposition at 40-42, Plaintiffs do not seek compensation in this class action for personal injuries or property damages, so GM's arguments are irrelevant. *See also GM Ignition Switch Litig.*, 257 F. Supp. 3d at 393-394 (observing that the Fifth Amended Complaint "does not seek damages for physical injury or property damage").

Third, GM contends that Mr. Boedeker's analysis cannot be applied to leases and used vehicles, GM Br. at 36-37, but that argument is neither a valid *Comcast* argument nor correct. As Mr. Boedeker testified, his analysis applies to used cars, because the "class wide damages figure can then be allocated using information like … the age of the vehicle." Berman Reply Decl., Ex. 4 at 390:23-25. His analysis similarly shows that leases were overpriced based on the price premium charged by GM, although some allocation may again be necessary. *See* Ex. 215 at ¶ 68 ("the economic loss model in the Boedeker Report estimates the amount GM's customers would have paid when they purchased or leased vehicles had GM not hidden the safety defect"). In any event, the methodology fits Plaintiffs' theory of damages. GM's improper merits arguments are both misplaced and incorrect.

5. Boedeker's methodology is reliable and supported by relevant law.

As explained above, Mr. Boedeker's analysis shows that *all* Class members overpaid for their defective vehicles, and, therefore, *all* Class members suffered damages as the result of GM's violations of state law in the bellwether jurisdictions. *See supra* at Section IV.A.2. Mr. Boedeker does *not* average Class members' losses but instead calculates Class-wide diminution in value, which results in Class-wide losses. *See id.* Indeed, Plaintiffs have calculated their damages using Mr. Boedeker's analysis and simple objective record facts concerning the vehicle and the date of

purchase. *See* SJ Ex. 43. Using the same objective facts, which GM has agreed to provide post-certification, Mr. Boedeker's conjoint analysis can accurately assess Class-wide damages. *See*, *e.g.*, *Flynn v. FCA US LLC*, 2018 WL 3303267, at *12 (S.D. Ill. July 5, 2018) (conjoint analysis that "attempts to measure the value of the class vehicles had consumers been aware of the allegedly withheld information" met Plaintiffs' "burden of showing a proposed class-wide damage calculation"); *Dial*, 320 F.R.D. at 331-33 (certifying class based in part on Boedeker conjoint analysis determining value of soap's purported germ-killing properties); *MyFord Touch*, 291 F. Supp. 3d at 968-73 (rejecting *Daubert* challenge to Boedeker conjoint analysis and denying summary judgment for alleged failure to prove class-wide damages). Accordingly, GM is wrong in asserting that Mr. Boedeker's damages methodology is "not permitted" because "many class members have no injury and thus no claim." GM Br. at 42. His methodology poses no bar to class certification because it shows with Class-wide proof that *every* Class member overpaid.

Because all Class members suffered economic losses, GM's cases do not help it. In GM's lead case, *Tyson Foods*, the court held that proof that a "representative sample" of employees who worked time for which they were not compensated would be sufficient to certify a class. 136 S.Ct. at 1046-47. Here, while GM would point out that this not a wage and hour case, GM also ignores that *every* Class member here bought (and overpaid for) a defective vehicle. And, while the employer kept no records of "donning and doffing" time in *Tyson Foods*, here GM has agreed to produce the data showing each purchaser of the defective vehicles. This case bears no similarity to the employment cases cited by GM even if *Tyson Foods* helps Plaintiffs insofar as it makes clear that aggregate damages is distinct from the notion of trial by formula.[59]

[59] Contrary to GM's argument, the Court has never held that "benefit of the bargain damages must be measured by vehicle-specific 'variables.'" GM Br. at 43 (quoting *GM Ignition Switch Litig.*, 2016 WL 3920353, at *7). Instead, the Court explicitly held that "a purchaser of a GM vehicle sold with a latent defect … could proceed under the benefit-of-the-bargain theory" because "a car with a safety defect is worth less than a car without a safety defect." *Id.* In the

6. Mr. Boedeker's "aggregate damage" calculation is equal to the sum total of the Class members' overpayments, and Plaintiffs' proposed distribution of that amount amongst Class members is appropriate.

Again mischaracterizing Mr. Boedeker's conjoint analysis, GM asserts that his "aggregate damages figure … bears little or no relationship to the amount of economic harm actually caused by defendants…." GM Br. at 44 (quoting *McLaughlin*, 522 F.3d at 231-33). Once again, GM is wrong; Mr. Boedeker's analysis indicates that *every* Class member incurred economic loss at the point of sale by overpaying for a car with an undisclosed latent safety defect, and his "aggregate damages figure" represents nothing more than the sum total of the Class's overpayments. And the aggregate damages figure that will be calculated at trial will be a "ground-up" calculation based on the individual vehicle registration information that GM will provide. Thus, this case is unlike *McLaughlin*, 522 F.3d at 231, where the damage analysis entailed an "initial estimate of the percentage of class members who were defrauded" and would result in damages that did "not accurately reflect the number of plaintiffs actually injured by defendants."[60] GM will properly be held liable for the damages caused by its misconduct—and nothing more.

For the same reason, there are no problems—due process or otherwise—with distributing checks to Class members after an aggregate damage award. Each Class member will be entitled to a check in a particular amount based on that same analysis and the Class member-by-Class member data that GM will have provided. *See*, *e.g.*, SJ Ex. 43 (Plaintiff damages).

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passage quoted by GM, the Court merely noted—before it had the benefit of Plaintiffs' damages model—that isolating the impact of the latent defect on the sales price might be "difficult," and *not* that it cannot be done either on an individual or Class-wide basis.

[60] GM's other authorities also bear no resemblance to this case. Plaintiffs have not merely identified "unspecified 'tools' available to measure damages," as in *Ohio Pub Emps. Ret. Sys. v. Fed. Home Loan Mortg. Corp.*, 2018 WL 3861840, at *19 (N.D. Ohio Aug. 14, 2018). Instead, they have presented expert conjoint analysis demonstrating the precise amounts of their over-payments based on GM's concealment of the defects. Nor is this case like *In re ConAgra Foods, Inc.*, 302 F.R.D. 537, 550 (C.D. Cal. 2014), where Plaintiffs' expert generally "described" conjoint analysis but did conduct the analysis or "describe in any detail" its "specific application." *Id.* Boedeker has done the analysis based on vehicle estimates to demonstrate how the methodology works, and that analysis will be completed on a vehicle-by-vehicle basis if and when Classes are certified and GM provides the data that it has agreed to provide.

B. Common issues predominate regarding Plaintiffs' benefit-of-the-bargain damages because all putative class members have incurred such damage.

GM erroneously argues that no class can be certified because Plaintiffs' proposed Classes include "persons who disposed of their vehicles . . . before the 2014 recall announcements." GM Br. at 46. As discussed above, Mr. Boedeker's conjoint analysis proves that *all* Plaintiffs and Class members incurred damages at the moment of sale—even those who sold their cars before the belated recalls were announced in 2014. *See* SJ Opp. at 37-38; *see also In re: Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prods. Liab. Litig.*, 2018 WL 4777134 (N.D. Cal. Oct. 3, 2018) (denying motion to dismiss economic loss claims of people who sold before disclosure of the fraud). But even if GM were correct—and that group of purchasers should be excluded from the proposed Classes—that would pose no bar to certification: the final damages calculation would simply include only those persons who owned or leased the cars when the recalls were announced.

C. Common issues predominate for Plaintiffs' lost-time damages claims.

GM's argument that the availability of incidental damages in the form of lost time precludes class certification of those claims (GM Br. at 46-48) misstates the law and the work of Plaintiffs' expert Dr. Ernest Manuel. Incidental damages, even those that differ by Class member, do not defeat class certification. *Sykes*, 780 F.3d at 88. Like in many other states, in California and Texas no showing of lost income is needed, and, in Missouri, lost time damages are available if there is lost income. SJ Opp. at 41-44. Against this backdrop, GM's four arguments relating to lost time are wrong.

First, GM argues that Plaintiffs who did not obtain a recall are not entitled to incidental damages, but ignores that (i) Plaintiffs are *not seeking* damages for those who did not obtain recalls, and the expert model only includes those who did, and (ii) GM's records show who obtained recalls. *Second*, GM claims that lost income is an individual issue, but because lost income is not

required in California and Texas, it is simply not an issue there and, in Missouri, can be addressed by administrative proceedings.

Third, GM's contention that some Class members who obtained recalls did not lose time is impossible by definition given that GM's own documents [redacted]. Berman Reply Decl., Ex. 12 at ¶ 27 & n.10. GM speculates that some Class members were forced to make a virtue of their necessity by, for example, scheduling other repairs at the same time as receiving a new ignition switch. Even if true, this neither erases the fact of time spent on the recall nor provides a basis to exculpate GM. Further, and generally, GM overstates the precision required to obtain damages. "[B]road latitude is allowed in quantifying damages, especially when the defendant's own conduct impedes quantification." *BCS Servs. Inc. v. Heartwood 88, LLC*, 637 F.3d 750, 758-60 (7th Cir. 2011) (internal quotations omitted).

Fourth, Plaintiffs' common evidence in the form of an expert model shows average lost time spent by Class members responding to recalls. Putting aside GM's baseless quibbles with Dr. Manuel's work (which Plaintiffs address in opposing the Manuel *Daubert* motion),[61] GM's basic argument is that a model that shows averages cannot be used. Not only does this misstate the law, as shown in Section IV.A above, but even if for the sake of argument there were no model, individual issues still would not predominate as to incidental damages.

D. Plaintiffs' trial plan properly accounts for the manifestation requirement under Texas law.

GM argues that the Texas DTPA manifestation requirement precludes certification because standing presents individualized issues. GM Br. at 48-51. But "a court must 'look[] to the status of the named plaintiff[s], not the standing of unidentified class members.'" *Hughes v. Ester C Co.*,

[61] GM also argues that it has separately moved for summary judgment on the basis that, according to GM, Dr. Manuel's model did not factor in the individual Plaintiffs. This is flatly wrong: Dr. Manuel's model used, and in fact was based on, the data of all Plaintiffs and Class members who obtained the recalls.

930 F. Supp. 2d 439, 453 (E.D.N.Y. 2013) (quoting *Salsitz v. Peltz*, 210 F.R.D. 95, 99 (S.D.N.Y. 2002)). This Court has found standing for the Texas Plaintiffs who have alleged manifestations of the defects at issue, *GM Ignition Switch Litig.*, 257 F. Supp. 3d at 452, so there is no need to now determine exactly which members of the Texas putative classes also have standing. Because it is clear that *some* putative Class members have standing, a class liability trial will, with the benefit of common evidence on defect, materiality, scienter, and the other common elements, show whether GM "engaged in false, misleading or deceptive acts" by failing to disclose known and dangerous defects in Class vehicles. *Id.* at 448 (quoting *Doe v. Boys Clubs of Greater Dallas, Inc.*, 907 S.W.2d 472, 478 (Tex. 1995)).

Should Plaintiffs win a liability verdict on their DTPA claims, then—and only then—will it be necessary to determine which particular Texas Class members have satisfied the DTPA statutory standing requirements. Plaintiffs propose a self-identification procedure that comports with Texas' manifestation requirement and matches self-identification procedures in other consumer fraud cases where, as here, a defendant's conduct is uniform as to all class members. *See* Plfs. Op. Br. at 9-10. Which Class members satisfy that requirement and who therefore may collect damages can be addressed in post-judgment administrative proceedings. *Id*. at 36; *see also Tyson Foods*, 136 S. Ct. at 1050 (upholding class that included uninjured class members, while allowing lower courts to determine whether a "methodology will be successful in identifying" these class members). Relatedly, GM's argument that Plaintiffs have proposed "fail safe" classes (GM Br. at 49) is meritless because membership in a Class does not guarantee the right to recover.

V. A CLASS ACTION IS A SUPERIOR—INDEED THE ONLY—METHOD TO ADJUDICATE THIS DISPUTE

GM challenges superiority, contending that GM's recalls are a superior method of resolving Plaintiffs' claims, that Plaintiffs can simply pursue their individual claims, and that

Plaintiffs' proposed Classes and trial plan are unmanageable. GM Br. at 98-102. GM's contentions are unsupported by fact and law.

A. GM's recalls do not obviate the need for litigation to provide Plaintiffs the chance to recoup lost benefit-of-the-bargain.

GM asserts that its voluntary recalls "cure the defects and provide plaintiffs with what they were entitled to" and therefore moot the need for litigation. GM Br. at 99. GM is wrong for two reasons. *First*, there is a common merits dispute as to whether GM has actually fixed the underlying defects. While courts sometimes deny class certification where an available refund or voluntary recall affords class members a *comparable or even better remedy* than litigation, Plaintiffs' evidence shows that the recalls here do neither. GM's voluntary recalls cannot be an adequate—much less "superior"—remedy if they fail to actually resolve the underlying defects. *See Ysbrand v. DaimlerChrysler Corp.*, 81 P.3d 618, 628 (Okla. 2003) ("[a]n alternate method for adjudication must be *available* in order for it to be superior").[62]

Second, the recalls do not "provide plaintiffs with what they were entitled to" because *the recalls do not and cannot fully compensate Plaintiffs and the Classes for their benefit-of-the-bargain losses*. Indeed, the Court has already found against GM on this issue. *GM Ignition Switch Litig.*, 2016 WL 3920353, at *40 ("[T]he Court does not find that the recalls moot Plaintiffs' claims. New GM argues that the recalls provide Plaintiffs with full relief, but Plaintiffs are seeking benefit-of-the-bargain damages even for cars that have been fully repaired—cars that they allege were and are worth less than cars sold without the undisclosed defects . . . ."); *see also See Kurtz v. Kimberly-Clark Corp.*, 321 F.R.D. 482, 553 (E.D.N.Y. 2017) (statutory damages "a more

[62] Superiority considers the available methods of adjudication of the questions presented (individual suits, joinders and consolidations, or class-wide treatment) and chooses the most efficient and fair option. It does not demand that all questions raised in a suit be best adjudicated on a categorical basis, and it does not consider "no procedure" as a superior outcome.

effective" remedy for "most" class members, given uncertainty of recovering all damages through the refund program). Further, courts evaluating superiority recognize that resort to NHTSA is not required because the Safety Act does not preempt suits for monetary relief. *See*, *e.g.*, *GMC v. Bryant*, 285 S.W.3d 634, 644 (Ark. 2008); *Daffin v. Ford Motor Co*., 2004 U.S. Dist. LEXIS 18977, at *22-24 (S.D. Ohio July 15, 2004), *aff'd*, 458 F.3d 549 (6th Cir. 2006). GM's argument once again ignores that benefit-of-the-bargain damages (i) are calculated based "on the difference between what was paid and what a reasonable consumer would have paid *at the time of purchase* without the fraudulent or omitted information" and (ii) do not consider benefits obtained after the challenged fraudulent conduct. *Pulaski & Middleman*, *LLC v. Google*, *Inc.*, 802 F.3d 979, 989 (9th Cir. 2015) (citing *Kwikset*, 510 Cal. 4th at 329 (emphasis added)); *accord Davidson v. Kimberly-Clark Corp.*, 889 F.3d 956 (9th Cir. 2018) (upholding claims under UCL and CLRA). So, even if a defendant effectively cures a defect with free repairs, plaintiffs may still recover benefit-of-bargain damages. *See also In re Lenovo*, 2016 WL 6277245, at *21 (following *Pulaski*) (damage model properly did not consider effects of free repairs because "the calculation need not account for benefits received after purchase because the focus is on the value of the service at the time of purchase").[63]

GM's authorities are inapposite. *See Chin v. Chrysler Corp.*, 182 F.R.D. 448, 463 (D.N.J. 1998) (recall fixed the defect and fully reimbursed owners for previous repairs); *Daigle v. Ford Motor Co.*, 2012 U.S. Dist. LEXIS 106172, at *14 (D. Minn. July 31, 2012) (recall program of

[63] Further, the superiority requirement in "Rule 23(b)(3) was drafted with the legal understanding of 'adjudication' in mind [and] poses the question whether a single suit would handle the dispute better than multiple suits. A recall campaign is not a form of 'adjudication' under the committee note," *In re Aqua Dots Prods. Liab. Litig.*, 654 F.3d 748, 752 (7th Cir. 2011) (citations omitted), and GM's recalls do not "adjudicate" anything. Arguing that a recall is superior to class treatment also ignores the legislative intent behind consumer fraud statutes. *See In re Scotts EZ Seed Litig.*, 304 F.R.D. 397, 415 (S.D.N.Y. 2015) (refund program insufficient to effectuate the goals of consumer protection laws designed to act as a "strong deterrent against deceptive business practices and supplement the activities of the Attorney General" and "punish or deter offenders").

free repairs and repair-cost refunds "provide[d] most of the putative class the relief it seeks"); *In re Ford Motor Co. Ignition Switch Prods. Liab. Litig.*, 174 F.R.D. 332, 341-42, 353 (D.N.J. 1997) (recall provided the predominant relief sought, a $75 replacement part). In none of these cases did the court indicate that plaintiffs sought benefit-of-the bargain damages.[64]

B. Plaintiffs would be unable to obtain redress absent the class action device.

GM contends that the "substantial amount" of compensatory damages sought on behalf of each Class member provides vehicle owners with "more than a sufficient incentive" to pursue their claims individually. GM Br. at 99-100. But this argument is at odds with both the weight of authority and common sense: in certifying automobile defect classes, courts consistently recognize that plaintiffs have little incentive to litigate on their own where their claims are of similar value to those here. *See*, *e.g*., *Carriuolo v. GMC*, 823 F.3d 977, 989 (11th Cir. 2016); *Wolin*, 617 F.3d at 1176; *Daniel*, 2016 U.S. Dist. LEXIS 130745, at *22-25; *Falco*, 2016 U.S. Dist. LEXIS 46115, at *40-41; *MyFord Touch*, 2016 WL 7734558, at *28 & n.50.

More broadly, GM fails to address the formidable challenge any individual litigant would face here in light of (i) the high cost of marshalling the necessary evidence, and (ii) the gap in resources between individuals and a sophisticated party like GM, which has clung to a costly scorched earth strategy at every stage of these proceedings. *See* Plfs. Op. Br. at 34-35. Indeed, in order to develop the record of GM's wrongdoing, including the damages model, Plaintiffs' counsel invested millions—resources well beyond the capacity of any individual.[65] Absent the class

[64] While the Plaintiff may have sought overpayment damages in *Ortiz v. Ford Motor Co.*, 909 So. 2d 479 (Fla. Dist. Ct. App. 2005), *Ortiz* is not persuasive given its very conclusory treatment of the superiority inquiry and its primary finding that the plaintiff failed to present proof demonstrating manageability.

[65] *See* Berman Reply Decl., ¶ 19 (Hagens Berman has advanced over $2.7 million in costs); Declaration of Elizabeth J. Cabraser in Support of Economic Loss Plaintiffs' Motion to Certify Bellwether Classes in California, Missouri, and Texas (Dkt. No. 5848) ¶ 10 (Lieff Cabraser has advanced over $2.7 million in costs). Executive Committee member firms have also collectively advanced millions.

mechanism, individual Plaintiffs would be forced to fight an impossible uphill battle. *See Sykes v. Mel Harris & Assocs., LLC*, 285 F.R.D. 279, 294 (S.D.N.Y. 2012) (noting class member's potentially limited means to litigate separate actions); *Wolin*, 617 F.3d at 1176 ("Forcing individual vehicle owners to litigate their cases, particularly where common issues predominate for the proposed class, is an inferior method of adjudication.").

Further, GM ignores the efficiency inquiry, failing to discuss let alone demonstrate why individual suits by more than 1.4 million vehicle owners in the bellwether states is more judicially efficient than a class proceeding that the MDL Panel decided for efficiency purposes to concentrate in this District. *See In re US FoodService*, 729 F.3d at 130 (a single class action in lieu of numerous individual trials achieves economies and promotes uniformity of decision); *Woods v. Vector Mktg. Corp.*, 2015 U.S. Dist. LEXIS 118678, at *52-53 (N.D. Cal. Sept. 4, 2015) ("It is far more efficient for the judiciary as a whole, as well as both [parties], to litigate [p]laintiffs' . . . claims in one action, as opposed to in several thousand individual actions filed across the country.").

C. Plaintiffs have presented a cogent trial plan that demonstrates that the trial of class claims is manageable.

GM says that Plaintiffs' proposed trial plan is unmanageable because a jury will be confused by too many facts and legal claims. GM Br. at 100-02. But GM magnifies the complexity of the facts and the law, overlooks the fact that juries regularly decide complex cases, and ignores the many cases certifying car defect claims for class treatment. *See*, *e.g.*, *Falco*, 2016 U.S. Dist. LEXIS 46115, at *41 ("these kinds of vehicle consumer defect class action cases are brought fairly regularly, and there are no particular difficulties in managing such class actions when appropriate"); *Motley*, 2012 Conn. Super. LEXIS 2701, at *49 ("Once predominance is determined, considerations of superiority and manageability should fall into their logical place [and] court[s] generally will find that the class action is a superior mechanism even if it presents

management difficulties.") (quoting *Collins v. Anthem Health Plans, Inc.*, 275 Conn. 309, 347 (Conn. 2005)); *Keegan*, 284 F.R.D. at 550-52 (certifying claims under the laws of three states with a subclass for each state). GM's argument also undermines the bellwether procedure intended to provide guidance for future certification motions for other state classes.

As to GM's fact averments, GM inconsistently argues that the seven different recalls are both too similar, such that the jury may conflate all of the evidence (GM Br. at 102), and yet too different, due to "disparate" vehicles, field histories, and recalls (*id.*). Its insincerity aside, GM is wrong on both counts. *First*, the jury will hardly be overwhelmed by dissimilar recalls given the common threads that run through the ignition switch defects—a common technology (ignition switch) that performs a common function (powering the car) that results in common perils when defective (loss of engine power, power steering, power brakes, and airbags).[66] The topical content of the power steering and side impact airbag recalls will become quite familiar to the jury given that they will be learning about the power steering and airbag deployment failure hazards associated with faulty ignition switches. Further, all of the recalls tell a unifying and predictable story: GM knew about the defects, yet sold defective cars for many years before issuing a recall. The evidence, which will be illuminated by helpful expert commentary, will not overwhelm the jury, *especially given the fact that GM has admitted that the defects exist*. *See Edwards*, 603 F. App'x at 541 (Ford's notice and repair program was an "acknowledge[ment] that a single class defect exists"). Indeed, courts commonly certify classes in automobile defect litigation where common proof exists of a uniform defect across different vehicle models and years even when the fact of defect is contested. *See*, *e.g.*, *Falco*, 2016 U.S. Dist. LEXIS 46115 (certifying class of six

[66] *See* Appendix D (table containing GM's admissions that the inadvertent rotation recalls share the same or very similar defect descriptions, conditions under which the defect may occur, and effect of the defect).

models over six model years); *Masquat v. DaimlerChrysler Corp*., 195 P.3d 48 (Okla. 2008) (certifying class of six models and eight model years); *Dale v. DaimlerChrysler Corp.*, 204 S.W.3d 151, 170-71 (Mo. Ct. App. 2006) (class certified even though there were at least 13 design changes to power window regulator motors, resulting in 10 distinct iterations of the regulators installed in the class vehicles).

Second, the defects are not so similar that the jury will conflate the evidence. As revealed by the defect chronologies attached to GM's recall notification letters to NHTSA, each recall has its own story, even if, for instance, there were common protagonists (such as engineer Ray DeGiorgio). GM is simply speculating that the jury will ignore the Court's careful instructions to focus on the evidence relevant to the particular recall and Class at issue; such speculation is insufficient to undermine manageability.

The conclusion is no different for GM's legal contentions. While the jury will make findings under consumer statutes and common law in three separate states where the legal elements do not perfectly overlap, there is no reason to believe that the jury cannot competently complete these tasks. Plaintiffs submitted with their Class certification motion Proposed Special Verdict Forms that set forth the precise findings that the jury, and in some instances, the Court[67] will be required to make at the conclusion of the evidence. These forms, *which GM fails to mention let alone argue against*, coupled with standard jury instructions, demonstrate that the fact finder's task of applying facts to law will be an organized, manageable exercise.

GM's cases, two of which involved contested defects in multiple vehicle models over many years, do not apply. In *Walsh v. Ford Motor Co.*, 130 F.R.D. 260, 277 (D.D.C. 1990), Ford denied

[67] For example, a jury does not decide liability under the California UCL; the Court does. *See*, *e.g.*, *Hodge v. Superior Court*, 145 Cal. App. 4th 278, 284-85 (2006).

that a defect existed in "four engine systems consisting of twenty-three or more component configurations employed in at least seventeen different models . . . over five model years," in addition to "layers of legal standards and choice of law dilemmas" of "epic proportions" because of the nationwide scope of the claims. *Id.* at 277; *see also In re GMC Dex-Cool Prods. Liab. Litig.*, 241 F.R.D. 305, 326 (S.D. Ill. 2007) (nationwide class action where GM, citing plaintiffs own negligence in failing to maintain proper coolant levels, disputed whether a defect existed in nearly 40 vehicle models with multiple engine types manufactured over 10 model years). Of course, Plaintiffs' legal claims here do not encompass the laws of 50 jurisdictions. Further, GM's recalls themselves are an admission of defect, eliminating a pivotal factual dispute for all but the SVPs included in Recall No. 14v047.[68] Plaintiffs' proposed Classes and trial procedure are manageable.

VI. THE CLASSES ARE PROPERLY DEFINED

GM's final argument in opposition to class certification—that the proposed Classes are "overbroad" because the Classes include persons who sold their vehicles before the 2014 recalls, as well as persons who have no damage—is a repeat of its earlier argument that Plaintiffs' proposed Classes should not be certified because they include consumers who do not have claims against GM. GM Br. at 102-103. Again, Plaintiffs' conjoint analysis shows that *all* Class members,

[68] GM's non-auto cases are also inapposite. *See Sprague v. GMC*, 133 F.3d 388, 399 & n.9 (6th Cir. 1998) (ERISA case predicated on a diverse set of alleged misrepresentations); *Harding v. Tambrands, Inc.*, 165 F.R.D. 623, 631-32 (D. Kan. 1996) (proposed nationwide medical monitoring and damages class of Toxic Shock Syndrome victims against multiple defendants where individual adjudication of such cases had "been the norm"); *Woodard v. Fid. Nat'l Title Ins. Co.*, 2008 U.S. Dist. LEXIS 108411, at *10-27 (D.N.M. Dec. 8, 2008) (materially different standards of liability among the five applicable jurisdictions in case where plaintiffs failed to show numerosity); *Ramthun v. Bryan Career College Inc.*, 93 F. Supp. 3d 1011, 1021 (W.D. Ark. 2015) (proposed multi-state class marked by conflicts of law where only representatives were from a single state); *Bouder v. Prudential Fin., Inc.*, 2013 U.S. Dist. LEXIS 8799, at *29-30 (D.N.J. Jan. 18, 2013) (proposed classes under the laws of 11 states where entitlement to overtime compensation depended on each employee's status and inquiries into each office's overtime policies); *Road Hog Trucking, LLC v. Hilmar Cheese Co., Inc.*, 2016 U.S. Dist. LEXIS 145143, at *8-9 (N.D. Tex. Oct. 19, 2016) (individualized issues of employment classification with only a small number of potential class members); *Shoots v. iQor Holdings US Inc.*, 325 F.R.D. 253, 269 (D. Minn. 2018) (proposed labor action for unpaid overtime wages under varying laws of eight states).

including those who disposed of their cars before the recalls, overpaid for their defective vehicles at the time of purchase and therefore incurred compensable benefit-of-the-bargain damages. *See* SJ Opp. at 37-38. The Classes are properly defined.

VII. CONCLUSION

Plaintiffs have demonstrated that they satisfy all of the elements of Rule 23(a) and (b)(3), and, GM's opposition does not demonstrate otherwise. The class action mechanism remains the best and most efficient way to adjudicate the Class members' claims in this case. For all of the foregoing reasons, and for the reasons set forth in Plaintiffs' opening brief, Plaintiffs respectfully request that the Court grant their motion to certify the Bellwether Classes.

DATED: October 19, 2018

HAGENS BERMAN SOBOL SHAPIRO LLP

By: */s/ Steve W. Berman*

Steve W. Berman
steve@hbsslaw.com
Sean R. Matt
sean@hbsslaw.com
Andrew M. Volk
andrew@hbsslaw.com
HAGENS BERMAN SOBOL SHAPIRO LLP
1301 Second Avenue, Suite 2000
Seattle, WA 98101
Telephone: (206) 623-7292
Facsimile: (206) 623-0594

DATED: October 19, 2018

LIEFF CABRASER HEIMANN & BERNSTEIN, LLP

By: */s/ Elizabeth J. Cabraser*
Elizabeth J. Cabraser

ecabraser@lchb.com
Rachel Geman
rgeman@lchb.com
275 Battery St., 29th Floor
San Francisco, CA 94111
Telephone: (415) 956-1000
Facsimile: (415) 956-1008

Co-Lead Counsel with Primary Focus on Economic Loss Cases

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above document was served upon the attorney of record for each other party through the Court's electronic filing service on October 19, 2018, which will send notification of such filing to the e-mail addresses registered.

/s/ Steve W. Berman
Steve W. Berman

APPENDICES A-D
Filed Under Seal

EXHIBIT C

MDL SUMMARY JUDGMENT BRIEFING

EXHIBIT C-1

DEFENDANT GENERAL MOTORS LLC'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT AGAINST THE BELLWETHER ECONOMIC LOSS PLAINTIFFS

[MDL ECF NO. 5859] (FILED JULY 20, 2018)

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

IN RE:	)	
	)	No. 14-MD-2543 (JMF)
GENERAL MOTORS LLC IGNITION SWITCH LITIGATION	)	No. 14-MC-2543 (JMF)
	)	Hon. Jesse M. Furman
This Document Relates To All Actions	)	

DEFENDANT GENERAL MOTORS LLC'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT AGAINST THE BELLWETHER ECONOMIC LOSS PLAINTIFFS

Richard C. Godfrey, P.C.
Andrew B. Bloomer, P.C.
KIRKLAND & ELLIS LLP
300 N. LaSalle
Chicago, IL 60654-3406
Phone: 312-862-2000
Fax: 312-862-2200
richard.godfrey@kirkland.com
andrew.bloomer@kirkland.com

Attorneys for Defendant General Motors LLC

TABLE OF CONTENTS

Page

TABLE OF CONTENTS (CONT'D)

Page

TABLE OF CONTENTS (CONT'D)

Page

TABLE OF CONTENTS (CONT'D)

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES (CONT'D)

Page(s)

TABLE OF AUTHORITIES (CONT'D)

Page(s)

TABLE OF AUTHORITIES (CONT'D)

Page(s)

TABLE OF AUTHORITIES (CONT'D)

Page(s)

TABLE OF AUTHORITIES (CONT'D)

Page(s)

TABLE OF AUTHORITIES (CONT'D)

Page(s)

TABLE OF AUTHORITIES (CONT'D)

Page(s)

TABLE OF AUTHORITIES (CONT'D)

Page(s)

TABLE OF AUTHORITIES (CONT'D)

Page(s)

TABLE OF AUTHORITIES (CONT'D)

Page(s)

TABLE OF AUTHORITIES (CONT'D)

Page(s)

TABLE OF AUTHORITIES (CONT'D)

Page(s)

TABLE OF AUTHORITIES (CONT'D)

Page(s)

TABLE OF AUTHORITIES (CONT'D)

Page(s)

TABLE OF AUTHORITIES (CONT'D)

Page(s)

TABLE OF AUTHORITIES (CONT'D)

Page(s)

Statutes

TABLE OF AUTHORITIES (CONT'D)

Page(s)

Other Authorities

Rules

INTRODUCTION

The undisputed facts and law establish that the named plaintiffs from the bellwether states of California, Missouri, and Texas cannot prove either damages or liability, and thus do not have any valid claims.

First, damages are an essential element of all claims in the bellwether states and plaintiffs cannot prove any such damages, whether in the form of benefit of the bargain, lost time, or otherwise. Named plaintiffs allege they did not receive the benefit of the bargain at the time of purchase, but ignore New GM's recall repairs, which the Court has concluded are relevant to benefit-of-the-bargain damages. *In re Gen. Motors Ignition Switch Litig.*, 2018 WL 1638096, at *2 (S.D.N.Y. Apr. 3, 2018) ("*BotB Opinion*"). Plaintiffs attempt to dispute whether New GM's recall repairs cured their defects, but the putative expert opinions they offer are inadmissible under *Daubert* and, even if considered, do not raise a genuine issue of material fact as to whether New GM's repairs were effective. Independently, each named plaintiff must prove benefit-of-the-bargain damages by measuring the difference between the purchase price and the market value of their vehicle with the alleged defects. Despite their burden, plaintiffs themselves offer no evidence on this issue and their putative experts admit that they did not, and were not even asked to, calculate benefit-of-the-bargain damages for any named plaintiff. Likewise, named plaintiffs' request for "lost free time" damages is legally and factually invalid because each bellwether state holds that lost time is not recoverable without proof of lost income, and none of the named plaintiffs (with one exception) have any such evidence. Certain named plaintiffs lack damages for additional reasons, such as that they sold, traded-in, or otherwise disposed of their vehicles before the recalls were announced.

Second, starting with model year 2008, Cobalts, Ions, and other vehicles covered by the Delta Ignition Switch recall (Recall No. 14v047) were built using an ignition switch that was not

defective. Such "Service Parts Vehicles" were recalled because they "could have been repaired at some point using the faulty ignition switch." *In re Gen. Motors LLC Ignition Switch Litig.*, 2016 WL 3920353, *20 n.15 (S.D.N.Y. July 15, 2016) ("*TACC MTD Opinion*"). If such plaintiffs "are ultimately to succeed on their claims with respect to the ignition switch, they will have to show that their cars in fact contained that defect." *TACC MTD Opinion*, at *20 n.15. None of the named plaintiffs owning the Service Parts Vehicles can satisfy this factual predicate.

Third, individual named plaintiffs' claims fail for a variety of additional reasons:

- Most named plaintiffs did not see ***any*** New GM advertising, much less the specific advertisements the Fifth Amended Consolidated Complaint ("5ACC") claims are false, and thus have no evidence that these alleged misrepresentations caused them injury.

- Other named plaintiffs' claims are legally impermissible because the advertisements they allegedly saw constitute non-actionable puffery.

- Various named plaintiffs cannot prove reliance on New GM's alleged misrepresentations or omissions.

- Many named plaintiffs' implied warranty claims fail because the written warranties bar recovery of consequential damages, the limitations period has expired, or plaintiffs drove their vehicles for many tens of thousands of miles without a problem.

- Named plaintiffs' unjust enrichment claims are barred because they have an adequate remedy at law, and because many plaintiffs received a written vehicle warranty.

- Named plaintiffs who purchased Old GM or used vehicles face additional bars, including that New GM had no duty to disclose to or warn these plaintiffs, New GM did not sell the vehicles as required for an implied warranty claim, and plaintiffs did not provide any benefits to New GM as required for an unjust enrichment claim.

- The counts of plaintiffs who allege that New GM concealed their right to file a bankruptcy claim fail for numerous reasons, including that (i) New GM had no duty to disclose to or warn such plaintiffs and (ii) such plaintiffs have no damages for the reasons discussed previously.

Fourth, plaintiffs cannot obtain injunctive relief because they have not alleged or provided evidence that legal remedies are inadequate to prevent any irreparable future harm. Plaintiffs' requested relief of having the Court monitor the effectiveness of New GM's recalls is

both impractical and unprecedented. Finally, plaintiffs' requested injunctive relief is vague and overbroad, and thus impermissible under federal rules and traditional equitable requirements.

Accordingly, the Court should grant summary judgment against each named plaintiff's claims for each of these reasons, which are summarized in Exhibit 1.

BACKGROUND

A. New GM Conducted Recalls To Repair Vehicles Free-of-Charge.

1. Recall No. 14v047 ("Delta Ignition Switch")

New GM issued a recall in February 2014 under NHTSA Recall No. 14v047 to remedy the "Delta Ignition Switch" defect. SUF ¶ 1. That initial recall covered model year ("MY") 2005-2007 Chevrolet Cobalt, MY 2007 Pontiac G5, MY 2003-2007 Saturn Ion, MY 2006-2007 Chevrolet HHR, MY 2005-2006 Pontiac Pursuit (Canada), MY 2006-2007 Pontiac Solstice, and MY 2007 Saturn Sky vehicles. SUF ¶ 1. These vehicles were manufactured with an ignition switch known as "the '423 switch" and were recalled because under certain conditions that switch could unintentionally move from the "run" position to "accessory" or "off" with a corresponding loss of power. *Id.* ¶¶ 2-3.

In March 2014, New GM extended Recall No. 14v047 to MY 2008-2010 Pontiac Solstice and G5, MY 2008-2010 Saturn Sky, MY 2008-2010 Chevrolet Cobalt, and MY 2008-2011 Chevrolet HHR vehicles (the "Service Parts Vehicles"). SUF ¶ 4. Service Parts Vehicles were not considered defective as manufactured, as they were built with an ignition switch ("the '190 switch") that had a longer detent plunger and higher torque resistance than the '423 switch. *Id.* ¶¶ 6-8. New GM's testing in 2014 concluded that vehicles equipped with the '190 switch did not have susceptibility to inadvertent key rotation, and so were not included in the initial Delta Ignition Switch recall. SUF ¶¶ 7-9. In March 2014, however, New GM, received information that a limited number of vehicles originally manufactured with the '190 switch might have been

repaired with the '423 switch, and "out of an abundance of caution" New GM extended the recall to all Service Parts Vehicles. *Id.* ¶¶ 10-11; *see also TACC MTD Opinion*, at *20 n.15.

New GM remedied the original No. 14v047 recall vehicles and the Service Parts Vehicles with a recall kit comprising an ignition switch, an ignition lock cylinder, two keys, and a key ring. SUF ¶ 13. With the recall remedy implemented, the vehicle is resistant to unintended key rotation because the moment arm[1] is minimized. *Id.* ¶ 16. The remedy also decouples the rigid interaction between the ignition key and the key fob or other items attached to it, making the ignition system resistant to unintended key rotation due to knee-key contact. *Id.* ¶ 17. New GM validated the remedy through a variety of extreme driving condition and surrogate-driver tests. *Id.* ¶¶ 18; 33-35. The ignition key did not rotate from "run" to "accessory" during any of the extreme driving condition tests or any of the surrogate driver tests when the driver's knee was in a normal driving position. *Id.* ¶¶ 32-40. The Virginia Tech Transportation Institute independently evaluated New GM's testing, concluding that the tests were valid and robust to assess the risk of inadvertent key rotation. *Id.* ¶¶ 41-44. New GM recalled the vehicles, made the remedy available free of charge to all consumers, and sent out notices informing customers and dealers. *Id.* ¶ 51.

2. Recall Nos. 14v355, 14v394, 14v400 ("Key Rotation")

In June 2014, New GM recalled under NHTSA Recall No. 14v355 MY 2005-2009 Buick Lacrosse, MY 2006-2014 Chevrolet Impala, MY 2000-2005 Cadillac Deville, MY 2006-2011 Cadillac DTS, MY 2006-2011 Buick Lucerne, and MY 2006-2007 Chevrolet Monte Carlo vehicles ("Impala Key Rotation"). *Id.* ¶ 52. The ignition key for these vehicles was originally

[1] The moment arm distance is the distance from where the force is being applied to the axis of rotation. Torque is the product of the moment arm distance and the applied force. Thus, reducing the moment arm distance reduces the torque. SUF ¶ 16 n.1.

designed with a slot for attaching the key ring to the key. *Id.* ¶ 54. New GM's inadvertent key rotation testing showed that "[i]f the key ring is carrying added weight and the vehicle goes off road or experiences some other jarring event, it may unintentionally move the key away from the 'run' position." *Id.* ¶ 53.

In July 2014, New GM recalled under NHTSA Recall No. 14v394 certain MY 2003-2014 Cadillac CTS and MY 2004-2006 Cadillac SRX vehicles ("Cadillac CTS / SRX Key Rotation"). *Id.* ¶ 64. The ignition key for the 2003-2007 MY Cadillac CTS vehicles and 2004-2006 MY Cadillac SRX vehicles was originally designed with a slot for attaching the key ring to the key. *Id.* ¶ 66. The ignition key for the 2008-2014 MY Cadillac CTS vehicles was also originally designed with a slot, but that slot was changed to a hole in December 2010. *Id.* ¶ 67. New GM's inadvertent key rotation testing showed that "[i]f the key ring is carrying added weight and the vehicle goes off road or experiences some other jarring event, or if the driver unintentionally bumps the key ring or items attached to the key ring with their knee, the key may unintentionally move away from the 'run' position." *Id.* ¶ 65.

In July 2014, New GM recalled under NHTSA Recall No. 14v400 MY 2000-2005 Chevrolet Impala and Monte Carlo, MY 1997-2005 Chevrolet Malibu, MY 1999-2004 Oldsmobile Alero, MY 1998-2002 Oldsmobile Intrigue, MY 1999-2005 Pontiac Grand Am, and MY 2004-2008 Pontiac Grand Prix vehicles ("Malibu Key Rotation"). *Id.* ¶ 79. The ignition key for these vehicles was originally designed with a slot for attaching the key ring to the key. *Id.* ¶ 81. New GM's inadvertent key rotation testing showed that "[i]f the key ring is carrying added weight and the vehicle goes off road or experiences some other jarring event, it may unintentionally move the key away from the 'run' position." *Id.* ¶ 80.

Differences exist among the vehicles, ignition system, and ignition switches subject to

these three key rotation recalls that materially impact the circumstances under which the key may unintentionally rotate and the specific remedy implemented. SUF ¶ 55 n.2. New GM remedied the defects in Recall Nos. 14v355, 14v394, 14v400 by having dealers change the design of the ignition key and key rings to provide a key with a small diameter hole and two small (16-mm) diameter key rings and, depending on the vehicle's ignition key, a key insert in the key slot or a cover over the key head of all ignition keys. *Id.* ¶¶ 55, 68, 82. For the CTS vehicles manufactured after December 2010 in Recall No. 14v394, dealers provided drivers with two small (one 16 mm and one 18 mm) diameter key rings. *Id.* ¶ 70.

With the recall remedy for Recall Nos. 14v355, 14v394, 14v400, even if the ignition key is weighted with other items and the vehicle experiences a jarring event, the key does not rotate out of "run" because the moment arm is minimized such that the input torque to the ignition key due to a jarring event is negligible. *Id.* ¶¶ 16, 56-58, 71-73, 83-85. The remedy also decouples the rigid interaction between the ignition key and the key fob or other items attached to it, making the ignition system resistant to unintended key rotation due to knee-key contact. *Id.* ¶¶ 17, 59-60, 74-75, 86-87. To validate the remedy, New GM used the same peer-reviewed testing as conducted for the Delta Ignition Switch recall. *Id.* ¶¶ 56-60, 71-75, 83-87. No unintentional rotations occurred on any vehicle with the remedy during any of the extreme driving condition tests or any of the surrogate driver tests when the driver's knee was in a normal driving position. *Id.* ¶¶ 58, 60, 73, 75, 85, 87. New GM recalled the vehicles, made the remedy available free of charge to all consumers, and sent out notices informing customers and dealers. *Id.* ¶¶ 63, 78, 90.

3. Recall No. 14v346 ("Camaro Knee-Key Rotation")

In June 2014, New GM recalled MY 2010-2014 Chevrolet Camaros. *Id.* ¶ 91. New GM determined there "is a risk, under certain conditions, that some drivers may bump the ignition key with their knee and unintentionally move the key away from the 'run' position." *Id.* ¶ 92.

New GM remedied this defect by having dealers remove the key blade from the original flip key/RKE transmitter assemblies provided with the vehicle and provide two new keys and two key rings per key. *Id.* ¶ 96. The key head of the new key was thinner than the original flip key head, presenting less surface area for the driver's knee to contact the key, and also was re-oriented approximately 90 degrees from the original flip key design, creating less opportunity for rotation from "run" to "accessory." *Id.* ¶ 98.

New GM validated the remedy's effectiveness using the same extreme driving condition tests and surrogate driver tests as the Delta Ignition Switch recall. *Id.* ¶¶ 99-103. No unintentional rotations occurred on any vehicle with the remedy during any of the extreme driving condition tests or any surrogate driver tests when the driver's knee was in a normal driving position. *Id.* ¶¶ 101, 103. New GM recalled the vehicles, made the remedy available free of charge to all consumers, and sent out notices informing customers and dealers. *Id.* ¶ 106.

4. Recall No. 14v118 ("SIAB Wiring Harness")

In March 2014, New GM recalled MY 2008-2013 Buick Enclave, 2009-2013 Chevrolet Traverse, 2008-2013 GMC Acadia, and 2008-2010 Saturn Outlook vehicles. *Id.* ¶ 107. In these vehicles, "[c]orrosion and/or loose crimps in the driver and passenger seat mounted side impact airbag wiring (SIAB) harness connectors could cause an increase in resistance." *Id.* ¶ 108. The airbag sensing system would interpret the increase in resistance as a fault, illuminating the airbag light on the dashboard and sending a "service air bag" message to the driver. *Id.* "Over time, the resistance may reach a level where the SIABs, front center side airbag, if equipped, and pretensioners will not deploy in a crash." *Id.*

New GM remedied this issue by having dealers remove the SIAB wiring harness connectors and solder the wires directly together. *Id.* ¶ 109. New GM recalled the vehicles, made the remedy available free of charge to all consumers, and sent out notices informing

customers and dealers. *Id.* ¶ 119.

5. Recall No. 14v153 ("EPS Assist")

In March 2014, New GM recalled the following vehicles if they were equipped with electric power steering: all MY 2004-2005 and certain MY 2006, 2008-2009 Chevrolet Malibu, all MY 2004-05 and certain MY 2006 Chevrolet Malibu Maxx, certain MY 2009-2010 Chevrolet HHR (non-turbo), certain MY 2010 Chevrolet Cobalt, certain MY 2008-2009 Saturn Aura, all MY 2004-2007 Saturn Ion, and all MY 2005 and certain MY 2006, 2008-2009 Pontiac G6 vehicles. *Id.* ¶ 120. These "vehicles equipped with electric power steering (EPS) may experience a sudden loss of power steering assist . . . ." *Id.* ¶ 121. The cause of EPS assist loss varied among models. *Id.* ¶¶ 122-23. EPS assist loss in Delta platform vehicles (*e.g.*, the Cobalt, HHR, and Ion) was caused by oil contamination or intrusion within the electric power steering motor case. *Id.* ¶ 122. The cause of the EPS assist loss in Epsilon platform vehicles—*e.g.*, the Pontiac G6, Saturn Aura, and Malibu/Malibu Maxx—was supplier manufacturing issues concerning the torque sensor and power steering motor controller unit. *Id.* ¶ 123.

New GM remedied the EPS assist defect, with the repair depending on the particular cause. *Id.* ¶¶ 126-30. For the oil intrusion issue in Delta platform vehicles, New GM and its supplier designed, tested, validated and produced a new motor. *Id.* ¶ 124. For the supplier manufacturing issues in Epsilon platform vehicles, New GM and its suppliers implemented manufacturing and process improvements or replaced the affected steering components with different components manufactured by other suppliers. *Id.* ¶ 125. Plaintiffs "do not dispute that New GM's recall 'cured' the 'Power Steering Defect.'" *BotB Opinion*, 2018 WL 1638096, at *2 n.1. New GM issued recall notices that provided for the repair free of charge to all consumers. *Id.* ¶ 135.

B. The Court's Prior Rulings Narrowed Plaintiffs' Claims And Alleged Damages.

Named plaintiffs allege economic loss based on the "benefit-of-the-bargain defect theory," which "compensates a plaintiff for the fact that he or she overpaid, at the time of sale, for a defective vehicle." *TACC MTD Opinion*, 2016 WL 3920353, at *7, 10; *see also*, *e.g.*, 5ACC ¶¶ 17, 861, 1596, 1623, 1643, 1658. Plaintiffs also allege that they "incurred damages in at least the form of lost time required to repair their vehicles." *E.g.*, 5ACC ¶¶ 1602, 4300, 6545.

The Court previously concluded that New GM's recall repairs affect whether plaintiffs can recover benefit-of-the-bargain damages. "The Court has not exhausted its research on the question of whether and to what extent evidence of post-sale mitigation would affect the availability or calculation of damages in the sixteen jurisdictions at issue. But it has done enough research to conclude that many, if not most (or even all), states would factor such evidence into the analysis." *BotB Opinion*, 2018 WL 1638096, at *2. The "Court surmises (though, to be clear, does not yet hold) that the viability of Plaintiffs' claims for benefit-of-the-bargain damages is likely to turn on the question of whether New GM actually fixed the recalls at issue in its many recalls." *Id.*

Plaintiffs' claims also were the subject of New GM's motions to dismiss, with the Court rejecting many of the claims. At this stage of the litigation, for the states of California, Missouri, and Texas, the following plaintiff claims remain pending:

- **Consumer Protection:** Consumers Legal Remedies Act ("CLRA") and Unfair Competition Law ("UCL") for California plaintiffs; Missouri Merchandising Practices Act ("MMPA") for Missouri plaintiffs; and Deceptive Trade Practices Consumer Protection Act ("DTPA") for Texas plaintiffs who allege a manifest defect.
- **Fraudulent Concealment:** California and Missouri plaintiffs.
- **Breach of Implied Warranty of Merchantability / Magnuson-Moss Warranty Act ("MMWA"):** Under the Song-Beverly Consumer Warranty Act ("SBA") for California

plaintiffs; and under the Uniform Commercial Code for Missouri and Texas plaintiffs who allege a manifest defect.[2]

- **Unjust Enrichment:** California and Missouri plaintiffs who did not purchase a vehicle subject to the manufacturer's warranty.

- **Successor Liability:** Missouri plaintiffs who purchased a Delta Ignition Switch vehicle on or before July 9, 2009 allege successor liability versions of the previous claims, seeking to hold New GM liable for Old GM's conduct.[3]

- **Fraud By Concealment of the Right to File A Claim Against Old GM in Bankruptcy ("Bankruptcy Claim Fraud"):** California, Missouri, and Texas plaintiffs who owned a Delta Ignition Switch vehicle between July 10, 2009 and November 30, 2009.

See TACC MTD Opinion, 2016 WL 3920353, at *19-24 (California claims); *id.* at *32-35 (Missouri claims); *In re Gen. Motors LLC Ignition Switch Litig.*, 257 F. Supp. 3d 372, 445-55 (S.D.N.Y. 2017) ("*FACC MTD Opinion*") (Texas claims); *In re Gen. Motors LLC Ignition Switch Litig.*, 2017 WL 6509256, at *5-6 (S.D.N.Y. Dec. 19, 2017) (Missouri successor liability); Docket No. 5618 at 28-29 (Bankruptcy Claim Fraud counts).

The Court has dismissed categories of plaintiffs and alleged damages. Other than successor liability claims, the "claims of all Plaintiffs who bought their vehicles prior to entry of the Sale Order on [July 2009] must be dismissed." *FACC MTD Opinion*, 257 F. Supp. 3d at 400-03. Plaintiffs who sold, traded in, or returned their vehicles before the recalls "could not have realized any 'diminished value' because they did not own the defective vehicles when the recalls were announced." *FACC MTD Opinion*, 257 F. Supp. 3d at 403; *see also In re Gen. Motors LLC Ignition Switch Litig.*, 2017 WL 3443623, at *2 (S.D.N.Y. Aug. 9, 2017) (on reconsideration, stating that some claims might not require proof of damages, and that "Plaintiffs do not articulate

[2] The arguments in this memorandum against each named plaintiff's state law implied warranty claim apply equally to that named plaintiff's MMWA claim. *E.g.*, *Abraham v. Volkswagen of Am., Inc.*, 795 F.2d 238, 247 (2d Cir. 1986); *Walsh v. Ford Motor Co.*, 807 F.2d 1000, 1011 (D.C. Cir. 1986).

[3] Because the successor liability claims are the same as the claims pled directly against New GM, New GM's summary judgment arguments apply equally to the successor liability claims.

a coherent theory of how a plaintiff who bought a vehicle with a concealed defect and sold the same vehicle before the defect was revealed can logically, if not legally, prove that he or she suffered damages."). The Court also dismissed the successor liability claims of California and Texas plaintiffs. *In re Gen. Motors LLC Ignition Switch Litig.*, 2017 WL 3382071, at *19 (S.D.N.Y. Aug. 3, 2017) (California); *In re Gen. Motors LLC Ignition Switch Litig.*, 2018 WL 1989572, at *3 (S.D.N.Y. Apr. 25, 2018) (Texas). Finally, the Court dismissed all Texas plaintiffs' fraudulent concealment and unjust enrichment claims. *FACC MTD Opinion*, 257 F. Supp. 3d at 453-55.

C. The Named Plaintiffs At Issue.

The number of economic loss named plaintiffs has fallen substantially over the course of this litigation. A total of 273 plaintiffs have joined at least one of the various consolidated complaints, but only 213 plaintiffs were named in the 5ACC, with 22 included "solely for the purpose of preserving their claims on appeal." *E.g.*, 5ACC ¶¶ 64, 249. Fifty plaintiffs from the three bellwether states have joined at least one consolidated complaint, but 21 (42%) have dropped out or been dismissed.

Of the remaining 29 named plaintiffs, only 16 plaintiffs (32% of the total) are asserting the full range of claims against New GM. These 16 plaintiffs, described in Exhibit 2, are:

- **California:** Chimen Basseri, Kellie Cereceres, Santiago Orosco, David Padilla, and Michelle Thomas
- **Missouri:** Brad Akers, Deloris Hamilton, Cynthia Hawkins, Ronald Robinson, Mario Stefano, and Christopher Tinen
- **Texas:** Gareebah Al-ghamdi, Dawn Bacon, Dawn Fuller, Michael Graciano, Lisa McClellan

Two additional plaintiffs—Kenneth Robinson and Patrice Witherspoon—are from Missouri, the only bellwether state where the Court has not rejected successor liability claims.

These two plaintiffs can allege only successor liability, as they purchased their vehicles before July 10, 2009 and thus do not have direct claims against New GM. *FACC MTD Opinion*, 257 F. Supp. 3d at 400-03. Exhibit 3 describes these two successor liability plaintiffs.

The remaining 11 named plaintiffs are from California and Texas, purchased Delta Ignition Switch vehicles before July 10, 2009 and can bring only Bankruptcy Claim Fraud counts against New GM. *See* 5ACC ¶ 959 (defining Bankruptcy Claim Fraud class as "All persons who owned or leased a Delta Ignition Switch Vehicle between July 10, 2009, and November 30, 2009."); *FACC MTD Opinion*, 257 F. Supp. 3d at. 401-03 & n.5. Missouri plaintiffs Akers, K. Robinson, and Witherspoon also bring Bankruptcy Claim Fraud counts. These California and Texas Bankruptcy-Claim-Fraud plaintiffs, described in Exhibit 4, are:

- **California:** Patricia Barker, Michael & Sylvia Benton, Kimberly Brown, Crystal Hardin, Javier Malaga, Winifred Mattos, Esperanza Ramirez, and William Rukeyser
- **Texas:** Shenyesa Henry and Lisa Simmons

Because these 11 plaintiffs are limited to their Bankruptcy Claim Fraud count, unless otherwise specified, they are not included in the discussion of "plaintiffs" in the argument sections until Section III.G, which addresses their count.

ARGUMENT

I. PLAINTIFFS HAVE NO LEGALLY RECOVERABLE DAMAGES.

"Rule 56(c) mandates the entry of summary judgment … against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). As described in Section I.F, damages are an essential element of each of plaintiff's claims. Because plaintiffs cannot offer sufficient proof of damages for multiple, independent reasons, summary judgment should be granted against their claims. *Small Bus.*

Bodyguard Inc. v. House of Moxie, Inc., 230 F. Supp. 3d 290, 303 (S.D.N.Y. 2017) ("On a motion for summary judgment, [plaintiff] must offer actual evidence that it suffered damages, not mere speculation. In other words, a summary judgment motion is 'put up or shut up' time for litigants. [Defendant] is, therefore, entitled to summary judgment . . . ."); *Valley Juice Ltd., Inc. v. Evian Waters of France, Inc.*, 213 F.3d 627 (2d Cir. 2000); *Sellify Inc. v. Amazon.com, Inc.*, 2010 WL 4455830, at *5 (S.D.N.Y. 2010); *Burns v. Bank of Am.*, 655 F. Supp. 2d 240, 250 (S.D.N.Y. 2008).

A. New GM's Recall Repairs Preclude Plaintiffs' Alleged Benefit-Of-The-Bargain Damages.

Under the laws of all states, including the three bellwethers, plaintiffs cannot recover benefit-of-the-bargain damages. New GM incorporates and relies on the authorities and arguments previously made in its Motion for Summary Judgment Against Plaintiffs' Claims For Benefit-Of-The-Bargain Damages (Docket No. 4679), the Supporting Memorandum to that Motion (Docket No. 4681), the Statement of Undisputed Facts (Docket No. 4682), and the Reply (Docket No. 4868). *First*, plaintiffs received the benefit of their bargain because New GM repaired or offered to repair their vehicles for free. *Second*, plaintiffs are limited to cost-of-repair as the measure of recoverable damages for property. Because of New GM's recalls, plaintiffs' repair costs are zero. *Third*, plaintiffs seek both (i) the costs of fully repairing vehicles, which New GM has paid through its recalls, as well as (ii) damages for an allegedly defective vehicle, which is an impermissible double recovery. *Id.*

The Court previously explained that "most (or even all) states would factor such evidence [of post-sale mitigation] into the analysis" of benefit-of-the-bargain damages and surmised "that the viability of Plaintiffs' claims for benefit-of-the-bargain damages is likely to turn on the question of whether New GM actually fixed the recalls at issue in its many recalls." *BotB*

Opinion, 2018 WL 1638096, at *2. "That, in turn, would require a determination of whether each side's expert testimony is admissible," which had not been briefed at the time. *Id.* Plaintiffs' purported expert evidence must create a genuine issue of material fact that each of the vehicles subject to all seven recalls (about 11 million vehicles) continue to have the safety defect that prompted each recall. *See* 5ACC ¶ 683 ("the vehicle continues to have unintended stalls while driving, the very safety defect the Defective Ignition Switch Vehicle recalls are intended to correct); *see also id.* ¶¶ 699, 702. Plaintiffs do not and cannot satisfy their substantial burden on this issue.

New GM accordingly renews its benefit-of-the-bargain summary judgment motion previously filed at Docket Nos. 4679, 4681, 4682, 4868. In this regard and to further expose the failure of plaintiffs' proofs, New GM is simultaneously filing *Daubert* motions to exclude the opinions of plaintiffs' putative experts. New GM's expert and factual evidence together with the failure of plaintiffs' putative experts to satisfy *Daubert* establish that New GM's recalls fixed the identified safety defects, precluding alleged benefit-of-the-bargain damages.

1. The Undisputed Evidence Establishes That The Recall Repairs Were Effective And Remedied The Defects.

For the Delta Ignition Switch, Key Rotation, and Camaro Knee-Key Rotation recalls, New GM applied fundamental physics principles and design assessment tools to develop and verify that the remedies fixed the safety defects. SUF ¶¶ 14, 56, 71, 83, 99. While the remedies differ among the recalls, a basic principle is to reduce the moment arm[4] of any weight hanging from the ignition key by reducing the size of the hole in the key head and to decouple the rigid interaction between the ignition key and items hanging from it through use of newly designed key rings. *Id.* ¶¶ 15-17. Plaintiffs' experts concede the scientific principles behind the

[4] *See* footnote 1 for the definition of "moment arm."

effectiveness of these key rotation remedies, characterizing them as "sound." *Id*. ¶ 137.

New GM also validated the remedies using a peer-reviewed testing regime designed for evaluating inadvertent key rotation. *Id*. ¶¶ 19, 33-35, 56-60, 71-75, 83-87, 99-103. For example, New GM subjected the recalled vehicles to 8 extreme driving condition tests, such as once-in-a-vehicle-life potholes and abusive roads, with 0.7 lbs of key weight[5] hanging from the newly designed key and key rings. *Id*. ¶¶ 18-32, 56-58, 71-73, 83-85, 99-101. Additionally, New GM had surrogate drivers, representing the standing height of a 5th percentile female, a 50th percentile male and a 99th percentile male, evaluate whether they could rotate the key with their knee during normal driving moves, such as moving a foot between pedals, slamming on the brakes, or twisting to look over both shoulders. *Id*. ¶¶ 33-40, 59-60, 74-75, 86-87, 102-103. Plaintiffs' experts concede that "there is nothing wrong with" New GM's testing and that New GM was "reasonable" to rely on it. *Id*. ¶ 39.

Virginia Tech Transportation Institute ("VTTI"), an independent engineering organization which plaintiffs' expert Glen Stevick admits is "well-respected in the automotive industry" (*id*. ¶ 42), conducted a peer review evaluation of New GM's inadvertent key rotation tests. VTTI, concluded that New GM's testing was "robust" and "acceptable" for assessing inadvertent key rotation in existing vehicles. SUF ¶ 43.

For the SIAB Wiring Harness recall, New GM eliminated the possibility of corrosion affecting the interface and increasing the circuit resistance by removing the connector from the system. SUF ¶¶ 109-10. For the EPS Assist recall, New GM and suppliers designed, tested, validated, and implemented effective remedies to address the issues specific to the different vehicles. *Id*. ¶¶ 124-29. Plaintiffs' experts do not dispute the adequacy of the EPS recall

[5] A key weight of 0.7 lb is abnormally high and exceeds the heaviest weight New GM encountered during a key chain weight study. SUF ¶ 18.

remedies, and plaintiffs have conceded that the EPS Assist remedy repaired the defect. *Id*. ¶ 131; *BotB Opinion*, 2018 WL 1638096, at *2 n.1.

2. Plaintiffs Have No Relevant Or Admissible Evidence That New GM's Recalls Did Not Fix The Defects.

Plaintiffs have no evidence that New GM's recall remedies did not fix the defects. The overwhelming majority of named plaintiffs did not experience any power losses or other problems after the repairs were performed. SUF ¶¶ 145-146 (Basseri), 154 (Cereceres), 180 (Thomas), 184-185 (Barker), 192 (Benton), 211-212 (Malaga), 218-219 (Mattos), 224-225 (Ramirez), 231-232 (Rukeyser), 240 (Akers), 255-256 (Hawkins), 271-272 (R. Robinson), 280-281 (Stefano), 301-302 (Witherspoon), 322-323 (Fuller), 354-344 (Simmons).[6]

Moreover, as the Court has indicated, expert evidence is necessary to prove that the recall did not fix the relevant defect, and plaintiffs do not proffer sufficient admissible or relevant expert evidence that each vehicle remains defective even after the recalls. *BotB Opinion*, 2018 WL 1638096, at *2; *see also In re General Motors LLC Ignition Switch Litig.*, 2017 WL 6729295, at *8-9 (S.D.N.Y. Dec, 28, 2017) ("*Garza/Greenroad Daubert Opinion*") ("In the absence of admissible expert evidence, Plaintiffs concededly cannot prove that the Airbag

[6] The only plaintiffs who allege incidents after the recalls repairs were performed have no evidence to support their assertions. David Padilla claims that post-repair the key would not turn on two occasions when he tried to start his vehicle, but not that the ignition key inadvertently rotated and his vehicle stalled. He took the vehicle to the dealership a second time for repairs, for which he was not charged anything. SUF ¶¶ 170-172. Bankruptcy Claim Fraud plaintiff Kimberly Brown alleges that her vehicle shut off after the repairs but she does not know the position of the switch for any of these incidents and thus has no evidence that the defects at issue were the cause, no one has told her that the ignition switch was causing her vehicle to turn off, and her vehicle had problems with its transmission, gearshift, and floor shifter that could cause the shut offs. SUF ¶¶ 198. Bankruptcy Claim Fraud plaintiff Crystal Hardin alleges that in a single instance after the repair her vehicle shut down, but has no idea why this happened or any evidence it was caused by a defect. SUF ¶¶ 204. Moreover, plaintiffs who own their vehicles can still contact their dealerships to have their vehicles inspected. Any recall-related repairs will continue to be performed free of charge. SUF ¶¶ 47, 61, 76, 88, 104, 117, 133.

Deployment RAR Sequence occurred.").[7]

To contest New GM's recall remedies for the Delta Ignition Switch, Key Rotation, and Camaro Knee-Key Rotation vehicles, plaintiffs proffer one expert, Glen Stevick.[8] Stevick, however, has conducted *no testing or scientific analysis* to support his speculative opinion that the remedies are ineffective. He relies only on his own idiosyncratic "logical deduction" and a misreading of the testing that validates New GM's remedies fixed the defects. Indeed, plaintiffs' putative expert Ernest Manuel states [redacted] SUF ¶ 377. If the repairs did not cure the defects, then more than .02-.03% of the vehicles would have required multiple dealer visits. Stevick also admitted that NHTSA was aware of New GM's testing and remedies, and raised no concern. *Id*. ¶ 139. Stevick's unsupported speculation that the remedies did not fix the defects is inconsistent with the repeatable, scientific testing New GM performed and fails to satisfy *Daubert*, as discussed in New GM's *Daubert* motion. *See In re Mirena*, 169 F. Supp. 3d 396, 430 (S.D.N.Y. 2016); *In re C.R. Bard, Inc.*, 948 F. Supp. 2d 589, 604-605 (S.D. W. Va. 2013); *see also Pro Serv. Auto., L.L.C. v. Lenan Corp.*, 469 F.3d 1210,

[7] Each bellwether state requires expert evidence. *See Minkin v. State Farm Gen. Ins. Co*., 2014 WL 117481, at *6 (Cal. Ct. App. Jan. 14, 2014) (holding "expert testimony was required to establish the scope and cost of repairs"); *Grasshopper House v. Bosworth*, 2015 WL 7354822, at *12 (Cal. Ct. App. Nov. 20, 2015), *as modified on denial of reh'g* (Dec. 15, 2015) (holding expert testimony required on estimated cost of repairs). *Rauscher v. Gen. Motors Corp.*, 905 S.W.2d 158, 162 (Mo. Ct. App. 1995) ("In claims for negligent repair, expert testimony is almost always required because the jurors are unfamiliar with the business of repairing automobiles."); *Wortham Bros. v. Haffner*, 347 S.W.3d 356, 361 (Tex. App. 2011) (holding necessity and reasonableness of repairs and repair costs requires expert testimony); *Chuong Cam Ha v. W. Houston Infiniti, Inc.*, 1995 WL 516993, at *2 (Tex. App. Aug. 31, 1995) (same); *Exec. Taxi/Golden Cab v. Abdelillah*, 2004 WL 1663980, at *1 (Tex. App. July 19, 2004) (holding repair estimate unsupported by expert testimony is no evidence of reasonableness or necessity of repair).

[8] Plaintiffs' only other technical expert, Steven Loudon, did not investigate the effectiveness of any of the recall remedies to address inadvertent key rotation and testified that he is not offering any opinions on that topic or about the EPS or SIAB wiring harness recalls. SUF ¶ 138.

1216 (8th Cir. 2006). Stevick's opinions should be excluded for the same reasons that they were excluded in the *Garza/Greenroad* case. *See In re General Motors LLC Ignition Switch Litig.*, 2017 WL 6729295, at *8-9 (S.D.N.Y. Dec, 28, 2017) ("*Garza/Greenroad Daubert Opinion*") (excluding Stevick's opinions because his "logical deduction" method did not satisfy *Daubert*: "such pure speculation, untethered to the facts in the record, is not a proper basis for reliable scientific testimony.").

For the SIAB Wiring Harness recall, Stevick is the only expert who offers any opinion on the remedy. Stevick concedes that the remedy of splicing the wires directly "should be pretty good" (SUF ¶ 115), and that "it's certainly doable" for a dealer technician to implement the remedy *(id*). Stevick's only opinion is that dealers *might* make a mistake in implementing the remedy. He did not conduct any testing or scientific analysis to support his opinion, and he has no evidence of a specific instance where a dealer improperly implemented the remedy. *Id*. ¶ 113. In fact, plaintiffs' putative expert Manuel's exhibits state [redacted] *Id*. ¶ 378. Manuel's data supports that dealers are splicing correctly. Without any real-world proof, Stevick's opinion is nothing more than inadmissible speculation. *See Garza/Greenroad Daubert Opinion*, 2017 WL 6729295, at *8 ("[M]ere possibility is not proof …") (citing *In re Mirena*, 169 F. Supp. 3d at 430; *In re Accutane Prods. Liab.*, 511 F. Supp. 2d 1288, 1296 (M.D. Fla. 2007); *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997)).

For the EPS Assist recall, neither plaintiffs' nor their technical experts dispute the remedy's effectiveness. SUF ¶¶ 131-32; *see also BotB Opinion*, 2018 WL 1638096, at *2 n.1 (Plaintiffs "do not dispute that New GM's recall 'cured' the 'Power Steering Defect.'").

Overall, plaintiffs have no admissible expert opinions or other evidence to show that the

recall remedies did not fix the defects. *See In re Wright Med. Tech. Inc., Conserve Hip Implant Prod. Liab. Litig.*, 127 F. Supp. 3d 1306, 1347 (N.D. Ga. 2015) (holding that an expert's extrapolation unsupported by evidence or data was unreliable, even if the expert's opinion might be logical). The undisputed facts, particularly the comprehensive testing, demonstrate that New GM's recalls addressed and remedied the defects. Under governing law plaintiffs cannot recover any benefit-of-the-bargain damages.

B. Named Plaintiffs Have No Legally Cognizable Benefit-Of-The-Bargain Evidence.

Under the "benefit-of-the-bargain" damages theory, "a plaintiff is compensated 'for the fact that he or she overpaid, at the time of the sale, for a defective vehicle.'" *See TACC MTD Opinion*, 2016 WL 3920353, at *7-10. The named plaintiffs have no evidence, whether fact or expert, to show support that they overpaid.

Each named plaintiff's benefit-of-the-bargain damages claim must be based on the difference between what each plaintiff paid and the allegedly defective vehicle's market value, as plaintiffs have alleged and argued. 5ACC ¶ 41.[9] The Court's description of such damages relied on a market value or worth: "Plaintiffs who purchased defective cars were injured when they purchased for x dollars a New GM car that contained a latent defect; had they known about the defect, they would have paid fewer than x dollars for the car (or not bought the car at all),

[9] *See also* 5ACC ¶ 41 ("The defects that New GM concealed throughout the Class Period related to the safety and reliability of the Defective Vehicles, and affected the brand perception and ***market value*** of all Defective Vehicles.") (emphasis added); Pl. Memo. in Opp. to MTD TACC (Docket No. 2761) at 1 ("[a]ll Plaintiffs allege 'manifest' damages in the decreased market value of their cars"; "[t]he revelation of the fraudulent scheme and the magnitude of concealed defects substantially reduced the fair market value of Plaintiffs' property."); Pl. Ltr. to Judge re Supp. Auth. in Support of Opp. to MTD TACC (Docket No. 2871) at 3 ("damages for all Plaintiffs and Class members here should reflect the difference between the market value of their vehicles if made by a reputable manufacturer…and the market value of their vehicles as actually made by a disreputable manufacturer."); Pl. Hearing Slides, Hearing on New GM's Motion to Dismiss the Economic Loss Allegations, at 3 (June 17, 2016) (asserting plaintiffs paid a "premium on the sales price" where "the size of that premium [is] the difference in the market value of the vehicle as delivered and its market value on the condition it should have been delivered.").

because a car with a safety defect is worth less than a car without a safety defect." *TACC MTD Opinion*, 2016 WL 3920353, at *7. California,[10] Missouri,[11] and Texas[12] require that such damages compare the purchase price to the allegedly defective vehicle's market price.

1. The Named Plaintiffs Have No Evidence Of Benefit-Of-The-Bargain Damages And Deferred To Their Experts.

Plaintiffs have no admissible fact evidence on the market value of their vehicles at the time of purchase or the amount of the benefit-of-the-bargain damages. When asked about such damages in their plaintiff fact sheets, all named plaintiffs (except Padilla) deferred to their

[10] Overpayment damages under the California UCL and CLRA are "determined by taking the 'difference between the market price actually paid by consumers and the true market price that reflects the impact of the unlawful, unfair, or fraudulent business practices'" reflecting "the prices at which … [manufacturers] are willing to sell their products." *In re NJOY, Inc. Consumer Class Action Litig.*, 120 F. Supp. 3d 1050, 1118, 1120-22 (C.D. Cal. 2015); *see also Saavedra v. Eli Lilly & Co.*, 2014 WL 7338930, at *3-7 (C.D. Cal. Dec. 18, 2014) ("[T]he typical benefit-of-the bargain claim relies on a difference in fair market value (i.e. the amount that a willing buyer and willing seller would both accept) between the product as represented and the product actually received."); *Werdebaugh v. Blue Diamond Growers*, 2014 WL 7148923, at *8 (N.D. Cal. Dec. 15, 2014) ("Restitution is then determined by taking the difference between the market price actually paid by consumers and the true market price that reflects the impact of the unlawful, unfair, or fraudulent business practices.") (citing *Werdebaugh v. Blue Diamond Growers*, 2014 WL 2191901, at *22 (N.D. Cal. May 23, 2014); *Bagdasarian v. Gragnon*, 192 P.2d 935, 940-41 (Cal. 1948) ("[C]ases and texts clearly show that 'value,' in connection with legal problems, ordinarily means market value."); *Stout v. Turney*, 586 P.2d 1228, 1231-32 (Cal. 1978); *Colgan v. Leatherman Tool Grp., Inc.*, 135 Cal. App. 4th 663, 675 (Cal. App. 2006); *Astiana v. Ben & Jerry's Homemade, Inc.*, 2014 WL 60097, at *12 (N.D. Cal. Jan. 7, 2014).

[11] To prove an ascertainable loss and benefit-of-the-bargain damages under Missouri law, including the MMPA, named plaintiffs must establish the difference between the price paid and the "fair market value" of the allegedly defective product. *Larabee v. Eichler*, 271 S.W.3d 542, 548 (Mo. 2008) (benefit-of-the-bargain damages are measured as "the difference between the fair market value of the property received and the value if the property had been as represented . . . at the time of the transaction"); *Smith v. Tracy*, 372 S.W.2d 925, 938-39 (Mo. 1963) (same); *In re Davenport*, 491 B.R. 911, 921 (Bankr. W.D. Mo. 2013) (same); *see also Peterson v. Cont'l Boiler Works, Inc.*, 783 S.W.2d 896, 900 (Mo. 1990).

[12] Under the Texas DTPA, "in order to sustain such a finding of damages, there must be evidence of both the actual amount paid by the buyer ***and the actual market value*** of the car as received in its defective condition." *Town E. Ford Sales, Inc. v. Gray*, 730 S.W.2d 796, 801-03 (Tex. App. 1987) (emphasis added) (reversing damages award under the DTPA where evidence of "market value" was determined at the time of trial rather than "the time it was received in its defective condition"); *see also GJP, Inc. v. Ghosh*, 251 S.W.3d 854, 888-89 (Tex. App. 2008) (measuring benefit-of-the-bargain damages for a defective vehicle as the difference in price paid and the market value of a vehicle).

experts, claiming an "[i]nflated purchase price and/or the diminution in value of the Subject Vehicle in an amount subject to expert opinion and to be proven at trial." SUF ¶¶ 148 (Basseri), 156 (Cereceres), 165 (Orosco), 181 (Thomas), 188 (Barker), 194 (Benton), 201 (Brown), 208 (Hardin), 214 (Malaga), 221 (Mattos), 228 (Ramirez), 234 (Rukeyser), 243 (Akers), 251 (Hamilton), 258 (Hawkins), 265 (K. Robinson), 274 (R. Robinson), 284 (Stefano), 294 (Tinen), 303 (Witherspoon), 311 (Al-ghamdi), 318 (Bacon), 325 (Fuller), 335 (Graciano), 345 (McClellan), 350 (Henry), 358 (Simmons). At deposition, almost all named plaintiffs (including Padilla) confirmed that they did not know by how much the value of their vehicles had diminished because of the alleged defects, and generally deferred to their lawyer or putative experts. *E.g.*, SUF ¶ 265 (K. Robinson testifying that "I'm not a -- that's my lawyer's job."); SUF ¶ 284 (Stefano testifying that "I couldn't tell you. I'm not an expert. … I don't know anything about the actual value on it."); SUF ¶ 303 (Witherspoon testifying that "I'm not an expert in the value, but I've left that to my attorneys and their experts."); *see also* SUF ¶ 156 (Cereceres), ¶ 173 (Padilla), ¶ 181 (Thomas), ¶ 243 (Akers), ¶ 251 (Hamilton), ¶ 274 (R. Robinson), ¶ 294 (Tinen), ¶ 311 (Al-ghamdi), ¶ 318 (Bacon), ¶ 325 (Fuller).

Some plaintiffs who attempted to quantify their losses admitted that their claims were not based on market value or any other foundation. For example, Chimen Basseri claims she would have paid $3,000 less for the vehicle, but when asked the basis for that number admitted that "I'm just giving you a round figure. I'm not basing it on anything." SUF ¶ 148; *see also* SUF ¶ 165 (Orosco claiming decrease of five-to-six thousand dollars based "[j]ust on my personal belief" without any other basis), ¶ 258 (Hawkins claiming her vehicle had lost all value, but admitting she had not attempted to sell or trade in the car, had no valuation of her vehicle, had not checked Kelley Blue Book or any valuation sites to see what the vehicle was worth, and no

one besides her counsel had told her the vehicle was worth less because of the recalls).

2. The Named Plaintiffs' Putative Experts Did Not Determine Damages For Any Named Plaintiff.

As plaintiffs have no admissible evidence of benefit-of-the-bargain damages, they defer to their putative economic loss experts. Plaintiffs retained two putative economic loss experts, Stefan Boedeker and Joshua Gans, to opine about the amount of alleged ***classwide*** overpayment damages. New GM will be filing a *Daubert* motion to exclude their economic loss opinions in connection with class certification briefing. Without regard to *Daubert* considerations, and whether assessed individually or in combination the classwide damage opinions of Boedeker and Gans are legally insufficient to establish each named plaintiff's damages.

Plaintiffs' putative economic loss damages experts have no opinions regarding, and have not been asked to establish, market value or benefit-of-the-bargain damages for any named plaintiff. When asked, [redacted][13]

As this Court recognized, measuring benefit-of-the-bargain damages is difficult "given how many variables (such as age, mileage, technical features, consumer preference, and even

[13] *See also* SUF ¶ 368 (Boedeker Dep. Testimony) [redacted]

paint color) affect the value and price of cars." *TACC MTD Opinion*, 2016 WL 3920353, at *7. Plaintiffs' experts, including Dr. Weisberg,[14] agree [redacted] SUF ¶ 371. [redacted] *Id.* ¶ 372. The prices paid by named plaintiffs demonstrate this variety. For example, Deloris Hamilton bought a used 12-year-old 2000 Oldsmobile Alero for $3,500; Gareebah Al-ghamdi bought a used 2004 Impala for $12,999; Orosco Santiago bought a new 2010 Camaro for $28,000; and Christopher Tinen bought a new 2010 GMC Acadia for $32,080.27. SUF ¶¶ 245, 305, 158, 287; *see also id.* ¶ 373 [redacted]

Accordingly, plaintiffs lack any basis to determine whether, or by how much, any individual named plaintiff's purchase price exceeded the market price of the particular allegedly defective vehicle he or she bought. Indeed, plaintiffs' own expert Weisberg agreed that "[redacted] *Id.* ¶ 374.

Individual evidence and comparison of the price each individual named plaintiff paid to the market value of the particular vehicle that plaintiff bought is necessary to establish damages.

[14] Plaintiffs hired Weisberg to review results concerning the presence or absence of changes in prices in used recalled Old GM and New GM vehicles following their recalls in 2014. SUF ¶ 370.

As no named plaintiff has such evidence—fact, expert, or otherwise—no named plaintiff can carry their burden of providing benefit-of-the-bargain damages. Accordingly, summary judgment should be awarded against each plaintiff's claims for benefit-of-the-bargain damages.

C. Various Plaintiffs' Claims Fail Because They Cannot Show A Manifest Defect.

Plaintiffs cannot recover for any Texas claims, or for Missouri implied warranty claims, without a manifest defect. *FACC MTD Opinion*, 257 F. Supp. 3d at 450-51, 462; *TACC MTD Opinion*, 2016 WL 3920353, at *35. The Court dismissed the implied warranty claims of Missouri plaintiffs Cynthia Hawkins and Ronald Robinson for lack of a manifest defect. *TACC MTD Opinion*, 2016 WL 3920353, at *35, 42 (Exhibit A). Summary judgment should be awarded against additional claims because (1) new plaintiffs that do not allege manifestation have joined the 5ACC; (2) plaintiffs who alleged a manifest defect have no evidence to support their contention; or (3) the alleged manifestation is not of a defect at issue in this litigation.

For the ignition switch-related recalls, named plaintiffs allege that the ignition switch may inadvertently rotate out of the "on" or "run" position, causing the vehicle to lose power and disabling the airbags. *E.g.*, 5ACC ¶ 10. Importantly, a vehicle simply stalling cannot show manifestation of an ignition switch-related defect. As plaintiff's putative expert Stevick concedes, "moving stalls are something that can happen in all vehicles," and occur for a "variety of reasons," such as "running out of gas," "[b]ad spark plugs," a "[b]ad ignition cable," or a "[c]logged EGR valve." SUF ¶ 140. Accordingly, plaintiffs must have evidence that the ignition switch in their vehicles inadvertently rotated and caused a loss of power.

Of the Texas plaintiffs, Dawn Fuller does not claim that her 2008 Impala experienced a moving stall, loss of power steering, or any other manifestation caused by the defects at issue. SUF ¶ 322. Other Texas plaintiffs have no evidence that the defects at issue manifested:

- Gareebah Al-ghamdi alleges that she experienced moving stalls in her 2004 Impala, but admits that during the first stall the ignition switch was in the "on" position and she does not know the position for the other stalls. SUF ¶ 308.

- Lisa McClellan's vehicle was recalled only for EPS Assist, not a key rotation recall. SUF ¶¶ 336-37. She does not allege loss of power steering assist. *Id.* ¶ 341. The only times she had issues with her steering was when the vehicle shut off, but not only was her vehicle not subject to a key rotation recall, she also does not know the position of the ignition for any of those occasions. *Id.* ¶ 341.

- Michael Graciano does not claim that he experienced or witnessed any incidents with his 2007 Cobalt, but instead that his then-fiancee's daughter told him that she lost power steering and the brakes did not work. SUF ¶ 329. Such hearsay cannot defeat summary judgment. *See Burlington Coat Factory Warehouse Corp. v. Esprit De Corp.*, 769 F.2d 919, 924 (2d Cir. 1985). Moreover, Graciano testified that the daughter does not recall details about the incidents, and thus he has no evidence that the ignition switch rotated. *Id*.

For the Missouri plaintiffs, Deloris Hamilton admits that her 2000 Alero never experienced an inadvertent ignition rotation or other potential manifestation. SUF ¶ 248. Other Missouri plaintiffs likewise admit they have no evidence that a defect manifested:

- Mario Stefano claims that his Camaro lost power once, but does not claim his knee hit the key or that the ignition rotated. SUF ¶ 281. Instead, he believes there was a faulty battery in the vehicle's fob which was later replaced, a condition separate from and unrelated to the claimed defects at issue in the 5ACC. *Id*.

- Brad Akers alleges a single incident in which his 2009 HHR lost engine power. SUF ¶ 240. Akers admits that he does not know whether his key rotated when his vehicle lost power, and thus has no evidence that his vehicle manifested the defect at issue. *Id*.

- Patrice Witherspoon claims her 2006 Ion shut off on multiple occasions, but each time the ignition key was in the "run" position, establishing that these shut offs were not related to the recall condition. SUF ¶ 299.

- Kenneth Robinson claims that his 2008 Pontiac G5 shut down multiple times, but does not recall the ignition switch's position on any of those occasions. SUF ¶ 262.

Accordingly, summary judgment should be granted against all claims of Al-ghamdi, Fuller, McClellan, and Graciano, and against the implied warranty claims of Akers, Hamilton, K. Robinson, Stefano, and Witherspoon for lack of a manifest defect.

D. Plaintiffs Who Disposed Of Their Vehicles Before The Recalls Do Not Have Legally Cognizable Or Recoverable Damages.

Plaintiffs "who disposed of their vehicles before the recall could not have realized any 'diminished value' because they did not own the defective vehicles when the recalls were announced," and could not have benefit-of-the-bargain damages. *FACC MTD Opinion*, 257 F. Supp. 3d at 403; *see also In re Gen. Motors LLC Ignition Switch Litig.*, 2017 WL 3443623, at *2 (S.D.N.Y. August 9, 2017) (on reconsideration, confirming that "even now, Plaintiffs do not articulate a coherent theory of how a plaintiff who bought a vehicle with a concealed defect and sold the same vehicle before the defect was revealed can logically, if not legally, prove that he or she suffered damages."). Nor could such plaintiffs have "lost time" by taking their vehicles for recalls, since repairs were not available until after plaintiffs disposed of their vehicles.

Three of the named plaintiffs disposed of their vehicles before the 2014 recalls. Kenneth Robinson sold his 2008 G5 in May 2013. SUF ¶ 263. Christopher Tinen traded-in his 2010 Acadia in April 2012. SUF ¶ 292. Lisa McClellan returned her vehicle to the dealership in April 2012. SUF ¶ 342. Summary judgment should be granted against the benefit-of-the-bargain and lost time damages claims of these three plaintiffs.

Moreover, because these three plaintiffs lack damages, summary judgment should be granted against all their claims. The Court previously declined to dismiss such plaintiffs because certain claims might allow some form of recovery without damages. *See In re Gen. Motors LLC Ignition Switch Litig.*, 2017 WL 3443623, at *2-3. But as explained in Section I.F, all claims at issue require damages, which these three plaintiffs lack.[15]

[15] The *FACC MTD Opinion* notes that McClellan alleged "out-of-pocket expenses and lost time," but she has no evidence to support any such damages. *FACC MTD Opinion*, 257 F. Supp. 3d at 403. McClellan admitted the defect did not cause her to lose income, and thus she cannot recover for "lost time." SUF ¶¶ 343; Section I.E. McClellan also claimed that after she returned the car to the dealership, an amount of $4,716 was left owing on her credit report, but at deposition admitted that "I'm not even sure where I got

E. Plaintiffs Cannot Recover Lost Time Damages.

1. Lost Time Damages Require Proof Of Lost Earnings, Which No Plaintiff (With One Exception) Provides.

No jurisdiction recognizes a claim for "lost time" without proof of lost income. *See* New GM's briefs at Docket No. 5098 at 30-49; Docket No. 5191 at 16-21. "[L]oss of time, per se, is not compensable unless it is directly connected with some loss of" wages or other revenue. 25 C.J.S. DAMAGES § 52; *see also* 22 AM. JUR. 2D DAMAGES § 155 (unless the plaintiff is prevented from earning wages, "no allowance can be made for loss of time"). California, Missouri, and Texas follow this rule.

Lost time is not cognizable under the California's consumer protection laws, including the CLRA and UCL. *E.g., Dugas v. Starwood Hotels & Resorts Worldwide, Inc.*, 2016 WL 6523428, at *11 (S.D. Cal. Nov. 3, 2016) (time spent responding to credit card charges could not "demonstrate that Plaintiff has suffered a loss of money or property" for a UCL claim); *In re Sony Gaming Networks & Customer Data Sec. Breach Litig.*, 903 F. Supp. 2d 942, 966 (S.D. Cal. 2012) ("Plaintiffs' allegations that the heightened risk of identity theft, time and money spent on mitigation of that risk . . . do not suffice as injury under the UCL, FAL, and/or the CLRA."); *Butler v. Adoption Media, LLC*, 486 F. Supp. 2d 1022, 1062 (C.D. Cal. 2007).

California also rejects lost time damages for fraud and other claims. *E.g., Lueras v. BAC Home Loans Servicing, LP*, 163 Cal. Rptr. 3d 804, 829 (Cal. Ct. App. 2013) (holding for fraud that "[t]ime and effort spent assembling materials for an application to modify a loan is the sort of nominal damage subject to the maxim de minimis non curat lex—i.e., the law does not

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the $4,716," that she did not know where the number came from, and that she did not have a credit report listing that any debt was owed to the dealership. *Id.* Similarly, McClellan alleges she spent $1,500 at different shops to correct problems with the vehicle and $200 in rental charges, but admitted she does not have any receipts or documentation to prove these alleged amounts. *Id.*

concern itself with trifles").[16] This rule is consistent with California law holding that fraud plaintiffs can recover only for pecuniary losses. *E.g., R. D. Reeder Lathing Co. v. Cypress Ins. Co.*, 84 Cal. Rptr. 98, 100 (Cal. Ct. App. 1970).

Similarly, Missouri holds that lost time is not recoverable under the MMPA. *Ford v. St. Louis Metro. Towing, L.C.*, 2010 WL 618491, at *13 (E.D. Mo. Feb. 18, 2010) (dismissing plaintiffs' claims for "loss of time" damages"); *Amburgy v. Express Scripts, Inc.*, 671 F. Supp. 2d 1046, 1057 (E.D. Mo. 2009) ("A claim of damages for time expended is not sufficiently definite or certain to support a monetary award for an 'ascertainable loss' under the MMPA.").[17] The MMPA's ascertainable loss "requirement is not satisfied where plaintiff claims speculative, non-pecuniary harm or where he alleges no out-of-pocket costs." *Pleasant v. Noble Fin. Corp.*, 54 F. Supp. 3d 1071, 1079 (W.D. Mo. 2014) (internal quotation marks omitted); *see also Kuhns v. Scotttrade, Inc.*, 868 F.3d 711, 719 (8th Cir. 2017) (under the MMPA, damages are limited to "ascertainable pecuniary loss[es]."); Mo. Ann. Stat. § 407.025(1) (plaintiff must prove an "ascertainable loss of money or property" to recover under consumer protection law). Claims for lost "free time" are neither pecuniary nor an out-of-pocket loss, and thus not recoverable.

Missouri follows the same rule for other claims. *E.g.*, *Messina v. Prather*, 42 S.W.3d

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[16] *See also Badame v. J.P. Morgan Chase Bank, N.A.*, 641 F. App'x 707, 710 (9th Cir. 2016) ("Furthermore, Plaintiffs' contention that they are entitled to damages for the loss of time and energy they spent through the loan modification process also fails because the time and effort spent assembling materials for an application to modify a loan is the sort of nominal damage subject to the maxim de minimis non curat lex-i.e., the law does not concern itself with trifles."); *Gerard v. Wells Fargo Bank, N.A.*, 2015 WL 12791416, at *10 (C.D. Cal. 2015) ("Any damages associated with the time and effort spent assembling materials for an application to modify a loan are insufficient to support an intentional misrepresentation claim under California law.").

[17] *See also Walsh v. Al West Chrysler, Inc.*, 211 S.W. 3d 673, 675 (Mo. Ct. App. 2007) (rejecting claim for "lost or wasted time" damages under the MMPA as insufficiently definite or certain); *Schoenlein v. Routt Homes, Inc.*, 260 S.W.3d 852, 855 (Mo. Ct. App. 2008) (reversing, in an MMPA case arising out of the defendant's failure to provide a warranty, a damages award that was based on evidence of telephone calls made by the plaintiffs to the defendant and evidence of "the significant time [the plaintiffs] spent attempting to obtain the warranty").

753, 764 (Mo. Ct. App. 2001) ("A personal injury plaintiff may prove a resulting loss of time, and a consequent loss of personal earnings or wages as an item of special damages and may recover for loss of future earnings due to impairment of the plaintiff's earning capacity."). Common law fraud requires proof of pecuniary loss, same as the MMPA. *E.g.*, *Harris v. Penninger*, 613 S.W.2d 211, 214 (Mo. Ct. App. 1981); *Walsh v. Ingersoll-Rand Co.*, 656 F.2d 367, 371 (8th Cir. 1981) (applying Missouri law). Indeed, "[l]oss of 'time' and loss of 'earnings' for that time mean the same thing." *Ganz v. Metro. St. R. Co.*, 220 S.W. 490, 496 (Mo. 1920).[18]

For Texas, lost "free time" is not recoverable under the DTPA, which is limited to "economic damages or damages for mental anguish." Tex. Bus. & Com. Code § 17.50(a); *see Valley Nissan, Inc. v. Davila*, 133 S.W.3d 702, 713 (Tex. App. 2003) (holding that "damages based on loss of time" are not within scope of Texas consumer protection law). This exclusion of lost "free time" is a general principle of Texas law. *E.g.*, *Vista Chevrolet, Inc. v. Barron*, 698 S.W.2d 435, 441 (Tex. App. 1985) (holding that "damages for loss of time in and of itself are not recoverable" and "that loss of time means loss of earnings").[19] Texas holds that time spent on vehicle repairs cannot be recovered without proof of lost earnings. *Bossier Chrysler Dodge II, Inc. v. Rauschenberg*, 201 S.W. 3d 787, 810 (Tex. App. 2006) (holding that plaintiff could not recover time spent visiting a repair shop on Saturday, when he did not work and thus did not lose any compensation), *rev'd in part on other grounds*, 238 S.W. 3d 376 (Tex. 2007).

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[18] *See also Scholl v. Grayson*, 127 S.W. 415, 417 (Mo. Ct. App. 1910) ("loss of time is averred, which is the same, in legal effect, as averring loss of earnings"); *Lesser v. St. Louis & S. Ry. Co.*, 85 Mo. App. 331 (Mo. App. Ct. 1900) ("loss of time or of earnings (which is the same thing)").

[19] *See also Combined Am. Ins. Co. v. Morgan*, 214 S.W.2d 145, 148 (Tex. Civ. App. 1948) ("Loss of time as used in connection with damages recoverable for personal injuries means loss of earnings."); *Atchison, Topeka & Santa Fe Ry. Co. v. Acosta*, 435 S.W.2d 539 (Tex. Civ. App. 1968) (rejecting alleged lost time damages where there "is no testimony that he hired someone to do the work he had previously done, or that his net profits had been reduced").

With the exception of Brad Akers, the other named plaintiffs have no evidence of lost income from having the recall repairs performed. Indeed, plaintiffs Santiago Orosco, Deloris Hamilton, Kenneth Robinson, Gareebah Al-ghamdi, Dawn Bacon, and Lisa McClellan did not have the recall repairs performed when they owned their vehicles, SUF ¶¶ 163, 249, 263, 309, 316, 342, and thus even under plaintiffs' theory have no claim for lost time. Similarly, Kellie Cereceres' vehicle was remedied during a standard maintenance visit, and thus she did not spend additional time having her vehicle repaired pursuant to the recall. SUF ¶ 154. Summary judgment should be awarded against the lost time claims of all plaintiffs except Akers.

2. No Plaintiffs Have Relevant Expert Testimony To Support Their Lost Time Claims.

Even if named plaintiffs' lost-time claims were not barred as a matter of law, they are barred for lack of evidence. Most plaintiffs who obtained recall repairs depend on the opinion of Ernest Manuel, who was retained by Lead Counsel to estimate "the monetary value of time lost to Class Members who obtained recall repairs." *Id.* ¶ 375. His analysis suffers from numerous deficiencies, and New GM intends to file, in connection with the class certification briefing, a *Daubert* motion detailing why Manuel's opinion is inadmissible.

But even if Manuel's opinion were admissible, it could not establish any plaintiff's claim for lost-time damages because Manuel admittedly [redacted] *Id.* ¶ 376. Accordingly, plaintiffs who provided no individual evidence of their alleged damages (that is, all named plaintiffs besides Akers) cannot rely on Manuel's opinion to establish lost income from the time they spent having their vehicles repaired, and their "lost-time" damages claim should be rejected as a matter of fact as well as law.

F. Plaintiffs Cannot Recover On Their Claims Without Damages.

Under the laws of the three bellwether states, plaintiffs have no claims unless they have damages. While the Court previously suggested that "some claims in some states" might not "require a plaintiff to allege damages in order to survive a motion," *In re Gen. Motors LLC Ignition Switch Litig.*, 2017 WL 3443623, at *2-3 (S.D.N.Y. Aug. 8, 2017), that possible exception is not available to any of the named plaintiffs:

- **California UCL:** "To satisfy the narrower standing requirements imposed by [the amended UCL], a party must now (1) establish a loss or deprivation of money or property sufficient to qualify as injury in fact, i.e., *economic injury … .*" *TACC MTD Opinion*, 2016 WL 3920353, at *19 (emphasis in original) (quoting *Kwikset Corp. v. Super. Ct.*, 246 P.3d 877, 885 (Cal. 2011).)

- **California CLRA:** "Notably, the language of the CLRA is even broader than that of the UCL: It provides a remedy to '[a]ny consumer who suffers ***any damage*** as a result' of an unfair trade practice …" *TACC MTD Opinion*, 2016 WL 3920353, at *21 (emphasis in original) (quoting Cal. Civ. Code § 1780(a)).

- **California Fraudulent Concealment:** "Under California law, a plaintiff bringing a claim for fraudulent concealment must allege … (5) resulting damage." *TACC MTD Opinion*, 2016 WL 3920353, at *22.

- **California Song-Beverly Act:** "Any buyer of consumer goods ***who is damaged*** by a failure to comply with any obligation under this chapter or under an implied or express warranty or service contract may bring an action for the recovery of damages and other legal and equitable relief." Cal. Civ. Code § 1794(a) (emphasis added).

- **California Restitution:** "The elements of unjust enrichment are receipt of a benefit and unjust retention of the benefit ***at the expense of another***." *Berger v. Home Depot USA, Inc.*, 741 F.3d 1061, 1070 (9th Cir. 2014) (emphasis added), *abrogated on other grounds by Microsoft Corp v. Baker*, 137 S. Ct. 1702 (2017). This Court relied on *Berger* in finding that California would recognize an action for unjust enrichment or restitution. *TACC MTD Opinion*, 2016 WL 3920353, at *23.

- **Texas DTPA:** The DTPA's "clear language provides a cause of action only to consumers who have sustained damages." *Cruz v. Andrews Restoration, Inc.*, 364 S.W.3d 817, 823-24 (Tex. 2012); *see also FACC MTD Opinion*, 257 F. Supp. 3d at 448-49 ("'To prove a violation of the Act, a plaintiffs must show that … (3) these acts constituted a producing cause of the consumer's damages.'") (quoting *Doe v. Boys Clubs of Greater Dallas, Inc.*, 907 S.W.2d 472, 478 (Tex. 1995).)

- **Texas Implied Warranty:** "The statutory elements of the Everetts' breach of implied warranty of merchantability are … (3) that the alleged defect proximately caused the injuries for which the Everetts seek damages." *Everett v. TK-Taito, L.L.C.*, 178 S.W.3d 844, 853 (Tex. App. 2005).

- **Missouri Merchandising Practices Act:** "To pursue a claim under the MMPA, a plaintiff must show: … (2) an ascertainable loss of money or property … ." *TACC MTD Opinion*, 2016 WL 3920353, at *33.

- **Missouri Fraudulent Concealment:** Fraud elements include "the hearer's consequent and proximately caused injury" and plaintiffs can use the benefit-of-the-bargain measure to calculate "damages." *Heberer v. Shell Oil Co.*, 744 S.W.2d 441, 443 (Mo. 1988).

- **Missouri Implied Warranty:** "A plaintiff bringing a breach of implied claim in Missouri must show … injury and damages to the plaintiff or his property." *TACC MTD Opinion* at *35.

- **Missouri Unjust Enrichment:** "The right to restitution for unjust enrichment presupposes: … (2) that the enrichment was at the expense of the plaintiff . . . ." *S & J, Inc. v. McLoud & Co., L.L.C.*, 108 S.W.3d 765, 768 (Mo. Ct. App. 2003) (internal citations omitted).

Summary judgment should be entered in New GM's favor and awarded against each named plaintiff's claims for lack of any legally recoverable damages.

II. PLAINTIFFS WHOSE VEHICLES ARE SUBJECT TO SERVICE PARTS VEHICLE RECALL HAVE NO CLAIMS.

The MY 2008-2010 Pontiac Solstice and G5, MY 2008-2010 Saturn Sky, MY 2008-2010 Chevrolet Cobalt, and MY 2008-2011 Chevrolet HHR vehicles covered under Recall No. 14v047—the Service Parts Vehicles—were not defective as manufactured with the '190 switch. *See* Background.A.1. Instead, New GM recalled those vehicles because some of them might have been repaired with the earlier, faulty '423 switch. But unless the switch in a Service Parts Vehicle had been replaced with a '423 switch, they are not defective.

Consistent with these facts, the Court previously held that Service Parts Vehicles are automobiles that "were not manufactured with the faulty ignition switch, but which could have been repaired at some point using the faulty ignition switch. Accordingly, if they [Service Parts

Vehicle plaintiffs] are ultimately to succeed on their claims with respect to the ignition switch, they will have to show that their cars in fact contained that defect." *TACC MTD Opinion*, 2016 WL 3920353, at *20 n.15.

None of the named plaintiffs with Service Parts Vehicles has any proof that his or her ignition switch was replaced prior to the recalls, let alone replaced with the defective '423 switch. SUF ¶¶ 146 (Basseri), 263 (K. Robinson), 171 (Padilla), 241 (Akers), 255 (Hawkins). As a result, none of the named plaintiffs can prove the elements of their claim as required by the Court's *TACC MTD Opinion*. Without evidence of an ignition switch repair, any allegation that a vehicle subject to the Service Parts Vehicle recall had a defective ignition switch contradicts the undisputed facts and this Court's prior opinion.

Additionally, plaintiffs have conducted no testing or analysis showing that the ignition switches in the Service Parts Vehicle recall are defective. In the *Ward* case, the plaintiffs claimed that such vehicles are defective if the ignition switch has a torque resistance from "Run" that falls below 15 N.cm. Although New GM disputes this position as applied to ignition switches in the Service Parts Vehicle recall population, plaintiffs have no evidence that any of named plaintiffs' vehicles met plaintiffs' own standard. Glen Stevick, the only plaintiffs' expert who offers an opinion on inadvertent key rotation, has admitted that he has conducted no analysis of the named plaintiffs' vehicles. SUF ¶ 140.

As a result, summary judgment should be granted against all claims of Chimen Basseri, David Padilla, Kenneth Robinson, Brad Akers, and Cynthia Hawkins the to the extent based on the Service Parts Vehicle recall.[20] See Fed. R. Civ. P. 56; *Celotex*, 477 U.S. at 322.

[20] Padilla, Akers, and Hawkins allege claims based on both the Service Parts Vehicle recall and the EPS Assist recall. The argument in Section II bars their claims based on the Service Parts Vehicle recall.

III. AS A MATTER OF LAW AND UNDISPUTED FACT, VARIOUS NAMED PLAINTIFFS CANNOT ESTABLISH NEW GM'S LIABILITY.

A. Certain Plaintiffs Cannot Show Reliance As Required For Consumer Protection And Fraudulent Concealment Claims.

Plaintiffs' consumer protection and fraudulent concealment claims (other than claims under the MMPA) require proof of reliance.[21] Under Texas law, "[g]enerally, to prevail on a DTPA claim, a plaintiff must establish that: . . . the defendant engaged in false, misleading, deceptive, or unconscionable acts upon which the plaintiff relied to his detriment." *Moore v. Panini Am.*, 2016 WL 7163899, at *3 (Tex App. Nov. 7, 2016).[22] Similarly, under current California law,[23] proof of each plaintiff's reliance is required for the CLRA and UCL. *E.g.*, *Durell v. Sharp Healthcare*, 183 Cal. App. 4th 1350, 1362-63, 1366-67 (2010) (reliance is required for UCL claims based on fraud as well as CLRA claims); *Backhaut v. Apple, Inc.*, 74 F. Supp. 3d 1033, 1047-48 (N.D. Cal. 2014) (where "CLRA claims and UCL claims are based on alleged misrepresentations, omissions, and fraudulent conduct . . . those claims are therefore subject to the actual reliance requirement").[24] California and Missouri also require reliance for

[21] Each named plaintiff had a variety of different reasons as to why they purchased their vehicles. In this section, New GM is moving for summary judgment against the named plaintiffs where the undisputed facts—including their own testimony—show that they did not rely on safety or reliability.

[22] *See also Cruz v. Andrews Restoration, Inc.*, 364 S.W.3d 817, 823-24 (Tex. 2012) (under DTPA, a "consumer loses without proof that he relied to his detriment on the deceptive act"); *Henry Schein, Inc. v. Stromboe*, 102 S.W.3d 675 (Tex. 2002); *Peltier Enters. v. Hilton*, 51 S.W.3d 616, 623-24 (Tex. App. 2000) (under unconscionability prong of DTPA that there "must be a showing of what the consumer could have or would have done if he had known about the information").

[23] Before November 2, 2004, UCL claims did not require individualized proof of reliance, injury, or damages. *Hall v. Time Inc.*, 158 Cal. App. 4th 847, 852 (2008). On that date, Proposition 64 changed the UCL to require plaintiffs to prove they have "suffered injury in fact" and "lost money or property as a result of such unfair competition." *Id.* Earlier case law that did not require reliance, as well as decisions that mistakenly continue to rely on such case law, have been superseded by Proposition 64.

[24] *Princess Cruise Lines, Ltd. v. Superior Court*, 179 Cal. App. 4th 36, 46 (2009) (holding that "reliance is required for CLRA actions"); *Sud v. Costco Wholesale Corp.*, 229 F. Supp. 3d 1075, 1082-83 (N.D. Cal. 2017) ("Plaintiffs must allege reliance to show they have statutory standing to pursue each of their

common law fraudulent concealment. *See, e.g.*, *Mirkin v. Wasserman*, 858 P.2d 568, 573-74 (Cal. 1993); *Triggs v. Risinger*, 772 S.W.2d 381, 384 (Mo. Ct. App. 1989).

1. Various Texas Plaintiffs Cannot Prove Reliance.

Under Texas law, reliance cannot be presumed, but must be proven for each consumer. *McManus v. Fleetwood Enters., Inc.*, 320 F.3d 545, 549 (5th Cir. 2003). Reliance cannot be inferred from a consumer purchasing a product, even if it has an undisclosed problem or inflated price. *See Tex. S. Rentals, Inc. v. Gomez*, 267 S.W.3d 228, 237-38 (Tex. App. 2008); *Fidelity & Guar. Life Ins. Co. v. Pina*, 165 S.W.3d 416, 424-25 (Tex. App. 2005); *In re Clorox Consumer Litig.*, 301 F.R.D. 436, 446 (N.D. Cal. 2014); *see also Ford Motor Co. v. Ocanas*, 136 S.W.3d 447, 453 (Tex. App. 2004) (even if defendant wanted plaintiff to rely on its statements, there is no DTPA violation unless the plaintiff actually did rely). Texas courts recognize that a plaintiff might proceed with the transaction for various different reasons. *See Peltier Enters., Inc. v. Hilton*, 51 S.W.3d 616, 623 (Tex. App. 2000) (differences in loan interest rates and thus monthly payments for a vehicle may not be material to a buyer, such as if the buyer cannot acquire financing elsewhere); *Tex. S. Rentals, Inc. v. Gomez*, 267 S.W.3d 228, 238 (Tex. App. 2008) (a consumer might pay an inflated fee for a product for various reasons). A plaintiff cannot prove reliance without showing "what the consumer could have or would have done if he had known about the information." *Peltier Enters., Inc. v. Hilton*, 51 S.W.3d 616, 623-24 (Tex. App. 2000).

Texas courts regularly reject DTPA and fraud claims where a plaintiff relies on statements from sources other than the defendant in buying the product. *See Henry Schein, Inc. v. Stromboe*, 102 S.W.3d 675, 694 (Tex. 2002) (plaintiffs could not show reliance on defendant's

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claims" under the CLRA and UCL); *Coleman-Anacieto v. Samsung Elecs. Am., Inc.*, 2016 WL 4729302, at *10-11, 17 (N.D. Cal. Sept. 12, 2016); *English v. Apple Inc.*, 2016 WL 1188200, at *12 (N.D. Cal. Jan. 5, 2016) ("Courts require a showing of reliance from named plaintiffs asserting UCL claims based on alleged misrepresentations irrespective of which of the UCL's prongs the claims are bought under.").

statements regarding software where plaintiffs "relied on recommendations from colleagues and others"); *McLaughlin v. Northstar Drillings Techs., Inc.*, 138 S.W.3d 24 (Tex. App. 2004) (rejecting DTPA claims where the "record in this case establishes that McLaughlin did not rely on Northstar's promotional literature to hire McLaughlin, but rather on a friend's recommendation"); *Bowles v. Mars, Inc.*, 2015 WL 3629717, at *4 (S.D. Tex. June 10, 2015) (plaintiff could not show reliance on manufacturer's label when plaintiff relied on the recommendation of the retailer that sold him the product).

Under Texas law, neither plaintiff Gareebah Al-ghamdi nor Lisa McClellan can prove reliance on New GM's alleged omission of information about vehicle defects. Al-ghamdi relied on her family in buying her 2004 Chevrolet Impala, testifying that she was influenced by her mother and cousins owning Chevrolets and being happy with those vehicles. SUF ¶ 306. Al-ghamdi's stepfather accompanied her on trips to the dealerships, test drove the Impala, and negotiated its price with the dealership. *Id.* Al-ghamdi did not mention safety as a reason for buying the vehicle and, while she said she wanted a reliable car, she relied on her stepfather to determine this, as he discussed "status of the vehicles, maintenance, and things of that sort" with the dealerships. *Id.* Indeed, despite receiving several recall notices, Al-ghamdi chose to not have the recall repair performed. *Id.* ¶ 309.

Lisa McClellan bought her used vehicle because it had low mileage, she liked the vehicle's look and liked Chevrolets in general, and that she preferred an American car over foreign competitors. *Id.* ¶ 330. McClellan did not mention safety as a reason for buying the vehicles, and mentioned reliability only in general. *Id.* The undisputed evidence establishes that Al-ghamdi and McClellan did not rely on New GM's alleged representations or omissions, and

judgment should be granted against their DTPA claims.[25]

2. Various California Plaintiffs Likewise Cannot Show Reliance.

Under California law "to show actual reliance, whether based on an affirmative misrepresentation or a material omission, Plaintiffs must demonstrate that the misrepresentation or omission was an immediate cause of the injury-causing conduct." *Sud v. Costco Wholesale Corp.*, 229 F. Supp. 3d 1075, 1083 (N.D. Cal. 2017) (collecting and summarizing cases). Plaintiffs must "show that the misrepresentation or omission was a substantial factor in their decision making process." *Id.*; *see also Rojas-Lozano v. Google, Inc.*, 159 F. Supp. 3d 1101 (N.D. Cal. 2016). "If an omission is material, … that one would have behaved different can be presumed, or at least inferred." *Sud*, 229 F. Supp. 3d at 1083. "However, a plaintiff cannot use that presumption if the evidence establishes an actual lack of reliance." *Id.*; *see also Philips v. Ford Motor Co.*, 2016 WL 7428810, at *15-16 (N.D. Cal. Dec. 22, 2016) (presumption or inference does not apply where plaintiffs are exposed to disparate information).

To show reliance on omissions, each plaintiff must prove that (1) "had the omitted information been disclosed one would have been aware of it" and (2) he or she would have "behaved differently." *Mirkin v. Wasserman*, 858 P.2d 568, 574 (Cal. 1993); *see also Webb v. Carter's Inc.*, 272 F.R.D. 489, 502 (C.D. Cal. 2011); *Sud*, 229 F. Supp. at 1083. California courts have rejected claims where plaintiffs cannot show reliance, even where those claims were

[25] For the plaintiffs discussed in Section III.A., plaintiffs' counsel used leading questions to have plaintiffs answer that they would not have purchased the vehicle if they had known of the alleged defects. These improper questions cannot change that when these plaintiffs were asked why they purchased each vehicle, they did not rely on safety or reliability. *See, e.g.*, Fed. R. Evid. 611(c) ("Leading question should not be used on direct examination except as necessary to develop the witness's testimony."); *Rylott-Rooney v. Alitalita-Linee Aeree Italiane SpA*, 2009 WL 37817, at *2-3 (S.D.N.Y. Jan. 6, 2009) (the "assertions in plaintiff's counsel's leading question are, however, not evidence in themselves" and were not sufficient to prevent summary judgment, especially where the witness himself did not offer such testimony); *Newton v. City of New York*, 640 F. Supp. 2d 426, 444-45 (S.D.N.Y. 2009) (striking witness's responses to plaintiffs leading questions and granting summary judgment to defendant).

based on alleged omissions that could cause physical injury. *E.g.*, *Webb v. Carter's Inc.*, 272 F.R.D. 489, 502-03 (C.D. Cal. 2011) (disclosing that children's clothes had toxic chemical may not change consumer behavior depending on perceptions of likelihood of injury and whether disclosure conflicted with consumer's experience); *In re Vioxx Class Cases*, 180 Cal. App. 4th 116, 134 (2009) (consumers who took allegedly harmful drug could not show reliance or materiality if they would still take the drug today or if their physicians would have distrusted statements by the pharmaceutical industry); *Algarin v. Maybelline, LLC*, 300 F.R.D. 444, 457 (S.D. Cal. 2014) (consumers would not be able to prove reliance on claim that makeup would last 24 hours based on their expectations, reasons for purchase, and consumer satisfaction).

According to plaintiffs themselves, New GM's alleged representations or omissions were not a substantial factor for various California plaintiffs. Chimen Basseri testified that she bought her car based on its appearance and because she and her fiancé liked the car:

> Q: How did you decide to buy a 2011 HHR from Valencia of Nissan of Valencia? Sorry.
>
> A. I was looking through the cars.com, you know, locally, but that's the only place that there was a 2011 white HHR, and we wanted to buy that car because we wanted to buy the car. You know, me and my fiancé, we liked the car.

SUF ¶¶ 143.

David Padilla relied on statements by an independent dealer's salesperson that the vehicle was a good buy and because he believed the salesperson was honest:

> Q. When you purchased the 2010 Chevy Cobalt why did you pick that car over the other two or three?
>
> A. Told me it is a good buy. He says, "It is in good shape." It wasn't. Later I found out, but he told me it was and I believed him. But he was honest. He said, "Get it in here." He says, "There is something wrong with it." . . .
>
> Q. Do you recall specifically what [the dealer's salesperson] told you about the Chevy Cobalt when you spoke with him on the day that you purchased it?
>
> A. No. I really -- I liked it and I bought it. I didn't ask no questions on it. . . .

A. I didn't do no shopping for that one. I -- I purchased it when he suggested it.

SUF ¶¶ 168. That Padilla did not mention safety when asked about why he purchased the Cobalt shows that it was not a "substantial factor" in his decision-making.

Various plaintiffs also are unable to prove that they would have been aware of the allegedly omitted information if it had been disclosed pre-purchase. Santiago Orosco and David Padilla did not view any New GM materials before purchasing their vehicles. SUF ¶¶ 161, 169. Their lack of exposure to New GM's alleged statements establishes that they would not have received information disclosed by New GM. *See, e.g.*, *Webb v. Carter's Inc.*, 272 F.R.D. 489, 502 (C.D. Cal. 2011) (plaintiff could not show she would have been aware of disclosures regarding children's clothing where she did not research children's clothes before buying them); *English*, 2016 WL 1188200, at *12 (plaintiff could not show reliance on omissions where she did not read or rely on documents where disclosures would have been made); *Sud*, 229 F. Supp. 3d at 1083-84 (plaintiff could not show reliance on omitted information by arguing it should have been revealed in disclosure where plaintiffs did not read disclosure before making purchase). Basseri bought her vehicle used from a Nissan dealer. SUF ¶ 142. Dealers are unlikely to provide information about another manufacturer's vehicles and thus a buyer will not learn of supposedly omitted information. *See Butler v. Porsche Cars N. Am., Inc.*, 2017 WL 1398316, at *11 (N.D. Cal. Apr. 19, 2017) (noting that "a class member who purchased a used Class Vehicle from a third party may not have interacted with a Porsche representative *at all* prior to purchase, and indeed may not have viewed *any* material or advertisements from Porsche") (emphases in original).

Basseri, Orosco, and Padilla did not rely on New GM's alleged representations or omissions. Judgment should be granted against their consumer and common law fraud claims.

3. Various Missouri Plaintiffs Cannot Show Reliance.

Under Missouri law, the "test of whether a plaintiff relied upon a misrepresentation is simply whether the representation was a material factor influencing final action." *Stein v. Novus Equities Co.*, 284 S.W.3d 597, 603 (Mo. Ct. App. 2009); *Grossoeheme v. Cordell*, 904 S.W.2d 392, 397 (Mo. Ct. App. 1995).

Ronald Robinson and Mario Stefano did not rely upon New GM's alleged misrepresentations or omissions. When asked about the reasons for his vehicle purchase, Robinson testified that he "was looking for low mileage and what I would consider a decent price." SUF ¶ 268. Robinson also relied on the opinion of his brother-in-law, who was in the auto repair business. SUF ¶ 270.

Stefano testified he bought his 2011 Camaro "[b]ecause it is a vehicle that my wife and I enjoy. We've always enjoyed Camaros." *Id.* ¶ 277; *see also Id.* (Stefano bought his 2011 Camaro because "it's a love my wife has for these cars that she loves Camaros. She's had them for so long, and she's driven them for many years. ... [W]e try and support each other by getting vehicles that we like."). Given the couple's shared enjoyment of Camaros, Stefano testified that he did no research before buying and that the purchase was "completely impulse." *Id.* Summary judgment should be granted against R. Robinson and Stefano's fraudulent concealment claims.

B. Plaintiffs Have Not Pled Any Actionable Misrepresentations.[26]

1. Alleged Statements That A Plaintiff Never Saw Or Heard Cannot Have Caused Plaintiff Harm.

In California,[27] Texas,[28] and Missouri,[29] if a plaintiff never saw or heard a statement, that

[26] Plaintiffs plead misrepresentations only in their consumer fraud counts. *E.g.*, 5ACC ¶¶ 1585, 1592, 1594, 1614, 1620, 1622. The arguments in this section apply equally to any other claims to the extent that plaintiffs base those claims on alleged misrepresentations.

representation cannot have caused plaintiff any harm, nor can plaintiff have relied on it. Each plaintiff's misrepresentation claims can be based only on alleged statements he or she actually saw or heard. Santiago Orosco, David Padilla, Deloris Hamilton, Cynthia Hawkins, Kenneth Robinson, Mario Stefano, Gareebah Al-ghamdi, Dawn Fuller, Michael Graciano, and Lisa McClellan testified that they did not see or did not rely on New GM advertisements or materials before buying their vehicles. SUF ¶¶ 161 (Orosco), 169 (Padilla), 247 (Hamilton), 254 (Hawkins), 261 (K. Robinson), 279 (Stefano), 307 (Al-ghamdi), 321 (Fuller), 328 (Graciano), 340 (McClellan). Therefore, they have no valid claims for misrepresentation.

Other plaintiffs vaguely recalled having seen what they believed were advertisements, but cannot recall what these said. Chimen Basseri and Kellie Cereceres claim to have seen New GM advertisements, but do not remember any content and do not know whether they saw any of the statements the 5ACC alleges are inaccurate. *Id*. ¶¶ 144, 151. Brad Akers believes he may have seen one advertisement about his vehicle, but was not sure if it was an advertisement or article, or if it was written by New GM or someone else. *Id*. ¶ 239. Because none of these plaintiffs remember the content of any representations, they cannot have a misrepresentation claim.

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[27] *E.g.*, *Durrell v. Sharp Healthcare*, 183 Cal. App. 4th 1350, 1363 (2010) (plaintiff could not show reliance for UCL claim where he did not read agreement at issue); *Resnick v. Hyundai Motor Am., Inc.*, 2016 WL 9455016, at *15 (C.D. Cal. Nov. 14, 2016) ("Plaintiffs have failed to establish that they were aware of the alleged misrepresentations at the time they purchased their vehicles. Thus, they have failed to sufficiently plead reliance."); *Perkins v. LinkedIn Corp.*, 53 F. Supp. 3d 1190, 1220 (N.D. Cal. 2014); *In re iPhone Application Litig.*, 6 F. Supp. 3d 1004, 1018 (N.D. Cal. 2013); *In re LinkedIn User Privacy Litig.*, 932 F. Supp. 2d 1089, 1093 (N.D. Cal. 2013); *Ehret v. Uber Tech., Inc.*, 148 F. Supp. 3d 884, 901 (N.D. Cal. 2015).

[28] *E.g.*, *Solano v. Landamerica Commonwealth Title of Fort Worth, Inc.*, 2008 WL 5115294, at *9-10 (Tex. App. Dec. 4, 2008) (plaintiff could not show reliance without evidence he saw incorrect description in document); *Chapman v. Pacificare of Tex., Inc.*, 2005 WL 1155108, at *6 (S.D. Tex. Apr. 18, 2005); *Deburro v. Apple, Inc.*, 2013 WL 5917665, at *1 (W.D. Tex. Oct. 31, 2013).

[29] *E.g.*, *Williams v. HSBC Bank USA, N.A.*, 467 S.W.3d 836, 845 (Mo. Ct. App. 2015) (there can be no reliance "where the plaintiff took the action which caused the damage before hearing the alleged misrepresentation").

Christopher Tinen claims to have seen advertising with general themes of dependability and performance, but did not identify whether that advertising was Old GM or New GM, could not recall if these advertisements were about the vehicle he purchased, and could not recall whether he relied on any such themes or statements. *Id*. ¶ 288. As he cannot testify whether these alleged statements caused him to purchase the vehicle, he has no misrepresentation claims.

Moreover, three of the named plaintiffs who cannot recall or did not rely on the content of advertisements they saw testified that the representations in those advertisements were not false or misleading. Basseri and Cereceres admitted that they were not claiming that any of the New GM advertisements were false or misleading. *Id*. ¶¶ 144, 151. Tinen could not identify any representations he believed were untrue. *Id*. ¶ 288. These plaintiffs have no basis for a misrepresentation claim.

2. New GM Cannot Be Liable For The Statements Of Third Parties, Including Independent Dealers.

Plaintiffs cannot maintain misrepresentation claims based on statements made by dealership representatives. Dealerships are separate entities from, and not agents of, New GM. The "relationship between automobile manufacturers and their dealers has been examined by a host of courts throughout the country, all of which have agreed that dealers are not 'agents' of manufacturers." *Williams v. Yamaha Motor Corp., U.S.A.*, 2015 WL 13626022, at *6 & n.9 (C.D. Cal. Jan. 7, 2015) (collecting cases); *State ex rel. Bunting v. Koehr*, 865 S.W.2d 351, 354 (Mo. 1993) ("The relationship between the dealers and [manufacturer] for the sale of [manufacturer's] products is, therefore, that of buyer and seller, not agent and principal."); *Causey v. Sewell Cadillac-Chevrolet, Inc.*, 394 F.3d 285, 290 (5th Cir. 2004).[30] New GM's

[30] *See also Bushendorf v. Freightliners Corp.*, 13 F.3d .1024, 1026 (7th Cir. 1993) (An "automobile dealer or other similar type of dealer, who like [defendant dealer] merely buys goods from manufacturers or other suppliers for resale to the consuming public, is not his supplier's agent."); *Matthews v. Ford*

Dealer Sales and Service Agreements expressly confirm that dealers are not New GM's agents. SUF ¶¶ 379-81.

Santiago Orosco, David Padilla, Michelle Thomas, Brad Akers, Deloris Hamilton, Cynthia Hawkins, Kenneth Robinson, Christopher Tinen, Patrice Witherspoon, Michael Graciano all claim to have relied on statements made by dealership employees, not New GM. SUF ¶¶ 160 (Orosco), 168 (Padilla), 176 (Thomas), 239 (Akers), 246 (Hamilton), 254 (Hawkins), 261 (K. Robinson), 289 (Tinen), 297 (Witherspoon), 328 (Graciano). Such statements cannot be the basis for liability against New GM.

3. The Alleged Misrepresentations Are Non-actionable Puffery.

California,[31] Texas,[32] and Missouri[33] hold that puffery is not actionable under statutory or common law fraud. "Ultimately, the difference between a statement of fact and mere puffery rests in the specificity or generality of the claim." *Newcal Indus., Inc. v. Ikon Office Solution*,

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Motor Co., 479 F.2d 399, 403 & n.l3 (4th Cir. 1973) (noting that authorized dealer was not an agent of automobile manufacturer); *Capital Ford Truck Sales, Inc. v. Ford Motor Co.*, 819 F. Supp. 1555, 1580 (N.D. Ga. 1992); *Ortega v. Gen. Motors Corp.*, 392 So.2d 40, 43 (Fla. Dist. Ct. App. 1980); *Arnson v. Gen. Motors Corp.*, 377 F. Supp. 209, 213 (N.D. Ohio 1974).

[31] *Consumer Advocates v. Echostar Satellite Corp.*, 113 Cal. App. 4th 1351, 1353 (2d Dist. 2003) (holding that statements such as "crystal clear" and CD quality" were not factual representations and thus could not be the basis of liability under the UCL or CLRA); *Stickrath v. Globalstar, Inc.*, 527 F. Supp. 2d 992, 998 (N.D. Cal. 2007); *Atari Corp. v. The 3DO Co.*, 1994 WL 723601, at *2-3 (N.D. Cal. May 16, 1994); *Grassi v. Int'l Comfort Prods., LLC*, 2015 WL 4879410, at *6 (E.D. Cal. Aug. 14, 2015).

[32] *Autohaus, Inc. v. Aguilar*, 794 S.W.2d 459, 462 (Tex. App. 1990) ("[W]e hold that if the statements alleged to be misrepresentations are, in fact, only puffing or opinion, they cannot be actionable representations under the DTPA."); *id.* at 463 ("The Texas courts have routinely discussed puffing and opinion in breach of warranty and fraud cases."); *id.* at 464 (holding that representations that car "was the best engineered car in the world" and "probably would not have mechanical difficulties" were inactionable puffery); *McNeely v. Salado Crossing Holding, L.P.*, 2017 WL 2561551, at *3 (Tex. App. June 14, 2017); *Diais v. Land Rover Dallas, L.P.*, 2016 WL 1298392, at *4 (Tex. App. Apr. 4, 2016).

[33] *Williams v. United Techs. Corp.*, 2015 WL 7738370, at *8 (W.D. Mo. Nov. 30, 2015) ("Defendants' claims that its products were 'reliable' and 'built to last,' constitute non-actionable puffery" under the MMPA); *Wright v. Bath & Body Works Direct, Inc.*, 2012 WL 12088132, at *2 (W.D. Mo. Oct. 17, 2012); *Cortinas v. Behr Process Corp.*, 2017 WL 2418012, at *2 (E.D. Mo. June 5, 2017).

513 F.3d 1038, 1053 (9th Cir. 2008) (California law). "The common theme that seems to run through cases considering puffery in a variety of contexts is that consumer reliance will be induced by specific rather than general assertions." *Id.* (internal citations omitted). "Thus, a statement that is quantifiable, that makes a claim as to the 'specific or absolute characteristics of a product,' may be an actionable statement of fact while a general, subjective claim about a product is non-actionable puffery." *Id.*

"[C]ourts have repeatedly held that general statements about a brand's quality, or a product's safety, are too vague or lacking in factual content to be actionable." *TACC MTD Opinion*, 2016 WL 3920353 at *10. Consistent with the Court's ruling, California, Texas, and Missouri hold that general statements concerning safety or reliability are inactionable puffery.

The California Supreme Court has recognized that if "defendants' assertion of safety is merely a statement of opinion—mere 'puffing'—they cannot be held liable for its falsity." *Hauter v. Zogarts*, 14 Cal. 3d 104, 111 (1975);[34] *see also Sims v. Kia Motors Am., Inc.*, 2014 WL 12558249, at *1, 7 (C.D. Cal. Mar. 31, 2014) (advertisements where "safety and quality were consistent themes" including that the vehicles "are engineered to help ensure everyone's well-being" were puffery under the UCL and FAL) (internal citation omitted); *Azoulai v. BMW of N. Am., LLC*, 2017 WL 1354781, at *1, 8 (N.D. Cal. Apr. 13, 2017) (representation that vehicle soft close door system operated "safely" was puffery despite door crushing plaintiff's fingers: "Contrary to what Plaintiffs contend, there is nothing 'specific and measurable' about the word 'safely.'"); *Cirulli v. Hyundai Motor Co.*, 2009 WL 5788762, at *3 (C.D. Cal. June 12, 2009).

In Texas, statements that an airplane's engine was "'good, safe and reliable' … amount to

[34] After holding that puffing about safety was not actionable, *Hauter* ultimately concluded that the statements at issue in that case were sufficiently specific and measurable to be factual. Specifically, *Hauter* concerned a golfing training device where the defendant represented that "Completely Safe Ball Will Not Hit Player," when, in fact, the plaintiff was struck in the head by the golf ball. *Id.* at 109, 112.

mere opinion or puffing." *Bill & Joe Deane Bradford Invs., Inc. v. Cutter Aviation San Antonio, Inc.*, 2005 WL 3161083, at *2 (Tex. App. Nov. 23, 2005); *Chandler v. Gener Messer Ford, Inc.*, 81 S.W.3d 493, 501 (Tex. App. 2002) (dealership salesman's statement that one car would be "safer" than another was "'sales talk' or 'puffing' which are not actionable under the DTPA"); *Dunlap v. Gayle*, 2013 WL 1500377, at *4 (Tex. App. Apr. 11, 2013); *Greater Houston Transp. Co. v. Uber Techs., Inc.*, 155 F. Supp. 3d 670 (S.D. Tex. Dec. 2015).

Missouri has explained that allegations that "GM has through its national advertisements, press releases and promotions created a false impression that the ABS system is 'safe and reliable'" were "statements of puffery." *In re Gen. Motors Anti-Lock Brake Prods. Liab. Litig.*, 966 F. Supp. 1525, 1534 (E.D. Mo. 1997), *aff'd*, *Briehl v. Gen. Motors Corp.*, 172 F.3d 623 (8th Cir. 1999); *Williams v. United Techs. Corp.*, 2015 WL 7738370, at *8 (W.D. Mo. Nov. 30, 2015) ("Defendants' claims that its products were 'reliable' and 'built to last,' constitute non-actionable puffery" under the MMPA).[35] Beyond the bellwether states, decisions across the nation hold that automotive companies' general statements of safety or reliability are not actionable.[36]

The handful of plaintiffs in the three bellwether states who claim to have seen New GM

[35] In denying New GM's motion to dismiss plaintiffs' Wisconsin consumer fraud, the Court found that some of plaintiffs' statements were actionable, but that conclusion does not apply here. *FACC MTD Opinion*, 257 F. Supp. at 457-58. The Court's prior opinion dealt with the particularities of Wisconsin law, while California, Texas, and Missouri law all make clear that general statements regarding safety are puffery. Moreover, the prior opinion concerned a motion to dismiss where the complaints alleged, and the Court was required to assume, that each plaintiff viewed a range of statements. By contrast, on summary judgment each plaintiff must produce evidence of each specific representation of which he or she relies. The evidence shows that the New GM representations plaintiffs heard or saw, if any, are not actionable.

[36] *E.g.*, *In re Ford Motor Co. Sec. Litig., Class Action*, 381 F.3d 563, 570 (6th Cir. 2004); *Zaccagnino v. Nissan N. Am., Inc.*, 2015 WL 3929620, *4 (S.D.N.Y. June 17, 2015); *Mitchell v. Gen. Motors LLC*, 2014 WL 1319519, at *8 (W.D. Ky. Mar. 31, 2014); *Sabol v. Ford Motor Co.*, 2015 WL 4378504, *5 (E.D. Pa. July 16, 2015); *Daigle v. Ford Motor Co.*, 2012 WL 3113854, *9 (D. Minn. July 31, 2012); *In re Ford Motor Co. E-350 Van Prods. Liab. Litig. (No. II)*, 2010 WL 2813788, at *8-9 (D.N.J. July 9, 2010); *Hoffman v. A. B. Chance Co.*, 339 F. Supp. 1385, 1388 (M.D. Pa. 1972).

statements and recalled their content cite only puffery. Ronald Robinson claims he saw advertising about the vehicle's "quality." SUF ¶ 269. Patrice Witherspoon does not claim the advertisements made any statements, but rather depicted vehicles being hit with a baseball bat or shopping cart, which she asserts gave the impression of safety. *Id*. ¶ 297. Dawn Bacon claims she saw an advertisement describing a vehicle as being "first in its class in safety." *Id*. ¶ 314. Michelle Thomas alleges that she saw advertisements talking generally about "safety" and "reliability," though she does not recall what the advertisements specifically said about any vehicle. *Id*. ¶ 176. These general references are classic puffery; summary judgment should be granted against these plaintiffs' misrepresentation claims.

C. Plaintiffs' Implied Warranty Claims Are Barred In Whole Or In Part.[37]

1. New GM Warranties Exclude Benefit-of-the-Bargain, Lost Time, and Other Consequential Damages.

Texas and Missouri allow a manufacturer to limit the remedy for breach of implied warranty to repair and replacement of nonconforming parts, and also to exclude all consequential damages. Both states' UCC provisions on implied warranties state that "the agreement may provide for remedies in addition to or in substitution for those provided in this article and may limit or alter the measure of damages recoverable under this article, as by limiting the buyer's remedies to … repair and replacement of nonconforming goods or parts." Mo. Rev. Stat. § 400.2-719(1)(a); Tex. Bus. & Com. Code § 2.719(a)(1). "Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not." Mo. Rev. Stat. §

[37] If Texas plaintiffs' implied warranty claims are barred, their DTPA claims also are barred to the extent they are based on implied warranty. *See BaySystems N. Am. LLC v. Rosebud-Lott Indep. Sch. Dist.*, 2011 WL 6989898, at *3-4 (Tex. App. Dec. 21, 2011).

400.2-719(3); Tex. Bus. & Com. Code § 2.719(c).

All of New GM's (and Old GM's) express warranties for the named plaintiffs' vehicles limit implied warranties in accord with these UCC provisions. SUF ¶ 362. Those warranties provide in bold, conspicuous language that **"Performance of repairs and needed adjustments is the exclusive remedy under this written warranty or any implied warranty. GM shall not be liable for incidental or consequential damages, such as, but not limited to, lost wages or vehicle rental expenses, resulting from breach of this written warranty or any implied warranty."** *Id*. Texas[38] and Missouri[39] courts have enforced similar warranties limiting remedies to repair and replacement where plaintiffs sought economic losses and manufacturers agreed to repair the product.

Therefore, for implied warranty, Texas and Missouri plaintiffs are limited to "repair and replacement of nonconforming goods or parts," which New GM has already provided through the 2014 recalls. Plaintiffs' alleged economic loss damages are barred by the warranties' terms. No Texas or Missouri plaintiff[40] can obtain benefit-of-the-bargain, lost time, or other

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[38] *Henderson v. Ford Motor Co.*, 547 S.W.2d 663, 669 (Tex. App. 1977) (explaining that warranty satisfied its purpose where a "limited warranty to repair defects within the limitation prescribed without expense to the purchaser was given in lieu of any implied warranty of merchantability or fitness"); *Emmons v. Durable Mobile Homes, Inc.*, 521 S.W.2d 153, 154 (Tex. App. 1974) (holding that warranty limiting remedy to replacement of parts in a mobile home was reasonable, conscionable, and conspicuous, despite plaintiff's assertions that home was unfit for its intended purpose); *Mostek Corp. v. Chemetron Corp.*, 642 S.W.2d 20, 25 (Tex. App. 1982).

[39] *Russo v. Hilltop Lincoln-Mercury, Inc.*, 479 S.W.2d 211, 213 (Mo. Ct. App. 1972) (enforcing warranty's limitation of remedies to replacement or repair of defective parts to exclude plaintiff's damages for renting an alternative vehicle and for interest paid on car loan).

[40] These limitations on damages apply regardless of whether a plaintiff bought a vehicle new or used. *E.g., Welwood v. Cypress Creek Estates, Inc.*, 205 S.W.3d 722, 729 (Tex. App. 2006) ("Other cases indicate that disclaimers may apply to subsequent purchasers."); *Heritage Res., Inc. v. Caterpillar Fin. Servs. Corp.*, 774 N.W.2d 332, 345 (Mich. Ct. App. 2009); *Theos & Sons, Inc. v. Mack Trucks, Inc.*, 1999 WL 38393 (Mass. App. Ct. 1999); *LeCates v. Hertrich Pontiac Buick Co.*, 515 A.2d 163, 166 (Del. Super. Ct. 1986); *Gen. Motors Corp. v. Halco Instruments, Inc.*, 185 S.E.2d 619, 622 (Ga. Ct. App. 1971).

consequential damages under an implied warranty theory and, therefore, summary judgment should be granted against such claims.

2. Various Plaintiffs' Implied Warranty Claims Are Barred By The Statutory Limitations Period.

Both Texas and Missouri apply a four-year statute of limitations to implied warranty claims. Mo. Rev. Stat. § 400.2-725(1); Tex. Bus. & Com. Code § 2.725(1). The "cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach" and a "breach of warranty occurs when tender of delivery is made . . . ." Mo. Rev. Stat. § 400.2-725(2); Tex. Bus. & Com. Code § 2.725(2). Thus, the limitations period for implied warranty claims begins to run whether the vehicle is delivered to the plaintiff, and cannot be extended by any discovery period.[41]

In general, Texas and Missouri plaintiffs' implied warranty claims are time-barred if they purchased their vehicles before March 14, 2010. While filing a class action can, in certain circumstances, toll the limitations periods for absent class members, *see Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974), the first nationwide class action relating to the Delta Ignition Switch was filed on March 14, 2014. *See Brandt v. Gen. Motors, LLC*, Case No. 2:14-cv-00079, Docket No. 1, Original Class Action Complaint (S.D. Tex. Mar. 14, 2014). If a plaintiff purchased a vehicle before March 14, 2010, the four-year limitations period expired before that plaintiff could benefit from class action tolling.

Named plaintiffs Brad Akers, Kenneth Robinson, Christopher Tinen, Patrice

[41] *Buffington v. Lewis*, 834 S.W.2d 601, 603 (Tex. App. 1992) ("actions based on breach of warranty are not subject to the discovery rule" and "a warranty action accrues when delivery occurs and must be brought within four years after accrual"); *Muss v. Mercedes-Benz of N. Am.*, 734 S.W.2d 155, 158 (Tex. App. 1987) (claim of plaintiff alleging latent defects in his vehicle accrued on the date of delivery); *Safeway Stores, Inc. v. Certainteed Corp.*, 710 S.W.2d 544, 546-48 (Tex. 1986); *Schneider v. G. Guilliams, Inc.*, 976 S.W.2d 522, 529 (Mo. Ct. App. 1998); *May v. AC & S, Inc.*, 812 F. Supp. 934, 944-45 (E.D. Mo. 1993).

Witherspoon, and Gareebah Al-ghamdi all purchased their vehicles before March 14, 2010. SUF ¶ 237 (Akers bought his 2009 HHR in 2009), ¶ 260 (K. Robinson purchased his 2008 Pontiac G5 on September 7, 2008), ¶ 286 (Tinen purchased his 2010 Acadia on February 22, 2010), ¶ 296 (Witherspoon purchased her 2006 Ion in 2005), ¶ 305 (Al-ghamdi purchased her 2004 Impala on September 7, 2009). Each of their implied warranty claims is time-barred.

3. Various Plaintiffs' Implied Warranty Claims Are Barred By The Time And Mileage Limits In The Vehicles' Warranties.

Texas and Missouri have adopted UCC § 2-316 permitting the "Exclusion or Modification of Warranties." Mo. Rev. Stat. § 400.2-316; Tex. Bus. & Com. Code § 2.316. To "exclude or modify the implied warranty of merchantability of any part of it the language must mention merchantability and in case of a writing must be conspicuous." Mo. Rev. Stat. § 400.2-316(2); Tex. Bus. & Com. Code § 2.316(b). The warranties here contain such conspicuous language, stating in bolded text that, "**Any implied warranty of merchantability or fitness for a particular purpose applicable to this vehicle is limited in duration to the duration of this written warranty.**" SUF ¶ 362. In accord with the UCC, courts across the country have enforced similar limitations of implied warranties for vehicles and other products.[42]

Nearly all the written warranties of the vehicles at issue provide that "[c]overage is for

[42] *Deburro v. Apple, Inc.*, 2013 WL 5917665, at *7 (W.D. Tex. 2013) (enforcing one-year limit on implied warranties); *Brisson v. Ford Motor Co.*, 349 F. App'x 433, 434-35 (11th Cir. 2009) ("We also agree with the district court's ruling that plaintiffs' failure to allege that they experienced a defect within the warranty period of the three years or 36,000 miles is fatal. … Ford limited the implied warranty to the period of the express warranty, as expressly permitted by the MMWA, and plaintiffs failed to allege that a defect manifested itself or a breach occurred within that period."); *Meserole v. Sony Corp. of Am., Inc.*, 2009 WL 1403933, at *9 (S.D.N.Y. May 19, 2009) (enforcing disclaimer that stated that any implied warranty of merchantability or fitness for a particular purpose was limited to the duration of an express warranty); *Stevenson v. Mazda Motor of Am., Inc.*, 2015 WL 3487756, at *12 (D.N.J. June 2, 2015) (collecting cases).

the first 3 years or 36,000 miles, whichever comes first." *Id*. ¶ 363.[43] The sole exception is Dawn Bacon's Cadillac CTS, which states that "[c]overage is for the first 4 years or 50,000 miles, whichever comes first." *Id*. ¶ 364. As the first class action relating to the Delta Ignition Switch was filed on March 14, 2014, plaintiffs' implied warranty claims are barred if they purchased their vehicles before March 14, 2011 (or in Bacon's case, 2010), or if the vehicle had more than 36,000 miles (or in Bacon's case, 50,000 miles) before March 14, 2014.

The vehicles of Brad Akers, Deloris Hamilton, Kenneth Robinson, Christopher Tinen, Patrice Witherspoon, Gareebah Al-ghamdi, Dawn Bacon, Dawn Fuller, Michael Graciano, and Lisa McClellan each was either more than three years old or had more than 36,000 miles in March 2014.[44] These plaintiffs' implied warranty claims are barred.

4. Numerous Plaintiffs' Substantial Use Of Their Vehicles Precludes Their Implied Warranty Claims.

For California plaintiffs to recover under the Song-Beverly Act, or Texas or Missouri plaintiffs to recover under the UCC, for breach of implied warranty, they must prove that their

[43] In the *Cockram* summary judgment decision, the Court suggested that the 5-year powertrain warranty might cover the ignition system. *In re Gen. Motors LLC Ignition Switch Litig.*, 202 F. Supp. 3d 362, 370 (S.D.N.Y. 2016). The warranties define what is included in powertrain coverage—which is various parts of the engine, transmission, transaxle, transfer case, and drive systems (subject to various exclusions)—and do not include the ignition system as part of the powertrain. SUF ¶ 365. Accordingly, the ignition switch is subject to the bumper-to-bumper warranty.

[44] *See* SUF ¶ 242 (Akers' vehicle was originally bought in 2009; it also had 133,781 miles when repairs were conducted in mid-2014), ¶ 244 (Hamilton's vehicle was originally bought in 2000 or 2001), ¶ 257 (Hawkins' 2010 Cobalt had approximately 52,000 miles when she purchased it in July 2013), ¶ 260 (K. Robinson's 2008 Pontiac G5 was originally sold on September 7, 2008), ¶¶ 267, 273 (R. Robinson's 2010 Impala was bought used in June 2011; it had 25,000 miles at that time and over 77,000 when the recall was conducted), ¶ 286 (Tinen bought his 2010 Acadia on February 22, 2010), ¶ 296 (Witherspoon purchased her 2006 Ion in 2005), ¶¶ 304, 310 (Al-ghamdi purchased a used 2004 Impala; it had 80,000 miles in September 2009), ¶¶ 312, 317 (Bacon purchased a used 2006 Cadillac CTS; it had approximately 160,000 miles in January 2013), ¶ 328 (Fuller bought a 2008 Impala; it had over 79,000 miles in December 2011), ¶ 331 (Graciano's vehicle is a 2007 Cobalt; it had 43,991 miles in October 2011), ¶ 344 (McClellan's vehicle is a 2005 Malibu Maxx, which had approximately 60,000 to 70,000 miles in November 2010).

vehicles were not merchantable. Courts "have consistently held that an automobile that was driven for years without problems was merchantable and fit for its ordinary use at the time of sale." *Szymczak v. Nissan N. Am., Inc.*, 2011 WL 7095432, at *11 (S.D.N.Y. Dec. 16, 2011); *see also Skeen v. BMW of N. Am., LLC*, 2014 WL 283628, at *16 (D.N.J. Jan. 24, 2014) ("A claim for breach of implied warranty must ordinarily arise shortly after purchase—there will typically be no claim for breach of implied warranty where plaintiffs have driven their cars without problems for years."). This rule applies where plaintiffs allege that the vehicle has a latent, safety-related defect. In *Am. Suzuki Motor Corp. v. Superior Court*, plaintiffs alleged that the Suzuki Samurai had "an unacceptable risk of a deadly roll-over accident." 44 Cal. Rptr. 2d 526, 528 (Cal. App. Ct. 1995). But because "the vast majority of the Samurais sold to the putative class did what they were supposed to do for as long as they were supposed to do it, we conclude that these vehicles remained fit for their ordinary purpose." *Id.* at 531 (internal citations and quotations omitted). California courts have rejected Song-Beverly Act claims where "Plaintiffs' car operated for four years without apparent problem, easily satisfying any implied warranty that might attach as a matter of law." *Larsen v. Nissan N. Am.*, 2009 WL 1766797, at *6 (Cal. Ct. App. June 23, 2009); *see also Avedisian v. Mercedes-Benz USA, LLC*, 43 F. Supp. 3d 1071, 1079 (C.D. Cal. 2014) (vehicle was merchantable where plaintiff drove it for approximately 4.5 years and over 65,000 miles, despite peeling chrome cutting plaintiffs' hands).[45]

Courts nationwide have reached similar conclusions, rejecting implied warranty claims where vehicles operated for years or tens of thousands of miles without incident. *See, e.g.*, *Ford Motor Co. v. Fairley*, 398 So.2d 216, 219 (Miss. 1981) ("As to the breach of any implied

[45] Contrast these cases with *Isip v. Mecedes-Benz USA*, 65 Cal. Rptr. 3d 695, 696 (Cal. App. Ct. 2007), where a new vehicle began exhibiting numerous problems in its first year after being driven only 3,900 miles and *Mexia v. Rinker Boat Co., Inc.*, 95 Cal. Rptr. 3d 285, 288 (Cal. App. Ct. 2009), where a boat exhibited defects after only 27 months of use.

warranty of merchantability, the car had been driven over two years and 26,649 miles before Fairley experienced any difficulty with it. Such service as a matter of law negates a breach of an implied warranty of merchantability of this car."); *Tellinghuisen v. Chrysler Group, LLC*, 84 U.C.C. Rep. Serv. 2d 564 (Minn. Ct. App. 2014) (vehicle was merchantable when plaintiff "drove the car for nearly 31,000 miles over the course of more than a year before the alleged defect first manifested itself"); *Suddreth v. Mercedes-Benz, LLC*, 2011 WL 5240965, at *4 (D.N.J. Oct. 31, 2011) ("It is simply not plausible that a motor vehicle could be classified as not merchantable when it has been used for its intended purpose for 4 years and 50,000 miles").[46]

Court also reject implied warranty claims where owners continue to drive their vehicles even after learning of alleged defects. *See, e.g., Priebe v. Autobarn, Ltd.*, 240 F.3d 584, 588 (7th Cir. 2001) ("Although Priebe maintains that he 'lost faith' in the Acura and believed it was 'dangerous to drive,' his actions belie these vague claims. Priebe continued to drive the car; indeed, at the time of trial, Priebe had driven the Acura more than 30,000 miles. Priebe's claim for breach of warranty fails."); *Glass v. BMW of N. Am., LLC*, 2011 WL 6887721, at *15 (D.N.J. Dec. 29, 2011); *Adams v. Am. Suzuki Motor Corp.*, 2011 WL 1304766, at *1, 5 (N.J. Super. Ct. App. Div. 2011).

Many named plaintiffs drove their vehicles for years and tens of thousands of miles without incident:

- Chimen Basseri bought her used 2011 HHR in March 2013 and had driven it over 13,000 miles prior to its recall repair. SUF ¶¶ 142, 147. She had driven another 13,000 miles by

[46] *See also Bussian v. DaimlerChrysler Corp.*, 411 F. Supp. 2d 614 (M.D.N.C. 2006) (vehicle was merchantable despite ball joints needing to be replaced five years after vehicles original sale); *Lee v. Gen. Motors Corp.*, 950 F.Supp. 170, 174 (S.D. Miss. 1996) (no merchantability claim where vehicles had been driven for five years and 90,000 miles without manifesting their alleged defects); *Williams v. Kia Motors Am., Inc.*, 2005 WL 2649152, at *4 (E.D. Mich. Oct. 14, 2005); *Tague v. Autobarn Motors, Ltd.*, 914 N.E.2d 710, 722 (Ill. App. Ct. 2009); *Sharp v. Tom Wood East, Inc.*, 822 N.E.2d 173, 175 (Ind. Ct. App. 2004); *see also Suminski v. Maine Appliance Warehouse, Inc.*, 602 A.2d 1173 (Me. 1992).

November 2017, operating her vehicle for over four years. *Id*. ¶ 147. She has never experienced a shut off, loss of power steering, or other similar incident. *Id*. ¶ 145.

- Kellie Cereceres bought a new 2012 Traverse that had over 32,000 miles when the recall repair was performed. *Id*. ¶ 155. She continues to drive the vehicle, which had over 80,000 miles in December 2017. *Id*. She claims that on a single occasion the airbag light briefly illuminated before turning off again, but she did not take her vehicle to be serviced afterwards and has no evidence that this illumination was related to any defect. *Id*. ¶ 153.

- Santiago Orosco bought a new 2010 Camaro in August 2009. *Id*. ¶ 158. He drove the vehicle 145,000 miles and used it for seven years before selling it in August 2016. *Id*. ¶ 164. While he claims his daughter told him she experienced a single shut off-incident in the vehicle, this is inadmissible hearsay and there is no evidence that any defect caused this single shutoff. *Id*. ¶ 162. Orosco himself never experienced an incident in the 2010 Camaro. *Id*.

- David Padilla purchased a new 2010 Cobalt in April 2010, which he drove over 20,000 miles and used for years before he gave the vehicle to his son to trade in. *Id*. ¶¶ 167, 173. While Padilla claims that sometimes he had difficulty turning the key to start the vehicle, the Cobalt did not shut off while moving. *Id*. ¶ 170.

- Michelle Thomas purchased a used 2005 Lacrosse in December 2010. *Id*. ¶ 175. She drove the vehicle approximately 100,000 miles over the course of four-and-a-half years before she claimed that the ignition switch rotated out of position. *Id*. ¶¶ 177-79.

- Brad Akers bought his 2009 HHR in 2009, continues to drive it, and had put 177,777 miles on the vehicles as of November 2016. *Id*. ¶¶ 237, 242. He claims that a single time in 2013 the vehicle lost power, but does not know the key's position and has no evidence that the power loss was caused by any defect. *Id*. ¶ 240.

- Deloris Hamilton bought a 2000 Alero in February 2012, which she drove for approximately 12,000 to 13,000 miles over a two-and-a-half year period before giving it to her daughter. *Id*. ¶¶ 245, 250. She never experienced a moving stall, loss of power steering, or other similar incident. *Id*. ¶ 248.

- Mario Stefano bought a used 2011 Camaro in May 2013, which he drove more than 25,000 miles as of November 2016 and continues to use. *Id*. ¶ 276, 282. He experienced only a single event where he lost power, and believes this was caused by a faulty battery in the key fob rather than being related to the ignition. *Id*. ¶ 281. Stefano continues to drive his Camaro and regularly displays it at cars shows. *Id*. ¶ 283.

- Patrice Witherspoon bought a new 2006 Ion in 2005, and had driven it approximately 175,000 to 180,000 miles as of May 2017. *Id*. ¶¶ 296, 300. She claims to have experienced shut offs while driving, but on each occasion the ignition was in the "run" position, and thus the incidents were not related to the recall condition. *Id*. ¶ 299.

- Dawn Fuller purchased a used 2008 Impala in December 2011, which she has driven over 95,000 miles and continues to drive of September 2017. *Id*. ¶¶ 320, 324. She had never experienced a moving stall, loss of power steering, or similar incident. *Id*. ¶ 322.

- Michael Graciano bought a used 2007 Cobalt in October 2011, which he and his family drove for almost 60,000 miles as of December 2016 and which they used regularly until April 2017. *Id*. ¶¶ 327, 331, 330. While his then-fiancee's daughter alleged she experienced incidents, such claims are inadmissible hearsay, and Graciano himself does not claim to have had problems with the vehicle. *Id*. ¶ 329.

Summary judgment should be granted against the California Song-Beverly Act or UCC breach of implied warranty made by each of these plaintiffs.

D. All Plaintiffs' Unjust Enrichment Claims Are Barred.

None of the named plaintiffs has a valid unjust enrichment claim. The Court already held that "the unjust enrichment claims of all the Texas Plaintiffs fall short because they have an adequate remedy at law." *FACC MTD Opinion*, 257 F. Supp. 3d at 455. Judgment should be entered on that ground against all Texas plaintiffs' unjust enrichment claims in the 5ACC. All of the California and Missouri plaintiffs' unjust enrichment claims fail for the same reason, and various plaintiff's claims also fail because their vehicles were covered by warranties.

1. California Law Precludes Plaintiffs' Unjust Enrichment Claims.

As with Texas, California holds that an unjust enrichment or restitution claim cannot be brought where a plaintiff has adequate legal remedies:

> Because we have found that plaintiffs' remedies at law are adequate (counts alleged under the CLRA, the UCL, and common law fraud), a claim for restitution, alleging that [the defendant] has been unjustly enriched by its fraud, is unnecessary. This conclusion follows from the general principle of equity that equitable relief (such as restitution) will not be given when the plaintiff's remedies at law are adequate.

Collins v. eMachines, Inc., 202 Cal. App. 4th 249, 260 (2011); *see also Ramona Manor Convalescent Hosp. v. Care Enters.*, 177 Cal. App. 3d 1120, 1140 (1986) (explaining that there is "no action for restitution . . . in cases of wrongful dispossession of land because the remedy in

tort damages is adequate").[47] All named California plaintiffs seek damages as a legal remedy under the CLRA, fraudulent concealment, and the Song-Beverly Act, and thus their unjust enrichment claims are barred.[48]

Independently, the Court previously held that California plaintiffs could not bring claims where "their cars were covered by warranties at the time of purchase." *TACC MTD Opinion*, 2016 WL 3920353, at *23. The Court previously dismissed David Padilla's unjust enrichment claim on this ground. *Id.* at *23, 42 (Exhibit A). Chimen Basseri, Kellie Cereceres, and Santiago Orosco also purchased vehicles covered by warranties, and summary judgment should be granted against each of their unjust enrichment claims. SUF ¶¶ 142, 150, 158.

2. Missouri Law Precludes Plaintiffs' Unjust Enrichment Claims.

Like Texas and California, Missouri bars the equitable remedy of unjust enrichment where an adequate remedy at law exists. *Bennett v. Crane* rejected unjust enrichment claims because of "the unmistakable barrier that an adequate remedy at law exists . . . . If equity alone were left to impose a remedy because there is no remedy at law, then we would be on safe ground, and only then." 289 S.W. 26, 28 (Mo. Ct. App. 1926). Courts follow *Bennett* in holding that Missouri does not allow recovery for unjust enrichment where a plaintiff has an adequate legal remedy. *E.g.*, *Muehlbauer v. Gen. Motors Corp.*, 2009 WL 874511, at *6 (N.D. Ill. Mar.

[47] *See also Stanislaus Food Prods. Co. v. USS-POSCO Indus.*, 2010 WL 3521979, at *32 (E.D. Cal. Sept. 3, 2010) (dismissing unjust enrichment claim where plaintiff "alleges numerous statutory violations which protect it from the same alleged harm as contained in plaintiff's unjust enrichment claim"); *Goodrich & Pennington Mortgage Fund, Inc. v. Chase Home Fin., LLC*, 2008 WL 11338041, at *4 (S.D. Cal. Apr. 22, 2008) ("However, unjust enrichment is an equitable rather than a legal claim, and it is a basic doctrine of equity jurisprudence that courts of equity should not act when the moving party has an adequate remedy at law.") (internal quotation marks and modifications omitted); *Zapata Fonseca v. Goya Foods Inc.*, 2016 WL 4698942, at *7 (N.D. Cal. Sept. 8, 2016).

[48] Whether plaintiffs can prevail on any of these claims is irrelevant; the existence of adequate remedies at law bars any unjust enrichment claims. *See, e.g.*, *Tudor Dev. Group, Inc. v. U.S. Fidelity & Guar. Co.*, 968 F.2d 357, 364 (3d Cir. 1992); *Fernandes v. Havkin*, 731 F. Supp. 2d 103, 114 (D. Mass. 2010); *Season Comfort Corp. v. Ben A. Borenstein Co.*, 655 N.E.2d 1065, 1071 (Ill. App. Ct. 1995).

31, 2009); *Martin v. Ford Motor Co.*, 292 F.R.D. 252, 280 (E.D. Pa. July 2, 2013); *Thompson v. Bayer Corp.*, 2009 WL 362982, at *6 (E.D. Ark. 2009). Because all of the Missouri plaintiffs have adequate legal remedies, their unjust enrichment claims are barred.

Separately, the Court previously held that Missouri plaintiffs' claims are barred where they "allege[] the existence of an express warranty . . ., and [their] unjust enrichment claims arise out of the same allegations." *TACC MTD Opinion*, 2016 WL 3920353, at *35. Because Brad Akers, Kenneth Robinson, Mario Stefano, Christopher Tinen, and Patrice Witherspoon all received express warranties with their vehicles, summary judgment should be granted against their unjust enrichment claims. SUF ¶¶ 237 (Akers), 260 (K. Robinson), 276 (Stefano), 287 (Tinen), 296 (Witherspoon).

E. Summary Judgment Should Be Granted Against Claims Of Plaintiffs Who Purchased Old GM Or Used Vehicles.

1. New GM Had No Duty To Disclose To Old GM Vehicle Purchasers.

a. New GM Did Not Have A Duty Under California Law.

New GM can be liable for an omission under the UCL, CLA, or fraudulent concealment only if New GM had a duty to disclose. *TACC MTD Opinion*, 2016 WL 3920353, at *20-22. Under California law, unless the parties are in a fiduciary relationship, the "circumstances in which nondisclosure may be actionable presupposes the existence of some other relationship between the plaintiff and defendant in which a duty to disclose can arise." *LiMandri v. Judkins*, 60 Cal. Rptr. 2d 539, 543 (Cal. Ct. App. 1997). "As a matter of common sense, such a relationship can only come into being as a result of some sort of *transaction* between the parties." *Id.* (emphasis in original) (holding that because there was no transaction giving rise to a

relationship, defendant could not be liable for nondisclosure).[49]

Under California law, New GM did not have a duty to disclose to Michelle Thomas, who bought a used 2005 Lacrosse in December 2010. Thomas has no argument that New GM owed her a fiduciary duty. Nor was there any transaction between Thomas and New GM that could create a relationship giving rise to a duty to disclose. Thomas bought her used Old GM vehicle from an independent dealership, and did not enter into any transaction with New GM. SUF ¶ 175. Without any transactional relationship, New GM had no duty to disclose information to Thomas and her omission claims fail.

b. New GM Did Not Have A Duty Under Texas Law.

The lack of any transaction between New GM and plaintiffs who purchased Old GM vehicles similarly dooms Texas plaintiffs' omission-based claims under the Texas DTPA. Such claims require a duty to disclose.[50] Like California, Texas holds that a duty to disclose arises only if the parties transact. For example, in *Steele v. Goddard*, a jury found Robert, an advisor to a home seller, liable under the DTPA for failing to disclose that the home had termites. 2013

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[49] *See also Hoffman v. 162 North Wolfe LLC*, 175 Cal Rptr. 3d 820, 827-30 (Cal. Ct. App. 2014) (defendant could not be liable for omission in absence of "circumstances that constitute a transactional relationship between the parties" and collecting "several cases [that] have rejected fraud claims founded on nondisclosure where there was an absence of a relationship between the plaintiff and the defendant"); *Rogozienski v. Allen*, 2007 WL 867773, at *9 (Cal. Ct. App. Mar. 23, 2007) ("There was no transaction between [plaintiff] and [defendant] that established a relationship such that [defendant] had a duty to disclose the fact of the gift" that defendant made to a temporary judge presiding over plaintiff's divorce); *Fulford v. Logitech*, 2009 WL 837639, at *1 (N.D. Cal. Mar. 26, 2009) (dismissing fraud claims where plaintiff "has neither argued nor alleged that [defendant] owed him any fiduciary duty, nor has [plaintiff] argued or alleged that he entered into any transaction with [defendant]" but instead purchased plaintiff's product from a friend).

[50] *E.g.*, *Terry v. Mercedes-Benz, USA, LLC*, 2007 WL 2045231, at *5 (Tex. App. 2007) ("Because we conclude as a matter of law that appellees had no duty to disclose the information regarding the bumper, the trial court did not err in granting the no-evidence summary judgment on appellants' common-law fraud, DTPA nondiscloure, and civil theft claims."); *Wilson v. John Daugherty Realtors, Inc.*, 981 S.W.2d 723, 726 (Tex. App. 1998) (affirming summary judgment for defendant because it did not have "a duty to tell [plaintiff] about the [defective] water heater").

WL 3013671, at *3-4 (Tex. App. June 13, 2013). The Texas appellate court reversed, holding that "with respect to section 17.46(b)(24), the nondisclosure portion of the DTPA, we fail to see how Robert had any duty to disclose any information to the Goddards considering he was not the seller of the house." *Id.* at *7; *see also Marshall v. Kusch*, 84 S.W.3d 781, 786 (Tex. App. 2002) ("Marshall sold the ranch to Gilmore-Barclay. Any duty to disclose he had was to Gilmore-Barclay. Marshall was not the seller nor was he involved in the sales transaction with Kusch. Accordingly, Marshall had no duty to disclose anything to Kusch."); *Myre v. Meletio*, 307 S.W.3d 839, 844 (Tex. App. 2010) ("As for 8 of the 9 Homeowners, Myre not only had no relationship with them, he had no contact at all. Therefore, there is no basis for the imposition of a duty to disclose as between Myre and these 8 Homeowners. Because there is no duty to disclose, Myre cannot be liable for fraud.").

This rule bars the omissions-based DTPA claims of the Texas plaintiffs, each of whom purchased used Old GM vehicles. Gareebah Al-ghamdi bought a used 2004 Impala from an Auto Expo used car lot; Dawn Bacon bought a used 2006 Cadillac CTS from her former stepfather; Dawn Fuller bought a used 2008 Impala from a Kia dealership; Michael Graciano bought a used 2007 Cobalt from a Chrysler dealership; and Lisa McClellan bought a used 2005 Malibu Maxx from La Fiesta Auto Sales. SUF ¶¶ 305 (Al-ghamdi), 313 (Bacon), 320 (Fuller), 327 (Graciano), 338 (McClellan). None of these plaintiffs engaged in any transaction with New GM, and thus New GM had no duty to disclose information to them.

c. New GM Did Not Have A Duty Under Missouri Law.

Like California and Texas, Missouri fraudulent concealment and MMPA claims based on omissions require a duty to disclose. *See DePeralta v. Dlorah, Inc.*, 2012 WL 4092191, at *7 (W.D. Mo. Sept. 17, 2012) (MMPA omission claims); *TACC MTD Opinion*, 2016 WL 3920353, at *34 (fraudulent concealment). And similar to those two states, Missouri law also holds that

only parties to a transaction have a duty to disclose. *E.g.*, *Bohac v. Walsh*, 223 S.W.3d 858, 865 (Mo. Ct. App. 2007) (explaining that "one party to a business transaction has a duty to disclose" under certain circumstances); *see also* Mo. Rev. Stat. § 407.020 (under MMPA, only omissions made "in connection with the sale or advertisement of any merchandise" are actionable).

Deloris Hamilton bought a used 2000 Oldsmobile Alero from 94 Auto in 2012. SUF ¶ 245. As she did not engage in any transaction with New GM, summary judgment should be granted against her omissions claims.

2. California And Texas Do Not Recognize An Asset Purchaser's Duty to Warn.

As described in Section III.E.1, there can be a duty to disclose under the bellwether states only if the parties engaged in a transaction giving rise to a relationship, which does not exist between New GM and purchasers of Old GM vehicles. Independently, the claims of California and Texas Old GM vehicle purchasers also fail because neither state imposes a duty at all on asset purchasers such as New GM to warn consumers who purchased products of the asset seller.

a. California Does Not Recognize An Asset Purchaser's Duty To Warn.

California courts have repeatedly declined to hold that an asset purchaser has a duty to warn the asset seller's customers of defects. *E.g.*, *Burroughs v. Precision Airmotive Corp.*, 93 Cal. Rptr. 2d 124, 136 (Cal. App. Ct. 2000) ("California has not adopted an independent duty to warn theory of liability."); *Chularee v. Cookson Co.*, 2014 WL 726778, at *7 (Cal. App. Ct. Feb. 26, 2014) ("California has not adopted an independent duty of a successor to warn of defects in products manufactured by a predecessor."); *Garcia v. Asphalt Equip. & Serv. Co.*, 2005 WL 488569, at *5 (Cal. App. Ct. Mar. 3, 2005) ("Although some other jurisdictions have recognized such an independent duty to warn, California has not adopted it. We decline the opportunity to do so here.") (citations omitted). Notably, all these cases were decided after *Gee v. Tenneco,*

Inc., which in dicta suggested that California might recognize such a duty but which held that none existed on that case's facts. 615 F.2d 857, 865-66 (9th Cir. 1980). That multiple California appellate cases have refused to adopt an asset purchaser's duty to warn confirms that *Gee's* dicta incorrectly predicted California law. Finally, even if California were to recognize such a duty, *LiMandri* and its progeny hold that an asset purchaser would not have any duty to disclose in the absence of a transaction with the particular customer of the asset seller. *See* Section III.E.1.a.

Therefore, New GM did not have a duty to disclose to Michelle Thomas, who bought a used Old GM 2005 Lacrosse in December 2010, and summary judgment should be granted against her omissions-based consumer protection and fraudulent concealment claims.

b. Texas Does Not Recognize An Asset Purchaser's Duty To Warn.

Texas does not recognize post-sale duty claims against an asset purchaser like New GM that did not manufacture the vehicle. *Jones v. SIG Arms, Inc.*, 2001 WL 1617187, at *3-4 (Tex. App. Dec. 19, 2001) (granting summary judgment on "post sale duty to warn" claims against alleged successor corporation where the defendant "was not even in existence at the time the [product] was manufactured and distributed" and thus "did not manufacture, design, market, sell or distribute the [product]"). Under Texas law, a non-manufacturer "owe[s] no duty" at all to consumers of a product "it did not design, manufacture or sell," and cannot be liable because it "was not involved in the production, marketing or distribution" of the allegedly defective product. *Firestone Steel Prods. Co. v. Barajas*, 927 S.W.2d 608, 615-16 (Tex. 1996); *see also Gaulding v. Celotex Corp.*, 772 S.W.2d 66, 68 (Tex. 1989) ("A fundamental principle of traditional products liability law is that the plaintiff must prove that the defendants supplied the product which caused the injury."); *Olivas v. Am. Home Prods. Corp.*, 2002 WL 32620351, at *3 (W.D. Tex. Oct. 18, 2002) (plaintiffs are "barred from asserting a claim of negligence and strict

liability against a defendant who did not supply the injury-producing product") (citing *Barajas*, 927 S.W.2d at 616); *Block v. Wyeth, Inc*., 2003 WL 203067, at *1-2 (N.D. Tex. Jan. 28, 2003) (conducting "a brief Texas two-step analysis: (1) because [the defendant] did not design, manufacture, or sell the product, it owed no legal duty to plaintiff; and (2) because it owed no legal duty, plaintiff's tort claim fail[s].").

As Texas does not impose any duty to warn on an asset purchaser like New GM that was not involved in designing, manufacturing, or selling Old GM vehicles, summary judgment should be granted against the omissions-based DTPA claims of the Texas plaintiffs, each of whom is basing claims on an Old GM vehicle. *See* Section III.E.1.b.

3. Used Old GM Purchasers Cannot Bring Implied Warranty Claims Against New GM, Which Was Not A "Seller" Of The Vehicles.

New GM cannot be liable for breach of implied warranty for Old GM vehicles because it was not the "seller" of those automobiles. Under the Missouri and Texas UCC, an implied warranty applies only to "the seller." Mo. Rev. Stat. § 400.2-314(1); Tex. Bus. & Com. Code § 2.314(1). Similarly, the Song-Beverly Act provides that goods "shall be accompanied by the manufacturer's and the retail seller's implied warranty." Cal. Civ. Code § 1792. As case law confirms, "[i]mplied warranties are given only by the actual sellers of products, not by others who have played some other role in the distribution of the product." *Arceneaux v. Lykes Bros. S.S. Co., Inc.*, 890 S.W.2d 191 n. 2 (Tex. App. 1994); *Allgood v. R.J. Reynolds Tobacco Co.*, 80 F.3d 168, 170-71 (5th Cir. 196) ("Even where a party has promoted a product, and made promises regarding that product, if the party is not the actual seller a claim for breach of warranty will not lie. Plaintiffs have provided no evidence of manufacture or sale on the part of" defendants, and thus summary judgment was properly granted to them.).

New GM did not sell, manufacture, or distribute Old GM vehicles. As New GM was not

the "seller" or "manufacturer" of Old GM vehicles, the implied warranty claims of all plaintiffs who purchased Old GM vehicles are barred. Indeed, such claims are not "Independent Claims" and thus are precluded under the Sale Order. Independent claims "against New GM must [be] 'based solely on New GM's own, independent, post-Closing acts or conduct.'" *In re Gen. Motors LLC Ignition Switch Litig.*, 2016 WL 874778, at *4 (S.D.N.Y. Mar. 3, 2016). Any implied warranty for an Old GM vehicle is based on Old GM selling and manufacturing the vehicle and thus is not based solely on New GM's conduct.

Summary judgment should be awarded against the implied warranty claims of Old GM vehicle purchasers Orosco Santiago, Michelle Thomas, Brad Akers, Deloris Hamilton, Gareebah Al-ghamdi, Dawn Bacon, Dawn Fuller, Michael Graciano, and Lisa McClellan.

4. The California Song-Beverly Act Does Not Apply To The Purchase Of Any Used Vehicle.

The Song-Beverly Act does not impose an implied warranty of merchantability on a manufacturer for the sale of used goods. The Act provides that "every sale of consumer goods … shall be accompanied by the manufacturer's and the retail seller's implied warranty that the goods are merchantable." Cal. Civ. Code § 1792. "Consumer goods" are defined as "any ***new*** product or part that is used, bought, or leased for use primarily for personal, family, or household purposes." Cal. Civ. Code. § 1791(a) (emphasis added). Thus, "unless new consumer goods were bought, the Act does not protect a consumer." *Dagher v. Ford Motor Co.*, 238 Cal. App. 4th 905, 918 (2015). Summary judgment should be granted against the Song-Beverly Act claims of Chimen Basseri and Michelle Thomas, who purchased used vehicles.

5. Used Vehicle Purchasers Cannot Recover On Their Unjust Enrichment Claims Because They Did Not Provide Any Benefit To New GM.

Unjust enrichment under California and Missouri law requires that the suing plaintiff

have benefitted the defendant. *Astiana v. Hain Celestial Grp., Inc.*, 783 F.3d 753, 762 (9th Cir. 2015); *Hoffmeister v. Kranawetter*, 407 S.W.3d 59, 61 (Mo. Ct. App. 2013). Used vehicle purchasers have not provided any benefit to New GM. Instead, any price they paid went to the seller, and New GM did not receive any direct or indirect benefit from the purchase of a used vehicle. The Court previously declined to dismiss such claims "because it may be proved at a later stage that purchasing a used New GM car conferred a sufficient benefit on New GM," but plaintiffs have no such proof. *TACC MTD Opinion*, 2016 WL 3920353, at *35. Other courts have rejected unjust enrichment claims brought by used vehicle purchasers for lack of any benefit to the manufacturer. *E.g.*, *Daigle v. Ford Motor Co.*, 2012 WL 3113854, at *5 (D. Minn. July 31, 2012) (if "the Class Vehicle had been purchased used, no benefit would have been conferred to Ford"); *In re Ford Motor Co. E-350 Van Prods. Liab. Litig.*, 2011 WL 601279, at *6 (D.N.J. Feb. 16, 2011) (entering summary judgment against plaintiff where "[p]laintiffs have not presented evidence or explained how [a plaintiff's] purchase of a used vehicle conferred a benefit upon Ford.").[51] This Court should reach the same conclusion and grant summary judgment against the unjust enrichment claims of used car purchasers Chimen Basseri, Michelle Thomas, Deloris Hamilton, Cynthia Hawkins, Ronald Robinson, and Mario Stefano.

F. Texas Plaintiffs Cannot Prove Unconscionability Under the Texas DTPA.

1. New GM's Mitigation By Recalling And Repairing The Vehicles Precludes DTPA Unconscionability Claims.

Acts cannot be unconscionable under the Texas DTPA if a defendant mitigates the acts' harm. As this Court has previously held, to "prove an unconscionable action or course of action

[51] *See also Schmidt v. Ford Motor Co.*, 972 F. Supp. 2d 712, 721-22 (E.D. Pa. 2013) (rejecting unjust enrichment claims where plaintiffs "fail to show any way in which their money transferred from their own pockets to Defendant's"); *Doll v. Ford Motor Co.*, 814 F. Supp. 2d 526, 551-52 (D. Md. 2011) ("Ford points out that these three Plaintiffs [who purchased used vehicles] have not provided any evidence that suggests Ford received a benefit when they bought their vehicles.").

[under the Texas DTPA], a plaintiff must show that the defendant took advantage of his lack of knowledge and the resulting unfairness was glaringly noticeable, flagrant, complete ***and unmitigated***." *FACC MTD Opinion*, 257 F. Supp. 3d at 449 (emphasis added).

State Farm Lloyds v. Nicolau illustrates how mitigation defeats a DTPA claim based on unconscionability. 951 S.W.2d 444 (Tex. 1997). In *Nicolau*, a water leak damaged the plaintiff's home. 951 S.W.2d 444, 446-47 (Tex. 1997). The plaintiff filed a claim with the defendant home insurer for $102,200. *Id.* at 447. The insurer denied the claim and offered to pay only $1,820.05 for expenses incurred in locating and repairing the leak. *Id.* at 447. Plaintiff prevailed at trial on DTPA unconscionability and other claims. *Id.* at 447-48. On appeal the Texas Supreme Court found that "there is some evidence that State Farm denied the claim without a reasonable basis or without attempting to objectively determine whether its liability had become reasonably clear." *Id.* at 448. Nevertheless, the Texas Supreme Court reversed the DTPA unconscionability jury verdict, relying on the fact that "[a]lthough State Farm refused to pay the Nicolaus' claim for foundation repairs, it did pay for the plumbing repairs and investigative costs after the leak was discovered." *Id.* at 451.

New GM did not just mitigate plaintiffs' claimed injuries here; it paid to eliminate them at no cost to plaintiffs. New GM's affirmative conduct to address the defects is far greater than the insurer's in *Nicolau*, and that decision's rejection of the DTPA unconscionability claim applies all the more. In *Nicolau*, the insurer offered to pay less than 2% of the plaintiff's cost to repair his house, and refused to pay for the foundation repairs until found liable after a jury verdict, yet the Texas Supreme Court still held that the insurer's actions were not unconscionable. By contrast, here New GM announced recalls before litigation began that paid 100% of the costs of repairs. New GM's conduct cannot be unconscionable under Texas DTPA

law, and all the Texas plaintiffs' unconscionability DTPA claims should be rejected.

2. Various Plaintiffs Cannot Show The Lack Of Sophistication Required To Assert A DTPA Unconscionability Claims.

The DTPA's unconscionability prong requires proof that the defendant took "advantage of the [plaintiff's] lack of knowledge, ability, experience, or capacity of the consumer to a grossly unfair degree." Tex. Bus. & Com. Code § 17.45(5); *see also Peltier Enters., Inc. v. Hilton*, 51 S.W.3d 616, 623 (Tex. App. 2000). Texas courts reject unconscionability DTPA claims where the plaintiff is sophisticated. For example, in *Diais v. Land Rover Dallas, L.P.*, the plaintiff bought a vehicle with a defective engine that would cause the vehicle not to move, make knocking noises, and not accelerate over 30 miles per hour. 2016 WL 1298392, at *1-2 (Tex. App. Apr. 4, 2016). When the dealership would not refund his purchase price, the plaintiff sued alleging DTPA unconscionability. *Id.* at *2. The Texas appellate court rejected this claim based on plaintiff being a "sophisticated businessman" who had negotiated and purchased several new cars in the past and had talked with family members in the car business about the vehicle. *Id.* at *5. "[T]here is no evidence supporting Diais's claim that he lacked knowledge, ability, or experience to which Land Rover took advantage of to a grossly unfair degree." *Id.* at *5; *see also Peltier*, 51 S.W.3d at 624 (in case involving claims based on dealerships charging buyers higher interest rates for loans than what the dealership pays, holding that a "plaintiff with knowledge about indirect lending or with years of experience in the car-selling business would not be able to show that Peltier did anything that was 'unconscionable.'").

As in *Diais*, plaintiffs Michael Graciano and Gareebah Al-ghamdi cannot show the lack of sophistication necessary for an unconscionability claim. Graciano took courses in automotive maintenance, performs automotive work on his own vehicle, and can work on "[a]nything from brakes to power steering pump, alternatives to serpentine valve, heater core, radiator, head

gasket." SUF ¶ 332. He owned several vehicles before buying his 2007 Cobalt, including a MY 05 Jeep Cherokee, a MY 62 Chevy Impala Super Sport, a MY 07 Ford Expedition, a Mazda MX-6, and "a couple Chevy trucks." *Id*. ¶ 333. He also understood that vehicles could be recalled for defects and that this was not a rare occurrence. *Id*. ¶ 334.

When Al-ghamdi shopped for her 2004 Impala, she had her stepfather with her who "is very knowledgeable on vehicles, and he can fix anything." *Id*. ¶ 306. Her stepfather test drove the Impala and negotiated its price. *Id*. Thus, similar to Diais, Al-ghamdi relied on relatives with knowledge about vehicles in making her purchase. Moreover, Al-ghamdi understood—and believes it is common knowledge—that vehicles can be recalled for defects. SUF ¶ 309. Accordingly, summary judgment should be awarded against the DTPA unconscionability claims of Graciano and Al-ghamdi.

G. Multiple Grounds Bar Plaintiffs' Bankruptcy-Claim-Fraud Counts.

Plaintiffs' attempts to avoid the Sale Order and successor liability restrictions by alleging New GM had a duty to disclose to allow them to file bankruptcy claims against Old GM is both unprecedented and meritless. New GM has not located any case law holding that a non-debtor such as New GM has any duty to disclose information that a potential creditor might use to file a claim against a separate company such as Old GM. Moreover, the authorities and legal principles previously described bar the Bankruptcy-Claim-Fraud counts.

1. New GM Had No Duty To Purchasers Of Old GM Vehicles.

New GM had no duty to Old GM purchasers for three separate reasons, each of which is sufficient to defeat the Bankruptcy-Claim-Fraud plaintiffs' counts. *First*, plaintiffs' fraudulent concealment requires a duty to disclose under the law of each bellwether state. *See* Section III.E; *TACC MTD Opinion*, 2016 WL 3920353, at *20-22, 34 (California and Missouri law); *Terry v. Mercedes-Benz, USA, LLC*, 2007 WL 2045231, at *5 (Tex. App. 2007). That duty to disclose

can arise only where the plaintiff and defendant have engaged in a transaction. *See* Section III.E; *LiMandri v. Judkins*, 60 Cal. Rptr. 2d 539, 543 (Cal. Ct. App. 1997); *Marshall v. Kusch*, 84 S.W.3d 781, 786 (Tex. App. 2002); *Bohac v. Walsh*, 223 S.W.3d 858, 865 (Mo. Ct. App. 2007).

New GM did not engage in any transaction with the Bankruptcy-Claim-Fraud plaintiffs, and thus did not have a duty to disclose as required for a fraudulent omissions claim. Each of the Bankruptcy-Claim-Fraud plaintiffs had purchased vehicles manufactured by Old GM before New GM existed.[52] New GM did not sell those Old GM vehicles either to the plaintiffs or dealers, did not manufacture those vehicles, and was in no other way involved in the transactions by which the Bankruptcy-Claim-Fraud plaintiffs bought their Old GM vehicles. Without a transaction, New GM had no duty to disclose to those plaintiffs.

Second, Texas requires proof not only of a transaction, but a *direct* transaction between the parties. The Court has held that fraudulent concealment claims under Texas law require "proof of a transaction between the parties of some sort (even arm's length) before a duty to disclose will arise" and dismissed all Texas fraudulent concealment claims because "none of the Texas Plaintiffs interacted with New GM directly." *FACC MTD Opinion*, 257 F. Supp. at 453-54. That same rationale applies to the Texas Bankruptcy-Claim-Fraud plaintiffs, who likewise had no transaction with New GM, much less a direct transaction or interaction, and thus cannot bring any fraudulent concealment counts, including those based on bankruptcy claims.

Third, a plaintiff can recover on a fraudulent concealment claim from an asset purchaser such as New GM (rather than the original manufacturer Old GM) only if the asset purchaser also had a duty to warn, in addition to a duty to disclose. *See* Section III.E.2. Neither California nor

[52] Brad Akers alleges that he is a Bankruptcy-Claim-Fraud plaintiff even though he purchased his vehicle in November 2009, after July 10, 2009 Sale Date. 5ACC ¶ 163; SUF ¶ 237. Accordingly, as explained in Section III.G.2, Akers would not have been able to file a claim in Old GM's bankruptcy.

Texas recognizes an asset purchaser's duty to warn. *See* Section III.E.2; *Burroughs v. Precision Airmotive Corp.*, 93 Cal. Rptr. 2d 124, 136 (Cal. App. Ct. 2000); *Jones v. SIG Arms, Inc.*, 2001 WL 1617187, at *3-4 (Tex. App. Dec. 19, 2001). Thus, the California and Texas Bankruptcy-Claim-Fraud plaintiffs' count is barred as a matter of law.

2. The Bankruptcy-Claim-Fraud Plaintiffs' Count Fails For Additional Reasons.

Independently, judgment should be granted against the Bankruptcy-Claim-Fraud plaintiffs for reasons other than lack of duty. *First*, "Plaintiffs who purchased cars from Old GM suffered an injury before New GM even existed and cannot now recover from New GM for those injuries." *FACC MTD Opinion*, 257 F. Supp. at 401. This holding applies equally to the Bankruptcy-Claim-Fraud plaintiffs, who all purchased Old GM vehicles before New GM existed. SUF ¶¶ 183 (Barker), 190 (Benton), 196 (Brown), 203 (Hardin), 210 (Malaga), 216 (Mattos), 223 (Ramirez), 230 (Rukeyser), 347 (Henry), 352 (Simmons).

Bankruptcy law confirms that New GM could not have caused these plaintiffs' injuries. "A claim exists only if before the filing of the bankruptcy petition, the relationship between the debtor and the creditor contained all of the elements necessary to give rise to a legal obligation—'a right to payment'—under the relevant non-bankruptcy law." *In re Chateaugay Corp.*, 53 F.3d 478, 497 (2d Cir. 1995); *see also In re Motors Liquidation Co.*, 829 F.3d 135, 156 (2d Cir. 2016) ("A claim is (1) a right to payment (2) that arose before the filing of the petition."). As fraud requires injury and damages, plaintiffs could only have had a bankruptcy claim for fraud if they were injured and damaged *before* Old GM filed its Chapter 11 petition, which was before New GM purchased any of Old GM's assets. New GM could not have caused the supposed economic losses forming the basis of plaintiffs' Bankruptcy-Claim-Fraud counts.

Second, fraud claims require damages. *See* Section I.F. The Bankruptcy-Claim-Fraud

plaintiffs' damages are based on the same benefit-of-the-bargain theory other plaintiffs use. *TACC MTD Opinion*, 2016 WL 3920353, at *7, 10. Plaintiffs cannot recover such benefit-of-the-bargain losses because (1) New GM has offered to repair the vehicles free of charge, thus providing plaintiffs with the benefit of their bargain and (2) no named plaintiff can prove their alleged benefit-of-the-bargain loss. *See* Sections I.A-B. Nor can plaintiffs recover "lost time" for recall repairs, as the recalls occurred after the time for filing a claim.

Third, fraud claims—including the Bankruptcy-Claim-Fraud counts—require proof of reliance and causation, which various plaintiffs cannot show. *See* Section III.A. Patricia Barker and Esperanza Ramirez were not even aware that Old GM had filed for Chapter 11 in 2009, and thus would not have known to file claims in Old GM's bankruptcy even if the defects had been disclosed. SUF ¶¶ 187, 227. Kim Brown and Winifred Mattos did not see or rely on any advertisements or materials related to their vehicles before purchasing them, and thus have no evidence that they would have learned of the defects even if they had been disclosed. SUF ¶¶ 197, 217; *see* Section III.A.2. Michael and Sylvia Benton and Javier Malaga purchased from used car dealers unaffiliated with Old GM or New GM, who likely would not have disclosed information from the manufacturer. SUF ¶¶ 190, 210; *see* Section III.A.2.

Fourth, without a meritorious underlying claim, the Bankruptcy-Claim-Fraud plaintiffs would not not have been able to recover on any bankruptcy claim against Old GM.[53] *See* 11 U.S.C. § 502(b)(1) (bankruptcy claims are not allowed if "such claim is unenforceable against the debtor and property of the debtor, under any agreement or applicable law …"); *Travelers Cas. & Sur. Co. of Am. v. Pacific Gas & Elec. Co.*, 549 U.S. 443, 450 (Section 502(b)(1) "is

[53] Missouri Bankruptcy-Fraud-Claim plaintiffs Akers, K. Robinson, and Witherspoon also would not have been able to recover on a bankruptcy claim against Old GM because their underlying counts fail for the reasons discussed throughout this brief.

most naturally understood to provide that, with limited exceptions, any defense to a claim that is available outside of the bankruptcy context is also available in bankruptcy.").

This rule bars the claims of the two Texas Bankruptcy-Claim-Fraud plaintiffs for lack of a manifest defect. Plaintiff Lisa Simmons does not allege a manifest defect as required to state any counts under Texas law. *Id.* ¶ 354. Similarly, while Shenyesa Henry alleged that her key got stuck in the ignition and that one time her steering and brakes locked up, she is not aware of any incidents of inadvertent key rotation, a prerequisite for any bankruptcy claim against Old GM. *Id.* ¶ 348; *see also* Section I.C. As they could not recover on a bankruptcy claim against Old GM, summary judgment should be granted against their fraudulent concealment claims for lack of injury. *FACC MTD Opinion*, 257 F. Supp. 3d at 452 (Texas fraudulent concealment claims require injury).

The lack of meritorious underlying claims also bars the Bankruptcy-Claim-Fraud count of Service Parts Vehicle owner William Rukeyser. As explained in Section II, the Service Parts Vehicles are not defective unless repaired with an older switch, and Rukeyser does not claim that his switch was replaced and thus cannot recover. SUF ¶ 231.

IV. PLAINTIFFS CANNOT OBTAIN INJUNCTIVE RELIEF.

Plaintiffs allege that this Court should oversee New GM's implementation of the 2014 recalls at issue, covering millions of vehicles. 5ACC ¶¶ 1077, 1094. Plaintiffs further ask the Court to establish and administer a fund to pay claims for vehicle owners' out-of-pocket expenses and, more generally, to "monitor New GM's efforts to improve its safety processes." *Id.* ¶ 1688. Plaintiffs cannot prove the factual or bases legal prerequisites for such an extraordinary injunction.

To obtain a permanent injunction, a "'plaintiff must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are

inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.'" *Samms v. Abrams*, 198 F. Supp. 3d 311, 315 (S.D.N.Y. 2016) (quoting *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006)). Moreover, "imminent and irreparable harm is essential for a claim for a permanent injunction." *See Fort v. Am. Fed'n of State, County and Mun. Emps.*, 375 Fed. App'x 109, 112 (2d Cir. 2010); *see also Roach v. Morse*, 440 F.3d 53, 56 (2d Cir. 2006).[54]

A. Plaintiffs' Have Not Alleged And Cannot Establish Irreparable Harm.

A "showing of irreparable harm is required for the imposition of any injunctive relief, preliminary or permanent." *See Ford v. Reynolds*, 316 F.3d 351, 355 (2d Cir. 2003) (internal quotation marks omitted). To establish irreparable harm, the injury alleged "must be one requiring a remedy of more than mere money damages." *Id.*; *see also N.Y. State Nat. Org. for Women v. Terry*, 886 F.2d 1339, 1362 (2d Cir. 1989). The claimed irreparable harm must also be real and immediate, not speculative. *Trudeau v. Bockstein*, 2008 WL 541158, at *6 (N.D.N.Y. Feb. 25, 2008) ("[i]njunctive relief is inappropriate 'where there is no showing of any real or immediate threat that the plaintiff will be wronged again.'") (*quoting City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983)); *see also Hangarter v. Provident Life and Acc. Ins. Co.*, 373 F.3d 998, 1021-22 (9th Cir. 2004).

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[54] Plaintiffs must meet the traditional requirements for equitable relief even when Congress has explicitly authorized equitable remedies, such as under the Magnuson-Moss Warranty Act. A "major departure from the long tradition of equity practice should not be lightly implied," *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 320 (1982), and unless Congress clearly intended such a departure, the ordinary requirements for injunctive relief apply. *See eBay Inc*, 547 U.S. at 391-92 (lower court erred by applying a presumption that an injunction would issue if plaintiffs met the requirements of a statute); *see also Sadat v. Am. Motors Corp.*, 470 N.E.2d 997, 1002 (Ill. 1984) ("[W]hile we conclude that the plain language of the Magnuson-Moss Warranty Act extends the full range of equitable remedies to private litigants in appropriate situations, we do not find that the Act's general grant of equitable relief evinces congressional intent to dispense with the traditional equitable pleading requirements.").

Here, no plaintiff has even alleged that he or she will suffer irreparable future harm absent an injunction or that there is no adequate legal remedy. Nor do plaintiffs provide evidence to establish that the recall remedy was inadequate, *see* Section I.A, let alone that they will suffer real and immediate irreparable harm absent an injunction. Plaintiffs' failure to move for injunctive relief in the four years since the recalls were announced, but instead to pursue damages claims, precludes any argument that an injunction is necessary to prevent irreparable harm, that the repairs have not worked, or that the public is at risk. *Cf. Fed. Exp. Corp. v. Fed. Espresso, Inc.*, 201 F.3d 168, 178 (2d Cir. 2000) ("The seeming lack of urgency on the part of a plaintiff who has been denied interim relief tends to confirm the view that irreparable harm was not imminent."); *Contech Casting, LLC v. ZF Steering Sys., LLC*, 931 F. Supp. 2d 809, 821 (E.D. Mich. 2013) (The "glaring failure of Plaintiff to pursue other reasonable alternatives to avoid the harm it claims is imminent fundamentally undermines its contention of irreparable injury."); *Frank v. DaimlerChrysler Corp.*, 292 A.D.2d 118, 127 (N.Y. App. Div. 1st Dept. 2002) (in case without allegations of manifest defect, NHTSA remedy was preferable; plaintiffs' lawsuit would benefit no one except "the lawyers handling the case and perhaps the few consumers directly involved in the litigation.").

B. The Extraordinary Relief Plaintiffs Request Is Not In The Public Interest.

The public interest factor is of great importance in a case of this magnitude involving millions of New GM vehicle owners. No federal court has ever granted such broad injunctive or equitable relief over automobile recalls, *see, e.g., Chin v. Chrysler Corp*., 182 F.R.D. 448, 464 n.6 (D.N.J. 1998), and for good reason. Such an extraordinary remedy—requiring the court to manage and supervise a recall and a defendant's future business conduct—is contrary to the public interest and unavailable where, as here, plaintiffs cannot establish a non-speculative risk of future irreparable harm. *See Salazar v. Buono*, 559 U.S. 700, 714 (2010) ("Equitable relief is

not granted as a matter of course, . . . and a court should be particularly cautious when contemplating relief that implicates public interests"); *Detroit Newsp. Publishers Ass'n v. Detroit Typographical Union No. 18, Intern. Typographical Union*, 471 F.2d 872, 876 (6th Cir. 1972) ("The right must be clear, the injury impending or threatened, so as to be averted only by the protecting preventive process of injunction: but that will not be awarded in doubtful cases, or new ones, not coming within well-established principles.").

In addition, given that New GM's recall obligations arise from the Safety Act's regulatory framework, an injunction requiring New GM to implement, and this Court to supervise, plaintiffs' version of an adequate recall remedy is not the proper legal mechanism for addressing plaintiffs' alleged harms. No public interest is served by ignoring Congressional mandates and inviting conflicting judicial decisions. *Cf. Frank*, 292 A.D.2d at 128 (holding that, where there was no manifest defect, "the remedy which will not only best promote consumer safety, but will also address the parties' concerns regarding the possible consequences of a rear-end collision if the purported defect is not remedied, is to petition the NHTSA for a defect investigation."); *O'Keefe v. Mercedes-Benz USA, LLC*, 2002 WL 377122, at *4 (E.D. Pa. Jan. 31, 2002) (holding that, given reporting required by NHTSA, "there is no public interest in ordering the corrective notice ... without a showing that the recipients of the notice will be harmed irreparably without it."); *Silvas v. Gen. Motors, LLC*, 2014 WL 1572590, at *3 (S.D. Tex. Apr. 17, 2014) (rejecting request for "park-it-now" injunction where NHTSA "has proceeded substantially into the recall process": "The Court is of the opinion that NHTSA is far better equipped than this Court to address the broad and complex issues of automotive safety and the regulation of automotive companies in connection with a nationwide recall."). Plaintiffs cannot explain how the public would benefit from their requested injunction, or why this case is

different from all previous vehicle recall cases that reject the injunctive relief plaintiffs seek.

C. The Requested Future Relief Is Overbroad And Impermissibly Reaches Conduct Unrelated To The Alleged Violations.

Finally, New GM cannot be held responsible for unknown potential violations in connection with possible future, unrelated recalls, defects, or advertising. *N.L.R.B. v. Express Pub. Co*., 312 U.S. 426, 435-36 (1941) ("[T]he mere fact that a court has found that a defendant has committed an act in violation of a statute does not justify an injunction broadly to obey the statute and thus subject the defendant to contempt proceedings if he shall at any time in the future commit some new violation unlike and unrelated to that with which he was originally charged."); *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 518 F. Supp. 2d 1197, 1226 (C.D. Cal. 2007) ("[A] district court should only include injunctive terms that have a common sense relationship to the needs of the specific case, and the conduct for which a defendant has been held liable.").

Any injunction regarding, for example, New GM's "response to problems," 5ACC Prayer for Relief ¶ B, would contravene to Fed. R. Civ. P. 65(d)(1), which requires that "every order granting [an] injunction shall be specific in terms and shall describe in reasonable detail the act or acts sought to be restrained." *See Sanders v. Air Line Pilots Ass'n Int'l.*, 473 F.2d 244 (2d Cir. 1972); *see also Chicago Bd. of Educ.* v. *Substance, Inc*., 354 F.3d 624, 631-32 (7th Cir. 2003) (Posner, J.) (noting court's "independent duty" under Rule 65(d)(1) to scrutinize and limit scope of injunctions).

Rule 65(d)(1) proscribes unduly broad injunctions. As the Second Circuit has observed, an injunction like the one plaintiff requests is plainly impermissible:

> [The injunction] would be "so broad as to place the entire conduct of [defendant's] business under the jeopardy of punishment for contempt for violating" the injunction . . . [Even if] the proposed injunction [would not] 'invariably paralyze' [defendant] . . ., we do see a danger that [defendant] would be exposed to contempt prosecution for the

> performance of acts not properly within the scope of the injunction. . . . Any number of normal business actions, not even remotely concerned with the Grandfathers' seniority rights and having only a limited and tangential effect thereon, might be in violation of the order.

See Sanders v. Air Line Pilots Ass'n, Int'l, 473 F.2d 244, 248 (2d Cir. 1972). Plaintiffs have not even alleged the traditional equitable requirements, much less "the specific acts sought to be restrained."

In short, plaintiffs cannot establish any risk of future irreparable harm, that an injunction would serve the public interest, or that the substantial money damages they seek (in addition to the recall repairs provided by New GM) are inadequate to remedy any claimed harm. Accordingly, plaintiffs' claims for injunctive relief should be rejected.

CONCLUSION

The undisputed evidence establishes that the bellwether named plaintiffs cannot, as a matter of law and undisputed fact, prove the fundamental prerequisites of their claims, such as damages, defect, causation, or reliance. Accordingly, summary judgement should be granted against each plaintiff's claims.

Respectfully submitted,

Dated: July 20, 2018

/s/ Richard C. Godfrey, P.C.

Richard C. Godfrey, P.C.
Andrew B. Bloomer, P.C.
KIRKLAND & ELLIS LLP
300 N. LaSalle
Chicago, IL 60654-3406
Phone: 312-862-2000
Fax: 312-862-2200
richard.godfrey@kirkland.com
andrew.bloomer@kirkland.com

Attorneys for Defendant General Motors LLC

CERTIFICATE OF SERVICE

I hereby certify that on July 20, 2018, I electronically filed the foregoing using the CM/ECF system which will serve notification of such filing to the email of all counsel of record in this action.

By: /s/ *Andrew B. Bloomer, P.C.*
Andrew B. Bloomer, P.C.

Exhibit 1

EXHIBIT 1: REASONS FOR SUMMARY JUDGMENT AGAINST EACH PLAINTIFF WITH ALL CLAIMS

Plaintiff	All Claims	Consumer Protection	Fraudulent Concealment	Implied Warranty	Unjust Enrichment
California					
1. Basseri, Chimen SUF ¶¶ 141-48	1. Recall repairs provide benefit of the bargain 2. No evidence of benefit-of-the-bargain damages 3. No recoverable lost time damages 4. Owned Service Parts Vehicle that was not defective 5. Cannot obtain injunctive relief	1. Cannot prove reliance 2. Would not have been aware of defect if disclosed 3. No misrepresentation claim because no evidence re advertisements 4. No misrepresentation claim because does not claim advertisements were untrue	1. Cannot prove reliance 2. Would not have been aware of defect if disclosed	1. Barred by substantial use of vehicle 2. Used car purchaser to whom Song-Beverly Act does not apply	1. Barred by adequate remedy at law 2. Barred by warranty 3. Used car purchaser who did not provide benefit to New GM
2. Cereceres, Kellie SUF ¶¶ 149-56	1. Recall repairs provide benefit of the bargain 2. No evidence of benefit-of-the-bargain damages 3. No recoverable lost time damages 4. Cannot obtain injunctive relief	1. No misrepresentation claim because no evidence re advertisements 2. No misrepresentation claim because does not claim advertisements were untrue		1. Barred by substantial use of vehicle	1. Barred by adequate remedy at law 2. Barred by warranty
3. Orosco, Santiago SUF ¶¶ 157-65	1. Recall repairs provide benefit of the bargain 2. No evidence of benefit-of-the-bargain damages 3. No recoverable lost time damages 4. Cannot obtain injunctive relief	1. Would not have been aware of defect if disclosed 2. No misrepresentation claim because did not view advertisements 3. No misrepresentation claim because New GM not liable for dealer statements	1. Would not have been aware of defect if disclosed	1. Barred by substantial use of vehicle 2. Barred because New GM was not "seller" of Old GM vehicle	1. Barred by adequate remedy at law 2. Barred by warranty

EXHIBIT 1: REASONS FOR SUMMARY JUDGMENT AGAINST EACH PLAINTIFF WITH ALL CLAIMS

Plaintiff	All Claims	Consumer Protection	Fraudulent Concealment	Implied Warranty	Unjust Enrichment
4. Padilla, David SUF ¶¶ 166-73	1. Recall repairs provide benefit of the bargain 2. No evidence of benefit-of-the-bargain damages 3. No recoverable lost time damages 4. Owned Service Parts Vehicle that was not defective 5. Cannot obtain injunctive relief	1. Cannot prove reliance 2. Would not have been aware of defect if disclosed 3. No misrepresentation claim because did not view advertisements 4. No misrepresentation claim because New GM not liable for dealer statements	1. Cannot prove reliance 2. Would not have been aware of defect if disclosed	1. Barred by substantial use of vehicle	Dismissed because barred by warranty in *TACC MTD Opinion*
5. Thomas, Michelle SUF ¶¶ 174-81	1. Recall repairs provide benefit of the bargain 2. No evidence of benefit-of-the-bargain damages 3. No recoverable lost time damages 4. Cannot obtain injunctive relief	1. No misrepresentation claim because New GM not liable for dealer statements 2. No misrepresentation claim because statements are puffery 3. Old GM car purchaser so New GM did not have duty to disclose 4. Old GM car purchaser so New GM did not have post-sale duty to warn	1. Old GM car purchaser so New GM did not have duty to disclose 2. Old GM car purchaser so New GM did not have post-sale duty to warn	1. Barred by substantial use of vehicle 2. Barred because New GM was not "seller" of Old GM vehicle 3. Used car purchaser to whom Song-Beverly Act does not apply	1. Barred by adequate remedy at law 2. Used car purchaser who did not provide benefit to New GM

EXHIBIT 1: REASONS FOR SUMMARY JUDGMENT AGAINST EACH PLAINTIFF WITH ALL CLAIMS

Plaintiff	All Claims	Consumer Protection	Fraudulent Concealment	Implied Warranty	Unjust Enrichment
Missouri					
6. Akers, Brad SUF ¶¶ 236-43	1. Recall repairs provide benefit of the bargain 2. No evidence of benefit-of-the-bargain damages 3. Owned Service Parts Vehicle that was not defective 4. Cannot obtain injunctive relief	1. No misrepresentation claim because no evidence re advertisements 2. No misrepresentation claim because New GM not liable for dealer statements		1. No manifest defect 2. Damages barred by express warranty 3. Time-barred by statute 4. Time-barred by express warranty 5. Barred by substantial use of vehicle 6. Barred because New GM was not "seller" of Old GM vehicle	1. Barred by adequate remedy at law 2. Barred by warranty
7. Hamilton, Deloris SUF ¶¶ 244-51	1. Recall repairs provide benefit of the bargain 2. No evidence of benefit-of-the-bargain damages 3. No recoverable lost time damages 4. Cannot obtain injunctive relief	1. No misrepresentation claim because did not view advertisements 2. No misrepresentation claim because New GM not liable for dealer statements 3. Old GM car purchaser so New GM did not have duty to disclose	1. Old GM car purchaser so New GM did not have duty to disclose	1. No manifest defect 2. Damages barred by express warranty 3. Time-barred by express warranty 4. Barred by substantial use of vehicle 5. Barred because New GM was not "seller" of Old GM vehicle	1. Barred by adequate remedy at law 2. Used car purchaser who did not provide benefit to New GM

EXHIBIT 1: REASONS FOR SUMMARY JUDGMENT AGAINST EACH PLAINTIFF WITH ALL CLAIMS

Plaintiff	All Claims	Consumer Protection	Fraudulent Concealment	Implied Warranty	Unjust Enrichment
8. Hawkins, Cynthia SUF ¶¶ 252-58	1. Recall repairs provide benefit of the bargain 2. No evidence of benefit-of-the-bargain damages 3. No recoverable lost time damages 4. Owned Service Parts Vehicle that was not defective 5. Cannot obtain injunctive relief	1. No misrepresentation claim because did not view advertisements 2. No misrepresentation claim because New GM not liable for dealer statements		Dismissed for no manifest defect by *TACC MTD Opinion*	1. Barred by adequate remedy at law 2. Used car purchaser who did not provide benefit to New GM
9. Robinson, Ronald SUF ¶¶ 266-74	1. Recall repairs provide benefit of the bargain 2. No evidence of benefit-of-the-bargain damages 3. No recoverable lost time damages 4. Cannot obtain injunctive relief	1. No misrepresentation claim because statements are puffery	1. Cannot prove reliance	Dismissed for no manifest defect by *TACC MTD Opinion*	1. Barred by adequate remedy at law 2. Used car purchaser who did not provide benefit to New GM
10. Stefano, Mario SUF ¶¶ 275-84	1. Recall repairs provide benefit of the bargain 2. No evidence of benefit-of-the-bargain damages 3. No recoverable lost time damages 4. Cannot obtain injunctive relief	1. No misrepresentation claim because did not view advertisements	1. Cannot prove reliance	1. No manifest defect 2. Damages barred by express warranty 3. Barred by substantial use of vehicle	1. Barred by adequate remedy at law 2. Barred by warranty 3. Used car purchaser who did not provide benefit to New GM
11. Tinen, Christopher SUF ¶¶ 285-94	1. Recall repairs provide benefit of the bargain 2. No evidence of benefit-of-the-bargain damages 3. Sold vehicle before recalls 4. No recoverable lost time damages 5. Cannot obtain injunctive relief	1. No misrepresentation claim because lack of evidence re advertisements 2. No misrepresentation claim because does not claim advertisements were untrue 3. No misrepresentation claim because New GM not liable for dealer statements		1. Damages barred by express warranty 2. Time-barred by statute 3. Time-barred by express warranty	1. Barred by adequate remedy at law 2. Barred by warranty

EXHIBIT 1: REASONS FOR SUMMARY JUDGMENT AGAINST EACH PLAINTIFF WITH ALL CLAIMS

Plaintiff	All Claims	Consumer Protection	Fraudulent Concealment	Implied Warranty	Unjust Enrichment
Texas					
12. Al-ghamdi, Gareebah SUF ¶¶ 304-311	1. Recall repairs provide benefit of the bargain 2. No evidence of benefit-of-the-bargain damages 3. No manifest defect 4. No recoverable lost time damages 5. Cannot obtain injunctive relief	1. Cannot prove reliance 2. No misrepresentation claim because did not view advertisements 3. Old GM car purchaser so New GM did not have duty to disclose 4. Old GM car purchaser so New GM did not have post-sale duty to warn 5. Cannot prove unconscionability because New GM mitigated by recalls 6. Cannot prove unconscionability because does not lack sophistication	Dismissed by *FACC MTD Opinion*	1. Damages barred by express warranty 2. Time-barred by statute 3. Time-barred by express warranty 4. Barred because New GM was not "seller" of Old GM vehicle	Dismissed by *FACC MTD Opinion*
13. Bacon, Dawn SUF ¶¶ 312-18	1. Recall repairs provide benefit of the bargain 2. No evidence of benefit-of-the-bargain damages 3. No recoverable lost time damages 4. Cannot obtain injunctive relief	1. No misrepresentation claim because statements are puffery 2. Old GM car purchaser so New GM did not have duty to disclose 3. Old GM car purchaser so New GM did not have post-sale duty to warn 4. Cannot prove unconscionability because New GM mitigated by recalls	Dismissed by *FACC MTD Opinion*	1. Damages barred by express warranty 2. Time-barred by express warranty 3. Barred because New GM was not "seller" of Old GM vehicle	Dismissed by *FACC MTD Opinion*

EXHIBIT 1: REASONS FOR SUMMARY JUDGMENT AGAINST EACH PLAINTIFF WITH ALL CLAIMS

Plaintiff	All Claims	Consumer Protection	Fraudulent Concealment	Implied Warranty	Unjust Enrichment
14. Fuller, Dawn SUF ¶¶ 319-25	1. Recall repairs provide benefit of the bargain 2. No evidence of benefit-of-the-bargain damages 3. No manifest defect 4. No recoverable lost time damages 5. Cannot obtain injunctive relief	1. No misrepresentation claim because did not view advertisements 2. Old GM car purchaser so New GM did not have duty to disclose 3. Old GM car purchaser so New GM did not have post-sale duty to warn 4. Cannot prove unconscionability because New GM mitigated by recalls	Barred under *FACC MTD Opinion*	1. Damages barred by express warranty 2. Time-barred by express warranty 3. Barred by substantial use of vehicle 4. Barred because New GM was not "seller" of Old GM vehicle	Barred under *FACC MTD Opinion*
15. Graciano, Michael SUF ¶¶ 326-35	1. Recall repairs provide benefit of the bargain 2. No evidence of benefit-of-the-bargain damages 3. No manifest defect 4. No recoverable lost time damages 5. Cannot obtain injunctive relief	1. No misrepresentation claim because did not view advertisements 2. No misrepresentation claim because New GM not liable for dealer statements 3. Old GM car purchaser so New GM did not have duty to disclose 4. Old GM car purchaser so New GM did not have post-sale duty to warn 5. Cannot prove unconscionability because New GM mitigated by recalls 6. Cannot prove unconscionability because does not lack sophistication	Dismissed by *FACC MTD Opinion*	1. Damages barred by express warranty 2. Time-barred by express warranty 3. Barred by substantial use of vehicle 4. Barred because New GM was not "seller" of Old GM vehicle	Dismissed by *FACC MTD Opinion*

EXHIBIT 1: REASONS FOR SUMMARY JUDGMENT AGAINST EACH PLAINTIFF WITH ALL CLAIMS

Plaintiff	All Claims	Consumer Protection	Fraudulent Concealment	Implied Warranty	Unjust Enrichment
16. McClellan, Lisa SUF ¶¶ 336-45	1. Recall repairs provide benefit of the bargain 2. No evidence of benefit-of-the-bargain damages 3. No manifest defect 4. Returned vehicle before recalls 5. No recoverable lost time damages 6. Cannot obtain injunctive relief	1. Cannot prove reliance 2. No misrepresentation claim because did not view advertisements 3. Old GM car purchaser so New GM did not have duty to disclose 4. Old GM car purchaser so New GM did not have post-sale duty to warn 5. Cannot prove unconscionability because New GM mitigated by recalls	Dismissed by *FACC MTD Opinion*	1. Damages barred by express warranty 2. Time-barred by express warranty 3. Barred because New GM was not "seller" of Old GM vehicle	Dismissed by *FACC MTD Opinion*

EXHIBIT 1: REASONS FOR SUMMARY JUDGMENT AGAINST EACH SUCCESSOR LIABILITY PLAINTIFF

Plaintiff	All Claims	Consumer Protection	Fraudulent Concealment	Implied Warranty	Unjust Enrichment
Missouri					
17. Robinson, Kenneth SUF ¶¶ 259-65	1. No direct claims against New GM because purchased before July 10, 2009 2. Recall repairs provide benefit of the bargain 3. No evidence of benefit-of-the-bargain damages 4. Sold vehicle before recalls 5. No recoverable lost time damages 6. Owned Service Parts Vehicle that was not defective 7. Cannot obtain injunctive relief	1. No misrepresentation claim because did not view advertisements 2. No misrepresentation claim because New GM not liable for dealer statements		1. No manifest defect 2. Damages barred by express warranty 3. Time-barred by statute 4. Time-barred by express warranty	1. Barred by adequate remedy at law 2. Barred by warranty
18. Witherspoon, Patrice SUF ¶¶ 295-303	1. No direct claims against New GM because purchased before July 10, 2009 2. Recall repairs provide benefit of the bargain 3. No evidence of benefit-of-the-bargain damages 4. No recoverable lost time damages 5. Cannot obtain injunctive relief	1. No misrepresentation claim because New GM not liable for dealer statements 2. No misrepresentation claim because statements are puffery		1. No manifest defect 2. Damages barred by express warranty 3. Time-barred by statute 4. Time-barred by express warranty 5. Barred by substantial use of vehicle	1. Barred by adequate remedy at law 2. Barred by warranty

EXHIBIT 1: REASONS FOR SUMMARY JUDGMENT AGAINST EACH BANKRUPTCY CLAIM FRAUD PLAINTIFF

Plaintiff	Fraudulent Concealment of the Right to File A Claim Against Old GM in Bankruptcy
California	
19. Barker, Patricia SUF ¶¶ 182-88	1. Old GM car purchaser so New GM did not have duty to disclose 2. Purchased before Sale Order so New GM could not have caused injury 3. Cannot recover damages because recall repairs provide benefit of the bargain 4. Cannot recover damages because no evidence of benefit-of-the-bargain damages 5. Cannot recover lost time damages because recalls occurred after time for filing a bankruptcy claim 6. Old GM car purchaser so New GM did not have duty to warn 7. No reliance because not aware of Old GM bankruptcy in 2009 8. Cannot obtain injunctive relief
20-21. Benton, Michael & Sylvia SUF ¶¶ 189-94	1. Old GM car purchaser so New GM did not have duty to disclose 2. Purchased before Sale Order so New GM could not have caused injury 3. Cannot recover damages because recall repairs provide benefit of the bargain 4. Cannot recover damages because no evidence of benefit-of-the-bargain damages 5. Cannot recover lost time damages because recalls occurred after time for filing a bankruptcy claim 6. Old GM car purchaser so New GM did not have duty to warn 7. Purchased from unaffiliated used car dealer unlikely to disclose information about defects 8. Cannot obtain injunctive relief
22. Brown, Kimberly SUF ¶¶ 195-201	1. Old GM car purchaser so New GM did not have duty to disclose 2. Purchased before Sale Order so New GM could not have caused injury 3. Cannot recover damages because recall repairs provide benefit of the bargain 4. Cannot recover damages because no evidence of benefit-of-the-bargain damages 5. Cannot recover lost time damages because recalls occurred after time for filing a bankruptcy claim 6. Old GM car purchaser so New GM did not have duty to warn 7. No reliance because did not see or rely on New GM advertisements or other materials that could have disclosed defects 8. Cannot obtain injunctive relief
23. Hardin, Crystal SUF ¶¶ 202-08	1. Old GM car purchaser so New GM did not have duty to disclose 2. Purchased before Sale Order so New GM could not have caused injury 3. Cannot recover damages because recall repairs provide benefit of the bargain 4. Cannot recover damages because no evidence of benefit-of-the-bargain damages 5. Cannot recover lost time damages because recalls occurred after time for filing a bankruptcy claim 6. Old GM car purchaser so New GM did not have duty to warn 7. Cannot obtain injunctive relief

SUMMARY OF REASONS FOR SUMMARY JUDGMENT AGAINST EACH BANKRUPTCY CLAIM FRAUD PLAINTIFF

Plaintiff	Fraudulent Concealment of the Right to File A Claim Against Old GM in Bankruptcy
24. Malaga, Javier SUF ¶¶ 209-14	1. Old GM car purchaser so New GM did not have duty to disclose 2. Purchased before Sale Order so New GM could not have caused injury 3. Cannot recover damages because recall repairs provide benefit of the bargain 4. Cannot recover damages because no evidence of benefit-of-the-bargain damages 5. Cannot recover lost time damages because recalls occurred after time for filing a bankruptcy claim 6. Old GM car purchaser so New GM did not have duty to warn 7. Purchased from unaffiliated used car dealer unlikely to disclose information about defects 8. Cannot obtain injunctive relief
25. Mattos, Winifred SUF ¶¶ 215-21	1. Old GM car purchaser so New GM did not have duty to disclose 2. Purchased before Sale Order so New GM could not have caused injury 3. Cannot recover damages because recall repairs provide benefit of the bargain 4. Cannot recover damages because no evidence of benefit-of-the-bargain damages 5. Cannot recover lost time damages because recalls occurred after time for filing a bankruptcy claim 6. Old GM car purchaser so New GM did not have duty to warn 7. No reliance because did not see or rely on New GM advertisements or other materials that could have disclosed defects 8. Cannot obtain injunctive relief
26. Ramirez, Esperanza SUF ¶¶ 222-28	1. Old GM car purchaser so New GM did not have duty to disclose 2. Purchased before Sale Order so New GM could not have caused injury 3. Cannot recover damages because recall repairs provide benefit of the bargain 4. Cannot recover damages because no evidence of benefit-of-the-bargain damages 5. Cannot recover lost time damages because recalls occurred after time for filing a bankruptcy claim 6. Old GM car purchaser so New GM did not have duty to warn 7. No reliance because not aware of Old GM bankruptcy in 2009 8. Cannot obtain injunctive relief
27. Rukeyser, William SUF ¶¶ 229-34	1. Old GM car purchaser so New GM did not have duty to disclose 2. Purchased before Sale Order so New GM could not have caused injury 3. Cannot recover damages because recall repairs provide benefit of the bargain 4. Cannot recover damages because no evidence of benefit-of-the-bargain damages 5. Cannot recover lost time damages because recalls occurred after time for filing a bankruptcy claim 6. Owned Service Parts Vehicle that was not defective 7. Old GM car purchaser so New GM did not have duty to warn 8. Cannot obtain injunctive relief

SUMMARY OF REASONS FOR SUMMARY JUDGMENT AGAINST EACH BANKRUPTCY CLAIM FRAUD PLAINTIFF

Plaintiff	Fraudulent Concealment of the Right to File A Claim Against Old GM in Bankruptcy
Texas	
28. Henry, Shenyesa SUF ¶¶ 346-50	1. Old GM car purchaser so New GM did not have duty to disclose 2. Purchased before Sale Order so New GM could not have caused injury 3. Cannot recover damages because recall repairs provide benefit of the bargain 4. Cannot recover damages because no evidence of benefit-of-the-bargain damages 5. Cannot recover lost time damages because recalls occurred after time for filing a bankruptcy claim 6. Old GM car purchaser so New GM did not have duty to warn 7. Because no direct transaction with New GM, cannot bring any fraudulent concealment claim 8. No manifest defect and so no basis on which to file bankruptcy claim 9. Cannot obtain injunctive relief
29. Simmons, Lisa SUF ¶¶ 351-58	1. Old GM car purchaser so New GM did not have duty to disclose 2. Purchased before Sale Order so New GM could not have caused injury 3. Cannot recover damages because recall repairs provide benefit of the bargain 4. Cannot recover damages because no evidence of benefit-of-the-bargain damages 5. Cannot recover lost time damages because recalls occurred after time for filing a bankruptcy claim 6. Old GM car purchaser so New GM did not have duty to warn 7. Because no direct transaction with New GM, cannot bring any fraudulent concealment claim 8. No manifest defect and so no basis on which to file bankruptcy claim 9. Cannot obtain injunctive relief

Exhibit 2

EXHIBIT 2: PLAINTIFFS WITH ALL CLAIMS

Name	Vehicle	Recall(s)	Purchase Info	Warr-anty	Still Own	Miles Driven	Claims Manifest Defect	Claims Lost Earnings
California								
Basseri, Chimen	2011 Chevrolet HHR	14v047 (Cobalt/Ion Ignition Switch)	3/5/2013 (Used)	Y	Y	26,000 (37,000 at purchase)	N	N
Cereceres, Kellie	2012 Chevrolet Traverse	14v118 (SIAB)	6/18/2012 (New)	Y	Y	80,000	Y	N
Orosco, Santiago	2010 Chevrolet Camaro (Old GM)	14v346 (Camaro Key Rotation)	8/1/2009 (New)	Y	N - Sold August 2016	145,000	Y	N/A (No recall repair)
Padilla, David	2010 Chevrolet Cobalt (New GM)	14v047 (Cobalt/Ion Ignition Switch) 14v153 (EPS)	April 2010 (New)	Y	N - Sale date unknown	20,000	Y	N
Thomas, Michelle	2005 Buick Lacrosse	14v355 (Key Rotation)	12/9/2010 (Used)	N	Y	121,000 (72,000 at purchase)	Y	N
Missouri								
Akers, Brad	2009 Chevrolet HHR (Old GM)	14v047 (Cobalt/Ion Ignition Switch) 14v153 (EPS)	Nov 2009 (New)	Y	Y	177,777	Y	Y
Hamilton, Deloris	2000 Oldsmobile Alero	14v400 (Key Rotation)	2/24/2012 (Used)	N	N - Gifted 4/1/2016	165,000 total (including prior owner)	N	N/A (No recall repair)
Hawkins, Cynthia	2010 Chevrolet Cobalt (New GM)	14v047 (Cobalt/Ion Ignition Switch) 14v153 (EPS)	7/23/2013 (Used)	N	Y	48,000 (52,000 at purchase)	N	N

Name	Vehicle	Recall(s)	Purchase Info	Warr-anty	Still Own	Miles Driven	Claims Manifest Defect	Claims Lost Earnings
Robinson, Ronald	2010 Chevrolet Impala	14v355 (Key Rotation)	June 2011 (Used)	N	Y	80,000 (25,000 at purchase)	N	N
Stefano, Mario	2011 Chevrolet Camaro	14v346 (Camaro Key Rotation)	5/14/2013 (Used)	Y	Y	25,000 (32,000 at purchase)	Y	N
Tinen, Christopher	2010 GMC Acadia (New GM)	14v118 (SIAB)	2/22/2010 (New)	Y	N - Sold April 2012	52,000	Y	N/A (No recall repair)
Texas								
Al-ghamdi, Gareebah	2004 Chevrolet Impala	14v400 (Key Rotation)	9/7/2009 (Used)	N	N - Sold April 2017	100,000 (80,000 at purchase)	Y	N/A (No recall repair)
Bacon, Dawn	2006 Cadillac CTS	14v394 (Cadillac Key Rotation)	Sept 2012 (Used)	N	Y	40,000 (160,000 at purchase)	Y	N/A (No recall repair)
Fuller, Dawn	2008 Chevrolet Impala	14v355 (Key Rotation)	12/17/2011 (Used)	Y	Y	95,000 (79,630 at purchase)	N	N
Graciano, Michael	2007 Chevrolet Cobalt	14v047 (Cobalt/Ion Ignition Switch)	10/17/2011 (Used)	N	Y	58,000 (44,000 at purchase)	Y	N
McClellan, Lisa	2005 Chevrolet Malibu Maxx	14v153 (EPS)	11/22/2010 (Used)	N	N - Sold April 2012	Under 10,000 (60,000 at purchase)	Y	N/A (No recall repair)

Exhibit 3

EXHIBIT 3: SUCCESSOR LIABILITY PLAINTIFFS

Name	Vehicle	Recall(s)	Purchase Info	Warr-anty	Still Own	Miles Driven	Claims Manifest Defect	Claims Lost Earnings
Missouri								
Robinson, Kenneth	2008 Pontiac G5	14v047 (Cobalt/Ion Ignition Switch)	9/7/2008 (New)	Y	N - Sold May 2013	88,000	Y	N/A (No recall repair)
Witherspoon, Patrice	2006 Saturn Ion	14v047 (Cobalt/Ion Ignition Switch)	2005 (New)	Y	Y	165,000	Y	N

Exhibit 4

EXHIBIT 4: BANKRUPTCY-CLAIM-FRAUD PLAINTIFFS

Name	Vehicle	Recall(s)	Purchase Info	Warranty	Still Own	Claims Manifest Defect
California						
Patricia Barker	2005 Saturn Ion	14v047 (Cobalt/Ion Ignition Switch)	March, 2005 (New)	Y	Y	Y
Michael & Sylvia Benton	2005 Chevrolet Cobalt	14v047 (Cobalt/Ion Ignition Switch)	1/10/2009 (Used)	N	Y	Y
Kimberly Brown	2006 Chevrolet HHR	14v047 (Cobalt/Ion Ignition Switch)	1/7/2007 (New)	Y	Y	Y
Crystal Hardin	2005 Chevrolet Cobalt	14v047 (Cobalt/Ion Ignition Switch) 14v153 (EPS)	5/17/05 (New)	Y	Y	Y
Javier Malaga	2006 Chevrolet Cobalt	14v047 (Cobalt/Ion Ignition Switch)	12/8/06 (Used)	Y	N - Sold July 30, 2016	N
Winifred Mattos	2007 Pontiac G5	14v047 (Cobalt/Ion Ignition Switch)	April 2007 (New)	Y	Y	N
Esperanza Ramirez	2007 Saturn Ion	14v047 (Cobalt/Ion Ignition Switch)	3/13/07 (New)	Y	Y	N
William Rukeyser	2008 Chevrolet Cobalt	14v047 (Cobalt/Ion Ignition Switch)	9/4/08 (New)	Y	Y	N

Name	Vehicle	Recall(s)	Purchase Info	Warranty	Still Own	Claims Manifest Defect
Texas						
Shenyesa Henry	2004 Saturn Ion	14v047 (Cobalt/Ion Ignition Switch)	2003 (New)	Y	N - Donated 2016	Y
Lisa Simmons	2007 Saturn Ion	14v047 (Cobalt/Ion Ignition Switch)[1]	2007 (New)	Y	Y	N

[1] The Barker, Henry, and Simmons plaintiffs' vehicles also were subject to the EPS Assist recall, but those recalls are not part of their Bankruptcy Claim Fraud counts, which are limited to claims based on the Delta Ignition Switch recall. 5ACC ¶ 959.

EXHIBIT C-2

PLAINTIFFS' OPPOSITION TO GENERAL MOTORS LLC'S MOTION FOR SUMMARY JUDGMENT AGAINST THE BELLWETHER ECONOMIC LOSS PLAINTIFFS

[MDL ECF NO. 6059] (FILED SEPTEMBER 21, 2018)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE: GENERAL MOTORS LLC IGNITION SWITCH LITIGATION	No. 14-MD-2543 (JMF) No. 14-MC-2543 (JMF) Hon. Jessee M. Furman
This Document Relates to: ALL ACTIONS	

PLAINTIFFS' OPPOSITION TO GENERAL MOTORS LLC'S MOTION FOR SUMMARY JUDGMENT AGAINST THE BELLWETHER ECONOMIC LOSS PLAINTIFFS

[REDACTED VERSION]

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

I. INTRODUCTION

Defendant General Motors LLC's (GM) motion for summary judgment should be denied. For years, GM knowingly sold millions of cars containing serious safety defects to unsuspecting consumers who paid a price reflecting the belief that the cars had no known defects. GM placed its customers and the public in grave danger by hiding the truth until it was finally forced to issue historic recalls of millions of defective vehicles in 2014. The recalls are themselves admissions of defects; the undisputed record also shows that GM knew the vehicles were defective when sold and failed to disclose this material information.

The overarching issue that GM's motion raises is whether GM can obtain "full price" for cars that GM knew had serious safety defects from consumers who would have paid substantially less had they known of the defects, and then avoid liability for the overcharges by instituting a series of belated (and largely ineffective) recalls *only after* its fraud was uncovered. GM's "heads I win, tails you lose" position is particularly repugnant given the deadly results of its gamesmanship, and, in any event, is unsupported by the laws of the bellwether jurisdictions.

GM's primary arguments fail. *First*, GM's assertion that Plaintiffs have no recoverable damages as a result of its belated recalls is inconsistent with the Court's repeated holdings that Plaintiffs' "benefit-of-the-bargain" damages were incurred at the point of sale *and* that post-sale facts have no relevance to benefit-of-the-bargain analysis. Such is the law in the bellwether jurisdictions, and GM cannot avoid responsibility for the economic impacts of its fraud with belated recalls that (even if effective) neither compensate Plaintiffs for their overpayment nor deprive GM of its ill-gotten gains. *See infra* Section III.A.1.a. Moreover, GM's contention that Plaintiffs' damages model does not account for the recalls is false; Plaintiffs' expert conjoint analysis explicitly considers the *actual* value that GM's belated recalls would have had to consumers *at the moment of purchase*, which is the relevant moment in a benefit-of-the-bargain

claim. *See infra* Section III.A.1.b. In any event, the record shows that the recall "remedies" for the defective ignition switches at issue here were *not* effective. *See infra* Section III.A.2. Further, in each of the bellwether states, Plaintiffs may recover "lost time" damages in appropriate circumstances. *See infra* Section III.B.

Second, GM argues that Plaintiffs have no claims because they cannot prove individual damage amounts. Not so. Plaintiffs' expert, Stefan Boedeker, provides a methodology for calculating "overpayment" damages with respect to the defective vehicles at issue, and using a few, objective record facts, each Plaintiff's damages are readily calculated. Those calculations preclude summary judgment. *See infra* Section III.A.3.

Third, GM is liable to Plaintiffs who sold their defective vehicles before the recalls were announced because they, too, overpaid for the cars as a result of GM's fraud. In reinstating such claims in response to Plaintiffs' reconsideration motion at the Rule 12(b)(6) stage, the Court chose to resolve the issue on a more fulsome record; now, Mr. Boedeker's conjoint analysis demonstrates that *all* purchasers suffered quantifiable loss at the moment of sale (regardless of later events), and this evidence, again, precludes summary judgment. *See infra* Section III.A.4.

Fourth, GM is liable to Plaintiffs who bought so-called "Service Part Vehicles"—cars built after the original low-torque "Delta Ignition Switch" was secretly modified by the now-infamous Old GM engineer Ray DeGiorgio—because the evidence shows that the modified switch was still defective. *See infra* Section III.C.

Fifth, GM cannot escape liability to those who purchased defective Old GM cars *after* GM's inception (Used-Car Purchasers). The bellwether states do *not* restrict consumer-fraud liability solely to those who manufactured or sold the vehicles. Instead, because GM has a strong relationship with the defective cars (especially given its duty to monitor and repair the

cars under the TREAD Act), *and* because GM's conduct caused Plaintiffs' economic losses, the Used-Car Purchasers' claims stand. *See infra* Section III.D.

Sixth, GM's scattered attacks on various claims also fail to meet GM's heavy burden on summary judgment. In this omissions case, Plaintiffs satisfy relaxed consumer protection reliance requirements based on the materiality of the omitted information, to wit, the existence of serious safety defects (*see infra* Sections III.E-F); Plaintiffs' implied warranty claims survive GM's contractual limitation of remedies, statute of limitations, and merchantability challenges (*see infra* Section III.G); Plaintiffs' alternatively pled unjust enrichment claims survive (*see infra* Section III.H); GM has not mitigated its unconscionable conduct (*see infra* Section III.I); and the California and Missouri Plaintiffs may maintain claims against GM for fraudulent concealment of the right to file bankruptcy claims because, but for GM's concealment of the Delta Ignition Switch Defect, Plaintiffs' claims would have been timely asserted in the Bankruptcy Court while the GUC Trust still had assets (*see infra* Section III.J)

Seventh, summary judgment cannot be granted on Plaintiffs' claims for injunctive relief because the record contains ample evidence that the defective vehicles pose an ongoing risk of irreparable bodily harm that cannot be adequately remedied with money damages, and Plaintiffs meet the substantive requirements for obtaining injunctive relief under the laws of the bellwether states. *See infra* Section III.K.

GM fails to satisfy the heavy burden of demonstrating that summary judgment is warranted. Its motion should be denied, and except as noted herein, Plaintiffs' claims should proceed to trial.

II. RELEVANT FACTS

A. GM has not fixed the ignition switch defects.

The five ignition switch recalls—Recall Nos. 14v047, 14v355, 14v394, 14v400, and 14v346—have not cured the defects plaguing the relevant vehicles.[1] Plaintiffs' supporting evidence is robust and, at a minimum, presents reasonably disputed issues of fact precluding summary judgment in GM's favor. The evidence is a compelling combination of facts found in GM's stipulated plea deal with the Department of Justice, GM documents, GM witness testimony, and Delphi documents and witness testimony, buttressed by reliable opinions and targeted testing by Plaintiffs' experts Dr. Glen Stevick and Steve Loudon.

1. All vehicles subject to Recall No. 14v047 are defective, and GM has not cured the defects.

a. All vehicles subject to Recall No. 14v047, including the Service Part Vehicles, were sold with defective ignition switches.

Recall No. 14v047 was done in two "waves." In February and March of 2014, GM initiated the recall to cover vehicles containing the "Delta" ignition switch with part number 10392423 (the 423 Delta switch). GMSUF at ¶ 2.[2] In announcing the recall, GM said that the "ignition switch torque performance may not meet General Motors' specification," which could cause the Delta ignition switch to "unintentionally move from the 'run' position to the

[1] Regarding Recall Nos. 14v118 (side-impact airbags) and 14v153 (power steering), although GM acted unlawfully by knowingly selling defective vehicles and failing to timely recall those vehicles, Plaintiffs acknowledge that the evidence now demonstrates that the remedies offered under those recalls are effective in repairing the defects.

[2] These vehicles were: 2005-2007 model year (MY) Chevrolet Cobalt; 2007 MY Pontiac G5; 2006-2007 MY Chevrolet HHR and Pontiac Solstice; 2003-2007 MY Saturn Ion; and 2007 MY Saturn Sky vehicles. *Id.* at ¶ 1. "GMSUF" refers to Plaintiffs' Response to Defendant General Motors LLC's Statement of Undisputed Material Facts in Support of its Motion for Summary Judgment (Dkt. No. 5860).

'accessory' or 'off' position with a corresponding reduction or loss of power" and potential for airbags not to deploy in a crash. PSUF at ¶ 2.[3]

In April 2014, GM expanded the 14v047 recall to include a second "wave" of vehicles, which were manufactured [redacted] GMSUF at ¶ 5; PSUF at ¶ 26.[4] The recall notice explained that a defect relating to motor vehicle safety existed in "service parts" and kits containing the 423 Delta switch that may have been used to repair up to 2,664 vehicles and that the recall was being done "[o]ut of an abundance of caution and to provide a replacement switch to all customers whose vehicles could have been impacted by the subject ignition switch . . . ." PSUF at ¶ 28. GM calls these the "Service Part Vehicles" and maintains that the vehicles themselves were not defective. GMSUF at ¶¶ 4, 8. This is false; the Service Part Vehicles [redacted] PSUF at ¶¶ 29-56.

(1) The first "wave" 14v047 recalled vehicles manufactured with the 423 Delta switch had defective switches.

Old GM established a torque specification for the Delta switches in all vehicles subject to Recall No. 14v047 of no less than 15 Newton-centimeters (N-cm). *Id.* at ¶ 7. The torque specification was communicated to the switch supplier, Delphi, which tested switches pre-production and found that the switches had "low detent plunger force" and did not meet Old GM's specifications. *Id.* at ¶¶ 7-12. Nonetheless, Old GM installed the defective Delta switches into vehicles, quickly learned of vehicle stalls resulting from the defective switch inadvertently moving out of the "run" position, did nothing to repair or replace the switches, continued to

[3] "PSUF" refers to Plaintiffs' Statement of Undisputed Material Facts Pursuant to Local Rule 56.1 in Support of Plaintiffs' Opposition to GM's Motion for Summary Judgment Against the Bellwether Economic Loss Plaintiffs.

[4] The April 2014 expansion of the 14v047 recall included the following vehicles that were manufactured with the 190 Delta switch: 2008-2010 MY Chevrolet Cobalt, 2008-2011 MY Chevrolet HHR, 2008-2010 MY Pontiac Solstice, 2008-2010 MY Pontiac G5, and 2008-2010 MY Saturn Sky vehicles. GMSUF at ¶¶ 4-5.

install the defective switches in millions of new vehicles, and concealed the defect. *Id.* at ¶¶ 12-19. GM has *admitted* that it *knew* that these vehicles were sold with defective switches that did not meet the torque specifications; that GM concealed this knowledge from the public and regulators until the recalls in 2014; that GM "falsely represented to consumers that vehicles containing the defect posed no safety concern;" and that GM misled consumers. *Id.* at ¶ 6. In a Consent Order with NHTSA, GM also admitted to violating the TREAD Act by not disclosing the defect. And GM agreed to a Deferred Prosecution Agreement (DPA) with the U.S. Department of Justice in which GM consented to the filing of an Information charging it with a scheme to conceal the deadly defect in violation of 18 U.S.C. § 1001, and committing wire fraud in violation of 18 U.S.C. § 1343. *Id.* at ¶ 5.

In 2006, Old GM secretly altered the Delta ignition switch to include a stronger "Catera" plunger that improved torque performance in vehicle models beginning in 2007. *Id.* at ¶¶ 20-27. [redacted] *id.* at ¶¶ 20-25, [redacted]. GMSUF at ¶ 5; PSUF at ¶ 26.

(2) The second "wave" 14v047 recalled vehicles (Service Part Vehicles) manufactured with the 190 Delta switch had defective switches.

Contrary to GM's contention, the 190 Delta switch installed in the Service Part Vehicles was also defective. [redacted]. *Id.* at ¶ 31. Delphi representatives confirmed to Congress that these test results "[redacted]

[redacted]." *Id.* at ¶ 32. GM's corporate representative confirmed under oath that the [redacted] *Id.* at ¶ 33. GM testing confirmed [redacted]. *Id.* at ¶ 34.

Litigation experts for both sides have confirmed that the 190 Delta switch suffers from low torque. Defense expert Michael Stevenson, [redacted], testified that, [redacted] *Id.* at ¶¶ 35-36. He also testified that [redacted] *Id.* at ¶¶ 37-38. Plaintiffs' expert Glen Stevick's testing obtained similar results, finding that, [redacted]. *Id.* at ¶¶ 39-41 (citing Nov. 10, 2017 Stevick report). Further, GM and its consultants [redacted]. *Id.* at ¶¶ 42-46.

GM has repeatedly highlighted the importance of torque, as demonstrated in the following examples. *First*, GM emphasized that [redacted] *id.* at ¶¶ 8, and GM's engineers have [redacted]

[redacted] *Id.* at ¶ 29. *Second*, GM initiated Recall 14v047 precisely because, as GM itself said, the "ignition switch *torque performance may not meet General Motors' specification*." *Id.* at ¶ 2 (emphasis added). *Third*, in response to [redacted] *Id.* at ¶¶ 47-56. This [redacted] is particularly damning to GM's litigation position that the switches in the Service Part Vehicles were not defective given that GM sold the recall remedy to NHTSA on the basis that every switch would meet torque specifications. The evidentiary record could not be clearer: the 190 Delta switches used in the Service Part Vehicles were defective.

b. All vehicles subject to Recall No. 14v047 are still defective.

While the 14v047 recall remedied the low torque problem, all cars with the Delta switch remain defective because (i) the ignition switch is placed too low on the steering column and is still vulnerable to knee-to-key turn offs, and (ii) the vehicles suffer from a single point of failure in that critical safety systems, including airbags, are disabled if the ignition switch moves out of the "run" position.

(1) The 14v047 vehicles still have a knee-key defect due to the low placement of the switch on the steering column.

As Dr. Stevick has opined, the 14v047 vehicles [redacted] *Id.* at ¶ 57 (citing Nov. 10, 2017 and May 18, 2018 Stevick reports). Dr. Stevick's opinion is fully supported by GM documents and GM witness testimony.

The ignition cylinder in the 14v047 cars is located in the lower right side of the steering column, placing the key and any items hanging from it close to the driver's right knee. PSUF at ¶ 58. Over time, Old GM and then GM attributed [redacted] and Ray DeGiorgio in 2004 identified [redacted] PSUF at ¶¶ 59, 61-62 (citing GM documents and GM witness testimony). In early 2005, Old GM engineers proposed a change to the switch location as a "sure solution," which was rejected due to cost considerations. *Id.* at ¶ 60 (citing the Valukas report).

On multiple occasions, GM engineers identified [redacted] *Id.* at ¶¶ 64-65. In 2012, GM engineer Terrance Connolly opined that [redacted]. *Id.* at ¶ 63. In 2014, GM hired consultants at Virginia Tech Transportation Institute (VTTI) to evaluate GM's testing, and VTTI concluded that [redacted] *Id.* at ¶ 66 (citing VTTI report and testimony of GM engineer Joe Fedullo). Indeed, VTTI confirmed that [redacted] *id.*, [redacted] *id.* at ¶¶ 69-70, and found that "[redacted] *id.* at ¶ 68. In her deposition, GM engineer Valarie Boatman endorsed VTTI's findings and [redacted] *Id.* at ¶ 67.

Additional evidence that GM did not solve the knee-to-key defect is [redacted] *Id.* at ¶¶ 71-85 (citing GM documents). Just before the recalls were announced in early 2014, GM decision-makers contemplated [redacted]. Investigator John Murawa concluded by mid-December that the "root cause" of airbag non-deployment in Cobalt models was [redacted] *Id.* at ¶ 72. But GM [redacted]. *Id.* at ¶¶ 77-85.

Tellingly, GM still advises customers to keep all items removed from their key chains even after receiving a replacement switch meeting GM's torque specification. *Id.* at ¶ 89 (citing GM documents). This, of course, would be unnecessary if remedying the low-torque issue with stronger switches addressed the only root cause of inadvertent key rotation. GM has not "fixed" these vehicles.[5]

(2) The 14v047 vehicles also suffer from a single-point-of-failure defect.

An ignition switch transitioning from "run" to "acc" results in the loss of engine power. A serious safety concern results, as other safety systems power down, including the seat belt pretensioners, power steering, power brakes, electronic stability control, and airbags. PSUF at ¶ 234 (citing Nov. 10, 2017 Loudon report); *see also id.* at ¶¶ 235-38 (citing DPA Statement of Facts). [redacted]

[5] Moreover, even if low torque is not the root cause of defects (and it is), relying on consumers to change keys and rings and follow GM's instructions to never weight the key is not an effective remedy [redacted]. *Id.* at ¶ 215.

[redacted] *Id.* at ¶ 239 (citing Dr. Stevick and Loudon reports).

As Dr. Stevick opines, engineers "[redacted]." *Id.* at ¶ 240. In other words, as Mr. Loudon explains, "[redacted]." *Id.* at ¶ 241. The ignition-switch recalls at issue in this case did not address this single point of failure. So, the cars remain defective even after recall. *Id.* at ¶ 242.

In Dr. Stevick's opinion, power should have been supplied to the SDM for a longer period after ignition switch power-off in order to be available during a crash scenario, or the SDM should have been connected directly to the battery and either software logic or an additional hardware circuit should have been implemented to ensure airbag deployment if the vehicle was still moving. PSUF at ¶ 243 (citing Ex. 8 at 73-75; SJ Ex. 9 at 26-50 (July 29, 2015 Stevick Report); SJ Ex. 10 at 62:10-64:4, 100:2-22, 130:25-135:18 (Sept. 28, 2015 Stevick Dep.). Dr. Stevick even designed, built, and tested a simple circuit that powers the SDM if the vehicle is moving more than 15 mph. PSUF at ¶ 244 (citing SJ Ex. 10 at 13:4-19:24 (Sept. 28, 2015 Stevick Dep.). Mr. Loudon concurs, opining that the loss of engine power and power steering, moving stalls, and airbag non-deployment present serious safety issues, and that GM

should have designed the SDM to remain active and allow the airbags to deploy where the ignition switch moved out of "run." *Id.* at ¶ 245 (citing Ex. 126 at 4).

GM could have fixed this problem but did not. [redacted], *id.* at ¶ 246 (citing Dr. Stevick), [redacted] *Id.* (citing VTTI documents). [redacted] *Id.* at ¶ 247 (citing Nov. 10, 2017 Loudon report).

[redacted] *See id.* at ¶ 248. [redacted] *Id.* (citing SJ Ex. 11 GM-MDL2543-000673219-225); SJ Exs. 12 (GM-MDL2543-003853956-959) and 13 (GM-MDL2543-002134382)). [redacted] PSUF at ¶¶ 249-55 (citing Ex. 48; SJ Exs. 14 (GM-MDL2543-000851826-841), 15 (GM-MDL2543-004241860-861), 16 (GM-MDL2543-402048593-604), 17 (GM-MDL2543-003501412-414), 18 (GM-MDL2543-002375439-503); Exs. 129-32). [redacted] PSUF at ¶ 254 (citing SJ Exs. 19 (GM-MDL2543-003575716-720), 18 (GM-MDL2543-002375439-503), 20 (GM-MDL2543-002139814-815)). [redacted]

[redacted] PSUF at ¶ 255 (citing SJ Ex. 21 at 15 (Nov. 13, 2015 Stevick Report); SJ Ex. Ex. 22 (GM-MDL2543-400955824); SJ Ex. 23 at 53:1-54:5 (Jul. 21, 2015 John Capp Dep.); *see also* Ex. 130; SJ Ex. 24 at 38:22-40:13, 34:11-16, 86:14-93:9, 96:10-97:14, 94:11-95:6, 101:20-103:2, 104:13-18, 109:4-13, 110:15-111:16, 131:22-132:9, 155:5-7 (June 1, 2015 Vipul Modi Dep.); SJ Ex. 25 at 21:19-27:17 (Nov. 5, 2015 Eric Buddrius Dep.). [redacted]

[redacted] PSUF at ¶¶ 248-56 (citing GM documents and Loudon report).

2. GM has not cured the ignition switch defects in the vehicles subject to Recall Nos. 14v355, 14v394, and 14v400.

a. The switches in the vehicles subject to Recall Nos. 14v355, 14v394, and 14v400 are defective because they have low torque.

The recall procedure for cars subject to the 14v355, 14v394, and 14v400 recalls consisted entirely of modifying key covers and key rings.[6] GM contends that these switch defects differ from the 14v047 defect, even though all of the vehicles in all four recalls have the same defect (a weak switch) that created exactly the same safety risks (inadvertent rotation with moving stalls and loss of safety systems). The low-torque defect in these switches has not been remedied by GM's recalls that merely change key covers and key rings.

GM has known since its inception that the defect in the 14v355 vehicles is low-torque ignition switches. In 2005, [redacted]. PSUF at ¶¶ 93-102 (citing

[6] Recall No. 14v355 recalled the 2005-2009 Buick Lacrosse, 2006-2011 Buick Lucerne, 2000-2005 Cadillac Deville, 2006-2011 Cadillac DTS, 2006-2014 Chevrolet Impala, 2006-2007 Chevrolet Monte Carlo, and 2014 Chevrolet Impala Limited. PSUF ¶ 90. Recall No. 14v394 recalled the 2003-2014 Cadillac CTS and 2004-2006 Cadillac SRX. *Id.* at ¶ 130. Recall 14v400 applied to the 2000-05 Chevy Impala, 2000-05 Chevy Monte Carlo, 1997-03 Chevy Malibu, 2004-05 Chevy Malibu Classic, 1999-04 Olds Alero, 1998-02 Olds Intrigue, 1999-05 Pontiac Grand Am, and 2004-08 Pontiac Grand Prix. *Id.* at ¶ 176. GM said the defect underpinning all three recalls related solely to a key ring carrying added weight which, if bumped or if the vehicle goes off road or experiences another jarring event, may cause the key to unintentionally rotate out of "run." *Id.* at ¶¶ 91, 131; GMSUF at ¶ 80.

Old GM documents and Ms. Andres testimony). A company technician confirmed the problem, [redacted] *Id.* at ¶ 97. [redacted]. *Id.* at ¶ 101. [redacted] *Id.* at ¶ 98. Indeed, GM torque testing in 2014 found that the 14v355 vehicle switches performed below the target specification of [redacted]. *Id.* at ¶¶ 117-21 (citing GM documents and testimony of GM engineers Joe Reiss and Brian Thompson). Dr. Stevick's testing also found that all three relevant switch models implicated by Recall No. 14v355 (which have the same housing and mechanics) failed GM's minimum torque specification of 15 N-cm. *Id.* at ¶ 122 (citing Nov. 10, 2017 Stevick report).

[redacted]. *Id.* at ¶¶ 106-16 (citing GM documents and testimony of GM engineers Joe Reiss and Brian Thompson). [redacted] *Id.* at ¶ 116.

Low-torque switches also play a pivotal role in the 14v394 defect, which has not been remedied by installing two key rings and a key insert. *Id.* at ¶¶ 155-59 (citing Nov. 10, 2017 Stevick report, GM documents, and testimony of GM engineer Brian Thompson). GM testing in 2014 [redacted]. *Id.* at ¶¶ 160-65 (citing GM documents and testimony of GM engineer Brian Thompson). This is not surprising, [redacted]

[redacted] *Id.* at ¶¶ 132-36 (citing GM documents, testimony of GM engineer Brian Thompson, Delphi documents, and testimony of Delphi engineer Eric Mattson). And like the Delta switch, [redacted]. *Id.* at ¶¶ 137-38.[7] Further, [redacted] *id.* at ¶ 147 (GM contends that the slot, coupled with new key rings, fixes the problem).

As for Recall No. 14v400, while GM told NHTSA that the defect was limited to the risk of a key ring carrying added weight (GMSUF at ¶ 79), GM internally described [redacted] PSUF at ¶ 177. Early on, Old GM engineers [redacted] *id.* at ¶¶ 179-99 (citing GM documents and testimony of GM engineers Brian Thompson and Ray Romeo), but this did not solve the problem. GM testing in 2014 demonstrated [redacted] *Id.* at ¶¶ 205-09 (citing GM documents and testimony of GM engineers Brian Thompson and Valarie Boatman). Dr. Stevick's testing of

[7] The Catera switch was redesigned in 2006 for the Cadillac SRX, the plunger and spring remained the same as in the original Catera. *Id.* at ¶¶ 140-41. And while the switch was redesigned again for the CTS models beginning in model year 2008, inadvertent switch rotation problems impelled GM to change the key head opening from a slot to a hole and use smaller key rings. *Id.* at ¶¶ 142-47.

three switch part numbers associated with Recall No. 14v400 [redacted] *Id.* at ¶ 210.[8]

b. The switches in the vehicles subject to Recall Nos. 14v355 and 14v394 are also defective because they still have a knee-to-key defect, and all vehicles subject to Recall Nos. 14v355, 14v394, and 14v400 have a single-point-of-failure defect.

The 14v355 vehicles also remain defective because the key insert and ring changes do not eliminate the potential for knee-to-key interaction, just as those modifications did not remedy the 14v047 defect. *See supra* Section IIA.b.1. [redacted] PSUF at ¶¶ 128-29 (citing GM documents and testimony of Joe Reiss). For vehicles subject to the 14v394 recall, GM testing revealed [redacted], *id.* at ¶¶ 168-72 (citing GM documents and testimony of GM engineers Valarie Boatman and Brian Thompson), and GM has [redacted], *id.* at ¶¶ 148-154 (citing GM documents and testimony of GM engineers Mark Beauregard and Brian Thompson). And all vehicles involved in all three recalls, like the 14v047 vehicles, still suffer from a single-point-of-failure defect, *id.* at ¶¶ 234-56 (citing Dr. Stevick and Loudon reports, VTTI documents, GM documents, and testimony of GM engineer Vipul Modi).

[8] Dr. Stevick also found that suppliers of replacement keys for the subject GM cars are selling keys with slots, thereby mooting the effectiveness of even the slot-to-hole key insert half-measure. SJ Ex. 38 at 208-10 (July 11, 2018 Stevick Dep.).

3. All vehicles subject to Recall No. 14v346 still have a knee-to-key defect.

Recall No. 14v346 involves an admitted knee-to-key defect in the 2010-2014 Chevrolet Camaro for which GM made available new key heads and key rings. But this action is not an adequate remedy; [redacted]. *Id.* at ¶¶ 216-33 (citing GM documents, testimony of GM engineers Valarie Boatman and Anthony Melocchi, and Nov. 10, 2017 Stevick report). Prior to announcing the recall, [redacted]. *Id.* at ¶¶ 224-26. [redacted] *Id.* at ¶ 227. [redacted]. *Id.* at ¶¶ 228-32. At a minimum, blade rotation should have been part of the Recall No. 14v346 remedy.

B. GM knew about the defects at issue from day one of its existence.

Plaintiffs' proof demonstrates that Old GM had knowledge of the pre-Sale Defects.[9] Because GM retained nearly all of Old GM's employees, documents and databases, *id.* at ¶¶ 319-50, Old GM's knowledge of the Defects is imputed to GM from its inception.[10] *See, e.g.*, CAL. CIV. CODE § 2332 ("both principal and agent are deemed to have notice of whatever either has notice of, and ought, in good faith and the exercise of ordinary care and diligence, to

[9] The "pre-Sale Defects" are all those that first impacted vehicles sold before the July 20, 2009 effective date of the bankruptcy Sale—all the defects at issue here *except* for the defect that led to Recall No. 14v346.

[10] *See, e.g., In re Motors Liquidation Co.*, 529 B.R. 510, 538 (Bankr. S.D.N.Y. 2015) ("at least 24 Old GM personnel (all of whom were transferred to New GM), including engineers, senior managers and attorneys, were informed or otherwise aware of the Ignition Switch Defect prior to the Sale Motion….").

communicate to the other");[11] *Eveready Heating & Sheet Metal, Inc. v. D. H. Overmyer, Inc.*, 476 S.W.2d 153, 155 (Mo. Ct. App. 1972) ("unbroken line of decisions" provides that "knowledge of an agent while acting within the scope of authority [is] knowledge of the principal");[12] *Great Am. Mortg. Inv'rs v. Louisville Title Ins. Co.*, 597 S.W.2d 425, 432 (Tex. Civ. App. 1980) ("knowledge of an agent relating to information, acts and events within the scope of the agency is imputed to the principal").[13]

Contrary to GM's position in prior briefing, Plaintiffs imputation argument is not limited to the fact that some employees worked at both companies. Rather, a "critical mass" of high-level Old GM employees with knowledge of the Delta Ignition Switch Defect stayed on at GM, *In re Motors Liquidation Co.*, 529 B.R. at 558 n.154, [redacted]. PSUF at ¶¶ 340-50. [redacted] *Id.* at ¶¶ 331-39.[14] None of GM's authorities involve remotely similar facts,[15] and Old GM's pre-Sale knowledge of the defects is imputed to—and in fact was transferred to and possessed by—GM.

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[11] *See also Columbia Pictures Corp. v. De Toth*, 197 P.2d 580, 587 (Cal. Ct. App. 1948) (the principal is "charged with knowledge which his agent acquires before the commencement of the relationship when that knowledge can reasonably be said to be present in the mind of the agent while acting for the principal").

[12] *See also Packard Mfg. Co. v. Indiana Lumbermens Mut. Ins. Co.*, 203 S.W.2d 415, 421 (Mo. 1947) (corporate agent's knowledge within the scope of his authority and employment is imputed to the corporation).

[13] *See also Seven Elves, Inc. v. Eskenazi*, 704 F.2d 241, 245 (5th Cir. 1983) (collecting Texas authorities).

[14] Indeed, Old GM documents are now GM documents.

[15] In arguing against imputation in the past, GM has relied on *Conmar Prods. Corp. v. Univ. Slide Fastener Co.*, 172 F.2d 150 (2d Cir. 1949), but that case is inapposite. The *Conmar* plaintiff had to prove that the defendants knew that plaintiff's former employees had executed contracts promising not to divulge plaintiff's methods, and that defendants "induced the men to divulge the secrets they had learned." *Id.* at 154. The Second Circuit affirmed the district court's finding that defendants "had no knowledge of the secrecy contract," *id.* at 154, and therefore ruled in favor of the defendants: "[h]aving acquired the secrets innocently, they were entitled to exploit them." *Id.* at 157. *Conmar* provides no support for GM.

C. Plaintiffs were harmed at the point of sale in a quantifiable amount, and many suffered additional injury in the form of lost time.

All Plaintiffs were damaged when they bought or leased their cars. As the Court has recognized, damages occur at the point of sale, *In re GM LLC Ignition Switch Litig.*, 2016 WL 3920353, at *30 (S.D.N.Y. July 15, 2016) ("*TACC Order*"), when GM's omissions caused Plaintiffs to acquire defective cars they otherwise would not have acquired or for which they would have paid less. *See id.* at *20 ("a concealed defect" that "implicated a safety issue … would have affected a reasonable person's decision to purchase a car—making the omission material"). Indeed, each of the Plaintiffs testified that safety was a materially important factor in their purchase or lease of their vehicle, and that they would not have bought their vehicle, or paid less, had GM disclosed the defects. PSUF at ¶¶ 266-67. Of course, GM understood that safety was and is an important factor in a consumer's purchase decision. *Id.* at ¶¶ 257-63. For example, in 2006 customers told Old GM that [redacted]," *id.* at ¶ 263, and in 2012, GM recognized that safety "ranks among the top 10 reasons for purchase," *id.* at ¶ 259. That is why GM includes implicit and explicit safety messages in so much of its vehicle advertising and promotional material. *Id.* at ¶ 268.

GM's understanding of the importance of safety to consumers is echoed in publicly available research, including *Consumer Reports* surveys in which 88% of participants reported safety as a "top three" priority in purchasing a vehicle. *Id.* at ¶¶ 264-65. Plaintiffs' advertising expert reliably concludes that safety is a major consideration for consumers. *Id.* at ¶ 268. Even GM's own experts [redacted]. *Id.* at ¶ 271.

1. Plaintiffs' point-of-sale damages model.

Consistent with the foregoing evidence, Plaintiffs' damages expert Stefan Boedeker has constructed a reliable damage model that measures Plaintiffs' benefit-of-the-bargain damages.

[redacted]. *Id.* at ¶¶ 272-98.

[redacted]. *Id.* at ¶ 283. Where, as in the case of Recall No. 14v047, [redacted] *Id.* at ¶ 284.

The calculated median economic loss numbers, when applied to the circumstances of each

Plaintiff, establish each Plaintiff's specific damage amount. *Id.* at ¶¶ 289-97. Professor Joshua Gans opines that "Mr. Boedeker's approach to damages is conceptually appropriate as a matter of economics" and that "it is valid to measure economic harm calculating the reduction in value for the cars that they had actually purchased had consumers known about the Defect at the time of purchase." *Id*. at ¶ 298.[16]

2. Plaintiffs' lost time damages model.

Plaintiffs' damages are not limited to loss of benefit-of-the-bargain. They were also damaged by losing valuable time in responding to the recall notices and taking the vehicles to the GM dealership for recall service.[17] Many Plaintiffs spent hours and sometimes days of their time seeking and waiting for recall repairs. *See, e.g., id.* at ¶¶ 453 (Plaintiff Thomas), 462 (Plaintiff Akers), 522 (Plaintiff Witherspoon), 548 (Plaintiff Fuller). Plaintiffs' expert Ernest Manuel has created a reliable model for estimating these consequential damages in terms of average time spent. *Id.* at ¶¶ 314-18.

III. ARGUMENT

Summary judgment is inappropriate here because there are genuine issues of material fact supporting Plaintiffs' claims. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). GM has not satisfied its initial burden of demonstrating the absence of a genuine issue of material fact in any area. *See id.* at 322. If the movant fails to carry that initial burden, the motion must be denied, even if the opposing party has not disputed any of the moving party's facts. *See id.* at 140-41; *St. Pierre v. Dyer*, 208 F.3d 394, 404-05 (2d Cir. 2000).

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[16] To be clear, on this motion GM has not challenged Mr. Boedeker's qualifications, the reliability of his methodology, or the relevance of his opinions. Instead, GM claims that Mr. Boedeker has not rendered specific opinions about the specific losses of the named plaintiffs, including those at issue in this motion. However, and as discussed more fully below, this argument is wrong because Mr. Boedeker has shown that *every class member* has been damaged.

[17] As shown below, in California, lost time is itself sufficient to confer a plaintiffs' entitlement to these damages; in other states, damages are available for people who suffered lost wages.

A moving party cannot satisfy its burden by simply stating an affirmative fact that is unsupported in the evidentiary record. *See, e.g., Giannullo v. City of N.Y.*, 322 F.3d 139, 141 n.2, 143 n.5 (2d Cir. 2003); *St. Pierre*, 208 F.3d at 404-05. A defendant seeking summary judgment must introduce admissible, supporting evidence. *St. Pierre*, 208 F.3d at 405. Allowing anything else "would derogate the truth-finding functions of the judicial process by substituting convenience for facts." *Giannullo*, 322 F.3d at 143 n.5. In making its determination, the Court "must construe all evidence in the light most favorable to the non-movant, which requires drawing all reasonable inferences in the non-movant's favor." *Mabry v. Hester*, 2014 WL 1848739, at *1-2 (S.D.N.Y. May 8, 2014) (Furman, J.).

There are ample genuine issues of material fact here, and GM cannot carry its burden of demonstrating that it is entitled to summary judgment.

A. GM's deceptive and fraudulent conduct caused Plaintiffs to suffer legally cognizable harm.

1. Plaintiffs were deprived of the benefit of their bargain because they did not bargain for cars with known safety defects.

The Court has repeatedly held that Plaintiffs' "benefit-of-the-bargain" injury occurs at the moment of purchase, and that "the benefit-of-the-bargain defect theory . . . measures the difference in value between the defective car the consumer received and the defect-free car the consumer thought she was getting (and for which she paid)." *TACC Order*, 2016 WL 3920353, at *30. In accordance with the Court's orders, logic, and the weight of authority, Plaintiffs' damages must be calculated as of the moment of purchase or lease, and are not vitiated or mitigated by GM's belated recalls (even if the recalls were completely effective in remedying all the defects at issue in this case, which they were not).

GM's assertion that Plaintiffs' damages would be obviated by free and effective recalls fails to consider the relevant facts at the moment of transacting—the key moment in this benefit-

of-the-bargain fraud case for economic loss. Had Plaintiffs (and other purchasers) been aware of the serious safety defects in Plaintiffs' cars at the moment of purchase, the cars would have been worth less.[18] Regardless of what happened later, Plaintiffs paid (and GM received) an excess amount for the cars—and those are the precise amounts Plaintiffs seek to recover in this action.[19] A repair—days, months or years later—cannot restore Plaintiffs' overpayment. And absolving GM of liability would reward GM for misconduct that allowed it to continue selling defective vehicles and postpone the business harm that prompt revelation would cause. The belated recalls (even if they were 100% effective) are therefore no substitute for the benefit-of-the-bargain damages that Plaintiffs may recover under established law. As the Court expressly held, "*the recalls, even those sufficient to remedy the defects, do not compensate Plaintiffs fully for the damages sought here.*" *TACC Order*, 2016 WL 3920353, at * 40 (emphasis added).

GM incorrectly contends that Plaintiffs suffered no benefit-of-the-bargain damages. GM Br. at 12-24. As the Court has recognized, the "crux of New GM's argument is that Plaintiffs did, in fact, receive the benefit of their bargain" because GM eventually "fixed (or offered to fix) each vehicle free of charge to each plaintiff…." *In re GM LLC Ignition Switch Litig.*, 2018 WL 1638096, at *2 (S.D.N.Y. Apr. 3, 2018) ("*BoB Opinion*"); *see also* GM Br. at 13 (repeating this assertion). GM is wrong, because Plaintiffs did not bargain and willingly pay for vehicles with serious safety defects known to GM at the time of sale—defects that might cause them to suffer death or serious bodily harm, and that might not be repaired. At the moment of sale, Plaintiffs overpaid for their cars based on GM's fraud and concealment, and GM should not be permitted

[18] As the Court has recognized, "a concealed defect" that "implicated a safety issue … would have affected a reasonable person's decision to purchase a car—making the omission material." *TACC Order*, 2016 WL 3920353 at *20.

[19] GM further benefitted by avoiding the cost and adverse publicity of recalls.

to retain that overpayment simply because subsequent events forced GM to belatedly attempt to cure the defects. GM's argument fails for several independent reasons.

First and foremost, because of the Court's ruling that benefit-of-the-bargain damages are incurred at the time of sale and that diminished-value damages are not available here, Plaintiffs are not seeking damages based on a diminished-value theory.[20] Post-sale developments (including free repairs) are relevant only to a diminution-of-value analysis that is not at issue as a result of this Court's prior rulings. *See infra* at Section III.A.1.a.

Second, Plaintiffs' conjoint damage analysis explicitly accounts for the recall repairs in an appropriate and fair fashion—at the time of sale when the consumer's damages were incurred (and GM's ill-gotten overpayment received). Tellingly, GM does *not* challenge the admissibility of Plaintiffs' conjoint analysis for the purposes of this motion. Accordingly, Plaintiffs' undisputed expert evidence shows that consumers (including the named Plaintiffs, *see infra* at Section III.A.3) would have paid less for a vehicle with a safety defect *even if* they knew that repairs would be immediate. And, crucially with respect to GM's argument, the further out in time that the consumer knew a recall was to occur, the less the consumer would be willing to pay (and hence the higher the damages). Thus, the belated recalls (if effective) may, at most, *impact* Plaintiffs' damages, but cannot *eliminate* them. *See infra* at Section III.A.1.b.

Third, even if the law permitted free and effective repairs to eliminate Plaintiffs' damages, Plaintiffs' evidence presents a question of fact as to whether the ignition switch-related recalls fully cured most of the defects at issue (they did not). *See infra* at Section III.A.2.[21]

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[20] In any event, GM's own expert analysis, when properly applied, demonstrates that the recalls *did* diminish the value of Plaintiffs' vehicles *even after* the repairs. *See* SJ Ex. 47 at ¶ 9 (May 18, 2018 Weisberg Report). That is further proof that the recalls (even if 100% effective) do not make Plaintiffs whole; only benefit-of-the-bargain damages can do that.

[21] Plaintiffs concede that the recall repairs fully cured the Side Impact Airbag and Power Steering defects.

Plaintiffs thus present substantial, undisputed evidence that they were harmed at the point of sale, and GM's belated repairs (even if fully effective) cannot change that fact.

a. The undisclosed defects created damage at the time of sale, even for cars that were later repaired.

Contrary to GM's "no harm, no foul" recall defense, Plaintiffs were damaged at the point of sale without regard to whether GM later repaired the defects. Again, as the Court held: "The benefit-of-the-bargain defect theory compensates a plaintiff for the fact that he or she overpaid, *at the time of sale*, for a defective vehicle. That form of injury has been recognized by many jurisdictions." *TACC Order*, 2016 WL 3920353, at *10 (emphasis added).[22] Further, the Court held that benefit-of-the-bargain damage analysis does *not* consider the alleged post-sale fact of diminution of value of the impacted automobile; that post-sale fact analysis could *only* be relevant to the "brand devaluation theory" rejected by the Court. *Id.*[23]

Given the Court's rulings, it follows that Plaintiffs' damages are not obviated by post-sale developments. *See, e.g., Carriuolo v. GM Co.*, 823 F.3d 977, 987 (11th Cir. 2016) (recognizing point-of-sale benefit-of-the-bargain damages—even if fraud later "cured"—because a "vehicle that the manufacturer knows to be safe is more valuable than a vehicle that the manufacturer perhaps anticipates will later be declared safe"); *see also id.* (defendant may not escape Florida statutory consumer fraud liability "merely because a deceptive or misleading statement later turns out to be true. The injury occurs at the point of sale because the false statement allows the seller to command a premium on the sales price."). That benefit-of-the-bargain damages are

[22] *Cf. In re GM LLC Ignition Switch Litig.*, 257 F. Supp. 3d 372, 401 (S.D.N.Y. 2017) ("*FACC Order*") (emphasis added) (rejecting the argument New GM's post-sale misconduct could be considered as a cause of Old GM purchasers' damages; holding that "*Plaintiffs' injury*, if any, *was complete at the time of sale*, and thus is not attributable to New GM's conduct.").

[23] The Court stated: "The benefit-of-the bargain defect theory does not compensate a plaintiff for a decrease in resale value"—the brand devaluation theory does. *Id.*

measured as of the time of purchase without regard to subsequent events is the law in the bellwether jurisdictions, and across the country.[24]

Plaintiffs anticipate that GM will cite *In re Johnson & Johnson Talcum Powder Prods. Mktg., Sales Practices & Liab. Litig.*, 2018 WL 4292359 (3d Cir. Sept. 6, 2018), a case holding that a baby powder consumer lacked standing to bring claims for economic loss because she had not adequately pled an injury in fact. However, standing is not challenged in this case and, unlike here, the *Johnson & Johnson* plaintiff failed to plead that she would have paid less for the product had she known the truth. *Id.* at *8. Also, here Plaintiffs' proof shows that *every* defective vehicle carried serious safety risks, whereas the *Johnson & Johnson* plaintiff "chose not to allege … that she was ever at risk of developing ovarian cancer." *Id*. at *9. Moreover, *Johnson & Johnson* did "not involve allegations of a defective product," and did "not involve a durable product still in a plaintiff's possession." *Id.* at *1.[25] Most significantly, in stark contrast to this case where Plaintiffs offer expert conjoint analysis showing that all Plaintiffs overpaid for their defective vehicles, *see* PSUF at ¶¶ 272-98, the *Johnson & Johnson* plaintiff failed to allege "that the Baby Powder provided her with an economic benefit worth one penny less than what she paid" and failed "to provide a non-conjectural basis for concluding that she did not receive

[24] *See, e.g., Hunter v. SMS, Inc.*, 843 F.2d 1391 (6th Cir. 1988) (Michigan law) ("[I]f subsequent events in the company's operations result in the [property] at some later date being worth as much as the plaintiff paid for it, this would not, under the benefit of the bargain approach, prevent plaintiff from recovery of damages for the false representations. What occurs *after* the bargain was made is thus normally not relevant to the representation made at the time of the bargain regarding the value of the [property] *at that time*.") (emphasis in original); *Merrill Lynch & Co. v. Allegheny Energy, Inc.*, 500 F.3d 171, 184-85 (2d Cir. 2007) (New York law) ("It is a well-established principle that … damages are measured at the time of the breach." Inquiries into the product's value "in the months following the acquisition [are] improper because events subsequent to the breach, viewed in hindsight, may neither offset nor enhance general damages.") (citations omitted); *Agliori v. Metro. Life Ins. Co.*, 879 A.2d 315, 316-17 (Pa. Super. Ct. 2005) ("If the court permits the appellee-defendants simply to repay what is owed the consumer under the fraudulently induced contract, the deterrence value of the [Pennsylvania consumer protection statute] is weakened, if not lost entirely. We cannot accept such an evisceration of the statutory goals.").

[25] The *Johnson & Johnson* court expressly distinguished the case before it from a case like this one, which involves a "plaintiff who…alleged that her automobile was at risk of imminently malfunctioning because of a particular defect," noting that such a case "would present a much different case than the one at hand." *Id.* at *1 n.4.

the benefit of her bargain." *Johnson & Johnson*, 2018 WL 4292359, at *7, 12. Even if *Johnson & Johnson* were correctly decided,[26] it does not support GM's motion.

(1) California law calculates benefit-of-the-bargain damages as of the time of sale, and not at any later time.

As a remedy for their statutory consumer and implied-warranty claims, the California Plaintiffs may recover the difference in value between what they thought they were purchasing (a car without known safety defects) and what they actually received, measured as of the time of the transaction under traditional benefit-of-the-bargain analysis.[27] The California Unfair Competition Law (UCL), CAL. BUS. CODE § 17200, and the California Legal Remedies Act (CLRA), CAL. BUS. CODE § 1750, *et seq.*, compensate consumers who "purchase a product that he or she *paid more for* than he or she otherwise might have been willing to pay … whether or not a court might objectively view the products as functionally equivalent." *TACC Order*, 2016 WL 3920353, at *20 (citing *Kwikset Corp. v. Superior Court*, 51 Cal. 4th 310, 329 (2011) (emphasis in original)); *see also id.* at *21 (*Kwikset* applies equally to claims under the CLRA).

Hence, under both the UCL and the CLRA, benefit-of-the-bargain damages are calculated based "on the difference between what was paid and what a reasonable consumer would have paid *at the time of purchase* without the fraudulent or omitted information." *Pulaski & Middleman, LLC v. Google, Inc.*, 802 F.3d 979, 989 (9th Cir. 2015) (citing *Kwikset*, 510 Cal. 4th at 329 (emphasis added)); *accord Davidson v. Kimberly-Clark Corp.*, 889 F.3d 956 (9th Cir.

[26] As the *Johnson & Johnson* dissent points out, the majority decision appears to be inconsistent with the rule that a "consumer's subjective willingness to pay more for the product than he or she would have been willing to pay in the absence of the misrepresentation is itself a form of economic injury 'whether or not a court might objectively view the products as functionally equivalent.'" *Id.* at *15 (quoting *Hansen v. Newegg.com Americas, Inc.*, 236 Cal. Rptr. 3d 61, 72 (2018) (quoting *Kwikset*, 246 P.3d at 890)).

[27] The Court has held that benefit-of-the-bargain damages are not available as a remedy for fraudulent concealment under California law. *TACC Order*, 2016 WL3920353, at *22.

2018) (upholding claims under UCL and CLRA).[28] The *Pulaski* Court explicitly held that whether the plaintiff actually obtained benefits after the challenged fraudulent conduct is irrelevant because "restitution under the UCL … measures what the [plaintiff] would have paid at the outset, rather than accounting for what occurred after the purchase." *Pulaski*, 802 F.3d at 989. So, even if a defendant effectively cures a defect with free repairs, plaintiffs may recover benefit-of-bargain damages. *See also In re Lenovo Adware Litig.*, 2016 WL 6277245, at *21 (N.D. Cal. Oct. 27, 2016) (following *Pulaski*) (damage model properly did not consider effects of free repairs because "the 'calculation need not account for benefits received after purchase because the focus is on the value of the service at the time of purchase"). This rule serves two purposes: "to restore the defrauded party to the position he would have had absent the fraud," (*i.e.*, to return the "overpay") and "to deny the fraudulent party any benefits, whether or not for[e]seeable, which derive from his wrongful act." *Pulaski*, 802 F.3d at 988. Applying the rule here also properly focuses on the difference in value between the cars Plaintiffs received (with safety defects known to GM) and the price Plaintiffs paid when they were *unaware* of the safety defects in their cars; their awareness of the safety defects would necessarily have impacted the price they would have willingly paid *at the time of purchase* when future events were unknowable (including whether they would be lucky and not suffer harm or unlucky and suffer harm, and when and if a "free" and effective repair would be offered).

GM now asks the Court to deviate from the rule and its prior holdings in order to allow GM to reduce (or even eliminate) its liability for fraud by relying on cases involving "diminution in value" damages, and "tortious injury to personal property," *see* Dkt. No. 4868 at 25-27,

[28] Rejecting the defendant's argument that plaintiff was required to prove post-sale harm in order to show damages, the Ninth Circuit reaffirmed that benefit-of-the-bargain damages under California law are incurred at the moment of sale: "[Plaintiff] was not required to allege damage to her plumbing or pipes. Under California law, the economic injury of paying a premium for a falsely advertised product is sufficient harm to maintain a cause of action." *Davidson*, 889 F. 3d at 965.

neither of which is at issue in this benefit-of-the-bargain case concerning consumer fraud in which the Court has categorically rejected any diminished-value damage theory. The California Supreme Court has explicitly declined to import damage theories from other areas of law to benefit-of-the-bargain consumer cases. *See Kwikset Corp. v. Superior Court*, 246 P.3d 877, 893 (Cal. 2011) (rejecting defendants' invitation to calculate benefit-of-the bargain damages in accordance with "two real property fraud cases"). In its previous summary judgment motion, GM provided no real basis for the Court to deviate from its prior rulings in this case and established California law, and GM provides no additional authorities here.[29]

In re Myford Touch Consumer Litig., 2016 WL 7734558 (N.D. Cal. Sept. 14, 2016), does not warrant the about-face GM asks the Court to take with respect to the consistent holdings in this and other cases that benefit-of-bargain damages (as opposed to diminished value damages) are incurred at of the time of sale, rendering post-sale events irrelevant. *See BoB Order*, 2018 WL 1638096, at *2 (suggesting that, consistent with *Myford Touch*, evidence of "post-sale mitigation" might "affect the availability or calculation of [benefit-of-bargain] damages"). *Myford Touch* is neither controlling nor persuasive. That opinion begins with the dubious premise that *Pulaski*'s holding—that the damages "calculation need not account for benefits received after purchase"—"appears to be confined to situations in which a plaintiff seeks (1) restitution under (2) California's UCL." *Myford Touch*, 2016 WL 7734558, at *18.[30] Plaintiffs respectfully submit that *Myford Touch* is mistaken on this point because consumers can also recover restitution under the CLRA. *E.g.*, *Colgan v. Leatherman Tool Grp., Inc.*, 135 Cal.

[29] GM previously cited two California District Court cases in support of its claim that repair offers can obviate a plaintiff's damages, *In re Toyota Motor Corp. Hybrid Brake Mktg., Sales Practices & Prod. Liab. Litig.*, 288 F.R.D. 445 (C.D. Cal. 2013), and *Waller v. Hewlett-Packard Co.*, 295 F.R.D. 472 (S.D. Cal. 2013), but both of these cases pre-date *Pulaski* and are therefore effectively overruled.

[30] The California Plaintiffs seek restitution under the UCL here, putting this case on all fours with *Pulaski* under any analysis.

App. 4th 663, 694 (2006). Moreover, *Pulaski* itself was grounded in the holding of *Kwikset*, 246 P.3d at 890—that damages arise at the point of sale when "a consumer purchase[s] a product that he or she *paid more for* than he or she otherwise might have been willing to pay … whether or not a court might objectively view the products as functionally equivalent." And this Court has recognized that *Kwikset* applies equally to UCL and CLRA claims. *TACC Order*, 2016 WL 3920353, at *21. Accordingly, the California Plaintiffs' benefit-of-the-bargain damages are not obviated by GM's belated remedial measures, even if effective.[31] The California Plaintiffs may recover their benefit-of-the-bargain damages, as well as punitive damages,[32] and lost-time damages (*see infra* at Section III.B).

(2) Missouri law also calculates benefit-of-the-bargain damages as of the time of sale, and not at any later time.

The Court has held that benefit-of-the-bargain damages are an available remedy for the Missouri Plaintiffs' claims for violations of the Missouri Merchandising Practices Act, MO. REV. STAT. § 407.010, *et seq.* (MMPA), fraudulent concealment, and implied warranty. *See TACC Order*, 2016 WL 3920353, at *33-35. Punitive damages are also available under the MMPA. MO. REV. STAT. § 407.025.1. In cases concerning the sale of a car, benefit-of-the-bargain damages are calculated as "the difference between the actual value of the car and the value the car would have had if the representation had been true." *Auffenberg v. Hafley*, 457 S.W.2d 929, 937 (Mo. Ct. App. 1970). As in California, these "damages are measured at the time of the transaction." *Heberer v. Shell Oil Co.*, 744 S.W.2d 441, 443 (Mo. 1988) (*en banc*).

[31] *Clayworth v. Pfizer*, 233 P.3d 1066, 1072 (Cal. 2010), cited by GM, is inapposite as it did not involve benefit-of-the-bargain damages and concerned only the question of standing. In rejecting the defendants' argument that the plaintiffs lacked standing because they passed-on their alleged overpayments to their consumers, the *Clayworth* court found that the defendants' argument "conflates the issue of standing with the issue of the remedies to which a party may be entitled." 233 P.3d at 1087. In holding that the plaintiffs had standing, the court explicitly did not rule on the issue of what damages the plaintiffs might recover, or, more specifically, whether damages might be reduced through the doctrine of mitigation. *Id.*

[32] *See* CAL. BUS. CODE § 1780(a)(4) (punitive damages available under the CLRA).

Auffenberg expressly rejected the seller's argument that post-sale events should be taken into account when calculating consumer damages arising from the sale of a misrepresented car:

> It is true that after the completion of the transaction [seller]-plaintiffs forced a return of the property by a suit in replevin and [consumer] Mrs. Hafley persuaded plaintiffs to give her back her old car, but this was after the date of the transaction to which this action of fraud is directed. As stated above, *the damages are to be ascertained on the date of the transaction.* Mrs. Hafley … was entitled … to the "benefit of the bargain" to compensate for the alleged wrong done her.

Auffenberg, 457 S.W.2d at 938 (emphasis added); *see also Miller v. Higgins*, 452 S.W.2d 121, 125 (Mo. 1970) ("Is the victim of fraud to be penalized or denied any recovery when he is successful in mitigating the damage? We know of no authority so holding."); *In re Usery*, 123 F.3d 1089, 1094 (8th Cir. 1997) (citing *Auffenberg*) ("Damages are measured as of the time of the transaction."); *Larabee v. Eichler*, 271 S.W.3d 542, 548 (Mo. 2008) (same). Missouri law could not be clearer: for claims based on fraud in connection with a consumer sale, benefit-of-bargain damages are measured at the time of transaction, and post-sale events are irrelevant.

Once again, GM's prior briefing that it incorporates by reference (GM Br. at 13) ignores the relevant consumer fraud authorities, and mainly relies on factually and legally inapposite cases that do not involve misrepresented-product sales or benefit-of-the-bargain damages. *See, e.g., Crawford v. Whittaker Constr., Inc.*, 772 S.W.2d 819, 822 (Mo. Ct. App. 1989) (discussing "diminution of value" damages); *De Armon v. City of St. Louis*, 525 S.W.2d 795, 801 (Mo. Ct. App. 1975) (discussing "diminution in value" damages); *Flora v. Amega Mobile Home Sales, Inc.*, 958 S.W.2d 322, 324 (Mo. Ct. App. 1998) (discussing "measure of damages in a negligence action for damage to real property"). But this Court has repeatedly distinguished diminished value damages (not at issue in this case) from benefit-of-the-bargain damages. Further, Plaintiffs' claims do not sound in negligence. As in California, then, GM's belated post-fraud recalls (even if effective) do not eliminate its liability. The Missouri Plaintiffs may recover their

benefit-of-the-bargain damages as of the time of sale, as well as punitive damages and lost-time damages (*see infra* at Section III.B).

(3) Texas law also calculates benefit-of-the-bargain damages as of the time of sale and not at any later time.

The Texas Plaintiffs' remaining claims at issue on this motion are brought under the Texas Deceptive Trade Practices Act (TDPA), TEX. BUS. & COM. § 17.41, *et seq.*, which permits recovery of benefit-of-the-bargain damages. *See FACC Order*, 257 F. Supp. 3d at 448-49. As in California and Missouri, these damages "are properly measured at the time of the sale induced by the fraud . . . and not at some future time." *Fazio v. Cypress/GR Houston I, L.P.*, 403 S.W.3d 390, 396 (Tex. Ct. App. 2013); *see also Arthur Andersen & Co. v. Perry Equip. Corp.*, 945 S.W.2d 812, 817 (Tex. 1997) ("damages are determined at the time of sale").

GM's argument that post-sale repairs should vitiate its liability (GM Br. at 13-14) rings particularly hollow in Texas, where the Court has held that Plaintiffs must prove a manifestation of the defect. Whatever the efficacy of the recall repairs, they were too late to save Plaintiffs from the ill-effects of the defects. *See infra* at Section III.A.2. In any event, GM has proffered no on-point authorities granting it the immunity it seeks under Texas law, and Plaintiffs are not aware of any. The Texas Plaintiffs may recover benefit-of-the-bargain damages, as well as other damages (including lost-time damages, *see infra* at Section III.B). *See, e.g., Henry S. Miller Co. v. Bynum*, 836 S.W.2d 160, 162 (Tex. 1992) (under the TDPA, "such direct measures as 'benefit-of-the-bargain' and 'out-of-pocket' are not exclusive[,]" and courts may award "other damages to ensure that the plaintiff is made whole").

b. Plaintiffs' damage model fairly accounts for GM's belated recalls.

To the extent that the Court may use this motion to elaborate on its tentative "surmise" that GM's post-sale recalls could "affect the availability or calculation of damages," *BoB Order*,

2018 WL 1638096, at *2, Plaintiffs' damage model factors in the actual value of belated repair (properly measured as of the time of purchase, the relevant moment in this benefit-of-the-bargain case).[33] PSUF at ¶¶ 282-83. Thus, GM's complaint that Plaintiffs' damage analysis fails to account for its recalls is misguided. Plaintiffs' damage analysis fairly discerns the impact of the latent safety defects on the price of the defective vehicles and takes into account the time between sale and recall.

2. Plaintiffs' vehicles remain defective.

In any event, Plaintiffs' damages have not been mitigated by the recalls. The recalls did not fix the ignition switch-related defects.

a. GM has not repaired the vehicles.

With regard to all defects other than side airbag (Recall No. 14v118) and power steering (Recall No. 14v153), there is—at a minimum—an issue of fact as to whether GM's recall repairs actually cured the defects. As described above, the evidence indicates that GM chose not to fix aspects of the cars that GM knew were causing or contributing to the safety hazards, and as a result the cars remain defective. Vehicles subject to the 14v355, 14v394, and 14v400 recalls still suffer from low-torque switch defects because GM did not replace the switches as part of the recalls; vehicles subject to the 14v047, 14v355, and 14v394 recalls still suffer from knee-to-key defects because of the low placement of the ignition switch on the steering column; and all of the vehicles still have a single-point-of-failure defect because critical safety systems, including airbags, are disabled if the ignition switch moves out of run. *See Section* II.A, *supra*.

[33] As demonstrated above, the Court's prior rulings are inconsistent with any notion that post-sale events can be viewed as exculpatory or mitigating. *See, e.g.*, *TACC Order*, 2016 WL 3920353, at *30 ("the benefit-of-the-bargain defect theory… measures the difference in value between the defective car the consumer received and the defect-free car the consumer thought she was getting (and for which she paid)"); *FACC Order*, 257 F. Supp. 3d at 401 ("*Plaintiffs' injury*, if any, *was complete at the time of sale*, and thus is not attributable to New GM's conduct.") (emphasis added); *TACC Order*, 2016 WL 3920353, at *40 ("the recalls, even those sufficient to remedy the defects, do not compensate Plaintiffs fully for the damages sought here").

b. Plaintiffs' evidence of un-remedied defects is admissible.

GM contends that none of Plaintiffs' evidence demonstrating the un-remedied defects is admissible, GM. Br. at 16-19, but GM is wrong. While Plaintiffs rely on the opinions of experts Glen Stevick and Steve Loudon, much of the evidence is comprised of GM's admissions from its own switch testing. For example, [redacted] *See* PSUF at ¶¶ 117-21, 160-65, 205-09. For a fuller treatment, Plaintiffs respectfully refer the Court to their Opposition to GM's Motion to Exclude Plaintiffs' Expert Opinions under *Daubert* and Federal Rules of Evidence 702, which is incorporated herein by this reference. Plaintiffs' evidence that GM has not fixed these cars is admissible.

3. Plaintiffs' evidence properly quantifies their benefit-of-the-bargain damages and precludes summary judgment.

Plaintiffs' damages are the same damages suffered by all class members: their overpayments resulting from GM's failure to disclose the safety defects in their vehicles. Once again, these amounts arise from the impact on price the safety defects *would have had* if GM had disclosed (i) the particular defect at issue and (ii) when (if ever) a free fix would be available. *See* PSUF at ¶¶ 271-97. Thus, Plaintiffs' benefit-of-the-bargain damages are determinable, based on the vehicle they purchased, the defect that vehicle contained, and the length of time from the sale to the recall.[34] The damages are itemized in Exhibit SJ Ex. 43. Contrary to GM's argument, then, the record evidence establishes for each Plaintiff the "fact that he or she overpaid, at the time of sale, for a defective vehicle." *TACC Order*, 2016 WL 3920353, at *7-10. That is all they are required to show, and GM's arguments to the contrary fail.

[34] The California and Missouri Ignition Switch Defect Bankruptcy Class Plaintiffs' damages are limited to the percentage of the value of their claims that they would have recovered if they had filed timely claims in Old GM's bankruptcy. *See infra* at Section III.J.

Named Plaintiffs need not themselves be experts as to the impact of the safety defects on the value of their cars. GM Br. at 20-22. GM chastises Plaintiffs because they "deferred to their experts" as to the impact of the undisclosed defects on the value of their cars. *Id.* But GM cites no authority requiring Plaintiffs to have such expertise themselves, or to refrain from using experts. *See, e.g., BPP Wealth, Inc. v. Weiser Capital Mgmt., LLC*, 623 F. App'x 7 (2d Cir 2015) (affirming damages finding based on expert testimony).

Plaintiffs' expert need not separately calculate each Named Plaintiffs' damages. GM Br. at 22-24. As GM states, Mr. Boedeker himself did not allocate individual Plaintiffs' damages. Instead, he provided a methodology for doing so that establishes that each and every class member overpaid for defective cars and thereby suffered damages. Crucially, GM does *not* challenge that methodology for the purposes of summary judgment. Depending upon the findings made by the trier of fact, Boedeker's conjoint analyses can readily determine each Plaintiffs' damages, and SJ Ex. 43 sets forth the range of damages the jury might award depending upon its findings. *See, e.g.*, PSUF ¶ 293 (citing July 5, 2018 Boedeker Dep. at 132:6-7 ("[redacted]."); *id.* at 134:10-11 ([redacted]. Plaintiffs easily meet their burden in opposing summary judgment by offering proof that they overpaid for the cars, even if the precise amount of their damages is dependent upon the jury's findings. *See, e.g., Persh v. Peterson*, 2016 WL 4766338, at *5 (S.D.N.Y. Sept. 13, 2016) (summary judgment denied where "a reasonable jury could conclude that [Plaintiff] was damaged by … even though the precise amount" of damage was "not certain").

GM next complains that Plaintiffs' expert did not individually compute each Plaintiffs' damages—but again cites no authority imposing such a requirement. It is certainly true that

Plaintiffs' experts offer a methodology for assessing "the amount of *classwide* overpayment damages." GM Br. at 22 (emphasis supplied by GM). But that same *classwide* methodology shows each Plaintiff's damages by simply plugging in a few simple record facts for each Plaintiff, which Plaintiffs have done. *See* PSUF at ¶¶ 288-296; SJ Ex. 43.[35]

Plaintiffs need not proffer proof of the prices they paid for their vehicles in order to prove damages. GM mistakenly suggests that each Plaintiff must offer proof to a mathematical certainty of "what each plaintiff paid and the allegedly defective vehicle's market value." GM Br. at 19. That is not the law. Instead, the calculation of damages "'requires only that some reasonable basis of computation of damages be used, and the damages may be computed even if the result reached is an approximation.'" *Pulaski*, 802 F.3d at 989 (quoting *Marsu, B.V. v. Walt Disney Co.*, 185 F.3d 932, 938-39 (9th Cir. 1999)) (California law); *accord In re Lenovo Adware Litig.*, 2016 WL 6277245, at *21 (conjoint analysis sufficient to calculate benefit-of-the-bargain damages); *Larabee*, 271 S.W.3d at 548 (reversing grant of summary judgment where plaintiffs submitted an estimate of damages in a real property fraud case based on a "Sales Comparison Analysis" reviewing the sales price of 90 "similar properties" and concluding that the subject property "had a decrease in value of forty percent" as compared with the property as represented); *Millers Cas. Ins. Co. of Tex. v. Lyons*, 798 S.W.2d 339, 345 (Tex. Ct. App. 1990) (law does not require proof of damages "with mathematical exactness" as long as the evidence affords "a reasonable basis for estimating the amount of damage").

Plaintiffs provide adequate proof of their damages such that, at a minimum, there is a material issue of fact to be decided at trial.

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[35] While it is true that "not all consumers pay the same price for identical vehicles" and that "many variables" impact the price of a car, GM Br. at 22-23, Plaintiffs' benefit-of-the-bargain damages are based on the precisely-modeled impact of the safety defects on the value of their cars—and not on, for example, the paint color or age of the car. That is why Plaintiffs' experts have reliably modeled the impact of safety defects on the overall car value, as opposed to the impact of other factors not at issue in this case.

4. Plaintiffs who disposed of their vehicles before the recalls suffered compensable benefit-of-the-bargain damages at the point of sale.

In moving to reconsider the Court's dismissal of the claims of Plaintiffs who sold their cars prior to the recalls ("Pre-Recall Plaintiffs"), Plaintiffs advised the Court that they planned to "prove, through expert testimony" that they suffered damages. Dkt. No. 4344, at 8. While the Court noted that Plaintiffs had not *alleged* "sufficient factual matter" as to why the Pre-Recall Plaintiffs suffered losses, *In re GM LLC Ignition Switch Litig.*, 2017 WL 3443623, at *2 (S.D.N.Y. Aug. 9, 2017), the Court nonetheless denied GM's motion to dismiss the Pre-Recall Plaintiffs and chose to "defer" ruling on the issue "to 'another day—either in connection with motions for class certification or dispositive motions examining the laws of each applicable state.'" *Id.* at *3 (citation omitted). Now that day has come; the evidentiary record (including uncontested expert reports from Messrs. Boedeker and Gans) and bellwether state law demonstrate that the Pre-Recall Plaintiffs' claims stand.

As discussed *supra*, under the laws of the bellwether states, benefit-of-the-bargain damages are measured at the time of purchase. Where, as here, a plaintiff overpays for a product as the result of a defendant's deceptive and fraudulent conduct, the plaintiff is entitled to receive (and the defendant is not permitted to retain) the amount of that overpayment. The fact that subsequent purchasers were *also* harmed by GM's fraud does not change the fact that the Pre-Recall Plaintiffs overpaid for their vehicles and are entitled to a remedy.

Dispositive of GM's motion here, Plaintiffs' expert's conjoint analysis demonstrates precisely how *all* Plaintiffs incurred damages at the moment of sale consistent with the governing authorities in the bellwether states—including the Pre-Recall Plaintiffs. Because GM does not challenge Plaintiffs' conjoint evidence in connection with this motion, it cannot obtain summary judgment with respect to the Pre-Recall Plaintiffs. Stated differently, GM has failed to

produce sufficient evidence to support its contention that Pre-Recall Plaintiffs suffered no economic loss as a matter of law. *See* GM Br. at 26 (citing only evidence that three Plaintiffs disposed of their calls before the recalls, but providing no evidence of the impact of their alleged fraud on the price Plaintiffs paid for their cars). In the absence of such evidence, GM cannot prevail on its motion. *See, e.g.*, *Balestriere PLLC v. CMA Trading, Inc.*, 2014 WL 929813, at *12-13 (S.D.N.Y. Mar 7, 2014) (summary judgment denied where movant failed to provide evidence of contentions central to motion).

5. Recent precedent applying Missouri law confirms manifestation is not required for a Missouri implied warranty claim.

GM does not dispute that manifestation is not required for Plaintiffs to prevail on any of their California claims or the majority of their Missouri claims. GM Br. at 24 (challenging only Texas and Missouri implied warranty claims). While this Court previously held that a single Missouri Court of Appeals case—*Hope v. Nissan N. Am., Inc.*, 353 S.W.3d 68 (Mo. Ct. App. 2011)—"suggests that . . . manifestation is required to plead a viable breach of warranty claim under Missouri law[,]" *TACC Order*, 2016 WL 3920353, at *35, subsequent developments in the law confirm this is not so. Earlier this year, a federal court held that *Hope*'s reliance on two Eighth Circuit cases was misplaced because neither "were decisions based on Missouri law[.]" *Tershakovec v. Ford Motor Co.*, 2018 WL 3405245, at *8 (S.D. Fla. July 12, 2018) (declining to require manifestation and denying motion to dismiss Missouri implied warranty claims). Consequently, *Hope* alone "is unpersua[sive] that the clear weight of authority in Missouri requires a manifestation of the defect [.]" *Id.*; *see also* Dkt. No. 6028, Op. & Order Re Manifestation, Lost Time, & Unjust Enrichment at 7 (Sept. 12, 2018) ("the Court can no longer say with confidence that, across the states, the 'majority view' is that manifestation is required to state claims for fraud, violations of consumer protection statutes, and breaches of warranty"); *id.*

at 8 ("[W]hile manifestation may be helpful in proving the presence of a defect, it does not follow that recovery for economic loss should turn on whether the defect also caused property or personal damage.").

Plaintiffs concede, however, that Texas law requires manifestation in order to prevail on a breach of implied warranty claim. But there is a genuine issue of material fact regarding defect manifestation in Plaintiffs' vehicles, including the four Texas Plaintiffs and four of the Missouri Plaintiffs that GM has highlighted. Dawn Fuller (Texas) testified that [redacted] PSUF at ¶ 547 (citing Nov. 20, 2017 D. Fuller Dep. Tr. at 33:11-23; 55:2-11).

Gareebah Al-ghamdi (Texas) testified [redacted] PSUF at ¶ 528 (citing May 5, 2017 G. Al-ghamdi Dep. at 59:8-10). She also [redacted] *Id.* (citing May 5, 2017 G. Al-ghamdi Dep. at 61:21-62:4; 63:14-21 (emphasis added)). Ms. Al-ghamdi also testified [redacted] *Id.* at (citing May 5, 2017 G. Al-ghamdi Dep. at 168:21-169:9).

Lisa McClellan (Texas) testified [redacted] PSUF at ¶ 563 (citing May 4,

2017 L. McClellan Dep. at 69:7-10, 70:7-9, 73:20-74:6, 82:3-10, 85:21-86:1, 94:6-11, 95:14-18). Michael Graciano's stepdaughter (Texas) testified [redacted]. PSUF at ¶¶ 554-55. In each incident, the ignition switch had moved into the "off" position. *Id.*

Mario Stefano (Missouri) testified [redacted] PSUF at ¶ 502 (citing Apr. 14, 2017 M. Stefano Dep. at 52:18-53:4; 93:3-9). Brad Akers (Missouri) testified that [redacted]. PSUF at ¶ 458 (citing B. Akers PFS Q 58 at ELPLNTFF00013453). Kenneth Robinson (Missouri) testified [redacted] PSUF at ¶ 485 (citing May 9, 2017 K. Robinson Dep. at 67:8-20; 70:21-71:11). And Patrice Witherspoon (Missouri) testified [redacted] PSUF at ¶¶ 518-19 (citing GM-MDL2543-305118727, 33; GM-MDL2543-305154067-70; ELPLNTFFF00009318). The recall notice indicated that the recall repair was only required if the defect had manifested which, according to Ms. Witherspoon's records, it had. *Id.* at ¶ 519 (citing ELPLNTFFF00009318; GM-MDL2543-305154067-68).

B. Plaintiffs can recover consequential damages in the form of lost time.

Summary judgment is not warranted with respect to Plaintiffs' claims for lost time damages under California, Missouri, or Texas law.[36]

[36] Plaintiffs seek lost-time damages only on behalf of those Plaintiffs who brought their vehicles in for repair.

1. California does not require a showing of lost wages.

Like Colorado, New York, Ohio, Oklahoma, Utah, and Virginia, California allows recovery for lost time beyond lost earnings. Dkt. No. 6028, Op. & Order Re Manifestation, Lost Time, & Unjust Enrichment at 82. California courts expressly distinguish damages for loss of time from damages for loss of earnings, and California law permits lost time damages for UCL, CLRA, and fraud-based claims in the circumstances presented here. GM ignores relevant precedent and cites cases out of context in arguing otherwise.

Courts in California recognize "a clear distinction" between damages for "loss of time" and "loss of earnings." *Rupp v. Summerfield*, 326 P.2d 912, 918 (Cal. Ct. App. 1958). In *Rupp*, the California Court of Appeals rejected defendant's argument that "allowing a person both the value of his time and loss of earnings is to permit a duplication of damages." *Id.* Rather, the court instructed the jury "to place a monetary value upon the time lost away from plaintiff's normal pursuits in addition to money lost in the form of salary or wages." *Id.*

With respect to restitution under the UCL, federal courts recognize that the contours of economic injury sufficient to confer UCL standing are "still developing." Notably, some courts define "a loss of money or property" under the UCL far more broadly than GM suggests. *See, e.g., In re Anthem, Inc. Data Breach Litig.*, 162 F. Supp. 3d 953, 985-86 (N.D. Cal. 2016). For example, in *Corona v. Sony Pictures Entm't, Inc.*, 2015 WL 3916744, at *4-5 (C.D. Cal. June 15, 2015), the Northern District of California held that "costs relating to credit monitoring, identity theft protection, and penalties"—including the cost of lost time related to such activities, *see id.* at *4 (citing "costs already incurred" as alleged in specific paragraphs of the complaint)—constitute "a cognizable injury" under the UCL. None of the costs that the *Corona* court discussed included lost income. *See also In re Anthem, Inc. Data Breach Litig.*, 2016 WL 3029783, at *26 (N.D. Cal. May 27, 2016) ("using their own time for credit monitoring" in

response to a data breach "resulted in damages that may be recoverable" under federal law without discussing lost income).

As to the CLRA, its "any damage" provision may encompass "opportunity costs," which are "the benefit[s] forgone by employing a resource in a way that prevents it from being put to another use." *Meyer v. Sprint Spectrum L.P.*, 200 P.3d 295, 299 n.1 (Cal. 2009) (citation omitted). Here, as a result of GM's unfair or deceptive acts or practices, Plaintiffs had to spend time obtaining repairs to their vehicles rather than putting that time to another use. PSUF at ¶¶ 314-18, 355, 364, 371, 383, 391, 395, 403, 405, 412-13, 419, 425, 432-33, 441, 450, 452-53, 460-62, 477, 485-86, 494, 501, 520, 522, 529, 548-49, 556, 563-64.

As for Plaintiffs' fraud-based claims, the California Supreme Court explicitly recognizes that damages may include "lost time and money reasonably expended in reliance" on a defendant's fraudulent acts. *Stout v. Turney*, 586 P.2d 1228, 1233 (Cal. 1978); *see also Lawson v. Town & Country Shops, Inc.*, 323 P.2d 843, 849 (Cal. Ct. App. 1958) (citing *Sutter v. Gen. Petroleum Corp.*, 170 P.2d 898, 903 (Cal. 1946)) ("Loss of time and effort or loss of salary . . . proximately caused by making fraudulent misrepresentations . . . have been held to be recoverable."); *Nagy v. Nagy*, 258 Cal. Rptr. 787, 793 (Cal. Ct. App. 1989) (Johnson, J., concurring) (observing in fraud case that "harm suffered through the loss of appellant's investment of time and money in the fathering of a child he was fraudulently led to believe was his own flesh and blood" was "a compensable item of damages").

Here, there are genuine issues of material fact regarding the value of Plaintiffs' lost time. Michelle Thomas testified [redacted] PSUF at ¶ 453 (citing M. Thomas PFS Q 424 at ELPLNTFF00014026). Thomas, Basseri, Cereceres, Padilla and other Plaintiffs are laypersons

who further rely on expert analysis and opinion to prove their damages. [redacted]

[redacted].

PSUF at ¶¶ 314-18; 355, 364, 371, 383, 391, 395, 403, 405, 412-13, 419, 425, 432-33, 441, 450, 452-53. This includes Plaintiff Cereceres, who's routine maintenance appointment lasted longer than it would have had her vehicle not required the 90-minute recall repair. GM fails to cite a single authority in support of its contention that plaintiffs may not rely on expert testimony to establish their lost-time damages. GM Br. at 30.

2. Missouri permits lost time damages.

In Missouri, GM concedes that plaintiffs with evidence of resulting financial losses may recover damages for lost time and that Plaintiff Brad Akers has presented such evidence. GM Br. at 30 (conceding that the court should not award summary judgment on lost time against Missouri Plaintiff Brad Akers). *See also Seymour v. House*, 305 S.W.2d 1, 3 (Mo. 1957) (in the personal injury context, plaintiffs "may prove a resulting loss of time, and a consequent loss of personal earnings or wages as an item of special damages"). Consequently, summary judgment should be denied with respect to Akers's claims for lost-time damages. Plaintiffs concede that, to the extent other Plaintiffs have not presented evidence demonstrating resulting financial loss, they may not recover for lost time under Missouri law.

3. Texas does not require a showing of lost wages.

Texas, too, allows recovery for lost time beyond lost earnings. Specifically, in *Farmers & Merchs. State Bank of Krum v. Ferguson*, 617 S.W.2d 918, 921-22 (Tex. 1981), plaintiff alleged that the defendant bank wrongfully dishonored his checks and that he was entitled to damages for "lost time calling creditors and attempting to explain the situation to them." A Texas jury awarded the plaintiff "$5,000.00 for loss of time," and the Supreme Court upheld the award on appeal, rejecting defendant's argument "that there is no evidence in the record to

support the jury's findings on . . . loss of time[.]" *Id.* The result should be no different under statutory consumer law. Indeed, in *Rhey v. Redic*, 408 S.W.3d 440, 454-55 (Tex. Ct. App. 2013), the Texas Court of Appeals affirmed an award for lost time damages, among other things, in a statutory fraud case. Federal courts applying Texas law likewise recognize the availability of lost-time damages. For instance, in *Allen v. JPMorgan Chase Bank, N.A.*, 2012 WL 12865210, at *3 (N.D. Tex. July 6, 2012), the court included claimed damages under the DTPA for "the value of the time that Plaintiffs spent trying to obtain the correct amount to pay on the loan" when assessing the amount in controversy and denying a motion to remand to state court. Consequently, summary judgment should be denied with respect to Plaintiff Fuller's and Graciano's claims for lost time damages.[37]

C. Plaintiffs with Service Part Vehicles have viable claims because those vehicles are defective.

GM falsely contends that plaintiffs whose vehicles are subject to the Service Parts Vehicle recall have no claim because their cars are not defective unless the 190 switch was replaced with a 423 switch. GM Br. at 32-33. As detailed above in Section II.A.1.a, GM put into production the 190 switch knowing that it did not meet GM's safety torque specifications—specifications that were so important that GM ensured that *all* of the new switches used in the 14v047 repairs met the required minimum torque spec. This makes the switches defective. While GM derides the torque specification as "plaintiffs' own standard," GM Br. at 33, GM is wrong. The evidence clearly demonstrates that Old GM and then GM established the standard and believed—until GM filed the instant motion—that cars are defective if their switches may

[37] Even assuming that Texas law requires evidence of lost earnings to recover damages for lost time, which it does not, Plaintiff Fuller has put forth evidence giving rise to a genuine issue of material fact. Ms. Fuller testified [redacted] PSUF at ¶¶ 548 (citing D. Fuller PFS Q 424 at ELPLNTFF00016420). Thus, there is, at a minimum, a genuine issues of material fact regarding whether Fuller may recover lost time damages and summary judgment should be denied with respect to her claim.

not meet the torque standard. *See*, *e.g.*, PSUF ¶ 2 (describing ignition switches as defective because they may not meet the company's torque specification); ¶ 29 [redacted]; *see also id.* at ¶ 32 ([redacted]").

Thus, Old GM's 2006 design change that ultimately led to the 190 switch did not remedy the defect. While GM maintains that the longer Catera spring used in the 190 switch effectively cured the low torque problem in the 423 switch, this is untrue, as GM's own documents reveal. The ignition switches in the Service Part Vehicles are all defective, PSUF at ¶¶ 28-56, rendering it unnecessary to test the torque in each individual Plaintiff's car. And the Service Part Vehicles also suffer from knee-to-key and single-point-of-failure defects. *See supra* Section II.A.1.b.

For these reasons, Plaintiffs Basseri, K. Robinson, Padilla, Akers, and Hawkins, who have so-called Service Part Vehicles, do not need to show that they had a 423 switch installed, because the evidence shows that both the 190 and 423 switch models are defective. Tellingly, in issuing the Service Part Vehicles portion of the 14v049 recall, GM did not just recall the 2,664 vehicles into which the 423 switches had been installed. Instead, it recalled *all* Service Part Vehicles—over 820,000 of them. PSUF at ¶¶ 4, 28. And, in doing so, it did not examine each switch to determine whether it was a 190 or 423 switch and replace just the 423 switches, but replaced *all* switches. Nor did it test switches and replace only those not meeting the torque minimum; again, it replaced *all* switches. It did so because GM knew that all pre-recall 190 and 423 switches are defective.

In any event, at a minimum, an issue of material fact exists such that summary judgment in favor of GM must be rejected. As the Court already held in denying GM's *Daubert* and

summary judgment motions in the *Ward* case, "whether and to what extent the 190 switch suffers from the same defect as the 423 switch" is a "core factual dispute" on which, based on the evidence, the jury could find for Plaintiffs. Dkt. No. 4110 at 7; *see also id.* at 14-15 (evidence supported the conclusion that 190 switch was defective but was insufficient to grant summary judgment in favor of Ward).

D. Plaintiffs who acquired used Old GM vehicles after GM's inception have valid claims against GM given GM's breaches of its uncontested duty to recall Old GM cars with safety defects and GM's strong relationship with the defective cars.

As the Second Circuit held, consumers who bought Old GM cars after the effective date of the bankruptcy Sale ("Used-Car Purchasers") may bring claims against GM without impediment from the bankruptcy Sale Order because those Plaintiffs "purchased Old GM cars *after* the closing, without knowledge of the defect or possible claim against New GM." *In re Motors Liquidation Co.*, 829 F.3d 135, 157 (2d Cir. 2016). Just as it has repeatedly done in the personal injury context,[38] the Court should reject GM's claim that it owed no duty to Used-Car Purchasers because it did not make or sell the cars. GM's argument must fail because it alone had both knowledge of the defects and the ability to forestall the Used-Car Purchasers' economic losses. Under the consumer protection and fraudulent concealment laws of the bellwether jurisdictions,[39] GM is liable to Used-Car Purchasers for breaching its clear duty to disclose and remedy safety defects and for foreseeably causing economic harm to *all* who purchased defective Old GM cars after GM's inception.[40]

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[38] *See, e.g.*, *In re GM LLC Ignition Switch Litig.*, 154 F. Supp. 3d 30, 37-41 (S.D.N.Y. 2015) (finding New GM had post-sale duty to warn of the Ignition Switch Defect under Oklahoma law); *In re GM LLC Ignition Switch Litig.*, 202 F. Supp. 3d 362, 366-72 (S.D.N.Y. 2016) (same under Virginia law).

[39] Plaintiffs are not pursuing implied warranty claims on behalf of Used-Car Purchasers, and (of the bellwether jurisdictions) only have surviving fraudulent concealment claims for Used-Car Purchasers in Missouri.

[40] Confusingly, GM discusses the law on duty to warn in California and Texas (but not in Missouri where, presumably, the law is worse for GM). *See* GM Br. at 59-61. Because the economic loss Plaintiffs do *not* bring duty to warn claims, they will not address GM's arguments on that score.

1. Because GM had a strong relationship with the Used-Car Purchasers' vehicles, California law provides a remedy for the economic losses caused by GM's failure to disclose the safety defects in the vehicles.

GM cannot contest that it owed a duty to disclose the safety defects at issue. Under the CLRA and the UCL, a duty to disclose exists when a defendant "ha[s] exclusive knowledge of material facts not known or reasonably accessible to the plaintiff," or "when the defendant actively conceals a material fact from the plaintiff." *Collins v. eMachines, Inc.*, 134 Cal. Rptr. 3d 598, 593 (Cal. Ct. App. 2011). A misrepresented (or omitted) fact is material "if a reasonable man would attach importance to its existence or nonexistence in determining his choice of action…." *Kwikset*, 246 P.3d at 892. The Court has held that a concealed safety defect "would have affected a reasonable person's decision to purchase a car—making the omission material." *TACC Order*, 2016 WL 3920353 at *20.

GM cannot evade this duty simply because Old GM made the Used-Car Purchasers' vehicles. From day one of its existence in July 2009, GM was aware of the ignition switch defect in California Plaintiff Michelle Thomas' 2005 Lacrosse, *see* PSUF at ¶¶ 319-50, and [redacted] *Id.* at ¶ 448. It is also undisputed that GM had disclosure and recall duties with respect to Ms. Thomas' vehicle under the Federal Safety Act,[41] which required GM to take immediate action as soon as it determined or should have determined that a safety defect exists. *See, e.g., U.S. v. GMC*, 574 F. Supp. 1047, 1049-50 (D.D.C. 1983) (Safety Act "imposes an independent duty upon manufacturers of motor vehicles to give notification of and to remedy known safety-related

[41] 49 U.S.C. §§ 30101-30170. A "safety defect" is one that creates an "unreasonable risk of accidents occurring because of the design, construction, or performance of a motor vehicle" or "unreasonable risk of death or injury in an accident." 49 U.S.C. § 30102(a)(8). It is undisputed that all the defects at issue in this case were "safety defects."

defects").[42] Because the UCL "borrows" violations of other laws and makes them actionable under its "unlawful" prong, *Cel-Tech Commcn's, Inc. v. Los Angeles Cellular Tel. Co.*, 20 Cal. 4th 163, 180 (1999), Safety Act violations are actionable under the UCL. *In re Toyota Motor Corp. Unintended Acceleration Mktg*., 2012 U.S. Dist. LEXIS 189744, at *265-272 (C.D. Cal. May 4, 2012). There can be no question that GM's disclosure obligations ran to Plaintiff Thomas' vehicle and therefore to Plaintiff Thomas.

California courts have squarely rejected GM's argument that only consumers who purchase from a defendant may sue under consumer protection laws. Instead, Used-Car Purchasers can bring claims under the CLRA and the UCL against responsible parties for failure to disclose material facts (including safety defects). *See Johnson v. Nissan N. Am., Inc.*, 272 F. Supp. 3d 1168, 1183 (N.D. Cal. 2017) (used-car purchasers who did not buy from a Nissan dealer could sue Nissan under the UCL and the CLRA for failure to disclose a latent safety defect because "the CLRA does not require a direct transaction between plaintiffs and defendants") (quoting CAL. CIV. CODE § 1780(a) ("Any consumer who suffers any damage as a result of the use or employment by any person of a method, act or practice declared to be unlawful by Section 1770 may bring an action against that person."));[43] *see also Chamberlan v. Ford Motor Co.*, 369 F. Supp. 2d 1138, 1144 (N.D. Cal. 2005) (used car purchasers "have standing to bring CLRA claims, despite the fact that they never entered into a transaction directly with [the] Defendant"); *McAdams v. Monier, Inc.*, 105 Cal. Rptr. 3d 704, 712-13 (Cal. Ct. App. 2010) ("a cause of action under the CLRA may be established independent of any contractual

[42] In order to get the bankruptcy Sale approved, GM agreed to step into the shoes of the manufacturer, Old GM, and comply with the Safety Act with respect to Old GM cars. *E.g., In re GM LLC Ignition Switch Litig.*, 154 F. Supp. 3d at 40. Accordingly, the Court recognized that the Safety Act fully applied to New GM with respect to Old GM cars. *Id.* ("The notification and recall obligations under the Safety Act that New GM inherited provide another kind of service and repair duty" with respect to Old GM car owners.").

[43] In contrast, the Court dismissed the used-car purchasers' implied-warranty claims under the Song-Beverly Act. *Johnson*, 272 F. Supp. 3d at 1179.

relationship between the parties"). The same result obtains under the UCL. *See Johnson*, 272 F. Supp. 3d at 1184 (because the used car purchaser's "allegations are sufficient to state a claim under the CLRA based on the deceptive act of fraudulent omissions or concealment, [she] has likewise stated a claim under the unlawfulness prong of the UCL"). While *LiMandri v. Judkins*, 60 Cal. Rptr. 2d 539, 543 (Cal. Ct. App. 1997), states that the duty to disclose normally arises in the context of a transaction between the parties, GM Br. at 56, GM ignores cases making clear that such a transaction is not *required.*[44] GM cannot prevail in its effort to avoid liability for the sale of defective used GM vehicles by dint of the fact that it didn't sell or make the cars.

2. Missouri law also provides a remedy for the Used-Car Purchaser's economic losses caused by GM's failure to disclose the safety defects in vehicles.

Just like California, Missouri imposes a duty to disclose a material fact (including a safety defect) when the defendant "has superior knowledge of information not within the fair and reasonable reach of the" plaintiff. *See TACC Order*, 2016 WL 3920353, at *34 (fraudulent concealment); *DePeralta v. Dlorah, Inc.*, 2012 WL 4092191, at *6 (W.D. Mo. Sept. 17, 2012) (quoting *White v. Bowman*, 304 S.W.3d 141, 149 (Mo. Ct. App. 2009)).[45] From its inception on July 2009, GM knew about the ignition switch defect in Missouri Plaintiff Deloris Hamilton's

[44] Instead of discussing those cases, GM relies on a handful of cases that are inapposite or do not contradict Plaintiffs' authorities. *LiMandri* involved the failure to disclose a security lien to plaintiff, and the court held there was no duty to disclose the lien because there was no transaction or relationship between the plaintiff and the lender holding the lien. 60 Cal. Rptr. 2d at 543-44. *See also Hoffman v. 162 N. Wolfe LLC*, 228 Cal. App. 4th 1178 (2014) (defendant, who claimed an easement right in the property purchased by plaintiff, had no duty to disclose that right to plaintiff as there was no transaction between the parties); *Rogozienski v. Allen*, 2007 WL 867773 (Cal. Ct. App. Mar. 23, 2007) (wife's attorney, who had given a gift to the judge presiding over the dissolution proceeding, had no duty to disclose the gift to the husband since no relationship existed between the parties); *Fulford v. Logitech*, 2009 WL 837639 (N.D. Cal. Mar. 26, 2009) (plaintiff did not allege that defendant owned him a fiduciary duty nor that the parties entered into any transaction because plaintiff purchased from a friend, and not from defendant).

[45] A fact is material "'if it would be likely to induce a reasonable person to manifest his assent, or if the maker knows that it would be likely to induce the recipient to do so. The test of materiality is objective and not subjective." *DePeralta*, 2012 WL 4092191, at *6 (quoting *Grosseohme v. Cordell*, 904 S.W.2d 392, 397 (Mo. Ct. App. 1995)).

2000 Oldsmobile Alero, PSUF at ¶¶ 319-50, and [redacted] [redacted] *Id.* at ¶¶ 471-72. GM breached its disclosure duties under Missouri law.

Controlling Missouri precedent squarely rejects GM's argument that it had no duty to Used-Car Purchasers under Missouri law because it did not sell the cars. GM Br. at 58-59. While GM correctly notes that the MMPA prohibits actionable omissions made "'in connection with the sale or advertisement of any merchandise,'" GM Br. at 59 (quoting MO. REV. STAT. § 407.020), GM ignores Missouri courts' broad interpretation of that provision in particular and the MMPA more generally: "there is no compelling reason to interpret 'in connection with' to apply only when the entity engaged in the misconduct was a party to the transaction at the time the transaction was initiated." *Conway v. CitiMortgage, Inc.*, 438 S.W.3d 410, 415 (Mo. 2014).[46] Instead, the MMPA "prohibits the use of the enumerated deceptive practices if there is a relationship between the sale of merchandise and the alleged unlawful action. According to the statute, *the unlawful action may occur at any time before, during or after the sale and by any person*." *Id*. at 414 (emphasis added).

That the "in connection with" language of the MMPA imposes liability on GM here is underscored by *Gibbons v. J. Nuckolls, Inc.*, 216 S.W.3d 667, 669 (Mo. 2007), where the plaintiff sued an automobile wholesaler for concealing the fact that the car the plaintiff purchased from a third-party dealer had been involved in an accident. In sustaining the MMPA claim against the wholesaler, the court rejected the wholesaler's argument that it was immune from suit

[46] As GM omits, the "in connection with" language of the MMPA is modified by the phrase "the sale or advertisement of *any merchandise in trade or commerce*." MO. REV. STAT. § 407.020.1 (emphasis added). This broad provision generally covers all conduct connected to "trade" and "commerce"—meaning any practice "directly or *indirectly* affecting the people of [Missouri]." *Id.* § 407.010(7) (emphasis added); *see also Peel v. Credit Acceptance Corp.*, 408 S.W.3d 191, 208 (Mo. Ct. App. 2013) (referring to the MMPA's definition of "trade" and "commerce" as evidence of the breadth of the "in connection with" language in the statute); *State ex rel. Nixon v. Estes*, 108 S.W.3d 795, 800 (Mo. Ct. App. 2003) ("[T]he definition of trade or commerce . . . makes clear the intent of the General Assembly that the terms should be understood to include, but not necessarily be limited to, economic activity which has a direct or indirect effect on the people of this state.").

because it had sold the car to the dealer but not to Gibbons (the dealer had). *Id*. Noting that Missouri "precedent consistently reinforces the plain language and spirit of the statute to further the ultimate objective of consumer protection," the *Gibbons* court held that the "in connection with" language of the MMPA does not require a contractual relationship between the plaintiff and the defendant. *Id.* at 669-70. The law is the same for fraudulent concealment.[47]

Faltermeier v. FCA US LLC, 2016 WL 4771100, at *1 (W.D. Mo. Sept. 13, 2006), also demonstrates that Used-Car Purchasers may sue here. There, the plaintiff in 2013 purchased a defective used Jeep manufactured by Chrysler prior to its bankruptcy in 2009. He brought an MMPA claim for economic loss against Chrysler's successor, FCA, based on alleged misrepresentations made by FCA in press releases opposing NHTSA's recall request in 2013. *Id.* at *2-3. In seeking dismissal, FCA argued that "the alleg[ed] misrepresentations were not made 'in connection with the sale or advertisement of any merchandise in trade or commerce.'" *Id.* at *6 (quoting MO. REV. STAT. § 407.020.1). Rejecting FCA's argument, the *Faltermeier* court held that the plaintiff had properly "alleged a relationship between the alleged misrepresentations and the Jeep Vehicle purchases" since "it can be reasonably inferred that FCA expected the representations contained in those statements to reach current and future owners of Jeep Vehicles" and that "future purchasers of Jeep Vehicles could rely on the statements in making their purchases." *Id.* at *7.[48]

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[47] "[P]rivity of contract between the parties is not an element of fraudulent misrepresentation." *White v. Bowman*, 304 S.W.3d 141, 147 (Mo. Ct. App. 2009) (citing *Westerhold v. Carroll*, 419 S.W.2d 73, 77 (Mo. 1967)); *Anderson v. Ford Motor Co*., 2017 WL 6733972, at *3 (W.D. Mo. Dec. 29, 2017) (Missouri law does not require privity of contract for fraudulent concealment claim) (citing *White*, 304 S.W.3d at 147-50)).

[48] The *Faltermeier* court subsequently granted summary judgment to FCA because "the press release statements … reached Plaintiff *after* he purchased his Jeep," and therefore there was "no connection of any kind with the sale of Plaintiffs' Jeep." *See Faltermeier v. FCA US LLC*, 2017 WL 1128467, at *4 (W.D. Mo. Mar. 24, 2017), *aff'd*, 899 F.3d 617 (8th Cir. 2018) (emphasis in original). In sharp contrast in this omissions case, GM's concealment of and failure to disclose the defect occurred prior to Plaintiff Hamilton's purchase, and prevented her (and all Used-Car Purchasers) from learning the material fact of the safety defect.

Under Missouri law, then, an aggrieved party may sue a defendant when the defendant has a relationship with the merchandise at issue *and* the defendant's deceptive conduct has caused the plaintiff's damage. *See Conway*, 438 S.W.3d at 414 (*any* "person" can commit the misconduct, and it can occur at any time before the sale). Here, GM had the requisite relationship with Plaintiff Hamilton's vehicle, as it alone had knowledge of the defect and notification and recall obligations under the Safety Act. Moreover, the Court has held that "the relationship between GM and Old GM's customers … was 'direct and continuing' and sufficiently 'special' to give rise to a duty to warn…." *In re GM LLC Ignition Switch Litig.*, 202 F. Supp. 3d 362, 371 (S.D.N.Y. 2016). Missouri law is the same. *See Sherlock v. Quality Control Equip. Co.*, 79 F.3d 731, 735 (8th Cir. 1996) (finding sufficient evidence of a duty-to-warn relationship between a successor and its predecessor's customers under Missouri law where the successor "perceived it to be economically advantageous to foster relationships with [the predecessor's] customers; for, through these associations [the successor] would have the opportunity not only to peddle replacement parts, but to one day possibly benefit from the sale of new machines" to those same customers). GM plainly had the requisite relationship with Ms. Hamilton and her vehicle. And GM's misconduct in concealing and failing to disclose the defect is the cause of Plaintiff's economic losses. Ms. Hamilton's claim stands.

3. Texas law also provides a remedy for the Used-Car Purchaser's economic losses caused by GM's failure to disclose the safety defects in vehicles.

Texas courts do not require that a plaintiff buy a misrepresented product from the defendant in order to bring a claim under the DTPA. Instead, the plaintiff can bring a claim when the defendant and its misconduct have a sufficient relationship with the product. Here, the Used-Car Purchasers have a claim because of GM's undisputed connection with the defective

cars and because GM's failure to disclose the defects at issue caused Plaintiffs' economic damages.

The Texas Supreme Court has held that the DTPA is *not* limited "to deceptive trade practices committed by persons who furnish the goods or services on which the complaint is based," and there is no "other similar privity requirement" under the Act. *Cameron v. Terrell & Garrett, Inc.*, 618 S.W.2d 535, 540-41 (Tex. 1981). Instead, the "Act is designed to protect consumers from any deceptive trade practice made *in connection with* the purchase or lease of any goods or services." *Id.* at 541 (emphasis added); *see also Flenniken v. Longview Bank & Tr. Co.*, 661 S.W.2d 705, 707 (Tex. 1983) (quoting *Cameron*, 618 S.W.2d at 539) ("A plaintiff establishes his standing as a consumer in terms of his relationship to a transaction, not by a contractual relationship with the defendant.").[49]

Consumer-plaintiffs state a claim under the DTPA when there is a "connection between the plaintiffs, their transactions, and the defendants' conduct…." *Amstadt v. U.S. Brass Corp.*, 919 S.W.2d 644, 649-50 (Tex. 1996). Such a connection exists where, as here, the defendant's actionable conduct is a "producing cause" of the consumer's injury. TEX. BUS. & COM. CODE § 17.50(a)(1).[50] A "producing cause" is "a substantial factor which brings about the injury and without which the injury would not have occurred." *Doe v. Boys Clubs*, 907 S.W.2d 472, 481 (Tex. 1995). The "producing cause" requirement is satisfied by "evidence that the consumer was adversely affected by the defendant's deceptive conduct." *McLeod v. Gyr*, 439 S.W.3d 639, 649 (Tex. Ct. App. 2014) (citations omitted); *see also Home Sav. Ass'n v. Guerra*, 733 S.W.2d 134,

[49] The Used-Car Purchasers are plainly "consumers" under the DTPA since they "acquired goods or services by purchase or lease" and "the goods or services purchased or leased . . . form the basis of the complaint." *Cameron*, 618 S.W.2d at 539.

[50] *Cf. Amstadt*, 919 S.W.2d at 650 (citing *Sw. Bell Tel. Co. v. Boyce Iron Works, Inc.*, 726 S.W.2d 182, 187 (Tex. Ct. App. 1987) for the proposition that requisite connection was lacking where there was no proof that defendant's deceptive conduct was the "producing cause" of plaintiff's damages).

136 (Tex. 1987) (plaintiff states claim when a defendant has "*some connection* either with the actual sales transaction or with a deceptive act related to" it) (emphasis added).

The Texas Used-Car Purchasers present ample proof that GM's failure to disclose (and concealment) was a producing cause of their injuries. From its inception on July 2009, GM knew of the ignition switch defect in the Texas Used-Car Purchasers' cars, PSUF at ¶¶ 319-50, [redacted]. *Id.* at ¶¶ 532, 535-36, 550, 553, 566. [redacted] *Id.* at 532, 542, 550, 559, 566-67. GM is liable to the Texas Used-Car Purchasers for its DTPA violations.

GM's authorities are again unavailing. *Myre v. Meletio*, 307 S.W.3d 839, 844 (Tex. Ct. App. 2010), declining to extend duty of disclosure beyond the seller in a real estate transaction, is irrelevant because the claim was not brought under the DTPA (where, as discussed above, there is no such limitation). *See Miller v. Keyser*, 90 S.W.3d 712, 715-16 (Tex. 2002) (DTPA provides consumers with a means to redress deceptive practices "without the burden of proof and numerous defenses encountered in a common law fraud or breach of warranty suit").

GM's DTPA authorities (all but one involving real estate transactions) are equally inapposite. In *Terry v. Mercedes-Benz, USA, LLC*, 2007 WL 2045231, at *3 (Tex. Ct. App. 2007), the court found no duty to disclose the height of the car's bumper because it was "open and obvious" and there was no evidence that plaintiff lacked an equal opportunity to discover the information. Here, in stark contrast, only GM (and not Plaintiffs) knew of the concealed defects. In *Steele v. Goddard*, 2013 WL 3013671, at *5 (Tex. Ct. App. June 13, 2013), the defendant had no duty to disclose the termites in the house because plaintiff did not offer evidence that defendant had any knowledge of the termites. In *Marshall v. Kusch*, 84 S.W.3d 781 (Tex. Ct.

App. 2002), the court rejected Marshall's argument that the DTPA did not apply to him because he was not a party to the transaction; however, the court found that none of Marshall's misrepresentations reached Kusch, and there was no other evidence connecting him to the sale. Here, GM's omissions and concealment impacted the Used-Car Purchasers' knowledge (and the cars' price) at the time of the sale and were a "producing cause" of Plaintiffs' damages. Finally, *Wilson v. John Daugherty Realtors, Inc.*, 981 S.W.2d 723 (Tex. Ct. App. 1998), yet another real estate transaction case, turned on contractual limitations in the appraisal report and, again, is wholly inapposite. The Texas Used-Car Purchasers' claims should proceed to trial.

4. The Used-Car Purchasers conferred benefits upon GM sufficient to make out unjust enrichment.

Unlike in GM's authorities, *see* GM Br. at 63, the Used-Car Purchasers here provide evidence that their purchase of defective used Old GM cars conferred a benefit upon GM. Of course, by concealing the defects and allowing the used cars to be sold in a defective condition, GM avoided the immediate cost of repair and the harm to its reputation the recalls would have caused. Moreover, many Plaintiffs conferred benefits on GM by having their cars serviced at GM dealers, and/or buying GM parts or cars, and/or developing or maintaining a relationship with GM that would lead to further expenditures for the benefit of GM. *See, e.g.*, PSUF at ¶¶ 452 (Michelle Thomas); 460, 465 (Brad Akers); 566 (Lisa McClellan). As all of these benefits flowed directly from the purchase of the cars at issue, the Used-Car Purchasers state claims under the Unjust Enrichment laws of the bellwether jurisdictions. *See infra at* Section III.H.

E. Plaintiffs satisfy applicable reliance requirements.

GM contends that Plaintiffs cannot show required reliance under their consumer protection and fraudulent concealment claims, GM Br. at 34-40, but GM is wrong. The California, Missouri, and Texas Plaintiffs can recover on their omissions claims upon proof of

the materiality of the omitted information—here, the fact of the safety defect—without the need for individualized proof of reliance.

Under California law, plaintiffs my prove reliance on an omission by "simply proving 'that, had the omitted information been disclosed, one would have been aware of it and behaved differently.'" *Daniel v. Ford Motor Co.*, 806 F.3d 1217, 1225 (9th Cir. 2015) (quoting *Mirkin v. Wasserman*, 23 Cal. Rptr. 2d 101, 107 (Cal. 1993)). "That one would have behaved differently can be presumed, or at least inferred, when the omission is material[,]" and it is well-established that "defects that create 'unreasonable safety risks' are considered material." *Id.*; *see also Engalla v. Permanente Med. Grp.*, 15 Cal. 4th 951, 977 (1997) (a misrepresented or omitted fact is material "if a reasonable man would attach importance to its existence or nonexistence in determining his choice of action…."). "[M]ateriality is generally a question of fact unless the 'fact misrepresented is so obviously unimportant that the jury could not reasonably find that a reasonable man would have been influenced by it.'" *Id.* (citation omitted).[51] And reliance or causation can be inferred from the misrepresentation (or omission) of a material fact. *E.g.*, *Engalla*, 15 Cal. 4th at 977 ("a presumption, or at least an inference, of reliance arises wherever there is a showing that a misrepresentation was material");[52] *see also Falk v. GMC*, 496 F. Supp. 2d 1088, 1099 (N.D. Cal. 2007) ("justifiable reliance element of the fraud by omission claim is easily satisfied" where "a 'reasonable customer' … may have justifiably relied on GM's failure to disclose defects").

[51] It is "a basic rule of California law" that "a fact can give rise to a duty to disclose and an actionable omission if it implicates safety concerns that a reasonable consumer would find material." *Mui Ho v. Toyota Motor Corp.*, 931 F. Supp. 2d 987, 997 (N.D. Cal. 2013); *see also Apodaca v. Whirlpool Corp.*, 2013 U.S. Dist. LEXIS 176363, at *16 (C.D. Cal. Nov. 8, 2013) ("Nondisclosures about safety considerations of consumer products are material.").

[52] This inference (or presumption) creates a question of fact for trial. *See, e.g., Woodling v. Garrett Corp.*, 813 F.2d 543, 555-56 (2d Cir. 1987) (citation omitted) (when "circumstances permit varying inferences as to the foreseeability of the intervening act, the proximate cause issue is a question of fact for the jury").

Here, as in *Daniel*, a reasonable fact finder could infer that a vehicle that experiences stalls, disabled power steering and power brakes, and disabled airbag systems in normal and foreseeable driving circumstances would pose an unreasonable safety risk, "such that it can be presumed that the nondisclosure of the safety risk impacted Plaintiffs' purchasing decision." 806 F.3d at 1226. The Court has recognized that "a concealed defect" that "implicated a safety issue … would have affected a reasonable person's decision to purchase a car—making the omission material." *TACC Order*, 2016 WL 3920353 at *20. Indeed, each of the Plaintiffs testified that safety was a materially important factor in their purchase or lease of their GM vehicle, and that they would not have bought their vehicle, or paid less, had GM disclosed the defects. PSUF at ¶¶ 266-67.[53]

Plaintiffs have also put forth evidence that GM knowingly sold vehicles with defective ignition, power steering, and airbag systems. PSUF at ¶¶ 5-256. Had GM disclosed the defects, "it is plausible that the media would pick up that story, and it would have made national news" such that even Plaintiffs who purchased their vehicles from non-GM affiliated dealerships or private sellers would have been aware of the disclosure. *In re Chrysler-Dodge-Jeep EcoDiesel Mktg., Sales Practices, & Prods. Liab. Litig.*, 295 F. Supp. 3d 927, 1015 (N.D. Cal. 2018); *see also In re Carrier IQ, Inc. Consumer Privacy Litig.*, 78 F. Supp. 3d 1051, 1114 (N.D. Cal. 2015) (inferring reliance on omissions where plaintiffs "alleged that had they been aware of the Carrier IQ Software, they would not have purchased affected mobile devices" and alleged facts

[53] [redacted]. PSUF at ¶¶ 418, 424 (citing Mar. 9, 2017 S. Orosco Dep. at 74:1-13, 55:21-56 & Dep. Ex. 2 at ELPLNTFF00011516; Feb. 17, 2017 D. Padilla Dep. at 20:22-21:3; 37:25-38:4). Such evidence "is sufficient to sustain a factual finding that Plaintiffs would have been aware of the disclosure if it had been made through [GM's] authorized dealerships." *Daniel*, 806 F.3d at 1226; *see also In re Myford Touch Consumer Litig.*, 2016 WL 6873453, at *2 (N.D. Cal. Nov. 22, 2016) ("reliance may be presumed on the basis of omissions of material facts by authorized dealers").

"regarding the public outcry regarding the Carrier IQ Software once its existence became public knowledge"). The maelstrom that arose when GM finally disclosed the defects is strong evidence that Plaintiffs would have learned of the defects prior to purchase if GM had not concealed them.[54]

With respect to Missouri law, GM concedes that reliance is not required to prevail on an MMPA claim. GM Br. at 34. The Supreme Court of Missouri has explained that where, as here, plaintiffs allege fraudulent concealment based on omissions, the fact finder "is empowered to find that the buyer has a right to rely on the seller to disclose where the undisclosed material information would not be discoverable through ordinary diligence." *Hess v. Chase Manhattan Bank, USA, N.A.*, 220 S.W.3d 758, 765 (Mo. 2007). Consequently, "the analysis of proof of a duty to disclose and of the right to rely collapses into a combined inquiry as to whether [defendant] had knowledge of undisclosed material information that [plaintiff] would not have discovered through ordinary diligence." *Id.* at 765-66. And an omission "is material if it would likely affect the conduct of a reasonable man with respect to his transaction with another." *Star Indem. & Liab. Co. v. Cont'l Cement Co., LLC*, 2013 WL 1442456, *16 (E.D. Mo. Apr. 9, 2013) (quoting *Crewse v. Shelter Mut. Ins. Co.*, 706 S.W.2d 35, 39 (Mo. Ct. App. 1985)). Here, there are at the very least genuine disputes of material fact as to whether GM knew about the defects (it did) and whether Plaintiffs could have discovered the defects through ordinary diligence (they could not). Moreover, because plaintiffs expressly allege fraudulent concealment based on

[54] GM's cases recognize this rule (which was not altered by Proposition 64) but note that Plaintiffs are not entitled to the presumption of reliance in an extreme case where the evidence indisputably shows "an actual lack of reliance." *Sud v. Costco Wholesale Corp.*, 229 F. Supp. 3d 1075, 1083 (N.D. Cal. 2017). The evidence here shows that this is not such a case, as safety was a factor in all Plaintiffs' purchase decisions. And GM's suggestion that Plaintiffs would not have learned of the serious safety defects because they "did not review any New GM material" prior to purchase (GM Br. at 39) is misplaced because announcements of serious safety defects receive widespread publicity far beyond ordinary promotional materials. *See In re Chrysler-Dodge-Jeep EcoDiesel*, 295 F. Supp. 3d at 1015.

omission, GM's reliance on affirmative misrepresentation cases is misplaced. GM Br. at 40 (quoting *Stein v. Novus Equities Co.*, 284 S.W.3d 597, 603 (Mo. Ct. App. 2009); citing *Grossoeheme v. Cordelle*, 904 S.W.2d 392, 397 (Mo. Ct. App. 1995)).

Texas courts recognize that, for omissions-based DTPA claims such as Plaintiffs' claims here, the "reliance" requirement is satisfied where the defendant withheld material information "with the intent of inducing the consumer to engage in a transaction" and "the consumer would not have entered into the transaction had the information been disclosed." *Patterson v. McMickle*, 191 S.W.3d 819, 827 (Tex. Ct. App. 2006); *see also In re Ford Motor Co. E-350 Van Prods. Liab. Litig.*, 2012 WL 379944, at *22 (D.N.J. Feb. 6, 2012) ("[T]o satisfy the reliance element for an omission, a plaintiff must show that defendant had intent to induce a transaction through failure to disclose, and that plaintiff would not have entered into the transaction if the information had been disclosed." (citation omitted)). GM's citations to affirmative misrepresentation cases are therefore inapposite. GM Br. at 35–36 (collecting affirmative misrepresentation cases). GM has admitted that it "falsely represented to consumers that vehicles containing the defect posed no safety concern" and that it mislead consumers by failing to disclose the truth. PSUF at ¶ 6 (quoting DPA). And Plaintiffs Al-ghamdi and McClellan both testified [redacted] PSUF at ¶¶ 532, 567 (citing May 5, 2017 G. Al-ghamdi Dep. at 169:20-24; 171:4-13; May 4, 2017 McClellan Dep. at 176:16-21). The evidence is easily sufficient to proceed to trial.

F. GM's material omissions violated California, Missouri, and Texas law.

This is predominantly an *omissions*, and not an affirmative misrepresentation case, and GM is wrong to reframe it as grounded in misrepresentations. Plaintiffs' consumer law claims primarily turn on GM's actionable omissions in violation of California, Missouri, and Texas consumer laws, among others. *See, e.g.*, *TACC Order*, 2016 WL 3920353, at *20-21 (Plaintiffs'

UCL and CLRA claims rest on "undisclosed defects in GM Vehicles" and "allegations that new GM actively concealed and failed to disclose safety defects in GM cars"); *id.* at *33 (Plaintiffs' MMPA claims rest on "actionable omissions"); *FACC Order*, 257 F. Supp. 3d at 448 (Plaintiffs' allege that GM "conceal[ed] defects prior to Plaintiffs' purchases" in violation of the DTPA). GM has admitted that it "falsely represented to consumers that vehicles containing the defect posed no safety concern" and that it mislead consumers by failing to disclose the truth. PSUF at ¶ 6 (quoting DPA SOF). Plaintiffs have testified that safety was a materially important factor in their purchase or lease of their cars, *see* PSUF at ¶¶ 266-67, and GM's heavy focus on safety in its advertisements is further proof that safety is material to *all* car purchasers. *See In re Duramax Diesel Litig.*, 298 F. Supp. 3d 1037, 1062, 1084 (E.D. Mich. 2018) (in omissions case, GM's ads stressing that its diesel cars had low emissions "reveal[] an understanding that consumers believe emission levels are material to their purchasing decisions" and serve as proof that low-emission "was a material consideration for consumers purchasing a vehicle"). For this reason, GM's "puffery" argument, already rejected by this Court,[55] is inapplicable here. *See id.* at 1084 (puffery argument irrelevant where ads are used to show materiality in an omissions case). GM's reliance on affirmative misrepresentation cases is misguided and not relevant to this Court's summary judgment analysis of Plaintiffs' UCL, CLRA, MMPA, or DTPA claims.

G. Plaintiffs have valid implied warranty claims.

GM's argument regarding contractual limitation of remedies under Texas and Missouri law fails because the purported limitation is unconscionable, and therefore unenforceable, in light of GM's active concealment of material safety defects.[56] *See Trinity Prods. Inc. v. Burgess*

[55] *See* 257 F. Supp.3d at 457-58. Contrary to GM's argument, that ruling cannot be limited to Wisconsin law, as the Court cites California law in finding that at least some of GM's statements are not "puffery." *Id.*

[56] GM raises the statutory unconscionability exception in both Missouri and Texas. GM Br. at 46.

Steel, L.L.C., 486 F.3d 325, 332 (8th Cir. 2007) (quoting MO. REV. STAT. §§ 400.2-719(2), (3)) ("[T]he Missouri UCC bars damage disclaimers where 'circumstances cause an exclusive or limited remedy to fail of its essential purpose,' or where the exclusion of consequential damages 'is unconscionable.'"); *Lindemann v. Eli Lilly & Co.*, 816 F.2d 199, 202 (5th Cir. 1987) (quoting TEX. BUS. & COM. CODE § 2.719(c)) ("Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable."). GM's attempt to limit Plaintiffs' remedies under warranty while knowingly concealing serious safety defects that Plaintiffs could not have discovered on their own is precisely the kind of unconscionability that Missouri courts recognize, namely "'an inequality so strong, gross, and manifest that it must be impossible to state it to one with common sense without producing an exclamation at the inequality of it.'" *Patterson Oil Co. v. VeriFone, Inc.*, 2015 WL 6149594, at *5 (W.D. Mo. Oct. 19, 2015) (quoting *State, Mo. Dep't of Soc. Servs., Div. of Aging v. Brookside Nursing Ctr., Inc.*, 50 S.W.3d 273, 277 (Mo. 2001)); *see also Oldham's Farm Sausage Co. v. Salco, Inc.*, 633 S.W.2d 177, 182-83 (Mo. Ct. App. 1982) (limitation on consequential damages unconscionable where "clause [was] tucked away in fine print on the back side of the signature page").

The sole Missouri case GM cites in support of its purported limitation, *Russo v. Hilltop Lincoln-Mercury, Inc.*, 479 S.W.2d 211 (Mo. Ct. App. 1972), is distinguishable because it did not involve claims of unconscionability or active concealment. Under Texas law, courts determine unconscionability based on: (i) "the circumstances surrounding the agreement," (ii) "the alternatives, if any, which were available to the parties at the time of making the contract," (iii) "the nonbargaining ability of one party," and (iv) "whether the contract is illegal or against public policy." *Lindemann*, 816 F.2d at 203. These factors weigh in Plaintiffs' favor. Because the circumstances include GM knowingly concealing a material safety defect from consumers—

who had no alternative means of discovering the defect and therefore no ability to bargain with respect to the defect—it would be against public policy to enforce such a fraudulently induced agreement. By contrast, none of the Texas cases on which GM relies, *see* GM Br. at 47 n.38, involved active concealment.

GM's attempt to limit the duration of any implied warranties fails for the same reason—the purported limitations are unconscionable in light of GM's fraudulent conduct. *See, e.g.*, *Patterson Oil Co.*, 2015 WL 6149594, at *6 (Missouri courts' ability to refuse to enforce or limit application of unconscionable contract clauses extends to warranty disclaimers); *Arkwright-Boston Mfrs. Mut. Ins. Co. v. Westinghouse Elec. Corp.*, 844 F.2d 1174, 1184 (5th Cir. 1988) (Texas law "permits a court to disregard any unconscionable clause in a contract").

Regarding statutes of limitations, there is a genuine dispute of material fact as to whether GM's knowing and active concealment of defects tolled the applicable statutes of limitation. *See Owen v. GMC*, 533 F.3d 913, 920 n.5 (8th Cir. 2008) (Missouri law governing implied warranty provides for "equitable tolling on account of fraudulent concealment"); *Cortez v. State Farm Mut. Auto. Ins. Co.*, 2006 WL 8435999, at *7 (W.D. Tex. Oct. 25, 2006) (recognizing "fraudulent concealment as a basis for equitable tolling" of statute of limitations for implied warranty claims under Texas law). GM has admitted that it "falsely represented to consumers that vehicles containing the defect posed no safety concern" and that it mislead consumers by failing to disclose the truth. PSUF at ¶ 6 (quoting DPA SOF).

GM's arguments regarding the "merchantability" of Plaintiffs' vehicles are similarly without merit. It is well-established that "California courts reject the notion that merely because a vehicle provides transportation from point A to point B, it necessarily does not violate the implied warranty of merchantability." *Keegan v. Am. Honda Motor Co.*, 838 F. Supp. 2d 929,

946 (C.D. Cal. 2012) (quoting *Isip v. Mercedes-Benz USA, LLC*, 65 Cal. Rptr. 3d 695 (Cal. Ct. App. 2007)). Rather, "a defective product that causes a safety hazard will generally render that product unfit for its ordinary purpose" and thus establish a breach of implied warranty of merchantability. *Stewart v. Electrolux Home Prods., Inc.*, 304 F. Supp. 3d 894, 913 (E.D. Cal. 2018). Courts have routinely found vehicles unmerchantable under California law in light of defects similar to the safety defects at issue here. *See, e.g., Aguilar v. GM, LLC*, 2013 WL 5670888, at *7 (E.D. Cal. Oct. 13, 2013) (GM vehicles "unfit for the ordinary use of driving due to a steering defect that can result in potential failure of power steering, pulling to the left and right, and loss of steering control during the normal course of driving"); *Cholakyan v. Mercedes-Benz USA, LLC*, 796 F. Supp. 2d 1220, 1244 (C.D. Cal. 2011) ("Vehicles subject to engine failure cannot be said to be merchantable.").

Missouri law likewise recognizes claims for breach of implied warranty where a vehicle fails to "provide safe, reliable transportation" and is therefore "unfit for its ordinary purpose of providing transportation." *In re GMC Anti-Lock Brake Prods. Liab. Litig.*, 966 F. Supp. 1525, 1533 (E.D. Mo. 1997) (citations omitted). The safety defects present in Plaintiffs' vehicles also render them "unfit" for driving under Texas law. *GMC v. Brewer*, 966 S.W.2d 56, 57 (Tex. 1998). GM has admitted that moving stalls and loss of power present a safety-related defect. PSUF at ¶ 46. And Plaintiffs have put forth evidence showing that other safety systems power down during moving stalls, including seat belt pretensioners, airbags, power steering, power brakes, and electronic stability control. PSUF at ¶ 234.

H. Plaintiffs have valid unjust enrichment claims.

California Plaintiffs plead their unjust enrichment claims in the alternative to other causes of action. FACC at ¶ 1695. Although the Court dismissed the California unjust enrichment claims of Plaintiff Padilla and may be inclined to do the same for the remaining California

Plaintiffs, recent California precedent recognizes that "[t]he Ninth Circuit has instructed district courts to construe claims for unjust enrichment under California law as quasi-contract claims." *In re Vizio, Inc. Consumer Privacy Litig.*, 238 F. Supp. 3d 1204, 1233 (C.D. Cal. 2017) (citing *Astiana v. Hain Celestial Grp.*, 783 F.3d 753, 762 (9th Cir. 2015)). "[W]here a plaintiff states a claim for relief under a quasi-contract cause of action that cause should not be dismissed as 'duplicative or superfluous' to the plaintiff's other claims." *Owino v. CoreCivic, Inc.*, 2018 WL 2193644, at*27 (S.D. Cal. May 14, 2018) (quoting *Astiana*, 783 F.3d at 762). Consequently, in *In re Vizio, Inc. Consumer Privacy Litig.*, the court found "no basis" for dismissing unjust enrichment claims despite defendants' argument that plaintiffs had "adequate remedies at law." 238 F. Supp. 3d at 1233. The same principle applies here.

Similarly, recent Texas precedent confirms that "[u]njust enrichment is an implied-contract basis for requiring restitution when it would be unjust to retain the benefits received." *Perales v. Bank of Am., N.A.*, 2014 WL 3907793, at *3 (S.D. Tex. Aug. 11, 2014). Notably, since this Court last considered Plaintiffs' unjust enrichment claims under Texas law, Texas courts have emphasized that the "bar on equitable claims" where other remedies are available "is a general rule, not an absolute one" and "exceptions apply." *Norhill Energy LLC v. McDaniel*, 517 S.W.3d 910, 919 (Tex. Ct. App. 2017).

Missouri courts allow plaintiffs to advance unjust enrichment claims in the alternative to other claims, regardless of whether or not the validity or enforceability of a contract is in question. *See, e.g.*, *In re Dollar Gen. Corp. Motor Oil Mktg. & Sales Practices Litig.*, 2017 WL 3863866, at *10 (W.D. Mo. Aug. 3, 2017) (citing *Thornton v. Pinnacle Foods Grp.*, 2016 WL 4073713, at *4 (E.D. Mo. Aug. 1, 2016)); *Howard v. Turnbull*, 258 S.W.3d 73, 76 (Mo. Ct. App. 2008). That is precisely what Plaintiffs do here. *See* FACC at ¶ 4350.

I. GM has not "mitigated" its unconscionable conduct under Texas law.

There is a genuine dispute of material fact regarding whether GM is liable for unconscionable conduct under the Texas DTPA. "Unconscionable" is defined as "an act or practice which, to a consumer's detriment, takes advantage of the lack of knowledge, ability, experience, or capacity of the consumer to a *grossly unfair degree*." TEX. BUS. & COM. CODE ANN. § 17.45(5) (emphasis added). "To prove an unconscionable action or course of action," the Texas Supreme Court has held that "a plaintiff must show that the defendant took advantage of his lack of knowledge and 'that the resulting unfairness was glaringly noticeable, flagrant, complete and unmitigated.'" *Bradford v. Vento*, 48 S.W.3d 749, 760 (Tex. 2001) (quoting *Ins. Co. of N. Am. v. Morris*, 981 S.W.2d 667, 677 (Tex. 1998)). GM took advantage of Plaintiffs by intentionally concealing a material safety defect—of which Plaintiffs had no knowledge and no ability, experience, or capacity to discover—and knowingly selling dangerous vehicles to Plaintiffs and class members at a premium price. GM's conduct—intentionally risking the safety of unwitting consumers and their families—was thus grossly unfair because, examining "the entire transaction," *Daugherty v. Jacobs*, 187 S.W.3d 607, 616 (Tex. Ct. App. 2006), the resulting unfairness to Plaintiffs is glaringly noticeable, flagrant, complete, and unmitigated. *See, e.g.*, *Serv. Corp. Int'l v. Aragon*, 268 S.W.3d 112, 118-19 (Tex. Ct. App. 2008) (upholding jury finding of unconscionability where funeral home moved decedent to another burial plot without family's consent); *Sanchez v. Guerrero*, 885 S.W.2d 487, 493 (Tex. Ct. App. 1994) (upholding jury finding of unconscionability where real estate broker failed to disclose that accused child molester was a previous occupant when asked about home's former owners).

GM's argument that it entirely mitigated such gross unfairness through repairs alone is unavailing (especially given the evidence that the repairs were not effective). At best, any "mitigation" is partial because it does not remedy the full spectrum of Plaintiffs' damages. "The

purpose of the DTPA is to 'protect consumers against false, misleading, and deceptive business practices, unconscionable actions, and breaches of warranty and to provide efficient and economical procedures to secure such protection.'" *Amstadt,* 919 S.W.2d at 649 (quoting TEX. BUS. & COM. CODE ANN. § 17.44). It would be outrageous and against public policy as codified by the DTPA for GM to escape the full consequences of its unconscionable actions merely by offering belated repairs. The sole case GM cites in support of its argument is distinguishable because it did not involve fraudulent concealment of safety risks. Rather, in assessing the unfairness to a homeowner denied coverage by his insurance company for foundation problems, the Texas Supreme Court concluded that, in light of evidence of thorough reimbursement for testing and repairs and the "continual exchange of information between" the parties, "[t]he record . . . provides no support for the conclusion that State Farm took advantage of [the homeowner] to a grossly unfair degree." *State Farm Lloyds v. Nicolau,* 951 S.W.2d 444, 451 (Tex. 1997). That is not the case here.

J. Plaintiffs state claims against GM for fraudulent concealment of the right to file bankruptcy claims because, but for GM's concealment of the Delta Ignition Switch Defect, Plaintiffs' claims would have been timely asserted in the Bankruptcy Court while the GUC Trust still had assets.

As the Court has recognized, Plaintiffs' claim for "fraud by concealment of the right to file a claim against Old GM in bankruptcy" is premised on the facts that "New GM had knowledge of the [Delta] Ignition Switch Defect" and "improperly concealed its knowledge of that defect;" as a result, Plaintiffs "suffered *damages* because they could not timely file proofs of claim" and therefore could not timely partake of the proceeds of Old GM's bankruptcy. *In re Motors Liquidation Co.*, 2018 WL 2416567, at *12 (S.D.N.Y. May 29, 2018). Under these well-

documented facts, the claims of the California and Missouri Delta Ignition Switch Defect Bankruptcy Plaintiffs should proceed to trial.[57]

Under the Bankruptcy Court's Bar Date Order, November 30, 2009 was the deadline for proof of claims to be filed against Old GM (the Bar Date). *In re Motors Liquidation Co*., 829 F.3d at 147. As the Bankruptcy Court found, "at least 24 Old GM personnel (all of whom were transferred to New GM), including engineers, senior managers and attorneys, were informed or otherwise aware of the [Delta Ignition Switch] Defect prior to the Sale Motion, as early as 2003." *In re Motors Liquidation Co*., 529 B.R. at 538. Further, "[a]s of June 2009, when entry of the Sale Order was sought, Old GM had enough knowledge of the Ignition Switch Defect to be required . . . to send out mailed recall notices to owners of affected Old GM vehicles." *Id.* at 524; *see also* PSUF at ¶¶ 319-50 (documenting these facts).[58] GM necessarily had this same knowledge from day one of its existence, and it also had the undisputed duty to notify *all* affected car owners of the defect (including Plaintiffs) and to institute a recall. *See supra* Section III.D.1 (discussing GM's Safety Act duties with respect to Old GM car owners). And there can be no real question but that Plaintiffs would have promptly pursued a remedy in the bankruptcy had they been able to do so in a timely fashion given the massive outcry and tsunami of litigation that began immediately upon GM's belated recall in 2014.[59] *See In re Motors Liquidation Co.*, 529 B.R. at 521 (GM's belated announcement of the defect "was almost immediately followed by the filing of about 60 class actions" alleging economic loss).

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[57] The Texas Plaintiffs do not pursue this claim.

[58] The Court need not take up GM's likely argument that the stipulated facts from the bankruptcy proceedings are not binding here. Plaintiffs present evidence of all those facts—and more—in opposition to this motion. *See id.*

[59] Plaintiffs anticipate that GM will point to a statement in open court by bankruptcy counsel to the effect that Plaintiffs *in 2014* made a strategic choice to focus on GM rather than Old GM. But the circumstances would have been different in 2009, when claims could be timely filed and when the GUC Trust still had substantial monies. *See, e.g.*, *In Re Motors Liquidation Co.*, 529 B.R. at 586 (by the time Plaintiffs learned of the Delta Ignition Switch Defect and sought remedies, there were no available assets left in the GUC Trust).

GM's arguments against this claim consist of assertions already rejected by the Court, and arguments already addressed in this brief. *First*, GM repeats the argument that it owed no duty to Old GM purchasers because a "duty to disclose can arise only where the plaintiff and defendant have engaged in a transaction." GM Br. at 66-67. GM is wrong. It owed a duty because (i) it (and it alone) had knowledge of the safety defect and the undisputed obligation to disclose and remedy known defects; (ii) its conduct was a producing cause of Plaintiffs' damages and (iii) it had a close relationship with the cars. *See supra* Section III.D. Similarly unavailing is GM's repeated assertion that Plaintiffs can recover on a fraudulent concealment claim "only if the asset purchaser also has a duty to warn, in addition to a duty to disclose." GM Br. at 67. No authority supports GM's position. Because Plaintiffs don't bring duty-to-warn claims, they need not prove the existence of that duty.

Second, GM incorrectly argues that this claim should be dismissed because Plaintiffs have no claim under bankruptcy law. *Id*. at 68 (citing *In re Chateeaugay Corp.*, 53 F.3d 478, 497 (2d Cir. 1995)). The Court has already rejected GM's argument (or its close cousin), and found that this claim is an independent claim against GM for its post-petition conduct. *In re Motors Liquidation Co.*, 2018 WL 2416567, at *12 (emphasis in original) (Plaintiffs "contend that New GM had a duty to disclose *under nonbankruptcy law*…"). The claim is neither a claim based on "bankruptcy law" nor a successor liability claim based on the conduct of Old GM. For this claim, Plaintiffs' damages arose after the Bankruptcy Sale, when they lost the right to timely partake in the spoils of Old GM's bankruptcy. GM (not Old GM) caused this economic loss.

Third, while GM correctly notes that Plaintiffs cannot obtain benefit-of-the-bargain damages for this claim, GM Br. at 68-69, Plaintiffs do not directly seek benefit-of-the-bargain damages (incurred at the point-of-sale) for this claim. *GM* did not cause Plaintiffs' damages at

the point-of-sale; *Old GM* did. Plaintiffs in this count seek to recover from GM precisely what they lost as the result of GM's concealment of the Delta Ignition Switch Defect between the Sale Date and the Bar Date: namely, the amounts they would have recovered on a timely-filed claim in the bankruptcy.[60]

Fourth, as discussed, *supra* at Section III.E-F, the California and Missouri Plaintiffs can recover on these omissions claims upon proof of the materiality of the omitted information—here, the fact of the defect and therefore their right to file a claim in the bankruptcy—without the need for individualized proof of reliance. *See, e.g.*, *Engalla*, 15 Cal. 4th at 977 (California law) (materiality "is generally a question of fact," a misrepresented or omitted fact is material "if a reasonable man would attach importance to its existence or nonexistence in determining his choice of action," and materiality leads to a presumption of reliance); *Star Indem. & Liab. Co.*, 2013 WL 1442456, at *16 (Missouri law) (omission is material if it would likely affect the conduct of a reasonable man with respect to his transaction); *Crewse*, 706 S.W.2d at 39 (Missouri law) (in most cases, materiality is a fact question for the jury); *TACC Order*, 2016 WL 3920353 at *34 (concealed safety defects material under Missouri law). A jury could well find that reasonable car owners would have behaved differently, and filed timely proofs of claim in Old GM's bankruptcy *but for* GM's fraudulent concealment of the Delta Ignition Switch Defect.

Fifth, GM correctly notes that, in order to prevail on this claim against GM, the California and Missouri Delta Ignition Switch Defect Bankruptcy Plaintiffs must demonstrate that they would have had a viable claim against Old GM in the bankruptcy. GM Br. at 69-70 (relying on arguments made "throughout" its brief against the underlying claim, including the

[60] Those damages are the percentage of the benefit-of-the-bargain damages Plaintiffs would have recovered on a timely-filed proof of claim. *See* PSUF at ¶¶ 299-313. Hence, as GM correctly points out in a later portion of its brief, in order to recover on this claim, Plaintiffs must demonstrate that they would have had viable claims against Old GM to assert in the bankruptcy. For the reasons discussed throughout this brief, Plaintiffs had such claims.

argument that Service-Part Vehicle owners have no claim). For the reasons discussed throughout this brief, Plaintiffs have viable underlying claims.

K. Plaintiffs are entitled to injunctive relief.

Pursuant to California, Missouri, and Texas state consumer laws, Plaintiffs seek injunctive relief in the form of an order enjoining GM from continuing its unfair, unlawful, and/or deceptive practices; an order supervising, promoting, and accelerating the completion of the relevant recalls, to prevent or reduce ongoing crashes, injuries, and deaths; and any other relief that the Court deems just and proper. FACC at ¶¶ 1606, 1631, 4301, 6550. GM is wrong to argue that there is either insufficient harm or insufficient public interest to justify such relief or that the yet-to-be-determined contours of such relief would be overbroad.[61] GM Br. at 70–75. GM's arguments for summary judgment regarding injunctive relief are therefore misplaced.

GM ignores the standards for and availability of injunctive relief under applicable state laws. In California, for example, the "UCL empowers the Court to enjoin uncompetitive acts, as well as to 'make such orders or judgments . . . as may be necessary to prevent the use or employment of any practice which constitutes unfair competition.'" *Haas Automation, Inc. v. Denny*, 2014 WL 2966989, at *7 (C.D. Cal. July 1, 2014) (alterations in original) (quoting CAL. BUS. & PROF. CODE § 17203). "The remedial power granted under" California consumer law "is extraordinarily broad." *People v. JTH Tax, Inc.*, 151 Cal. Rptr. 3d 728, 759 (Cal. Ct. App. 2013) (citation omitted). Because "unfair business practices can take many forms, the Legislature has given the courts the power to fashion remedies to prevent their 'use or employment' in whatever context they may occur." *Id.* (quoting *Consumers Union of U.S., Inc. v. Alta-Dena Certified Dairy*, 6 Cal. Rptr. 2d 193, 198 (Cal. Ct. App. 1992)). Moreover, "[t]he standard for an

[61] The contours of such relief would be determined when and if liability is found.

injunction under California law differs from the federal standard." *Haas Automation*, 2014 WL 2966989, at *9. To obtain a permanent injunction under the UCL, "'the plaintiff must prove (1) the elements of a cause of action involving the wrongful act sought to be enjoined and (2) the grounds for equitable relief, such as, inadequacy of the remedy at law.'" *Id.* (quoting *City of S. Pasadena v. Dep't of Transp.*, 35 Cal. Rptr. 2d 113, 120 (Cal. Ct. App. 1994)). Grounds for equitable relief exist where there is a threat of future harm. *Id.* at *10.

As explained above, Plaintiffs are entitled to proceed on their UCL claims as a matter of fact and law and, consequently, Plaintiffs have proven the necessary "elements" of that cause of action, among others, for purposes of summary judgment. *See supra* Sections III.E & III.F. Plaintiffs have also shown grounds for equitable relief because GM's conduct demonstrates that there is a risk GM will continue to engage in unlawful, unfair, and fraudulent business practices. Specifically, GM knowingly concealed material safety defects while offering its vehicles for public sale (PSUF at ¶¶ 5-256), [redacted] (*id.* at ¶¶ 20-27), [redacted] (*id.* at ¶¶ 28-56). Absent an injunction, there is a serious risk that GM will continue to engage in similarly deceptive and harmful conduct.

Plaintiffs also satisfy the federal standard for purposes of summary judgment. Injunctions are forward-looking remedies, designed to prevent or reduce future or ongoing harm. *See, e.g.*, *SEC v. Saltsman*, 2016 WL 4136829, at *29 (E.D.N.Y. 2016 Aug. 2, 2016) (citation omitted) ("injunctions are equitable, forward-looking remedies"); *Vaguely Qualified Prods. LLC v. Metro. Transp. Auth.*, 2015 WL 5916699, at *12 (S.D.N.Y. Oct. 7, 2015) ("injunctions are forward looking"). To obtain a permanent injunction, a plaintiff "must demonstrate "that (1) it will suffer an irreparable injury in the absence of an injunction; (2) legal remedies are

insufficient to compensate for that injury; (3) considering the balance of hardships between the parties, an equitable remedy is warranted; and (4) the injunction is in the public interest." *Beck v. Test Masters Educ. Servs. Inc.*, 994 F. Supp. 2d 98, 101 (D.D.C. 2014) (citing *Monsanto Co. v. Geerston Seed Farms*, 561 U.S. 139, 156–57 (2010); *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006)).

The record evidence shows that vehicles experiencing sudden moving stalls and/or loss of power pose a serious risk of injury and death for drivers, passengers, and anyone in their path. PSUF at ¶¶ 46, 238. That accidents continue to occur well past the recalls (as documented in cases pending in this MDL) indicates the temporal consistency to support injunctive relief. *See, e.g., Soppeck v. Gen. Motors Corp.*, No. 18-cv-08322 (crash occurred Sept. 12, 2017, involving recall no. 14v400); *Curcio v. Gen. Motors Corp.*, No. 18-cv-06993 (crash occurred Aug. 4, 2017, involving recall no. 14v355); *Bauer v. Gen. Motors Corp.*, No. 18-cv-06980 (crash occurred Aug. 3, 2017, involving recall 14v355); *Sheffield-Turner v. Gen. Motors Corp.*, No. 18-cv-04112 (crash occurred May 15, 2017, involving recall 14v355); *Buchanan v. Gen. Motors Corp.*, No. 18-cv-03549 (crash occurred Apr. 21, 2017, involving recall 14v355); *Jones v. Gen. Motors Corp.*, No. 18-cv-02161 (crash occurred Mar. 10, 2017, involving recall 14v355); *Young v. Gen. Motors Corp.*, No. 18-cv-07986 (crash occurred Sept. 3, 2016, involving recall 14v400); *Gillard v. Gen. Motors Corp.*, No. 18-cv-07872 (crash occurred Aug. 29, 2016, involving recall 14v355); *Kuch v. Gen. Motors Corp.*, No. 18-cv-07901 (crash occurred Aug. 29, 2016, involving recall 14v355); *Allyn v. Gen. Motors Corp.*, No.18-cv-06297 (crash occurred Aug. 20, 2016, involving recall 14v355); *Willams- Leirmo v. Gen. Motors Corp.*, No. 18-cv-07532 (crash occurred Aug. 20, 2016, involving recall 14v355); *Scott v. Gen. Motors Corp.*, No. 18-cv-07255 (crash occurred Aug. 12, 2016, involving recall 14v047); *Zamarripa v. Gen. Motors Corp.*, No.

18-cv-07145 (crash occurred Aug. 9, 2016, involving recall 14v047); *Brown v. Gen. Motors Corp.*, No. 18-cv-05546 (crash occurred June 20, 2016, involving recall 14v355); *Veale v. Gen. Motors Corp.*, No. 18-cv-05524 (crash occurred June 20, 2016, involving recall 14v355); *Cardwell v. Gen. Motors Corp.*, No. 18-cv-05499 (crash occurred June 19, 2016, involving recall 14v394); *Williams v. Gen. Motors Corp.*, No. 18-cv-05450 (crash occurred June 18, 2016, involving recall 14v400); *Duwyenie v. Gen. Motors Corp.*, No. 18-cv-05349 (crash occurred June 14, 2016, involving recall 14v400); *Duncan v. Gen. Motors Corp.*, 18-cv-05198 (crash occurred June 10, 2016, involving recall 14v047); *Paxton v. Gen. Motors Corp.*, No. 18-cv-04904 (crash occurred June 1, 2016, involving recall 14v047); *McDuff v. Gen. Motors Corp.*, No. 18-cv-04305 (crash occurred May 16, 2016, involving recall 14v394); *Hogan v. Gen. Motors Corp.*, No. 18-cv-02114 (crash occurred Mar. 8, 2016, involving recall 14v355); *Kelley v. Gen. Motors Corp.*, No. 18-cv-01905 (crash occurred Mar. 3, 2016, involving recall 14v400); *Perry v. Gen. Motors Corp.*, No. 18-cv-01459 (crash occurred Feb. 18, 2016, involving recall 14v400).

Overall, the balance of hardships weighs in favor of equitable relief. *See, e.g.*, *Int'l Bhd. of Elec. Workers, AFL-CIO, Local Union No. 3 v. Charter Commc'ns, Inc.*, 277 F. Supp. 3d 356, 363 (E.D.N.Y. 2017) (quoting *Brenntag Int'l Chems., Inc. v. Bank of India*, 175 F.3d 245, 249 (2d Cir. 1999)) (a party demonstrates irreparable harm "for which a monetary award does not adequately compensate" where "it shows that there is a 'substantial chance' that, absent an injunction, the parties cannot be returned to the pre-injunction status quo"); *Ligon v. City of New York*, 925 F. Supp. 2d 478, 540 (S.D.N.Y. 2013) (weighing "the relative hardships faced by the parties" in light of "potentially dire and long-lasting consequences"). Notably, NHTSA itself has recognized that injunctive relief serves the public interest—NHTSA filed a "position statement" in multi-district litigation involving alleged fraudulent conduct by Fiat Chrysler expressing its

view that "court supervision of a prospective remedy for the alleged defects would not interfere with, and could well aid, the progress and resolution of its recall investigation and any subsequent technical determination of the most appropriate remedy." *In re FCA US LLC Monostable Elec. Gearshift Litig.*, 2017 WL 1382297, at *7 (E.D. Mich. Apr. 18, 2017).[62]

Another recent automotive multi-district litigation, involving defective Takata airbags, is also instructive. There, court-approved settlement agreements with various auto manufacturers provided additional recall-related equitable remedies to class members, with the court "retain[ing] continuing and exclusive jurisdiction over the Action and all matters relating to the administration, consummation, enforcement, and interpretation of the Settlement Agreement[.]" *In re Takata Airbag Prods. Liab. Litig.*, 2017 WL 5706147, at *6 (S.D. Fla. Nov. 1, 2017) ("Mazda Final Approval Order"); *see also id.* at *1 ("incorporat[ing] the [Mazda] Settlement Agreement and its exhibits" into final order). More specifically, the Takata-related settlement agreements generally provide for an "Outreach Program with the goal of maximizing, to the extent practicable, completion of the Recall Remedy in Subject Vehicles[,]" Mazda Settlement Agreement at 18,[63] a "Rental Car/Loaner Program" for certain Class Members awaiting recall repairs, *id.* at 21-22, an "Out-of-Pocket Claims Process" to pay for Class Members' reasonable out-of-pocket expenses related to the recalls, *id.* at 22–25, and a "Customer Support Program" extending for 10 years after the recall repairs, *id.* at 27–29.[64]

[62] State law also demonstrates the importance of the public interest in constructing or allowing injunctive remedies. For example, the California Supreme Court has characterized injunctions pursuant to the CLRA as "public injunctions" because such "relief is for the benefit of the general public rather than the party bringing the action." *Cruz v. PacifiCare Health Sys., Inc.*, 66 P.3d 1157, 1162 (2003).

[63] https://www.autoairbagsettlement.com/Content/Documents/Mazda/Mazda%20Settlement%20Agreement.pdf.

[64] Information on the Takata airbag class action settlements with BMW, Honda, Mazda, Nissan, Subaru, and Toyota can be found on the court-approved website, www.autoairbagsettlement.com.

Accordingly, GM cannot and has not shown that it is entitled to summary judgment on the availability of injunctive relief.[65]

IV. CONCLUSION

For the reasons stated above, the Court should deny GM's motion for summary judgment in its entirety.

DATED: September 21, 2018

HAGENS BERMAN SOBOL SHAPIRO LLP

By: */s/ Steve W. Berman*
Steve W. Berman

steve@hbsslaw.com
Sean R. Matt
sean@hbsslaw.com
Andrew M. Volk
andrew@hbsslaw.com
HAGENS BERMAN SOBOL SHAPIRO LLP
1301 Second Avenue, Suite 2000
Seattle, WA 98101
Telephone: (206) 623-7292
Facsimile: (206) 623-0594

[65] GM incorrectly asserts that Plaintiffs would have no claims for injunctive relief without damages. GM Br. at 31-32. Although this may be true for the Texas Plaintiffs (who in any event have shown damages), it is not for the California and Missouri Plaintiffs. California Plaintiffs bring claims under the CLRA, which does *not* require proof of monetary "damages," but only proof of "damage" (here, the receipt of a defective vehicle). *See Meyer*, 200 P.3d at 298-99 (citing § 1780(a), and finding that "the phrase 'any damage' is not synonymous with 'actual damages,' which generally refers to pecuniary damages."); *see also Gonzales v. CarMax Auto Superstores, LLC*, 845 F.3d 916, 918 (9th Cir. 2017) (citing *Meyer*) (CLRA claim can be brought for injunctive relief alone). In addition, the Moss-Magnuson Act Plaintiffs can obtain injunctive relief without proof of damages. *See* 15 U.S.C. § 2304(a)(4). For the Missouri Plaintiffs, they can obtain injunctive relief *without* damages on their fraud claim. *See, e.g., St. Bethel Missionary Baptist Church, Inc., v. St. Louis Builders, Inc.*, 388 S.W.2d 776 (Mo. 1965) (discussing equitable proceeding to enjoin foreclosure on the basis of fraud).

DATED: September 21, 2018

LIEFF CABRASER HEIMANN & BERNSTEIN, LLP

By: */s/ Elizabeth J. Cabraser*
Elizabeth J. Cabraser

ecabraser@lchb.com
Rachel Geman
rgeman@lchb.com
275 Battery St., 29th Floor
San Francisco, CA 94111
Telephone: (415) 956-1000
Facsimile: (415) 956-1008

Co-Lead Counsel with Primary Focus on Economic Loss Cases

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above document was served upon the attorney of record for each other party through the Court's electronic filing service on September 21, 2018, which will send notification of such filing to the e-mail addresses registered.

/s/ Steve W. Berman
Steve W. Berman

EXHIBIT C-3

DEFENDANT GENERAL MOTORS LLC'S REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT AGAINST THE BELLWETHER ECONOMIC LOSS PLAINTIFFS

[MDL ECF NO. 6194] (FILED OCTOER 19, 2018)

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

IN RE:	)	
GENERAL MOTORS LLC IGNITION SWITCH LITIGATION	)	No. 14-MD-2543 (JMF)
	)	No. 14-MC-2543 (JMF)
	)	Hon. Jesse M. Furman
This Document Relates To All Actions	)	

DEFENDANT GENERAL MOTORS LLC'S REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT AGAINST THE BELLWETHER ECONOMIC LOSS PLAINTIFFS

Richard C. Godfrey, P.C.
Andrew B. Bloomer, P.C.
KIRKLAND & ELLIS LLP
300 N. LaSalle
Chicago, IL 60654-3406
Phone: 312-862-2000
Fax: 312-862-2200
richard.godfrey@kirkland.com
andrew.bloomer@kirkland.com

Attorneys for Defendant General Motors LLC

TABLE OF CONTENTS

TABLE OF CONTENTS (CONT'D)

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES (CONT'D)

Page(s)

TABLE OF AUTHORITIES (CONT'D)

Page(s)

TABLE OF AUTHORITIES (CONT'D)

Page(s)

TABLE OF AUTHORITIES (CONT'D)

Page(s)

TABLE OF AUTHORITIES (CONT'D)

Page(s)

TABLE OF AUTHORITIES (CONT'D)

Page(s)

TABLE OF AUTHORITIES (CONT'D)

Page(s)

Statutes

TABLE OF AUTHORITIES (CONT'D)

Page(s)

Other Authorities

Rules

INTRODUCTION

A principal reason and advantage for the Court to have simultaneous briefing of summary judgment *and* class certification is that dual track briefing enables the Court to better evaluate—based upon a mature evidentiary record—whether the requirements of Rule 23 can be satisfied at all, much less at trial. In some cases, the combined Rules 56 and 23 evaluation shows that the Rule 23 requirements can be satisfied; but in other instances, the plaintiffs' defenses and arguments against summary judgment independently establish the inherent lack of predominant commonality and plaintiffs' inability to comply with Rule 23's requirements.[1]

This case falls into that latter category. Time after time, plaintiffs' defenses against summary judgment under Rule 56 turn on individual and uncommon questions of fact, precluding certification under Rule 23. For example:

- Plaintiffs oppose summary judgment arguing that New GM sold millions of cars "to unsuspecting consumers who paid a price reflecting *the belief* that the cars had no known defects." Pls. Opp. (Dkt. 6059) at 1 (emphasis added). To drive their point home, plaintiffs claim they would have "*behaved differently*" and either "not have entered into the transaction" or "paid less" had they known the truth. *Id.* at 20, 56, 59 (emphasis added). Of course, those arguments contradict named plaintiffs' testimony regarding the myriad differing reasons they bought their vehicles, expert consumer survey evidence in the class certification context, and numerous decisions holdings that questions of "belief" or how someone would have "behaved" are individual, not class common. New GM Memo. (Dkt. 5859) at 34-40; New GM Class Cert Opp. (Dkt. 6132) at 9 & Ex. B; *id.* at 52-72.

- Plaintiffs oppose summary judgment arguing "there is a genuine issue of material fact regarding defect manifestation" based on the individual facts of the Texas and Missouri plaintiffs' vehicles—confirming the need to examine each putative class member's experience with his or her particular vehicle to determine whether a defect manifested. Pls.

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[1] *See, e.g., Bd. of Trustees of S. Cal. IBEW-NECA Defined Contribution Plan v. Bank of N.Y. Mellon Corp.*, 287 F.R.D. 216, 226-28 (S.D.N.Y. 2012) (denying certification where plaintiffs relied on differences among putative class members in opposing summary judgment); *Espejo v. Santander Consumer USA, Inc.*, 2016 WL 6037625, at *7, 10 (N.D. Ill. Oct. 14, 2016) ("Plaintiffs' argument in opposition to ... motions for summary judgment amply demonstrate … how such [individual] questions would predominate (indeed, consume) the litigation"); *Gieseke v. First Horizon Home Loan Corp.*, 2007 WL 437792, at *1 (D. Kan. Feb. 6, 2007) ("Plaintiffs' own words in response to defendants' summary judgment motion best explain the problem with certifying the claims as a class action.").

Opp. at 39-40. Plaintiffs' summary judgment arguments confirm the lack of predominant commonality under Rule 23.

- For damages, plaintiffs argue they "may recover the difference in value between what *they thought they were purchasing* (a car without known safety defects) and what they actually received … ." Pls. Opp. at 22, 27 (emphasis added). What each plaintiff "thought they were purchasing" is inherently subjective and not compliant with Rule 23. Plaintiffs' footnote 26 confirms that a person-by-person "subjective" fact inquiry is necessary, as plaintiffs attempt to distinguish adverse authority by claiming "the majority decision appears to be inconsistent with the rule that a *consumer's subjective willingness to pay* more for the product than he or she would have been willing to pay … is itself a form of economic injury … ." *Id*. at 27 n.26 (emphasis added).

- Plaintiffs admit they have no individual proof of economic injury. Pls. Opp. at 35. Instead, they assert their class damages expert (Mr. Boedeker) shows that "all" and "*every class member*" suffered damages. *Id*. at 2, 21 n.17, 34, 37 (emphasis added). But Boedeker's survey proves the opposite—between 26.6% and 39.1% of his respondents have no damages at all, and the claimed damages vary widely for the remainder. Once again, plaintiffs' argument opposing summary judgment confirms why no class is proper here. New GM Class Cert Opp. at 24-26; New GM Boedeker *Daubert* Memo. (Dkt. 6131) at 20-21.[2]

- Plaintiffs argue "there are genuine issues of material fact regarding the value of Plaintiffs' lost time" based upon differing individual facts, such as time value for plaintiffs ranging from $600 to "two hours of work at an hourly rate of $25." Pls. Opp. at 42 & n. 37. By contrast, their so-called lost time expert, Dr. Manuel, calculates damages formulaically and uniformly for all putative class members, ignoring the individual facts upon which plaintiffs rely. Confirming the individual, non-class nature of the necessary factual inquiry, plaintiffs "concede that, to the extent other Plaintiffs have not presented evidence demonstrating resulting financial loss, they may not recover for lost time under Missouri law." *Id*. at 43.

These examples reflect only some of the many instances in plaintiffs' summary judgment opposition brief in which—in an attempt to survive summary judgment—plaintiffs argue

[2] Plaintiffs have no evidence of individual damages, and so must rely on the purported "class-wide" damages methodology of their putative experts Mr. Boedeker and Dr. Gans. Pls. Opp. at 24, 35-37. In doing so, plaintiffs chastise New GM for not moving on summary judgment to exclude the Boedeker/Gans damages methodology, claiming that such class-wide damages are thus "uncontested." Not true. New GM moved for summary judgment against the named plaintiffs because, among other reasons: (i) they have no proof of any individual injury—even under the Boedeker/Gans' methodology, (ii) that methodology is legally impermissible, and (iii) even taken at face value, between 26.6% and 39.1% of the consumers surveyed in the Boedeker/Gans' methodology have no injury or damages. Moreover, now that plaintiffs rely upon a class-wide damages methodology to try and save their individual claims, they have tied the summary judgment and class certification motions together, and thus cannot avoid New GM's *Daubert* Motions filed in opposition to the proposed classes addressing the legal impropriety and scientific unreliability of that methodology.

individual, plaintiff-specific facts, confirming why no classes can possibly be certified here under Rule 23.

Even as to the specific, differing plaintiff facts argued, plaintiffs cannot avoid summary judgment under Rule 56. Plaintiffs' summary judgment arguments defeat the proposed classes and separately warrant summary judgment against their individual claims on the merits.

I. PLAINTIFFS' OPPOSITION CONFIRMS THAT NO PLAINTIFF HAS ANY LEGALLY RECOVERABLE DAMAGES.

A. New GM's Recall Repairs Preclude Plaintiffs' Alleged Benefit-Of-The-Bargain Damages.

Plaintiffs continue to misstate the role of recall repairs in the benefit-of-the-bargain remedy. Where a recall has been implemented under the Safety Act and remains unchallenged by NHTSA or any party under Safety Act regulations, plaintiffs cannot establish that the recall repaired vehicles are defective simply by proffering alternative and untested engineering theories. Rather, they must provide empirical proof and scientific testing that the repaired vehicles are unsafe. Plaintiffs' contention that over 13 million recalled GM vehicles remain defective is belied by the real world; plaintiffs' complete failure to pursue injunctive or administrative relief for these alleged safety defects in the more than four years since the recalls were announced; and the utter lack of evidence supporting their experts' opinions, none of which satisfy *Daubert*'s standards as explained in New GM's accompanying motion and briefs. Adopting plaintiffs' position and ignoring the legal effect of New GM's recall repairs would result in an unwarranted expansion of manufacturers' liabilities for recalled vehicles untethered to statute, regulation, and settled law.

1. Post-Sale Remediation Through Recall Repairs Precludes the Double Recoveries Sought By Plaintiffs.

In late 2017, the parties filed 121 pages of summary judgment briefing on whether New

GM's recalls precluded plaintiffs' benefit-of-the-bargain damages. On April 3, 2018, the Court had "done enough research to conclude that many, if not most (or even all), states would factor such evidence [of post-sale remediation] into the analysis" of damages, and "surmises (though, to be clear, does not yet hold) that the viability of Plaintiffs' claims for benefit-of-the-bargain damages is likely to turn on the question of whether New GM actually fixed the recalls at issue in its many recalls." *In re Gen. Motors LLC Ignition Switch Litig.*, 2018 WL 1638096, at *2 (S.D.N.Y. Apr. 3, 2018) ("*BoB Op.*").[3] Plaintiffs seek another bite at the apple, but offer no new arguments, case law, or reasons to change the Court's prior opinion. Pls. Opp. at 22-33. New GM thus incorporates its benefit-of-the-bargain briefing, and will again address plaintiffs' principal points. BoB SJM (Dkt. 4681); BoB SJR (Dkt. 4868).

Recall repairs provide plaintiffs with the benefit of their bargain and eliminate any legally cognizable benefit-of-the-bargain damages. *In re Toyota Motors Corp. Hybrid Brake Mktg. Sales Pracs. & Prods. Liab. Litig.*, 915 F. Supp. 2d 1151, 1159 (C.D. Cal. 2013); *Kommer v. Ford Motor Co.*, 2017 WL 3251598, at *5 (N.D.N.Y. July 28, 2017); *Thiedemann v. Mercedes-Benz USA, LLC*, 872 A.2d 783, 794 (N.J. 2005); BoB SJM at 16-20; BoB SJR at 8-13. Independently, each bellwether state measures property damages by the lesser of cost-of-repair or diminished-value damages. *Safeco Ins. Co. v. J & D Painting*, 21 Cal. Rptr. 2d 903, 904-05 (Cal. Dist. Ct. App. 1993); *Crawford v. Whittaker Constr., Inc.*, 772 S.W.2d 819, 822 (Mo. Ct. App. 1989); *Orr Chevrolet, Inc. v. Courtney*, 488 S.W.2d 883, 886 (Tex. Civ. App. 1972); BoB SJM at 25-27, 29-30; BoB SJR at 16-17, 20-21, 22-23. Under this rule of law, plaintiffs have no

[3] Citation abbreviations are "SUF" for New GM's Statement of Undisputed Material Facts; "PSUF" for Plaintiffs' Statement of Undisputed Material Facts; "Pls. SUF Resp." for Plaintiffs' Response to the SUF; "SUF Reply" for New GM's Reply to its SUF; and "PSUF Resp." for New GM's Response to the PSUF. All record and legal citations omit internal quotation marks, citations, footnotes, brackets, and other modifications unless otherwise indicated.

damages because New GM repaired or offered to repair plaintiffs' vehicles without cost to any of the GM vehicle owners. Awarding any plaintiffs with a separate and additional money beyond the recall repairs would be an impermissible double recovery.[4]

Plaintiffs' principal argument is that benefit-of-the-bargain damages are incurred at the time of sale; thus, post-sale conduct cannot be considered. Pls. Opp. at 24. But this simply repeats their prior argument (*see* Pls. BoB Opp., Dkt. No. 4805, at 1), which has no merit because it confuses *when* one measures damages with *whether* a plaintiff has recoverable damages. BoB SJR at 3-5. That is why this Court held that "a plaintiff who is *injured* at one point in time by a defendant's conduct does not necessarily suffer cognizable *damages* at that same time for purposes of an economic loss claim." *In re Gen. Motors LLC Ignition Switch Litig.*, 2017 WL 3443623, at *2 (S.D.N.Y. Aug. 9, 2017) ("*FACC Supp. Op.*") (emphasis in original); Opinion re Order No. 131 Issues, Dkt. 6028, at 11. For that same reason, courts hold that recalls and similar remedial actions provide plaintiffs with the benefit of their bargain and preclude economic loss damages. BoB SJM at 16-20; BoB SJR at 8-13.[5]

Plaintiffs' attempt to manufacture a distinction between diminished-value and benefit-of-the-bargain damages (Pls. Opp. at 24) fails because the two damage theories are synonymous. *See, e.g., In re Gen. Motors LLC Ignition Switch Litig.*, 257 F. Supp. 3d 372, 460 (S.D.N.Y. 2017) ("*FACC MTD Op.*") (referring to "diminished value (or benefit-of-the-bargain

[4] Certain vehicle owners may claim incidental damages related to the recalls, but such damages must be proven on an individual basis, yet another reason why class certification would not comply with Rule 23.

[5] If plaintiffs' argument that post-sale remedies could never be considered were correct, then short of a court judgment, no seller could ever give or restore a person's benefit-of-their bargain post-sale, and double recovery would be commonplace. Take New GM's real estate example discussed in prior briefing, where rather than 1 acre being transferred, only 9/10ths of an acre was provided at the point of sale. BoB SJM at 12. If one week later the seller transferred to plaintiff the additional 1/10th of an acre, in plaintiffs' world, that would not matter or compensate them, even though the parties' bargain would be fulfilled and plaintiff would have received precisely what it contracted for, though one week late.

damages)"); *T.Co Metals, LLC v. Dempsey Pipe & Supply, Inc.*, 592 F.3d 329, 335 (2d Cir. 2010) (stating that party "was still entitled to recover damages for the diminished value of the pipe, since those damages constituted 'benefit-of-the-bargain' damages'").[6] For these purposes, cases using the term "diminution in value" are analytically indistinguishable from those using "benefit of the bargain." *See also Hybrid Brake*, 915 F. Supp. 2d at 1153 (rejecting plaintiff's "benefit-of-the-bargain argument" because plaintiff "cannot complain that he received less than what he paid for—that is a vehicle with a safe and operable" braking system after the vehicle received recall repairs).

Plaintiffs cite the same cases as their prior briefing (Pls. Opp. at 25-32 & n.24), yet none of those cases involve recalls or post-sale remedies. For example, *Carriuolo v. Gen. Motors* did not involve defects, recalls, or repairs, much less suggest that recalls or other remedies do not provide the benefit of the bargain. 823 F.3d 977 (11th Cir. 2016); BoB SJR at 7-8. **California** plaintiffs' argument primarily relies on *Pulaski & Middleman, LLC v. Google, Inc.*, which involved deficient advertising—not vehicles or any other product—and does not discuss recalls or other remedies.[7] 802 F.3d 979, 982-83 (9th Cir. 2015); BoB SJR at 7, 9. For **Missouri**, plaintiffs' reliance on *Auffenberg v. Hafley* is inapt, as the dealer there did not repair the vehicle or offer any kind of post-transaction remedy. 457 S.W.2d 929, 932-33 (Mo. Ct. App. 1970). As to **Texas**, plaintiffs do not cite any relevant case law, and have no answer to *Orr Chevrolet's*

[6] *See also Coghlan v. Wellcraft Marine Corp.*, 240 F.3d 449, 453 (5th Cir. 2001) (explaining that "diminished value" and "benefit of the bargain" are "clearly synonymous"); *United States ex rel. Roby v. Boeing Co.*, 302 F. 3d 637, 647 (6th Cir. 2002) ("Under the 'diminished value' or 'benefit of the bargain' test … we subtract the market value of what the Government received from what it was promised."); *Tietsworth v. Sears, Roebuck and Co.*, 2011 WL 3240563, at *3 (N.D. Cal. 2011); *Aas v. Superior Court*, 12 P.3d 1125, 1133 (Ca. 2000), *superseded on other ground by statute as stated in Rosen v. State Farm Gen. Ins. Co.*, 70 P.3d 351, 356-57 (Cal. 2003).

[7] For California, plaintiffs also claim *Kwikset v. Superior Court* declined to use damages theories from other areas of law in consumer cases, Pls. Opp. at 29, but *Kwikset's* statement addressed only statutory *standing*, not recoverable damages. 246 P.3d 877, 894-95 (Cal. 2011); BoB SJR at 17.

holding that damages for vehicles are limited to the lesser of cost of repair or diminished value. 488 S.W.2d at 886. Plaintiffs' other cases are similarly irrelevant because they do not address a recall or other remedy. *See* BoB SJR, Dkt. 4868, at 6-9, 16-17, 20-21, 22-23.

Finally, plaintiffs' reliance on Boedeker's class-wide damages methodology cannot save their claimed benefit-of-the-bargain damages. Pls. Opp. at 32-33. Recalls bar such damages as a matter of law. *Hybrid Brake*, 915 F. Supp. at 1157, 1159; *Kommer*, 2017 WL 3251598, at *5; BoB SJR at 22-24. Plaintiffs, in sum, have no legally recoverable damages, and any award would constitute an impermissible double recovery. BoB SJM; BoB SJR.

2. The Undisputed Scientific And Empirical Evidence Proves That New GM's Repairs Fixed The Recall Conditions.

Plaintiffs "acknowledge that the evidence now demonstrates that the remedies offered under [the SIAB and EPS recalls] are effective in repairing the defects." Pls. Opp. at 4 n. 1; *see also id.* at 24 n. 21. Thus, for all claims of Cereceres, Tinen, and McClellan, as well as the EPS Assist claims of Padilla, Akers and Hawkins, there is no factual dispute, and summary judgment on their claimed benefit-of-the bargain damages is warranted.

For the other five recalls (the Delta Ignition Switch Recall and the four Key Rotation Recalls), plaintiffs base their sweeping and class-wide conclusion that New GM's Delta Ignition Switch and Key Rotation recall remedies are ineffective on the scientifically unsupported and unreliable opinions of one expert, Glen Stevick. But his opinions, which New GM moved to exclude in its *Daubert* motion (Dkt. 5855), have no basis in the real world, no support from the evidentiary record, and no reliable testing in support. Plaintiffs admit that Stevick has conducted no vehicle-level testing and no assessment of field performance data of the recall-repaired vehicles to assess their susceptibility to inadvertent key rotation. Indeed, Stevick testified that he cannot identify a single, real-world incident of inadvertent key rotation in a repaired vehicle:

> Q. [A]s you sit here today, there are no incidents of inadvertent key rotation that you can specifically identify for a GM recalled vehicle with the remedy implemented, correct?
>
> A. Yeah, I can't say. Sorry. I don't know of any as I sit here. (SUF Reply ¶ 140.)

Plaintiffs' lack of empirical proof and real-world evidence stands in stark contrast to the overwhelming evidentiary support and unrebutted testing establishing the recall repairs' effectiveness. New GM subjected recall-repaired vehicles to a battery of peer-reviewed tests and all of them passed—*i.e.*, no key rotation during any of the extreme driving tests, and no surrogate driver rotated the ignition key, even deliberately, in normal driving positions. SUF Reply ¶ 17. The Virginia Tech Transportation Institute ("VTTI") validated this testing as "robust" and "acceptable for examining risk [of inadvertent key rotation] within existing vehicles." SUF Resp. ¶ 66. As a result, the unrebutted evidence shows that the repairs effectively address inadvertent key rotation. SUF ¶¶ 18-46, 57-60, 72-75, 83-87, 99-103.

Although they have no empirical testing or field performance data showing how the recall-repaired vehicles perform in the real world, plaintiffs dispute the recall remedies' effectiveness by arguing that recall-repaired vehicles (1) have "low torque" ignition switches; (2) "still have a knee-key defect;" and (3) "suffer from a single-point-of-failure defect."[8] But none of these theories go to whether the recall-repaired vehicles are susceptible to inadvertent key rotation in the real world and cannot create a material factual dispute as to remedy effectiveness. These opinions are speculative, unsupported by reliable data, and fail *Daubert*.[9]

First, there is no evidence that "low torque" switches in the recall-repaired vehicles present susceptibility to inadvertent key rotation. To start, plaintiffs' myopic focus on ignition

[8] Plaintiffs concede that Recall No. 14v346 has no alleged single-point-of-failure defect. Pls. Opp. at 17.

[9] New GM further addresses plaintiffs' arguments in its *Daubert* briefing to exclude the speculative opinions of Stevick and Loudon (Dkt. 5855).

switch torque misses the point. The relevant inquiry is not whether the *ignition switch* in a repaired vehicle is "low torque" or does not meet an engineering specification. Indeed, Stevick concedes that a component may fall outside an engineering specification and not pose a safety risk. SUF Reply ¶¶ 6-7. Rather, the relevant inquiry is whether a recall-repaired vehicle is susceptible to inadvertent key rotation, and New GM's uncontroverted, validated testing proves they are not. SUF ¶¶ 18-46, 57-60, 72-75, 83-87, 99-103. Further, the fundamental physics behind the remedy, which Stevick admits is "sound," mitigates the significance of switch torque because the newly designed key that eliminates the moment arm, and plaintiffs offer no evidence otherwise. SUF ¶ 16. Tellingly, plaintiffs' experts did not even inspect the ignition switches in the named plaintiffs' vehicles and thus have *no evidence* that they are "low torque." SUF ¶ 140.

Second, plaintiffs' argument that all the recall-repaired vehicles "still have a knee-key defect" is premised on the assumption that New GM can only solve knee-key rotation by moving the ignition key location from the "lower right side of the steering column." There is no reliable scientific support for this theory. SUF ¶¶ 136-140; *see also* New GM's Motion to Exclude G. Stevick and S. Loudon (Dkt. 5855). To start, New GM's recall remedy is specifically designed to address knee-key rotation, and the validated testing proves that it does so irrespective of the ignition key location. SUF ¶¶ 18-46, 57-60, 72-75, 83-87, 99-103. Additionally, plaintiffs have offered no scientific proof that a vehicle with the ignition key located on the "lower right side of the steering column" is, without more, susceptible to knee-key rotation, and if true, numerous automotive vehicles would have this susceptibility. PSUF Resp. ¶¶ 58-59. Further, the New GM documents and tests on which plaintiffs rely to argue that the recalled vehicles are susceptible to inadvertent key rotation based on key location all relate to pre-recall vehicles, and have absolutely no bearing on whether vehicles *with the remedy implemented* "still have a knee-key

defect."[10] Indeed, there is no evidence that the named plaintiffs have experienced an inadvertent knee-key rotation in their vehicles, let alone following the recall repair. SUF ¶ 140.

Third, plaintiffs' argument that the recall-repaired vehicles are defective because the ignition switch continues to be a "single-point-of-failure" is based on a false premise. Plaintiffs argue that, "in the event of an ignition switch malfunction" the switch has "[n]o backup system or redundancy [to power the airbags." Pls. Opp. at 10-11. In other words, plaintiffs' argument presumes that vehicles with the recall repair contain an ignition switch that may "fail" or "malfunction." But without any scientific testing or real-world proof that recall-repaired vehicles are susceptible to inadvertent key rotation, plaintiffs' "single-point-of-failure" claim fails. *See* New GM's Motion to Exclude G. Stevick and S. Loudon; *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 591 (1993) ("Rule 702's 'helpfulness' standard requires a valid scientific connection to the pertinent inquiry as a precondition to admissibility.").

In sum, none of plaintiffs' arguments or purported evidence creates a factual dispute as to whether the recall remedies are effective or that the vehicles continue to have safety defects. Plaintiffs have no scientific support that controverts New GM's peer-reviewed testing that the remedies are effective in the real world.

B. Plaintiffs Have No Legally Cognizable Benefit-Of-The-Bargain Damages.

Plaintiffs admit that damages experts Stefan Boedeker and Joshua Gans have "not yet calculated damages for any individual plaintiff" (Pls. SUF Resp. ¶¶ 368, 369) and that "none of

[10] Plaintiffs refer to "reports of rotation caused by knee-key contact" (Pls. Opp. at 16 (citing PSUF ¶¶ 148-154)), relying entirely on testing conducted in 2012 on a single vehicle (a 2012 Cadillac CTS) that did *not* have the recall repair. *See* PSUF Resp. ¶¶ 148-154. Similarly, plaintiffs claim that testing shows a "'medium' risk that knee-key contact would occur for certain drivers." Pls. Opp. at 17 (citing PSUF ¶¶ 223-232). This claim relies solely on a draft presentation related to one vehicle (a Chevrolet Camaro), and ignores that (1) this was a *deliberate* attempt to rotate the key, and (2) New GM's testing showed that after the Camaro recall repair "there was no problem and the vehicle was safe." PSUF Resp. ¶ 230.

plaintiffs' experts have calculated the purchase price of any named plaintiff's vehicle" (*id.* ¶ 371). Plaintiffs similarly do not dispute that their experts offer no opinions regarding how their class-wide damage totals apply to any named plaintiff. *Id.* ¶¶ 368-369.

These are dispositive adverse admissions. Each bellwether state measures benefit-of-the bargain damages based on the difference between the price a plaintiff paid and the allegedly defective vehicle's market price. New GM Memo. at 19-20 & nn.10-12. Yet "none of plaintiffs' experts have calculated the purchase price of any named plaintiff's vehicle" (Pls. SUF Resp. ¶ 371), and Mr. Boedeker has "not attempted to calculate the market value of any vehicles" (*id.* ¶ 373). Plaintiffs further admit that "[a]ctual prices paid are affected by differences in vehicles, including variations among vehicle models, model year, trim, options, [and] whether it is new or used." *Id.* ¶ 372. Indeed, plaintiffs' expert Dr. H. Sanford Weisberg agreed that "for any particular buyer, it could be that there was no impact from the recall, it could be that the recall impacted the price by causing somebody to pay a higher price, or it could be that the recall impacted the price by causing that individual to pay a lower price … ." *Id.* ¶ 374.

Despite no empirical support, plaintiffs assert that "[w]hatever price each class member paid for his or her vehicle, damages can be calculated by applying the median damage figures from Mr. Boedeker's analysis to each" named plaintiff. *Id.* ¶¶ 372, 373; *see also id.* ¶ 371; PSUF ¶¶ 289-97. Plaintiffs' attempt to save their claims by using Boedeker's class-wide, median estimates as individual damage calculations is precluded by plaintiffs' own experts' admissions. *Major League Baseball Props., Inc. v. Salvino, Inc.*, 542 F.3d 290, 319 (2d Cir. 2008). Such an approach also is precluded by Article III, the Rules Enabling Act, and Supreme Court and Second Court precedents. *See* New GM Class Cert. Opp. at 24-32; *see also In re Asacol Antitrust Litig.*, 2018 WL 4958856, at *8-10 (1st Cir. Oct. 15, 2018).

1. Plaintiffs Have No Evidence Of Their Alleged Damages, Much Less That Their Damages Equal Boedeker's "Median" Estimates.

Plaintiffs have no evidence supporting their counsel's assertion that Boedeker's "median damages" can be "used to determine individual damages." Pls. SUF Resp. ¶¶ 371-373. Instead, they rely on Boedeker's testimony that he "can't rule it out that the judge will say" Boedeker's median estimate is "the amount that everybody gets and it's the same for everybody." *Id.* ¶ 371; PSUF ¶ 288 (same). This is rank speculation, not admissible evidence showing that named plaintiffs' damages relate in any way to Boedeker's median loss estimates. Moreover, Boedeker's own data shows that (i) between 26.6% and 39.1% of his survey respondents have *no injury and no damages* at all, and (ii) the alleged damages for the rest vary widely by many thousands of dollars, ranging from zero to amounts greater than the MSRP of the vehicle. SUF Reply ¶ 367; *see also* New GM Class Cert Opp. at 24-26; New GM Boedeker *Daubert* Memo. at 10-11, 20-21. Each purchaser's vehicle price paid varies widely depending upon differing factors, including negotiation skill. SUF ¶¶ 371-72.

Boedeker also acknowledges his median loss estimates cannot be used as an allocation formula. SUF Reply ¶ 371 ("I don't sit here today and say [the median estimate] is the number to use for every single permutation."). He claimed he needed more "data … to come up with an allocation formula" and refused to "speculate" about what factors or information were necessary to allocate his class-wide damage totals to individuals. *Id*. That is because determining damages on a "vehicle-by-vehicle basis, plaintiff-by-plaintiff basis, new purchase, used purchase basis" is "*way to[o] complex to answer here with any specificity*." *Id*. (emphasis added).

Plaintiffs likewise have no evidence to support their assertion that every named plaintiffs suffered the same damages regardless of the "price each class member paid for his or her vehicle." Pls. SUF Resp. ¶¶ 371-373. Plaintiffs concede that the "[a]ctual prices paid" for

vehicles are affected by various factors but without citing any evidence dispute "that such differences affect the damage calculations." *Id.* ¶ 372. Arguments by counsel unsupported by evidence are inadmissible and cannot defeat summary judgment. *See Key v. Brewington-Carr*, 2000 WL 1346688, at *40 (D. Del. Sept. 6, 2000); *Williams v. Burlington N. & Santa Fe Ry. Co.*, 13 F. Supp. 2d 1125, 1129 (D. Kan. 1998). Moreover, counsel's summary judgment arguments are contradicted by plaintiffs' experts. Boedeker explains that the price and condition of the vehicle "could be an input factor" into the allocation of his purported damages. SUF Reply ¶ 371. Dr. Gans acknowledges that prices and damages may vary from plaintiff to plaintiff "for all manner of reasons," including whether the vehicle was purchased new or used. *Id*.

Plaintiffs' suggestion that Boedeker's medians can establish damages (or fact of injury) also contradicts the dictates of the Rules Enabling Act, Article III, and *Amchem*. As *Amchem* explains, the Constitution and Rules Enabling Act do not permit the procedural class action device of Rule 23 to enlarge, modify, or otherwise change a party's substantive legal rights. *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 613 (1997); 28 U.S.C. § 2072; *see also* New GM Class Cert. Opp. at 28-29. Yet named plaintiffs seek to use a supposed class-wide median to hide that they have no evidence of their individual damages. Plaintiff Hamilton is a telling example. Plaintiffs argue the "jury might award" Hamilton—who purchased a 12-year old 2000 Oldsmobile Alero—up to $4,714 in overpayment damages despite her spending only $3,500 for her vehicle, meaning the vehicle's seller would have been willing to pay Hamilton $1,214 to take the vehicle off his or her hands. SUF ¶ 245; Pls. Opp. at 35; PSUF ¶ 297, Table 1.

Finally, plaintiffs argue they must only prove a "reasonable basis" for awarding damages. Pls. Opp. at 36. But that requires non-speculative evidence, and here plaintiffs provide no evidentiary basis to find they have been injured or suffered damages. Plaintiffs have no

individual proof of damages, and Boedeker's class-wide estimates cannot establish damages for any individual plaintiff according to his own admissions, survey data, and as a matter of law given the Rules Enabling Act, Article III, and *Amchem*. Plaintiffs simply invite the Court to permit a jury to engage in the kind of speculation Boedeker himself refused to do. SUF Reply ¶ 371. Rule 56 does not allow this.

2. Named Plaintiffs Likewise Have No Evidence To Establish Fact Of Injury—That They Each In Fact Overpaid For Their Vehicles.

Plaintiffs' unsubstantiated assertions likewise cannot prove fact of injury—that named plaintiffs in fact overpaid for their vehicles. *See McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 227 (2d Cir. 2008) (explaining that "proof of injury, or whether plaintiffs have been harmed, is bound up in proof of damages, or by how much plaintiffs have been harmed."); *Cordes & Co. Fin. Servs. v. A.G. Edwards & Sons, Inc.*, 502 F.3d 91, 109 (2d Cir. 2007). The inability to establish fact of injury not only dooms their damages claims—it is fatal under Article III. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *Golden Hill Paugussett Tribe of Indians v. Weicker*, 39 F.3d 51, 58 (2d Cir. 1994).

Plaintiffs assert that Boedeker's conjoint analyses "demonstrate the fact of damage for all Plaintiffs and other purchasers or lessees of the vehicles at issue, because all of them suffered overpayment." PSUF ¶ 293. Boedeker's own data proves the contrary, showing that between 26.6% and 39.1% of survey respondents have no injury at all under his approach. SUF Reply ¶ 367; *see also* New GM Class Cert Opp. at 24-26; New GM Boedeker *Daubert* Memo. at 20-21; *see also Asacol Antitrust*, 2018 WL 4958856, at *8-10 (averages could not be used to prove injury and damages for all class members where data showed that 10% lacked injury). Plaintiffs' expert Dr. Weisberg testified that because of "individual buyer and seller effects" the same individual might pay the same price or even more after a defect and recall are announced than

before. SUF Reply ¶ 371. The average difference in price Boedeker purports to calculate "can't tell you which particular members of the class incurred the damages and which didn't." *Id*.

In addition, Boedeker defined lost "benefit of the bargain" in terms of buyers who "were led to believe they had received…a particular *defect-free GM vehicle* compared to what they actually received when the GM vehicle had a defect that was not disclosed at the point of purchase." PSUF Resp. ¶ 293 (emphasis added). But many plaintiffs testified that when they purchased their vehicles, they were aware that a recall was possible, facts that are contrary to Boedeker's unrealistic assumption. *Id*. Boedeker's analyses cannot establish these plaintiffs suffered any injury because they did not in fact expect to receive a defect-free vehicle.[11]

3. Boedeker's Damage Calculations Do Not Measure Legally Cognizable Or Recognized Benefit-Of-The-Bargain Damages.

Even if plaintiffs had evidence to support fact of injury and damages for each plaintiff, New GM would still be entitled to summary judgment because the so-called "damages" measured by Boedeker are contrary to governing law. Benefit-of-the-bargain damages require calculating a difference in market values. New GM Memo. at 19-20 & nn. 10-12. But plaintiffs admit Boedeker has "not attempted to calculate the market value of any vehicles," and that "none of plaintiffs' experts calculated the purchase price of any named plaintiff's vehicle." Pls. SUF Resp. ¶¶ 371, 373. Boedeker consequently did not calculate benefit-of-the-bargain damages as defined by applicable law. Nor could he determine market values, because under applicable law market values must be based on both willingness to pay and willingness to sell. Boedeker, however, concedes he has not determined willingness to sell at any of his conjoint prices. New GM Boedeker *Daubert* Memo. at 26-34; PSUF Resp. ¶ 276. Further, Boedeker's surveys and

[11] One of the many *Daubert* flaws with Boedeker's methodology is his foundational assumptions, which are contrary to fact. Boedeker's "defect-free vehicle" assumption is just one example discussed in New GM's *Daubert* Motion. New GM Boedeker *Daubert* Memo. at 21-24.

analyses allegedly measure the impact of defect disclosures on demand for "scenarios" involving certain safety features, and does not quantify an impact on vehicle prices as required by plaintiffs' legal theory.[12] PSUF Resp. ¶ 272.

Finally, Boedeker and Gans' damages methodology includes the extra-legal imposition of a substantial "penalty" against New GM. PSUF Resp. ¶ 298; New GM Class Cert Opp. at 35; New GM Boedeker *Daubert* Memo. at 33-36. Such a "penalty" is not cognizable as a form of benefit-of-the-bargain damages, which are compensatory. 1 Dan B. Dobbs, LAW OF REMEDIES § 3.3(7) at 312 (2d ed. 1993); BoB SJM at 31-34.

C. Plaintiffs Cannot Prove A Manifest Defect For Texas And Missouri Claims.

Plaintiffs admit Texas law requires defect manifestation for all claims at issue, but argue the evidence shows manifestation for individual plaintiffs. Pls. Opp. at 32, 39-40. The undisputed facts demonstrate that plaintiffs are wrong for at least Texas plaintiffs Fuller, Al-ghamdi, and McClellan.

The ignition defect plaintiffs allege is that the vehicle may inadvertently rotate out of the "on" or "run" position into the "accessory" or "off" position, causing the vehicle to lose power and disabling the airbags. New GM Memo. at 24. But Fuller, whom plaintiffs claim experienced defect manifestation, stated in her sworn Plaintiff Fact Sheet and testified at deposition that her vehicle did not experience a moving stall, loss of power steering assist, or failure of the airbags to deploy. SUF ¶ 322. Fuller claims instead that she had difficulty turning the key, and plaintiffs have no evidence that such difficulty is related to any defect at issue; indeed, their claim is that the key turns too easily. Pls. Opp. at 39.

[12] In addition, Boedeker's survey used a purchasing scenario—involving the option to add safety features to a vehicle—that does not reflect the process of buying a used car, even though many named plaintiffs buying used vehicles. *Id.*; SUF ¶¶ 141, 174, 245, 252, 266, 275, 305, 313, 320, 327, 338.

Plaintiff Al-ghamdi, claims to have had moving stalls, but plaintiffs' own technical expert admits that stalls occur for many different reasons. SUF ¶ 140. Al-ghamdi has no evidence that her ignition switch rotated, and admitted that in the first incident the switch was in the "on" position and not in the "accessory" or "off" position, establishing that it did not rotate as is required to prove manifestation. SUF ¶ 308. Plaintiffs claim "it is possible" that her switch rotated (Pls. Opp. at 39), but summary judgment cannot be defeated by speculative possibilities. New GM Memo. at 12-13. As Al-ghamdi has no evidence of rotation and thus no evidence of defect manifestation, New GM is entitled to summary judgment on her claims. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

Like Al-ghamdi, McClellan lacks evidence of manifestation of the recall condition. McClellan's vehicle was included in the EPS Assist recall, SUF ¶¶ 336-37, for which the alleged defect is that a vehicle may experience "sudden loss of power steering assist," not that the vehicle stalls. New GM Memo. at 8. McClellan's allegations that her vehicle stalled does not establish a loss of EPS assist while operating her vehicle.[13]

Regarding Missouri, plaintiffs argue—based on a single Florida federal district court decision—that this Court should reverse its prior holding that Missouri law requires a manifest defect for implied warranty. Pls. Opp. at 38. That argument is without merit. This Court properly relied on the Missouri appeals court decision in *Hope v. Nissan N. Am, Inc.*, 353 S.W.3d 68, 87 (Mo. Ct. App. 2011), as well as Missouri federal district court cases holding that

[13] For Graciano, New GM explained that he relied on inadmissible hearsay in his attempt to show a manifest defect. New GM Memo. at 25. Plaintiffs do not dispute that Graciano's testimony is hearsay, but instead submit a declaration from a non-plaintiff claiming that the vehicle stalled with the ignition switch rotating. Pls. Opp. at 40; PSUF ¶ 555. Graciano has no evidence that he ever experienced the alleged defect. That he must now rely on the testimony of a third party simply confirms why plaintiffs cannot satisfy Rule 23, as determining whether each plaintiff and putative class member can prove manifestation is an individual fact issue predominating over any alleged common ones. New GM Class Cert. Opp. at 48-51.

manifestation is required for breach of implied warranty claims. *In re Gen. Motors LLC Ignition Switch Litig.*, 2016 WL 3920353, *35 (S.D.N.Y. July 15, 2016) ("*TACC MTD Op.*"). The Florida case—*Tershakovec v. Ford Motor Co.*, 2018 WL 3405245, at *8 (S.D. Fla. July 12, 2018)—cannot overcome Missouri case law, especially as *Tershakovec* does not cite any Missouri authorities suggesting that a manifest defect is not required. *Tershakovec* faults *Hope* for not relying on Missouri law, but a state appellate court can rely on authorities from other jurisdictions to establish its state's law, which is what *Hope* did.

The record evidence establishes that four Missouri plaintiffs—Stefano, Akers, Witherspoon, and K. Robinson—cannot prove a manifested defect. Plaintiffs argue that the vehicles of these four plaintiffs lost power or shut off, but a vehicle may lose power for many different reasons unrelated to any defect. *E.g.*, SUF ¶ 140. The question is whether the power loss was caused by inadvertent ignition switch rotation to the "accessory" or "off" position. None of these four plaintiffs has any proof of rotation or that the recall condition manifested in their vehicles. Witherspoon testified that her key remained in the "run" position for each shutoff and thus did not rotate, while Stefano claims his single power loss was caused by a faulty battery in the vehicle's key fob. New GM Memo. at 25. As they lack evidence necessary to prove manifestation, summary judgment should be granted against each of these plaintiff's implied warranty claims. *Celotex*, 477 U.S. at 322-23.

D. This Court Has Held That Plaintiffs Who Disposed Of Their Vehicles Before The Recalls Do Not Have Legally Recoverable Economic Loss Damages.

This Court has twice held "that Plaintiffs who sold their vehicles at an allegedly still-inflated value *before* a defect became public did not have valid claims for economic loss because they had suffered no damages." Opinion re Order No. 131 Issues, Dkt. 6028, at 11 (emphasis in original); *FACC Supp. Op.*, 2017 WL 3443623, at *2 (S.D.N.Y. Aug. 9, 2017); *FACC MTD Op.*,

257 F. Supp. 3d at 403. Plaintiffs now seek to avoid these rulings, believing that because they allege injuries at the point of sale, subsequent sales or dispositions of their vehicles are irrelevant. Plaintiffs' position has no legal support and has been rejected by this Court. *FACC Supp. Op.*, 2017 WL 3443623, at *2 (S.D.N.Y. Aug. 9, 2017). A "plaintiff who is *injured* at one point in time by a defendant's conduct does not necessarily suffer cognizable *damages* at that same time for purposes of an economic loss claim." *Id.*; *see also* Opinion re Order No. 131 Issues, Dkt. 6028, at 11 (same). Because plaintiffs sold before the recalls, they recovered the "allegedly still-inflated value" and thus "suffered no damages," as this Court previously held. *See also Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 342-45 (2005).

Boedeker's conjoint surveys and damages methodology cannot save plaintiffs' claims because those surveys did not attempt to determine if plaintiffs who sold before the recalls had damages. Pls. Opp. at 37-38; SUF Reply ¶¶ 367-73. The surveys did not analyze market prices at all (Pls. SUF Resp. ¶ 373), and consequently cannot show that plaintiffs who sold pre-recall received a lower market price for their vehicles or incurred any other kind of damages. Such plaintiffs once again "do not articulate a coherent theory of how a plaintiff who bought a vehicle with a concealed defect and sold the same vehicle before the defect was revealed can logically, if not legally, prove that he or she suffered damages." *FACC Supp. Op.*, 2017 WL 3443623, at *2.

Last, plaintiffs mischaracterize why the Court deferred ruling on dismissing the pre-recall sellers. Pls. Opp. at 37. The Court deferred because for "at least *some* claims in *some* states, the law does not appear to require a plaintiff to allege damages in order to survive a motion to dismiss." *FACC Supp. Op.*, 2017 WL 3443623, at *2 (emphasis in original). Here, each bellwether state requires damages for the at-issue claims, which plaintiffs do not dispute. New GM Memo. at 31-32. The pre-recall sellers in the bellwether states—K. Robinson, Tinen, and

McClellan—consequently have no economic loss damages and summary judgment should be granted against their claims.

E. Plaintiffs Do Not—And Cannot—Distinguish Case Law Holding That "Lost Personal Time" Is Not Legally Recoverable Damage.

Plaintiffs concede that Missouri requires lost income to recover for "lost time," but argue the rule is otherwise for California and Texas. Pls. Opp. at 41-44. This is untrue. Numerous recent cases from California and Texas—involving both consumer protection and common law fraud claims—hold that lost time is not recoverable without lost income. New GM Memo. at 27-29. Plaintiffs make no effort to distinguish these cases. Pls. Opp. at 41-44. Nor do they explain why California and Texas would have a different rule from "the overwhelming majority of states [that] adhere to the view that lost-time damages are the equivalent of lost earnings or income." Opinion re Order No. 131 Issues, Dkt. 6028, at 59.

Plaintiffs cite distinguishable or inapplicable case law. The sixty-year-old decision in *Rupp v. Summerfield* involved a plaintiff being "held in custody approximately six weeks" because of the defendant's malicious prosecution. 326 P.2d 912, 914 (Cal. App. Ct. 1958). *Rupp* did not involve time spent repairing any product, and is not relevant here where plaintiffs do not bring any malicious prosecution claims and were not incarcerated.

Plaintiffs' other citations ignore this Court's holding that "'loss of time' appears to be something of a term of art" with a "broadly recognized and well-established meaning" excluding lost personal time. Opinion re Order No. 131 Issues, Dkt. 6028, at 59. Nothing in the cases plaintiffs cite suggests that the courts in those decisions departed from this established meaning or otherwise allow for "lost personal time." *Id.*

Moreover, several plaintiffs did not have their vehicles repaired and thus concede they have no lost time damages. Pls. Opp. at 40 n.36; *see also* New GM Memo. at 30. Nor do

Thomas or Fuller have lost-time damages under plaintiffs' own theory. Pls. Opp. at 42-43, 44 n.37. To create a purported common issue, the 5ACC alleges that plaintiffs "incurred damages in at least the form of lost time *required to repair their vehicles*," not that plaintiffs lost income from not being able to drive their vehicles for some other reason. 5ACC ¶¶ 1602, 6545 (emphasis added). Thomas and Fuller, in contrast, only claim to have lost income because of issues with their vehicles, not that this time was "lost" because their vehicles were being repaired pursuant to the recalls (or otherwise). PSUF ¶¶ 453, 548.

Finally, even if proof of lost income was not required, plaintiffs have no evidence to support their lost time claims because they rely on Dr. Manuel, who did not address any named plaintiff's facts or claims. New GM Memo. at 30. Instead, Manuel's damages methodology relies on averages and unsubstantiated assumptions (Pls. Opp. at 21), and plaintiffs have no authority holding that a person can recover lost time based on averages of earnings, travel distance, and time spent at a dealership. *See Asacol Antitrust*, 2018 WL 4958856, at *8-10.

II. THERE IS NO ISSUE OF MATERIAL FACT AS TO WHETHER OR NOT PLAINTIFFS WITH SERVICE PART VEHICLES HAD A FAULTY SWITCH.

Plaintiffs have no evidence of the ignition switch torque for the six plaintiffs (Basseri, K. Robinson, Padilla, Akers, Hawkins, and Rukeyser) with Service Parts Vehicles. Pls. Opp. at 45. Plaintiffs also ignore this Court's holding that Service Parts Vehicles "were not manufactured with the faulty ignition switch, but … could have been repaired at some point using the faulty ignition switch. Accordingly, if [Service Parts Vehicle plaintiffs] are ultimately to succeed on their claims with respect to the ignition switch, they will have to show that their cars in fact contained *that defect*." *TACC MTD Op.*, 2016 WL 3920353, at *20 n.15 (emphasis added).

Plaintiffs argue, *first*, that they need not show the Service Parts Vehicles had "that defect" at all because there are allegedly "other" defects. Plaintiffs principally rely on the *Ward*

summary judgment decision, Pls. Opp. at 45-46, but in that case the "core factual dispute" was whether the ignition switch in Ward's vehicle had sufficient resistive torque to withstand the accelerations in Ward's accident. *In re Gen. Motors LLC Ignition Switch Litig.*, 2017 WL 2664199, at *3, 6 (S.D.N.Y. June 20, 2017). Here, plaintiffs have no evidence of the ignition switch torque for any of their vehicles, much less that the torque was below specification.

Second, plaintiffs do not dispute that, regardless of the *Ward* decision, they must have admissible expert evidence supporting a defect theory. As discussed previously and in New GM's *Daubert* briefing, plaintiffs' experts' opinions on this issue are inadmissible. Without the requisite expert evidence, New GM is entitled to summary judgment. *See In re General Motors LLC Ignition Switch Litig.*, 2017 WL 6729295, at *1, 11 (S.D.N.Y. Dec. 28, 2017). Plaintiffs could have had an expert examine their vehicles and opine about whether the switch in each is defective, but they chose not to do so, dooming their claims under Rule 56.

III. PLAINTIFFS' OPPOSITION DEMONSTRATES THAT MANY OF THEM CANNOT ESTABLISH NEW GM'S POTENTIAL LIABILITY.

A. Various Plaintiffs Cannot Show Reliance.

Several plaintiffs did not mention safety when asked open-ended questions about why they purchased their vehicles. New GM Memo. at 35-40. Plaintiffs argue that safety was important to them, Pls. Opp. at 57, but this is based largely on saying "yes" in response to plaintiffs' counsels' leading questions, and cannot prevent summary judgment. *E.g.*, PSUF Response ¶¶ 266-67, 366, 429, 503, 532, 567; Fed. R. Evid. 611(c); *Rylott-Rooney v. Alitalita-Linee Aeree Italiane SpA*, 2009 WL 37817, at *2-3 (S.D.N.Y. Jan. 6, 2009) (the "assertions in plaintiff's counsel's leading question are, however, not evidence in themselves" and were not sufficient to prevent summary judgment, especially where the witness himself did not offer such testimony); *Newton v. City of New York*, 640 F. Supp. 2d 426, 444-45 (S.D.N.Y. 2009) (striking

witness's responses to plaintiffs leading questions and granting summary judgment to defendant); *see also* New GM Memo. at 37 n.25. Under governing case law, such plaintiffs cannot show reliance. New GM Memo. at 34-40.

Unable to overcome the record evidence and case law, plaintiffs argue that for California residents Basseri and Padilla reliance can be "presumed, or at least inferred" if the omissions are material. Pls. Opp. at 56. No such inference applies here because where a plaintiff alleges omissions concerning safety California courts refuse to infer reliance where plaintiffs were not exposed to uniform misrepresentations or had varying reasons for making a purchase. *E.g.*, *Phillips v. Ford Motor Co.*, 2016 WL 7428810, at *15-16 (N.D. Cal. Dec. 22, 2016); New GM Class Cert. Opp. at 59-63. For example, *In re Vioxx Class Cases* rejected an inference of reliance and materiality where a drug caused an increased risk of death because some plaintiffs might still use the drug if it were available, patients received information from different sources, and each consumer had his or her own preferences and characteristics.[14] 180 Cal. App. 4th 116, 122-23, 133-34 (Cal. App. Ct. 2009); *see also* New GM Class Cert. Opp. at 61-62. California courts also have held that reliance on third party statements defeats claims. *E.g.*, *Howard v. GC Servs., Inc.*, 2015 WL 5163328, at *9-10 (Cal. App. Ct. Sept. 3, 2015); *Nunes v. Toshiba Am. Info. Sys., Inc.*, 2016 WL 5920345, at *8 (C.D. Cal. June 23, 2016). Here, named plaintiffs had widely varying reasons for their purchases besides safety, such as relying on third party

[14] *See also Johnson v. Harley-Davidson Motor Co. Grp. LLC*, 285 F.R.D. 573, 576, 581 (E.D. Cal. 2012) (denying certification of class alleging UCL and CLRA claims based on motorcycle engine heat presenting an unreasonable risk of burns to users where "there are numerous individualized issues as to whether the reasonable consumer purchasing one of Defendants' motorcycles would find the excessive heat material"); *Webb v. Carter's Inc.*, 272 F.R.D. 489, 502-03 (C.D. Cal. 2011) (denying certification of UCL and CLRA allegations that defendant made toxic clothing that injured children because "a consumer's response to a warning will vary based on many factors"); *Fine v. ConAgra Foods, Inc.*, 2010 WL 3632469, at *1, 3-4 (C.D. Cal Aug. 26, 2010); *Reynante v. Toyota Motor Sales USA, Inc.*, 2018 WL 329569, at *5 (Cal. App. Ct. Jan. 9, 2018); *Safaie v. Jacuzzi Whirlpool Bath, Inc.*, 2008 WL 4868653, at *8-9 (Cal. App. Ct. Nov. 12, 2008).

recommendations, liking a vehicle's look, or wanting an American car, among others. New GM Memo. at 35-40. Nor did plaintiffs directly receive any uniform misrepresentations. New GM Memo. at 40-42. Under these admitted facts, reliance must be proven, not inferred, and plaintiffs such as Basseri and Padilla lack evidence showing they relied on New GM's omissions.

Independently, Basseri, Orosco, and Padilla cannot show they would have been aware of any information disclosed by New GM. New GM Memo. at 37-38. Relying on *Daniel v. Ford Motor Co.*, plaintiffs claim that if the recall conditions had been disclosed, New GM-affiliated dealers would have provided the information to plaintiffs. 806 F.3d 1217, 1226-27 (9th Cir. 2015); Pls. Opp. at 56-57. But this is speculation—particularly where these plaintiffs did not view New GM materials before purchase. Moreover, Basseri bought her vehicle used from a Nissan dealer, and following the *Daniel* decision, California district courts have dismissed claims for lack of awareness where vehicles were purchased from dealers not affiliated with the manufacturer. *Hindsman v. Gen. Motors LLC*, 2018 WL 2463113, at *13 (N.D. Cal. June 1, 2018); *Butler v. Porsche Cars N. Am., Inc.*, 2017 WL 1398316, at *11 (N.D. Cal. Apr. 19, 2017). Plaintiffs' alternative claim that disclosure would have generated sufficient publicity to notify all plaintiffs is equally speculative, especially given the undisputed facts that these three plaintiffs ignored information from New GM. Indeed, the evidence here demonstrates that other named plaintiffs did not even know that Old GM had filed for bankruptcy in 2009, an event that received pervasive nationwide coverage. New GM Memo. at 69.

For the fraudulent omissions claims of R. Robinson and Stefano, plaintiffs confuse two separate requirements under Missouri fraud law: whether a plaintiff has a "right to rely" and whether that plaintiff can prove "reliance" on the alleged statements or omissions. Pls. Opp. at 58-59. Plaintiffs' primary authority of *Hess v. Chase Manhattan Bank, USA, N.A.*, states that to

recover for fraud a Missouri plaintiff must prove both "the hearer's reliance on the representation being true; [and] … the hearer's right to rely thereon." 220 S.W.3d 758, 765 (Mo. 2007); *see also Dancin Dev., L.L.C. v. NRT Mo., Inc.*, 291 S.W.3d 739, 743-44 (Mo. Ct. App. 2009) (fraud elements include "(5) the hearer's reliance on the truth of the representation; (6) the hearer's right to rely thereon"). Nothing in *Hess* suggests that "reliance" need not be proven for an allegedly material omission. *Id.* Instead, as plaintiffs' own quote shows, *Hess* concerns the "right to rely," Pls. Opp. at 58, which addresses whether a plaintiff can rely on certain statements as a matter of law, such as opinions or predictions. *E.g.*, *Dancin*, 291 S.W.3d at 744. By contrast, New GM's argument concerns the separate and independent element of "reliance," which is whether plaintiffs can show in fact they relied on the defendant's statement or omission. The record evidence shows that R. Robinson and Stefano did not rely on New GM's omissions or misrepresentations, but instead relied on other factors such as their shared, long-term enjoyment of Camaros. New GM Memo. at 40.

The testimony of Texas plaintiffs Al-ghamdi and McClellan shows they relied on other factors and not on representations or omissions from New GM. New GM Memo. at 36-37. Plaintiffs argue that they testified they would not have purchased their vehicles if the recall conditions had been disclosed, but this was in response to plaintiffs' counsel's leading questions and is inadmissible on summary judgment. Fed. R. Evid. 611(c); *Rylott-Rooney*, 2009 WL 37817, at *2-3; *Newton*, 640 F. Supp. 2d 426, 444-45 (S.D.N.Y. 2009). Moreover, Al-ghamdi expressly relied on the recommendations of her family and step-father, and Texas courts regularly reject DTPA and fraud claims where plaintiffs relied on statements by someone other than the defendant. *See Henry Schein, Inc. v. Stromboe*, 102 S.W.3d 675, 694 (Tex. 2002); *McLaughlin v. Northstar Drillings Techs., Inc.*, 138 S.W.3d 24 (Tex. App. 2004); *Bowles v.*

Mars, Inc., 2015 WL 3629717, at *4 (S.D. Tex. June 10, 2015); New GM Memo. at 35-36.

B. Plaintiffs Concede They Cannot Prove Actionable Misrepresentations.

Plaintiffs fail to respond to New GM's arguments regarding affirmative misrepresentations, and thus any misrepresentation claims should be dismissed as a matter of law. New GM Memo. at 40-46; Pls. Opp. at 59-60.[15]

C. Plaintiffs' Implied Warranty Claims Are Barred In Whole Or In Part.

1. New GM's Warranty Limitations Are Not Unconscionable.

Texas and Missouri courts consistently enforce limitations in the written warranties against implied warranty claims. New GM Memo. at 46-48, 49-50. Unable to deny settled law, plaintiffs argue these limitations are unconscionable because of New GM's concealment of latent defects. Courts across the country have rejected their argument.[16] Vehicle warranty limitations

[15] Plaintiffs' reliance on a non-controlling opinion in *In re Duramax Diesel Litig.*, 298 F. Supp. 3d. 1037 (E.D. Mich. 2018), is misplaced. The *Duramax* court confirmed that puffery cannot sustain affirmative misrepresentation claims, which plaintiffs have now disavowed. *Id*. at 1084. Moreover, to the extent *Duramax* could be read to use puffery to support a finding that omissions are material, any such holding would be legally erroneous and should not be relied on by this Court because puffery is immaterial as a matter of law. New GM Memo. at 43-46. Plaintiffs cite no other federal district or appellate court, in the Second Circuit or elsewhere, that has considered puffery in determining materiality.

[16] *E.g.*, *Smith v. Ford Motor Co.*, 749 F. Supp. 2d 980, 993-94 (N.D. Cal. 2010) (granting Ford summary judgment and rejecting plaintiffs' argument that "Ford's warranty, as applied to the ignition lock, is unconscionable because the warranty is presented in the form of a nonnegotiable contract and contains a durational limitation that Ford enforces with respect to a known, latent defect"), *aff'd*, 462 F. App'x 660, 663-64 (9th Cir. 2011) (no procedural unconscionability because plaintiff "was presented with a meaningful choice, not just the option of purchasing a different vehicle from a different manufacturer, but also the option of purchasing a different warranty with an extended durational limit from Ford."); *Darne v. Ford Motor Co.*, 2015 WL 9259455, at *8 (N.D. Ill. Dec. 18, 2015) (vehicle warranty was not substantively unconscionable despite allegations that "Ford knew that the 6.4L Engine was defective and would fail repeatedly beyond the warranty repair period"); *Fisher v. Honda N. Am., Inc.*, 2014 WL 2808188, at *9-10 (C.D. Cal. June 12, 2014); *Mitchell v. Gen. Motors LLC*, 2014 WL 1319519, at *17 (W.D. Ky. Mar. 31, 2014); *Majdipour v. Jaguar Land Rover N. Am., LLC*, 2013 WL 5574626, at *20 (D.N.J. Oct. 9, 2013); *Nelson v. Nissan N. Am.*, 894 F. Supp. 2d 558, 566 (D.N.J. 2012); *McCabe v. Daimler AG*, 948 F. Supp. 2d 1347, 1358 (N.D. Ga. 2013); *Seifi v. Mercedes-Benz USA, LLC*, 2013 WL 5568449, at *5 (N.D. Cal. Oct. 9, 2013); *Suddreth v. Mercedes–Benz, LLC*, 2011 WL 5240965, at *4 (D.N.J. Oct. 31, 2011); *see also Perez v. Volkswagen Group of Am., Inc.*, 2013 WL 1661434, at *5 (W.D. Ark. Apr. 17, 2013) (collecting cases holding that 3-year / 36,000 mile and similar vehicle warranties are not unconscionable); *Sharpe v. Gen. Motors Corp.*, 401 S.E.2d 328, 331 (Ga. Ct. App. 1981) ("The terms

are not procedurally unconscionable because buyers have the option of purchasing from a different manufacturer or buying an extended warranty. Nor are such warranties substantively unconscionable because, as these courts explain, warranties inform buyers of the possibility of a defect and allow for repairs.

2. Statutory Limitations Periods Cannot Be Tolled By Fraudulent Concealment.

Plaintiffs' argument that fraudulent concealment tolls the implied warranty limitation periods for Missouri and Texas is wrong. Under Missouri law, fraudulent concealment does not apply to implied warranty claims, as explained in *May v. AC & S, Inc.*, which tolled the limitations period for tort claims—but not implied warranty claims—based on fraudulent concealment. 812 F. Supp. 934, 946-47 (E.D. Mo. 1993). Missouri's fraudulent concealment tolling flows from Mo. Stat. § 516.280. *Id.* at 946. Mo. Stat. § 516.300 provides that § 516.280 "shall not extend to any action which is or shall be otherwise limited by any statute." Implied warranty claims are governed by the UCC, which has its own limitations period. Therefore, § 516.280 does not apply to implied warranty claims. While Missouri's UCC provision, Mo. Stat. § 400.2-725(4), states that the UCC does not "alter the law on tolling of the statute of limitations," here the law on fraudulent concealment tolling does not apply by its own terms. Plaintiffs rely on dicta from *Owen v. Gen. Motors Corp.*, which did not consider § 516.300 and affirmed dismissal of implied warranty claims. 533 F.3d 913, 920 & n.5 (8th Cir. 2008).

In Texas, fraudulent concealment tolling based on omissions requires that the defendant have a duty to disclose. *E.g.*, *B. Mahler Interests, L.P. v. DMAC Constr., Inc.*, 503 S.W.3d 43,

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of appellee's warranty expressly excluded a recovery of consequential damages (other than for injury to the person) as a remedy for its breach and this exclusion is not unconscionable."); *Burtt v. Ford Motor Co.*, 2008 WL 373659, at *4-5 (W.D. Va. Feb. 11, 2008); *Hornberger v. Gen. Motors Corp.*, 929 F. Supp. 884, 892 (E.D. Pa. 1996); *see also Freidman v. Gen. Motors Corp.*, 2009 WL 1515031, at *3 (S.D.N.Y. May 29, 2009).

58 (Tex. App. 2016). This Court already held that New GM does not have such a duty under Texas law, defeating plaintiffs' tolling argument. *FACC MTD Op.*, 257 F. Supp. 3d at 453-54.

3. Plaintiffs' Substantial Use Of Their Vehicles Independently Precludes Their Implied Warranty Claims.

Numerous cases hold that vehicles, including those with alleged latent safety defects, are merchantable where they are operated for years or tens of thousands of miles without incident. *E.g.*, *Am. Suzuki Motor Corp., v. Superior Court*, 44 Cal. Rptr. 2d 526, 528, 531 (Cal. App. Ct. 1995); *Am. Honda Motor Co. v. Superior Court*, 199 Cal. App. 4th 1367, 1369, 1377 (2011); New GM Memo. at 50-54. Plaintiffs make no effort to distinguish this case law. Pls. Opp. at 62-63. And plaintiffs' cited cases support New GM's position. For example, *Keegan v. Am. Honda Motor Co.* explains that a "vehicle that operates for some time after purchase may still be deemed 'unfit for ordinary purposes' *if* its components are so defective that the vehicle *becomes inoperable within an unacceptably short period of time*." 838 F. Supp. 2d 929, 948 (C.D. Cal. 2012) (emphasis added).[17] In this case, many plaintiffs drove their vehicles for lengthy periods and tens or even hundreds of thousands of miles without incident. New GM Memo. at 52-54.

D. The Court Should Reject Plaintiffs' Belated Request To Reconsider And Reverse Its Unjust Enrichment Rulings.

Plaintiffs' unjust enrichment arguments are *de facto* and improper attempts to have the Court reverse its prior rulings and avoid the law of this case. For Texas, this Court relied on

[17] *See also Aguilar v. Gen. Motors LLC*, 2013 WL 5670888, at *7 (E.D. Cal. Oct. 16, 2013) (denying dismissal of implied warranty claim where plaintiff's "vehicle experienced general instability in the steering column and vibrations in the steering wheel, along with noises, *within one year of purchasing his vehicle*") (emphasis added); *Cholakyan v. Mercedes-Benz USA, LLC*, 796 F. Supp. 2d 1220, 1224 (C.D. Cal. 2011) (water flooded vehicle's interior 16 months after purchase and again 18 months after purchase); *Gen. Motors Corp. v. Brewer*, 966 S.W.2d 56, 57 (Tex. 1998) (ordering judgment against plaintiffs' implied warranty claims); *In re Gen. Motors Corp. Anti-Lock Brake Prods. Liab. Litig.*, 966 F. Supp. 1525, 1533 (E.D. Mo. 1997) (dismissing implied warranty claims based on defective braking system where plaintiffs "have not alleged brake failure or that they have stopped driving their vehicles because of the defects").

Texas Supreme Court precedent to hold that "the unjust enrichment claims of all the Texas Plaintiffs falls short because they have an adequate remedy at law." *FACC MTD Op.*, 257 F. Supp. 3d at 455 (citing cases including *BMG Direct Mktg., Inc. v. Peake*, 178 S.W.3d 763, 770 (Tex. 2005)); *see also Fortune Production Co. v. Conoco, Inc.*, 52 S.W.3d 671, 684 (Tex. 2000). Plaintiffs vaguely claim that "exceptions apply" to this rule, but do not identify any exception or explain how one applies. Pls. Opp. at 64.

For Missouri, plaintiffs do not distinguish or respond to the authorities holding that unjust enrichment is barred by an adequate legal remedy. New GM Memo. at 55-56; Pls. Opp. at 64. Separately, this Court previously held that a plaintiff's "claim must be dismissed because she alleges the existence of an express warranty, and her unjust enrichment claims arise out of the same allegations." *TACC MTD Op.*, at 2016 WL 3920353, at *35. The Court's holdings are well-supported by Missouri case law: "If the plaintiff has entered into an express contract for the very subject matter for which he seeks recovery, unjust enrichment does not apply, for the plaintiff's rights are limited to the express terms of the contract.'" *Howard v. Turnbull*, 316 S.W.3d 431, 436 (Mo. Ct. App. 2010).[18] At most, plaintiffs' cases state only that a party can allege unjust enrichment as an alternative theory in the event the evidence shows there was no contract. Pls. Opp. at 64. But this case is no longer at the pleading stage, there is no dispute that the named plaintiffs at issue received a warranty, and plaintiffs have not produced any evidence that the warranties are invalid or unenforceable.

For California, New GM cited state appellate court cases holding that unjust enrichment or restitution is not available where there is an adequate remedy at law (New GM Memo. at 54-

[18] *Hunt v. Estate of Hunt*, 348 S.W.3d 103, 111 (Mo. Ct. App. 2011); *Affordable Communities of Mo. v. Fed. Nat'l Mortg. Ass'n*, 714 F.3d 1069, 1077 (8th Cir. 2013); *see also Lowe v. Hill*, 430 S.W.3d 346, 349-50 (Mo. Ct. App. 2014) (unjust enrichment is an "implied contract claim[]" that can "arise only where there is no express contract").

55), and this Court previously held that such claims are not permitted "when there is a valid, express contract between the parties," *TACC MTD Op.*, 2016 WL 3920353, at *23. Plaintiffs cannot, and do not even attempt to, distinguish this adverse authority. Pls. Opp. at 64. Instead, plaintiffs rely on two district court decisions (*id.*), but both fail to consider on-point California state case law, and neither attempts to distinguish the numerous California cases holding that an adequate legal remedy bars unjust enrichment or restitution claims.

E. Summary Judgment Should Be Granted Against Claims Of Old GM Or Used Vehicle Purchasers.

1. New GM Had No Duty To Disclose To Old GM Vehicle Purchasers.

Several plaintiffs purchased used Old GM vehicles that were not manufactured, distributed, or sold by New GM. New GM did not engage in any transaction regarding these vehicles, which were built and originally sold before New GM existed. Without any such transaction, there is no duty to disclose under state law regarding these vehicles.

Under California law, plaintiffs cannot dispute that New GM can only be liable under the UCL, CLRA, or for fraudulent concealment if New GM had a duty to disclose, and that multiple California state appellate courts have held there is no duty to disclose under California law without a transaction to which the defendant was a party. New GM Memo. at 56-57 & n.49. Plaintiffs argue that New GM had knowledge of the concealment, but this was equally true in the California cases rejecting a duty to disclose for lack of a transaction. *E.g.*, *LiMandri v. Judkins*, 60 Cal. Rptr. 2d 539, 543 (Cal. Ct. App. 1997) (plaintiffs alleged defendant had superior knowledge of liens); *Hoffman v. 162 N. Wolfe LLC*, 175 Cal. Rptr. 3d 820, 823 (Cal. Ct. App. 2014) (plaintiffs alleged defendant knew it had interest in property). Plaintiffs argue that New GM had disclosure and recall obligations under the federal Safety Act, but cite no California case law holding this can create a duty to disclose under state law. Pls. Opp. at 47; *compare Kovich v.*

Paseo Del Mar Homeowners' Ass'n, 48 Cal. Rptr. 2d 758, 759 (Cal. App. Ct. 1996) (homeowners association had no duty to disclose construction defects to prospective buyer); *Rogozienski v. Allen*, 2007 WL 867773, at *9 (Cal. Ct. App. Mar. 23, 2007) (attorney who gave gift to temporary judge presiding over divorce proceedings was not required to disclose gift to opposing party despite ongoing relationship in litigation). Finally, plaintiffs rely on two federal district court decisions and one California appellate court decision. Pls. Opp. at 48-49. But none of those cases distinguish *LiMandri* and its progeny, which are binding regarding whether there is a duty to disclose. *Id.* Moreover, the plaintiffs' cited cases each involved products manufactured, distributed, and sold by the defendant, unlike in this case. *Id.*

Plaintiffs' arguments regarding Texas law fail for similar reasons, and their attempts to distinguish New GM's case law are unavailing. In *Steele v. Goddard*, the Texas appellate court rejected the claims against defendant based on multiple independent holdings, including that under the DTPA the defendant did not have "any duty to disclose any information to the [plaintiffs] considering he was not the seller of the house." 2013 WL 3013671, at *7 (Tex. App. June 13, 2013). While reversing a verdict under the DTPA on an alternate ground, *Marshall v. Kusch* held there was no duty to disclose—which is equally required for omissions under the DTPA and fraudulent concealment (New GM Memo. at 57-58 n.50)—based on the defendant having no involvement in the sale to the plaintiff. 84 S.W.3d 781, 786 (Tex. App. 2002); *see also Myre v. Meletio*, 307 S.W.3d 839, 844 (Tex. App. 2010) (rejecting fraud claims based on defendant having no duty to disclose because he had no transaction with plaintiffs). By contrast, in the cases plaintiffs cite, the defendant was directly involved in the transaction.[19]

[19] *E.g.*, *Home Sav. Ass'n v. Guerra*, 733 S.W.2d 134, 136 (Tex. 1987) (rejecting DTPA claims against assignee of finance contract for defective home repairs: "To hold a creditor liable in a consumer credit transaction, the creditor must be shown to have some connection either with the actual sales transaction or with a deceptive act related to financing the transaction."); *Cameron v. Terrell & Garrett, Inc.*, 618

Finally, plaintiffs cannot show that Missouri would follow a different rule from California and Texas. Plaintiffs' cases are again inapposite because either the defendant engaged in a transaction or the case does not involve a duty to disclose at all.[20] In short, all three bellwether states require the defendant to engage in a transaction to create a duty to disclose, an essential element of plaintiffs' omissions-based consumer protection and fraud claims that is absent for Old GM vehicle purchasers here.

2. California And Texas Do Not Recognize An Asset Purchaser's Duty To Warn.

Plaintiffs do not address New GM's arguments on duty to warn, which provide an independent basis for rejecting California and Texas plaintiffs' claims. Pls. Opp. at 46 n.40; New GM Memo. at 59-61. Plaintiffs note that in certain personal injury cases the Court has found a duty to warn, Pls. Opp. at 46, but ignore that the Court has rejected any duty for other states. *See In re Gen. Motors LLC Ignition Switch Litig.*, 2016 WL 874778, at *6 (S.D.N.Y. Mar. 3, 2016) (rejecting duty to warn for Louisiana). Like Louisiana, both California and Texas reject an asset purchaser's duty to warn, and plaintiffs do not argue otherwise. Moreover, the lack of a duty to warn in these states further demonstrates that New GM has no duty to disclose

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S.W.2d 535, 537 (Tex. 1981) (home buyers could sue seller's real estate agent, who participated in transaction); *Flenniken v. Longview Bank & Trust Co.*, 661 S.W.2d 705, 707 (Tex. 1983) (finding bank that foreclosed on home liable under the DTPA because "[f]rom the [plaintiffs'] perspective, there was only one transaction: the purchase of a house," which defendant bank participated in by extending a loan, and then foreclosing on plaintiffs' house); *McLeod v. Gyr*, 439 S.W.3d 639, 649-50 (Tex. App. 2014) (plaintiff paid defendant attorney for legal services that were not adequately provided).

[20] *E.g.*, *Conway v. CitiMortgage, Inc.*, 438 S.W.3d 410, 415 (Mo. 2014) (claims against the assignee of a mortgage and a mortgage servicer who bought the loan in a transaction, and stating that a loan uniquely "creates a long-term relationship in which the borrower and the lender continue to perform various duties, such as making and collecting payments over an extended period of time," unlike the purchase of a vehicle or other good); *Gibbons v. J. Nuckolls, Inc.*, 216 S.W.3d 667, 668 (Mo. 2007) (suit against automobile wholesaler who sold the vehicle to a retailer, unlike New GM who did not engage in any transaction with Old GM vehicles); *Faltermeier v. FCA US LLC*, 2016 WL 4771100, at *2, 6 (W.D. Mo. Sept. 13, 2016) (case involving affirmative misrepresentations, which do not require a duty to disclose, unlike the omissions alleged by plaintiffs here, which do).

under state law for Old GM vehicles that it did not manufacture, distribute, or sell.

3. Plaintiffs Concede That Used Car Purchasers Do Not Have Implied Warranty Claims.

Plaintiffs admit that purchasers of Old GM vehicles have no implied warranty claims. Pls. Opp. at 46 n.39; *see also id.* at 2 (defining "Used-Car Purchasers"). Moreover, the Song-Beverly Act does not apply to any used vehicle purchases, regardless of who built the vehicle, and plaintiffs do not claim otherwise. New GM Memo. at 62. Summary judgment should therefore be granted against all implied warranty claims of Old GM vehicle purchasers, and used New GM vehicle purchasers (*e.g.*, Basseri). New GM Memo. at 61-62.

4. Used Vehicle Purchasers Have No Unjust Enrichment Claims.

Unjust enrichment requires that a plaintiff confer a benefit on the defendant, and several courts have rejected unjust enrichment claims by used vehicle purchasers because they cannot satisfy this requirement. New GM Memo. at 62-63. Plaintiffs do not identify a single legal authority supporting their claim for used vehicle purchasers. Pls. Opp. at 55. Nor do plaintiffs proffer evidence of any benefit they provided New GM. Alleged cost-of-repair savings and reputation were not benefits plaintiffs provided to New GM. Nor does having their vehicles serviced at New GM-affiliated dealers (who are independent and retain the money they receive), buying unspecified parts (which could be built by others), or "maintaining a relationship" provide a benefit that plaintiffs conferred to New GM. *Id.* Plaintiffs' vague, conclusory, and legally unsupported statements cannot save used vehicle purchasers' unjust enrichment claims.

F. Texas Plaintiffs Cannot Prove Unconscionability Under The Texas DTPA.

Plaintiffs fail to show that New GM's conduct was unmitigated as required for a DTPA unconscionability claim. New GM Memo. at 63-65. This is outcome determinative, as plaintiffs cannot avoid the Texas Supreme Court's decision in *State Farm Lloyds v. Nicolau* reversing a

verdict where the defendant mitigated. 951 S.W.2d 444 (Tex. 1997). Plaintiffs contend that New GM's recalls are partial, but New GM has done far more than the *Nicolau* defendant, which paid less than 2% of the amount plaintiff sought. *Id.* at 446-47, 451. Plaintiffs also claim that offering repairs after-the-fact is insufficient, but the *Nicolau* defendant likewise mitigated only after the plaintiffs had incurred over $100,000 in damages—indeed, mitigation typically occurs after an alleged injury. *Id.* Nor do plaintiffs cite any case law where the defendant mitigated or remediated yet a court upheld a DTPA unconscionability claim. Pls. Opp. at 65-66.

New GM also explained how case law and evidence demonstrate that Al-ghamdi and Graciano cannot show the lack of sophistication necessary for a DTPA unconscionability claim. New GM Memo. at 65-66. Plaintiffs have no response to this argument, and thus summary judgment should be granted against the DTPA claims of these two plaintiffs.

G. Summary Judgment Should Be Granted Against Plaintiffs' Bankruptcy-Claim-Fraud Counts.

Plaintiffs admit that Texas plaintiffs are not pursuing this count (Pls. Opp. at 67 n.57), and thus summary judgment should be granted against both pre-July 2009 Texas purchasers, Henry and Simmons.

For the remaining claims brought by California and Missouri plaintiffs, New GM did not manufacture, distribute, or otherwise engage in any transaction with such Old GM purchasers regarding their Old GM vehicles between July 2009 and November 2009. New GM thus had no duty to disclose or warn such Old GM purchasers, and cannot be liable for omissions to them. Plaintiffs rely on their prior arguments on this issue (Pls. Opp. at 68), and thus New GM does as well. *See* Section III.E; New GM Memo. at 56-61, 66-67. Notably, most of plaintiffs' cases regarding a duty to disclose concern consumer protection statutes (Pls. Opp. at 48-55), and do not apply to or provide support for their arguments here, which are based on common law

fraudulent concealment. Plaintiffs do not cite a single California or Missouri case holding that New GM had a duty to disclose for vehicles or other products in which it never transacted, and this Court should not create one. *See H.L. Hayden Co. of N.Y., Inc. v. Siemens Med. Sys., Inc.*, 879 F.2d 1005, 1025 (2d Cir. 1989) (rejecting novel claim under New York law that was not "grounded in any New York case" because "it is not the role of a federal court ruling in diversity to undertake such an expansion of New York law").

Nor do plaintiffs have any damages. Plaintiffs acknowledge that under this Court's prior holdings they cannot obtain benefit-of-the-bargain damages. Pls. Opp. at 68. Notwithstanding their attempts at obfuscation, Pls. Opp. at 68-69, such damages are exactly what plaintiffs seek. The bankruptcy claim plaintiffs would have filed against Old GM would have sought benefit-of-the-bargain damages, and that is why plaintiffs admit they are seeking from New GM a percentage of such benefit-of-the-bargain damages against Old GM. Pls. Opp. at 69 n.60. Thus, these pre-July 10, 2009 purchasers are seeking to recover discounted benefit-of-the-bargain damages from New GM that are barred by this Court's prior orders. Opinion re Order No. 131 Issues, Dkt. 6028, at 11; *FACC Supp. Op.*, 2017 WL 3443623, at *2; *FACC MTD Op.*, 257 F. Supp. 3d at 401-02.

Independently, plaintiffs have no evidence that any of the Bankruptcy-Claim-Fraud plaintiffs have any injury or damages. *See* Section I. For example, as discussed in Section I.B., plaintiffs rely only on their experts for their alleged injury and damages, but those experts repeatedly admit that they did not determine injury or damages for any plaintiff.

Nor can several plaintiffs show reliance or causation as required for a fraudulent concealment claim. Plaintiffs argue that reliance can be inferred if the omissions are material, Pls. Opp. at 69, but this is legally incorrect as discussed in Section III.A., and regardless, does

not apply here. Several plaintiffs either would not have received any disclosures from New GM or would not have known to file bankruptcy claims with Old GM (because they did not know the company had filed for bankruptcy). New GM Memo. at 69-70. Plaintiffs who would not have received information that New GM disclosed, or who did not know that Old GM had filed for bankruptcy, would not have filed a claim regardless of whether they considered such information "material." *See also* New GM Class Cert Opp. at 89-90. Finally, the claims of Service Parts Vehicle owner William Rukeyser are barred for the reasons described in Section II.

IV. PLAINTIFFS HAVE NO EVIDENCE ESTABLISHING A THREAT OF FUTURE HARM FOR WHICH A LEGAL REMEDY IS INADEQUATE.

Even though more than four years have passed since the recalls (and almost as much time since suits were filed), plaintiffs claim injunctive relief under state consumer protection statutes, but limit their discussion to the California UCL. Under the UCL, in addition to meeting the elements of the cause of action, "'plaintiff must prove ... the grounds for equitable relief, such as, inadequacy of the remedy at law.'" Pls. Opp. at 70-71, *citing Haas Automation, Inc. v. Denny*, 2014 WL 2966989, at *10 (C.D. Cal. July 1, 2014). Plaintiffs have not established the equitable grounds for an injunction, including an inadequate legal remedy, and so fail both the state and federal standards. New GM Memo. at 71-72.[21]

Plaintiffs claim there is a risk New GM will continue to conceal safety defects (Pls. Opp. at 72), but do not explain how this risk could materialize for these plaintiffs given New GM's public recalls, repair remedies, and the presence of a federally required monitor (which recently ended). Nor do plaintiffs offer any evidence that New GM is likely to commit any such alleged

[21] *See also Smith v. City of St. Louis*, 409 S.W.3d 404, 413-14 (Mo. Ct. App. 2013) ("An injunction is an equitable remedy. … Plaintiffs are not entitled to seek and receive equitable relief unless the facts pleaded in the petition show they lack an adequate remedy at law."); *Aust v. Platte Cty.*, 477 S.W.3d 738, 744 (Mo. Ct. App. 2015).

violations in the future. Therefore, injunctive relief is unavailable. *See Andrade v. Arby's Rest. Group, Inc.*, 225 F. Supp. 3d 1115, 1135 (N.D. Cal. 2016) ("[T]o obtain injunctive relief under § 17203, a showing of threatened future harm or continuing violation is required; no past events may be enjoined."); *Feitelberg v. Credit Suisse First Boston, LLC*, 134 Cal. App. 4th 997, 1012 (2005) ("[T]he injunctive remedy should not be exercised in the absence of any evidence that the acts are likely to be repeated in the future.").

Plaintiffs' reliance on MDL personal injury cases alleging post-recall accidents is equally dubious. Pls. Opp. at 72-73. Accidents that allegedly occurred *after* the recalls and after disclosure of the recall conditions have nothing to do with the alleged continued concealment. The consumer protection statutes authorize injunctive relief to prevent future *statutory violations*; they may not be used to address unproven harm from unknown causes in other cases.[22] Nor is the purported speculative risk of future personal injury stemming from unknown causes relevant to the balance of hardship between the parties. Pls. Opp. at 73-74.

Plaintiffs do not assert personal injury claims, which proceed on a different track in this MDL. Instead, the harm plaintiffs claim from New GM's past alleged statutory violation is an *economic* one and, according to plaintiffs' purported damages experts, is based upon historical risks of vehicle malfunctions that never occurred where such risks have since been eliminated or mitigated for such vehicles by the recalls. The entire focus of plaintiffs' damages model and

[22] *See Gutierrez v. Wells Fargo Bank, NA*, 589 F. App'x 824, 828 (9th Cir. 2014) (defendant bank's violation of statute by its statements regarding the posting of debit card transactions did not support an injunction barring misleading statements in connection with the posting of checks and ACH transactions); *Meta-Film Associates, Inc. v. MCA, Inc.*, 586 F. Supp. 1346, 1363 (C.D. Cal. 1984) ("plaintiff [is] limited to injunctive relief barring future acts of unfair competition."); *Scott v. Blue Springs Ford Sales, Inc.*, 215 S.W.3d 145, 162 (Mo. Ct. App. 2006), *overruled on other grounds by Badahman v. Catering St. Louis*, 395 S.W.3d 29 (Mo. 2013) ("[I]ndividual plaintiffs [] are not empowered to seek injunctive relief to protect the public from unlawful acts[.]"); *Blake v. Career Educ. Corp.*, 2009 WL 140742, at *4 (E.D. Mo. Jan. 20, 2009); *David McDavid Pontiac, Inc. v. Nix*, 681 S.W.2d 831, 839 (Tex. App. 1984); *Dragoslavic v. Ace Hardware Corp.*, 274 F. Supp. 3d 578, 583 (E.D. Tex. 2017); *Luv N' Care, Ltd. v. Royal King Infant Prod. Co.*, 2016 WL 3617776, at *10 (E.D. Tex. July 6, 2016).

claims are historical and they have proffered no evidence of future, much less, irreparable harm.

Finally, plaintiffs do not dispute that no federal court has granted such broad injunctive or equitable relief over automobile recalls. New GM Memo. at 72.[23] Such relief is contrary to the public interest and the limits on equitable relief.[24]

CONCLUSION

Plaintiffs received the benefit of the bargain through New GM's recall remedies, have no relevant evidence of injury or damages, cannot prove New GM's liability under different states' laws, and rely on unprecedented theories that would improperly expand the scope of automotive manufacturers' liabilities for vehicles subject to safety recalls. Accordingly, summary judgment should be entered in New GM's favor against plaintiffs' claims.

Respectfully submitted,

Dated: October 19, 2018

/s/ Richard C. Godfrey, P.C.

Richard C. Godfrey, P.C.
Andrew B. Bloomer, P.C.
KIRKLAND & ELLIS LLP
300 N. LaSalle
Chicago, IL 60654-3406
Phone: 312-862-2000
Fax: 312-862-2200
richard.godfrey@kirkland.com
andrew.bloomer@kirkland.com

Attorneys for Defendant General Motors LLC

[23] Plaintiffs describe programs voluntarily adopted as part of class action settlement agreements, Pls. Opp. at 73-74, which provide no support for the mandatory injunctions they seek.

[24] *See, e.g.*, *Long Beach Drug Co. v. United Drug Co.*, 13 Cal. 2d 158, 171 (1939) (courts "will not decree specific performance when the duty to be performed is a continuous one, extending possibly over a long period of time and which, in order that the performance may be made effectual, will necessarily require constant personal supervision and the oversight of it by the court."); *United Coin Meter Co. v. Johnson-Campbell Lumber Co.*, 493 S.W.2d 882, 888 (Tex. Civ. App. 1973) (court will "not decree a party to perform a continuous series of acts extending through a long period of time, requiring constant supervision by the court"); *Am. Hous. Res., Inc. v. Slaughter*, 597 S.W.2d 13, 15 (Tex. Civ. App. 1980).

CERTIFICATE OF SERVICE

I hereby certify that on October 19, 2018, I electronically filed the foregoing using the CM/ECF system which will serve notification of such filing to the email of all counsel of record in this action.

By: /s/ *Andrew B. Bloomer, P.C.*
Andrew B. Bloomer, P.C.

EXHIBIT D

MDL *DAUBERT* BRIEFING

EXHIBIT D-1

MEMORANDUM OF LAW IN SUPPORT OF GENERAL MOTORS LLC'S MOTION TO EXCLUDE THE OPINIONS OF STEFAN BOEDEKER

[MDL ECF NO. 6070] (FILED SEPTEMBER 22, 2018)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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IN RE:

GENERAL MOTORS LLC
IGNITION SWITCH LITIGATION

14-MD-2543 (JMF)
14-CV-05810
15-CV-01626

This Document Relates To All Actions

Hon. Jesse M. Furman

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AMENDED MEMORANDUM OF LAW IN SUPPORT OF GENERAL MOTORS LLC'S MOTION TO EXCLUDE THE OPINIONS OF STEFAN BOEDEKER

Richard C. Godfrey, P.C.
Andrew B. Bloomer, P.C.
KIRKLAND & ELLIS LLP
300 N. LaSalle Street
Chicago, IL 60654
Phone: 312-862-2000
Fax: 312-862-2200
richard.godfrey@kirkland.com
andrew.bloomer@kirkland.com

Attorneys for Defendant General Motors LLC

Dated: September 21, 2018

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

INTRODUCTION

Plaintiffs seek to recover economic loss damages on a class-wide basis for every post-Sale purchaser or lessor of vehicles subject to seven different recalls. To prove both the fact of injury and the amount of the claimed "overpayment" when each plaintiff purchased or leased a vehicle, plaintiffs repeatedly told the Court that the benefit-of-the-bargain damages are measured by calculating the difference between the market price at the time of sale versus the market price they would have paid if the subject recall defects had been disclosed at the point of purchase. That measure of damages also is consistent with this Court's holdings (and the law) regarding how benefit-of-the-bargain economic loss damages must be calculated.

As discovery unfolded, however, plaintiffs learned they had a serious problem. Specifically, neither real-world marketplace data, nor the testimony of nearly one hundred putative class representatives, supports their benefit-of-the-bargain damages claims. Faced with the realization that their purported classes could not prove actual economic injuries, plaintiffs and their economic loss experts resorted to a novel damages methodology that does not address differences in vehicle market values resulting from alleged misrepresentations or omissions, *i.e.*, the benefit-of-the-bargain damages that the Court permitted plaintiffs to seek. Instead, plaintiffs' damages construct is predicated entirely on compensating millions of diverse purchasers and lessors of varying vehicles and varying recalls for historical risks of vehicle malfunctions that never occurred.

Plaintiffs hired Stefan Boedeker to bridge the gap between the real-world facts and the benefit-of-the-bargain economic loss damages theory they advance here. Boedeker designed a novel damages methodology that suspends traditional economic principles and discards the recognized legal framework for awarding benefit-of-the-bargain damages—*i.e.*, the difference in vehicle market price framework. His contrived "penalty"-based damages methodology is

untethered to economics or the law. Using this methodology, Boedeker opines that the "aggregate" economic loss damages total over [redacted] across the three Bellwether states (California, Missouri, and Texas). Boedeker's novel methodology and opinions are inadmissible and should not be considered under *Daubert* and Rule 702 for seven fundamental reasons:

First, Boedeker's methodology is built on untested assumptions that are both erroneous and contrary to the undisputed real-world factual record. These assumptions are fundamental to his methodology and his methodology cannot work without them.

Second, Boedeker's damages methodology and opinions do not calculate market prices for vehicles; instead, they are unreliable, answer the wrong questions, and do not "fit" the issues in this case. In this regard, plaintiffs repeatedly have alleged that had the recall condition defects been disclosed at or before the time of sale, they "***would have paid"*** less for their vehicles. But Boedeker did not calculate the difference between actual vehicle prices paid and the prices that would have been paid if the defects were disclosed. In fact, he did not study or calculate vehicle prices at all, choosing instead to conduct conjoint surveys to calculate damages based upon various made-up safety feature scenarios, which do not even exist in the real world.

Third, Boedeker's damages methodology cannot calculate market prices for safety feature scenarios, vehicles, or anything else. Thus, even with respect to the calculations Boedeker did for his various scenarios, he did not determine the market prices that plaintiffs "would have paid" based on supply *and* demand curves—as required by both economics and law. Instead, Boedeker purported to calculate what survey participants "***would have been willing to pay***" regardless of any supply curve. The problem with this is that Boedeker's "would have been willing to pay" methodology cannot as a matter of basic economics determine a market price without considering the supply curve; in fact, it is "impossible" to do so as New GM's expert economist, Dr. List,

explains. Boedeker, in short, does not determine market price, does not determine what plaintiffs would have paid or how much they overpaid, and does not measure legally recognized damages. Plaintiffs' damages methodology and Boedeker's opinions simply do not "fit" the measure of damages required by law.

Fourth, Boedeker's methodology incorporates an economic "penalty" he decided is appropriate to impose upon New GM for its alleged "active deception" in failing to disclose the defects when each of the recalled vehicles was sold (new or used) or leased. But a methodology to calculate compensatory benefit-of-the-bargain economic loss damages may not include a penalty. Neither sound economics nor the law allows such a penalty. Significantly, Boedeker imposes such a penalty because otherwise, he admits, his damages methodology may very well come up with zero market-price damages.

Fifth, Boedeker's methodology and opinions are based on legally irrelevant and scientifically unreliable conjoint surveys. His surveys do not replicate actual marketplace conditions, nor are they conducted on a representative sample of putative class members.

Sixth, Boedeker's methodology is unsound not only in principle, but also in application. It suffers from an uncommonly large number of errors and mistakes, rendering it inherently unreliable and incoherent. Courts have excluded similar conjoint studies and opinions, including those offered by Boedeker, in the face of similar errors that taint the survey and "render it useless" for damages and class-certification purposes. *Townsend v. Monster Beverage Corp.*, 303 F. Supp. 3d 1010, 1049-50 (C.D. Cal. 2018); *Laumann v. Nat'l Hockey League*, 117 F. Supp. 3d 299, 309 (S.D.N.Y. 2015). This "junk science" should never see a courtroom. *Amorgianos v. Nat'l R.R. Passenger Corp.*, 303 F.3d 256, 266–67 (2d Cir. 2002).

Last, Boedeker is not a qualified expert—at least not in any of the fields in which he is

offering opinions. He has no doctorate—period—in any field. He has never published any peer-reviewed article or any article having anything to do with his opinions in this case. Moreover, although Boedeker claims to rely upon the published, peer-reviewed works of other recognized experts in various fields, these other experts have reviewed Boedeker's work in this case and have overwhelmingly condemned it, including: (i) Daniel McFadden, M.B.A., Ph.D., who won the Nobel Prize in Economics, and who Boedeker highlights as the author of peer-reviewed conjoint studies; (ii) Shari Diamond, Ph.D., the lead author of the "Reference Guide on Survey Research" in the *Federal Judicial Center's Reference Manual On Scientific Evidence*; (iii) Peter Rossi, M.B.A., Ph.D, who developed the Hierarchical Bayesian Choice-Based Conjoint Analysis method that Boedeker claims to use; (iv) John List, Ph.D., the Chairman of the University of Chicago's Department of Economics and former Senior Economist on President Obama's Council of Economic Advisors; and (v) Laurentius Marais, Ph.D., who holds a doctorate in mathematics and statistics and was a professor at Stanford University and the University of Chicago.

Consistent with settled law and economic and survey principles, these experts conclude that Boedeker's non-market-price and "penalty"-based damages methodology relies on concepts and principles that: (i) are not recognized in the field of economics, statistics, or survey design, (ii) improperly deviate from recognized economic principles, and (iii) result in unreliable, invalid, and nonsensical conclusions. As Dr. List puts it: Boedeker's novel methodology and opinions are inconsistent with "what I have taught for more than 25 years on the very first day of my Economics 101 course."

In sum, Boedeker's invented, novel damages methodology and opinions are "so flawed as to be completely unhelpful to the trier of fact," and do not pass muster under *Daubert* and Rule 702. They should be excluded for all purposes, and cannot serve as the basis to find class-wide

injury in fact, much less common class-wide damages.

BACKGROUND

A. Plaintiffs' Benefit-of-the-Bargain Claims.

Plaintiffs contend that the "'gravamen of the benefit-of-the-bargain defect theory is that Plaintiffs who purchased defective cars were injured when they purchased for *x* dollars a New GM car that contained a latent defect; that had they known about the defect, they ***would have paid*** fewer than *x* dollars for the car (or not bought the car at all), because a car with a safety defect is worth less than a car without a safety defect.'" Dkt. 5846 at 28 (quoting *In re Gen. Motors LLC Ignition Switch Litig.*, 2016 WL 3920353, at *7 (S.D.N.Y. July 15, 2016). Plaintiffs' primary benefit-of-the-bargain expert Boedeker,[1] however, invented a penalty-based economic loss methodology that is irreconcilable with benefit-of-the-bargain damages law and the claims plaintiffs have advanced for years and upon which they rely to this day.

1. What Boedeker Was Required To Measure.

Plaintiffs' benefit-of-the-bargain claims depend on an alleged change in vehicle market price at the time of sale purportedly caused by New GM's alleged concealment of defects in over 160 different model and model year vehicles subject to seven recalls. 5ACC ¶ 41; Ex. 32, 1st Rpt. ¶ 8.[2] Plaintiffs allege that, "[p]rovided with the truth regarding these vehicles," plaintiffs "would not have purchased or leased their Old GM or New GM vehicles or their New GM Certified Pre-

[1] Plaintiffs seek damages for both (i) benefit-of-the bargain damages; and (ii) "lost free time." This motion is directed at plaintiffs' purported benefit-of-the-bargain expert, Boedeker, who was supported in rebuttal by Dr. Gans. New GM is filing concurrently separate *Daubert*-Rule 702 Motions addressing the opinions and testimony of Dr. Gans.

[2] The following conventions are used in this brief: "Ex. " refers to an Exhibit to the Declaration of A. Pixton, filed contemporaneously herewith; "1st Rpt." refers to Boedeker's 11/10/17 report; "2nd Rpt." refers to Boedeker's 5/18/18 report which was corrected on 6/27/18; "3rd Rpt." refers to Boedeker's 6/27/18 memo re estimated Bellwether state damages corrected on 7/5/18; "4th Rpt." refers to Boedeker's 8/31/18 report; "OCDA Rpt." refers to Boedeker's 4/13/17 report in the Orange County District Attorney litigation. Unless otherwise noted, deposition citations refer to Boedeker depositions ("[Date] Dep."). The other expert reports or depositions are cited as "[Date] [Expert] Rpt." and "[Date] [Expert] Dep."

Owned Vehicles and/or ***would have paid less***." 5ACC ¶ 41.[3]

Lead Counsel tasked Boedeker with developing "an economic loss model to quantify the damages suffered by the class due to having purchased vehicles sold by General Motors that had undisclosed defects," 1st Rpt. ¶ 11, with respect to "plaintiffs' claims in the Bellwether States." Order No. 131 ¶ 6, Dkt. 4499. Boedeker was required to measure the market price that plaintiffs "would have paid" for vehicles if the defects had been disclosed. Dkt. 5846 at 28; *In re Gen. Motors LLC Ignition Switch Litig.*, 2018 WL 1638096, at *1 (S.D.N.Y. Apr. 3, 2018).

2. What Boedeker Actually Measured.

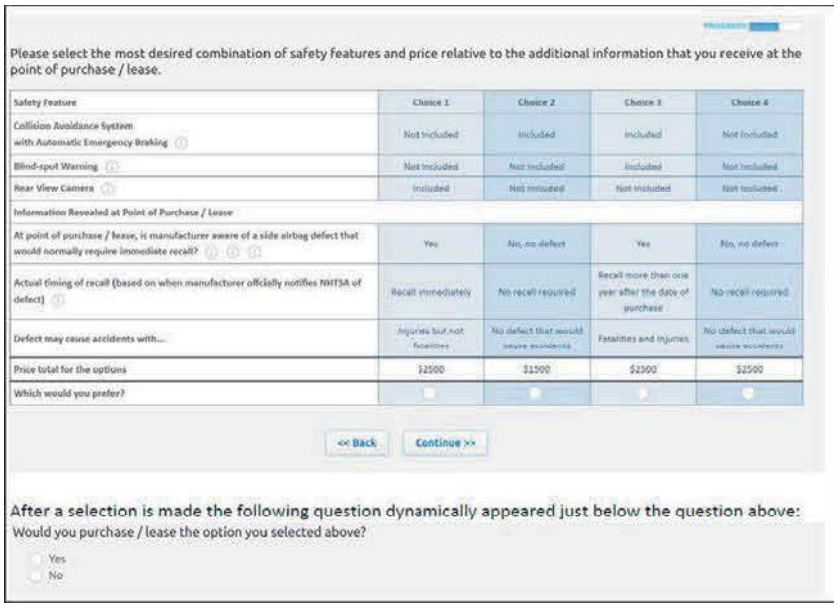
Boedeker's reports and depositions confirm that, instead of measuring the ***market price*** putative class members ***would have paid*** for their ***vehicles*** had a defect been disclosed, Boedeker measured what class members ***would have been willing to pay*** for ***hypothetical safety scenarios*** and risks. 1st Rpt. Fig. 19. Boedeker did not determine vehicle prices; instead he purports to have determined the "difference between…two demand curves for a given market share" for various safety "scenarios" which he then extrapolates—without any basis or reliable methodology—to "one numerical figure" reflecting the difference in vehicle price due to defect and other disclosures. *Id.* ¶¶ 116-119, 133. In addition, as part of determining the difference in willingness to pay for those scenarios, Boedeker includes a "penalty" imposed upon New GM for its allegedly "active deception." Ex. 27, 2nd Rpt. ¶ 16. Boedeker's opinions flow from the same multi-step process predicated on fundamentally-flawed conjoint surveys explained below. 1st Rpt. ¶¶ 118-121; 2nd Rpt. ¶¶ 719, 733; Ex. 124, OCDA Rpt. ¶¶ 143-144.

[3] Unless otherwise noted, all emphases within quotations throughout this brief were added.

B. Boedeker's Unscientific "Methodology."

Boedeker's purported methodology follows several steps.[4]

Step 1: Boedeker hired a company to administer internet-based conjoint surveys instructing respondents to assume they already decided on what vehicle to purchase, and must now choose from add-on scenarios involving different combinations of attributes, including: (i) several arbitrarily-selected "safety features" (*e.g.*, "rear view camera"); (ii) "information revealed at the point of purchase" about a defect, recall, and harm (*e.g.*, "no recall required," "recall more than one year after the date of purchase," "defect may cause accidents with . . . fatalities and injuries"); and (iii) five arbitrarily selected prices: $500, $1000, $1500, $2000, and $2500.[5]



Please select the most desired combination of safety features and price relative to the additional information that you receive at the point of purchase / lease.

Safety Feature	Choice 1	Choice 2	Choice 3	Choice 4
Collision Avoidance System with Automatic Emergency Braking	Not Included	Included	Included	Not Included
Blind-spot Warning	Not Included	Not Included	Included	Not Included
Rear View Camera	Included	Not Included	Not Included	Not Included
Information Revealed at Point of Purchase / Lease				
At point of purchase / lease, is manufacturer aware of a side airbag defect that would normally require immediate recall?	Yes	No, no defect	Yes	No, no defect
Actual timing of recall (based on when manufacturer officially notifies NHTSA of defect)	Recall immediately	No recall required	Recall more than one year after the date of purchase	No recall required
Defect may cause accidents with...	Injuries but not fatalities	No defect that would cause accidents	Fatalities and injuries	No defect that would cause accidents
Price total for the options	$2500	$1500	$2500	$2500
Which would you prefer?				

<< Back Continue >>

After a selection is made the following question dynamically appeared just below the question above:
Would you purchase / lease the option you selected above?
Yes
No

Step 2: Using commercial software applying "Hierarchical Bayesian Analysis," Boedeker estimates "utilities" (or "part-worths") reflecting each "consumer's subjective value" for each

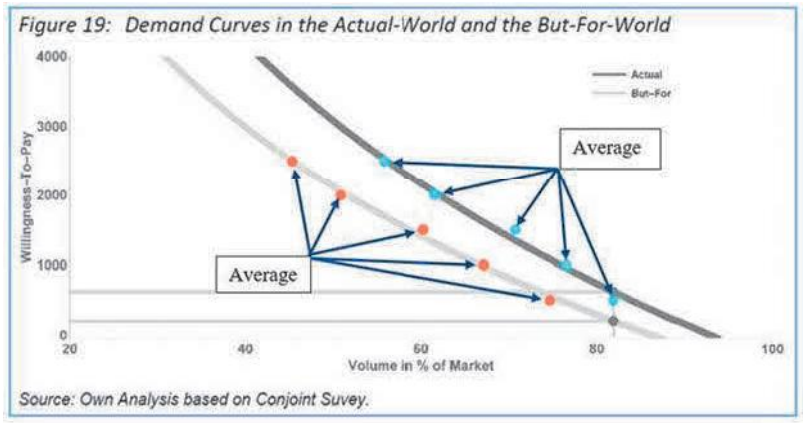
[4] *See generally* Ex. 29, 8/13/18 Rossi Rpt. ¶¶ 25-34; Ex. 30.B, 8/13/18 List Rpt. ¶¶ 24-25; Ex. 30.A, 2/23/18 List Rpt. ¶ 36.

[5] Boedeker abandoned the results from his original MDL conjoint. His current damages estimates are from: (i) his rebuttal conjoint for all recalls but the Delta Ignition Switch Recall (14v047); and (ii) as to 14v047, he used results from his conjoint in the now-settled Orange County District Attorney suit.

scenario component (*e.g.*, "rear view camera"). Boedeker then used these utilities to estimate the probability that each respondent would purchase each of his hypothetical scenarios at each of his five arbitrary price points ($500, $1000, $1500, $2000, $2500), compared to the alternative of not purchasing the scenario. For example, Boedeker calculated a 36% probability that respondent #2085 from the MDL survey would purchase a scenario including collision avoidance, blind-spot warning, and rear-view camera, no recall, and pay a price for that of $500.

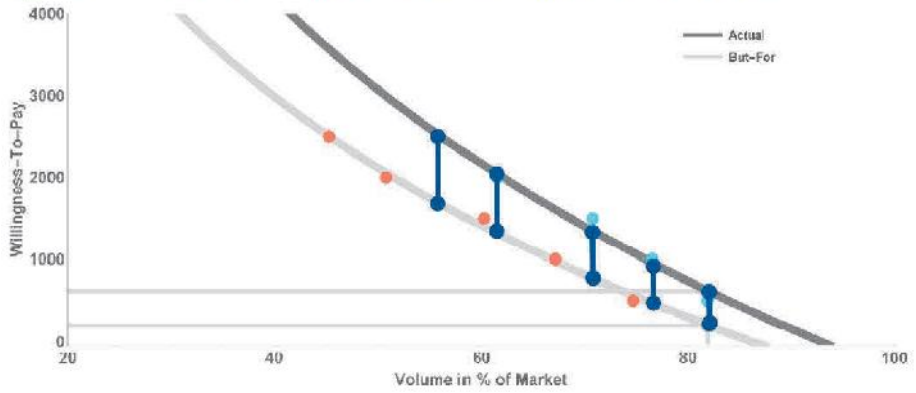
Step 3: Using estimated probabilities of this kind for example, for all 2,872 MDL survey respondents, the computer calculates their overall ***average*** (mean) probability of willingness to pay for each arbitrarily assumed price for the same scenario. Ex. 34, 7/5/18 Dep. 277:5-10 ("Q: [O]n Figure 19, as your example, we are getting the average probability across the respondents in the survey that they would purchase the defect free package, correct, versus not at all? A. That's correct.") For example, for the scenario in Step 2, the computer calculated a mean purchase probability of 81.9% across all 2,872 respondents. Ex. 125, 7/5/18 Dep. Ex. 15 at 7.

Step 4: Boedeker calculated similar average probabilities at each of his ***five*** arbitrary prices ***with and without*** disclosure of defect/recall/harm information, to generate the ***ten*** dots used to construct his "actual" and "but for" demand curves. The graphic below shows Figure 19 from Boedeker's original MDL report, annotated to show that each dot is an average probability:



Step 5: Boedeker claims to measure "economic losses" by calculating the vertical distance between the two demand curves (with disclosure of a defect/recall/harm and with a defect-free disclosure) at each price point for each scenario. For example, New GM annotated the demand curves below from Boedeker's Figure 19, for a package including collision avoidance, lane departure warning, and rearview camera. The vertical difference reflects the decrease in willingness-to-pay required to hold constant the average probability that an otherwise identical scenario—one disclosed to be defect free, and the other with a disclosed defect/recall/harm—would be purchased among the sample of respondents. Boedeker claims this discount is a measure of economic loss.

Figure 19: Demand Curves in the Actual-World and the But-For-World



Step 6: For each defect and disclosure scenario, Boedeker then determined the "economic loss" for each of his five price points and for each of the eight[6] safety feature combinations in each survey, resulting in a total of forty economic loss estimates for each pair of actual and but-for scenarios (comprising eight sets of five vertical differences paralleling those shown in the figure

[6] For example, Boedeker's original MDL survey scenarios included eight safety feature combinations: (1) collision avoidance system-yes; lane departure warning-yes; rearview camera-yes; (2) collision avoidance system-yes; lane departure warning-yes; rearview camera-no; (3) collision avoidance system-yes; lane departure warning-no; rearview camera-yes; (4) collision avoidance system-yes; lane departure warning-no; rearview camera-no; (5) collision avoidance system-no; lane departure warning-yes; rearview camera-yes; (6) collision avoidance system-no; lane departure warning-yes; rearview camera-no; (7) collision avoidance system- no; lane departure warning - no; rearview camera-yes; (8) collision avoidance system-no; lane departure warning-no; rearview camera-no.

above). Boedeker uses the median of these 40 numbers as his estimate of economic loss for each defect, recall, and harm scenario.[7] *E.g.* 1st Rpt. Figs. 20-22 at 45-46.

Step 7: Steps 1-6 above result in 62 different "median" estimates of economic loss across the two MDL and Orange County conjoints.[8] In his latest July 5, 2018 Report, Boedeker ignores many of these "medians." Instead, for the Delta Ignition Switch Recall, he used the highest median estimate from his Orange County conjoint. Ex. 31, 3rd Rpt. ¶ 5. For non-Delta vehicles, he calculated medians of pooled sets of 120 individual loss estimates from his Second MDL conjoint where the "harm" was limited to "vehicle damage only" scenarios and pooled across three recall timing alternatives. *Id*. He multiplies these "median economic loss[es] per vehicle" by an estimated vehicle count for each recall to generate a lump-sum damage award for each state. *Id.* ¶ 1.

C. Boedeker's Multiple Conjoints Yield Divergent Results.

Boedeker's methodology resulted in wildly disparate damages estimates from three different conjoint analyses. In November 2017, Boedeker offered a nationwide economic loss damages estimate for this case ranging from [redacted]. 1st Rpt. ¶ 135. In May 2018, he offered new opinions based on entirely different work, but using the same methodology, including: (1) a new conjoint survey conducted in May 2018; and (2) the revival of Boedeker's earlier April 2017 Orange County conjoint and expert opinions.[9] In July 2018, Boedeker relied on his new

[7] The Orange County conjoint included 16 different safety features combinations resulting in 80 different economic losses for 8 recall timing/harm/probability of harm disclosure scenarios; the Rebuttal MDL conjoint included 9 recall timing/harm disclosure scenarios each with 40 different results. (8/13/18 List Rpt. ¶¶ 44-48.)

[8] These include different median estimates for: (i) the type of defect (*e.g.*, ignition switch v. power steering); (ii) recall timing scenarios (recall immediately, recall between one and two years, and recall more than two years); and (iii) harm scenarios (vehicle damage only, injuries but not fatalities, fatalities and injuries).

[9] 2nd Rpt. ¶¶ 703-36. Plaintiffs attempted to salvage Boedeker's opinions by proffering Professor Gans to bless Boedeker's theory as "conceptually appropriate" and to offer alternative damages calculations. Ex. 36, 5/18/18 Gans Rpt. ¶¶ 7, 49-57. But Dr. Gans' alternative calculations are based entirely on Boedeker's original MDL conjoint survey results and suffer from the same problems require exclusion of Boedeker's opinions. New GM's motion to exclude Dr. Gans under *Daubert* and Rule 702 is filed contemporaneously with this Motion.

work to estimate Bellwether state damages of [redacted] for California, [redacted] for Missouri, and [redacted] for Texas. 3d Rpt. ¶ 5. In all, Boedeker calculated more than 20 entirely different "median" economic loss estimates for each recall ranging from $95.60 to $9,273.60 per vehicle—a 97 times difference in claimed economic losses per vehicle. 1st Rpt. ¶¶ 117-119; 2d Rpt. ¶¶ 718-719; OCDA Rpt. ¶ 144.

LEGAL STANDARDS

A. Rule 702 And *Daubert*.

Under Rule 702 and *Daubert*, federal courts serve as gatekeepers to ensure that "any and all scientific testimony or evidence admitted is not only relevant, but reliable." 509 U.S. 579, 589 (1993). *Daubert* "applies not only to testimony based on 'scientific' knowledge, but also to testimony based on 'technical' and 'other specialized' knowledge." *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141 (1999). The proffering party must show by a "preponderance of proof" that the expert satisfies each of the *Daubert* admissibility requirements. *Daubert*, 509 U.S. at 592 n.10.

To be relevant, the testimony must "help the trier of fact . . . to determine a fact in issue." Fed. R. Evid. 702(a). That is, the expert's opinion must be "sufficiently tied to the facts of the case that it will aid the [trier of fact] in resolving a factual dispute." *Daubert*, 509 U.S. at 591 (citations omitted); *see also id.* at 591–92. In addition, an expert's damage calculations must fit the damages permitted by law. *See Malletier v. Dooney & Burke, Inc.*, 525 F. Supp. 2d 558, 572 (S.D.N.Y. 2007) (excluding opinion where "study does not 'fit' with the substantive law").[10]

[10] *See also Loeffel Steel Products, Inc. v. Delta Brands, Inc.*, 387 F. Supp. 2d 794 (N.D. Ill. 2005) (excluding damage expert who failed to calculate damages recognized by substantive law); *id.* at 806 ("Expert opinions that are contrary to law are inadmissible. They cannot be said to be scientific, to be reliable, or to be helpful to the trier of fact."); *Alexander v. Halliburton Energy Servs., Inc*, 2015 WL 4489185, at *1 (W.D. Okla. July 22, 2015) (excluding expert who calculated "value diminutions" rather than difference in "reasonable market value immediately after injuries" as required by Oklahoma law).

To be reliable, the testimony must be based upon "sufficient facts or data," and be "the product of reliable principles and methods" that have been "reliably" applied to the "facts of the case." Fed. R. Evid. 702 Advisory Committee's Notes (2000 Amendment); *Amorgianos*, 303 F.3d at 267. In other words, expert opinions must be "derived by the scientific method," "supported by appropriate validation—*i.e.*, 'good grounds,' based on what is known," and scientifically reliable—based on "more than subjective belief or unsupported speculation." *Daubert*, 509 U.S. at 590; *see also R.F.M.A.S., Inc. v. Mimi So*, 748 F. Supp. 2d 244, 248–49 (S.D.N.Y. 2010). Moreover, "*any* step that renders the analysis unreliable under the *Daubert factors renders the expert's testimony inadmissible*." *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 745 (3d Cir. 1994) (original emphasis); *Amorgianos*, 303 F.3d at 267.

B. *Daubert* In The Class Certification Context.

Boedeker's opinions are inadmissible with respect to both liability and class certification issues. "When a motion to exclude expert testimony is made at the class certification stage, the *Daubert* standard applies, but the inquiry is limited to whether or not the [opinions] are admissible to establish the requirements of Rule 23." *Ge Dandong v. Pinnacle Perf. Ltd.*, 2013 WL 5658790, at *13 (S.D.N.Y. Oct. 17, 2013) (quotation and citation omitted); *see also Am. Honda Motor Co., Inc. v. Allen*, 600 F.3d 813, 815-16 (7th Cir. 2010) ("[W]hen an expert's report or testimony is critical to class certification" "a district court must conclusively rule on any challenge to the expert's qualifications or submissions prior to ruling on a class certification motion.") (internal citation omitted).[11] In the context of putative class certification experts like Boedeker, Rule 702's

[11] Regardless of whether an expert "is sufficiently reliable and relevant to pass *Daubert* muster," each requirement of Rule 23 "must still be established by a preponderance of the evidence" and "to the extent that flaws in expert testimony proffered at class certification do not warrant that testimony's exclusion by the Court as gatekeeper under *Daubert* at the threshold, those flaws may nonetheless be considered in the Rule 23 analysis undertaken by the Court as trier of fact." *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, 299 F. Supp. 3d 430, 471 (S.D.N.Y. 2018) (excluding causation and damages experts under *Daubert* for class certification).

fit and reliability prongs converge to require a reliable methodology of showing on a class-wide basis that class members were injured under legally cognizable theories. *See Weiner v. Snapple Beverage Corp.*, 2010 WL 3119452, at *7 (S.D.N.Y. Aug. 5, 2010) (excluding expert without methodology showing class-wide injury).

ARGUMENT AND AUTHORITIES

I. BOEDEKER'S METHODOLOGY AND OPINIONS ARE BASED ON DEMONSTRABLY FLAWED AND INCORRECT ASSUMPTIONS.

It is black-letter law that proposed expert testimony must be supported by appropriate validation—*i.e.*, "'good grounds' based on what is known." *Daubert*, 509 U.S. at 590. "'[E]xpert testimony should be excluded if it is speculative or conjectural, or if it is based on assumptions that are so unrealistic and contradictory as to suggest bad faith.'" *In re Gen. Motors LLC*, 2017 WL 6729295, at *6 (S.D.N.Y. Dec. 28, 2017) (quoting *Boucher v. U.S. Suzuki Motor Corp.*, 73 F.3d 18, 21 (2d Cir. 1996)).[12] Moreover, an expert's opinions "connected to the analyses he actually performed and the existing data … 'only by the *ipse dixit* of the expert'" are inadmissible. *In re Gen. Motors LLC Ignition Switch Litig.*, 2017 WL 6729295, at *7 (S.D.N.Y. Dec. 28, 2017); *see also Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997) (expert testimony should be excluded

[12] *See also Macaluso v. Herman Miller, Inc.*, 2005 WL 563169, at *8 (S.D.N.Y. Mar. 10, 2005) (excluding expert's opinions where "incorrect factual assumptions" rendered "all of his subsequent conclusions purely speculative"); *Davidov v. Lousiville Ladder Grp., LLC*, 2005 WL 486734, at *1 (S.D.N.Y. Mar. 1, 2005) (excluding expert opinion as speculative where "an essential element of his theory is contradicted by the evidence in the case"), *aff'd* 169 Fed. App'x 661 (2d Cir. 2006); *Dora Homes, Inc. v. Epperson*, 344 F. Supp. 2d 875, 888-89 (E.D.N.Y. 2004) (excluding expert opinion that was "in opposition to the well-documented facts"); *Mink Mart, Inc. v. Reliance Ins. Co.*, 65 F. Supp. 2d 176, 180 (S.D.N.Y. 1999) (excluding expert opinions as speculative where theory was contradicted by the factual record and therefore not "grounded on verifiable propositions of fact"); *Langley v. Coughlin*, 715 F. Supp. 522, 541 (S.D.N.Y. 1989) ("If an expert's opinions rest on pure speculation or are directly contradicted by the factual record or are otherwise unworthy of even arguable belief, they may be rejected."); *Smith v. Target Corp.*, 2012 WL 5876599, at *10 (N.D.N.Y. Nov. 20, 2012) (excluding expert opinion that was based on "incorrect factual assumptions that are not in evidence"); *Barrett v. Black & Decker (U.S.) Inc.*, 2008 WL 5170200, at *8 (S.D.N.Y. Dec. 9, 2008) ("[T]he undisputed factual disconnect between Mr. Clauser's and Plaintiff's versions of the accident at issue is reason enough to preclude Mr. Clauser's expert testimony."); *Bakst v. Cmty. Mem'l Health Sys., Inc.*, 2011 WL 13214315, at *20 (C.D. Cal. Mar. 7, 2011) ("because Wunderlich's damages calculation is based on factual assumptions that are entirely unsupported in the record, it fails to meet the second prong of *Daubert*").

where there is "too great an analytical gap" between the expert's data and analysis and his conclusions). This is because "pure speculation, untethered to the facts in the record, is not a proper basis for reliable scientific testimony." *See In re Gen. Motors*, 2017 WL 6729295, at *9 (citing *Daubert*, 509 U.S. at 590); *Macaluso v. Herman Miller, Inc.*, 2005 WL 563169, at *8 (S.D.N.Y. Mar. 10, 2005) (excluding opinions "based on incorrect factual assumptions that render all of [the expert's] subsequent conclusions purely speculative"). Boedeker's methodology and penalty-based theory violate this black-letter law.

A. The Vehicle Price Assumption.

1. Boedeker Measures Demand For Hypothetical "Scenarios," Not Vehicles.

Plaintiffs allege they overpaid for ***vehicles***, but Boedeker did not study or analyze prices of "vehicles"—much less the difference between the actual GM vehicle prices consumers paid as compared to what vehicle prices they would have paid in the but-for world. He instead analyzed survey respondents' demand for alternative "scenarios" comprised of three arbitrary safety features, three alternative disclosure and recall timing and risk assumptions, and five alternative made-up prices. Yet Boedeker does not reliably connect these scenarios to (a) at-issue GM vehicle prices actually paid or (b) vehicle purchase prices or lease terms that plaintiffs would have paid in the but-for world. "[A]ctual purchase decisions involve multiple tradeoffs between features of a car (*e.g.*, brand name, design, size of engine, trim level, safety features, etc.)." 2/23/18 List Rpt. ¶ 97. "[T]here is no economic basis to conclude that the valuation of safety features is independent of other vehicle features," *id.* ¶¶ 98-99, much less that it has anything to do with the price of the vehicle. *See* Ex. 26, 2/23/18 Jason Rpt. ¶ 12; Ex. 42, 2/23/18 McFadden Rpt. ¶ 37; Ex. 42, 8/13/18 McFadden Rpt. re Boedeker ¶16; Ex. 24, 8/14/18 Marais Rpt. ¶¶ 21-26. Accurate attribute selection is required. As Dr. List explains:

> In terms of conjoint analysis, this boils down to a question about which attributes must be specified in the choice set to generate reliable estimates of the features of interest. The literature on conjoint analysis recognizes that omission of important product attributes from the analysis can yield unreliable estimates of valuations for included product attributes. Continuing the above example, failure to specify the size of the car as a product characteristic presented to respondents in the conjoint can lead to distorted estimates of the value of safety features.

2/23/18 List Rpt. ¶ 99. The same literature upon which Boedeker relies confirms that the "selection of attributes and levels is a very crucial step in the design of conjoint studies"[13] and that "[d]efining proper attributes and levels is arguably the most fundamental and critical aspect of designing a good conjoint study."[14] These academic sources explain further that the "scientific aspects" of attribute selection require identifying the "salient attributes involved in the choice of an alternative by a majority of target consumers."[15] The axiom "garbage in, garbage out" applies to developing reliable conjoint surveys.[16] Indeed, one of Boedeker's survey respondents identified this very issue in explaining his confusion with the survey: "Am I buying an SUV or a compact car? The safety feature importance and what I would pay varies based on that. For an SUV I would not buy without a backup camera, but I don't need that on a smart car."[17]

Boedeker's arbitrary attribute selection violated these sound and generally accepted conjoint survey requirements. Importantly, there is no dispute that he did not attempt to calculate vehicle prices or demand curves for vehicles. Ex. 40, 7/6/18 Dep. 427:12-15 ("Q: And in your conjoint you don't offer the whole price of a vehicle at all. You're offering a price of an option

[13] Ex. 127, Vithala Rao, *Applied Conjoint Analysis*, at 43; *see also* 1st Rpt. ¶¶ 28-29 (citing Rao).

[14] Ex. 128, Bryan K. Orme, *Getting Started with Conjoint Analysis* 3rd Ed., 53 (2014); *see* 1st Rpt. ¶ 28 (citing Orme).

[15] Rao at 43. Dr. Rao further explains that this must be done by referencing "information available from a previous consumer survey"; "[e]xternal sources such as Consumer Reports" and the "list of attributes used in their evaluations of the product category"; or conducting a "primary study among a small sample of consumers." *Id.*

[16] Ex. 129, 6/28/18 Gans Dep. Ex. 19, Hensher, et al., Applied Choice Analysis, at 201.

[17] Ex. 130, Respondent #1831 Comment, TotalCAMOTX110717.

package, correct? A. Yeah.").[18] Instead, Boedeker purports to calculate demand curves only for hypothetical safety option "scenarios." *Id.* For example, although his First MDL Conjoint included 3 safety features, Boedeker failed to "undertake any study to figure out . . . what safety features consumers considered to be important to their decision making." Ex. 143, 4/20/17 Dep. 203:2-6. Boedeker argues that the sole purpose of these safety features was to "to help disguise the fact" that the focus of the survey was defect preferences.[19] 1st Rpt. ¶ 93; 2nd Rpt. ¶ 657.

Ultimately, Boedeker assumes that the difference in purported willingness-to-pay for hypothetical safety-option scenarios, with and without defect, is the same as the difference in prices consumers would have paid for entire vehicles. 1st Rpt. ¶ 52 (opining on economic loss for "vehicles"). Boedeker did *no testing* to confirm whether the difference in *willingness-to-pay he derives from hypothetical scenarios* has anything to do with *the prices of "vehicles,"* much less the difference in relevant GM vehicle market prices in the actual and but-for worlds.[20] Instead, Boedeker's opinions regarding the impact of defect, recall timing, and harm disclosures on ***vehicle*** prices "are, at bottom, connected to the analyses he actually performed and the existing data… 'only by the *ipse dixit* of the expert.'" *In re Gen. Motors LLC*, 2017 WL 6729295, at *8. Dr. Gans—plaintiffs' rebuttal expert proffered to salvage Boedeker's opinions—confirms the

[18] *See also* Ex. 111, 6/28/18 Gans Dep. 316:5-8; 10-12 (agreeing that Boedeker estimates "demand for various scenarios with safety packages, not demand for vehicles").

[19] Indeed, Boedeker did not determine whether the safety features were actually available as add-on options in any or all of the class members' subject vehicles. 2/6/18 Dep. 109:10-14; 111:6-16.

[20] *See* Ex. 29, 2/23/18 Rossi Rpt. ¶19 ("[T]he most important [survey] defect is nowhere is the survey respondent asked about how recalls would affect their decision to purchase vehicle or the price they might be willing to pay for vehicles with defects."); 8/13/18 Rossi Rpt. ¶¶ 4-5 (similar); 2/23/18 McFadden Rpt. ¶ 37 (Boedeker's conjoint "does not allow him to estimate demand for New GM vehicles but instead focused on a bundle of safety options."); 2/23/18 McFadden Rpt. ¶ 16; 2/23/18 Marais Rpt. § III.C, ¶ 17, 30 ("Mr. Boedeker's purported calculation of damages rests on a crucial implicit assumption . . . that the dollar amount of disclosure-related demand shifts for packages of safety options will be equal to corresponding demand shifts for entire vehicles equipped with those packages. . . . He nowhere states or justifies his implicit assumption—or proves mathematically—that a shift in the demand curve for this ***hypothetical bundle of features*** and disclosures as measured by his CBC analysis will mimic the corresponding shift in demand for the ***entire vehicle*** to which the bundle pertains."); *see also* 6/27/18 Gans Dep. 325:14-17 (has not done analysis to "confirm whether the difference in demand curves attributes actually translates to vehicles").

unreliability of extrapolating from arbitrarily selected features to vehicle price:

> Consider the case of peanut butter sandwiches and just peanut butter. The difference between those two products is, obviously, bread. No one would suggest, though, that subtracting the demand curve for peanut butter from the demand curve for peanut butter sandwiches would yield the demand curve for bread . . . ***The fact is that when peanut butter and bread are combined to form a peanut butter sandwich the resulting combination reflects a different set of economic factors than those embodied by its constituent parts***.

8/31/18 Gans Rpt. ¶ 26 (internal citations omitted). In sum, Boedeker assumes that willingness to pay for his arbitrary hypothetical scenarios offered at made-up prices can be extrapolated to determine vehicle prices—an assumption contrary to survey science, based simply upon his own *ipse dixit*, and precisely what Dr. Gans explains is economically incorrect. *See* Ex. 42, 8/13/18 McFadden Rpt. re Gans ¶ 16

2. Boedeker's Incorrect Vehicle Price Assumption And Arbitrary Exclusion Of Salient Vehicle Features Require Exclusion.

Boedeker "eschew[ed] real-world options," included only a few safety-related vehicle features in his made-up scenarios, and also failed to include in his survey "salient attributes" that determine consumer purchases of ***vehicles***. 2nd Rpt. ¶ 657. "[T]here are numerous other vehicle features that were offered for the vehicles at issue but were omitted from his surveys." Jason Rpt. 7. The omitted features include brand, price, color, size, and designs, among others, *id.* at 9-10, yet Boedeker's surveys include none of these features. None of the 96 deposed named plaintiffs mentioned any of Boedeker's arbitrary survey features as a reason for their purchase or lease decisions.

The survey design choices were divorced from reality, and biased "towards safety-related features when in fact there are numerous other vehicle features that were offered for the vehicles at issue but were omitted from his surveys." *Id.* at 7. By designing "a highly flawed choice task that does not resemble any actual vehicle purchase scenario," Boedeker's method "leads

respondents to place an overstated importance on the challenged claim." 2/23/18 McFadden Rpt. ¶ 58; 8/13/18 McFadden Rpt. re Boedeker ¶ 17 & App. C ¶¶ 16, 32.

In the conjoint-survey context, courts exclude opinions based on surveys that ignore realistic attributes that impact value and price. For example, a federal court recently excluded Boedeker's conjoint-based damages methodology and denied class certification because his conjoint suffered from "focalism bias, rendering it useless for the purpose of determining price premiums attributable to the challenged statements" at issue in that case. *See Townsend*, 303 F. Supp. 3d at 1049. There, Boedeker selected 16 attributes and purported to assess their impact on purchase decisions, but "failed to justify adequately [his] attribute selection for the conjoint analysis or illustrate how the price premium determination is reliable." *Id.* at 1050. That is precisely what Boedeker did here. Ex. 33, 2/6/18 Dep. 109:10-14 ("How did you come up with the decision to include those [collision avoidance and lane departure warning systems, and rear view camera] features as part of your survey? A: Those are just like available safety features. ***I don't recall that I did any particular research into those three***.").

Townsend is consistent with settled law. In *Oracle Am., Inc. v. Google Inc.*, for example, the court rejected a conjoint-based methodology as "unreliable because the features selected to be surveyed, only seven in total, were purposely few in number and omitted important features that would have played an important role in real-world consumers' preferences." 2012 WL 850705, at *10 (N.D. Cal. Mar. 13, 2012).[21] The Court held that the expert's conjoint analysis impermissibly

[21] *See also Sunlight Saunas, Inc. v. Sundance Sauna, Inc.*, 427 F. Supp. 2d 1022 (D. Kan. 2006) (excluding economic expert who did not take into account significant factors, aside from the defendants' conduct, which could have explained the decline in the growth of the plaintiff's sales; and the record contained "no data on market share, no market research and no evidence that, absent wrongful conduct by defendants, plaintiff's sales would have increased" where plaintiff failed to present evidence that a reasonable economist would assume those facts); *Herman Schwabe, Inc. v. United Shoe Machinery Corp.*, 297 F.2d 906, 911 (2d Cir. 1962) (affirming exclusion of economist's damage evidence where no basis for assumption established), *cert. denied*, 369 U.S. 865 (1962); *Cochrane v. Schneider Nat. Carriers, Inc.*, 980 F. Supp. 374 (D. Kan. 1997) (excluding expert loss estimates based on unjustified assumptions); *In re Aluminum Phosphide Antitrust Litigation*, 893 F. Supp. 1497, 1507 (D. Kan. 1995) (similar);

focused on only seven smartphone features, excluding other "important product features, such as battery life, WiFi, weight, and cellular network, all of which were not covered by patented functionalities," and replacing those features with "an arguably unimportant feature, voice dialing." *Id.* at *9-10. Moreover, the expert "had no reasonable criteria for choosing the four non-patented features to test." *Id.* at *10. Boedeker's methodology here likewise "inappropriately focused consumers on artificially-selected features and did not reliably determine real-world behavior." *Id.* at *11. Boedeker did not attempt to select features relevant to the product being studied—vehicles—but only scenarios of a few safety features—some of which were either standard features (and thus came with a vehicle at no increased costs) and others which were not available for these vehicles. 2/6/18 Dep. 109:10-14; 111:6-16; 2/23/18 Jason Rpt. at 7, 11, Ex. B, at 4-20.

Similarly, in *In re Fluidmaster,* the court excluded a proposed conjoint analysis that arbitrarily selected survey attributes, finding that "[b]y selecting these four non-price attributes ***without determining if they play an important role in real-world consumers' preferences***, [the] survey potentially elevates the two attributes linked to Plaintiffs' damages claims and inflates respondents' [willingness to pay] estimates for these attributes." 2017 WL 1196990 at **31, 63. Like in *Fluidmaster*, plaintiffs have not met their "burden to show why the expert's selection of certain attributes makes her methodology reliable." *Id.* at *31 n. 28. Boedeker's conjoint surveys should be excluded. *See Visteon Glob. Techs., Inc. v. Garmin Int'l, Inc.*, 2016 WL 5956325, at *6 (E.D. Mich. Oct. 14, 2016) (excluding conjoint survey results that "express nothing about the value of the four patented features relative to other important features of the accused devices.").[22]

Communications Co. v. American Tel. & Tel. Co., 556 F. Supp. 825, 1075-76 (D. D.C. 1982) (damage model based on unreasonable and speculative assumptions not sufficient to support just and reasonable approximation of damages).

[22] In addition, highlighting of safety features, while excluding other salient features, creates experimenter demand effects, further structurally biasing and dooming the reliability of his surveys. *See Sears, Roebuck & Co. v. Menard,*

3. The Irrational Survey Results Underscore The Many Flaws In Boedeker's Surveys.

The collective impact of Boedeker's erroneous assumptions, unprincipled feature selection, and other methodological flaws, is not theoretical or academic. His data show over ***95%*** *of* respondents in all three surveys have at least one "subjective value" that is inconsistent with rational economic behavior, such as preferring: higher prices to lower prices, a vehicle with a defect to one without, a recall as compared to no recall, a later recall as compared to an earlier recall, a greater risk of injury to lesser risk of injury and, incredibly, the risk of death over the risk of only property damage to the vehicle.[23] In addition, reliability analyses show that for each scenario, over 26% of First & Second MDL respondents are willing to pay ***more*** for the scenario with the defect than a scenario without one.[24] Further reliability analyses show that Boedeker's methods applied to Boedeker's survey data yield the economically nonsensical result of a multitude of upward-sloping demand curves for individual features indicating that consumers would be willing to buy ***more*** of those features when the price is ***higher***.[25]

As in *Oracle*, one "likely explanation for this irrational result is that survey respondents were not holding non-specified features constant and instead placing implicit attributes on features" arbitrarily selected. 2012 WL 850705, at *11. Although *Daubert* instructs courts to

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Inc., 2003 WL 168642, at *2 (N.D. Ill. Jan. 24, 2003) (excluding expert because, *inter alia*, survey included leading questions that focused consumers on specific phrase that created demand effect); *MPS Entm't, LLC v. Abercrombie & Fitch Stores, Inc.*, 2013 WL 3288039, at *11 (S.D. Fla. June 28, 2013) ("A survey question that begs its answer by suggesting a link between plaintiff and defendant cannot be a true indicator of the likelihood of consumer confusion") (citing *Universal City Studios, Inc. v. Nintendo Co.*, 746 F.2d 112, 118 (2d Cir. 1984); *Scott Fetzer Co. v. House of Vacuums Inc.*, 381 F.3d 477, 488 (5th Cir. 2004)). *See also* 2/23/18 List Rpt. ¶¶ 83-85; 2/23/18 Rossi Rpt. ¶¶ 20-23.

[23] 2/23/18 Rossi Rpt. ¶¶ 34-36; 8/13/18 Rossi Rpt. ¶ 17, App. A at 17-18; ; Ex. 29, Rossi OCDA Rpt. at 19; 2/23/18 List Rpt. ¶¶ 52-60; 8/13/18 List Rpt. ¶¶ 32-33 & App. Table 2.1, 2.2, 2.3, 2.4.

[24] 2/23/18 List Rpt. ¶¶ 113-119; 8/13/18 List Rpt. ¶¶ 56-57, App. 5-6; 2/23/18 Rossi Rpt. ¶¶ 38-43 & App. E; 8/13/18 Rossi Rpt. ¶¶ 8-9, 20-24,

[25] 8/14/18 Marais Rpt. Sec. ¶¶ 46-55, App. A, D.2, F Addendum. Further, a reliability test of Boedeker's OCDA Conjoint showed similar results regardless of the magnitude of risk, *e.g.* whether risk was 1 in 100,000 or 1 in 10 million. (8/13/18 List Rpt. App. 1 ¶ 6.A-F)

focus "on [the] principles and methodology" employed by the expert and "not on the conclusions that they generate," *Daubert*, 509 U.S. at 595, "methodology and results are not entirely distinct from one another." *In re LIBOR.*, 299 F. Supp. 3d at 501 (internal citations and quotations omitted). This is especially true where, as here, Boedeker's "results" are the only inputs into the next step in his methodology. *Amorgianos*, 303 F.3d at 266–68.[26]

In *Laumann*, for example, Judge Scheindlin excluded as unreliable the demand portion of a damages model related to sports-broadcasting bundling packages where the results of the study were illogical. In that case, "the fans classified as 'single-team fans'-- the ones primarily interested in watching one and only one team -- are the *most likely* to purchase the league package, and the *least likely* to purchase an a la carte channel," while "the fans most likely to purchase an a la carte channel are those that are interested in the greatest number of teams." 117 F. Supp. 3d at 310 (original emphasis). Like the Boedeker survey and methodology results, "this distribution of results makes no sense: the more teams a fan is interested in watching, the more likely he would be to buy a package of the telecasts of *all* teams instead of the telecast of *only one* team." *Id.* at 318. Where, as here, the expert had "no real world data" to support or explain these absurd results, the unreliable methodology "cannot demonstrate with any precision the monetary damages class members incurred," and the opinions must be excluded. *Id.* at 320.

B. The Defect-Free Vehicle Assumption.

Another fundamental methodological error is Boedeker's explicit "assumption" that consumers "paid for the vehicle [at the point of sale] with the expectation to receive a vehicle without defects." 2/6/18 Dep. 91:10-92-8. This "defect-free" assumption is essential to

[26] *Amorgianos*, 303 F.3d at 266–68 ("[A]ny step that renders the analysis unreliable under the *Daubert* factors renders the expert's testimony inadmissible…In deciding whether a step in an expert's analysis is unreliable, the district court should undertake a rigorous examination of the facts on which the expert relies.").

Boedeker's conjoint methodology. For example, one of Boedeker's survey "scenarios" includes the following information: "Safety feature recall expected by experts? . . . No, no recall needed, ***vehicle is safe as is***. . ." Ex. 145, OCDA Dep. Ex. 4, OCDA Survey Screenshots _2, at 25 (emphasis added); *see also* 1st Rpt. ¶ 106 ("A purchaser of a vehicle with one of the non-disclosed defects alleged in the Complaint, actually paid for the vehicle with the expectation to receive a vehicle ***without defects***."); 2nd Rpt. ¶ 103 ("buyers were led to believe they had received . . . a particular ***defect-free GM vehicle***"); *id.* ¶ 552 ("Plaintiffs' theory of damages is that consumers were ***denied the benefit of a defect-free vehicle*** from the time of the purchase to the time of availability of the repair associated with the recall").[27] Boedeker uses this defect-free assumption to generate his purported "actual" world demand curves and includes only defect-free scenarios in "but for" world demand curves. 1st Rpt. ¶ 22 ("If the demand curve shifts downward because the vehicle with [the] defect is less desirable to consumers, then all 6 purchasers suffered an economic loss because when they purchased the vehicle with the undisclosed defect ***they assumed that they purchased a vehicle without a defect***.").

Boedeker's opinion that "non-disclosure of defects ***caused*** class members to overpay for their vehicles" is entirely dependent upon this defect-free assumption. 1st Rpt. ¶ 22. But his defect-free vehicle assumption is unsupported *and* demonstrably incorrect.

First, the "defect-free" assumption is untested. Boedeker admits that he has "not done any separate studies that would test specifically consumers' perceptions of defects or recalls." 2/6/18 Dep. 99:4-17. Nor has he cited any other data, testing, or publications in support of his defect-free assumption. *See generally* 1st, 2nd & 3rd Rpts. Instead, Boedeker proclaims that consumer

[27] *See also* 6/27/18 Gans Dep. 328:5-12 (Boedeker "was estimating changes in demand that were associated with putting to consumers that they were getting a ***defect-free vehicle*** versus knowingly getting a vehicle with defects. That's how the survey was described and I believe that is relevant information properly used for this case.").

expectations about recall frequency "is irrelevant to my study." 2nd Rpt. ¶ 378. As Dr. Rossi observes, "it is not known whether class members believe their vehicles were defect-free and, therefore, would not be subject to recall." 2/23/18 Rossi Rpt. ¶ 44.

Boedeker's opinions should be excluded because they are based on an "unexplained assumption" that "lack[s] *any* basis in the record." *Stewart v. Estate of Sugar Hill Music Pub. Ltd.*, 2013 WL 1405422, at *1 (S.D.N.Y. Apr. 8, 2013).[28] As this Court recognized, reliance on such an assumption is not the "scientific method at work; instead, it reveals Plaintiffs' experts to be reverse-engineering a theory to fit the desired outcome." *In re Gen. Motors LLC Ignition Switch Litig.*, 2017 WL 6729295, at *8 (S.D.N.Y. Dec. 28, 2017).

Second, Boedeker's "defect-free" assumption is not just "unexplained" but is contrary to real-world data showing that vehicle safety recalls are commonplace. Between 1997 and 2013, an average of more than 432 motor vehicle safety recalls were issued each year covering more than an average of 15.9 million vehicles per year.[29] Over 80% of automobiles in service in the U.S. between 1996-2017 have been subject to at least one recall.[30] Further, the "recall rate across all manufacturers was 1,115 recalls per 1,000 vehicles sold over the three decades period from 1985

[28] *See Davis v. Carroll*, 937 F. Supp. 2d 390, 418–19 (S.D.N.Y. 2013); *Barrows v. Forest Labs., Inc.*, 742 F.2d 54, 60 (2d Cir. 1984) ("A claim for benefit-of-the-bargain damages must be based on the bargain that was actually struck, not on a bargain whose terms must be supplied by hypotheses about what the parties would have done if the circumstances surrounding their transaction had been different."); *Thiedemann v. Mercedes-Benz USA, LLC*, 872 A.2d 783, 794 (N.J. 2005) ("Defects can, and do, arise with complex instrumentalities such as automobiles. The mere fact that an automobile defect arises does not establish, in and of itself, an actual and ascertainable loss to the vehicle purchaser"); *Dabush v. Mercedes-Benz USA, LLC*, 874 A.2d 1110, 1120–21 (N.J. App. 2005) ("Plaintiff's loss must rest upon an objectively reasonable basis. The navigation system is exactly what it was designed and intended to be; an aid to navigation, not a perfect instrumentality of navigation. A reasonable consumer would expect no more, namely, a device that directs the driver to most destinations most of the time.").

[29] *See* NHTSA, Vehicle Recall Summary by Year, available at https://www.nhtsa.gov/sites/nhtsa.dot.gov/files/documents/annualvehiclerecallssince1996.pdf (accessed 5/11/18).

[30] NHTSA/ODI Recall Database (https://www-odi nhtsa.dot.gov/downloads file: FLAT_RCL.zip), accessed 1/1/18, and Polk NVPP 1997-2017). The rate of recalls of model year 1997-2017 GM models in 1996-2017 (approximately 84%) was indistinguishable from that of U.S. non-GM models (approximately 85%), and comparable to that of other non-GM models (approximately 80%). 2/23/18 Marais Rpt. ¶ 6.

to 2016 (i.e., an average of more than one recall per vehicle sold)." Ex. 21, 2/23/18 Cornell Rpt. ¶ 19. Indeed, given these well known facts it is not surprising that the vast majority of purported class representative plaintiffs *in this case* testified at deposition that they were aware at the time of purchase that their cars (like any other car) could be subject to a recall.[31] Boedeker, however, did not consider this data or testimony (or any other data or testimony from the actual plaintiffs in this case); he simply assumed the counter-factual position that vehicle purchasers expected to purchase defect-free vehicles. Ex. 43, 2/7/18 Dep. 483:1-13.[32]

In sum, Boedeker's flawed defect-free assumption "is too significant to overlook under *Daubert* and Rule 702." *Medisim Ltd. v. BestMed LLC*, 861 F. Supp. 2d 158, 180 (S.D.N.Y. 2012) (excluding report in its entirety where based on survey with two fundamental flaws).[33]

II. BOEDEKER DOES NOT RELIABLY MEASURE RELEVANT MARKET-PRICE DAMAGES.

A. Boedeker Did Not Calculate Vehicle Market Prices.

Plaintiffs claim benefit-of-the-bargain damages as measured by an alleged difference in the market price paid for their vehicles at the time of the sale versus what they should have paid had the defects been disclosed. But Boedeker's methodology does not determine *vehicle market prices*

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[31] *See, e.g.*, Ex. 47, 3/9/17 S. Orosco Dep. at 89:9-90:1; Ex. 48, 3/23/17 B. Akers Dep. at 70:24- 71:5; Ex. 49, 5/9/17 K. Robinson Dep. at 61:8-11; Ex. 50, 3/21/17 R. Robinson Dep. at 64:21-25; Ex. 51, 4/14/17 M. Stefano Dep. at 80:20-81:12; Ex. 52, 4/13/17 C. Tinen Dep. at 91:14-92:6; Ex. 53, 5/31/17 P. Witherspoon Dep. at 114:10-115:2; Ex. 16, 5/5/17 G. Al-ghamdi Dep. at 44:1:4, 9-13; Ex. 18, 5/1/17 M. Graciano Dep. at 110:24-111:13.

[32] Boedeker's defect-free assumption is also inconsistent with the express disclosures made by New GM (or Old GM) in Owner Manuals, each of which referenced the possibility of safety-related defects. For example, the MY 2010 Cobalt owner manual states at section 8-15: "If you believe that your vehicle has a defect which could cause a crash or could cause injury or death, you should immediately inform the National Highway Traffic Safety Administration (NHTSA) in addition to notifying General Motors. If NHTSA receives similar complaints, it may open an investigation, and if it finds that a safety defect exists in a group of vehicles, it may order a recall and remedy campaign." Ex. 133. Express warranties explicitly contemplate defects might exist. Warranty booklets disclose the possibility of defects. For example, the MY 2006 Cobalt warranty booklet states at page 4: "The warranty covers repairs to correct any vehicle defect related to materials or workmanship occurring during the warranty period." Ex. 134. Boedeker ignored these facts, wrongly assuming that customers expect that GM promised a "defect free" vehicle.

[33] *Aff'd on reconsideration in part*, 2012 WL 1450420 (S.D.N.Y. Apr. 23, 2012).

at all, much less a difference between the actual vehicle prices and the should-have-been vehicle market prices, rendering his opinions unreliable, irrelevant, and inadmissible.

1. Benefit-Of-The-Bargain Damages Measure Market-Price Differences.

"Benefit-of-the-bargain" damages in the three Bellwether states (and elsewhere) are defined as the difference between the price paid and the market price that plaintiffs would have paid had the defect information been disclosed. Benefit-of-the-bargain damages under the California Unfair Competition Law ("UCL") and the Consumer Legal Remedies Act ("CLRA") are "determined by taking the difference between the market price actually paid by consumers and the true market price that reflects the impact of the unlawful, unfair, or fraudulent business practices."[34] Benefit-of-the-bargain damages under the Missouri Merchandising Practices Act are likewise measured by the difference between the price paid and the "fair market value" of the product in its defective condition.[35] Under the Texas Deceptive Trade Practices Act ("DTPA"), "in order to sustain such a finding of damages, there must be evidence of both the actual amount paid by the buyer and the actual market value of the car as received in its defective condition."[36]

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[34] *In re NJOY, Inc. Consumer Class Action Litig.*, 120 F. Supp. 3d 1050, 1118, 1120-22 (C.D. Cal. 2015); *see also Werdebaugh v. Blue Diamond Growers*, 2014 WL 7148923, at *8 (N.D. Cal. Dec. 15, 2014) (under UCL and CLRA "[r]estitution is then determined by taking the difference between the market price actually paid by consumers and the true market price that reflects the impact of the unlawful, unfair, or fraudulent business practices."); *Astiana v. Ben & Jerry's Homemade, Inc.*, 2014 WL 60097, at *12 (N.D. Cal. Jan. 7, 2014) ("Plaintiff has not offered any expert testimony demonstrating that the market price of Ben & Jerry's ice cream with the 'all natural' designation was higher than the market price of Ben & Jerry's without the 'all natural designation. Thus, by definition, there is no evidence showing how much higher the price of one was than the other."); *Bagdasarian v. Gragnon*, 192 P.2d 935, 940-41 (Cal. 1948) (defining "actual value" as "market value" under California compensatory damages statute).

[35] *Larabee v. Eichler*, 271 S.W.3d 542, 548 (Mo. 2008) (benefit of the bargain damages are measured as "the difference between the ***fair market value*** of the property received and the value if the property had been as represented…at the time of the transaction" where "contract price is strong evidence of the value of the property if it had been as represented"); *see also Smith v. Tracy*, 372 S.W.2d 925, 938–39 (Mo. 1963); *In re Davenport*, 491 B.R. 911, 921 (Bankr. W.D. Mo. 2013).

[36] *Town E. Ford Sales, Inc. v. Gray*, 730 S.W.2d 796, 801-03 (Tex. App. 1987) (reversing damages under the DTPA where evidence of "***market value***" was determined at the time of trial rather than "the time it was received in its defective condition"); *see also Matheus v. Sasser*, 164 S.W.3d 453, 462 (Tex. App. 2005) ("Under either the benefit-of-the-bargain or the out-of-pocket measure of damages, the plaintiff is also required to prove the ***fair market value*** of the item as received."); *GJP, Inc. v. Ghosh*, 251 S.W.3d 854, 888-89 (Tex. App. 2008) (benefit-of-the-bargain damages for defective vehicle is difference between the price paid and the market value of defective vehicle).

Other courts and commentators agree that the "benefit-of-the-bargain measure" of is "based on market value." Dobbs, Hayden & Bublick, *The Law of Torts* § 689 (2d ed.).[37]

Recognizing this settled law, plaintiffs have repeatedly defined benefit-of-the-bargain damages in terms of "market price" and "market value," alleging that "the defects that New GM concealed throughout the Class Period related to the safety and reliability of the Defective Vehicles, and affected the brand perception and ***market value*** of all Defective Vehicles. Provided with the truth regarding these vehicles, plaintiffs claim that putative class members "would not have purchased or leased their Old GM or New GM vehicles or their New GM Certified Pre-Owned Vehicles ***and/or would have paid less***." 5ACC ¶ 41. Plaintiffs move for class certification relying on the claim that Boedeker's method will quantify "[c]hanges to the ***market price*** when a car becomes less desirable" because "it contains defects (that may or may not result in injury or death) and whether GM or the consumer (or both) knew about the defects." Dkt. 5847 at ¶ 133.[38]

2. Consideration Of Both (i) Willingness To Pay <u>And</u> (ii) Willingness To Sell Are Required For Determining Any Market Price.

"[T]he typical benefit-of-the bargain claim relies on a difference in fair market value (*i.e.* the amount that a willing buyer and willing seller would both accept) between the product as represented and the product actually received." *Saavedra v. Eli Lilly & Co.*, 2014 WL 7338930, at *4 (C.D. Cal. Dec. 18, 2014). Under the California UCL and CLRA, "fair market value is the

[37] *See also U.S. v. United Techs. Corp.*, 782 F.3d 718, 731 (6th Cir. 2015) ("The only benchmark consistent with this benefit-of-the-bargain theory of damages is 'fair market value,' by which we meant (and still mean) 'what a willing buyer would pay in cash to a willing seller at the time.'") (*quoting U.S. v. 564.54 Acres of Land*, 441 U.S. 506 (1979)).

[38] *See also e.g.* Dkt. 2761 at 1 ("All Plaintiffs allege 'manifest' damages in the ***decreased market value*** of their cars"); *id.* at 28 ("[t]he revelation of the fraudulent scheme and the magnitude of concealed defects substantially ***reduced the fair market*** value of Plaintiffs' property."); Dkt. 2871 at 3 (damages "should reflect the difference between the ***market value*** of their vehicles if made by a reputable manufacturer…and the ***market value*** of their vehicles as actually made by a disreputable manufacturer."); Ex. 135, Pltf. Hr'g Slides, at 3 alleging plaintiffs paid a "premium on the sales price" where "the size of that premium [is] the ***difference in the market value*** of the vehicle as delivered and its market value on the condition it should have been delivered.".

'price that a seller is willing to accept and a buyer is willing to pay on the open market and in an arm's-length transaction.'" *Id.* (*quoting* Black's Law Dictionary (9th ed. 2009)); *In re NJOY, Inc. Consumer Class Action Litig.*, 120 F. Supp. 3d 1050, 1119 (C.D. Cal. 2015) ("Although Dr. Harris now proposes to use actual market prices instead of percentages, his models still ***only look to the demand side of the market equation***, and ignores the price at which NJOY, and other e-cigarette manufacturers, would be willing to sell their products. . . . Because Dr. Harris's 'modified' conjoint analysis and direct method continue to focus on a consumer's subjective valuation, [they] ***do not permit the court to calculate the true market price*** of N–JOY cigarettes absent the purported misrepresentations and omissions.").[39] In Missouri, "'fair market value'… is a phrase without ambiguity in the law. It means the price which property will bring when it is offered for sale by an owner who is ***willing but under no compulsion to sell*** and is bought by a buyer who is willing or desires to purchase but is not compelled to do so." *Peterson v. Cont'l Boiler Works, Inc.*, 783 S.W.2d 896, 900 (Mo. 1990) (internal quotations and citations omitted)).[40] Under Texas law, "[m]arket value is the amount that would be paid in cash by a willing buyer who desires to buy, but who is not required to buy, to a ***willing seller who desires to sell, but who does not need to sell***." *See GJP, Inc. v. Ghosh*, 251 S.W.3d 854, 888–89 (Tex. App. 2008).[41]

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[39] Boedeker inaccurately cites *In re NJOY* as holding that "damage in this case is the difference between the market price GM vehicle owners paid in the actual world and the true market price that GM would have needed to charge to sell the same quantity of vehicles to the same buyers had the defects known to GM been disclosed." (2d Rep. ¶ 69.) In fact, the *In re NJOY Court* rejected such an argument and ruled that a conjoint analysis offered to measure price premium damages did not support class certification because the expert "ignore[d] the price for which NJOY is willing to sell its products." *In re NJOY, Inc*, 120 F. Supp. 3d at 1119; *see also* New GM Memorandum in Opposition to Plaintiffs' Motion to Certify Bellwether Classes, filed contemporaneously.

[40] *See Equitable Life Assur. Soc. of U.S./Marriott Hotels, Inc. v. State Tax Comm'n of Missouri*, 852 S.W.2d 376, 380 (Mo. Ct. App. 1993) ("True value in money is defined as the price which the subject property would bring when offered for sale by one ***willing but under no compulsion to sell it***, and is bought by one willing or desirous to purchase, but who is not compelled to do so….") (internal quotations and citations omitted).

[41] *See also Nelson v. Najm*, 127 S.W.3d 170, 177 (Tex. App. 2003) ("Fair market value is defined as the price a willing buyer would pay to a willing seller."); *Exxon Corp. v. Middleton*, 613 S.W.2d 240, 246 (Tex. 1981); *Humes v. Hallmark*, 895 S.W.2d 475, 480 (Tex. App. 1995).

The United States Supreme Court, the Second Circuit, and Black's Law Dictionary likewise all require consideration of both (i) willingness to pay and (ii) willingness to sell in order to determine market price or market value.[42]

Like the laws of the three Bellwether states (and elsewhere), economists also define "market price" to require both willingness to pay and willingness to sell. Indeed, the textbook authored by plaintiffs' rebuttal expert Dr. Gans explains:

> The dictionary defines the word equilibrium as a situation in which various forces are in balance. This definition applies to a ***market's equilibrium*** as well. At the ***equilibrium price***, the quantity of the goods that buyers are willing and able to buy exactly balances the quantity that ***sellers are willing*** and able to sell.

Gans Textbook at 81. Numerous other economics textbooks are in accord.[43] As one textbook states, citing the famous economist Alfred Marshall: "just as you cannot tell which blade of scissors does the cutting, so too you cannot say that either demand or supply alone determines price."[44] Also in accord are the opinions of economists expressly relied upon by Boedeker, all of whom explain that Boedeker's opinions are "economically unsound" and result in an "illogical measure

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[42] *See Gillespie v. U.S.*, 23 F.3d 36, 40 (2d Cir. 1994) ("Fair market value is commonly defined as 'the price at which the property would change hands between a willing buyer and a willing seller.'") (*citing United States v. Cartwright*, 411 U.S. 546, 551 (1973)); *see also* Black's Law Dictionary, 4th ed. ("market value" is "fair market value," which is "[t]he price that a seller is willing to accept and a buyer is willing to pay on the open market and in an arm's-length transaction; the point at which supply and demand intersect").

[43] 8/13/18 List Rpt. n.45 (citing Acemoglu, Daron, Laibson, List, *Microeconomics*, 1st ed (2016) at 69-70 (discussing "willingness to accept"); 8/13/18 McFadden Rpt. ¶ 10 & n.27 (citing Nicholson & Snyder, *Microeconomic Theory*, 12th ed. at 11; Mankiw, *Principles of Microeconomics*, 8th ed. at 76-77 (At "market equilibrium" price, "the quantity of the goods that buyers are willing and able to buy exactly balances the quantity that sellers are willing and able to sell."); Krugman & Wells, *Microeconomics*, 4th ed. at 86 ("Equilibrium price is also known as the market-clearing price: it is the price that 'clears the market' by ensuring that every buyer willing to pay that price finds a seller willing to sell at that price, and vice versa."); Pindyck & Rubenfeld, *Microeconomics*, 9th ed. at 22-25 ("The supply curve shows the quantity of a good that producers are *willing to sell at a given price*"; "[t]he demand curve shows how much of a good consumers are willing to buy as prier per unit changes", and "[t]he two curves intersect at the equilibrium, or market-clearing, price and quantity."); Bernheim & Whinston, *Microeconomic*s, at 26-32 ("[a] product's supply curve shows how much sellers of a product want to sell at each possible price, holding fixed all other factors that affect supply . . . Once we know the demand and supply for a product, the next step is to determine equilibrium price. That is the price at which the amounts supplied and demanded are equal. Graphically, it's the price at which the supply and demand curve intersect.").

[44] Nicolson & Snyder at. 11.

of loss" because he completely ignores the willingness to sell part of the equation.[45]

3. Boedeker Does Not Measure Actual Or But-For Vehicle Market Prices.

Boedeker's conjoint surveys and damages methodology do not and cannot determine any actual or but-for market prices for GM vehicles.

First, Boedeker does not determine actual-world market prices for vehicles because his conjoint surveys do not even involve vehicles much less seek to determine vehicle prices. For example, as shown in "Choice 3" in the screenshot on page 7 above, one of Boedeker's survey "scenarios" involves no safety features, "information" ("no defect that could cause accidents"), and an arbitrary price of $2,500. Boedeker does not determine an actual-world market price for such "scenarios."

Second, Boedeker's five price points are arbitrary and do not correspond to any observed market prices because such "scenarios" (which include both "safety features" and "information") would never be sold in the marketplace. Boedeker did no research to determine whether these prices were consistent with the prices in the market for such "scenarios." 2/6/18 Dep. 109:10-14, 134:3-135:14; 2/7/18 Dep. 481:15-482:7.[46]

Third, Boedeker does not consider ***willingness to sell*** at his hypothetical conjoint prices. 7/6/18 Dep. 462:11-18 ("Q. You are not opining that New GM would be willing to sell these option packages at the prices offered in your conjoints, are you? . . . A. I'm not opining on New GM's

[45] 2/23/18 McFadden Rpt. ¶¶ 4,8-9, 82; 8/13/18 McFadden Rpt. re Boedeker ¶ 9; 2/23/18 Rossi Rpt. ¶ 12; 8/13/18 Rossi Rpt. re Boedeker. ¶ 13; 2/23/18 List Rpt. ¶ 10; 8/13/18 List Rpt. ¶¶ 50-51. Plaintiffs' lost-time expert agrees that "[y]ou have to look at the supply side to get the market price." Ex. 75, Manuel Dep. 19:24-25.

[46] Boedeker's "scenarios" include numerous combinations of "safety features," "information," and "price." Some scenarios, such as "Choice 3" in the screenshot at page 7 above, involve no safety features, but involve "information" and a related price. Boedeker does not identify real-world market prices for this "information" component (*e.g.*, the "information" in one survey that "No, no recall needed, vehicle is safe as is. . ." OCDA Dep. Ex. 4, OCDA Survey Screenshots _2, at 25). *See also Adams v. Target Corp.*, 2014 WL 12558858, at *3 (C.D. Cal. 2014) (expressing skepticism over conjoint analysis because "'sized as advertised' is not a feature of waterslides in any normal sense. And conjoint analysis is not effective when the features that it focuses on are artificial because the analysis does not reflect real-world consumer behavior").

willingness to sell those option packages at those prices. That is correct.").[47] Because willingness to sell is an essential ingredient for determining a market price, Boedeker's methodology cannot determine actual or but-for market prices at all, much less for any vehicles in the putative class.

4. An Incorrect "Fixed Supply" Does Not Yield A Market Price.

Recognizing that neither law nor economics permits one to determine a market price without consideration of willingness to sell, Boedeker relies on what he calls a "fixed supply" to determine a purported "***market price*** at which all consumers who bought the product with the alleged false statement would buy the product again if they find out about the falsity of the statement."[48] 2nd Rpt. ¶ 32a. Without citation, Boedeker asserts that "given a fixed supply equal to the supply in the actual world, the estimated drop in the ***willingness-to-pay*** is the estimate of the economic loss and can be used to calculate the economic loss for all consumers who purchased in the actual world," while ignoring ***willingness to sell*** the "fixed supply" at the lower price. *Id.* ¶ 506. But Boedeker's "market price" re-definition is irreconcilable with that term's precise legal and economic definition.[49]

First, Boedeker's "fixed supply" assumption—that a change in what he mislabels as "market price" is determined solely by a change in willingness to pay for the original quantity supplied regardless of willingness to sell that same quantity at a lower price—exists neither in the

[47] 8/13/18 McFadden Rpt. re Boedeker ¶¶ 9-10 & n. 20; 8/13/18 Rossi Rpt. ¶¶ 9-13; 2/23/18 List Rpt. ¶ 10. Dr. Gans agrees that Boedeker did not analyze willingness to sell—either in the actual or the but-for world. Gans Dep. 225.

[48] Boedeker does not determine the price at which "all consumers would buy the product again." Instead Boedeker purportedly determines the change in price that would be necessary to hold constant the ***average*** probability that survey respondents would buy a scenario if a defect/recall were disclosed. Dr. Gans concedes that, in reality, 1) some buyers in the actual world would not be buyers in the but-for world; (2) some non-buyers in the but-for world would be buyers in the actual world; and (3) some buyers in the actual word may have zero or negative willingness-to-pay in the but-for world. 6/27/18 Gans Dep. 135-36, 261; 6/28/18 Gans Dep. 354.

[49] 8/13/18 Rossi Rpt. ¶¶ 9-12; 8/13/18 McFadden Rpt. re Boedeker ¶¶ 4-11 8/13/18 McFadden Rpt. re Gans ¶¶ 4-15.

real world nor in economics.[50] Neither Boedeker nor Dr. Gans cites any academic authority supporting this novel theory.[51] Nor could they, because there is no such thing as a "market price" that ignores willingness to sell at that price; such a concept or market price definition is an economic impossibility. 2/23/18 List Rpt. ¶ 20; 8/13/18 List Rpt. ¶ 50. As Dr. McFadden explains, "it does not matter if the vehicles" were "already sold"—"market price" always requires consideration of willingness to pay and willingness to sell at that price. 8/13/18 McFadden Rpt. re Boedeker ¶¶ 9-10.[52]

Second, Boedeker's "fixed supply" methodology does not answer (i) what is being held "fixed"; and (ii) what is the "fixed" quantity of that product? Boedeker's report claims he is holding the number of "vehicles" fixed.[53] Boedeker's conjoint surveys analyze "scenarios" (including "safety features" and certain "information revealed at the point of purchase"); they do not analyze "vehicles."[54] Thus, as Boedeker's Figure 19 (as New GM annotated below)

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[50] *See* 8/13/18 McFadden Rpt. re Gans n. 11 ("I am unaware of any economic literature that allows one to combine the two concepts as Professor Gans and Mr. Boedeker attempt to do in this matter—*i.e.*, by requiring the supplier to hold quantity fixed at the quantity of sales prevailing in the as-is equilibrium (or—equivalently—requiring class members to purchase the same number of vehicles that they purchased under as is conditions)."

[51] *See, e.g.*, 6/27/18 Gans Dep. 291:6-19 ("Q. So your report does not contain any citation to work by economists using a fixed supply to determine economic loss, right? A. I didn't... I didn't cite, no I don't contain any citation on that I offered my opinion on that. Q. But you didn't cite any economic literature on that? A. No."). Boedeker cites Busse, *et. al*., "Are Consumers Myopic? Evidence from New and Used Car Purchases," *Am. Econ. Rev*, 103, no. 1 (February 2013): 220–256, 2013, p. 243. (2nd Rpt. at n. 500.) Although Boedeker's personal definition of "fixed supply" is different from "inelastic supply," this article uses "fixed supply" as a synonym for "inelastic supply." *See* Busse at Figure 5 (showing vertical/inelastic supply curve for used cars). The same figure in the article depicts the supply of new cars as being more elastic. *Id.* Significantly, and in contrast to the article, Boedeker rejects "the argument of a vertical [or inelastic] supply curve" as "fundamentally flawed because a vertical supply curve means that a given product is supplied by the manufacturer in the same quantity no matter what the price is." 2nd Rpt. ¶ 387.

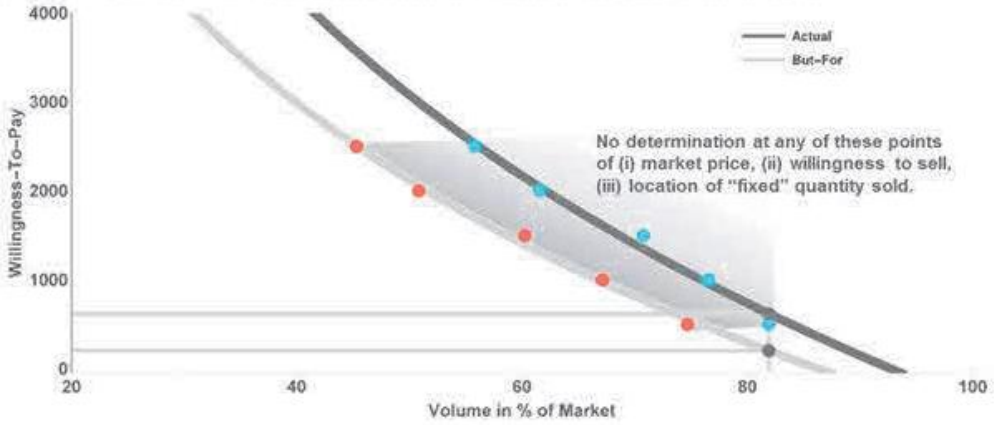
[52] 8/13/18 Rossi Rpt. ¶ 10 (same).

[53] 2nd Rpt. ¶ 32b ("The Boedeker Study correctly asserts that the GM vehicles sold without the disclosure of the defect at the point of purchase at issue in this case represent a ***fixed number of vehicles sold***. This fixed number can easily be obtained from the list of recalled vehicles.").

[54] Boedeker speculates that "[h]ad GM told customers about the defect after cars were produced but before they had been sold and had demand declined as a result, so would the price ***needed to clear the inventory*** of already produced vehicles that were viewed as lower-quality than customers had believed when GM made its production decision." 2nd Rpt. ¶ 37. But the benefit-of-the-bargain measure proposed by plaintiffs—and approved by this Court—does not require "clear[ing of] the inventory." *Id.* As the Court explained: "Plaintiffs who purchased defective cars were injured when they purchased for x dollars a New GM car that contained a latent defect; had they known about the

demonstrates, Boedeker cannot determine a starting point for his invented "fixed" quantity; indeed, that quantity could fall anywhere along Boedeker's actual-world demand curve:[55]

Figure 19: Demand Curves in the Actual-World and the But-For-World



Source: Own Analysis based on Conjoint Suvey.

Third, Boedeker cannot determine any but-for market price at that "fixed" quantity. Willingness to sell is an essential component of any market price, but Boedeker did not assess willingness to sell at his actual ***or*** but-for conjoint prices.[56] *See* Annotated Figure 19 above (Boedeker has not determined willingness to sell at any point along his but-for demand curve, and therefore cannot determine any but-for market price). Dr. Gans also concedes it is "highly unlikely

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defect, they would have paid fewer than x dollars for the car ***(or not bought the car at all)***, because a car with a safety defect is worth less than a car without a safety defect." *In re Gen. Motors LLC.*, 2018 WL 1638096, at *1 (*quoting In re Gen. Motors LLC Ignition Switch Litig.*, 2016 WL 3920353, at *7 (S.D.N.Y. July 15, 2016)). Boedeker's "price needed to clear the inventory" measure also ignores that purchases occurred over a five-year period (2009-2014); if New GM had disclosed defects in 2009, it could—if the demand for those vehicles dropped—have reduced the quantity manufactured and/or sold in any year between 2010 and 2014. Gans Dep. 302-303.

[55] Boedeker's "scenarios" are not sold in the marketplace. But even assuming *arguendo* that Boedeker's scenarios only included "safety features" (they do not), Boedeker cannot even claim that the supply or volume of safety feature packages sold equals the supply or volume of vehicles sold. As but one example, Boedeker's MDL survey scenarios included eight different safety feature combinations (some combination of collision avoidance system, lane departure warning, and rearview camera). But, for example, Boedeker does not know how many vehicles were sold with lane departure warning but no collision avoidance system or rearview camera. And the problem is even worse than that, because Boedeker's scenarios include not only "safety features," but also price and other hypothetical "information."

[56] 7/6/18 Dep. 462; 6/27/18 Gans Dep. 225. Boedeker and Dr. Gans treat New GM as the "seller" in both the actual world and the but-for world. *Id.* 249. "A ***market*** is a group of buyers ***and sellers*** of a particular good or service." Gans Textbook 67. "In any market, buyers look at the price when determining how much to demand and sellers look at the price when deciding how much to supply." 6/27/18 Gans Dep. 50.

that GM—it would have wanted to sell the same amount of cars at the price implied by Mr. Boedeker's 'but-for' analysis." 6/27/18 Gans Dep. 281:6-10.[57]

Fourth, Boedeker repeatedly argues that his invented definition of "fixed supply" is different from an "inelastic supply curve."[58] This is significant, because unlike Boedeker's idiosyncratic definition of "fixed supply," an "inelastic supply curve" has a recognized meaning in economics, which is that sellers are ***willing*** to sell the same quantity at a lower price. 2/23/18 List Rpt. ¶ 20. But both Boedeker and New GM's experts opine that the supply curves are not inelastic in this case.[59] Thus, Boedeker agrees with Dr. List and Dr. McFadden, both of whom opine that an "inelastic supply curve" for vehicles is unsupported, "impossible" and "makes no sense" as a matter of fundamental economics.[60]

B. Boedeker's Methodology Independently Fails Because It Relies Upon A Novel "Penalty"-Based Methodology Having No Basis In Law Or Economics.

Plaintiffs have never claimed, alleged or sought recovery in this litigation for a "punitive"

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[57] Because Boedeker ignores willingness to sell any "fixed" quantity at a but-for price, it is not a "market price." A "market price" always "requires consideration of both willingness to pay and willingness to sell at that price." 8/13/18 Rossi Rpt. ¶ 10; *see also* 8/13/18 McFadden Rpt. re Boedeker ¶¶ 9-10; Nicholson & Snyder at 11 (supply and demand operate "simultaneously" to determine any market price, like two "blade[s] of scissors").

[58] 2nd Rpt.¶ 32b (economists should not "confuse a fixed supply with an inelastic supply"; "this fixed number can easily be obtained from the list of recalled vehicles during the relevant time period. In contrast, an inelastic supply is defined as unresponsiveness to price changes. . . the Boedeker Study does not use an inelastic supply").

[59] Boedeker opines that "the argument of a vertical supply curve is fundamentally flawed because a vertical supply curve means that a given product is supplied by the manufacturer in the same quantity no matter what the price is." 2nd Rpt. ¶ 32b; *see also* 7/5/18 Dep. 62-63 ("Q. Do you think that the supply curve for cars is elastic, inelastic, or something else? A. In general, cars as a good do have an elastic supply curve. Just like the demand for cars is elastic, right. It's not that—that inelastic or whatever other things you were thinking about in your question."); *id*. (Q. "And you say (as read): There is no evidence in the data presented by any of the GM experts that the supply is inelastic. Is that your opinion? A. From the review of the data that were used, right, there's no — prices are not inelastic, or supply is not inelastic. Q. And here we're talking about supply of GM vehicles? A. I think this is the general, yeah. This must be GM, so it's no longer a hypothetical elastic example."); Ex. 113, *Dial* Tr. 224 (Boedeker: "I did not use a vertical supply curve in this case, and the only time I heard about a vertical supply curve is the Rolls Royce Dealership in Beverly Hills where people buy a Rolls Royce no matter what the price, how the people can afford it and then buy, but I've never seen it elsewhere and I've never applied it elsewhere.").

[60] 2/23/18 List Rpt. at 11, 13 ("The extreme assumption that the supply curve is vertical makes no sense and is in fact impossible in this setting for several reasons . . . [C]ertain ancient artifacts cannot be duplicated and therefore their supply is fixed regardless of the price . . . [A]utomobiles and their components can be duplicated and supply can expand or contract."); 8/13/18 McFadden Rpt. n.25.

or "penalty-based" component of benefit-of-the-bargain damages. No such recovery is legally permissible in the Bellwether states (or any others for that matter). Yet Boedeker and Dr. Gans justify the "fixed supply" assumption as a necessary "penalty" to impose upon New GM due to alleged "active deception." 2nd Rpt. ¶ 16; 6/27/18 Gans Dep. 241. Boedeker's penalty-based damages methodology is economically infirm and does not fit benefit of the bargain damages law.

1. Boedeker's Penalty-Based "Fixed Supply" Measure Is Pure *Ipse Dixit* And Is Contrary To Law.

Boedeker concedes that if a change in market price were determined using supply and demand curves (as required by basic economics and the law), it very well could result in this litigation of "an estimate of $0 damages to deceived buyers if GM's supply elasticity is sufficiently high." 2nd Rpt. ¶ 15. This is an arresting admission, specifically: applying Boedeker's methodology using both supply and demand curves as required could very well estimate no damages at all. But, of course, a zero damages methodology is not what plaintiffs' counsel are seeking. To avoid this outcome, Boedeker offers the untethered assertion that there "need[s] to be a penalty (in the economic sense) for active deception" incorporated into his methodology. *Id.* ¶ 16.

Plaintiffs' other benefit-of-the-bargain expert, Dr. Gans acknowledges Boedeker's "fixed supply" measure of damages and expressly incorporates such a "penalty" into his methodology. *Id.*; 6/27/18 Gans Dep. 241. As Dr. Gans explained:

> Q. [W]hen you say that there needs to be a penalty in the economic sense for active deception,
> A. Yes.
> Q. [I]s compelling the number of vehicles supplied in the 'but-for' world to be the same as in the actual world
> A. Yes.
> Q. -- consistent with that?
> A. Yes, it is. It is consistent. In fact, it's compelled by that.

6/27/18 Gans Dep. 286:20-287:5; *see also* 8/31/18 Gans Rpt. ¶ 12 ("Absent any penalty, the seller

earns more from deception than transparently selling a product with a known defect.").

Boedeker's and Gans' "penalty"-based methodology is economically unsound and legally improper. As Dr. McFadden explains: "I am not aware of any economic literature that supports the approach that Mr. Boedeker and Professor Gans take towards estimating a penalty." 8/13/18 McFadden Rpt. ¶ 11. Boedeker's penalty-based damages measure is also contrary to law. None of the Bellwether states allows or incorporates a penalty into the benefit-of-the-bargain measure of damages, which, by definition, are designed to compensate in the amount of a change in market value, not penalize.[61] *See* Black's Law Dictionary, 14th ed. ("Penalty" includes "a sum of money exacted as punishment. . .as distinguished from compensation for the injured party's loss"). Any penalty or punitive damages opinions are also outside the province of admissible expert testimony here. *See also Voilas v. Gen. Motors Corp.*, 73 F. Supp. 2d 452 (D.N.J. 1999) ("there are numerous problems associated with allowing expert testimony on the issue of punitive damages. . . there are no credentials that could qualify an individual as a punitive damages expert, primarily because the area of assessing punitive damages, implicative of various societal policies and lacking any basis in economics, rests strictly within the province of the jury and, thus, does not necessitate the aid of expert testimony.").[62]

2. Boedeker's Penalty-Based Damages Methodology Also Impermissibly Permits a Double Recovery Contrary To Benefit-Of-The-Bargain Law.

Benefit-of-the-bargain damages are required to be measured "at the time of sale." But

[61] *See also Raines v. Coastal Pac. Food Distributors, Inc*., 234 Cal. Rptr. 3d 1, 12 (Ct. App. 2018) ("Damages are intended to be compensatory, to make one whole. (See Civ. Code, § 3281.) Accordingly, there must be an injury to compensate. On the other hand, ***[c]ivil penalties***, like punitive damages, are ***intended to punish the wrongdoer and to deter future misconduct***.") (internal quotation marks omitted).

[62] *See also Lopez v. Geico Ins. Co.*, 2013 WL 9720887, at *2 (D.N.M. Oct. 9, 2013) ("Punitive damages are entirely within the purview and ability of a jury to determine" and do "not require any particular expertise."); *Anderson v. Boeing Co.*, 2005 WL 6011245, at *2 (N.D. Okla. Aug. 2, 2005) (noting "the absence of citation to any cases where such [expert] testimony has been received on the issue of punitive damages.)

applying their penalty-based methodology, Boedeker also impermissibly includes post-sale harm arising during the period "***between purchase and recall*** [when] purchasers... were driving around at a greater degree of risk." (Ex. 36, 5/18/18 Gans Rpt. ¶ 53)

Boedeker fails to explain why economics or benefit-of-the-bargain law requires New GM to compensate the same population both (i) for historical " risk they incurred after purchase," and (ii) for any injuries that were actually incurred, *e.g.*, personal injuries or property damages. Personal injury plaintiffs in this litigation have had the opportunity to assert claims for such actual injuries—and they have done so. As Judge Easterbrook has explained, "[i]f tort law fully compensates those who are physically injured, then any recoveries by those whose products function properly mean excess compensation." *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1017 (7th Cir. 2002).[63]

Because Boedeker's penalty-based methodology impermissibly seeks to compensate putative economic loss class members for the historical risk of injury (which never occurred to them) when driving after the sale and up to the point of any applicable 2014 recall, plaintiffs' damages model would result in a double recovery for the reasons explained by Judge Easterbrook in *Bridgestone/Firestone*—making the model and all related expert opinions unreliable, irrelevant, and inadmissible. *See Malletier*, 525 F. Supp. 2d at 662–63; *Alexander*, 2015 WL 4489185, at *1.

[63] *See also In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1017 (7th Cir. 2002) ("Consider an example. Defendant sells 1,000 widgets for $10,000 apiece. If 1% of the widgets fail as the result of an avoidable defect, and each injury creates a loss of $50,000, then the group will experience 10 failures, and the injured buyers will be entitled to $500,000 in tort damages. That is full compensation for the entire loss; a manufacturer should not spend more than $500,000 to make the widgets safer. Suppose, however, that uninjured buyers could collect damages on the theory that the risk of failure made each widget less valuable . . . This would both overcompensate buyers as a class and induce manufacturers to spend inefficiently much to reduce the risks of defects. A consistent system—$500 in damages to every buyer, or $50,000 in damages to every injured buyer—creates both the right compensation and the right incentives. A mixed system overcompensates buyers and leads to excess precautions.").

C. Boedeker's Conjoint Studies Cannot Determine Market Price.

Various courts have admitted conjoint analyses in certain circumstances,[64] but Boedeker's misplaced reliance on flawed conjoint studies is neither relevant nor reliable in this case. As Nobel Laureate Dr. McFadden explains, "conjoint analysis applies only to the demand side and cannot be used on its own to determine a 'but for' market price." 2/23/18 McFadden Rpt. ¶ 85. Consistent with these fundamental economic principles,[65] courts have excluded conjoint analyses that purport to determine a decrease in market price on grounds the expert fails to consider (i) real-world market prices; and/or (ii) willingness to sell. For example, in *Saavedra v. Eli Lilly & Co.*, 2014 WL 7338930 (C.D. Cal. 2014), the Court rejected plaintiffs' conjoint analysis-based damage model for California's UCL and CLRA claims because it failed to consider willingness to sell:

> Dr. Hay proposes calculating class members' lost consumer value using conjoint analysis. . . . [His] model looks only to the demand side of the market equation. By looking only to consumer demand while ignoring supply, Dr. Hay's method of computing damages converts the lost-expectation theory from an objective evaluation of relative fair market values to a seemingly subjective inquiry of what an average consumer wants. The Court has found ***no case*** holding that a consumer may recover based on consumers' ***willingness to pay irrespective of*** what would happen in a functioning market (*i.e*. what could be called sellers' ***willingness to sell***).

Id. at *4. Similarly, in *In re NJOY*, the Court held that a "conjoint analysis" did not support class certification because it could only "quantify the relative value a class of consumers ascribed to [a]

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[64] For example, courts in certain cases have admitted conjoint analyses for the purpose of determining willingness to pay. *See, e.g., Odyssey Wireless, Inc. v. Apple Inc.*, 2016 WL 7644790, at *9 & n.12 (S.D. Cal. Sept. 14, 2016) ("a conjoint analysis is a generally accepted method for valuing the individual characteristics of a product"; distinguishing *Oracle*, 2012 WL 850705, on ground that "[i]n *Oracle*, the expert at issue used a conjoint analysis to attempt to measure market share, not a consumer's willingness to pay for a particular feature of a product"); *TV Interactive Data Corp. v. Sony Corp.*, 929 F. Supp. 2d 1006, 1020 (N.D. Cal. 2013) ("Professor Srinivasan estimated the '***market's willingness to pay***' ('MWTP') for TVI's patented technology as an incremental benefit in Sony's accused products."); *Apple Inc. v. Samsung Elecs. Co.*, 735 F.3d 1352, 1367 (Fed. Cir. 2013) (in patent case, reversing district court exclusion of conjoint analysis as evidence of "willingness to pay"); *Microsoft v. Motorola*, 904 F. Supp. 2d 1009, 1120 (W.D. Wash. 2012) (in patent case, admitting survey that "sought to solicit data on the impact on consumer demand").

[65] 2/23/18 List Rpt. ¶ 56; 2/13/18 Rossi Rpt. ¶ 14.

safety message" but did not "permit the court to turn the relative valuation into an absolute valuation to be awarded as damages." 120 F. Supp. 3d at 1119. The *NJOY* Court explained that "[t]he ultimate price of a product is a combination of market demand and market supply," but the expert's model looked "only to the demand side of the market equation" and ignored the price the defendant was "willing to sell its products." *Id.* Likewise, in *Apple, Inc. v. Samsung Electronics Co.*, 2014 WL 976898 (N.D. Cal. Mar. 6, 2014), the Court held that "the ultimate price of a product is a combination of market demand and market supply." *Id.* at *11. Thus, where a "survey measures the market demand for" particular product attributes "in a vacuum, without relation to the actual price or value of the" product, that "survey leaves the Court with no way to compare [the expert's] willingness to pay metrics—which relate only to demand for the…feature—to the market price of the [product], which reflects the real-world interaction of supply and demand for the products." *Id.*[66]

In their class certification motion (Dkt. 5846 at 29), Plaintiffs cite two cases where Courts denied motions to exclude Boedeker's work: *In re MyFord Touch Consumer Litig.*, 291 F. Supp. 3d 936, 970 (N.D. Cal. 2018), and *In re Dial Complete Mktg. & Sales Practices Litig.*, 320 F.R.D. 326, 329 (D.N.H. 2017). But these cases do not support Boedeker here; in fact, they confirm the unreliability and inadmissibility of his methodology and opinions in this case.

a. The *Dial* Opinion Relies On A Fundamental Misunderstanding Of Dr. McFadden's Work.

The *Dial* Court mistakenly admitted Boedeker's conjoint survey analysis and opinions; specifically, the *Dial* Court misapplied an article written by Dr. McFadden, who did not testify in that case and who was not consulted in that case by anyone, to find that it supported Boedeker.

[66] In *Apple Inc. v. Samsung Elecs. Co.*, the Federal Circuit discussed a survey by the same expert in a different lawsuit without ruling on the market price supply-and-demand issue, instead addressing the relationship between measures of willingness to pay and causation under patent law. 809 F.3d 633, 644 (Fed. Cir. 2015).

New GM engaged Dr. McFadden as expert to address this issue. Dr. McFadden explains that the *Dial* Court misreads his article, and that his article does not support the *Dial* Court's conclusion. That decision, Dr. McFadden further explains, also reveals a fundamental flaw in this case that did not exist in *Dial*.

First, in permitting Boedeker's testimony, the *Dial* Court[67] misread a Law360 article co-authored by Dr. McFadden.[68] Dr. McFadden explains:

> The *Dial* court failed to recognize that the admonition in my Law360 article on the necessity of determining the [willingness to pay ("WTP")] of the marginal consumer ***did not indicate that this could be done without considering the supply side***. . . . In fact, ***Mr. Boedeker did not and could not determine the marginal consumer*** from his conjoint-based method. The marginal consumer is the consumer whose WTP is equal to the market price and one cannot compute a market price based on even a validly designed conjoint analysis alone.

2/23/18 McFadden Rpt. ¶¶ 73-74. Because the *Dial* Court did not have the benefit of Dr. McFadden's report or testimony, it misread Dr. McFadden's article and erroneously concluded that Boedeker had identified the "willingness to pay of the marginal consumer." *In re Dial*, 320 F.R.D. at 336. In this case, Dr. McFadden clarifies that a "marginal consumer" cannot be identified without consideration of a seller's willingness to sell and that Boedeker's failure to compute a supply curve renders his methodology incapable of determine market price impact (if any).[69]

Second, in *Dial*, Boedeker's conjoint survey analysis (unlike here) involved the actual product at issue, hand soap, and he measured the price of the product at issue; thus, Boedeker "set the price attribute at nine different point levels, ranging from $0.99 to $3.99 to reflect prices he

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[67] The *Dial* Court candidly noted it did not have economic background. Ex. 113, 11/16/16 Hr'g Tr. at 106-07.

[68] *In re Dial.*, 320 F.R.D. at 336 ("[The] Boedeker's model purports to calculate the 'Marginal Consumer's Willingness to Pay' for that product in the actual market in which the products . . . were sold. The distinction is important, for, as explained in a brief paper co-authored by Lisa Cameron, Michael Craig, and Nobel Laureate in Economics Daniel McFadden . . . 'It is the WTP of the marginal consumer that is equivalent to the price premium associated with the infringing level of the attribute; this marginal consumer can be identified by offering respondents a 'no buy' option.'")

[69] As Dr. McFadden explains, the *Dial* Court got it wrong in its analysis of Dr. McFadden's own work. 2/23/18 McFadden Rpt. ¶¶ 83-85; *see also* 8/13/18 McFaddden Rpt. re Boedeker ¶¶ 9-10.

[actually] observed in his preliminary research" on this product. 320 F.R.D. at 32. Here, however, Boedeker purported to construct demand curves for hypothetical safety-feature scenarios, not vehicles.[70] And, the prices are purely arbitrary because no such "scenarios" are or would be sold in any actual marketplace. Thus, *Dial* not only was predicated on a fundamental misunderstanding of Dr. McFadden's work, but confirms that Boedeker's opinions in this case are unreliable and irrelevant because Boedeker did not measure vehicle prices.[71]

b. The *MyFord Touch* Court Relied On An Inelastic Supply Curve Assumption That Is Inapplicable In This Case And Improperly Rejected Accepted Economic Principles.

Plaintiffs' expected reliance on *MyFord Touch* fares no better. In that case, the Court did not ignore the sellers' willingness to sell in the but-for world, but instead concluded that it was not "indisputably wrong" to assume that Ford would be ***willing*** to sell the same quantity of "vehicles" at a lower price (*i.e.*, an inelastic supply curve).[72] Whether the Court in *My Ford Touch* had any evidentiary record and/or expert basis to make its "not so far-fetched as to be indisputably wrong"[73] inelastic-supply-curve assumption is unclear. In this case, however, an inelastic supply

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[70] Unlike in *Dial*, because there is no actual market for these safety-feature scenarios, Boedeker could not "set the price attribute" at "different point levels . . . to reflect prices he observed" in the real world. For example, Boedeker did not observe a market price for a "scenario" with no safety features, no recall, and the "vehicle is safe as is" disclosure. But Boedeker included precisely that "scenario" in his conjoint analysis.

[71] The *Dial* court focused on Dial's ability to sell at the but-for price: "[Boedeker's] model seeks to calculate the highest price in the actual market at which Dial could have sold the same number of products without the challenged claim. . . . Boedeker's model asks, it appears, "At what price in that actual market in which Dial sold the offending products ***could Dial have sold*** the equivalent number of products without the false claim(s)?" *In re Dial*, 320 F.R.D. at 336. But the *Dial* Court did not consider New GM's argument that under basic economic and legal principles, a market equilibrium price requires not only the ***ability*** to sell at the but-for price, but also the ***willingness*** to sell.

[72] *MyFord Touch*, 291 F. Supp. 3d at 970 ("The assumption that Ford would have sold the same number of vehicles notwithstanding a drop in value ranging from $729–$1,290 is not so far-fetched as to be indisputably wrong"); *see also id.* ("Though Mr. Boedeker adamantly denies that his analysis is consistent with assuming a vertical supply curve, that is the effect."). An inelastic supply curve means that sellers are willing to sell the same quantity at a lower price. *See* 2/23/18 List Rpt. at 11; Gans Dep. 275 ("a supply curve gives you the amount that a supplier would choose to supply at given prices"); Ex. 112, Gans' Dep. Ex. 4, Gans Textbook 105, 107.

[73] Courts do not (and should not) admit expert testimony merely because it is based on assumptions that are not "indisputably wrong." That is not a recognized or proper legal standard in the Second Circuit or elsewhere. Instead, proffered "expert testimony should be excluded if it is speculative or conjectural"; the "[a]dmission of expert

assumption is false because all experts—including Boedeker and Dr. Gans—agree that GM vehicle supply curves are not inelastic.[74] In addition, the *MyFord Touch* inelastic-supply-curve holding expressly applied to the "number of vehicles." 291 F. Supp. 3d at 970. Boedeker's conjoint analyses here do not involve vehicles. And neither Boedeker nor any other expert opines that the supply of "scenarios" or "safety features" is inelastic.

The *My Ford Touch* court also incorrectly relied on "policy reasons to afford Plaintiffs a reasonable opportunity to posit damages based on a more flexible approach to economic theory."[75] The *MyFord Touch* Court's "policy" recommendations are erroneous as a matter of basic math, economics and law, and regardless, should not be followed for three reasons.

First, Drs. McFadden and Rossi explain the *MyFord Touch* policy is based on a mathematically wrong conclusion that a supply response results in under-compensation because: (1) a difference in market price is calculated by allowing the quantity supplied to change in the but-for world; and (2) that "difference in market prices (if any) would be awarded to all proposed class members to compensate them for possible overpayment. Each class member would receive an award equal to the estimated overpayment."[76]

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testimony based on speculative assumptions is an abuse of discretion." *Major League Baseball Properties, Inc. v. Salvino, Inc.*, 542 F.3d 290, 311 (2d Cir. 2008) (alteration in original).

[74] *See* Section II above. Moreover, Boedeker's analysis generates over $9,000 in damages for some vehicles. Boedeker does not and cannot opine that GM would be willing to sell the same number of vehicles (much less "scenarios") if the price decreased by over $9,000.

[75] *Id.* at 971 (Recognizing that "projecting an equilibrium market price requires consideration of both supply and demand curves," but holding that "the fact that a fixed number of vehicles were in fact sold (and thus a fixed number of consumers were potentially harmed) merits assuming that the size of the class is the same in both the hypothetical and real worlds and assessing damages on that basis. Doing otherwise might allow a defendant to profit in the real world by its wrongdoing (if proven) based on the notion that fewer people were harmed in the hypothetical world.").

[76] 8/13/18 Rossi Rpt. ¶ 4; *see* Ex. 142, 4/10/18 McFadden Dep. 15-20 ("the damage is the difference between the price actually paid and the price that would have been paid in that but-for world . . . that difference would apply to each" class member; "[b]ut that difference would be determined by the market equilibrium price in the but-for world compared with the market equilibrium price in the as-is world," even though the but-for market price is calculated based on a reduced quantity supplied). Indeed, in a report that Dr. Gans issued in the *In re Whirlpool Corp. Front-Loading Washer Litigation*, he opined that, if the Court "believed that the but-for marketplace should be taken into consideration," then all eligible putative class members would be compensated with the same change in market price, even though estimating the but-for price "requires a measure of the supply response to a change in prices." Ex. 118,

Second, *Erie* precludes the *MyFord Touch* Court's "policy reasons" from superseding substantive state law[77] that requires willingness to sell to determine "market price," "market value," and benefit-of-the-bargain damages.

Third, the Court incorrectly stated that "doing otherwise might allow a defendant to profit in the real world by its wrongdoing (if proven) based on the notion that fewer people were ***harmed*** in the hypothetical world." *MyFord Touch*, 291 F. Supp. 3d at 971. The Court's assertion simply assumes the existence and quantum of "harm." Under the law of the Bellwether states, "harm" is measured by a change in "market price," which requires consideration of willingness to sell in the actual and but-for worlds. If there is no change in market price, then there is no "harm." Indeed, Boedeker concedes that if he considered a highly elastic supply curve in his analysis, the damages would be low or even $0. Boedeker 2nd Rpt. ¶ 15. Thus, by ignoring any supply curve, Boedeker simply concocts his own "harm."[78]

Whirlpool Gans Rpt. ¶¶ 61-65; *see also* Memorandum of Law in Support of General Motors LLC's Motion to Exclude the Options of Dr. Joshua Gans at 11-12 (describing Dr. Gans' *Whirlpool* report).

[77] *MyFord Touch* observed that "as a matter of economic theory, projecting an equilibrium market price requires consideration of both supply and demand curves." 291 F. Supp. 3d at 971.

[78] The cases that have followed *Dial* and *MyFord Touch* are inapplicable because none of them had the benefit for McFadden's correction regarding the interpretation of his article, because all experts in the current case agree there is no inelastic supply curve, because various of the cases involved conjoint analyses that included actual market prices for the product at issue (as opposed to the Boedeker conjoint involving scenarios for which no real-world market prices exist), and for other reasons. *See, e.g.*, *Fitzhenry-Russell v. Dr. Pepper Snapple Grp., Inc.*, 2018 WL 3126385, at *8 (N.D. Cal. June 26, 2018) (expert used "actual market-clearing prices as the basis for the prices in the survey"; repeating *Dial* assertion that but-for price is "highest price in the actual market at which [defendant] ***could*** have sold the same number of products without the challenged [statement]," without considering whether ***willingness*** to sell was required to determine but-for market price under applicable state law); *Hadley v. Kellogg Sales Co.*, 2018 WL 3954587, at *13 (N.D. Cal. Aug. 17, 2018) (holding conjoint accounted for supply in the actual world because "the prices used in the surveys underlying the analyses reflect the actual market prices that prevailed during the class period"; repeating *Dial* holding that but-for price is "highest price in the actual market at which [defendant] ***could*** have sold the same number of products without the challenged [statement]," without considering whether ***willingness*** to sell was required to determine but-for market price under applicable state law); *Davidson v. Apple, Inc.*, 2018 WL 2325426, at *22 (N.D. Cal. May 8, 2018) (relying on *MyFord Touch* to assume an inelastic supply curve and to assume Apple's willingness to sell same quantity of iPhones at lower price; "the portion of the supply curve that concerns Mr. Boedeker's analysis is effectively vertical"; "assuming Apple would have sold the same number of iPhones despite the drop in what consumers were willing to pay is not especially farfetched because the marginal cost of producing an iPhone could still have been below consumers' willingness to pay"); *In re Lenovo Adware Litig.*, 2016 WL 6277245, at *21 (N.D. Cal. Oct. 27, 2016) ("Plaintiffs' survey expert 'consulted pricing of the Lenovo models at issue, as well as comparable PC laptops' to ensure that the results would 'reflect the market.'").

III. BOEDEKER'S METHODOLOGY AND OPINIONS SHOULD BE EXCLUDED BECAUSE THEY ARE BASED ON IRRELEVANT AND UNRELIABLE CONJOINT SURVEYS.

Where, as here, the "pivotal legal question . . . virtually demands [expert] survey research" on "consumer perception," "the Court's gatekeeper function is of heightened importance." *Malletier*, 525 F. Supp. 2d at 562. Thus, "there will be occasions when the proffered survey is so flawed as to be completely unhelpful to trier of fact," and "its probative value is substantially outweighed by its prejudicial effect." *Id.* at 563; *see also Kargo Glob., Inc. v. Advance Magazine Publishers, Inc.*, 2007 WL 2258688, at *6 (S.D.N.Y. Aug. 6, 2007) (courts exclude surveys where "flaws in methodology are so severe that the survey's probative value is substantially outweighed by its potential for unfair prejudice and confusion."); *In re Fluidmaster*, 2017 WL 1196990, at *31 (excluding proposed survey, noting that "[w]hile any one of these methodological issues, standing alone, might not be fatal, the Court is sufficiently concerned that their combination renders [the expert's] proposed survey unreliable.").[79] Courts excluded survey and related opinions "where a single error or the cumulative errors are so serious that the survey is unreliable or insufficiently probative." *THOIP v. Walt Disney Co.*, 690 F. Supp. 2d 218, 219 (S.D.N.Y. 2010) (Scheindlin, J.). The cumulative survey errors, including the two fundamental flaws discussed below, provide an additional basis to exclude Boedeker's opinions in this case.

A. Boedeker's Surveys Do Not Replicate Actual Marketplace Conditions.

Boedeker's surveys are deficient both legally and scientifically because they fail to replicate (or even approximate) real-world market conditions. For example:

[79] In addition, courts have cautioned that surveys are frequently inherently biased on favor of the commissioning party, and advised that "caution is required in the screening of proposed experts on consumer surveys," especially because "stakes are much higher when actual shopping decisions have to be made (because that means parting with money) which may influence responses" and "the expert witnesses who conduct surveys in aid of litigation are likely to be biased in favor of the party that hired and is paying them, usually generously." *Kraft Foods Grp. v. Cracker Barrel Old Country Store, Inc.*, 735 F. 3d 735, 742 (7th Cir. 2013).

- Survey respondents were given a choice of adding "safety features" that already come standard on the vehicles and therefore respondents would have no option to include or exclude such standard features in the actual marketplace.[80]

- Respondents had the option of purchasing vehicles with an open recall even though "federal law prohibits the sale of new cars with open recalls."[81] 2nd Rpt. ¶ 152.

Because these survey questions (among others) "call upon respondents to imagine themselves in situations they cannot accurately picture," as a scientific matter, the questions "cannot produce reliable estimates of how [respondents] would actually respond to those situations." Ex. 141, 8/13/18 Diamond Rpt. ¶ 22.[82]

Boedeker's failure to replicate marketplace conditions is a structural, scientific defect that renders all of his conjoint surveys unreliable and mandates exclusion. *See, e.g.*, *THOIP*, 690 F. Supp. 2d at 237-37 (excluding survey and opinions in trademark case as unreliable when it failed to replicate marketplace conditions and "did not sufficiently approximate the manner in which consumers encountered the parties' products in the marketplace."); *Simon Prop. Grp. L.P. v. mySimon*, 104 F. Supp. 2d 1033, 1044 (S.D. Ind. 2000) (excluding in trademark case survey that did not replicate marketplace by presenting only products at issue, removing additional inputs available to real world consumers, and omitting information available to consumers).[83]

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[80] *See e.g.*, Respondent #2058 ("Rear View camera is standard, why is it even an option to be included?"); Respondent #1175 ("Rear view cameras are required in California so extra cost should not be an issue, just part of the vehicle's price."); *see also* 2/23/18 Jason Rpt., Ex. B 4-20.

[81] A proper but-for world should isolate the effect of the harmful act by assuming a scenario in which a defendant's alleged unlawful actions are replaced by proper actions, not by "alternative but also unlawful actions (*i.e.*, selling vehicles with disclosed but unrepaired safety defects)." 8/13/18 Cornell Rpt. n. 10 (citing Allen, Hall, & Lazear, "Reference Guide on Estimation of Economic Damages," *Ref. Man. on Scientific Evid.* 3rd ed. (2011) at 432").

[82] *See also* 8/13/18 Diamond Rpt.¶ 22 ("While considering preferences among various safety features is not unrealistic, it *is* unrealistic to expect respondents to be able to accurately put themselves in an unrealistic situation and imagine how they would respond to it….At the beginning of the *Reference Guide on Survey Research*, I observed that "if survey respondents had been asked in the days before the attacks of 9/11 to predict whether they would volunteer for military service if Washington, D.C., were to be bombed, their answers may not have provided accurate predictions" (Reference Guide, p. 362, fn. 7).").

[83] *See also Am. Footwear Corp. v. Gen'l Footwear Co.*, 609 F.2d 655, 661 n.4 (2d Cir. 1979) (non-conjoint survey in trademark case that failed even to come close to replicating "actual marketing conditions" was properly rejected by district court); *Troublé v. Wet Seal*, 179 F. Supp. 2d 291, 308 (S.D.N.Y. 2001) ("Although no survey can construct a

B. Boedeker Did Not Survey A Representative Population.

It is settled law that "[f]or a survey to be valid, 'the persons interviewed must adequately represent the opinions which are relevant to the litigation.'" *In re Fluidmaster*, 2017 WL 1196990, at *29; *Malletier*, 525 F. Supp. 2d at 580–81 (expert must show "the proper universe was examined and the representative sample was drawn from that universe.") (citing S. Diamond, *Reference Guide on Survey Research*, *Reference Man. On Scientific Evid*, 2d. ed. 2000, at 236-72).[84]

But Boedeker did not study—let alone attempt to limit the survey participants—to those who were reflective of or actual putative class members; and he did not attempt to ensure that the age, economic characteristics, education matched or were even approximately similar to the proposed class. Indeed, Boedeker's survey population likely included substantial numbers of pickup-truck buyers. 8/13/18 Diamond Rpt. ¶ 18. These demographic and other differences impact the economic losses estimated under Boedeker's methodology. 8/14/18 Marais Rpt. ¶¶ 27-33, App. C, D.1. Ultimately, Boedeker "failed at the start by using a misspecified population and consequently an unrepresentative sample of survey participants." 2/23/18 Diamond Rpt. ¶ 9. Likewise, "Mr. Boedeker provides *no* evidence that his sample of GM vehicle purchasers replicates the characteristics of *any* well-defined target population, much less the target population of class members." 2/23/18 Marais Rpt. ¶ 74. Because the survey is non-representative, the "results cannot be extrapolated to putative class members." *Id.* ¶ 19; *see also Marlo v. United Parcel Serv., Inc.*, 251 F.R.D. 476, 485–86 (C.D. Cal. 2008), *aff'd*, 639 F.3d 942 (9th Cir. 2011)

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perfect replica of 'real world' buying patterns, a survey must use a stimulus that, at a minimum, tests for confusion by roughly simulating marketplace conditions"; excluding non-conjoint survey in trademark case); *see also Amorgianos v. Nat'l R.R. Passenger Corp.*, 303 F.3d 256, 266–68 (2d Cir. 2002) ("[W]hen an expert opinion is based on data, a methodology, or studies that are simply inadequate to support the conclusions reached, *Daubert* and Rule 702 mandate the exclusion of that unreliable opinion testimony.").

[84] Boedeker agrees that "representativeness of the survey is important," 2/6/18 Dep. 190:8-16, and admits that, if a conjoint survey—like the one on which he bases all of his opinions—is given to the wrong people, it is inherently flawed and its conclusions will be unreliable. 7/6/18 Dep. 467:18-468:6.

(decertifying class because survey was "not the product of reliable principles and methods" and could not "qualify as common proof … because it is unrepresentative, unreliable, and has essentially no probative value") (citing Diamond at 245-246). Moreover, Boedeker provides no reliable basis for extrapolating from his surveys "one numerical figure" of loss to each proposed recall classes. 1st Rpt. ¶¶ 129-130; 3rd Rpt. ¶ 5. He admits he did not determine loss for *any* individual putative class member, or among purchasers of similar vehicles.[85] But Boedeker assigns, for example, a $966 per-vehicle-losses to 14v346 and 14v400 recall classes even though vehicles in the former recall were predominantly *new* purchased 2010-2014 Camaros, while the latter includes mostly pre-2005 vehicles purchased *used*.[86] Additionally, Boedeker admits that his entire survey work dealt with new not used vehicle purchases, which he admits are subject to different factors. Boedeker 7/5/18 Dep. at 410:3-11; 2nd Rpt. ¶ 141. In addition to the other flaws, he has therefore no basis to assign "losses" regarding used vehicle purchases. The impact of this unfounded class extrapolation assumption is shown by the absurd prices named plaintiffs "would have paid" if Boedeker's "median" economic loss were applied to the real-world vehicle prices named plaintiffs actually paid.[87]

IV. BOEDEKER IS NOT QUALIFIED TO OFFER HIS NOVEL ECONOMIC OPINIONS.

The myriad methodological errors, deviations from settled economic principles, and irrational results are symptoms of Boedeker's lack of qualifications. Boedeker's opinions are based "solely" on statistical analyses and an invented economic damages methodology based on

[85] 7/5/2018 Dep. 196:10-197:4; 7/6/2018 Dep. 483:19-484:2.

[86] 3rd Rpt. ¶ 5; 8/14/18 Marais l Rpt. ¶ 34.

[87] *See also* Ex. 136, Named Plaintiff Price Paid Compared to Boedeker Proposed "Median Loss" (applying Boedeker's "median" economic loss to show, for example, one plaintiff "would have paid" only $6,490.74 for a *new* Saturn Ion and another "would have paid" only $2,710.74 for a three year-old Cobalt)

his conjoint surveys. 2/6/18 Dep. 59:20-62:22. These subject matters require specialized expertise in conjoint study design and implementation, consumer behavior, marketing, economics, economic damages methodology, and statistics, which is why Boedeker cites to and purports to rely upon the leading experts in those specialized fields. Boedeker's *ipse dixit* assertion of a penalty-based theory of damages, is outside the province of expert testimony altogether. New GM has not identified any case where a Court was confronted with a direct challenge to Boedeker's qualifications. However, Boedeker's lack of qualifications provide an additional basis for exclusion here. *S.E.C. v. Tourre*, 950 F. Supp. 2d 666, 674 (S.D.N.Y. 2013); Fed. R. Evid. 702.

A. Boedeker Admits He Is Not An Expert In The Relevant Scientific Disciplines.

Boedeker holds no Ph.D. in economics, mathematics, statistics, or any other discipline. 4/20/17 Dep. 62:21-25; Ex. 144, 6/13/17 Dep. 45:11-24; 2/6/18 Dep. 23:11-16. He is not an expert in and has no degree in marketing or advertising, or consumer behavior or psychology. 4/20/17 Dep. 63:1-4, 76:8-77:4, 76:20-77:4; 6/13/17 Dep. 29:20-23, 33:7-10; 33:19-34:5; 43:22; 2/6/18 Dep. 29:23-25. He has a grand total of "one publication" that is not relevant to any issues in this case and that may not even have been peer reviewed. 4/20/17 Dep. 63:22-65:13, 65:17-20; 2/6/18 Dep. 33:13-17. Boedeker, in short, does not have the expertise necessary to speak to the specialized issues of conjoint surveys, economics, and statistics here. "A scientist, however well credentialed he may be, is not permitted to be the mouthpiece of a scientist in a different specialty." *Dura Auto. Sys. of Indiana, Inc. v. CTS Corp.*, 285 F. 3d 609, 614 (7th Cir. 2002).

Boedeker admits that he is not even an expert in conjoint analysis—but simply a "user":

> Q: Nor are you an expert in conjoint analysis, are you?
>
> A: I mean, I'm a user. The first time I started a -- I used a conjoint analysis was probably in the late '90s in a consulting context, and basically have read research, have read textbooks, have run conjoint studies. So from that end, it's-- I'm an experienced user, but I've not developed the methodology or written papers about it or taught classes about it.

4/20/17 Dep. 77:5-14; *see also id.* at 65:14-16; 2/6/18 Dep. 33:18-25. Boedeker's candid admission that he is nothing but a "user" of the expert work done by others in one of the disciplines at the heart of his opinions is telling.[88] Boedeker offers opinions reserved for those with expertise in advanced, specialized areas of the fields of economics, conjoint surveys, and statistics which he lacks. Boedeker's opinions are contrary to basic economics, 2/23/18 List Rpt. ¶¶ 124-127, and he is not simply not qualified to give them.

Significantly, courts exclude experts who, like Boedeker, offer opinions based on conjoint surveys but lack the requisite expertise to opine on the subject matters involved in their analysis. In *Wolf v. Hewlett Packard Co.*, for example, the Court excluded an expert who, although he had an MBA and was familiar with various statistical techniques and had served as a professional testifying expert, lacked "sufficient expertise in the area of consumer behavior prediction generally, and in the performance or analysis of conjoint studies specifically to opine on the matter." 2016 WL 7743692, at *6–8, 13 (C.D. Cal. Sept. 1, 2016). Like Boedeker, the proposed expert in *Wolf* had "no background in consumer psychology, nor in statistical methods for predicting consumer behavior"; "no educational or professional background in survey design or sampling"; and had not "published peer-reviewed articles on discrete choice modeling, conjoint experiments or analysis, or survey design/sampling." *Id.* at *6.

[88] *See State of N.Y. v. United Parcel Serv., Inc*, 2016 WL 4735368, at *8 (S.D.N.Y. Sept. 10, 2016) (excluding proposed expert who "lacked the qualifications to design and conduct the survey that forms the basis of his report"; expert's "overall lack of survey experience undermines his ability to design and implement a survey according to a method that will best ensure reliable results."); *Bloom v. ProMaxima Mf'g Co.*, 669 F. Supp. 2d 321, 329 (W.D.N.Y. 2009) (excluding opinions where expert "candidly conceded that he was not competent to testify on the issue of design and that he had no engineering expertise."); *Long v. Monaco Coach Corp.*, 2007 WL 4613000, at *6 (E.D. Tenn. Sept. 27, 2007) (excluding expert who "testified repeatedly that he was not an expert in the field of valuation").

B. The Recognized Experts Upon Whom Boedeker Claims To Rely Uniformly Opine That Boedeker Departs From And Violates Basic Economic And Statistical Principles.

At best, Boedeker's opinions reflect his personal views about what economic loss damages *should* be allowed under the law where "active deception" exists and how such damages *should* be calculated using his own idiosyncratic principles of pseudo-economics, statistics and conjoint surveys; they do not measure a price premium economic loss endorsed by any economist or allowed by the applicable benefit-of-the-bargain law. Boedeker, however, attempted to bolster his credibility and that of his conjoint survey analyses and damages methodology by citing the published works of well-respected and impeccably credentialed experts in economics, surveys, and statistics. These recognized experts then reviewed his work and opinions in this case. Their condemnation of his competency is universal, sweeping, and unequivocal. For example:

- Daniel McFadden, M.B.A., Ph.D. concludes that Boedeker's report and methodology improperly deviate from standard economic methodologies set forth in the very literature Boedeker cites, and that his "conjoint analysis is deeply flawed and cannot produce any reliable results." 2/23/18 McFadden Rpt. ¶ 9.

- Peter Rossi, M.B.A., Ph.D, personally developed the Hierarchical Bayesian Choice-Based Conjoint, the most widely used method for conjoint analysis and the method Boedeker claims to use. 1st Rpt. ¶¶ 31, 104, 107, 132; *id.* App. E, at 66-67. Dr. Rossi (whom Boedeker repeatedly cited and relied upon in his *Orange County* expert report, which he also now cites in this case), concludes that Boedeker "invents his own measure of damage" that is "not endorsed by any economist that [he is] aware of"; and (ii) "does not provide any citations to research by economists endorsing this measure because support for this measure does not exist." 2/23/18 Rossi Rpt. ¶¶ 3, 5, 8-9 10-11, App D.

- Shari Diamond, Ph.D. is the author of the Reference Guide on Survey Research in the Federal Judicial Center's Reference Manual On Scientific Evidence (3rd ed. 2011). Boedeker cites to and relies upon Dr. Diamond's work, claiming he has followed the best survey practices described in her Guide. 1st Rpt. ¶¶ 76, 83. But, as Dr. Diamond explains, Boedeker failed to comply with basic survey requirements as well as the generally accepted survey methodologies set forth in her Guide. 2/23/18 Diamond Rpt. ¶ 6.

At the end of the day, Boedeker's reports are incompatible with economic principles and are riddled with numerous mathematical and statistical errors. 2/23/18 Rossi Rpt. App. D; 2/23/18

Marais Rpt. ¶¶ 6-9; 11-24 32-38, 69-71, 83-85. Dr. List explains that Boedeker's methodology reflects a "misunderstanding of basic economic principles regarding how prices are determined," and is "[c]ontrary to accepted economic principles and standards," rendering his damages methodology unreliable because it "makes no sense" and in fact "is impossible." 2/23/18 List Rpt. ¶¶ 4, 10, 1. Boedeker's work in this case is at odds with and inconsistent with what Dr. List has "taught for more than 25 years on the very first day of [his] Economics 101 course" and therefore cannot compute economic loss for alleged class members. *Id.* ¶¶ 124-127.

CONCLUSION

Plaintiffs cannot meet their burden to establish that Boedeker's methodology and opinions meet Rule 702's reliability, relevance, or qualification requirements. This is precisely the type of case where the Court should employ "[t]he flexible *Daubert* inquiry" "to ensure that the courtroom door remains closed to junk science." *Amorgianos* 303 F.3d at 266–67. For the foregoing reasons, New GM respectfully requests the Court exclude all the opinions and testimony of Stefan Boedeker.

Dated: September 21, 2018

Respectfully submitted,

Richard C. Godfrey, P.C.
Andrew B. Bloomer, P.C.
KIRKLAND & ELLIS LLP
300 N. LaSalle
Chicago, IL 60654-3406
Phone: 312-862-2000
Fax: 312-862-2200
andrew.bloomer@kirkland.com
richard.godfrey@kirkland.com

Attorneys for Defendant General Motors LLC

CERTIFICATE OF SERVICE

I hereby certify that on October 2, 2018, I electronically filed the foregoing Motion using the CM/ECF system which will serve notification of such filing to the email of all counsel of record in this action.

By: */s/ Andrew B. Bloomer, P.C.*
Andrew B. Bloomer, P.C.

EXHIBIT D-2

PLAINTIFFS' OPPOSITION TO GM'S *DAUBERT* MOTION TO EXCLUDE THE OPINIONS OF STEFAN BOEDEKER

[MDL ECF NO. 6187] (FILED OCTOER 19, 2018)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE: GENERAL MOTORS LLC IGNITION SWITCH LITIGATION	No. 14-MD-2543 (JMF) No. 14-MC-2543 (JMF) Hon. Jesse M. Furman
This Document Relates to: ALL ACTIONS	

PLAINTIFFS' OPPOSITION TO GM'S *DAUBERT*
MOTION TO EXCLUDE THE OPINIONS OF STEFAN BOEDEKER

[REDACTED VERSION]

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

I. INTRODUCTION

GM's motion to exclude the opinions of Stefan Boedeker should be denied in its entirety. Mr. Boedeker employed the well-established methodology of conjoint analysis to estimate Class-wide economic losses that precisely fit Plaintiffs' benefit-of-the-bargain damages theory. GM seeks to exclude Mr. Boedeker's opinions by mischaracterizing his survey and conjoint analysis.[1]

Mr. Boedeker estimates Class-wide damages by comparing overall consumer demand for GM vehicles *with* knowledge of the defects at issue in this litigation (the but-for world) to overall consumer demand for GM vehicles *without* knowledge of those defects (the actual world). The difference in the *with* and *without* demand curves, considered together with the actual supply of vehicles sold by GM to Class members, provides Class-wide proof that all Class members suffered economic losses as a result of GM's alleged wrongful conduct. Mr. Boedeker estimated aggregate demand curves based on regression analysis, which provides Class-wide evidence that all Class members suffered economic loss regardless of any individual willingness-to-pay. He then estimated damages by conducting a "but for" analysis in which GM sold the actual number of vehicles it sold in the real world but had to disclose the truth about those vehicles. This is the exact supply-side methodology—measuring damages based on the supply of products *actually* sold by the defendant to class members—that courts endorse without exception. *See, e.g.*, *Broomfield v. Craft Brew Alliance, Inc.*, 2018 WL 4952519 (N.D. Cal. Sept. 25, 2018) (rejecting challenge to analysis by Mr. Boedeker); *Hadley v. Kellogg Sales Co.*, 2018 WL 3954587 (N.D. Cal. Aug. 17, 2018).[2]

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[1] *See* Memorandum of Law in Support of General Motors LLC's Motion to Exclude the Opinions of Stefan Boedeker (Dkt. No. 6070) ("GM Br.").

[2] *Accord*, *In re MyFord Touch Consumer Litig.*, 291 F. Supp. 3d 936 (N.D. Cal. 2018); *Davidson v. Apple, Inc.*, 2018 WL 2325426 (N.D. Cal. May 8, 2018); *Fitzhenry-Russell v. Dr. Pepper Snapple Grp.*, 2018 WL 3126385 (N.D. Cal. June 26, 2018); *In re Dial Complete Mktg. & Sales Practices Litig.*, 320 F.R.D. 326 (D.N.H. 2017); *In re Lenovo Adware Litig.*, 2016 WL 6277245 (N.D. Cal. Oct. 27, 2016).

GM consistently mischaracterizes Mr. Boedeker's survey and his conjoint analysis of the responses gathered in that survey. In particular, GM falsely claims that Mr. Boedeker measures each individual survey respondent's willingness to pay for certain features of GM vehicles. To the contrary, he estimates overall demand for GM vehicles *with* consumer knowledge of the defects at the time of sale (the but-for world) and overall demand for GM vehicles *without* consumer knowledge of the defects at the time of sale (the actual world). He then measures the downward shift in the demand curve when consumers learn of defects at the time of sale. This empirically-determined downward shift, with supply fixed at the number of vehicles actually sold by GM to Class members, provides Class-wide proof of the losses suffered by Class members.

GM mistakenly suggests that the Boedeker survey asked the respondents to value arbitrary safety features at arbitrary prices. In fact, the survey [redacted]. And contrary to GM's repeated mischaracterization that Mr. Boedeker used arbitrary prices, he explicitly [redacted] Ex. 214 at ¶ 442.[3] *See In re Elec. Books Antitrust Litig.*, 2014 WL 1282293, at *30 (S.D.N.Y. Mar. 28, 2014) (rejecting *Daubert* challenge that "ignores the factual record"). In fact, Mr. Boedeker's survey is very similar to GM's own conjoint surveys; in addition to asking about safety features, GM's conjoint surveys use similar methodology as Mr. Boedeker's. Ex. 215 at ¶ 404.

[3] All references to Ex. 214 and 215 cited herein are to those two exhibits as attached to the Declaration of Steve W. Berman in Support of Economic Loss Plaintiffs' Motion to Certify Bellwether Classes in California, Missouri, and Texas (Dkt. No. 5848).

GM also mischaracterizes Mr. Boedeker's conjoint analysis of the survey responses. In particular, in a misleading attempt to fabricate individual issues, GM and its experts improperly focus on individual survey respondents' willingness to pay for GM vehicles. But the market price of GM vehicles [redacted] *Id*. at ¶ 448. GM also falsely asserts that Mr. Boedeker simply averaged willingness-to-pay of individual respondents. Not so. Mr. Boedeker did not estimate individual willingness-to-pay *at all*. Instead, [redacted]

When these (and other) mischaracterizations of Mr. Boedeker's work are corrected, GM's motion to exclude his opinions collapses or shrinks to a set of expert battles that raise classic jury issues. GM has challenged Mr. Boedeker's analysis only with respect to class certification, so the issue for this Court is whether it may utilize his analysis in assessing Rule 23. Mr. Boedeker has properly measured Class-wide economic losses by applying a valid methodology, one used by GM itself and accepted by numerous courts to measure class-wide damages, so his analysis should be considered as part of Plaintiffs' proof in assessing class certification.

This Opposition proceeds as follows. *First*, it explains conjoint analysis and its acceptance by courts as a methodology to measure class-wide damages. *Second*, it describes Mr. Boedeker's survey and conjoint analysis. *Third*, it debunks GM's mischaracterizations of what his survey measured and how it measured it. From there, it proceeds to demonstrate that the *Daubert* criteria are satisfied: (1) Mr. Boedeker is qualified; (2) his survey and conjoint analysis are relevant and

reliable; (3) his analysis properly estimates benefit-of-the-bargain damages Class-wide; and (4) he measures only benefit-of-the-bargain damages, not legal penalties or punitive damages.

II. STANDARD OF REVIEW

"When a motion to exclude expert testimony is made at the class certification stage, the *Daubert* standard applies, but the inquiry is 'limited to whether or not the [expert reports] are admissible to establish the requirements of Rule 23.'" *Dandong v. Pinnacle Performance Ltd.*, 2013 WL 5658790, at *13 (S.D.N.Y. Oct. 17, 2013) (citation omitted). The "'question is not ... whether a jury at trial should be permitted to rely on [the expert's] report to find facts as to liability, but rather whether [the Court] may utilize it in deciding whether the requisites of Rule 23 have been met.'" *Id*. (citation omitted). "*Daubert* requires that an expert's testimony 'both rest [ ] on a reliable foundation and [be] relevant to the task at hand.'" *Id*. (quoting *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 597 (1993)). "Although expert testimony should be excluded if it is speculative or conjectural, or if it is based on assumptions that are so unrealistic and contradictory as to suggest bad faith, or to be in essence an apples and oranges comparison, other contentions that the assumptions are unfounded go to the weight, not the admissibility, of the testimony." *Dandong*, 2013 WL 5658790 at *15 (citations and internal quotation marks omitted).

Here, as in *Dandong*, GM's objections to the relevance and reliability of Mr. Boedeker's analysis "go more to weight than to admissibility." *Id*.

III. MR. BOEDEKER'S CONJOINT ANALYSIS

A. Conjoint analysis is an established methodology to measure economic loss.

Conjoint analysis is a reliable methodology that "has been used for decades as a way of estimating the market's willingness to pay for various product features." *Guido v. L'Oréal, USA, Inc.*, 2014 WL 6603730, at *5 (C.D. Cal. July 24, 2014). As Mr. Boedeker explains, the "[redacted]

[redacted]." Ex. 215 at ¶ 84. Businesses, including GM, regularly use conjoint analysis. Ex. 214 at ¶ 28 (more than [redacted]). A conjoint analysis is well-suited to calculate benefit-of-the-bargain damages in this litigation because it can measure the difference in market value between a vehicle with an undisclosed defect and an otherwise identical vehicle with a defect disclosed at the point of purchase. *Id*. at ¶ 113.

Courts routinely find that conjoint analysis is a "well-established damages model." *Price v. L'Oréal USA, Inc.*, 2018 WL 3869896, at *9 (S.D.N.Y. Aug. 15, 2018) (citing *Briseno v. ConAgra Foods, Inc.*, 674 F. App'x 654, 657 (9th Cir. 2017)); *see also Dzielak v. Whirlpool Corp.*, 2017 WL 1034197, at *6 (D.N.J. Mar. 17, 2017) ("Conjoint analysis has won acceptance from courts and legal commentators."). Further, courts "have recognized that conjoint analysis can effectively determine the value customers ascribe to a particular product attribute by measuring the 'part worth' of that attribute." *Dial*, 320 F.R.D. at 334.[4] More specifically, conjoint analysis has been found reliable to determine the "but-for" market value of automobiles with undisclosed defects to estimate Class-wide damages, as Mr. Boedeker does in this litigation. *MyFord Touch*, 291 F. Supp. 3d at 971; *Sanchez-Knutson v. Ford Motor Co.*, 310 F.R.D. 529, 539 (S.D. Fla. 2015).

[redacted].

Ex. 215 at ¶ 45. [redacted]

[4] Mr. Boedeker explains the use of part-worths. By having respondents answer a series of questions that evaluate their preferences between potential product profiles, Ex. 214 at ¶ 25, a conjoint analysis [redacted]." Ex. 215 at ¶ 84. Survey responses are used to find the [redacted] *Id*. at ¶ 85. Part-worths determine the "[redacted]." *Id*. at ¶ 86. Part-worths also [redacted]" thus allowing a researcher to "[redacted]." *Id*. at ¶ 88.

[redacted] *Id.* at ¶ 44. [redacted]

[redacted]:

- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]

Id. at ¶ 404.

B. Mr. Boedeker's analysis.

[redacted]

[redacted] *Id.* at ¶ 107. [redacted]

[redacted]

[redacted] *Id.* [redacted]

[redacted]. *Id.* at ¶ 129.

1. Mr. Boedeker's survey.

Mr. Boedeker utilized an online survey to conduct his conjoint analysis. As he explains, "[redacted]

[redacted] *Id.* at ¶ 25. *See TV Interactive Data Corp. v. Sony Corp.*, 929 F. Supp. 2d 1006, 1020 (N.D. Cal. 2013) (studies validate the use of conjoint analysis for purpose

of "comparing respondents' choices when presented with different features … [because that] is more reliable than asking consumers directly what they would pay for a specific feature").

The survey company [redacted] Ex. 214 at ¶ 73. The company [redacted]. *Id.* at ¶¶ 83-84. In the bellwether survey, [redacted] Ex. 215 at ¶ 520. [redacted] *Id.* [redacted] *Id.* at ¶¶ 86-87.

[redacted]. Ex. 214 at ¶ 90. [redacted] *Id.* at ¶ 91; *see also id.* at Figure 9. [redacted] *Id.* at ¶ 92 ([redacted] e. *Id.*

2. Mr. Boedeker's statistical analysis.

Armed with hundreds of thousands of data points in the aggregate, Mr. Boedeker took three steps to analyze the survey results and calculate economic loss. *First*, [redacted]. Ex. 214 at ¶ 107. These

common techniques [redacted]." Ex. 215 at ¶ 86. These methods are "[redacted]." Ex. 214, App'x ¶ E.1. *See Davidson*, 2018 WL 2325426, at *21 (N.D. Cal. May 8, 2018) ("[redacted]").

Second, he performed market simulations "to [redacted]" across all respondents (i.e., in the aggregate, not individually) at different price points. Ex. 214 at ¶ 110. *Third*, he estimated "[redacted] *Id*. at ¶ 112. [redacted] *Id*. at ¶ 115. In other words, Mr. Boedeker's three steps turned raw survey data into an appropriate estimate of Class-wide damages for each vehicle.

C. GM mischaracterizes Mr. Boedeker's analysis.

In its purported explanation of Mr. Boedeker's methodology, *see* GM Br. at 7-10, GM mischaracterizes his analysis in four fundamental respects.

First, GM falsely asserts that Mr. Boedeker's survey uses "arbitrarily-selected 'safety features'" and "five arbitrarily selected prices." GM Br. at 7. In reality, his $500 price increments (ranging from $500 to $2,500) are not arbitrary. Rather, [redacted] Ex. 214 at ¶ 442. *See Broomfield*, 2018 WL 4952519, at *19 ("[T]he Court finds no issues with the prices Boedeker

used in his survey. In describing why he selected those prices, Boedeker explains that 'the prices are not necessarily the exact prices charged for Kona beer in the market,' but instead reflect a 'realistic' price range for the product[.]").[5] Further, to the extent GM implies that hypothetical safety packages are improper survey subjects, it ignores that its own conjoint analyses seek information about hypothetical safety features (with hypothetical prices), as discussed below. Indeed, conjoint analysis is *designed* to test hypotheticals.

Second, GM fundamentally misrepresents Mr. Boedeker's analysis of the survey responses in order to make it appear that he merely averages individuals' willingness to pay. Specifically, GM falsely asserts that "Boedeker then used these utilities [for each survey respondent] to estimate the probability that each respondent would purchase each of his hypothetical scenarios at each of his five arbitrary price points ($500, $1000, $1500, $2000, $2500), compared to the alternative of not purchasing the scenario." GM Br. at 7. In fact, to create Class-wide demand curves, Mr. Boedeker [redacted]. Ex. 214 at ¶ 116.[6] As Mr. Boedeker explained, "[redacted]

[5] The survey does not require that respondents actually pick one of these values. As described above, respondents can choose whether or not they would actually purchase the option they chose.

[6] *See also* Ex. 215 at ¶ 398 ("[redacted]") (emphasis added).

[redacted]”[7] GM makes this misleading description because it wants the Court to focus on each survey respondent, rather than on the demand curves that apply to all Class members. As Mr. Boedeker explains, “[redacted]”[8]

Third, GM claims wrongly that Mr. Boedeker calculated percentages of specific individual survey respondents behaving in a particular manner. He did not do this, and the data does not even allow for such calculations. For example, GM incorrectly claims that “Boedeker calculated a 36% probability that respondent #2085 from the MDL survey would purchase a scenario including collision avoidance, blind-spot warning, and rear-view camera, no recall, and pay a price for that of $500.” GM Br. at 8. In fact, [redacted] Ex. 215 at ¶¶ 447-449. [redacted] *Id*. at ¶¶ 447-448.[9]

[7] Ex. 214 at ¶ 113.

[8] Ex. 215 at ¶ 23 (emphasis in original).

[9] *See id*. at ¶ 448 ([redacted] ”).

Fourth, GM describes Mr. Boedeker's computer simulation incorrectly by stating that "the computer calculates [the survey respondents'] overall ***average*** (mean) probability of willingness-to-pay for each arbitrarily assumed price for the same scenario." GM Br. at 8 (emphasis supplied by GM). In fact, [redacted],"[redacted] as GM says. [redacted] Ex. 215 at ¶ 398. [redacted] Ex. 214 at ¶ 107. In *Dial*, Mr. Boedeker similarly properly calculated "the marginal consumer's willingness to pay for the comparative product (not an 'average' or 'median' willingness to pay')[.]" 320 F.R.D. at 336.

[redacted] *See* Ex. 214 at ¶ 118; Ex. 215 at ¶ 398. This provided Class-wide evidence that all Class members suffered economic losses. Misleadingly, GM cites deposition testimony by Mr. Boedeker that may appear to say that he calculated simple average probabilities of individuals respondents' willingness to pay, *see* GM Br. at 8, but he explained immediately after that testimony that he in fact calculated [redacted]." *See* Affirmation of Allan Pixton ("Pixton Aff.") (Dkt. No. 6075), Ex. 34 (July 5, 2018 Boedeker Dep. at 278:19, 279:8-11); *see also Dzielak*, 2017 WL 1034197, at *21 (denying *Daubert* motion

to exclude expert's conjoint analysis, in part because "defendants' argument is based on a selective quotation of [the expert's] deposition testimony.").

* * *

[redacted] *See* Ex. 214 at ¶ 118; Ex. 215 at ¶ 398. This provides Class-wide evidence that all Class members suffered economic losses. Mr. Boedeker's reports clearly document this methodology and the damage estimates. GM's *Daubert* arguments merely mischaracterize his conjoint surveys and analysis of the survey responses to estimate damages. *See Abrams v. Ciba Specialty Chems. Corp.*, 2010 WL 779277, at *5 n.10 (S.D. Ala. Mar. 2, 2010) ("blatant mischaracterization of expert opinions has surfaced all too frequently in these *Daubert* motions"). All of GM's arguments lack merit, as demonstrated below.

IV. ARGUMENT

A. Mr. Boedeker is highly qualified.

GM incorrectly argues that Mr. Boedeker is not qualified to offer his opinions. GM Br. at 46-50. Mr. Boedeker has extensive experience with the use of conjoint analysis in general and specifically to calculate overpayment damages in consumer class actions. *See* Berman Reply Decl., Ex. 13 (Boedeker CV). He has a Bachelor of Science in Statistics and Business Administration, a Masters in Statistics, and a Masters in Economics. *Id.* He has worked in the economic and statistical consulting field since 1991 and is currently a Managing Director of the Berkeley Research Group (BRG). *Id.* Before working at BRG, he held partner-level positions in economic and statistical consulting at Arthur Andersen LLP, PricewaterhouseCoopers LLP, and Deloitte & Touche. *Id.* Much of his work over the past two decades, both in and out of litigation, has involved conjoint analysis. His credentials should not be disputed, just as they have not been disputed in

the other cases in which he has provided conjoint analysis of damages. Courts regularly find experts with comparable or lesser credentials to be qualified. *See Hughes v. The Ester C Co.*, 317 F.R.D. 333, 341-42 (E.D.N.Y. 2016) (expert who was vice president at research and consulting firm, held MBA, and had experience testifying in many courts found qualified over defendant's objections); *In re ConAgra Foods, Inc.*, 90 F. Supp. 3d 919, 952-53 (C.D. Cal. 2015) (expert who had never performed conjoint analysis to determine a price premium, but had a Ph.D. and taught conjoint analysis at undergraduate and graduate levels qualified), *aff'd*, 844 F.3d 1121 (9th Cir. 2017). And as shown below, courts have routinely admitted Mr. Boedeker's analysis of damages in class actions using conjoint analysis.

1. Many courts have admitted Mr. Boedeker's conjoint testimony.

GM's says that no court has considered "a direct challenge to Boedeker's qualifications." GM Br. at 47. GM's argument is backwards. The fact that GM could not find a "direct challenge" to Mr. Boedeker does not indicate his lack of qualifications but rather that other defendants have not even bothered to contest his credentials. In *Dial*, the court stated that "it is unclear whether Dial is arguing that Boedeker is unqualified to testify as an economic damages expert" but to "the extent Dial is making that argument, the court rejects it," because his "educational and professional background includes sufficient experience, knowledge and training to qualify him as an expert in the field of economic and statistical analysis and modeling." 320 F.R.D. at 331. *See also, e.g.*, *MyFord Touch*, 291 F. Supp. 3d at 943 (rejecting *Daubert* motion and stating that "Mr. Boedeker is an economist with advanced degrees in statistics and economics, and 25 years of experience applying economic, statistical, and financial models," and that "Ford does not challenge" those qualifications).

GM's argument that Mr. Boedeker's opinions should be excluded because he referred to himself as a "user" of conjoint analysis is also backwards, even setting aside its cherry-picking of

a few sentences from almost 24 hours of deposition testimony in this case alone. GM Br. at 48. He has performed conjoint studies for two decades, which by itself suffices. *See U.S. Commodity Futures Trading Comm'n v. Moncada*, 2014 WL 2945793, at *3 (S.D.N.Y. June 30, 2014) (finding that expert has "excellent credentials" and "probably has a better understanding [of] how the commodities market works [than] does some business school professor who has studied a great deal but never traded a futures contract under the gun"); *Johnson & Johnson Vision Care, Inc. v. CIBA Vision Corp.*, 2006 WL 2128785, at *5 (S.D.N.Y. July 28, 2006) ("one may be an expert solely based on one's practical experience notwithstanding a lack of professional education").

2. GM's attempts to disqualify Mr. Boedeker fail.

GM erroneously believes that this Court can and should reject Mr. Boedeker's opinions merely because it has hired a phalanx of experts who dispute his findings. GM Br. at 49-50. The focus is on *his* qualifications and analysis, not whether GM's experts disagree with his findings and methodology. *See McCullock v. H.B. Fuller Co.*, 61 F.3d 1038, 1044 (2d Cir. 1995) ("Disputes as to the strength of his credentials, faults in his use of differential etiology as a methodology, or lack of textual authority for his opinion, go to the weight, not the admissibility, of his testimony."). Cases routinely involve experts who disagree with each other's methods, and expert testimony cannot be excluded merely because the opposing party spends millions of dollars on its experts.

Finally, GM's argument that Mr. Boedeker's opinions should be excluded simply because he does not have a Ph.D. or academic publications is wrong. GM Br. at 47.[10] But "[a]cademic credentials, teaching experience, and the publication of papers are not necessary accoutrements to a robust practical resume that can qualify a person as an expert by virtue of knowledge and

[10] Mr. Boedeker met Ph.D. requirements except dissertation in Economics at the University of California, San Diego. *See Dial*, 320 F.R.D. at 329 n.4.

experience—both of which are specifically mentioned in Fed. R. Ev. 702." *Moncada*, 2014 WL 2945793, at *3. None of the cases GM cites supports exclusion of his testimony. GM Br. at 48.[11]

B. Mr. Boedeker's methodology and opinions are relevant and reliable.

Mr. Boedeker's conjoint survey is relevant and reliable because it appropriately measures the value that consumers place on cars with and without disclosed defects. As explained above, Section III.B, he used a standard methodology for his survey, obtained reliable survey results, and analyzed those results using industry-standard methods for determining the demand curves in the actual and but-for worlds and the resulting Class-wide median economic losses. From there, he multiplied those median losses by the fixed, historical amount of vehicles sold to Class members to obtain aggregate damages. This methodology appropriately measures benefit-of-the-bargain damages, as numerous courts have held. *See, e.g., Sanchez-Knutson*, 181 F. Supp. 3d at 995.

1. Mr. Boedeker incorporated real-world pricing appropriately.

As explained above, Mr. Boedeker measured the drop in consumer demand for the Class vehicles at the point of sale. As part of his analysis, he simulated the buying process for a consumer who has selected a vehicle but has not chosen particular options. As he states, survey respondents "[redacted]."[12] This is the essence of conjoint analysis in that [redacted]

[11] *See State of N.Y. v. UPS*, 2016 WL 4735368, at *8 (S.D.N.Y. Sept. 10, 2016) (expert had no survey experience at all); *Bloom v. ProMaxima Mfg. Co.*, 669 F. Supp. 2d 321, 329 (W.D.N.Y. 2009) (excluded expert had expertise in chair repair, but not chair design); *Long v. Monaco Coach Corp.*, 2007 WL 4613000, at *6 (E.D. Tenn. Sept. 27, 2007) (expert had no qualification to appraise a motor coach); *Wolf v. Hewlett Packard Co.*, 2016 WL 7743692, at *6 (C.D. Cal. Sept. 1, 2016) (excluding expert who "never conducted a conjoint study" and had no "educational or professional background in survey design or sampling").

[12] *See* Declaration of Steve W. Berman in Support of: 1) Economic Loss Plaintiffs' Reply Memorandum in Support of Motion to Certify Bellwether Classes in California, Missouri, and Texas; and 2) Oppositions to GM's *Daubert* Motions to Exclude the Opinions of Boedeker, Gans, Goldberg, and Manuel ("Berman Reply Decl."), Ex. 4 (July 6, 2018 Boedeker Dep.), at 427:15-19.

[redacted]." *Id*. at 428:19-22.

GM criticizes Mr. Boedeker for allegedly failing to "analyze prices of 'vehicles,'" GM Br. at 15, *even though GM uses exactly the same methodology* as Mr. Boedeker for its own business purposes. [redacted]"[14]

2. Mr. Boedeker chose appropriate features for his survey.

a. Mr. Boedeker chose appropriate "distractors."

When conducting his surveys, Mr. Boedeker properly included features relating to safety that were not the true focus of his survey. In particular, his initial survey included options for a rear view camera, lane-departure warning system, and collision-avoidance system with automatic emergency braking. *See* Ex. 214 at Fig. 9 (p. 31). His second conjoint survey included a forward collision warning system, a blind-spot warning system, and an anti-glare windshield. *See* Ex. 215 at Fig. 22 (p. 329). In conjoint surveys, these "distractor features" are included to prevent survey participants from inferring the true purpose of the survey and thus biasing its results.[15] He further

[13] *See* Berman Reply Decl., Ex. 1 (GM-MDL2543-402575459), at p. 12. Rather than acknowledge that its own methodology is the same as Boedeker's, GM cites Dr. Gans's discussion of peanut butter sandwiches and peanut butter. *See* GM Br. at 16-17. GM does not even try to show how bread is like a base vehicle to which an "option of peanut butter" is added. Of course, peanut butter and bread can be bought separately, unlike safety features, which are *features* of a car, not standalone products. GM's convoluted analogy falls flat in light of its own conjoint analyses.

[14] *See* Berman Reply Decl., Ex. 2 (GM-MDL2543-402633685), [redacted]

[15] Mr. Boedeker's deposition testimony amplifies why he chose attributes in order to disguise his interest in the effect of recalls on consumer demand. *See, e.g.*, Berman Reply Decl., Ex. 5 (Feb. 6, 2018 Boedeker Dep. at 110:16-

disguised the focus of his survey by showing all attributes other than price in a random order. Ex. 214 at ¶ 94. The estimated damages in his two surveys are essentially the same, which shows that neither set of distractor features biased his results.[16] *See Apple, Inc. v. Samsung Elecs. Co., Ltd.*, 2014 WL 794328, at *16 n.10 (N.D. Cal. Feb. 25, 2014) ("Whether Dr. Hauser chose the correct distraction features, or whether he should have instead relied on other distraction features, goes to weight, not admissibility.").

b. Mr. Boedeker properly limited the number of features.

Mr. Boedeker's survey also correctly asked about a limited number of features, holding all else constant. Conjoint surveys are designed to measure the value of particular features rather than to test each and every product feature. Indeed, this is the same approach GM itself takes when measuring consumer demand for vehicle safety features; *i.e.*, it asks only about safety features and holds all else constant rather than asking about features such as brand, color, size, or design.[17]

Now, in litigation, GM contends that a conjoint survey of vehicles must *also* ask about "brand name, design, size of engine, trim level, safety features, etc." Plaintiffs are aware of no survey that has *all* of these attributes, and GM cites none. Its argument goes at most to weight, not admissibility. *See TV Interactive*, 929 F. Supp. 2d at 1020 ("Sony's criticism of the survey

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18) [redacted]).

[16] *See, e.g.*, Berman Reply Decl., Ex. 5 (Feb. 6, 2018 Boedeker Dep. at 110:16-18) (" [redacted] .").

[17] *See* Berman Reply Decl., Ex. 2 (GM-MDL2543-402633685), [redacted] .

designs is more appropriate for consideration by a jury, rather than the Court on a *Daubert* motion."). This is particularly so because GM never gives any explanation as to *why* particular features had to be included as a matter of law. *See Fitzhenry-Russell*, 2018 WL 3126385, at *6 ("Dr. Pepper criticizes that Dr. Dennis did not include an attribute for taste in the survey…. While perhaps interesting, the problem with this argument is that Dr. Pepper did not follow it up with a 'so what' explanation of what legal difference this makes.").

c. The cases relied on by GM concerning survey features are readily distinguishable.

In erroneously contending the Mr. Boedeker's survey is so flawed that his opinions must be excluded, GM relies on easily distinguished cases in which courts found flaws in conjoint surveys that are not present in this litigation.[18] In *Townsend v. Monster Beverage Corp.*, 303 F. Supp. 3d 1010 (C.D. Cal. 2018), the court found that Mr. Boedeker's conjoint survey suffered from focalism bias because "attributes that ranked 8th, 9th, 10th, and 11th out of 16 attributes, with less than 10% of all survey respondents even mentioning each attribute as important to their purchasing decision, constitute approximately 81% of the value of the overall product, based on a product price of $2.24." *Id*. at 1050. GM does not and cannot demonstrate that Mr. Boedeker's

[18] In two footnotes, GM cites non-conjoint cases that have no relevance. GM Br. at 18-19 nn.21 & 22. GM cites "consumer confusion" cases in which survey questions improperly suggested a link between the plaintiff and defendant. *See Universal City Studios, Inc. v. Nintendo Co., Ltd.*, 746 F.2d 112, 118 (2d Cir. 1984) ("The participants were presented with the Donkey Kong-King Kong connection rather than permitted to make their own associations"); *Scott Fetzer Co. v. House of Vacuums Inc.*, 381 F.3d 477, 488 (5th Cir. 2004) ("[T]he survey question suggested a connection between House of Vacuums and Kirby instead of permitting participants to make their own associations. A survey question that begs its answer by suggesting a link between plaintiff and defendant cannot be a true indicator of the likelihood of consumer confusion."). The other cases cited by GM are also inapposite. *See Herman Schwabe, Inc. v. United Shoe Mach. Corp*., 297 F.2d 906, 911 (2d Cir. 1962) (antitrust economics expert inappropriately calculated market share); *Sears, Roebuck & Co. v. Menard, Inc.*, 2003 WL 168642, at *2 (N.D. Ill. Jan. 24, 2003) (survey showing respondents commercials "distorted marketplace conditions"); *Sunlight Saunas, Inc. v. Sundance Sauna, Inc*., 427 F. Supp. 2d 1022, 1030 (D. Kan. 2006) (expert's calculation of lost profits excluded for relying on plaintiff's historically inaccurate revenue projections); *Cochrane v. Schneider Nat'l Carriers, Inc*., 980 F. Supp. 374, 378 (D. Kan. 1997) (wrongful death damages estimated on wrong lifespan); *In re Aluminum Phosphide Antitrust Litig*., 893 F. Supp. 1497, 1505 (D. Kan. 1995) ("Dr. Hoyt's assumption that any change in prices between 1993 and the conspiracy period was caused solely by the conspiracy is not scientifically or economically valid.").

analysis here similarly shows that unimportant attributes constitute a large percentage of the value of the Class vehicles. His analysis estimates reasonable economic loss due to GM's failure to disclose defects, which cannot be deemed unimportant to consumers. *See, e.g.*, *In re GM LLC Ignition Switch Litig.* ("*TACC* Order"), 2016 WL 3920353, at *20 (S.D.N.Y. Feb. 20, 2016) ("a concealed defect" that "implicated a safety issue ... would have affected a reasonable person's decision to purchase a car").

Nor does Mr. Boedeker's analysis in this case suffer from any of the flaws identified by the court in *In re Fluidmaster, Inc., Water Connector Components Prods. Liab. Litig.*, 2017 WL 1196990 (N.D. Ill. Mar. 31, 2017). In *Fluidmaster*, the court assessed a proposed survey that "has not been conducted yet." *Id*. at *28. The survey would measure five attributes, "without determining if they play an important role in real-world consumers' preferences," which "potentially elevates the two attributes linked to Plaintiffs' damages claims and inflates respondents' WTP estimate for these attributes." *Id*. at *31. In contrast, Mr. Boedeker actually conducted a conjoint survey and provided evidence of the relevance of each survey attribute. Specifically, he presented an attribute utility analysis, which shows the relative importance of each attribute. Ex. 214, Figure 13. The rear-view camera ranks the highest, followed by price, the collision warning system, and recall. This demonstrates that the attributes in the survey other than recall were highly relevant to the respondents, unlike in *Fluidmaster*, where the expert "select[ed] four non-price attributes without determining if they play an important role in real-world consumers' preferences." *Fluidmaster*, 2017 WL 1196990, at *31.

Nor is this case at all like another case cited by GM, *Oracle Am., Inc. v. Google Inc.*, 2012 WL 850705 (N.D. Cal. Mar. 13, 2012), in which the court assessed market share, not whether a

price premium was paid, making the proffered conjoint analysis irrelevant.[19] Further, unlike here, the conjoint survey "inappropriately focused consumers on artificially-selected features." *Id*. at *10. And the court's suggestion that the survey perhaps should have shown 39 different features to respondents is at odds with other courts' consistent recognition that conjoint surveys must limit the number of features shown to the respondents. *See, e.g., In re ConAgra Foods*, 90 F. Supp. 3d at 954 (conjoint analysis properly limited to six attributes). Indeed, Dr. McFadden (a GM expert) has opined that "humans are limited in their capacity for choosing among a large number of options" and that "consumers cannot make effective decisions that involve weighing more than seven attributes."[20] Under that standard, Mr. Boedeker's survey had room for only four additional attributes after including three attributes of price, the possibility of a defect and the timing of recalls. He included three safety attributes, which means that under Dr. McFadden's view, he could only include one more attribute. *See* Ex. 215 at ¶ 541. Nonetheless, GM and its experts do not even suggest *which* attributes he should have included, and they did not conduct any empirical analysis on that subject.[21]

In any event, disputes about the number of survey choices go to weight, not admissibility. *See TV Interactive*, 929 F. Supp. 2d at 1026 (dispute over number of survey options is "for the jury to decide"); *Dial*, 320 F.R.D. at 332-33 (court denied defendant's argument about number of attributes Mr. Boedeker includes, reasoning that "[t]here is an important difference between what

[19] *Odyssey Wireless, Inc. v. Apple, Inc.*, 2016 WL 7644790, at *9 n.12 (S.D. Cal. Sept. 14, 2016) ("The Court does not find persuasive Defendants' reliance on *Oracle*…. In *Oracle*, the expert at issue used a conjoint analysis to attempt to measure market share, not a consumer's willingness to pay for a particular feature of a product.").

[20] *McFadden, et al*., "The Role of Conjoint Surveys in Reasonable Royalty Cases," *Law360*, Oct. 16, 2013, https://www.law360.com/articles/475390/.

[21] And GM is not aided by the *Oracle* court's finding that "irrational results shows that study participants did not hold all other, non-tested features constant. Specifically, the results show that one quarter of all participants preferred (9%), or were statistically indifferent between (16%), a smartphone costing $200 to a theoretically identical smart-phone costing $100[.]" *Id.* at *11. As demonstrated below, GM fails to show any irrational results in this matter.

is unreliable support and what a trier of fact may conclude is insufficient support for an expert's conclusion. As plaintiffs correctly note, those issues—and the myriad others identified by *Dial*—are either curable, or go to the weight, not admissibility, of Boedeker's testimony."); *Hadley*, 2018 WL 3954587, at *15 ("even though Kellogg's critiques about Gaskin's failure to include certain attributes in his conjoint survey may be valid, it is well-established that these types of critiques merely go to the weight, but not to the admissibility, of survey-based analyses").[22]

3. Mr. Boedeker's analysis is based on proper disclosure of defects at the time of purchase, not on expectations of a "defect-free" vehicle.

Mr. Boedeker measured whether consumers would expect to be told that GM *knew at the time of purchase* that the vehicles they bought contained safety defects unknown to the public. GM ignores this focus when it incorrectly contends that his analysis must be excluded because he purportedly assumes that consumers expect a defect-free vehicle. GM Br. at 21-24.

In fact, Mr. Boedeker did *not* assume that customers expect that a vehicle is always defect free. Instead, he analyzed whether consumers would expect to be told that GM *knew at the time of purchase* that the vehicles they bought contained latent safety defects. His surveys plainly reflect that theory of liability. *See* Ex. 215 at ¶ 634 ("[redacted]

[redacted]

[redacted]

[redacted]

[22] *Accord*, *Zakaria*, 2017 WL 9512587, at *13 (defendant's objections regarding expert's failure to account for certain important product attributes in his conjoint surveys "go to weight, not admissibility"); *Sanchez-Knutson v. Ford Motor Co*., 181 F. Supp. 3d 988, 995 (S.D. Fla. 2016) ("Ford challenges Gaskin's methodology, including but not limited to ... the variables he used [in his conjoint survey]. These arguments go to the weight of the survey, not its admissibility, and may be addressed by cross-examination and the presentation of contrary evidence at trial[.]"); *Khoday v. Symantec Corp.*, 93 F. Supp. 3d 1067, 1083 (D. Minn. 2015) ("To the extent Defendants believe Gaskin's analysis should have included additional factors or that it does not adequately explain the conclusions Gaskin reached, '[d]irect and cross-examination, testimony by supporting and opposing witnesses, and argument by plaintiff and defense counsel will provide the additional guidance 'needed to justify the inferences' the parties seek to draw from [Gaskin]'s survey.'") (citation omitted).

[redacted] "); *id*. at ¶ 635 ("[redacted]

[redacted]") (emphasis added).

GM quotes Mr. Boedeker's report out of context in support of its false claim that he and survey respondents assumed that vehicles are defect free. For example, GM cites "2nd Rpt. ¶ 103 ('buyers were led to believe they had received … a particular ***defect-free GM vehicle***.')…." GM Br. at 22 (emphasis added by GM).[23] In fact, Mr. Boedeker states in paragraph 103 that he assessed

[redacted] (Emphasis added.) GM omits the italicized portion of that statement, which shows that Mr. Boedeker did not measure losses based on the assumption that buyers believe all vehicles are always defect-free. Instead, he measured losses from a defect *known to GM at the time of sale but not to consumers*.

Next, GM posits that Mr. Boedeker's statement that "non-disclosure of defect caused class members to overpay for their vehicles" relies on a defect-free assumption. GM Br. at 22 (quoting Ex. 214 at ¶ 22). Not so. That quotation plainly shows that Mr. Boedeker analyzed overpayments

[23] Much like Mr. Boedeker, the Court has at times used the term "defect-free" as a shorthand. *See, e.g., TACC Order*, 2016 WL 3920353, at *30 ("benefit-of-the-bargain defect theory … measures the difference in value between the defective car the consumer received and the defect-free car the consumer thought she was getting"). The Court used this terminology though Plaintiffs do not claim they "were promised defect-free vehicles." *In re GM LLC Ignition Switch Litig.*, 257 F. Supp. 3d 372, 393-94 (S.D.N.Y. 2017).

caused by GM's "non-disclosure" of known defects, not by defects that were unknown both to GM and consumers.

Similarly, GM quotes Mr. Boedeker as stating that a "purchaser of a vehicle with one of the non-disclosed defects alleged in the Complaint, actually paid for the vehicle with the expectation to receive a vehicle without defects." GM Br. at 22 (quoting Ex. 214 at ¶ 106). GM ignores his explanation that he focused on "non-disclosed defects alleged in the Complaint," not defects of which GM was unaware. Thus, his reference to defect-free vehicles is in the context of analyzing the impact of GM's failure to disclose defects of which it was aware (but of which consumers were unaware) at the point of sale.

All of GM's cases are inapposite. In *Barrows v. Forest Labs., Inc.*, 742 F.2d 54, 60 (2d Cir. 1984), the court rejected as "speculative" the "question whether the parties would have reached any agreement if Forest's true financial condition had been known." As another court has explained, "*Barrows* is distinguishable … because Plaintiffs are not relying on 'a bargain whose terms must be supplied by hypotheses,' but on the transaction that actually occurred. Plaintiffs' allegation is that the transaction that occurred was billed as something other than it actually was to conceal its true nature. In other words, the transaction was 'a wolf in sheep's clothing.'" *In re DaimlerChrysler AG Sec. Litig.*, 197 F. Supp. 2d 42, 68 n.12 (D. Del. 2002). The other cases cited by GM are inapposite because they involve invalid assumptions—an issue not present in Mr. Boedeker's work.[24]

[24] *In re GM LLC Ignition Switch Litig.*, 2017 WL 6729295, at *8 (S.D.N.Y. Dec. 28, 2017) ("given that Plaintiffs and their experts proffer no evidence to support the proposition that the Airbag Deployment RAR Sequence has occurred in the real world—that is, evidence of general causation—they assume the very conclusion that they are trying to prove"); *Stewart v. Estate of Sugar Hill Music Pub. Ltd.*, 2013 WL 1405422, at *1 (S.D.N.Y. Apr. 8, 2013) (faulting expert for "'uncritical reliance on Defendants' representations regarding the amount to which Defendants were entitled under the Assignment and Agreement,' his failure to review the underlying documents Defendants used when preparing royalty summaries, and his unexplained assumption 'that certain companies were collecting 100% of the foreign performance royalties'"); *Davis v. Carroll*, 937 F. Supp. 2d 390, 418-19 (S.D.N.Y. 2013) ("by his own admission, Rosenberg based his conclusion on certain factual assumptions [that] lack *any* basis in the record");

4. The results of Mr. Boedeker's analysis are economically sensible.

Mr. Boedeker's damage estimates are consistent with expectations—consumers in the real world pay a premium for safety features, and consumers in Mr. Boedeker's survey require a discount to drive a vehicle with a safety defect. Ex. 214, Figures 20-22; Ex. 215, Figures 27-29. Despite this, GM argues that Mr. Boedeker's survey results are "irrational." GM Br. at 20. That argument should be rejected for four reasons.

First, this is a "drive by" argument made in only a couple of sentences, with unexplained citations to expert reports. That is procedurally improper. *Gray v. Carter*, 12 C 244, 2015 WL 1502380, at * 9 (N.D. Ill. Mar. 27, 2015) (rejecting "two-sentence drive-by argument"). This is particularly true given that GM received a substantial extension of page limits.

Second, a model such as Mr. Boedeker's is not used to estimate any results for specific individuals, as Dr. List seems to suggest. Specifically, the standard estimation technique that he used—Hierarchical Bayes regression—is not optimized to predict the behavior of individuals but rather to predict aggregate behavior of all survey participants together; to predict the behavior of individual respondents would require them to be presented with a vastly larger number of choice menus than can reasonably be done without fatiguing them. *See, e.g.*, *Becoming an Expert in Conjoint Analysis*, Chapter 12, Orme, Bryan K. and Keith Chrzon, pp. 183-84 (cited by GM's experts); *see also* Ex. 215 at ¶ 448 ("[redacted]

Medisim Ltd. v. BestMed LLC, 861 F. Supp. 2d 158, 179-80 (S.D.N.Y. 2012) ("there is no basis to equate the knowledge of a person admittedly not shopping for a given product with that of a potential purchaser," and because [the expert] did not specify which features of the Medisim product's packaging he was testing, it is impossible to tell what generated the reported confusion"); *Dabush v. Mercedes-Benz USA, LLC*, 874 A.2d 1110, 1121 (N.J. Super. Ct. App. Div. 2005) ("[P]laintiff's asserted loss was based on an unreasonable expectation of what was 'promised' in the brochure—a perfect navigation system that would include data of all locations and provide directions no matter where he happened to be at a particular point. There was no navigation system in any automobile at the time that was capable of fulfilling this expectation."). And another case cited by GM is inapposite, because it did not involve a claim that the defendant knew about but failed to disclose a defect at the time of sale. *Thiedemann v. Mercedes-Benz USA, LLC*, 872 A.2d 783, 794 (N.J. 2005) ("defects that arise and are addressed by warranty, at no cost to the consumer, do not provide the predicate 'loss' that the CFA expressly requires for a private claim under the CFA").

[redacted]

[redacted] ").

Third, even setting aside Mr. Boedeker properly did not estimate the willingness-to-pay of individuals, GM reports the wrong numbers. GM claims that "over ***95% of*** respondents in all three surveys have at least one 'subjective value' that is inconsistent with rational economic behavior...." GM Br. at 20. Not so. As Mr. Boedeker explains, the correct number is only 26.6%, not "over 95%," even assuming that GM's experts' expectations for respondents' preferences are correct, which they are not. Ex. 215 (Table 30) at p. 203. But because individual estimations are "noisy," it is not appropriate to look at raw percentages; instead, the expert must determine whether the estimated results are statistically significant. *See Apple*, 2014 WL 794328, at *16 n.10 (rejecting the argument that results were "irrational" when they were not statistically significant). The overwhelming majority of the individual results GM relies on are *not* statistically significant.[25]

Fourth, GM's "95%" number is also false on its own terms (*i.e.*, even assuming it were proper to look at individual estimations), because it is based on the subjective preferences of GM's experts. In particular, GM's "95%" number includes all consumers who do not want a particular feature in their vehicles. As one example, many rational consumers will prefer *not* to have a lane avoidance system given the current state of the technology. *See* Ex. 215 at ¶ 94 ([redacted] .'").

[25] As Mr. Boedeker explains, "[redacted] '" Berman Reply Decl., Ex. 6 (Boedeker Reply to Sur-Rebuttals, ¶ 14). That is why Mr. Boedeker's damage calculations are based on aggregate results, not individuals' results. Ex. 215 at ¶¶ 720-721. And GM does not challenge those aggregate results as allegedly irrational.

Nonetheless, GM relies on Dr. List's claim that *not* wanting a lane departure warning system is irrational and somehow requires wholesale exclusion of Dr. Boedeker's opinions. *See* Ex. 215 at ¶¶ 406-407. And in its exceedingly brief argument, GM presents nothing to support its claim that *anyone*, let alone 95% of survey respondents, made irrational choices.[26]

Moreover, when Mr. Boedeker examined the conjoint analyses GM itself conducted in the ordinary course of its business in the way that GM proposes analyzing Mr. Boedeker's (*i.e.*, by looking at individual estimations rather than aggregate ones), he unsurprisingly found the same type of supposedly "irrational" results that GM criticizes here. Ex. 215 at ¶ 428. In GM's "[redacted] *Id*. at ¶ 429. Similarly, in GM's "[redacted] *Id*. at ¶ 430. In other words, GM's own conjoint surveys are evidence that Mr. Boedeker's results are not problematic.

All of the cases cited by GM are, yet again, inapposite. In *In re LIBOR-Based Instruments Antitrust Litig.*, 299 F. Supp. 3d 430 (S.D.N.Y. 2018), the court did not assess a conjoint analysis but instead found the "methodology for identifying anomalous submissions is insufficiently reliable" and produced "nonsensical results." *Id*. at 500, 501. Unlike the untested methodology used by the expert in *LIBOR*, Mr. Boedeker used the well-tested and well-accepted methodology of conjoint analysis, and his loss estimations are perfectly sensible.

And GM mischaracterizes *Laumann v. Nat'l Hockey League*, 117 F. Supp. 3d 299, 310 (S.D.N.Y. 2015), in which the court again did not assess a conjoint analysis but instead found that

[26] In any event, "there is some degree of randomness to buyer behavior. It is not that people are irrational, but that buyers must balance the costs of making a utility maximizing decision against the costs of taking the time to make perfect decisions. It is quite reasonable for rational buyers to make what on the surface may seem as haphazard decisions." Ex. 215 at ¶ 409.

"common sense would suggest that the opposite of Dr. Noll's model should hold true…." In other words, the model's *aggregate* results violated economic theory. *Laumann* does not support GM's "for litigation only" effort to improperly examine individuals' willingness-to-pay.

GM also incorrectly claims that Mr. Boedeker's results must be excluded under *Laumann* because he "had 'no real world data' to support" his results. GM Br. at 21. GM ignores the fact that Dr. McFadden, who is one of GM's experts here, was an expert for the defendant in *Laumann* and criticized the plaintiffs' expert for *not* conducting a survey to obtain relevant data. He testified that "'there is now a long tradition and a long history of using survey techniques to understand what's going on and [to] make predictions.'" 117 F. Supp. 3d at 311 (quoting Dr. McFadden). As one court has explained, "Conjoint Analysis relies on data produced by surveys with hypothetical product-feature and price variations, conducted specifically for the purposes of evaluating a specific product to tease out the value to consumers of a particular product feature. These surveys have not required extensive data on actual sale prices or competing products in the market to produce valid results." *Price*, 2018 WL 3869896, at *10; *see also Guido*, 2014 WL 6603730, at *12 ("Conjoint analysis relies on data produced by surveys performed specifically for the purposes of evaluating a specific product.").

5. Mr. Boedeker's surveys are not flawed for presenting hypothetical choices.

GM's argument that Mr. Boedeker's surveys do not "replicate (or even approximate) real-world market conditions" misconstrues both Mr. Boedeker's survey and the purpose of conjoint analysis. GM Br. at 43. Conjoint analyses "[redacted]" Ex. 215 at ¶ 140. Far from being "completely unhelpful," that is how conjoint analysis is designed to work. *See Price*, 2018 WL 3869896, at *10 ("Conjoint Analysis relies on data produced by surveys with hypothetical product-feature and

price variations...."); *Guido*, 2014 WL 6603730, at *12 ("Conjoint analysis … does not require preexisting sales data to generate conclusions….").

GM points to two purported flaws in two discrete aspects of Mr. Boedeker's survey, neither of which supports wholesale exclusion of his opinions. The first alleged flaw is that survey respondents "were given a choice of adding 'safety features' that already come standard on the vehicles and therefore respondents would have no option to include or exclude such standard features in the actual marketplace." GM Br. at 44. GM does not provide *any* evidence that these safety features came standard on *any* vehicles, let alone all vehicles. Instead, GM drops a footnote that cites comments by only two respondents who said that rear view cameras are standard in California. *See id.* at 44 n.80. Based on those two comments out of 2,872 respondents, GM irrationally asks this Court to conclude that rear-view cameras are standard and throw out all of Mr. Boedeker's results.[27] And even if rear-view cameras were standard on some vehicles in some states, which GM has not established, GM neither proves that any of the other 2,870 respondents thought so nor explains why that alleged flaw would render Mr. Boedeker's analysis inadmissible in any event. *See Hadley*, 2018 WL 3954587, at *15 ("[C]riticisms about a [conjoint] survey's failure to replicate real world conditions—valid as they may be—go to issues of methodology, design, reliability, and critique of conclusions, and therefore go to the weight of the survey rather than its admissibility.") (citing *Fortune Dynamic*, 618 F.3d at 1037-38 (internal quotations omitted)).

The second alleged flaw cited by GM is that respondents "had the option of purchasing vehicles with an open recall even though 'federal law prohibits the sale of new cars with open

[27] Even if there were some merit to this argument, which there is not, it would *only* apply to California survey respondents.

recalls.'" GM Br. at 44 (quoting Ex. 215 at ¶ 152). GM misses the point. The appropriate "but for" world is a world in which GM told the truth about its vehicles; *i.e.*, one in which GM disclosed the safety defects. The fact that GM would not have actually been able to sell its vehicles legally had it done this cannot insulate GM from damages. And this argument, again, does not impact admissibility. *See In re Whirlpool*, 45 F. Supp. 3d at 753 (denying Whirlpool's motion to exclude on grounds that hypothetical choice included washing machines that do not exist in the market because it "bears on the weight, rather than the admissibility" of testimony); *Broomfield*, 2018 WL 4952519, at *17 (arguments about attributes Mr. Boedeker chose "are more appropriate at the merits stage of the litigation").

Tellingly, GM's only case citations are to non-conjoint cases. These cases concerned non-conjoint surveys that attempted to measure consumer confusion in trademark cases but did not replicate market conditions in which consumers would be exposed to the products at issue.[28] Unlike the consumer confusion surveys, Mr. Boedeker's conjoint survey had to tease out the but-for world to see how consumers would have reacted if GM had disclosed defects of which it was aware at the time of sale. And in any event, GM's argument goes to weight, not admissibility. *See*

[28] *See Am. Footwear Corp. v. Gen. Footwear Co.*, 609 F.2d 655, 660 n.4 (2d Cir. 1979) ("Whenever American had displayed this poster at various shoe fairs or industry trade shows, the poster always was shown in an environment replete with references to American as the seller of the boot. However, once removed from this environment, the poster differed from American's other 'Bionic Boot' advertisements …."); *THOIP v. Walt Disney Co.*, 690 F. Supp. 2d 218, 237 (S.D.N.Y. 2010) ("Dr. Ford coupled THOIP and Disney shirts based on resemblance rather than on whether they were found together in the marketplace."); *Louis Vuitton Malletier v. Dooney & Burke, Inc.*, 525 F. Supp. 2d 558, 569 (S.D.N.Y. 2007) ("The Special Masters found that the facts strongly suggest that the Jacoby Confusion Survey was 'not reported in an accurate manner and ... was not conducted in an objective manner,' and is therefore not reliable under Rule 702."); *Troublé v. Wet Seal, Inc.*, 179 F. Supp. 2d 291, 308 (S.D.N.Y. 2001) ("Given the lack of a proper universe and sample, the poor choice of location, the lack of proper stimuli, and questions that have little or no relevance to issues in the case, the Court finds that the prejudicial effect of Wet Seal's survey substantially outweighs its probative value."); *Simon Prop. Grp. L.P. v. mySimon, Inc.*, 104 F. Supp. 2d 1033, 1044 (S.D. Ind. 2000) ("The survey would distort [Internet users'] experience by presenting *only* those two home pages together. That approach removes entirely the confusion one encounters with scores, hundreds, or thousands of responsive websites, and it removes the inevitable need for some effort on the part of the Internet user to sort through the responses.") (emphasis in original).

Townsend, 303 F. Supp. 3d at 1033 (argument that survey "failed to replicate marketplace conditions" goes to "the weight, rather than the admissibility").

6. Mr. Boedeker surveyed a representative population.

Mr. Boedeker's survey population consisted of persons who purchased or leased at least one new or used vehicle in the past ten years and do not work in the automotive industry. *See* Ex. 214 at ¶ 87. This population is representative of those persons who had the option to purchase a GM car during the relevant time period. As Mr. Boedeker explains, these are individuals who "[redacted]" Ex. 215 at ¶ 626. GM erroneously contends that Mr. Boedeker did not survey a representative population because his population "likely included" pickup-truck buyers and other non-Class members, he did not determine the losses of any individual Class members, and he has no basis to assign losses for used cars. GM Br. at 45-46. Yet again, these attacks provide no basis for the exclusion of any of Mr. Boedeker's testimony, let alone all of it.

First, GM's argument that he did not survey a representative population because his survey population "likely included" pickup-truck buyers and included non-Class members, *see* GM Br. at 45-46, is unavailing because the representative sample included all *potential* purchasers who could have faced a defect. It would not have made sense to survey only actual purchasers, because the demand is set by both actual and potential buyers. Mr. Boedeker's sample properly estimates the market impact had the defects been disclosed. In any event, arguments concerning the breadth of a survey's population go to weight, not admissibility. *See In re Whirlpool*, 45 F. Supp. 3d at 753 ("Whirlpool's second argument, that Butler inappropriately excluded members of the Ohio class from her survey, also goes to the weight, rather than the admissibility of her results."); *Microsoft Corp. v. Motorola, Inc.*, 904 F. Supp. 2d 1109, 1120 (W.D. Wash. 2012) (denying motion to exclude on grounds that it used a non-representative sample of the relevant universe because the

criticisms "go to issues of methodology, survey design, reliability and critique of conclusions, and therefore go to the weight of the survey rather than its admissibility") (internal quotations omitted); *Sanchez-Knutson*, 181 F. Supp. 3d at 995 (same).

Second, GM's argument that Mr. Boedeker did not "determine loss for *any* individual putative class member" misstates the requirements for expert testimony at class certification. GM Br. at 46. "[T]he question is not whether a jury at trial should be permitted to rely on the expert's report to find facts as to liability, but rather whether the Court may utilize it in deciding whether the requisites of Rule 23 have been met." *Dandong*, 2013 WL 5658790, at *13 (citation omitted). Mr. Boedeker testified repeatedly that he calculated median prices per class vehicle, and that he was not opining as to how those median amounts should be allocated. *See, e.g.*, Berman Reply Decl., Ex. 3 (July 5, 2018 Boedeker Dep. at 140:3-9) ([redacted] ").[29]

Finally, GM's argument that Mr. Boedeker has no basis to assign losses to used vehicle purchases is incorrect. GM Br. at 46. Mr. Boedeker's methodology measures damages "[redacted] " Ex. 215 at ¶ 75. The law in the bellwether states is clear that these used car purchasers have valid benefit-of-the-bargain claims.[30] Moreover, Mr. Boedeker testified that his analysis can be applied to used vehicles because the [redacted]

[29] Nonetheless, Plaintiffs have demonstrated that Mr. Boedeker's analysis (together with a couple of objective, record facts concerning each Plaintiff's purchase) readily provides the amount of each Class member's loss (depending of course upon the ultimate findings of the trier of fact). *See* Plaintiffs' Memorandum of Law in Opposition to GM's Motion for Summary Judgment Against Bellwether Economic Loss Plaintiffs (Dkt. No. 6059) at 34-37 and exhibits cited therein.

[30] *See id*. at 46-52.

[redacted]" Berman Reply Decl., Ex. 4 (July 6, 2018 Boedeker Dep. at 390:23-25). His analysis similarly shows that leases were overpriced based on the price premium charged by GM, although some allocation may again be necessary.[31]

C. Mr. Boedeker properly measures benefit-of-the-bargain damages.

Mr. Boedeker's conjoint analysis appropriately measured both supply and demand to determine the damages Class members suffered from GM's failure to disclose its vehicles defects. For demand, Mr. Boedeker measured the shift in demand curve between the but for world—where GM *did* disclose defects—and the actual world—where GM *did not* disclose defects. For supply, he applied the historical number of vehicles purchased by Class members. As Plaintiffs' expert Dr. Gans wrote, [redacted]" Pixton Aff., Ex. 36 (Gans Report at ¶ 24); *see also* Ex. 215 at ¶ 67. In multiplying supply by the change in demand curves, Mr. Boedeker properly measures how survey respondents valued GM disclosing its defects at the point of sale.

1. Mr. Boedeker properly measures the diminution in value of Class vehicles at the time of sale.

a. Benefit-of-the-bargain damages are measured by the diminution in value of Class vehicles at the time of sale or lease.

Mr. Boedeker properly measures the diminution in value of class vehicles from the point of sale. This is consistent with Plaintiffs' benefit-of-the-bargain damages theory. As this Court has explained, the "gravamen of the benefit-of-the-bargain defect theory is that Plaintiffs who purchased defective cars were injured when they purchased for *x* dollars a New GM car that contained a latent defect; had they known about the defect, they would have paid fewer

[31] *See* Ex. 215 at ¶ 68 ("[redacted]").

than *x* dollars for the car (or not bought the car at all), because a car with a safety defect is worth less than a car without a safety defect." TACC Order, 2016 WL 3920353, at *7 . Such is the law in each of the bellwether states. *Id.* at *22 (California's "UCL and CLRA are consumer-protection statutes, which by their terms extend broadly and have been interpreted by courts to reach 'benefit of the bargain' or 'diminution in value' damages such as those alleged here."); *id*. at *33 (under Missouri law, "cases have recognized MMPA claims even without a manifested defect, often on a … 'benefit-of-the-bargain' theory of the sort pressed here"); *Yazdani-Beioky v. Sharifan*, 550 S.W.3d 808, 828 (Tex. Ct. App. 2018) (benefit-of-the-bargain damages are measured by "'the difference between the value as represented and the value as received by the nonbreaching party'") (citation omitted).

b. Mr. Boedeker properly measured willingness to sell by the number of Class vehicles actually sold by GM.

As Mr. Boedeker and economist Dr. Gans explain, Plaintiffs measure supply of vehicles in the economically sensible way. As Dr. Gans wrote, "[redacted] Pixton Aff., Ex. 36 (Gans Report at ¶ 24); *see also* Ex. 215 at ¶ 67. This method of calculating supply is logical and fits Plaintiffs' case—supply is known and fixed, because Class members bought and drove cars that they actually purchased, that GM actually supplied, and suffered economic losses as a result of the defect. Ex. 214 at ¶ 23.

In three sections of its brief, GM incorrectly argues that Mr. Boedeker ignores "willingness to sell" and improperly sets supply at the amount GM sold to Class members. GM Br. at 26-29 (§ II.A.2), 30-33 (§ II.A.4), 36-42 (§ II.C). Plaintiffs will address all of those arguments here, rather than separate them as GM does. GM's arguments lack merit.

First, GM falsely asserts that Mr. Boedeker "completely ignores the willingness to sell part of the equation." *Id*. at 29 (footnote omitted). As GM knows full well, paragraphs 65-68 of the Boedeker Report (Ex. 214) "[redacted]" Ex. 215 at ¶ 35(d). Mr. Boedeker did not ignore supply side, *i.e.*, willingness to sell.

Second, GM shows its preference for academics over legal precedent when it argues that "[n]either Boedeker nor Dr. Gans cites any academic authority supporting this novel theory" of using a fixed supply. GM Br. at 31 (footnote omitted). But the use of a fixed supply to measure damages, based on the actual sales to class members, is not a "novel theory," because at least seven courts have allowed the use of a fixed supply in a conjoint analysis that assesses damages. *See Rackely v. Union Cent. Life Ins. Co.*, 2010 WL 11597477, at *8 (N.D. Ga. Aug. 16, 2010) ("Novel" means "new and not resembling something formerly known or used"). To Plaintiffs' knowledge, no court has held that Mr. Boedeker's use of a steady supply to measure damages is impermissible, while at least four courts have held that his model permissibly fixes supply at the amount sold to class members.[32] In *Dial*, 320 F.R.D. at 336-337, the court stated:

> The number of products Dial sold with the offending claims is known.... Those products were sold at a price determined by the intersection of demand and supply in the actual market. Boedeker's model asks, it appears, "At what price in that actual market in which Dial sold the offending products could Dial have sold the equivalent number of products without the false claim(s)?" By determining the marginal consumer's willingness to pay for the comparative product (not an "average" or "median" willingness to pay), [the expert's] model discloses that maximum price—and that price is not only tethered to

[32] GM erroneously contends that Mr. Boedeker's methodology is flawed because he does not answer "what is being held 'fixed'" and "what is the 'fixed quantity of that product." GM Br. at 31. In fact, he fixes the supply as the quantity of vehicles sold by GM to the class. *See* Berman Reply Decl., Ex. 14 (May 18, 2018 Boedeker Rebuttal Report, ¶ 386) ("[redacted]") (footnote omitted).

> the real and stable market, but, as noted, also accounts for losses attributable to all products sold that included a price premium associated with the misrepresented feature.

Three other courts similarly have allowed Mr. Boedeker's use of a fixed supply to assess economic damages. *See Broomfield*, 2018 WL 4952519 at *18 (rejecting defense argument that Mr. Boedeker's damage analysis "improperly ignores consideration of supply-side factors" by holding supply fixed); *MyFord Touch*, 291 F. Supp. 3d at 971 (rejecting motion to exclude Boedeker conjoint survey, because "modifying the supply curve could mean that a projection will assume that fewer vehicles were sold than were in fact sold, thereby failing to account for the fixed number of defective vehicles that were sold"); *Davidson*, 2018 WL 2325426, at *22 (rejecting argument that Mr. Boedeker's analysis was flawed because it held supply constant). Other courts in cases not involving Mr. Boedeker similarly have found that holding supply fixed is a permissible methodology for assessing damages.[33]

In a footnote, GM tries to sweep away these cases with the cursory, invalid argument that the "cases that have followed *Dial* and *MyFord Touch* are inapplicable because none of them had the benefit for [sic] McFadden's correction regarding the interpretation of his article, because all experts in the current case agree there is no inelastic supply curve, because various of the cases involved conjoint analyses that included actual market prices for the product at issue (as opposed to the Boedeker conjoint involving scenarios for which no real-world market prices exist), and for other reasons." GM Br. at 42 n.78. GM and its experts do not address the fundamental flaw in their analysis, as the court explained in *MyFord Touch*: "Assuming that fewer consumers were

[33] *Fitzhenry-Russell*, 2018 WL 3126385, at *8 (denying *Daubert* motion to exclude conjoint survey, which "took into account the fixed quantity of supply of Canada Dry because those sales occurred in the past"); *Hadley*, 2018 WL 3954587, at *13 (conjoint analysis properly "used a 'quantity' figure that matched the quantity of the challenged product that was actually sold during the class period"); *Lenovo Adware*, 2016 WL 6277245, at *21 (plaintiffs' conjoint expert properly "addressed 'the supply side' of the market, determining that it was not at issue 'because all sales of the laptop models at issue have occurred in the past'").

injured in the hypothetical world than were injured in the real world runs the risk of undercompensating the real-world injured consumers…. [T]he fact that a fixed number of vehicles were in fact sold (and thus a fixed number of consumers were potentially harmed) merits assuming that the size of the class is the same in both the hypothetical and real worlds and assessing damages on that basis." 291 F. Supp. 3d at 971.

Moreover, courts uniformly distinguish the two principal cases cited by GM, *Saavedra* and *NJOY*, on the ground that the experts did not consider supply *at all*. As the court in *Broomfield* recently stated, "'willingness to sell' was completely ignored" in *Saavedra* and *NJOY*. 2018 WL 4952519 at *19. Other courts allowing fixed supply similarly distinguished *NJOY* and *Saavedra* on that ground.[34]

GM next mischaracterizes Mr. Boedeker's analysis by claiming he "cannot determine any but-for market price at that 'fixed' quantity" because he "did not assess willingness to sell at his actual ***or*** but-for conjoint prices." GM Br. at 32 (footnote omitted). This is yet another repetition of GM's incorrect argument that conjoint analyses cannot validly hold supply fixed. And GM's argument that Mr. Boedeker's supposedly "invented definition of 'fixed supply' is different from an 'inelastic supply curve'" is a red herring. GM Br. at 33 (footnote omitted). As explained above, use of fixed supply is not "invented by" Mr. Boedeker in this litigation but is accepted by numerous courts. Further, Mr. Boedeker does not contend that the supply curve for vehicles is vertical at all prices. Ex. 215 at ¶ 387. Instead, he holds supply steady because reducing supply as GM suggests

[34] *MyFord Touch*, 291 F. Supp. 3d at 970 n.25 ("because Mr. Boedeker does consider the supply curve, those cases are distinguishable"); *Dial*, 320 F.R.D. at 334 (unlike in *NJOY* and *Saavedra*, "Boedeker's model does account for the supply side"); *Fitzhenry-Russell*, 2018 WL 3126385, at *8 (unlike the experts in *Saavedra* and *NJOY*, plaintiff's "conjoint survey does consider supply-side factors"); *Davidson*, 2018 WL 2325426, at *22 ("This examination of the supply side of the market distinguishes Plaintiffs' expert from" *Saavedra* and *NJOY*.); *In re Lenovo*, 2016 WL 6277245, at *21 (explaining that unlike in *NJOY* and Saavedra, the plaintiffs' expert "addressed 'the supply side' of the market, determining that it was not at issue 'because all sales of the laptop models at issue have occurred in the past'").

"[redacted]." *Id*. at ¶ 385.

Finally, GM erroneously argues at length that *Dial* and *MyFord Touch* were wrongly decided. It first argues that *Dial* relies on a "fundamental misunderstanding" of a *Law360* article that was co-written by Dr. McFadden. GM Br. at 38. That argument is flawed in numerous respects. *First*, many other courts have allowed an expert to hold supply fixed without relying on that *Law360* article. *Second*, GM asks this Court to rely on an after-the-fact spin that GM gives to the Law360 article that the *Dial* court cited. Specifically, GM asserts that "Dr. McFadden clarifies that a 'marginal consumer' cannot be identified without consideration of a seller's willingness to sell." GM Br. at 39. But GM's argument begs the question, because numerous courts have permitted willingness-to-sell to be measured by what was *actually* sold to consumers, not by what a defendant might have sold absent its misconduct. As the *MyFord Touch* court explained, "the fact that a fixed number of vehicles were in fact sold (and thus a fixed number of consumers were potentially harmed) merits assuming that the size of the class is the same in both the hypothetical and real worlds and assessing damages on that basis. Doing otherwise might allow a defendant to profit in the real world by its wrongdoing (if proven) based on the notion that fewer people were harmed in the hypothetical world." 291 F. Supp. 3d at 971.

In arguing that *Dial* is inapposite, GM also recycles its flawed argument that "Boedeker did not measure vehicle prices." GM Br. at 40 (footnote omitted). As shown above, that argument is fundamentally flawed, because Mr. Boedeker properly analyzes that diminution in value of the Class vehicles at the time of sale caused by GM's alleged wrongdoing. If GM's argument were permitted then conjoint analysis could never be used to assess the value of *anything* that is not sold as a standalone product "in any actual marketplace." GM Br. at 40. This is true, of course, because

conjoint analysis generally uses hypothetical features.[35] GM's argument is belied by its own use of conjoint analysis to assess the value of safety features for business purposes and by the fact that conjoint analysis is a well-established means for assessing economic damages.

In addressing *MyFord Touch*, GM once again begs the question when it erroneously argues that the court erred by allowing a fixed supply because "[u]nder the law of the Bellwether states, 'harm' is measured by a change in 'market price,' which requires consideration of willingness to sell in the actual and but-for worlds." GM Br. at 42. GM's argument is tautological, because it *assumes* that the "but-for world" is a world in which GM would be permitted to sell fewer cars if it disclosed the defects at issue. But as Mr. Boedeker explains, the price [redacted] " Ex. 215 at ¶ 98. *Not* keeping the supply fixed "might allow a defendant to profit in the real world by its wrongdoing (if proven) based on the notion that fewer people were harmed in the hypothetical world." *MyFord Touch*, 291 F. Supp. 3d at 971; *see also Dial*, 320 F.R.D. at 337 (fixing the supply at the amount actually sold "accounts for losses attributable to all products sold that included a price premium associated with the misrepresented feature").

[35] *See Price*, 2018 WL 3869896, at *10 ("Conjoint Analysis relies on data produced by surveys with hypothetical product-feature and price variations, conducted specifically for the purposes of evaluating a specific product to tease out the value to consumers of a particular product feature."); *TV Interactive*, 929 F. Supp. 2d at 1020 (denying *Daubert* challenge to expert who explained that "conjoint analysis offers respondents hypothetical products in several combinations") (internal quotations omitted); *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 45 F. Supp. 3d 724, 753 (N.D. Ohio 2014) (denying *Daubert* challenge based on the contention that "the conjoint survey improperly presented respondents with choices of hypothetical washing machines that do not exist in the market").

Further, GM's experts do not provide any support for their contention that supply should *not* be fixed. For example, Dr. List was asked [redacted]

Berman Reply Decl., Ex. 9 (Mar. 28, 2018 List Dep. at 58:7-23). Indeed, none of GM's experts could provide any answer as to [redacted].[36] In short, GM has no basis in law or fact to support its *ipse dixit* claim that, as a matter of law, supply cannot be fixed in the but-for world or that Mr. Boedeker's use of fixed supply renders his opinions inadmissible.[37]

[36] [redacted]

[37] Another case cited by GM is also inapposite. In *Apple, Inc. v. Samsung Elecs. Co.*, 2014 WL 976898, at *11 (N.D. Cal. Mar. 6, 2014), the court did not even address whether a conjoint survey can properly keep supply fixed.

c. Mr. Boedeker measures damages from the appropriate time period—the point of sale.

GM erroneously claims that Mr. Boedeker's "conjoint surveys and damages methodology do not and cannot determine any actual or but-for market prices for GM vehicles." GM Br. at 29. Not so. Mr. Boedeker measures "[redacted]" Ex. 214 at ¶ 10. The diminution in value, when subtracted from each Class vehicle's selling price, establishes the vehicle price at the point of sale in the but-for world in which GM told the truth about the defects at issue. This is the methodology used in *Price v. L'Oréal USA, Inc.*, 2018 WL 3869896, at *9 (S.D.N.Y. Aug. 15, 2018), in which the court explained that conjoint analysis "is intended to determine any price premium charged for the Challenged Products on account of the Challenged Claims, and the incremental consumer willingness-to-pay for the Challenged Products without the Challenged Claims." (footnote omitted). Such incremental willingness to pay for a product sold *without* fraud is the flipside of diminution in value at the time of sale of a product sold *with* fraud. *See In re MyFord Touch Consumer Litig.*, 2016 WL 7734558, at *16 (N.D. Cal. Sept. 14, 2016) (conjoint analysis "will allow the fact finder to calculate the diminution in value of Plaintiffs' vehicles" due to a faulty "infotainment" system).

GM also incorrectly argues that a single choice in one screenshot proves that Mr. Boedeker does not measure vehicle prices. GM Br. at 29. Such a myopic focus ignores that in a conjoint exercise, "[redacted]"

Further, the court explained that it "is not addressing a *Daubert* challenge. The Court is weighing the persuasiveness of Dr. Hauser's survey as evidence of causal nexus [in assessing a motion for a permanent injunction]." *Id*. at *13. Here in contrast, the Court is addressing a *Daubert* challenge, not weighing evidence.

[redacted]." Ex. 214 at ¶ 26 (footnote omitted). GM does not and cannot explain how a single choice in a single set of choices establishes as a matter of law that Mr. Boedeker does not measure vehicle prices.

2. Mr. Boedeker measures only compensatory damages.

GM seizes upon Mr. Boedeker's use of the word "penalty" a single time in his 340-page rebuttal report (and not once in his initial report) to falsely argue that he *really* seeks to impose "'punitive' or 'penalty-based'" damages. GM Br. at 33-34. He does not mention punitive damages in any report or deposition, and nothing in his reports leads to the conclusion that Class members should be awarded such damages. Before his single use of the word "penalty" in his rebuttal report, he explained that he was addressing the argument by GM's bevy of experts that [redacted]." Ex. 215 at ¶ 15. He then stated that GM's approach [redacted] *Id*. One such reason is:

[redacted]

Id. at ¶ 16.[38] Mr. Boedeker's point is exactly the same point that the *MyFord Touch* court made in finding that it was reasonable to keep supply fixed in assessing damages:

[38] *See* Berman Reply Decl., Ex. 3 (July 5, 2018 Boedeker Dep. at 77:25-78:8) ([redacted]

> Assuming that fewer consumers were injured in the hypothetical world than were injured in the real world runs the risk of undercompensating the real-world injured consumers. Although the Court understands why, as a matter of economic theory, projecting an equilibrium market price requires consideration of both supply and demand curves, here the fact that a fixed number of vehicles were in fact sold (and thus a fixed number of consumers were potentially harmed) merits assuming that the size of the class is the same in both the hypothetical and real worlds and assessing damages on that basis. Doing otherwise might allow a defendant to profit in the real world by its wrongdoing (if proven) based on the notion that fewer people were harmed in the hypothetical world.

291 F. Supp. 3d at 971.

The only case cited by GM addresses a claim for punitive damages, which Mr. Boedeker does not address. *See Voilas v. GMC*, 73 F. Supp. 2d 452, 463-64 (D.N.J. 1999) ("there are no credentials that could qualify an individual as a punitive damages expert"). GM relies on that case based on Mr. Boedeker's single reference to "penalty," even though he never refers to punitive damages and makes clear that "penalty" refers to an economic concept, not legal penalties. GM's "gotcha" game should be rejected. *See In re Refco Sec. Litig.*, 779 F. Supp. 2d 372, 377 (S.D.N.Y. 2011) (a motion "is not designed to be a game of 'gotcha,' that ignores the clear thrust of hundreds of pages of specific allegations in favor of a line or two here or there that is arguably inconsistent with that thrust").

3. Mr. Boedeker does not measure post-sale harm.

GM also makes the fanciful argument that Mr. Boedeker "impermissibly includes post-sale harm arising during the period '***between purchase and recall*** [when] purchasers … were driving around at a greater degree of risk.' (Ex. 36, 5/18/18 Gans Rpt. ¶ 53)." GM Br. at 36 (emphasis supplied by GM). GM does not and cannot cite to *anything* in his reports or depositions to support

[redacted] ").

its argument. Instead, it seizes on a single sentence from Dr. Gans's report, but that citation does not support its argument that Mr. Boedeker includes post-sale harm in his analysis. In fact, GM omits Dr. Gans's explanation in his deposition that he was discussing [redacted]." Pixton Aff., Ex. 36 (Gans Rpt. ¶ 53).

GM next falsely gins up a "double recovery" argument by claiming that Mr. Boedeker seeks to "compensate the same population both (i) for historical 'risk they incurred after purchase,' and (ii) for any injuries that were actually incurred, *e.g.*, personal injuries or property damages." GM Br. at 36.[39] In fact, Plaintiffs do not seek compensation for personal injuries or property damages, as this Court has recognized. As this Court has stated, the operative complaint "does not seek damages for physical injury or property damage." *GM LLC Ignition Switch Litig.*, 257 F. Supp. 3d at 393-94. Accordingly, Mr. Boedeker did not estimate damages for personal injury or property damage but rather only benefit-of-the-bargain damages at the point of sale of the Class vehicles.[40]

For its "double recovery" argument, GM relies on *In re Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig.*, 288 F.3d 1012 (7th Cir. 2002), but this Court has rejected GM's interpretation of, and reliance on, that case. GM has argued that this Court's "conclusion that the majority view requires a manifest defect for all claims is well-supported by appellate case law, which plaintiffs also disregard. *E.g.*, *In re Bridgestone/Firestone, Inc.*, 288 F.2d 1012, 1017 (7th Cir. 2002)…."[41]

[39] By putting the phrase "risk they incurred after purchase" in quotation marks, GM seeks to convey that it is quoting *someone*, but it cites nothing, and Plaintiffs are unaware of anyone saying such a thing.

[40] Similarly unavailing is GM's red-herring assertion that "[p]ersonal injury plaintiffs in this litigation have had the opportunity to assert claims for such actual injuries—and they have done so." GM Br. at 36. GM ignores that Plaintiffs here do not assert claims for "actual" personal injuries.

[41] GM response brief (Dkt. No. 5191), dated March 8, 2018, at 3. *See also* GM brief (Dkt. No. 5098), dated Feb. 22, 2018, at 5 ("*see also, e.g.*, *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1017 (7th Cir. 2002) (explaining that 'most states would not entertain the sort of theory that plaintiffs press'").

This Court disagreed, explaining that "the Seventh Circuit expressed some skepticism that economic loss claims could be maintained absent a manifested defect on the ground that 'most states' had adopted the opposite rule, but the Circuit expressly declined to decide the issue because it found that Indiana law, rather than Michigan or Tennessee law, controlled." *In re GM LLC Ignition Switch Litig.*, 257 F. Supp. 3d at 423.[42] Nonetheless, GM now erroneously claims that *Bridgestone/Firestone* somehow precludes *all* claims under *all* state laws for fear of double recovery, even though Plaintiffs in this litigation do not seek recovery for either personal injuries or property damage. That assertion remains unsupported.

V. CONCLUSION

GM's motion under *Daubert* to exclude Mr. Boedeker's opinions for class certification purposes should be denied in its entirety.

DATED: October 19, 2018

HAGENS BERMAN SOBOL SHAPIRO LLP

By: */s/ Steve W. Berman*
Steve W. Berman
steve@hbsslaw.com
Sean R. Matt
sean@hbsslaw.com
Andrew M. Volk
andrew@hbsslaw.com
1301 Second Avenue, Suite 2000
Seattle, WA 98101
Telephone: (206) 623-7292
Facsimile: (206) 623-0594

DATED: October 19, 2018

LIEFF CABRASER HEIMANN & BERNSTEIN, LLP

By: */s/ Elizabeth J. Cabraser*
Elizabeth J. Cabraser
ecabraser@lchb.com

[42] This Court recently again rejected GM's reliance on *Bridgestone/Firestone*, stating that "New GM also urges the Court not to 'ignore' the Seventh Circuit's decision in *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012 (7th Cir. 2002). (New GM Resp. 8). But the *Bridgestone/Firestone* Court did not analyze any Mississippi law." *In re GM LLC Ignition Switch Litig.*, 2018 WL 4351892, at *7 (S.D.N.Y. Sept. 12, 2018).

Rachel Geman
rgeman@lchb.com
275 Battery St., 29th Floor
San Francisco, CA 94111
Telephone: (415) 956-1000
Facsimile: (415) 956-1008

Co-Lead Counsel with Primary Focus on Economic Loss Cases

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above document was served upon the attorney of record for each other party through the Court's electronic filing service on October 19, 2018, which will send notification of such filing to the e-mail addresses registered.

/s/ Steve W. Berman
Steve W. Berman

EXHIBIT D-3

GENERAL MOTORS LLC'S REPLY BRIEF IN SUPPORT OF ITS MOTION TO EXCLUDE THE OPINIONS OF STEFAN BOEDEKER

[MDL ECF NO. 6294] (FILED NOVEMBER 9, 2018)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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IN RE:

GENERAL MOTORS LLC
IGNITION SWITCH LITIGATION

No. 14-MD-2543 (JMF)
No. 14-MC-2543 (JMF)

This Document Relates To All Actions

Hon. Jesse M. Furman

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GENERAL MOTORS LLC'S REPLY BRIEF IN SUPPORT OF ITS MOTION TO EXCLUDE THE OPINIONS OF STEFAN BOEDEKER

Richard C. Godfrey, P.C.
Andrew B. Bloomer, P.C.
KIRKLAND & ELLIS LLP
300 N. LaSalle Street
Chicago, IL 60654
Phone: 312-862-2000
Fax: 312-862-2200
richard.godfrey@kirkland.com
andrew.bloomer@kirkland.com

Attorneys for Defendant General Motors LLC

Dated: November 9, 2018

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Rules

Other Authorities

INTRODUCTION

Stefan Boedeker's methodology and opinions contravene fundamental economic principles taught in basic microeconomic courses, fail reliability at every step, and produce absurd results that negate the very class-wide injury proposition plaintiffs must satisfy on their Rule 23 class certification motion. Failing to measure relevant market values, Boedeker attempts to justify his methodology by imposing an artificial, penalty-based assumption that supply is fixed and would not respond to a change in market price. This approach finds no support in law or economics, and should be rejected—particularly where Boedeker's own data shows many putative class members suffered no injury at all. Boedeker's methodology and opinions do not pass muster under *Daubert* or *Comcast*, and should be excluded, as further confirmed by the arguments made in plaintiffs' opposition brief. *See In re Asacol Antitrust Litig.*, --- F. 3d ---, 2018 WL 4958856, at **8-11 (1st Cir. Oct. 15, 2018).[1]

First, plaintiffs argue Boedeker's methodological errors merely reflect "expert battles that raise classic jury issues" going "to the weight, not the admissibility, of the testimony." *E.g.*, Dkt. 6187 ("Opp.") at 3, 4.[2] But *Daubert* would be rendered meaningless if every issue—no matter how fundamental, serious, and pervasive—could be brushed aside by invoking this "goes-to-the-weight" mantra. The problems here are not few or minor; rather, Boedeker's methodology and opinions contravene state benefit-of-the-bargain laws, established principles of economics, and other relevant disciplines. The Court should decline plaintiffs' invitation to abdicate its gatekeeping role and instead enforce the dictates of Rule 702 and *Daubert* by excluding

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[1] *See also* Dkt. 6131 ("Br."); Dkt. 5859, 6132, 6194. The conventions used in this brief are the same as those used in New GM's opening brief. *See* Br. 5, n.2, 3. Citations to exhibits refer to exhibits to the Affirmation, Supplemental Affirmation, and Reply Affirmation of Allan Pixton filed, respectively, September 22, 2018, October 2, 2018, and contemporaneously with this brief.

[2] Quoting *Ge Dandong v. Pinnacle Performance Ltd.*, 2013 WL 5658790, at *15 (S.D.N.Y. Oct. 17, 2013).

Boedeker's methodology and opinions. *In re Gen. Motors LLC Ignition Switch Litig.*, 2017 WL 6729295, at *11 (S.D.N.Y. Dec. 28, 2017); *see also In re Mirena IUD Prod. Liab. Litig.*, 202 F. Supp. 3d 304, 327–28 (S.D.N.Y. 2016).[3]

Second, plaintiffs attempt to defend Boedeker's speculative and demonstrably incorrect factual assumptions by trying to rewrite the history and plain language of Boedeker's conjoint survey questions. *E.g.*, Opp. 8-11, 15-16. But a *post-hoc* attempt to marshal support for preconceived arbitrary and counter-factual assumptions and conclusions is precisely the kind of "reverse engineering" that this Court and other courts repeatedly have condemned. *In re Mirena Ius Levonorgestrel-Related Prod. Liab. Litig. (No. II)*, 2018 WL 5276431, at *22 (S.D.N.Y. Oct. 24, 2018) ("*In re Mirena II*"); *In Gen. Motors LLC*, 2017 WL 6729296, at *7.

Third, settled benefit-of-the-bargain law requires damages calculated as the difference (if any) between the actual price[4] a consumer paid for his or her vehicle at the time of sale *less* the but-for market price the consumer whould have paid for the vehicle. *In re Gen. Motors LLC Ignition Switch Litig.*, 2016 WL 3920353, at *7 (S.D.N.Y. July 15, 2016). But Boedeker never determined or even considered the *actual prices consumers paid for their vehicles*—a knowable fact that varies for each putative class member. Nor did he determine a but-for market price based on both a willingness to pay for vehicles and *a willingness to sell them at his calculated but-for price*. Opp. 32-40. Plaintiffs' pretense that Boedeker accounted for willingness-to-sell by relying

[3] *Aff'd* 713 F. App'x 11 (2d Cir. 2017), *cert. denied Mirena v. Bayer Healthcare Pharm., Inc.*, 138 S. Ct. 1299 (2018).

[4] Boedeker misleadingly (and incorrectly) uses the phrase "actual prices," implying that he is using the price that consumers actually paid for vehicles, but that is false. Boedeker's "actual prices" are anything but that. Instead, Boedeker's "actual prices" are aggregate composites of the responses to artificial surveys relating to hypothetical safety packages. Ex. 29, 2/23/2018 Rossi Rpt., App'x D. Boedeker thus determines these so-called "actual world" prices based on how much survey respondents would hypothetically be willing to pay for a defect-free "scenario"—*e.g.*, one in which they hypothetically purchase certain safety features and are told that the entire "vehicle" is "safe as is." As plaintiffs admit, Boedeker does not in fact use, estimate, or aggregate the "actual world" (*i.e.,* real world) prices putative class members in fact paid for their vehicles. *See* Dtk. No. 6063, Pls. Resp. to New GM SUF ¶¶ 371, 373.

on the number of class vehicles actually sold, *id.* at 36-37, is *ipse dixit* divorced from reality and is contrary to plaintiffs' experts' admissions that supply is elastic in this case.

Fourth, plaintiffs' defense of Boedeker's deficient qualifications underscores the convergence of unreliability, irrelevance, and lack of expertise. Plaintiffs harken to Boedeker's so-called "experience," Opp. 13-14, but Boedeker's experience is insufficient to the task at hand, and the "[u]se of qualitative or experience-based methodology does not exempt an expert from *Daubert* scrutiny." *LVL XIII Brands, Inc. v. Louis Vuitton Malletier S.A.*, 209 F. Supp. 3d 612, 647 (S.D.N.Y. 2016). Boedeker and his opinions should be excluded.[5]

ARGUMENT AND AUTHORITIES

I. BOEDEKER'S METHODOLOGICAL ERRORS DO NOT GO TO "WEIGHT," BUT ARE FATAL FLAWS UNDER *DAUBERT* AND RULE 702.

Plaintiffs' argument that Boedeker's errors go to weight as a "battle of the experts" overlooks their gravity and results in a misapplication of Rule 702 and *Daubert*.

First, where an expert's opinions and methodology do not pass muster under Rule 702 and *Daubert*, "those opinions ***must be*** . . . excluded." *In re Gen. Motors LLC.*, 2017 WL 6729295, at *11.[6] The *Daubert* inquiry applies in full force on class certification to determine whether an expert's "opinions are admissible to establish the requirements of Rule 23," *Ge Dandong v. Pinnacle Perf. Ltd.*, 2013 WL 5658790, at *13 (S.D.N.Y. Oct. 17, 2013), and the Second Circuit requires a "***searching examination*** of expert testimony offered at the class certification stage." *In*

[5] While New GM's motion to exclude Boedeker was filed in connection with class certification briefing, as explained in New GM's reply brief in support of its motion for summary judgment, various overlapping issues impact both class certification and summary judgment. *See* Dkt. 6194 at 2 n.2.

[6] *In re Gen. Motors LLC.*, 2017 WL 6729295, at *11 (A court's "role in applying *Daubert*'s 'gatekeeping requirement' is 'to ensure the reliability and relevancy of expert testimony' and 'to make certain that an expert . . . employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.'") (quoting *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999)).

re LIBOR-Based Fin. Instruments Antitrust Litig., 299 F. Supp. 3d 430, 471 (S.D.N.Y. 2018).[7] The Court's gatekeeping role is particularly important in a Bellwether class certification inquiry because it will inform whether any present or future classes may or may not be certified.

Second, Boedeker's fundamental methodological errors render his entire analysis and opinions unreliable, speculative, and unhelpful. Regardless of whether "any one of these methodological flaws, standing alone, might not be fatal," the structural and cumulative effects of Boedeker's errors render his surveys and his entire methodology "unreliable." *In re Fluidmaster, Inc., Water Connector Components Prod. Liab. Litig.*, 2017 WL 1196990, at *31 (N.D. Ill. Mar. 31, 2017); *see also Hall v. Thomas*, 753 F. Supp. 2d 1113, 1154 (N.D. Ala. 2010) (any of the flaws "could, alone, render [the expert's] analysis unreliable; together, they are fatal").[8]

Third, plaintiffs' effort to cast Boedeker's flawed methodology as a "routine" battle of the experts who simply "disagree with each other's methods," Opp. 14, is unavailing here. "[P]eer review and scientific community acceptance" are hallmarks of the *Daubert* inquiry. *In re the Bear Stearns Companies, Inc. Sec. Litig.*, 2016 WL 4098385, at *8-9 (S.D.N.Y. July 25, 2016). Boedeker fails the peer-review test; the recognized and leading experts upon whom Boedeker purports to rely have universally condemned his methods and work as contrary to fundamental economic, statistical, and survey principles and practices. "This was not a battle of the experts; it was a rout." *Lehner v. Sec'y of Health & Human Servs.*, 2015 WL 5443461, at *40 (Fed. Cl. July 22, 2015). Accepting plaintiffs' argument would require the Court to ignore the opinions of

[7] *Accord Am. Honda Motor Co., Inc. v. Allen*, 600 F.3d 813, 815-16 (7th Cir. 2010) ("[W]hen an expert's report or testimony is critical to class certification" "a district court must conclusively rule on any challenge to the expert's qualifications or submissions prior to ruling on a class certification motion.") (internal citation omitted).

[8] *See also THOIP v. Walt Disney Co.*, 690 F. Supp. 2d 218, 219 (S.D.N.Y. 2010) ("[T]he limits and flaws of a survey generally go to evidentiary weight and do not warrant exclusion. Exclusion may be justified, however, where a single error or the cumulative errors are so serious that the survey is unreliable or insufficiently probative."); *Mastercard Int'l Inc. v. First Nat'l Bank of Omaha,* 2004 WL 326708, at *30 (S.D.N.Y. Feb. 23, 2004) (excluding survey on the basis of cumulative errors, even if each error considered alone could be a question of weight).

the world-renowned experts in the academic and professional communities at issue, an absurd result that would violate *Daubert*'s requirement to ferret out junk science before any "weighing" begins. *See Magdaleno v. Burlington N. R. Co.*, 5 F. Supp. 2d 899, 905 (D. Colo. 1998) (excluding expert testimony because expert's "methodology [was] not consistent with the methodologies described by the authors and experts whom [the expert] identifie[d] as key authorities in his field"); *Coffey v. Dowley Mfg., Inc.*, 187 F. Supp. 2d 958, 978 (M.D. Tenn. 2002), *aff'd*, 89 F. App'x 927 (6th Cir. 2003) (expert's "failure to comply with ASTM standards" which he recognized as authoritative "belies [his] claim that his theories are generally accepted").[9] Moreover, courts in the Second Circuit and elsewhere appropriately rely on opposing experts to exclude opinions under *Daubert*. In *Laumann v. Nat'l Hockey League*, for example, Judge Scheindlin repeatedly cited to the opinions of Nobel Laureate Daniel McFadden (one of New GM's experts here) to exclude the opposing expert's damages model. 117 F. Supp. 3d 299, 310, 312 (S.D.N.Y. 2015) (citing defendants' expert Dr. McFadden "to highlight methodological flaws" in and to offer criticisms of plaintiffs' damages model he described as "junk science" that "culminates in nonsensical results").

Fourth, the import of Boedeker's opinions in the class certification inquiry underscores the Court's gatekeeping role in this case.[10] Plaintiffs rely on Boedeker's methodology and opinions to seek certification of classes that Boedeker's own data show include substantial portions of

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[9] *See also In re Mirena IUD*, 169 F. Supp. 3d 396, 431 (S.D.N.Y. 2016) (excluding expert theory based on "impermissibly speculative conclusions from these studies that 'exceed the limitations the authors themselves placed on these studies'") (quoting *In re Accutane Prods. Liab.*, 2009 WL 2496444, at *2 (M.D. Fla. Aug. 11, 2009), *aff'd,* 378 Fed. App'x 929 (11th Cir. 2010)); *In re Zoloft (Sertraline Hydrochloride) Prod. Liab. Litig.*, 26 F. Supp. 3d 449, 465 (E.D. Pa. 2014) ("This does not represent a mere professional difference of opinion; Dr. Bérard's opinions regarding Zoloft are only made possible by her departure from use of well-established epidemiological methods."); *Hall v. Baxter Healthcare Corp.*, 947 F. Supp. 1387, 1407 (D. Or. 1996) (excluding as unreliable expert testimony that "inexplicably conflicts with the general consensus of the epidemiological community").

[10] *See In re Gen. Motors LLC.*, 2017 WL 6729295, at *11 (granting *Daubert* motion even though the "conclusions may have a significant impact on a swath of cases now pending in the MDL and, thus, [the Court] does not reach them lightly"); *In Mirena IUD*, 202 F. Supp. 3d at 327-28 (granting summary judgment after excluding experts under *Daubert*, noting that it "reaches this conclusion reluctantly, knowing that it will doom hundreds of cases.").

uninjured members. Dkt. 5846 at 27-32. Ignoring such errors is improper in these Bellwether actions and risks irrational ripple effects in this litigation and other cases.[11]

II. PLAINTIFFS CANNOT SALVAGE BOEDEKER'S METHODOLOGY BECAUSE IT IS BASED ON UNSUPPORTED AND INCORRECT ASSUMPTIONS.

It is axiomatic that analyses "premised on a number of crucial factual assumptions that are dramatically belied by the record" and that "lack even arguable reliability and would not meaningfully assist the trier of fact" must be excluded. *See Lava Trading, Inc. v. Hartford Fire Ins. Co.*, 2005 WL 4684238, at *21 (S.D.N.Y. Apr. 11, 2005). Boedeker's reliance on unsupported, speculative, and demonstrably incorrect assumptions alone requires exclusion.

A. The Speculative Extrapolation From Invented "Scenarios" To Vehicle Prices.

All parties agree that Boedeker's damages model was not designed to determine vehicle prices or demand curves for vehicles, but instead measured differences in consumers' aggregate willingness to pay for alternative hypothetical bundles (including safety option packages and information) devised by Boedeker. Br. 15-17. Plaintiffs attempt to minimize Boedeker's use of "scenarios," rather than vehicle prices, claiming that New GM "incorrectly argues that a single choice in one screenshot proves that Mr. Boedeker does not measure vehicle prices." Opp. 40-41. This is not New GM's argument. Rather, it's undisputed that none of the alternative products offered for sale in Boedeker's three surveys is a vehicle; nor do the surveys ask about vehicle pricing as opposed to hypothetical "scenarios" (comprised of "safety features" and "information" to be added to a vehicle and offered at sale prices also invented by Boedeker). *See* Exs. 44 (Screenshots Original MDL Survey), 45 (Screenshots Rebuttal MDL Survey), 145 (Screenshots OCDA Survey), for example.

[11] *See In re LIBOR-Based Fin. Instruments Antitrust Litig.*, 299 F. Supp. 3d at 471 ("An undiluted *Daubert* analysis is consonant with a class certification standard that requires a determination by a preponderance of the evidence that each Rule 23 requirement has been met, and under which head-to-head weighing of competing expert evidence is proper." (quoting 1 McLaughlin on Class Actions § 3:14 (14th ed. 2017)).

Moreover, the Court need not take New GM's word for it; Boedeker admitted that he has not calculated vehicle prices:

> Q: And in your conjoint ***you don't offer the whole price of a vehicle*** at all. You're offering a price of an option package, correct?
>
> A. ***Yeah***.

Ex. 40, 7/6/18 Dep. 427:12-15; *see also* Ex. 111, 6/28/18 Gans Dep. 316:5-8; 10-12. These are dispositive admissions because the law requires the calculation of vehicle prices, but Boedeker admittedly only calculated prices for features or scenarios. And the Court should reject plaintiffs' *post-hoc* attempt to justify those scenarios in response to New GM's experts and briefing.

1. Plaintiffs' Improper Burden-Shifting Cannot Save Boedeker's Unprincipled And Arbitrary Attribute Selection.

Boedeker's packaging of safety features into scenarios failed to consider whether such features (i) existed at the time of sale and mattered to consumers' vehicle purchase decisions, while at the same time (ii) excluding (without apparent consideration) other salient safety and non-safety vehicle features.[12] Br. 15-16. Boedeker's arbitrary attribute selection results in what courts recognize as "focalism bias" and is a sufficient basis for exclusion. *Id.* at 17-20 (and cases cited therein). In response, plaintiffs first argue that "GM does not and cannot demonstrate that Mr. Boedeker's analysis . . . shows that unimportant attributes constitute a large percentage of the value of the Class vehicles." Opp. 18-19. Plaintiffs have it backwards. The burden is on plaintiffs, as the party proffering Boedeker, to establish that his methodology and opinions satisfy Rule 702. *See Zaremba v. GMC,* 360 F.3d 355, 358 (2d Cir. 2004). Where, as here, plaintiffs fail to

[12] Plaintiffs' defense of "distractors" in conjoint surveys raises an irrelevant argument New GM did not make. Opp. 16-17. New GM does not contend that the use of distractors in conjoint surveys is *per se* inappropriate. In fact, the word "distractor" is not anywhere in New GM's opening brief. Nor does New GM argue that a conjoint survey "must *also* ask about 'brand name, design, size of engine, trim level, safety features etc." *Id.* at 17. Plaintiffs' "distractor" argument is its own distraction from Boedeker's arbitrary and untested attributes and price points.

demonstrate that the attribute selection process was reliable or principled, courts uniformly exclude expert opinions. *Townsend v. Monster Beverage Corp.*, 303 F. Supp. 3d 1010, 1049 (C.D. Cal. Mar. 20, 2018); *Oracle Am., Inc. v. Google Inc.*, 2012 WL 850705, at *9-10 (N.D. Cal. Mar. 13, 2012); *In re Fluidmaster,* 2017 WL 1196990, at *31, 63; *Visteon Glob. Techs., Inc. v. Garmin Int'l, Inc.,* 2016 WL 5956325, at *6 (E.D. Mich. Oct. 14, 2016).

Moreover, plaintiffs' cases holding that certain attribute selection issues go to weight are distinguishable. Opp. 18-20. In each case, the courts found the experts had provided some reasoned or principled basis for their attribute selection process. *See, e.g., TV Interactive Data Corp. v. Sony Corp.*, 929 F. Supp. 2d 1006, 1020-21, 1025-26 (N.D. Cal. 2013) (the expert "asked respondents to rank 18-20 product attributes in Phase 1 of his study" and in "Phase 2, he only used the five attributes respondents chose in Phase 1 to have the closest value to the autoplay" feature at issue; finding that the two-phased process "*entailed a principled basis* for choosing the five features that would be tested alongside autoplay in Phase 2").[13] Boedeker did not employ a principled basis for selecting vehicle features, scenarios or price points here, Br. 14-19, and his failure to do so requires exclusion.[14]

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[13] *See also Fitzhenry-Russell v. Dr. Pepper Snapple Grp.*, 326 F.R.D. 592, 603-04 (N.D. Cal. June 26, 2018) (reciting the expert's basis for selecting and grouping certain attributes); *Apple Inc. v. Samsung Elecs. Co., Ltd.*, 2014 WL 794328, at 16 n.10 (N.D. Cal. Feb. 25, 2014) (observing that "Dr. Hauser selected the distraction features to be surveyed based on Samsung's own manuals," and noting (unlike in *Oracle* and in the instant case) "there are no irrational results that stem from the surveys in this case"). Plaintiffs' suggestion that the results of Boedeker's survey are not irrational, Opp. 25-27, is belied by the extensive data and common-sense examples of irrationality on this score. *See* Br. 20-21. And their argument that irrational results are only significant in the "aggregate," Opp. 27, is contrary to the opinions of the experts upon whom Boedeker purports to rely and was not a determinative factor mentioned by Judge Scheindlin in *Laumann* or in any other case cited by plaintiffs.

[14] Plaintiffs argue that New GM's business or marketing use of conjoint surveys should *ipso facto* allow them to use conjoint survey results to calculate benefit-of-the-bargain damages for alleged overpayments for vehicles. Opp. 15-16. This is incorrect; just because a method may be suitable for one purpose (a purpose, in the case of the New GM conjoint studies plaintiffs cite, that did not involve determining damages or if there is a change in "market price"), does not mean that the method satisfies *Daubert*. It is axiomatic that the "reliability inquiry is context-specific, and the question before the Court is 'not the reasonableness [of the expert's methodology] *in general,*' but rather 'the reasonableness of using such an approach ... to draw a conclusion regarding *the particular matter to which the expert testimony was directly relevant.*" *Dev. Specialists, Inc. v. Weiser Realty Advisors LLC*, 2012 WL 242835, at *8 (S.D.N.Y. Jan. 24, 2012) (original emphasis; quoting *Kumho Tire*, 526 U.S. at 153-54); *see also R.F.M.A.S., Inc. v.*

2. Plaintiffs' *Post-Hoc* Price-Point Rationalization Confirms The Unreliability Of Boedeker's Methodology.

Boedeker concedes that "arbitrarily setting price points is not a reasonable way to design a meaningful survey and is likely to lead to unusable results." Ex. 27, 2nd Rpt. ¶ 442.[15] Plaintiffs argue, however, that Boedeker's $500 price increments "are not arbitrary" because he "used prices based on pricing data obtained from unchallenged and reliable sources, including Consumer Reports, Edmunds, Forbes, Mitchell International, Inc., and Mobileye." Opp. 2, 8. These statements are misleading, at best. *First*, in ***constructing his methodology and then forming his opinions***, Boedeker did ***not*** "use[] prices based on pricing data" at all. Boedeker admitted he did no research to determine whether the price points he selected were consistent with market prices for such "scenarios." Ex. 33, 2/6/18 Dep. 109:10-14, 134:3-135:14; Ex. 43, 2/7/18 Dep. 481:15-482:7. Nor could he, because these "scenarios" are not sold in real markets. *Second*, it was only after New GM's experts critiqued his arbitrary price selection that Boedeker tried to find factual support for his contrived prices.[16] *Last*, none of the reports or research that Boedeker claims to have relied upon after-the-fact actually support his price point selections for the alternative attribute bundles proposed in the surveys.

So, 748 F. Supp. 2d 244, 275-76 (S.D.N.Y. 2010) (the admissibility of the experts' "testimony as to damages is not saved" by "the fact that their approach to calculating damages might be appropriate in many other cases"). The question is whether Boedeker's conjoint surveys are appropriate to reliably provide proof of common damages and fact of injury in this case. They manifestly are not. Plaintiffs also claim that Boedeker's surveys take the "same approach GM itself takes when measuring consumer demand for vehicle safety features; *i.e.*, it asks only about safety features and holds all else constant rather than asking about features such as brand, color, size, or design." Opp. 17 (citing Berman Reply Decl., Ex. 2 (GM-MDL2543-402633685)). This too is incorrect; the very same exhibit shows that the cited conjoint analysis includes many ***non***-safety features, such as fuel economy; power seats; cloth or leatherette seats; heated seats, etc. *See id.* Plaintiffs' characterization itself limits New GM's use of conjoints to assessing consumer demand, whereas Boedeker misrepresents conjoint results as "damages" as if they yield differences in market prices.

[15] While Boedeker did no sensitivity testing on price points, Dr. List did, and showed that varying only the price points in the survey prompts—using $200, $400, $600, $800, and $1,000 options instead of Boedeker's arbitrarily selected prices—reduces Boedeker's per vehicle calculations by 58-77%. Ex. 30-A, 2/23/18 List Rpt. ¶¶101-104.

[16] *See* New GM's Mem. in Opp. to Pls. Mot. To Exclude Certain Opinions of Dr. List (Dkt. 6225) at 4-5.

"Opinions that assume a conclusion and 'reverse-engineer[] a theory' to fit that conclusion are [ ] inadmissible." *In re Mirena II*, 2018 WL 5276431, at *22 (quoting *In re Mirena IUD Prod. Liab. Litig.*, 169 F. Supp. 3d at 430); *In re Gen. Motors LLC*, 2017 WL 6729295, at *8.[17] This *post-hoc* price rationalization distinguishes Boedeker's opinions here from those in *Broomfield*—a case in which he "determined the price range he used based on his review of retail prices for various major retailers for the beers used in the study, as determined from a review of prices online," and the defendant did "not argue that this range was inappropriate, and indeed its own expert's report demonstrates that Boedeker's range comports with real world pricing data." *Broomfield v. Craft Brew All., Inc.*, 2018 WL 4952519, at *19 (N.D. Cal. Sept. 25, 2018). In contrast, none of Boedeker's various reports in this case provides empirical support for prices of many safety features included in his surveys, including anti-glare windshields, active head constraints, adaptive cruise control, and driver and front passenger air bags. Dkt. 6225 at 17-21. Even the few safety feature prices Boedeker includes in his rebuttal report (*e.g.*, after-market prices for "collision warning systems") cannot provide real-world price data for the *informational* component of Boedeker's invented "scenarios" (*e.g.*, scenarios including information that the entire "vehicle" (as opposed to any individual component or feature) is "safe as is" versus those including information that "experts" expect a safety recall).[18] Thus, although Boedeker now

[17] *See also B.H. ex rel. Holder v. Gold Fields Mining Corp.*, 2007 WL 188130, at *3 (N.D. Okla. Jan. 22, 2007) (rejecting "after-the-fact justification" for conclusions); *Haller v. AstraZeneca Pharms, LP*, 598 F. Supp. 2d 1271, 1296-97 (M.D. Fla. 2009) (finding it "most troubling" that the "underpinnings of the [the expert's] opinions have changed in direct response to [defendant's] motion practice."); *Cartwright v. Home Depot U.S.A., Inc.*, 936 F. Supp. 900 (M.D. Fla. 1996) (*post hoc* rationale suggests a lack of a reliable foundation under *Daubert*).

[18] *See also* Dkt. 6225, New GM's Opp. to Pls. Mot. to Exclude Certain Opinions of Dr. List at 17-21. Some "scenarios" have no safety feature at all, just information. *See, e.g.,* Ex. 153 (screenshots of no-feature "scenarios"); Ex. 44 (Screenshots MDL Survey) at 22, 24, 28, 36, 46, 50, 54, 68, 70, 76, 80, 82; Ex. 45 (Screenshots Rebuttal MDL Survey) at 21-22, 24, 30, 36, 43, 47, 49; Ex. 145 (Screenshots OCDA Survey) at 10, 14, 21, 22, 53, 67.)

claims after the fact to rely upon various sources for the price points he used, those sources do not match or support his "scenarios" or price points.

In short, Boedeker's price-point assumptions are not reliable and are precisely the kind of speculative "guesswork" that has no place in the courtroom. *In re Mirena IUD Prod. Liab. Litig.*, 169 F. Supp. 3d at 430-31 (quoting *Rosen v. Ciba–Geigy Corp.,* 78 F.3d 316, 319 (7th Cir. 1996)).

B. Boedeker's Incorrect And Speculative "Defect-Free" Vehicle Assumption.

Plaintiffs fare no better in their *post-hoc* attempt to revise the key assumption underlying Boedeker's survey and methodology: his defect-free vehicle assumption. Boedeker says he is presenting "actual" and "but-for" worlds, but in fact both are aggregate composites of responses to a survey of hypothetical and artificial buying scenarios; indeed, his methodology does not take into account or consider the first half of the necessary damages equation, *i.e.*, actual vehicle prices paid at the time of sale. Lacking empirical support for prices, Boedeker stretches his fictional scenario by adding a "defect-free" vehicle assumption to calculate the would-have-been-paid prices in the actual world. This assumption is inherent in Boedeker's characterization of the benefit-of-the-bargain formula, where he states that consumers purchased a vehicle expecting it to be defect free. Br. 21-24. Plaintiffs do not dispute that this defect-free assumption is untested and contrary to real-world data, and instead argue:

> In fact, Mr. Boedeker states in paragraph 103 that he assessed "the 'benefit of the bargain' buyers were led to **believe they had received with the purchase of a particular defect-free GM vehicle** *compared to what they actually received when the GM vehicle*[19] *had a defect that was not disclosed at the point of purchase*." (Emphasis added.) GM omits the italicized portion of that statement, which shows that Mr. Boedeker did not measure losses based on the assumption that buyers believe all vehicles are always defect-free.

[19] As the actual language from Boedeker's surveys demonstrates (*see, e.g.*, screenshot below), Boedeker's scenarios involve "safety features" and "information," not "vehicles."

Opp. 22. Plaintiffs' argument is misplaced because the non-italicized portion (which New GM bold and underlines for clarity here) confirms that Boedeker begins with a supposed actual world where survey respondents expect a defect-free vehicle (as he separately confirmed under oath). *See also* Ex. 33, 2/6/18 Dep. 91:10-92:8 (explaining "[y]eah, I'm probably assuming that -- that the consumer would not go in there with the expectation of buying a vehicle with a defect. So in that case, I would probably call it an assumption."); Ex. 27, 2nd Rpt. ¶ 552 ("As I have been instructed by counsel, Plaintiffs' theory of damages is that consumers were ***denied the benefit of a defect-free vehicle*** from the time of the purchase to the time of availability of the repair associated with the recall…"); Ex. 32, 1st Rpt. ¶ 106 ("A purchaser of a vehicle with one of the non-disclosed defects alleged in the Complaint, actually paid for the vehicle with the expectation to receive ***a vehicle without defects***."). Boedeker's "***actual***" world assumes survey respondents expect that the ***entire*** "***vehicle*** is safe as is," as shown below.

Survey

Which of these option packages would you be most likely to purchase?

Features	Option 1	Option 2	Option 3	Option 4
Lane Departure Warning System	Not Included	Included	Included	Not Included
Air Bags (driver and front passenger)	Included	Included	Not Included	Not Included
Rear View Camera	Included	Included	Not Included	Included
Adaptive Cruise Control	Not Included	Not Included	Not Included	Not Included
Collision Avoidance System with Automatic Emergency Braking	Not Included	Not Included	Not Included	Not Included
Safety feature recall expected by experts?	Yes	No, no recall needed, vehicle is safe as is	Yes	Yes
How long to recall vehicle after manufacturer discovers problem with safety feature:	Two Years		One Year	One Year
Manufacturer approach to recall of safety feature:	Manufacturer acts pro-actively, before any incidents reported		Manufacturer acts after multiple incidents reported	Manufacturer acts pro-actively, before any incidents reported
Price Total for the Options	$500	$1,000	$2,000	$2,500
Which option would you prefer?	○	○	○	○

CONTINUE >>

Ex. 145 (Screenshots OCDA Survey), at 49; *see also id.* at 3, 6, 8, 10-11, 61, 63, 67 (vehicle "works flawlessly"); *id*. at 14, 17, 20-23 (vehicle "without defect"); *id.* at 55, 58 ("vehicle safe as is"). Boedeker's defect-free assumption, which both he and plaintiffs admit is unsupported, fundamentally distorts his ***actual-world*** pricing and his overall loss estimates, independently rendering his methodology and opinions unreliable and inadmissible.

III. BOEDEKER DOES NOT MEASURE THE MARKET PRICES REQUIRED FOR BENEFIT-OF-THE-BARGAIN INJURY AND DAMAGES.

Plaintiffs do not dispute that, under applicable state law and fundamental economic principles: (1) benefit-of-the-bargain damages require market prices; and (2) the actual market prices paid are known, but the market prices that would have been paid in the "but-for" world must be determined based upon both willingness to buy and *willingness to sell at that price* at the time of sale. *See* Br. 25-33 & n.47; Opp. 3. Boedeker's methodology and opinions violate both these principles.

A. Boedeker's Methodology Does Not Measure Changes In Market Prices For Vehicles.

1. Benefit-of-the-Bargain Damages Require "Market Prices"—Including A Willingness To Pay And *Willingness To Sell At That Price.*

Benefit-of-the-bargain damages in the three Bellwether states are defined as the difference between the actual prices paid for vehicles and the but-for *market price* plaintiffs would have paid had a defect been disclosed at the time of sale. Br. 25-26 (citing authority). Plaintiffs do not dispute this.[20] Opp. 3 (not disputing a change in market price is required but incorrectly asserting Boedeker calculated a "change in market price"). Nor do plaintiffs dispute that "willingness to

[20] To the contrary, plaintiffs rely on the existence of a single "market price" to support their motion for class certification. Dkt. 5847, Plaintiffs' Class Cert. Offer of Proof at 60. But there never will be a single market selling price nationwide, statewide, regionally or locally for the same motor vehicle; market prices for the same vehicle vary, depending upon a myriad of factors—yet another inconvenient fact Boedeker fails to account for and instead assumes away. *See also* Dkt. 6227, New GM Willig Opp. 6 (discussing variation in prices for same vehicle).

sell" is required to calculate market prices. *Id*. at 33 (plaintiffs not disputing willingness to sell is required and instead incorrectly claiming "Mr. Boedeker properly measured willingness to sell"). Plaintiffs likewise do not dispute the Bellwether states' requirement that for a "market price" to exist, sellers must be willing to sell *at that price*.[21] The law of the three Bellwether states is consistent with basic principles of economics, including the Gans textbook and myriad other economic textbooks: any *market price* requires willingness to sell *at that price*. *See*, *e.g.*, Ex. 114, Gans/Mankiw Textbook at 81; *see also* Br. 28 n. 43 (citing texts).

2. Boedeker's Methodology Does Not Determine Willingness To Sell At His Purported Actual Or But-For Prices.

Boedeker and Dr. Gans both concede that their methodology did not determine willingness to sell any of the "scenarios" at any prices let alone the made-up prices in Boedeker's surveys.[22] *See* Ex. 32, 1st Rpt. Figure 19. Boedeker concedes he assessed neither the manufacturer's: (i) willingness to sell his defect-free scenarios (used to determine his invented "actual world" demand curves) at any price; nor (ii) willingness to sell his defect-included scenarios (used to determine his so-called "but-for world" demand curves) at any price. Ex. 40, 7/6/18 Dep. 462:11-18.

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[21] *See Peterson v. Cont'l Boiler Works, Inc.*, 783 S.W.2d 896, 900 (Mo. 1990) ("'Fair market value'…is a phrase *without ambiguity in the law*. It means *the price* which property will bring when it is offered for sale by an owner who is *willing but under no compulsion to sell* and is bought by a buyer who is willing or desires to purchase but is not compelled to do so."); *Pac. States Sav. & Loan Co. v. Hise, State Guar. Corp., Intervener*, 25 Cal. 2d 822, 837–38 (Cal. 1945) ("That market value is *the amount for which a property can be sold by a willing seller* to a willing buyer, is quite generally recognized."); *Glendale Fed. Sav. & Loan Assn. v. Marina View Heights Dev. Co.*, 66 Cal. App. 3d 101, 141 (Cal. App. 1977) (holding in fraud and breach of contract case that "definition of market value and the principles governing its ascertainment are the same as those applicable to the valuation of property in eminent domain proceedings and in ad valorem taxation of property"); *S. Bay Irr. Dist. v. Cal.-Am. Water Co.*, 61 Cal. App. 3d 944, 967 (Cal. App. 1976) ("It is usually said that market value is what a willing buyer would pay in cash to a willing seller.") (*quoting United States v. Miller,* 317 U.S. 369, 373-374 (1943)); *Nelson v. Najm*, 127 S.W.3d 170, 177 (Tex. App. 2003) ("Fair market value is defined as the price a willing buyer would pay to a willing seller.").

[22] Ex. 40, Boedeker 7/6/18 Dep. 462:11-18; ("Q. You are not opining that New GM would be willing to sell these option packages at the prices offered in your conjoints, are you? . . . A. I'm not opining on New GM's willingness to sell those option packages at those prices. That is correct."); Ex. 110, 6/29/18 Gans Dep. 429:2-8 ("Q. So [Boedeker] did not analyze GM's willingness to sell at the actual or but-for-price? A. No.").

Accordingly, Boedeker's methodology does not measure market prices for vehicles. To do so, Boedeker would need ***supply*** and demand curves for ***vehicles*** (not scenarios), but he calculated neither. Boedeker agrees that "[t]he argument of a *vertical supply curve is fundamentally flawed* because a vertical supply curve means that a given product is supplied by the manufacturer in the same quantity no matter what the price is." Ex. 27, 2nd Rpt. ¶ 387. Indeed, Dr. Gans' textbook confirms that the supply of "cars" is "*elastic*" (*i.e.*, highly sensitive to changes in price), and not inelastic, thereby refuting any argument that sellers would be willing to sell the same quantity of cars regardless of price.[23] Dr. Gans testified his "opinion is that [he] would find it *highly unlikely that GM -- it would have wanted to sell the same amount of cars at the price implied by Mr. Boedeker's 'but-for' analysis*." Ex. 111, 6/28/18 Gans Dep. 281:6-10.[24] Despite this, Boedeker adopts a "fixed-supply" methodology because he did not want to risk a finding of no compensatory damages at all under his methodology. Ex. 27, 2nd Rpt. ¶ 15.

3. Willingness To Sell "The Number Of Class Vehicles" Does Not Equal A Willingness To Sell "Scenarios" Or Vehicles ***At Boedeker's Claimed Prices.***

Plaintiffs argue "Mr. Boedeker properly measured *willingness to sell by the number of Class vehicles* actually sold by GM." Opp. 33; *see also* Ex. 27, 2nd Rpt. ¶ 32b (Boedeker claiming the number of "vehicles" sold "can easily be obtained"). That is economically unsound because

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[23] Ex. 114, Gans Textbook 105 ("In contrast, manufactured goods, such as books, *cars* and televisions, have *elastic supplies* because the firms that produce them can run their factories longer in response to a higher price."); *see also* Ex. 27, 2nd Rpt. ¶ 15 (considering but-for willingness to sell could result in "an estimate of $0 damages to deceived buyers if GM's supply elasticity is sufficiently high").

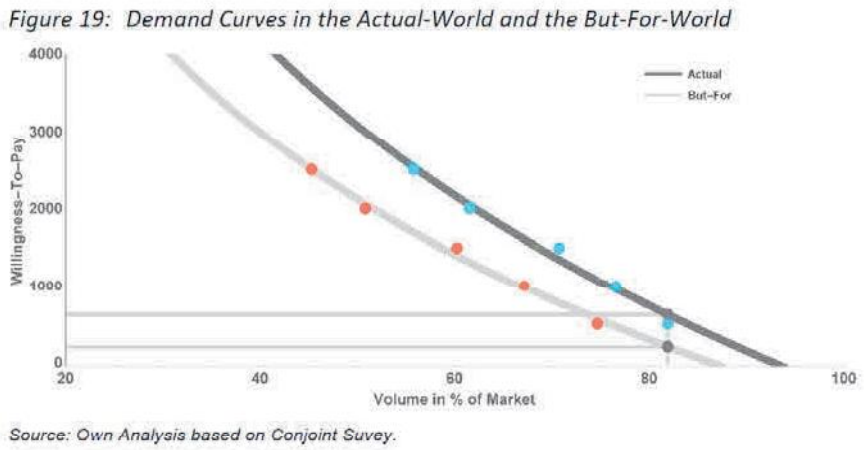
[24] These concessions are fatal on *Daubert* and class certification. Plaintiffs assert in their class certification brief that Boedeker's conjoint analysis "estimates the lesser *amount that consumers would have paid* for their GM vehicles had the consumers known of the defect." Dkt. 5846; *see also* Ex. 27, 2nd Rpt. ¶ 68 ("the economic loss model in the Boedeker Report estimates the *amount GM's customers would have paid* when they purchased or leased vehicles had GM not hidden the safety defect."). But because Dr. Gans agrees it is "highly unlikely" New GM would have been willing to sell at Boedeker's but-for price, he and Boedeker can opine that plaintiffs "would have paid" the same price only by assuming New GM is "*compelled* to sell the same quantity." Ex. 111, 6/28/18 Gans Dep. 281:1-10; 283:15-25. But under each Bellwether state's laws, a market price is "the price which property will bring when it is offered for sale by an owner who is willing but *under no compulsion* to sell." *Peterson*, 783 S.W.2d at 900.

willingness to sell a *quantity* at one price does not establish willingness to sell that same quantity at a lower price. Put simply, as a matter of both Bellwether state law and economics, willingness to sell a certain quantity of scenarios for $2,500 does not establish willingness to sell the same quantity for $100, $1 or some other lower price. Nor does Boedeker provide any reliable basis to believe that a willingness to sell a quantity of one product (scenarios consisting of safety features and informatoin) connotes anything about willingness to sell a different product (vehicles).

"The number of Class vehicles" is not part of Boedeker's calculation of purported actual or but-for demand curves or market prices. Instead, Boedeker: (1) calculated the probability that each of his survey respondents would purchase "scenarios"; (2) computed an "average" of each of those probabilities to determine the ten dots shown in Figure 19 below; (3) ran regressions to generate demand curves connecting "average"-based dots; and (4) calculated vertical differences, as described in New GM's opening brief.[25] But, regardless of whether "the number of Class vehicles" was ten or 10 million, the number of Class vehicles plays no role in Boedeker's computation of purported per-vehicle damages in Boedeker Figure 19 below. That computation solely assesses the difference between: (i) willingness to pay for defect-free scenarios at different prices (Boedeker's calculated so-called "Actual World" demand curve in Figure 19 below); and (ii) willingness to pay for defective scenarios at different prices (Boedeker's "But-For World"

[25] Ex. 146, 2/7/18 Dep. 337:9-19 ("Q: Okay. Now, what you -- what you are going to do in Mathematica, you basically are going to calculate, then, the probability for each of these respondents that they're going to purchase one of these scenarios versus not purchase it; is that right? A: It's basically for -- for each scenario, *there is a choice probability for one individual* -- a time for each individual to assess the likelihood that any of those different permutations will be bought."); Ex. 34, 7/5/18 Dep. 277:5-10 ("Q: [O]n Figure 19, as your example, we are getting the *average probability across the respondents in the survey that they would purchase* the defect free package, correct, versus not at all? A. That's correct.") Plaintiffs tout Boedeker's "regression," Opp. 11, but that "regression" simply generated lines connecting the ten "average"-based dots Boedeker had already calculated. Ex. 146, 2/7/18 Dep. 358 ("You do a regression that basically fits to the -- the blue dots, a demand curve. And then you do a regression that fits to the orange dots, a demand curve, correct? A That is correct.").

demand curve below). Boedeker, in short, calculated "no supply curve." Ex. 146, 2/7/18 Dep. 358:16.[26]



As Figure 19 shows, Boedeker purports to assess consumers' willingness to pay (demand curves) for various quantities of "scenarios" at a price range of $500-$2500. But the "number of Class vehicles" cannot analytically get Boedeker from a demand curve for "scenarios" to the market price for vehicles. *First*, the "number of Class vehicles" does not determine the actual-world quantity of "scenarios" that would be sold.[27] Nor does "the number of Class vehicles" determine New GM's willingness to sell scenarios at Boedeker's conjoint prices, as Boedeker

[26] Boedeker's Figure 19—in the "*Empirical*" section of his report—has an x-axis labelled "Willingness to Pay," and contains no supply curve. Tellingly, Boedeker's Figure 8—in the "*Theoretic*" section of his report—has an x-axis labelled "Willingness to Pay, Willingness to Accept, Price," and contains a theoretical supply curve not used by Boedeker in making up his damages calculations. *See* Ex. 32, 1st Rpt. at 10 ("*Theoretic* Framework of Economic Loss Model); *id.* at 23 ("The *Empirical* Study Performed Conducted to Quantify Economic Losses in this Matter"), Figs. 8, 19.

[27] For example, one Boedeker "scenario" includes lane departure warning but no other safety feature. Ex. 44 (Screenshots Original MDL Survey), at 21. Although Boedeker claims the number of "vehicles" sold "can easily be obtained," Ex. 27, 2nd Rpt. ¶ 32b, he did not determine the number of vehicles sold with lane departure warning and no other features. Nor did he determine the number of vehicles sold with other features included. Yet each set of feature combinations constitutes a separate demand curve used by Boedeker to compute damages. Ex. 32, 1st Rpt. ¶ 107 ("we then perform market simulations that construct, for **every choice combination that the survey respondents saw**, the demand curves for the actual-world (undisclosed defects) and the but-for-world (disclosed defects)." Another "scenario" involves the "information" that "no recall [is] required; *vehicle* is safe as is." Ex. 145 (Screenshots OCDA Survey), at 49. Boedeker cannot determine *any* number of vehicles sold with the "no recall"-guarantee reflected in his surveys; neither such "information" nor such "scenarios" are sold in reality.

concedes. Ex. 40, 7/6/18 Dep. 462:11-18. Because Boedeker cannot determine willingness to sell scenarios at any price, he cannot determine any market price for scenarios.

Second, a market price for scenarios (which Boedeker does not compute) is not the same as a market price for a vehicle. Rather, to determine a market price for a vehicle, Boedeker would need to determine much more than the "number of Class vehicles." For example, he would also need willingness to pay for and willingness to sell the vehicle at different prices (supply and demand curves for the vehicle). As Dr. Gans agreed, "a supply curve is not just quantities. It shows willingness to sell different quantities at different prices." Ex. 147, 6/28/18 Gans Dep. 55:15-19. An incurable flaw in Boedeker's methodology is that the "number of Class vehicles" cannot provide those supply and demand curves for vehicles, because it does not determine willingness to pay and willingness to sell vehicles at various prices. *Id.* 54:7-55:21.

Dr. Gans made this point when referencing Figure 8 from Boedeker's own report. Ex. 148, Annotated Version of Boedeker Figure 8, Ex. 6 to Gans Deposition. Boedeker Figure 8 (in the "Theoretic" Section of his report) purports to show that, at the actual world price, buyers are willing to buy 6 units, and sellers are willing to sell 6 units. After a defect is disclosed and the demand curve shifts downward, buyers are willing to buy 6 units at Boedeker's so-called but-for "market price." Ex. 32, 1st Rpt. 21-22 (claiming "$8,850" as the "new market equilibrium" price at which "al [sic] 6 original buyers of the vehicle would buy it again"). But, as Dr. Gans explained, sellers are *not in fact or even in theory* willing to sell the original quantity (6 units) at that lower calculated price. Ex. 147, 6/28/18 Gans Dep. 112:9-18 (explaining that, in Boedeker's Figure 8, "the seller is willing to sell two units and *not willing to sell six units*" at the lower price).[28] Because

[28] Boedeker claims the actual price where the Figure-8 but-for demand curve intersects 6 units is $8,850. Ex. 32, 1st Rpt. 21. The $10,000 used at Dr. Gans' deposition was an approximation. Ex. 147, 6/28/18 Gans Dep. Tr. 108-112.

sellers are not willing to sell six units at Boedeker's purported but-for "market price," it is not a "market price" at all as a matter of state law and economics, but instead is a proposed penalty.[29]

4. Plaintiffs' "Market-Price" Cases Are Irrelevant And Distinguishable.

Plaintiffs claim that case law supports using a "fixed supply" in determining a "market price." Opp. 34-35. Their cited cases fall into two distinguishable buckets.

First, plaintiffs cite cases where the court assumed or found the defendant was *willing to sell the same number of products at the lower but-for price*. *See Broomfield.*, 2018 WL 4952519, at *19 ("the *model assumes that CBA would have wanted to sell the same number of beers* with or without the representations'"); *In re MyFord Touch Consumer Litig.*, 291 F. Supp. 3d 936, 970 (N.D. Cal. 2018) ("assumption that Ford would have sold the same number of vehicles notwithstanding a drop in value ranging from $729–$1,290 is not so far-fetched as to be indisputably wrong")[30]; *Davidson v. Apple, Inc.*, 2018 WL 2325426, at *22 (N.D. Cal. May 8, 2018) ("*Assuming Apple would have sold the same number of iPhones despite the drop in what consumers were willing to pay is not especially farfetched* because the marginal cost of producing an iPhone could still have been below consumers' willingness to pay."). In this case, however, the Court cannot conclude or assume that New GM was willing to sell the same number of vehicles at Boedeker's but-for estimated prices (some of which are over $9,000 lower) because such an assumption is contradicted by Boedeker's reports and sworn testimony. Specifically, Boedeker opines that any such inelastic supply assumption regarding willingness to sell is

[29] In Boedeker's model, "GM is the seller in both the actual world and the 'but-for' world." Ex. 147, 6/28/18 Gans Dep. 296:18-19, 23. In any event, as Dr. McFadden explains, it would "not matter if the vehicles in this case were already sold," because "any 'market price' in economics" requires consideration of the current owners' willingness to sell at that price, regardless of whether the product had already been sold zero times, once, or ten times. Ex. 42, 8/3/18 McFadden Rpt. re Boedeker ¶¶ 9-10 (citing economics textbooks); 8/13/18 Rossi Rpt. ¶ 10 ("market price" requires "willingness to sell at that price").

[30] The "not indisputably wrong" standard is not the law of the Second Circuit or under *Daubert*. Br. 40 n. 73.

"fundamentally flawed" because it "means that a given product is supplied by the manufacturer in the same quantity no matter what the price is." Ex. 27, 2nd Rpt. ¶ 387; *see also* Ex. 114, Gans Textbook at 104 (supply curve for "cars" is "elastic"); 7/5/18 Dep. 62-63.

Second, plaintiffs cite cases that did not analyze whether applicable Bellwether state law requires willingness to sell at the alleged actual *and* but-for prices. At best, those courts analyzed whether the defendant was *able* to sell the same quantity at some lower price, *not* whether the defendant was *willing* to sell the same quantity at that price under Bellwether state law. *See In re Dial Complete Mktg. & Sales Practices Litig.*, 320 F.R.D. 326, 336 (D.N.H. 2017) ("Boedeker's model asks, it appears, '*At what price* in that actual market in which Dial sold the offending products *could Dial have sold* the equivalent number of products without the false claim(s)?,'" but not undertaking state-law analysis of *willingness* to sell at the calculated but-for price); *Fitzhenry-Russell*, 326 F.R.D. at 605 (asking whether defendant "*could have sold* the same number of products without the challenged claim in real life," but not addressing state-law requirement of *willingness* to sell at the but-for price); *Hadley v. Kellogg Sales Co.*, 324 F. Supp. 3d 1084, 1106 (N.D. Cal. 2018) (holding "these measures adequately account for supply-side market factors," but not undertaking state-law analysis of willingness to sell at but-for price); *In re Lenovo Adware Litig.*, 2016 WL 6277245, at *21 (N.D. Cal. Oct. 27, 2016) (conjoint expert properly "addressed 'the supply side' of the market, determining that it was not at issue 'because all sales of the laptop models at issue have occurred in the past,'" but not undertaking state-law analysis of willingness to sell at but-for price); *Sanchez-Knutson v. Ford Motor Co.*, 181 F. Supp. 3d 988, 995 (S.D. Fla. 2016) (Florida law).

As explained in New GM's opening brief, these cases also reflect certain courts' struggles with or disregard of well-established economic principles and the limited record before them. In

contrast, the mature expert record in this case presents this Court with an opportunity to comprehensively address the economic and legal issues with the benefit of insights from the very experts upon whose work Boedeker and other experts purport to rely. And plaintiffs' argument that Boedeker's methodology is not "novel" because it has been accepted by seven courts, Opp. 34, ignores those courts that have rejected it, as well as governing law and basic economics. *Daubert* and Rule 702 require the Court to shut the gate on expert opinions that are not reliable—regardless of whether they are considered "novel" or have been incorrectly accepted by other courts. *See also Almeciga v. Ctr. for Investigative Reporting, Inc.*, 185 F. Supp. 3d 401, 423 (S.D.N.Y. 2016) ("For decades, the forensic document examiner [handwriting analysis] community has essentially said to courts, 'Trust us.' And many courts have. But that does not make what the examiners do science.").

B. Plaintiffs Cannot Cure Boedeker's Missing Supply Curve With A "Penalty."

Plaintiffs do not dispute that economics as well as the law in the Bellwether states require consideration of willingness to sell *at the calculated actual and but-for alleged market prices*. But Boedeker worries that considering willingness to sell at his alleged prices for hypothetical scenarios (*i.e.*, "supply elasticity") could actually result in "an estimate of $0 damages to deceived buyers if GM's supply elasticity is sufficiently high." Ex. 27, 2nd Rpt. ¶ 15. In effect, Boedeker's "worry" is that the proper application of economics and law would show that the putative classes did not have any benefit-of-the-bargain damages. To avoid a "zero damages" result, Boedeker constructed a methodology that is dependent on his reasoning that there "need[s] to be a penalty (in the economic sense) for active deception." *Id.* ¶ 16. That "penalty," according to Boedeker and Dr. Gans, requires ignoring a seller's willingness to sell at the hypothesized but-for price. Ex. 111, 6/28/18 Gans Dep. 286-287. Boedeker's model thus "compels the number of vehicles supplied in the but-for world to be the same as in the actual world." *Id.* But there is no support in

economics for this novel "penalty" theory and it would represent an extraordinary scientific leap for any court to accept it.

A "penalty" for "active deception" likewise has no place in compensatory damages under a benefit-of-the-bargain theory. For benefit-of-the-bargain damages, the focus is on the differential market values or prices of the product. *See* Br. 25-26. No Bellwether state legislature has suggested incorporating a penalty component into the determination of the existence of injury or the amount of benefit-of-the-bargain damages, and this Court should not do so now. *See In re Gen. Motors LLC*, 2016 WL 3920353, at *9 (rejecting brand-devaluating theory; "[i]f such a sea change in consumer protection policy and law is warranted, it should emerge from the legislative, not the judicial, realm."). That is why plaintiffs cannot identify a single Bellwether state court or legislature that has adopted such a penalty rule. There are likely many reasons for this, such as that such an approach would be punitive, not compensatory, and that willingness to pay (without willingness to sell) could result in an enormous damages number exceeding differences (if any) in actual and "but for" market prices by many orders of magnitude.[31] In sum, Boedeker's (and Dr. Gans') proposed "penalty"-based damages methodology is not recognized under the law of any Bellwether state. Nor has it been accepted by any Court as, by definition, it is not compensatory, but instead is a form of punitive damages.

Plaintiffs erroneously and repeatedly rely on the *MyFord Touch* Court's statement that "[d]oing otherwise might allow a defendant to profit in the real world by its wrongdoing (if proven) based on the notion that fewer people were *harmed* in the hypothetical world." Opp. 42 (*quoting*

[31] Ex. 147, 6/28/18 Gans Dep. 261:7-14 ("Q. [S]ome people in the 'but-for' world may have a willingness to pay of negative $100,000, right? A. Yeah."); *see also* Ex. 29, 2/23/18 Rossi Rpt. Figure 4 (showing respondents with negative willingness to pay); Ex. 30-A, 2/23/18 List Rpt. ¶¶ 116-18; Ex. 30-B, 8/13/18 List Rpt. ¶¶ 55-59 & App'x 5 (between 26.6% and 39.1% of survey respondents would be willing to pay the same amount or more in scenarios with disclosed defects); Ex. 29-A, 2/23/18 Rossi Rpt., App'x E at 71-83 (willingness to pay for various respondents of $353,832, $188,022, $155,596, *etc.*).

291 F. Supp. 3d at 971). In attempting to cure that perceived "harm," the *MFT* Court admitted that it was not applying "traditional economic principles" and implicitly endorsed the imposition of a policy-based penalty on sellers/manufacturers. *Id.* There was and is no legal support for discarding "traditional economic principles" in applying benefit-of-the-bargain laws in California or any other Bellwether state. This Court should not follow the *MFT* court's policy judgment and its adoption of junk science over settled economics and the law. This Court has the opportunity on a full record to make the right decision in this case—one which is fully aligned with, and compelled by, law and economics—and to clarify an important issue in class-action jurisprudence.

C. Plaintiffs' Search For An "Answer" Confirms Why No Class Can Be Certified.

On the individual level, economic loss is calculated by comparing the actual point of sale prices paid versus the market price an individual purchaser would have paid had he or she known of the defect at the time of sale. But that inquiry is inherently fact and individual-purchaser specific—which precludes any class certification in this case. Thus, when plaintiffs argue that New GM does not provide an "answer" to how class-wide damages can be determined, Opp. 39, what they really are complaining about is that New GM does not agree that there are any class-wide damages, or that conjoint analysis can be used to determine class-wide damages and fact of injury. *First*, it is not New GM's burden to solve plaintiffs' inability to establish class-wide fact of injury or damages. *Second*, this is not a case in which class-wide damages analysis can legitimately be done because individual facts predominate. *Cf. Coffey*, 187 F. Supp. 2d at 978 ("There may be cases where no witness can be an expert because the Plaintiff does not have a case. . . . [T]he limitations of a case do not excuse deficiencies in expertise, as defined by Rule 702 and Daubert and its progeny.").

Third, courts have repeatedly held that conjoint-based market-price damage opinions must, at a minimum, include a reliable analysis of both the demand and supply curves—as opposed to

Boedeker's flawed methodology here. *See, e.g., Saaverdra v. Eli Lilli & Co.*, 2014 WL 7338930 (C.D. Cal. 2014); *In re NJOY, Inc. Consumer Class Action Litig.*, 120 F. Supp. 3d 1050 (C.D. Cal. 2015); *Apple, Inc. v. Samsung Electronics Co.*, 2014 WL 976898 (N.D. Cal. Mar. 6, 2014). Yet neither Boedeker nor Dr. Gans make such a required supply-response analysis here.

IV. PLAINTIFFS CANNOT OVERCOME BOEDEKER'S MANY OTHER METHODOLOGICAL ERRORS.

A. The Cumulative Impact Of Boedeker's Errors Requires Exclusion.

Aside from repeating their theme that everything "goes to weight," plaintiffs do not meaningfully address much less solve Boedeker's other methodological errors, *see* Br. 43-45, including that he (i) did not replicate actual marketplace conditions or (ii) survey a representative population. The cumulative impact of those and many other errors alone requires exclusion.[32]

B. Boedeker's Theory Would Result In Impermissible Excess Compensation.

Plaintiffs do not dispute that "[i]f tort law fully compensates those who are physically injured, then any recoveries by those whose products function properly mean excess compensation." *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1017 (7th Cir. 2002); *see also id.* (explaining excess compensation using "widget" example). Plaintiffs likewise do not dispute that plaintiffs who were "physically injured" have had the opportunity to obtain compensation, either through the Feinberg program or settlements of federal, state, and unfiled personal injury claims. Therefore, as Judge Easterbrook explained, any further "recoveries by those whose products function properly mean excess compensation." *Id.* Because Boedeker's methodology

[32] *See Malletier v. Dooney & Bourke, Inc.*, 525 F. Supp. 2d 558, 603 (S.D.N.Y. 2007) ("While we find that the above concerns are alone sufficient to require the exclusion, . . . we note other fundamental problems with the survey that, taken together with the problems of disjointed implementation and ambiguous reports, leave no doubt that the cumulative errors render the survey inadmissible").

and opinions would result in "excess compensation" and in plaintiffs receiving more than the "benefit of their bargain," they are unreliable, irrelevant, and inadmissible.[33]

V. PLAINTIFFS' QUALIFICATIONS RESPONSE CONFIRMS THAT BOEDEKER LACKS THE NECESSARY EXPERTISE FOR HIS OPINIONS IN THIS CASE.

Plaintiffs laud Boedeker's education and experience, and rest on the refrain that questions about qualifications should go to weight. But he has no Doctorate and he admittedly is not a conjoint expert.[34] Plaintiffs cite no case involving anything approaching the number of errors and mistakes made here. "[T]he catalog of errors, misunderstandings, mischaracterization, and *non sequiturs* . . . is sufficient to suggest that the nature and extent of the tasks he has undertaken in this matter exceed his competence in the proper application of tools he employs." Ex. 24, 2/23/18 Marais Rpt. ¶ 11. Boedeker should be excluded "for at least three independent reasons:" (i) he is "not qualified to offer the proffered testimony;" (ii) "his opinions are unhelpful and unreliable because they do not 'fit'" the facts or the law; and (iii) "he did not use a reliable methodology." *LVL XIII Brands*, 209 F. Supp. 3d at 646–48. What Boedeker did do is infected with pervasive error and should be excluded.

CONCLUSION

For these reasons, as well as those discussed in New GM's opening *Daubert* brief, and also the parties' class certification briefing, New GM respectfully requests the Court exclude the opinions, methodology, and testimony of Stefan Boedeker.

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[33] And plaintiffs' reference to other "manifest defect" cases does not help them. Plaintiffs do not cite any Bellwether state case allowing recoveries for un-manifested defects that also considered whether plaintiffs in the same population had separately recovered (or could recover) for actual injuries.

[34] *See also Lippe v. Bairnco Corp.*, 288 B.R. 678, 686, 689 (S.D.N.Y. 2003), *aff'd*, 99 F. App'x 274 (2d Cir. 2004) ("Dewey's opinions are based largely on his experience, but he makes no effort to explain how his conclusions were reached, why the conclusions have a factual basis, or how his experience is reliably applied."); *Dukes v. Georgia,* 428 F. Supp. 2d 1298, 1309,1315 (N.D. Ga.), *aff'd sub nom. Dukes v. State of Georgia*, 212 F. App'x 916 (11th Cir. 2006) ("Accepting Dr. Greifinger's experience alone as evidence of the reliability of his statements is tantamount to disregarding entirely the reliability prong of the Daubert analysis.").

Dated: November 9, 2018

Respectfully submitted,

Richard C. Godfrey, P.C

Richard C. Godfrey, P.C.
Andrew B. Bloomer, P.C.
KIRKLAND & ELLIS LLP
300 N. LaSalle
Chicago, IL 60654-3406
Phone: 312-862-2000
Fax: 312-862-2200
andrew.bloomer@kirkland.com
richard.godfrey@kirkland.com

Attorneys for Defendant General Motors LLC

CERTIFICATE OF SERVICE

I hereby certify that on November 9, 2018, I electronically filed the foregoing Motion using the CM/ECF system, which will serve notification of such filing to the email of all counsel of record in this action.

By: */s/ Richard C. Godfrey, P.C.*
Richard C. Godfrey, P.C.

EXHIBIT E

SUPPLEMENTAL LETTER BRIEFING

EXHIBIT E-1

GENERAL MOTORS LLC'S LETTER TO THE MDL COURT REGARDING *IN RE ASACOL ANTITRUST LITIG.*, 2018 WL 4958856 (1st Cir. Oct. 15, 2018)

[MDL ECF NO. 6183] (FILED OCTOBER 19, 2018)

KIRKLAND & ELLIS LLP
AND AFFILIATED PARTNERSHIPS

300 North LaSalle
Chicago, Illinois 60654

Andrew B. Bloomer, P.C.
To Call Writer Directly:
(312) 862-2482
andrew.bloomer@kirkland.com

(312) 862-2000

www.kirkland.com

Facsimile:
(312) 862-2200

October 19, 2018

The Honorable Jesse M. Furman
United States District Court for the
Southern District of New York
500 Pearl Street
New York, NY 10007

Re: ***In re: General Motors LLC Ignition Switch Litigation***, 14-MD-2543

Dear Judge Furman:

Counsel for New GM respectfully submits the First Circuit's opinion in *In re Asacol Antitrust Litig*., --- F.3d ---, 2018 WL 4958856 (1st Cir. Oct. 15, 2018) (attached as Exhibit 1), as supplemental authority in support of New GM's Amended Memorandum in Opposition to Economic Loss Plaintiffs' Motion to Certify Bellwether Classes (Dkt. 6132), and New GM's Motion for Summary Judgment Against the Bellwether Economic Loss Plaintiffs (Dkt. 5858).

First, the opinion is relevant to the proposed certification of a class that undisputedly includes many uninjured plaintiffs. *See In re Asacol Antitrust Litig.*, at * 8 ("[T]his is not a case in which a very small absolute number of class members might be picked off in a manageable, individualized process at or before trial. Rather, this is a case in which any class member may be uninjured, and there are apparently thousands who in fact suffered no injury. The need to identify those individuals will predominate and render an adjudication unmanageable absent . . .[a] mechanism that can manageably remove uninjured persons from the class in a manner that protects the parties' rights."); *see also id*. at *11 ("[To Court's knowledge, no] federal court [has] affirmed a damages judgment in a class action against a defendant who was precluded from raising genuine challenges at trial to the assertion of liability by individual members of a class that was known to have members who could not be presumed to be injured. Nor has either party drawn to our attention any federal court allowing, under Rule 23, a trial in which thousands of class members testify.").

Second, the opinion bears on whether an expert's opinion regarding "class-wide" impact may establish liability when the proposed class includes uninjured class members. *See id.* at *9 ("[P]laintiffs point to no . . . substantive law that would make an opinion that ninety percent of class members were injured both admissible and sufficient to prove that any given individual class member was injured. And whether such evidence would actually be 'sufficient to sustain a jury finding,' . . .is far from self-evident.") (citation omitted).

KIRKLAND & ELLIS LLP

Here, as discussed in New GM's Amended Memorandum in Opposition to Economic Loss Plaintiffs' Motion to Certify Bellwether Classes (Dkt. 6132), and New GM's Motion for Summary Judgment Against the Bellwether Economic Loss Plaintiffs (Dkt. 5858), Boedeker's own data shows that between 26.6% and 39.1% of the survey respondents he used to calculate class damages have no damages at all. *See* Dkt. 6132, at 26. This is far more than the 10% at issue in *In re Asacol Antitrust Litig.*, as discussed *supra.*

Respectfully submitted,

/s/ Richard C. Godfrey, P.C.
/s/ Andrew B. Bloomer, P.C.

Counsel for Defendant General Motors LLC

cc: MDL Counsel of Record

Exhibit 1

2018 WL 4958856
Only the Westlaw citation is currently available.
United States Court of Appeals, First Circuit.

IN RE: ASACOL ANTITRUST LITIGATION.
United Food & Commercial Workers Unions and Employers Midwest Health Benefits Fund, on behalf of itself and all others similarly situated; Mark Adorney, Plaintiffs, Teamsters Union 25 Health Services & Insurance Plan, on behalf of themselves and all others similarly situated; NECA-IBEW Welfare Trust Fund, on behalf of themselves and all others similarly situated; Wisconsin Masons' Health Care Fund, on behalf of itself and all others similarly situated; Minnesota Laborers Health and Welfare Fund, on behalf of itself and all others similarly situated; AFSCME Health and Welfare Fund; Pennsylvania Employees Benefit Trust Fund; Ahold U.S.A., Inc.; Rochester Drug Co-Operative, Inc.; Value Drug Company; Meijer, Inc.; Meijer Distribution, Inc., Plaintiffs, Appellees,
v.
Warner Chilcott Limited; Allergan, Inc., f/k/a Actavis, PLC; Allergan USA, Inc.; Allergan Sales, LLC; Allergan, PLC, Formerly known as Actavis, PLC, Defendants, Appellants, Zydus Pharmaceuticals USA Inc.; Cadila Healthcare Limited; Warner Chilcott (US), LLC; Warner Chilcott Sales (US), LLC; Warner Chilcott Company, LLC, Defendants.

No. 18-1065
|
October 15, 2018

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS, [Hon. Denise J. Casper, U.S. District Judge]

Attorneys and Law Firms

J. Mark Gidley, with whom Peter J. Carney, Dana Foster, Matthew S. Leddicotte, Jaclyn Phillips, Washington, DC, Maxwell J. Hyman, Robert A. Milne, Jack E. Pace III, Bryan D. Gant, Kelly Newman, and White & Case LLP New York, NY, were on brief, for appellants.

Richard A. Samp and Marc B. Robertson on brief for Washington Legal Foundation, amicus curiae.

Justin N. Boley, with whom Kenneth A. Wexler, Tyler J. Story, Wexler Wallace LLP, Chicago, IL, Tyler W. Hudson, Eric D. Barton, David Barclay, Wagstaff & Cartmell, LLP, Kansas City, MO, Nathaniel L. Orenstein, Boston, MA, Todd A. Seaver, San Francisco, CA, Berman Tabacco, Daniel E. Gustafson, Karla M. Gluek, Michelle J. Looby, Minneapolis, MN, Joshua J. Rissman, Gustafson Gluek PLLC, Jeffrey L. Kodroff, William G. Caldes, John A. Macoretta, Spector Roseman Kodroff & Willis, P.C., Philadelphia, PA, Peter J. Mougey, Levin, Papantonio, Thomas, Mitchell, Rafferty & Proctor, P.A., Pensacola, FL, Jonathan D. Karmel, and Karmel Law Firm, Chicago, IL, were on brief, for appellees.

Before Lynch, Kayatta, and Barron, Circuit Judges.

Opinion

KAYATTA, Circuit Judge.

***1** Drug manufacturer Warner Chilcott Limited pulled one of its products—Asacol—from the market just months before the drug's patent protection expired. Warner simultaneously introduced a similar but not exactly identical substitute drug called Delzicol, the patent protection for which ran years longer. This coordinated withdrawal and entry of the two drugs allegedly precluded generic manufacturers from introducing a generic version of Asacol, which would have provided a lower-cost alternative to Warner's drugs Delzicol and Asacol HD, a version of Asacol that was also still under patent protection. Crying foul, the named plaintiffs in this case filed a class action alleging a violation of the consumer protection and antitrust laws of twenty-five states and the District of Columbia. On plaintiffs' motion, the district court certified a class of all Asacol purchasers who subsequently purchased Delzicol or Asacol HD in one of those twenty-six jurisdictions. In so doing, the

court found that approximately ten percent of the class had not suffered any injury attributable to defendants' allegedly anticompetitive behavior. Nevertheless, the district court determined that those uninjured class members could be removed in a proceeding conducted by a claims administrator. We find this approach to certifying a class at odds with both Supreme Court precedent and the law of our circuit. We therefore reverse.

I.

Asacol is a pharmaceutical drug that treats mild to moderate ulcerative colitis, a chronic inflammatory bowel disorder. Developed and first manufactured by Procter and Gamble Pharmaceuticals, Asacol debuted on the market in 1992 and received the protection of two patents. Those patents expired on July 30, 2013. In 2008, Procter and Gamble brought a new variation of Asacol to market, dubbed Asacol HD, which treated moderate, but not mild, ulcerative colitis. This new drug differed from Asacol in two key ways: it included twice the dosage, and it replaced Asacol's single-layer coating with a dual-layer coating. Asacol HD's patent protection extended years beyond that of Asacol. In 2009, Warner Chilcott purchased Procter and Gamble's pharmaceutical portfolio, which included both Asacol and Asacol HD.

On March 18, 2013, only a few months shy of the end of Asacol's patent protection, Warner stopped selling and marketing Asacol. On the same day, Warner introduced a new drug: Delzicol. Delzicol, like Asacol, treats ulcerative colitis. The two drugs contain the same active ingredient and dosage, and sold for the same price. Unlike Asacol, Delzicol comes in a capsule that does not contain dibutyl phthalate ("DBP"). DBP is a plasticizer, the safety of which appears to have been the subject of a dialogue between the FDA and Asacol's manufacturers.

On June 22, 2015, several plaintiffs (collectively "plaintiffs," "named plaintiffs," or "class representatives") filed suit on their own behalf and on behalf of a putative class. These plaintiffs are all union-sponsored benefit plans that paid for the purchases of Asacol HD and Delzicol. In their operative complaint, plaintiffs allege that Warner harbored an anticompetitive motivation for its conduct. According to the complaint, Warner's aim in pulling Asacol from the market and introducing Delzicol was to preclude the possibility of market entry of generic drugs, which would have cut into Warner's profits. State law provides the mechanism for this preclusion. Under most state substitution laws, pharmacists can fill a prescription by substituting a generic drug for the prescribed brand drug, but only if the brand drug is listed as a "reference" drug for the generic. This automatic substitution, plaintiffs say, provides the "only viable cost-efficient means" for new generics to "compet[e] with brand drugs." But even a small alteration to the brand drug, such as substituting a tablet form for a capsule form, can prevent a generic equivalent from using the discontinued form as a reference drug. Thus, by pulling Asacol, Warner effectively prevented generic drugs that would have used Asacol as a reference drug from entering the market after the expiration of Asacol's patents. [1] And the introduction of a similar, but not wholly equivalent, drug—Delzicol—with the potential for longer-lasting patent protection, allowed Warner to substantially retain its market share. Thus, plaintiffs contend, Warner forced consumers into a "hard switch" and maintained its monopoly power unencumbered by competition from generic entry. Plaintiffs' theory of liability rests on a Second Circuit decision that condemns similar such conduct. See New York ex rel. Schneiderman v. Actavis PLC, 787 F.3d 638 (2d Cir. 2015).

***2** The named plaintiffs and the putative class members purchased Warner's products not from Warner directly, but from third party intermediaries. That means that they cannot sue Warner for damages under the federal antitrust law. Illinois Brick Co. v. Illinois, 431 U.S. 720, 736, 97 S.Ct. 2061, 52 L.Ed.2d 707 (1977). Plaintiffs therefore seek recovery under the laws of twenty-five states and the District of Columbia that allow indirect purchasers to challenge anticompetitive conduct by manufacturers whose products consumers acquire through intermediaries. [2] All twenty-six jurisdictions, according to plaintiffs,

generally interpret state law restraints on anticompetitive activity consistently with federal courts' interpretation of federal antitrust law, but have "Illinois Brick repealer" laws allowing antitrust damage actions by indirect purchasers against manufacturers.

Plaintiffs moved for class certification on behalf of a class of all similarly situated indirect purchasers, including any individual consumers who purchased the relevant Warner products from drug retailers in the twenty-six jurisdictions. Plaintiffs designed the class to include only those persons or entities that both purchased Asacol prior to July 31, 2013—the approximate date on which Asacol's patent protection expired—and also purchased either Asacol HD or Delzicol after July 31, 2013. Both sides introduced expert evidence regarding the propriety of class certification.

The district court granted plaintiffs' motion for class certification. Rejecting Warner's argument to the contrary, the district court concluded that the named plaintiffs had standing to prosecute claims on behalf of class members under various state laws even if the named plaintiffs themselves had not made purchases in all those states. Any difference between the claims of the named plaintiffs and those of unnamed class members was a matter for consideration under Rule 23, and not a matter of Article III standing, the court ruled.

Moving to the Rule 23 analysis, the district court first found that plaintiffs' proposed class satisfied the four elements of Rule 23(a): numerosity, commonality, typicality, and adequacy. See Fed. R. Civ. P. 23(a). The district court also concluded that the proposed class passed muster under Rule 23(b)(3) because common questions predominated over individual questions and a class action presented a superior method for resolving plaintiffs' claims.

In making those determinations, the district court grappled with a problem that has been the source of much debate among the circuits: the presence of uninjured class members. The district court presumed that approximately ten percent of class members had not been injured by Warner's allegedly anticompetitive conduct because, even had a lower-priced generic alternative been available, these consumers would not have switched to it.[3] The court based this conclusion on the reports of both sides' experts. Those experts used the experiences of similar pharmaceutical products as benchmarks from which to infer likely market dynamics had a lower-priced generic form of Asacol been introduced. Defendants' expert, Dr. Bruce Strombom, pointed to a benchmark product in which the prevalence of consumers who stuck with the higher-priced brand decreased to 10.6% within approximately three years after generic entry. Dr. Rena Conti, plaintiffs' expert, looked to different benchmark products, from which she concluded that the market share of generic Asacol would have grown to approximately 88.8% within a year of generic entry, and would then have risen to about 91.4% thirty-one months after generic entry. From these two reports, the district court presumed that "by the end of the relevant period, somewhere around 10% of the class members would have opted for Asacol HD or Delzicol even in the presence of generic Asacol." In re Asacol Antitrust Litig., 323 F.R.D. 451, 482 (D. Mass. 2017).

***3** The district court nevertheless concluded that the number of these uninjured class members was "de minimis." The district court also accepted plaintiffs' contention that they could remove these uninjured persons from the class with the assistance of a so-called claims administrator. Our opinion in Nexium, plaintiffs argue, permitted such a process. See In re Nexium Antitrust Litig., 777 F.3d 9 (1st Cir. 2015).

The district court's order certifying the class raises issues on which circuits are split and that are likely to arise in other cases in this circuit before an appeal from a final judgment would—if ever—ripen in this case. A panel of this court therefore found "special circumstances" justifying the grant of leave to pursue an interlocutory appeal under Rule 23(f). See Fed. R. Civ. P. 23(f); Waste Mgmt. Holdings, Inc. v. Mowbray, 208 F.3d 288, 293-94 (1st Cir. 2000). In accord with this grant,

Warner presents two primary challenges. First, it argues that, because the named plaintiffs only made purchases in four states, they lack Article III standing to assert claims under the laws of states in which they did not make purchases. Second, Warner takes issue with the district court's decision to certify a class containing uninjured class members.

II.

We review de novo the existence of Article III standing required to invoke the jurisdiction of a federal court. See Anderson ex rel. Dowd v. City of Boston, 375 F.3d 71, 92 (1st Cir. 2004). The named plaintiffs in this case indisputably have standing to litigate their own claims against Warner. They plausibly allege an injury in the form of lost money fairly traceable to an allegedly unlawful supra-competitive price, and seek classic redress in the form of a damage award. See generally Lujan v. Defs. of Wildlife, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). Nor does the standing requirement of Article III erect any impediment to the named plaintiffs' ability to litigate as class representatives materially identical claims by other persons under the same laws under which the named plaintiffs' claims arise. Gratz v. Bollinger, 539 U.S. 244, 267, 123 S.Ct. 2411, 156 L.Ed.2d 257 (2003).

Warner challenges, instead, the named plaintiffs' standing to bring claims on behalf of class members whose claims arise under the laws of the twenty-two states within which no named plaintiff has either resided or purchased the relevant Warner products during the class period. These states, apparently, apply their relevant law only to claims that arise out of purchases made within the state or by state residents. Therefore, says Warner, because no named plaintiff can successfully bring a claim under the laws of any of those twenty-two states, they necessarily lack standing to bring such claims as representatives of persons who might sue successfully in those states.

One might think that we could reject this argument merely by observing that whether a plaintiff may represent persons who themselves have standing to bring the claims alleged is a question to be addressed under Rule 23, rather than a question of standing. After all, that is how one would presumably proceed in seemingly analogous situations outside of Rule 23. For example, in deciding whether a fiduciary, a parent, a personal representative, or a partner may prosecute a claim on behalf of another person, courts generally focus not on whether the putative representative independently satisfies Article III standing, but rather on whether that party qualifies under the applicable law as a representative of the one who does have standing. See, e.g., Sam M. ex rel. Elliott v. Carcieri, 608 F.3d 77, 83 n.5 (1st Cir. 2010); Goodwin v. C.N.J., Inc., 436 F.3d 44, 49 (1st Cir. 2006); Pérez v. Clinica Dr. Perea, 915 F.2d 1556, 1990 WL 151307, at *3 (1st Cir. July 9, 1990) (unpublished); Levin v. Berley, 728 F.2d 551, 555-56 (1st Cir. 1984). And sometimes the authority for such a person to bring a suit as a representative of another resides in the Federal Rules of Civil Procedure. See, e.g., Fed. R. Civ. P. 17(c)(2) (allowing a "next friend" to sue on behalf of a minor with no requirement that the next friend possess standing to bring such a claim on behalf of herself or himself).

***4** Precedent, though, forecloses such a simple and quick answer. See Warth v. Seldin, 422 U.S. 490, 502, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975); Blum v. Yaretsky, 457 U.S. 991, 1000-01, 102 S.Ct. 2777, 73 L.Ed.2d 534 (1982); see also 1 William B. Rubenstein, Newberg on Class Actions § 2:5 (5th ed. 2012) ("In a class action suit with multiple claims, at least one named class representative must have standing with respect to each claim."). In Blum, the Supreme Court confronted an effort by two plaintiffs to represent a class of Medicaid patients challenging the decisions of a state committee to transfer them to different levels of nursing home care, allegedly without sufficient procedural safeguards. The two named plaintiffs, who had been threatened with transfers

to lower levels of nursing care, also sought to press the claims of persons who might object to being transferred to facilities providing higher levels of care. 457 U.S. at 1000-02, 102 S.Ct. 2777. The named plaintiffs had not been transferred or threatened with transfers to facilities providing higher levels of care. Furthermore, the conditions under which transfers to such facilities occurred were sufficiently different from transfers to facilities providing lesser care "that any judicial assessment of their procedural adequacy would be wholly gratuitous and advisory." Id. at 1001, 102 S.Ct. 2777. For that reason, the plaintiffs lacked "the necessary stake in litigating conduct ... to which [the plaintiffs] ha[d] not been subject." Id. at 999, 102 S.Ct. 2777.

In keeping with this precedent, we have trained our Article III focus in class actions on "the incentives of the named plaintiffs to adequately litigate issues of importance to them." Plumbers' Union Local No. 12 Pension Fund v. Nomura Asset Acceptance Corp., 632 F.3d 762, 770 (1st Cir. 2011). This focus is in many respects simply an application to aggregate litigation of the basic Article III requirement that a plaintiff possess "such a personal stake in the outcome of the controversy as to assure ... concrete adverseness." Baker v. Carr, 369 U.S. 186, 204, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962).

Nothing in this precedent, though, suggests that the claims of the named plaintiffs must in all respects be identical to the claims of each class member. See Gratz, 539 U.S. at 262-68, 123 S.Ct. 2411. Requiring that the claims of the class representative be in all respects identical to those of each class member in order to establish standing would "confuse[ ] the requirements of Article III and Rule 23." Fallick v. Nationwide Mut. Ins. Co., 162 F.3d 410, 421 (6th Cir. 1998). Indeed, such an approach would render superfluous the Rule 23 commonality and predominance requirements because any case that survived such a strict Article III analysis would by definition present only common issues. So the question of standing is not: Are there differences between the claims of the class members and those of the class representative? Rather, the pertinent question is: Are the differences that do exist the type that leave the class representative with an insufficient personal stake in the adjudication of the class members' claims? Here, with one exception, we think not.

Importantly, the claims of the named plaintiffs parallel those of the putative class members in the sense that, assuming a proper class is certified, success on the claim under one state's law will more or less dictate success under another state's law. Even while arguing that there may be a few subtle differences in the attitudes of some state courts toward such claims, Warner concedes that the "parties do agree that Plaintiffs' liability theories as to monopolization are limited to a construction of state antitrust laws that parallel the federal Sherman Act." Under those parallel laws, all plaintiffs who were forced to pay a higher price in the absence of generic competition have a substantial and shared interest in proving that the higher price was the result of unlawful monopolizing conduct that is redressable by an award of damages. And the fact that judgments for some class members will nevertheless enter under the laws of states other than the states under which any of the class representatives' judgments will enter, where those laws are materially the same, has no relevant bearing on the personal stake of the named plaintiffs in litigating the case to secure such judgments. See Morrison v. YTB Int'l, Inc., 649 F.3d 533, 536 (7th Cir. 2011) (holding that a state law's limit to in-state events is an "application of choice-of-law principles [that] has nothing to do with standing" (emphasis in original)). Indeed, the fact that the judgments will enter under different statutes is such a minor point of difference that in individual actions it might not even preclude a finding of issue preclusion. B&B Hardware, Inc. v. Hargis Indus., Inc., —— U.S. ——, 135 S.Ct. 1293, 1306, 191 L.Ed.2d 222 (2015); see also Smith v. Bayer Corp., 564 U.S. 299, 310, 131 S.Ct. 2368, 180 L.Ed.2d 341 (2011) (rejecting the proposition "that the source of law is all that matters" in determining whether two issues differ).

***5** It is true that, in order to prevail on their claims, the named plaintiffs need not prove where a class member resides, or where the class member made a purchase. But that same thing could be said of the named plaintiffs' need to prove that any class member made a purchase anywhere, even in the states under which the named plaintiffs' claims arise. As we have previously observed, "[i]n a properly certified class action, the named plaintiffs regularly litigate ... claims of other class members based on transactions in which the named plaintiffs played no part." Plumbers' Union, 632 F.3d at 769.

Warner does argue that the applicable laws in a few states actually do have added substantive elements that the named plaintiffs will have no interest in proving: First, the laws of three states require proving some effect on intrastate commerce, see In re Flonase Antitrust Litig., 610 F.Supp.2d 409, 415-16 (E.D. Pa. 2009) (Tennessee); Sun Dun, Inc. v. Coca-Cola Co., 740 F.Supp. 381, 396-97 (D. Md. 1990) (District of Columbia); In re Microsoft Corp. Antitrust Litig., 2003 WL 22070561, at *2 (D. Md. Aug. 22, 2003) (Maryland); Second, some states treble damages, compare, e.g., Nev. Rev. Stat. § 598A.210(2) (providing for treble damages); Wis. Stat. § 133.18(1)(a) (same) with Fla. Stat. § 501.211(2) (providing only for actual damages) and Mass. Gen. Laws ch. 93A, § 11 (requiring proof of willful conduct as a predicate to trebling); and, Third, New York's consumer protection statute requires proof of deception, see Stutman v. Chem. Bank, 95 N.Y.2d 24, 709 N.Y.S.2d 892, 731 N.E.2d 608 (2000).

Warner, though, makes no showing that an effect on intrastate commerce will even be a disputed issue. Trebling, in turn, seems irrelevant to our inquiry unless it is not automatically applied to the common surcharge that the named plaintiffs have ample self-interest in proving. So that leaves Warner's unopposed contentions that New York law may require proof of deception, and that trebling in Massachusetts apparently requires proof of willfulness. As to the latter, plaintiffs base their relatively novel common monopolization claim on a theory that expressly requires proof of a "specific intent to monopolize," as "distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." Actavis, 787 F.3d at 651 (quoting Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407, 124 S.Ct. 872, 157 L.Ed.2d 823 (2004)). They expressly allege in pursuit of their own claims that Warner acted willfully. Nor does Warner claim that plaintiffs need not prove an intent to monopolize. So, whether or not such proof is ultimately required, the named plaintiffs certainly have a substantial stake in proving up a case that is, as a practical matter, unreliably distinguishable from proving willfulness.

That leaves only Warner's contention that, under N.Y. Gen. Bus. Law § 349(a), the named plaintiffs have an insufficient stake in the claim of New York class members because that law requires proof of deception. Plaintiffs offer no response to this argument at all. The complaint's list of common issues and its statement of its causes of action include no suggestion that they intend to prove deception (suggesting that they indeed see no stake in doing so). We therefore find that plaintiffs have waived any opposition to Warner's argument that plaintiffs lack standing to sue on behalf of those who can claim no basis for relief other than under New York law. In so doing, we put off to another day how to apply Article III standing principles to a case in which a putative class representative has a personal stake in proving most but not all of the elements of a class member's claim.

***6** Finding Article III standing otherwise satisfied in this case is in accord with the decisions of our sister circuits that have considered similar issues. See Langan v. Johnson & Johnson Consumer Cos., 897 F.3d 88, 92-96 (2d Cir. 2018); see also Morrison, 649 F.3d at 536. Our conclusion is in line with our prior precedent, in which we required only that a plaintiff make a single purchase in order to satisfy standing for a claim brought under multiple state laws. See Nexium, 777 F.3d at 31-32. It also accords with direction from the Supreme Court that, once the

named plaintiff establishes injury and membership in the class, the inquiry should shift "from the elements of justiciability to the ability of the named representative to 'fairly and adequately protect the interests of the class.' " Sosna v. Iowa, 419 U.S. 393, 403, 95 S.Ct. 553, 42 L.Ed.2d 532 (1975) (quoting Fed. R. Civ. P. 23(a)). Therefore, it is to that inquiry that we now turn our focus.

III.

Satisfied that we have subject matter jurisdiction, we consider next the district court's finding that plaintiffs' proposed class meets the requirement of Rule 23(b)(3) that "questions of law or fact common to class members predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3). We review that decision for abuse of discretion. In re New Motor Vehicles Canadian Exp. Antitrust Litig., 522 F.3d 6, 17 (1st Cir. 2008). Within this ambit, we review pure issues of law de novo and "fact-dominated" issues for clear error. Id.

In considering the propriety of class certification in this case, we again deal with an issue that strikes at the heart of the competing considerations raised by some class actions: the proper treatment of uninjured class members at the class certification stage. Proof of injury, also called "injury-in-fact," is a required element of a plaintiff's case in an action such as this one. New Motor Vehicles, 522 F.3d at 19 n.18. Plaintiffs' class nevertheless includes consumers who would have continued to purchase a brand drug for various reasons, even if a cheaper, generic version had been available.

On appeal, both parties argue that the district court's estimate that approximately ten percent of the class was uninjured is wrong: Plaintiffs say it is too high and Warner says it is too low. The district court record suggests that many of these specific challenges were not preserved. See Clauson v. Smith, 823 F.2d 660, 666 (1st Cir. 1987) (stating that "points which were not seasonably advanced below" are waived on appeal). In any event, having reviewed the parties' competing critiques, we find no clear material error in the district court's factual approximation. See Nexium, 777 F.3d at 17 (reviewing factual findings for "clear error"). So, the question thus becomes: Can a class be certified in this case even though injury-in-fact will be an individual issue, the resolution of which will vary among class members?

To answer this question, the parties agree that we must direct our attention to the requirement of Rule 23(b)(3) that common issues must predominate over individual issues in order to certify a class. See Amgen, Inc. v. Connecticut Ret. Plans & Tr. Funds, 568 U.S. 455, 469, 133 S.Ct. 1184, 185 L.Ed.2d 308 (2013). The aim of the predominance inquiry is to test whether any dissimilarity among the claims of class members can be dealt with in a manner that is not "inefficient or unfair." Id. (citing Richard A. Nagareda, Class Certification in the Age of Aggregate Proof, 84 N.Y.U. L. Rev. 97, 107 (2009)). Inefficiency can be pictured as a line of thousands of class members waiting their turn to offer testimony and evidence on individual issues. Unfairness is equally well pictured as an attempt to eliminate inefficiency by presuming to do away with the rights a party would customarily have to raise plausible individual challenges on those issues.

***7** In assessing efficiency and fairness, we have recognized that a class may be certified notwithstanding the need to adjudicate individual issues so long as the proposed adjudication will be both "administratively feasible" and "protective of defendants' Seventh Amendment and due process rights." Nexium, 777 F.3d at 19. In Nexium itself, the court found a possible mechanism available to avoid both inefficiency and unfairness. The court reasoned that, "if unrebutted," a consumer's testimony that "given the choice, he or she would have purchased the generic" would be "sufficient to establish injury in an individual suit." Id. at 20. It therefore concluded that "similar testimony in the form of an affidavit or declaration would be sufficient in a class action"

when introduced "at the liability stage." Id. at 20-21.

The district court in this case sought to track Nexium, finding that "prior to judgment, it will be possible to establish a mechanism for distinguishing the injured from the uninjured class members." In re Asacol Antitrust Litig., 323 F.R.D. at 481 (quoting Nexium, 777 F.3d at 19). Pointing to a proposal advanced by plaintiffs, the district court described the mechanism to which it referred as follows: "[i]n a Court-approved notice, Class members will be asked to submit a claim form, along with data and documentation that may be deemed necessary for consideration. The Claims Administrator will evaluate each claim pursuant to a formula proposed by Plaintiffs and approved by the Court." Id. at 479. Plaintiffs' actual proposed mechanism also noted that "[i]ndividual Class members will have an opportunity to contest the calculations, and the Court will review the Claims Administrator's report, making any changes it believes are necessary."

One can only guess what data and documentation may be deemed necessary, what the formula will be, and how the claims administrator will decide who suffered no injury. Nevertheless, the district court was convinced that Nexium blesses such a scheme. We disagree.

Nexium held that "unrebutted testimony" contained in affidavits would suffice as a mechanism for identifying who was injured and who was not injured. Id. at 21 (emphasis added). If unrebutted, such testimony in an affidavit could be used prior to trial to obtain summary judgment, thereby efficiently and fairly removing the issue of injury-in-fact from the case for trial. See Fed. R. Civ. P. 56(c)(1)(A), (c)(4); see also, e.g., Kuperman v. Wrenn, 645 F.3d 69, 80 (1st Cir. 2011) (finding that a party prevailed on an issue on summary judgment on the basis of an unrebutted affidavit). In Nexium itself, neither our court nor the district court ever learned whether the defendants would in fact rebut any affidavits. The possibility that unrebutted affidavits could be used was raised sua sponte for the first time in the majority opinion. By the time that opinion was issued, the case had been tried without the benefit of our holding and, having won, the defendants indeed chose not to challenge the inclusion of any class members, by that point presumably enjoying the breadth of their win. See generally In re Nexium (Esomeprazole) Antitrust Litig., 842 F.3d 34, 40-42 (1st Cir. 2016).

Here, though, the record is clear that plaintiffs do not propose to rely on unrebutted testimony to eliminate the question of injury-in-fact before trial. And, unlike in Nexium, defendants have expressly stated their intention to challenge any affidavits that might be gathered. Nor do plaintiffs point to any basis in the record for deeming all such challenges to be so implausible as to warrant a finding that we can consider the issue to be uncontested. Warner has explained that some class members stopped taking (and will therefore have no record of purchasing) Asacol anywhere between 2009 and 2012, and some class members when asked will admit a preference for DBP-free medication such as Delzicol. Additionally, some class members would not have switched to a generic because they had no co-pay, and therefore were not price sensitive. So whatever one thinks of Nexium's sua sponte positing in the face of the defendants' silence that unrebutted affidavits might be both available and sufficient, see Nexium, 777 F.3d at 36 (Kayatta, J., dissenting), here we have no basis for venturing such a prediction (nor did the district court do so).

***8** Our inability to fairly presume that these plaintiffs can rely on unrebutted testimony in affidavits to prove injury-in-fact is fatal to plaintiffs' motion to certify this case. Testimony that is genuinely challenged, certainly on an element of a party's affirmative case, cannot secure a favorable summary judgment ruling disposing of the issue. Fed. R. Civ. P. 56(a). And the affidavits would be inadmissible hearsay at trial, leaving a fatal gap in the evidence for all but the few class members who testify in person. Nor have the plaintiffs provided

any basis from which we could conclude that the number of affidavits to which the defendants will be able to mount a genuine challenge is so small that it will be administratively feasible to require those challenged affiants to testify at trial.

We also reject any invitation to rewrite Nexium as sanctioning the use of inadmissible hearsay to prove injury to each class member at or after trial. The fact that plaintiffs seek class certification provides no occasion for jettisoning the rules of evidence and procedure, the Seventh Amendment, or the dictate of the Rules Enabling Act, 28 U.S.C. § 2072(b). See Tyson Foods, Inc. v. Bouaphakeo, —— U.S. ——, 136 S.Ct. 1036, 1048, 194 L.Ed.2d 124 (2016) (evidence may not be used in a class action to give "plaintiffs and defendants different rights in a class proceeding than they could have asserted in an individual action"). A "claims administrator's" review of contested forms completed by consumers concerning an element of their claims would fail to be "protective of defendants' Seventh Amendment and due process rights." Nexium, 777 F.3d at 19. Plaintiffs' proposed claims process provides defendants no meaningful opportunity to contest whether an individual would have, in fact, purchased a generic drug had one been available. A "class cannot be certified on the premise that [the defendant] will not be entitled to litigate its statutory defenses to individual claims." Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 367, 131 S.Ct. 2541, 180 L.Ed.2d 374 (2011). Here, we have more than a statutory defense; rather, we have a challenge to a plaintiff's ability to prove an element of liability. And although Halliburton permitted class certification based on a proper presumption furnished by the applicable law, even if the presumption might be rebutted as to individual plaintiffs in a few instances, Halliburton Co. v. Erica P. John Fund, Inc., 573 U.S. 258, 134 S.Ct. 2398, 2412, 189 L.Ed.2d 339 (2014), here we have no such presumption.

Relatedly, this is not a case in which a very small absolute number of class members might be picked off in a manageable, individualized process at or before trial. Rather, this is a case in which any class member may be uninjured, and there are apparently thousands who in fact suffered no injury. The need to identify those individuals will predominate and render an adjudication unmanageable absent evidence such as the unrebutted affidavits assumed in Nexium, or some other mechanism that can manageably remove uninjured persons from the class in a manner that protects the parties' rights. See Nexium, 777 F.3d at 30 ("We thus define 'de minimis' in functional terms."). And, as we have already explained, the process on which the district court relied is not such a mechanism.

Plaintiffs' fallback argument, urged most prominently on appeal, is that, at trial, they will prove "class-wide impact" with the testimony of their expert, Dr. Conti, and with defendants' own documents and admissions. But plaintiffs point to no documents or admissions that would support a finding that all class members suffered injury. So this argument on appeal comes down to their claim that they will prove class-wide impact at trial with the testimony of their expert, Dr. Conti.

To support this alternative approach, plaintiffs point to the approval in Tyson Foods of the plaintiffs' use of an expert report that calculated each individual employee's average time spent "donning and doffing" protective equipment for the purpose of establishing the employees' total hours worked in an overtime compensation case under the Fair Labor Standards Act. 136 S.Ct. at 1042-43. Here, plaintiffs contend that, "[c]onsistent with ... the guidance in Tyson Foods[ ], plaintiffs will prove classwide antitrust impact at trial using representative evidence." Such evidence relies on Dr. Conti's calculation that a generic substitute drug would have achieved approximately ninety percent market penetration in a but-for world, from which, in part, the district court estimated that about ten percent of the class was likely brand loyal and thus uninjured. For several reasons, plaintiffs' reliance on Tyson Foods falls short of the mark.

***9** To begin with, using the average time it takes a person to don and doff clothes to estimate how

long it takes a given individual to do so (as in Tyson Foods) is quite different than saying, for example, that a given person wore certain clothes merely because most but not all others did so. If statistically valid, an average multiplied by the total number of individuals likely equals the actual total time spent by all. But Dr. Conti's estimate that a generic drug would achieve roughly ninety percent market penetration, if used to prove that each individual would have likely purchased the generic drug and was thus injured by defendants' conduct, leads to the demonstrably wrong conclusion that one hundred percent of individuals were injured. And that is a contention that Dr. Conti's opinion itself rejects.

In Tyson Foods, the Court pointed out that under the controlling substantive law, the proffered representative evidence would be admissible and sufficient to prove injury in any individual class member's individual trial. See Tyson Foods, 136 S.Ct. at 1047 (quoting Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 687, 66 S.Ct. 1187, 90 L.Ed. 1515 (1946), for the proposition that, under the Fair Labor Standards Act, "an employee has carried out his burden" if he produces evidence demonstrating the amount of improperly compensated work "as a matter of just and reasonable inference"). Here, plaintiffs point to no such substantive law that would make an opinion that ninety percent of class members were injured both admissible and sufficient to prove that any given individual class member was injured. And whether such evidence would actually be "sufficient to sustain a jury finding," id. at 1048, is far from self-evident. See, e.g., Guenther v. Armstrong Rubber Co., 406 F.2d 1315, 1318 (3d Cir. 1969) ("[A]s we see it there was no justification for allowing plaintiff's case on that so-called probability hypothesis to go to a jury."); see also United States v. Veysey, 334 F.3d 600, 604-06 (7th Cir. 2003) (reviewing the academic literature and case law surrounding the use of statistical evidence); United States v. Hannigan, 27 F.3d 890, 896-901 (3d Cir. 1994) (Becker, J., concurring in the judgment) (similar); Laurence H. Tribe, Trial by Mathematics: Precision and Ritual in the Legal Process, 84 Harv. L. Rev. 1329 (1971) (discussing the use of statistical evidence in litigation). Indeed, plaintiffs do not even grapple with the question of whether federal or state law provides the relevant rule of decision. And without making such showings, plaintiffs cannot meet their burden to " 'affirmatively demonstrate ... compliance' with Rule 23." Comcast Corp. v. Behrend, 569 U.S. 27, 33, 133 S.Ct. 1426, 185 L.Ed.2d 515 (2013) (quoting Wal-Mart Stores, Inc., 564 U.S. at 350, 131 S.Ct. 2541).

Plaintiffs argue that we should nevertheless approve of their proposed approach because it protects Warner from any practical harm that might otherwise be caused by removing questions of individual injury-in-fact from the jury. Warner would only be found liable and forced to pay damages if the jury found that Warner's actions unlawfully raised the price paid by consumers by a specified amount, and if the jury also determined the percentage of sales for which that price surcharge would not have been paid but for the illegal conduct. The total aggregate damages award would therefore in theory net out all purchases by brand loyal consumers as a group. The fact that some of that money might then be paid to uninjured people should be of no concern to Warner, say plaintiffs.

This argument confuses different types of aggregate damages scenarios. See 4 William B. Rubenstein, Newberg on Class Actions § 12:2 (5th ed. 2012). In some cases, the total damage caused by the defendant is independent of the number and identity of people harmed. Newberg gives as an example a trustee's theft of money from a pension fund. Id. Such a case perhaps might be tried as a class action without causing any harm to the defendant no matter how the recovered funds are allocated among the beneficiaries (although there would still be the question whether Article III nevertheless precludes per se the knowing use of a civil suit to make an award to an uninjured person, see Tyson Foods, 136 S.Ct. at 1053 (Roberts, C.J., concurring)). In many other instances, as here, the aggregate damage amount

is the sum of damages suffered by a number of individuals, such that proving that the defendant is not liable to a particular individual because that individual suffered no injury reduces the amount of the possible total damage. Furthermore, here the district court has reasonably presumed that determining whether any given individual was injured (and therefore has a claim) turns on an assessment of the individual facts concerning that person. In such a case, the defendant must be offered the opportunity to challenge each class member's proof that the defendant is liable to that class member. See Wal-Mart Stores, Inc., 564 U.S. at 366-67, 131 S.Ct. 2541. Whether that opportunity precludes class certification turns on whether such challenges are reasonably plausible in a given case and whether the plaintiff cannot demonstrate that allowing for such challenges in a manner that protects the defendant's rights will be manageable and superior to the alternatives. See Fed. R. Civ. P. 23(b)(3).

***10** Accepting plaintiffs' proposed procedure for class litigation would also put us on a slippery slope, at risk of an escalating disregard of the difference between representative civil litigation and statistical observations of tendencies and distributions. Once one accepts plaintiffs' "no harm, no foul" position there would be no logical reason to prevent a named plaintiff from bringing suit on behalf of a large class of people, forty-nine percent or even ninety-nine percent of whom were not injured, so long as aggregate damages on behalf of "the class" were reduced proportionately. Such a result would fly in the face of the core principle that class actions are the aggregation of individual claims, and do not create a class entity or re-apportion substantive claims. See 1 William B. Rubenstein, Newberg on Class Actions § 1:1 (5th ed. 2012) (stating that Rule 23 is "fundamentally a procedural device" that allows a representative to "litigate on behalf of many absent class members" but cannot "abridge, modify, or enlarge any substantive right" (emphasis in original)); see also Tyson Foods, 136 S.Ct. at 1048 (noting that a class action cannot enlarge class members' substantive rights and thus basing the availability of evidence in a class action on what would be available "in an individual action"); In re Deepwater Horizon, 739 F.3d 790, 828 (5th Cir. 2014) (Garza, J., dissenting) ("Rule 23's aggregation function cannot be used to create new rights and then settle claims brought under them." (internal quotation marks omitted)).

We recognize that there remains the problem of how to deal with conduct that inflicts small amounts of damage on large numbers of people. Certainly Rule 23 serves as an important tool to address many such situations. See Mace v. Van Ru Credit Corp., 109 F.3d 338, 344 (7th Cir. 1997) ("The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action."); Castano v. Am. Tobacco Co., 84 F.3d 734, 748 (5th Cir. 1996) (noting that "negative value" suits provide the "most compelling rationale for finding superiority in a class action"). But that fact grants us no license to create a Rule 23(b)(3) class in every negative value case by either altering or reallocating substantive claims or departing from the rules of evidence. Moreover, there are other tools available to address the problem of low-value, high-volume claims that pose individual issues of causation. Regulators may sue, see, e.g., FTC v. Actavis, Inc., 570 U.S. 136, 141, 133 S.Ct. 2223, 186 L.Ed.2d 343 (2013); governments may bring parens patriae claims, see, e.g., New Hampshire v. Purdue Pharma, No. 17-cv-427, 2018 WL 333824, at *1 (D.N.H. Jan. 9, 2018); substantive laws may provide presumptions available to all class members, see, e.g., Halliburton, 134 S.Ct. at 2411-12; and private lawyers may marshal the threats of res judicata and fee shifting to induce aggregate settlements when liability is clear.

In reaching our conclusion, we acknowledge the divergence evident in the manner in which our sister circuits have addressed the treatment of uninjured putative class members. Framing the issue of uninjured class members through the lens of Article III, the Second Circuit opined that "no class may be certified that contains members lacking Article III standing," and required that the class "be

defined in such a way that anyone within it would have standing." Denney v. Deutsche Bank AG, 443 F.3d 253, 264 (2d Cir. 2006). [4]

In Halvorson v. Auto-Owners Insurance Co., 718 F.3d 773 (8th Cir. 2013), the Eighth Circuit announced the same standing requirement articulated by the Second Circuit, but also seemed to ground its analysis in the predominance requirement of Rule 23(b)(3). It thus denied class certification because the "individual inquiries" necessary to determine which class members were uninjured would "overwhelm questions common to the class." Id. at 779 (quoting Comcast Corp., 569 U.S. at 34, 133 S.Ct. 1426); see Neale v. Volvo Cars of N. Am., LLC, 794 F.3d 353, 366 (3d Cir. 2015) ("[I]t is ... not clear to us whether the Eighth Circuit's standing analysis rests on Article III or Rule 23.").

***11** More clearly viewing the issue of uninjured class members through the prism of Rule 23(b)(3) predominance, the D.C. Circuit vacated the certification of a class because the plaintiffs had failed to "show that they can prove, through common evidence, that all class members were in fact injured by the alleged conspiracy." See In re Rail Freight Fuel Surcharge Antitrust Litig.-MDL No. 1869, 725 F.3d 244, 252 (D.C. Cir. 2013) (emphasis added); see also Nexium, 777 F.3d at 24 n.20 (characterizing Rail Freight as requiring that plaintiffs " 'show that they can prove'—not that they have proved"—that all class members were in fact injured (emphasis in original)).

The Fifth Circuit has similarly held that "where fact of damage cannot be established for every class member through proof common to the class, the need to establish antitrust liability for individual class members defeats Rule 23(b)(3) predominance." Bell Atl. Corp. v. AT&T Corp., 339 F.3d 294, 302 (5th Cir. 2003). And the Third Circuit, expressly and closely following New Motor Vehicles, has joined this majority view. See In re Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 311 (3d Cir. 2008). [5]

The Seventh Circuit does appear to have signaled a willingness to allow a district court to certify a damages class containing not "a great many" uninjured members without requiring that there be a mechanism for eventually culling out the uninjured. Messner v. Northshore Univ. HealthSystem, 669 F.3d 802, 825 (7th Cir. 2012); Kohen v. Pac. Inv. Mgmt. Co. LLC, 571 F.3d 672, 677-78 (7th Cir. 2009). The Ninth Circuit recently arguably adopted a similar rule, although to some uncertain extent it seems to rely in great part on a notion that being "exposed to" injurious conduct can serve a proxy for common injury. See Torres v. Mercer Canyons Inc., 835 F.3d 1125, 1137 (9th Cir. 2016). Neither circuit, though, has explained what not "a great many" means. See, e.g., Messner, 669 F.3d at 825 ("There is no precise measure for 'a great many.' "). And if it means only that there can be a few unusual class members who can be picked off by the defendant, then neither case rests too far outside the mainstream. See Halliburton, 134 S.Ct. at 2412.

In any event, in no case cited above, nor in any case to which plaintiffs have directed our attention, has a federal court affirmed a damages judgment in a class action against a defendant who was precluded from raising genuine challenges at trial to the assertion of liability by individual members of a class that was known to have members who could not be presumed to be injured. Nor has either party drawn to our attention any federal court allowing, under Rule 23, a trial in which thousands of class members testify. We see no reason to think that this case should be the first such case.

IV.

The rule we reiterate today, consistent with our prior holding in Nexium, strikes a balance that is faithful to the requirements of Article III

and Rule 23, while remaining cognizant of the practical realities of class actions. We have not previously required every class member to demonstrate standing when a class is certified, nor do we do so today. See Nexium, 777 F.3d at 32; see also Neale, 794 F.3d at 362; DG ex rel. Stricklin v. Devaughn, 594 F.3d 1188, 1197 (10th Cir. 2010); Kohen, 571 F.3d at 676-77. We also agree that it would "put the cart before the horse," Kohen, 571 F.3d at 676, to read Rule 23 to require that a plaintiff demonstrate prior to class certification that each class member is injured. But certainly where injury-in-fact is a required element of a claim, as it is in an antitrust action, see New Motor Vehicles, 522 F.3d at 19 n.18, a class cannot be certified based on an expectation that the defendant will have no opportunity to press at trial genuine challenges to allegations of injury-in-fact. Cf. Wal-Mart Stores, Inc., 564 U.S. at 367, 131 S.Ct. 2541. And to determine whether a class certified for litigation will be manageable, the district court must at the time of certification offer a reasonable and workable plan for how that opportunity will be provided in a manner that is protective of the defendant's constitutional rights and does not cause individual inquiries to overwhelm common issues. These plaintiffs have plainly not enabled the district court to articulate such a plan. See New Motor Vehicles, 522 F.3d at 20 ("Under the predominance inquiry, 'a district court must formulate some prediction as to how specific issues will play out in order to determine whether common or individual issues predominate in a given case.' " (quoting Mowbray, 208 F.3d at 298)).

***12** For the foregoing reasons, we reverse the decision of the district court granting class certification, and remand for further proceedings in accord with this opinion.

BARRON, Circuit Judge (Concurring).

The issues that courts must address in deciding whether to certify a proposed class action in a case like this are potentially vexing. The class is large. It contains a non-trivial number of uninjured class members. The nature of the injury is not easily proved through common evidence. And the prospect of individualized recovery is unlikely, even though the aggregate wrong may be great, given the costs of litigation and the relatively minimal amount of loss each plaintiff incurred. Should, then, such a class be certified?

On the one hand, Rule 23 was clearly written to facilitate large consumer class actions. See, e.g., Amchem Prod., Inc. v. Windsor, 521 U.S. 591, 617, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997) ("While the text of Rule 23(b)(3) does not exclude from certification cases in which individual damages run high, the Advisory Committee had dominantly in mind vindication of 'the rights of groups of people who individually would be without effective strength to bring their opponents into court at all.' "); In re New Motor Vehicles Canadian Exp. Antitrust Litig., 522 F.3d 6, 8 (1st Cir. 2008) ("[A]n erroneous failure to certify a class where individual claims are small may deprive plaintiffs of the only realistic mechanism to vindicate meritorious claims."). On the other hand, Rule 23 sets forth requirements—most particularly, the requirement that common rather than individual issues predominate—that raise serious questions about whether a class of the sort I have just described can be certified. See Fed. R. Civ. P. 23(b)(3).

Not surprisingly, appellate courts throughout the country have struggled to develop a uniform mode of analyzing such cases. In fact, our own precedent reflects a similar struggle, given our holding rejecting certification of a consumer antitrust class in New Motor, 522 F.3d at 9, and our holding affirming the certification of one in In re Nexium Antitrust Litig., 777 F.3d 9, 14 (1st Cir. 2015).

Of course, because Nexium is our last word on the subject, we are bound, as a panel, to follow it if it controls. But, here, I agree with the majority that it does not, even though, in my view, one could be forgiven for concluding—as the District Court did

—that Nexium does require certification of the class proposed here.

In Nexium, we upheld the certification of a class where, like here, the anticipated means by which plaintiffs would cull uninjured class members would include the use of individual affidavits attesting to the affiant's injury. See id. at 20-21. Moreover, in Nexium, like here, the affidavits would be used to resolve an inquiry into injury turning on whether the plaintiffs would have hypothetically purchased a cheaper generic had one been available rather than on any representations as to past purchases. See id. at 20 n.17. And, finally, in Nexium, like here, the overwhelming bulk of the class is purported to be injured, as only a relatively small percentage of the class members in each case are conceded to be uninjured. See id. at 27.

***13** Nonetheless, I join our opinion reversing the order certifying this class. As our opinion explains, the culling process on which the plaintiffs rely—and which the District Court found to be sufficient—is not one that Nexium blessed or that we may bless, at least on this record. I do, however, want to say more about my reasons for reaching that conclusion. In particular, I wish to highlight two grounds for distinguishing this case from Nexium.

First, in Nexium, it was perfectly clear that the defendants would be able to challenge—prior to a liability finding—the sufficiency of testimony to prove injury (whether that testimony was offered at trial or pre-trial by affidavit) by any class member that she would have purchased a generic version of the drug had one been available. For that reason, we were confident that "a mechanism would exist for establishing injury at the liability stage of this case, compliant with the requirements of the Seventh Amendment and due process." Id. at 21.

Here, in contrast, it is hard for me to see how the plaintiffs' proposed claims processing mechanism for culling uninjured class members could be deployed before there were any claims to process. In fact, by the plaintiffs' own account, that culling mechanism will be deployed only "post-judgment." Thus, the reason that we gave in Nexium for concluding that there was no Seventh Amendment problem with the culling mechanism that we identified there does not appear to be one that we may rely on here.

Second, insofar as the plaintiffs here, as in Nexium, do propose to submit affidavits concerning class members' hypothetical purchasing preferences prior to completion of the liability phase, there is still another ground for distinguishing this case from that one. In Nexium, unlike here, the defendants presented a categorical challenge. They contended that the presence, at the certification stage, of any uninjured class members itself defeated predominance because the plaintiffs had no possible means to prove injury at all. The defendants based that contention on the hypothetical nature of the inquiry into injury presented in that case, given that the inquiry turned on what was necessarily speculation about a plaintiff's hypothetical purchasing preference. See id. at 20 (noting the defendants' argument that "the [brand-loyalist issue] presents problems that plaintiffs cannot overcome, for plaintiffs have no methodology to identify [at a later stage of litigation] those consumers who would have switched to a generic version" (emphasis added)).

Nexium rejected that categorical challenge. It did so by explaining that, in an individual action, a plaintiff could prove the injury claimed through "testimony by the consumer that, given the choice, he or she would have purchased the generic." Id. at 20. And Nexium then went on to explain that because "[t]here cannot be a more stringent burden of proof in class actions than in individual actions," it followed that "similar testimony in the form of an affidavit or declaration would be sufficient in a class action." Id. For that reason, Nexium concluded that the defendants had failed to show that the plaintiffs could not meet their burden at the

certification stage to demonstrate a viable means of identifying injured class members.

To be sure, Nexium did not stop there. Nexium also acknowledged that proof of injury in the form of personal testimony may "require[ ] determination of the individual circumstances of class members" and thus may cause individual rather than common issues to predominate. Id. at 21. But, having identified that additional potential obstacle to establishing predominance, Nexium dispensed with that concern by explaining that the predominance requirement does not categorically preclude a class from relying on individualized proof of injury, at least where the number of uninjured class members is de minimis. See id. (refusing to find that "the need for individual determinations or inquiry for a de minimis number of uninjured members at later stages of the litigation defeats class certification").

***14** Unfortunately, Nexium's holding that the predominance requirement does not impose a categorical bar against plaintiffs relying on individualized means of proving injury only gets us so far here. And that is because I do not read Nexium to have addressed the distinct issue of when, even where the number of uninjured class members is de minimis, plaintiffs' reliance on individualized means of proving injury is so great that it can no longer comport with the predominance requirement. Yet, that is the question that we must confront here, because the defendants make precisely that contention in this case.

In considering that question, I would not rule out the possibility that plaintiffs who seek to prove injury in such a case by relying on affidavits might be able to satisfy the predominance requirement just as the plaintiffs were found to have satisfied it in Halliburton Co. v. Erica P. John Fund, Inc., 573 U.S. 258, 134 S.Ct. 2398, 2412, 189 L.Ed.2d 339 (2014) (upholding certification on the basis of a presumption of reliance even where "the defendant might attempt to pick off the occasional class member here or there through individualized rebuttal"). I note, in that regard, that one reason that the Halliburton Court assumed that the defendants would only be able to engage in "individualized rebuttal" against the "occasional class member" may have been that proof of reliance in that case involved resolution of a " 'speculative state of facts, i.e., how [the plaintiff] would have acted ... if the misrepresentation had not been made.' " Id. at 2407 (quoting Basic Inc. v. Levinson, 485 U.S. 224, 245, 108 S.Ct. 978, 99 L.Ed.2d 194 (1988)). I suspect that defendants might have a similarly hard time making more than a speculative case that they would be able effectively to contest an affiant's representation that, if presented with a cheaper generic alternative, she would have spent less rather than more to get the same drug. See Nexium, 777 F.3d at 31 ("The defendants' speculation cannot defeat the plaintiffs' showing."). Moreover, I could imagine that plaintiffs in a case not unlike this one might be able to establish—perhaps through undisputed evidence from, say, health plan purchasing records—that only a small identifiable subset of the class's members would actually need to rely on individualized testimony concerning their hypothetical purchasing preferences to show injury.

In the event that plaintiffs made those showings, I could see how, in light of Nexium, a court might be able to conclude that the plaintiffs, at the certification stage, could succeed in showing that resolution of the injury issue would not require an impermissibly large number of individualized determinations. See id. at 21 (noting that Rule 23(b)(3) "does not require a plaintiff seeking class certification to prove that each element of her claim is susceptible to classwide proof" but only to show that there is no "reason to think that [individualized] questions will overwhelm common ones and render class certification inappropriate"). But, even if that is the case, the plaintiffs before us make no showing that would permit us to so find.

As our opinion explains, the plaintiffs do not argue that the defendants would be incapable of mounting effective challenges to any, let alone to most, of

the plaintiffs' affidavits at summary judgment. Nor may we conclude that the plaintiffs would only need to rely on individualized proof of injury for a small identifiable subset of the class, such that their reliance on individual adjudications could be deemed both efficient and fair.

The plaintiffs have not shown that the number of potentially uninjured class members could be winnowed down through common means of proof, even when that evidence is considered in combination with evidence gleaned from health plan purchasing records. And we may not assume that only the plaintiffs within the small subset of the class conceded to be uninjured will need to offer an affidavit to prove what hypothetical choice they would have made if given the option to purchase a generic. Class members do not come pre-identified as brand loyal or price sensitive, after all, and one does not ordinarily set out to find a needle in a haystack by examining only ten percent of the straw.

***15** I thus see no basis for affirming the certification order on this record, because the plaintiffs have not yet shown that common rather than individual issues would predominate if this class were certified. Accordingly, I join our opinion in full.

All Citations

--- F.3d ----, 2018 WL 4958856

Footnotes

1 A number of our recent opinions provide comprehensive overviews of the regulatory framework that governs the introduction of generic drugs. See In re Nexium (Esomeprazole) Antitrust Litig., 842 F.3d 34, 40-42 (1st Cir. 2016); In re Loestrin 24 Fe Antitrust Litig., 814 F.3d 538, 542-43 (1st Cir. 2016); In re Nexium Antitrust Litig., 777 F.3d 9, 15-16 (1st Cir. 2015).

2 Like the district court and the parties, we will use "states" informally in the remainder of this opinion to refer to both states and the District of Columbia.

3 Plaintiffs make no explicit claim that the price of Delzicol and Asacol HD would have been lower had generic versions of Asacol been available.

4 In Denney, the Second Circuit found that each member of the class had suffered an injury-in-fact, and thus held that the class satisfied Article III standing. 443 F.3d at 265.

5 Because our circuit precedent clearly requires that there exist "some means of determining that each member of the class was in fact injured," New Motor Vehicles, 522 F.3d at 28, we have been able to finesse the question whether Article III's standing requirement imposes any barrier to the certification of a class that will at judgment have uninjured members. See Nexium, 777 F.3d at 32 ("To the extent that it is necessary that each and every member of the class who secures a recovery also has standing, the requirement will be satisfied—only injured class members will recover.").

EXHIBIT E-2

THE MDL PLAINTIFFS' LETTER TO THE MDL COURT REGARDING *IN RE ASACOL ANTITRUST LITIG.*, 2018 WL 4958856 (1ST CIR. OCT. 15, 2018)

[MDL ECF NO. 6193] (FILED OCTOBER 19, 2018)

HAGENS BERMAN

Lieff Cabraser Heimann & Bernstein
Attorneys at Law

HMG
HILLIARD MUÑOZ GONZALES L.L.P.
TRIAL ATTORNEYS

October 19, 2018

BY ECF

The Honorable Jesse M. Furman
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 10007

RE: ***In re: General Motors LLC Ignition Switch Litigation***, 14-MD-2543 (JMF); 14-MC-2543

Dear Judge Furman:

We write in response to GM's supplemental authority, submitted earlier today. ECF 6183. The case on which GM relies, *In re Asacol Antitrust Litig.*, --- F.3d ---, 2018 WL 4958856 (1st Cir. Oct. 15, 2018), is distinguishable, and GM improperly uses this letter as a vehicle to raise a number of its failed arguments against class certification.

First, there are no uninjured Class members here because every Class member overpaid for their vehicle. GM's repeated focus on certain individual survey respondents completely misses the overall point of the Boedeker conjoint analysis. Mr. Boedeker uses well-established methodologies to estimate a but-for demand curve that is shifted downward from the demand curve in the actual world. That but-for demand curve applies to every purchaser, so that *every Class member overpaid in the actual world*. Those methodologies are not intended to estimate (and Mr. Boedeker properly does not estimate) individuals' willingness-to-pay.

Second, GM's significant reliance on antitrust cases only underscores the appropriateness of class certification here. GM frequently relies on *Comcast Corp. v. Behrend*, 569 U.S. 27 (2013). *Comcast* holds that the damages methodology must fit the theory of the claims. *Comcast* is violated when damages methodologies and claims elements from one area, antitrust, are attempted to be shoehorned into another. Plaintiffs have honored *Comcast*. Defendants have violated it. So, it is unsurprising that, in the antitrust case GM relies on here, the damages model must establish the substantive requirement of antitrust impact. Here, also unsurprisingly, Plaintiffs have put forth a damages model that fits the benefit of the bargain damages at issue in this case.

Respectfully Submitted,

Steve W. Berman
Hagens Berman Sobol Shapiro LLP
1918 Eighth Ave.
Suite 3300
Seattle, WA 98101

-and-

555 Fifth Avenue
Suite 1700
New York, NY 10017

Elizabeth J. Cabraser
Lieff Cabraser Heimann & Bernstein, LLP
275 Battery Street
29th Floor
San Francisco, CA 94111-3339

-and-

250 Hudson Street
8th Floor
New York, NY 10013-1413

Robert C. Hilliard
Hilliard Martinez Gonzales LLP
719 S Shoreline Blvd.
Suite 500
Corpus Christi, TX 78401

EXHIBIT E-3

THE MDL PLAINTIFFS' LETTER TO THE MDL COURT REGARDING *BEATON* V. *SPEEDYPC SOFTWARE*, 2018 WL 5623931 (7TH CIR. Oct. 31, 2018)

[MDL ECF NO. 6258] (FILED NOVEMBER 2, 2018)

HAGENS BERMAN

Lieff Cabraser Heimann & Bernstein
Attorneys at Law

HILLIARD MUÑOZ GONZALES
TRIAL ATTORNEYS

November 2, 2018

BY ECF

The Honorable Jesse M. Furman
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 10007

RE: ***In re: General Motors LLC Ignition Switch Litigation***,
14-MD-2543 (JMF); 14-MC-2543

Dear Judge Furman:

Plaintiffs respectfully submit *Beaton v. SpeedyPC Software*, No. 18-1010, 2018 WL 5623931 (7th Cir. Oct.31, 2018)[1], as supplemental authority in support of their motion for class certification (Dkt. No. 5845). In *Beaton*, Chief Judge Wood, writing for a unanimous panel, affirmed the certification of a nationwide implied warranty class and a state-wide consumer fraud class.

Respectfully Submitted,

Steve W. Berman
Hagens Berman Sobol Shapiro LLP
1918 Eighth Ave.
Suite 3300
Seattle, WA 98101

-and-

555 Fifth Avenue
Suite 1700
New York, NY 10017

Elizabeth J. Cabraser
Lieff Cabraser Heimann & Bernstein, LLP
275 Battery Street
29th Floor
San Francisco, CA 94111-3339

-and-

250 Hudson Street
8th Floor
New York, NY 10013-1413

Robert C. Hilliard
Hilliard Martinez Gonzales LLP
719 S Shoreline Blvd.
Suite 500
Corpus Christi, TX 78401

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[1] *Beaton* is attached as Exhibit A.

EXHIBIT A

In the

United States Court of Appeals

For the Seventh Circuit

No. 18-1010

ARCHIE BEATON,

Plaintiff-Appellee,

v.

SPEEDYPC SOFTWARE, a British Columbia Company,

Defendant-Appellant.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 13 C 8389 — **Andrea R. Wood**, *Judge*.

ARGUED MAY 30, 2018 — DECIDED OCTOBER 31, 2018

Before WOOD, *Chief Judge*, and SYKES and HAMILTON, *Circuit Judges*.

WOOD, *Chief Judge*. When Archie Beaton's laptop started misbehaving, he looked for an at-home fix. An internet search turned up a product from SpeedyPC Software ("Speedy") that offered both a diagnosis and a cure. Beaton took advantage of Speedy's free trial, which warned that his device was in bad shape and encouraged him to purchase its soft-

ware solution: SpeedyPC Pro. He did. But he was disappointed with the outcome: despite Speedy's promises, the software failed to improve his laptop's performance.

Beaton became convinced that he was the victim of a scam. He filed a consumer class action against Speedy, raising both contract and tort theories. The district court certified a nationwide class and an Illinois subclass of software purchasers. Hoping to dodge the consumer class action, Speedy turned to this court for relief. See FED. R. CIV. P. 23(f). Because we find no abuse of discretion in the district court's certification orders, we affirm.

I

The ad for SpeedyPC Pro that Beaton found in August 2012 promised that Speedy's software would fix common problems affecting computer speed and performance and unleash the device's "true potential." It also offered a free scan to detect any problems. Beaton decided to give it a try, and so he downloaded and ran the free trial. After assessing the laptop's health across five modules, the program told Beaton that his computer was in critical condition as a result of hundreds of serious errors.

The free trial prompted Beaton to buy the licensed version of the software, which (he was promised) would fix the identified problems. Beaton was sold. Using his personal business's credit card, he purchased SpeedyPC Pro and ran it on his laptop. It began by scanning his device, just as the free trial had done. The program then told Beaton to click on "Fix All." Beaton dutifully did so. Yet nothing happened. Beaton ran the software a few more times, to no avail.

Feeling ripped off, and suspecting that his experience was not unique, Beaton sued Speedy in 2013 on behalf of a class of consumers defined as "All individuals and entities in the United States who have purchased SpeedyPC Pro." Despite Speedy's lofty pledges, Beaton claimed, the software failed to perform as advertised. Instead, it indiscriminately and misleadingly warned *all* users that their devices were in critical condition, scared them into buying SpeedyPC Pro, and then ran a functionally worthless "fix." The district court had jurisdiction over this putative class action under the Class Action Fairness Act, 28 U.S.C. § 1332(d)(2).

Speedy twice tried, and twice failed, to get the lawsuit thrown out. The district court first rejected its effort to have the complaint dismissed for failure to state a claim on which relief could be granted. Speedy then tried a motion to dismiss on *forum non conveniens* grounds, based on the fact that the software's End User License Agreement ("the Agreement") contained a choice-of-law provision selecting the law of British Columbia (Canada) to govern any claims arising from it. The district court, however, decided to retain the case without definitively resolving the choice-of-law issue at that juncture.

Four years after the suit was filed, Beaton moved to certify a class and subclass of software purchasers. Beaton's proposed class definition was narrower than the one in his complaint. It included "[a]ll individuals living in the United States who downloaded a free trial of SpeedyPC Pro and thereafter purchased the full version between October 28, 2011 and November 21, 2014." He also proposed a subclass of class members "who reside in Illinois" and several other states.

The district court certified Beaton's class claims for breaches of the implied warranties of fitness for a particular

purpose and merchantability. On behalf of a subclass consisting only of Illinois residents, the court certified claims for fraudulent misrepresentation under the Illinois Consumer Fraud and Deceptive Business Practices Act (ICFA). It rejected the proposed subclass insofar as it included residents from other states, because Beaton failed to identify the relevant consumer-protection laws of those states.

The court had the benefit of dueling expert testimony before it at the time it made these certification decisions. Beaton's expert, Craig Snead, described how the free trial operated across devices. Speedy's expert, Monty Myers, disputed Snead's account. Although the court had not yet issued its ruling on the parties' cross-motions to exclude the testimony of each other's expert, it ultimately denied both motions (with minor exceptions) roughly two months later. See FED. R. EVID. 702. In that order, the court noted that it had "considered the challenged expert testimony for purposes of class certification only to the extent consistent with the rulings stated."

At that point, Speedy filed and we granted a petition for interlocutory appeal of the class certification decisions. See FED. R. CIV. P. 23(f). We note that Speedy's petition may have been untimely, but Beaton chose not to press the issue. The time limit for an appeal under Rule 23(f) is not statutory, and so a failure to abide by it does not affect our jurisdiction. See *Bowles v. Russell*, 551 U.S. 205, 210–11 (2007); *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482, 485 (7th Cir. 2012) (holding that Rule 23(f)'s 14-day limitations period is not jurisdictional), *abrogated on other grounds by Phillips v. Sheriff of Cook Cnty.*, 828 F.3d 541 (7th Cir. 2016).

II

Before we reach the heart of this appeal—the district court's Rule 23 decisions—we address Speedy's more substantial preliminary objections.

A

Speedy complains that the class definitions and legal theories covered by the court's certification orders impermissibly differ from those outlined in the original complaint. Speedy first attacks the narrowing of the class from everyone in the United States who had purchased SpeedyPC Pro, to individual persons (not entities) who downloaded the free trial and purchased the licensed software over roughly a three-year period. This is nothing like what we faced in *Supreme Auto Transport, LLC v. Arcelor Mittal USA, Inc.*, 902 F.3d 735, 741 (7th Cir. 2018), where the later proposed class greatly expanded the scope of the litigation beyond what the defendants could have imagined. We see no reason here why Speedy is prejudiced by the narrower certified definition. Speedy complains that it would have conducted discovery differently had it known about the narrowed class. See *Chessie Logistics Co. v. Krinos Holdings, Inc.*, 867 F.3d 852, 859 (7th Cir. 2017). But it has not told us, either in its briefs or at oral argument, what exactly would have changed. Speedy's position is further weakened by the fact that the district court allowed additional merits discovery following its certification decision. District courts may amend class definitions either on motion or on their own initiative. See FED. R. CIV. P. 23(c)(1)(C); *Chapman v. First Index, Inc.*, 796 F.3d 783, 785 (7th Cir. 2015); *Abbott v. Lockheed Martin Corp.*, 725 F.3d 803, 807 (7th Cir. 2013). We

are satisfied that the court reasonably exercised its discretion in adopting its class definition.

We similarly find no reversible error in the district court's decision to certify Beaton's two implied warranty claims. It is immaterial that these legal theories were not spelled out in the initial complaint. See *Chessie Logistics Co.*, 867 F.3d at 860. As the Supreme Court and this court constantly remind litigants, plaintiffs do not need to plead legal theories. *Johnson v. City of Shelby*, 135 S. Ct. 346, 346–47 (2014) (per curiam); *BRC Rubber & Plastics, Inc. v. Cont'l Carbon Co.*, 900 F.3d 529, 540–41 (7th Cir. 2018); *King v. Kramer*, 763 F.3d 635, 642 (7th Cir. 2014). Rule 8 requires only that a complaint must set forth plausible facts that, if true, would support a claim for relief. See *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007); FED. R. CIV. P. 8(a)(2). Even where a plaintiff initially asserts particular theories of recovery, unless the change unfairly harms the defendant she is allowed to switch course and pursue other avenues of relief as litigation progresses. *Chessie Logistics Co.*, 867 F.3d at 859; *Whitaker v. Milwaukee Cnty.*, 772 F.3d 803, 808 & n.18 (7th Cir. 2014). Here, the court's certification of the implied warranty claims was permissible as long as Beaton's allegations were plausible and Speedy had fair notice of what this suit was about. See *Runnion ex rel. Runnion v. Girl Scouts of Greater Chi. & Nw. Ind.*, 786 F.3d 510, 517 (7th Cir. 2015). We note as well that applicable law is no longer in dispute, as the parties now agree that the implied warranty claims derive from the Agreement, which chooses the law of British Columbia.

Beaton's complaint describes Speedy as a company that sells software products. He alleges that it marketed SpeedyPC

Pro in the hope of persuading consumers to purchase the software to fix their computers. And he asserts that customers relied on the company's expertise and representations that the software would improve their devices. For present purposes, this is enough to provide fair notice that he intends to pursue warranty claims under the law of British Columbia. See R.S.B.C. 1996, ch. 410, § 18(a)–(b). It is hard to imagine how Speedy suffered any "unfair surprise," given that the "legal basis for liability is based on the same allegations" about the sale of worthless software. *Whitaker*, 772 F.3d at 809 & n.19. Though Speedy insists that it is worse off because it cannot move to dismiss on the ground that the Agreement expressly disclaimed these implied warranties, there is no final judgment in this case. Nothing prevents Speedy from pursuing this point on remand.

B

Next, we briefly consider Speedy's assertion that Beaton is judicially estopped from seeking relief under the law of British Columbia because initially he argued for Illinois law. Equitable estoppel requires that: (1) the party's later position is clearly inconsistent with her earlier one; (2) the party successfully persuaded the court to adopt her first position; and (3) the party would be unfairly advantaged if not estopped. *Janusz v. City of Chi.*, 832 F.3d 770, 776 (7th Cir. 2016).

Speedy forfeited its estoppel argument by not raising it before the district court. *1st Source Bank v. Neto*, 861 F.3d 607, 611–12 (7th Cir. 2017). It merely acknowledged that Beaton changed his position on whether British Columbia or Illinois law controlled his contract claims.

Even on the merits, Speedy's estoppel theory falls short. It is true that Beaton flip-flopped his position on the source of his implied warranty claims, and so the first criterion for estoppel may be met. In his opposition to the motion to dismiss for *forum non conveniens*, Beaton argued that "[n]one of [his] claims are based upon [the Agreement]." But by the time he sought class certification, he sang a different tune, conceding that the implied warranty "claims derive from the End User License Agreement." Still, the other two factors necessary for estoppel are missing. Beaton may have defeated Speedy's motion to dismiss for *forum non conveniens*, but he did not persuade the district court that Illinois law controlled. The court thought that British Columbia law *may* not apply to Beaton's contract claims because they "have little or nothing to do with the terms of the [Agreement]." But ultimately the court found that this question did not matter for class certification and so could safely be postponed. And in any event, we cannot see how Beaton could derive an unfair advantage by agreeing to apply the substantive law that Speedy wanted all along.

C

Speedy also contends that the district court lacks personal jurisdiction over the claims of class members from states other than Illinois. Its argument relies on the Supreme Court's decision in *Bristol-Myers Squibb Co. v. Superior Court of Cal., San Francisco Cnty.*, 137 S. Ct. 1773 (2017). In that mass-tort action, there was no connection between the forum and the specific claims at issue. Under those circumstances, the Supreme Court held that a state court lacks specific jurisdiction over

non-resident plaintiffs' claims against non-resident defendants. *Id.* at 1781–82. Speedy seems to be asking us to extend *Bristol-Myers Squibb* to nationwide class actions.

While briefing the issue now before us—class certification—in the district court, neither party raised personal jurisdiction. Thus, we have no need to opine on this question, because it does not bear directly on our determination. See *Abelesz v. OTP Bank*, 692 F.3d 638, 652–53 (7th Cir. 2012) (a court's personal jurisdiction and class certification decisions were "only tangentially related" and so the former could not be evaluated on a Rule 23(f) appeal (quoting *Poulos Caesars World, Inc.*, 379 F.3d 654, 671–72 (9th Cir. 2004))). On remand, Speedy is free to explain if and how it preserved this point and how *Bristol-Myers Squibb* applies in these circumstances. For his part, Beaton will be free to contend that Speedy waived this defense through its conduct. See, *e.g.*, *H-D Mich., LLC v. Hellenic Duty Free Shops S.A.*, 694 F.3d 827, 848 (7th Cir. 2012). On a Rule 23(f) appeal, it is not for us to take the first bite of this apple.

III

Now we turn to the main event: the district court's decision to certify the nationwide class and the Illinois subclass. To certify a class under Federal Rule of Civil Procedure 23, a district court must rigorously analyze whether the plaintiff satisfies the rule's requirements. *Blow v. Bijora, Inc.*, 855 F.3d 793, 806 (7th Cir. 2017). Rule 23(a) sets forth four universal requirements for class actions: "numerosity, typicality, commonality, and adequacy of representation." *Messner v. Northshore Univ. HealthSys.*, 669 F.3d 802, 811 (7th Cir. 2012). Rule 23(b) then identifies particular types of classes, which have different criteria. Where, as here, certification is sought

under Rule 23(b)(3), common questions of law or fact must predominate over individual inquiries, and class treatment must be the superior method of resolving the controversy. *Id*.

In evaluating these factors, the court must go beyond the pleadings and, to the extent necessary, take evidence on disputed issues that are material to certification. *Bell v. PNC Bank, Nat'l Ass'n*, 800 F.3d 360, 377 (7th Cir. 2015); *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 675–76 (7th Cir. 2001). At this early stage in the litigation, the merits are not on the table. *Abbott*, 725 F.3d at 810 (describing class definition as a "tool of case management"); *Messner*, 669 F.3d at 811 (class certification should not be turned into a "dress rehearsal for the trial on the merits"). Beaton bears the burden of showing that each requirement is met by a preponderance of the evidence. *Steimel v. Wernert*, 823 F.3d 902, 917 (7th Cir. 2016).

We review the district court's class certification orders deferentially, leaving considerable room for the exercise of judgment unless the factual determinations are clearly erroneous or there are errors of law. *Reliable Money Order, Inc. v. McKnight Sales Co., Inc.*, 704 F.3d 489, 498 (7th Cir. 2013).

A

Speedy complains generically that the district court failed to give its evidence adequate attention. We see no basis for that accusation. The court referred to Beaton's pleadings in providing the case's background, and then it considered evidence submitted by Beaton and Speedy. A district court may abuse its discretion by omitting key factual and legal analysis. See *Priddy v. Health Care Serv. Corp.*, 870 F.3d 657, 661 (7th Cir. 2017). But it has no obligation to describe every part of the record.

Speedy also specifically challenges the district court's findings on commonality, typicality, and adequacy of representation for purposes of Rule 23(a). (It concedes that numerosity is not at issue.) We consider each of these in turn.

B

To satisfy the commonality requirement found in Rule 23(a)(2), there needs to be one or more common questions of law or fact that are capable of class-wide resolution and are central to the claims' validity. *Bell*, 800 F.3d at 374. The district court identified several such issues:

- Can the customers avail themselves of any implied warranties, or is the Agreement's disclaimer valid?
- What functions did the marketing materials represent that the software would perform?
- Did the software perform those functions?

Speedy takes exception to some of these questions, but most are amenable to class-wide resolution. See *Nikka Traders Inc. v. Gizella Pastry Ltd.* (2012), D.L.R. 4th 120, para. 65 (Can. B.C. Sup. Ct.) (describing the elements of claim for the implied warranty for fitness for a particular purpose); *Dream Carpets Ltd. v. Sandhedrai*, [2009] B.C.W.L.D 5070, para. 68 (Can. B.C. Prov. Ct.) (elements for implied warranty of merchantability); *Dubey v. Pub. Storage, Inc.*, 395 Ill. App. 3d 342, 353 (2009) (same for ICFA). And we can see additional common questions, including whether Speedy typically deals in goods related to this software and whether a reasonable consumer

would be deceived by the advertisements' representations. Commonality is easily satisfied.

C

Second, we consider typicality. See Rule 23(a)(3); *Oshana v. Coca-Cola Co.*, 472 F.3d 506, 514 (7th Cir. 2006). This requires us to evaluate whether Beaton's claims arise from the same events or course of conduct that gives rise to the putative class members' claims. The individual claims may feature some factual variations as long as they "have the same essential characteristics." *Id.* (citation omitted).

The district court thought this requirement satisfied because Beaton "appears to have seen the same representations as the other users of Speedy's free software, and the software appears to operate in the same way on each computer." Unlike Speedy, we do not take exception with the court's use of the word "appears" to describe the match between Beaton's claim and that of the other class members. This semantic choice suggests only that the court's determinations are preliminary, as they should be. See *Messner*, 669 F.3d at 811.

On the merits, neither of the court's findings reflects an abuse of discretion. We begin with the finding that Beaton saw the same representations as other users. Speedy emphasizes that some customers bought the software through third-party platforms, which could advertise as they saw fit. Yet the advertisements in the record, drawn from various sites, feature almost identical language. The class members were thus exposed to the same message (and promises) from Speedy.

Next, we turn to the court's determination that the free trial operated the same way across devices. Based on a review

of the free trial's source code, Beaton's expert, Snead, concluded that the software was programmed to operate uniformly on all PCs, independent of any differences among individual devices. He asserted that the software universally reported "problems" and "errors," mislabeled innocuous and routine features, and issued a low performance rating before any scan had begun. In his view, the scan failed to account for factors that do influence a device's performance, and it incorporated factors that have no impact. Speedy's senior director of technical operations confirmed that the scan identified as problems characteristics that might not affect performance.

Speedy asks us to reject this evidence because Snead examined only the source code for the free trial's scanning portion, as opposed to the scanning or repair portions of the licensed software. It is not clear how similar the two scanning programs are, but that does not matter for our purposes. The district court was entitled to credit the evidence indicating that the free trial scan software did not differentiate between devices before declaring them to be in "critical condition." This is sufficient to show that Beaton's claims are typical. He focuses on Speedy's uniform (alleged) misrepresentation of computer health to induce users to buy its product. Though Speedy issued 19 different versions of the software during the class period, Snead opined that "the primary features and functionality remained consistent" across versions. Speedy's expert, Myers, disagreed with Snead's conclusions, and the company pointed to positive survey responses and third-party reviews to argue that Beaton's experience was atypical. But that just indicates that there are merits issues to be resolved. For class certification purposes, the district court needed only to find by a preponderance of the evidence that the software scanned Beaton's device in the same way as it

scanned other class members' computers. We see no reason to reject its conclusion.

But, Speedy argues, the district court did not say out loud that it weighed both expert reports and found Snead's conclusions more persuasive. In fact, the court did not mention Myers's report at all. Speedy sees this as a glaring omission because the court had yet to rule on the Rule 702 cross-motions. It points out that a district court should not certify a class, and thereby raise the stakes of the litigation, based on faulty opinion evidence. Instead, it "must conclusively rule on any challenge to the expert's qualifications or submissions prior to ruling on a class certification motion," if the "expert's report or testimony is critical to class certification." *Am. Honda Motor Co., Inc. v. Allen*, 600 F.3d 813, 814–15 (7th Cir. 2010). Speedy concludes that the court erred by not doing so.

If this was error (a point we need not resolve), it was harmless. See *Messner*, 669 F.3d at 814. In its Rule 702 ruling, the district court made clear that it had considered only the expert testimony it later deemed admissible. Speedy gives us no reason to doubt the district court's assurance. And it is also worth recalling that the district court permitted additional merits discovery after its certification decision. Had Speedy wished to pursue the expert qualifications issue further, it could have done so. We thus find no abuse of discretion in the court's ruling on typicality.

D

The last requirement is adequate representation. See FED. R. CIV. P. 23(a)(4). A named plaintiff must be a member of the putative class and have the same interest and injury as other members. *Conrad v. Boiron, Inc.*, 869 F.3d 536, 539 (7th Cir.

2017). A representative might be inadequate if he is subject to a substantial defense unique to him. *CE Design Ltd. v. King Architectural Metals, Inc.*, 637 F.3d 721, 726, 728 (7th Cir. 2011).

The district court generously characterized Speedy's adequacy challenge as "scattershot." We need not catalog every objection Speedy raises, but we have considered all of them, and we will mention a few. First, Speedy claims Beaton is not actually a class member because he did not purchase the software as an individual. It cites the credit card statement billing the charge to Beaton's business, Chlorine Free Products Association, for which he was the sole shareholder. But Beaton averred in his declaration that he purchased the software for a laptop that he personally owned and used for primarily personal reasons. The software subscription was in Beaton's name. The district court did not clearly err in finding that Beaton purchased the software in his personal capacity.

Next, Speedy accuses Beaton of spoliating evidence—an act that (it says) makes him an inadequate representative. But spoliation is a harsh word for what happened (or so the district court could conclude). Beaton deleted a potentially useful email and took his laptop to an IT professional for repairs, where his data were lost when the hard drive was reformatted. The district court rejected Speedy's interpretation of this incident when it denied Speedy's motion for sanctions. It found as a fact that Beaton did not intend to destroy evidence. Speedy offers no reason for us to revisit that conclusion.

Speedy also launches a multipart attack on Beaton's credibility. It makes much ado of Beaton's decades-old manslaughter conviction. But assaults on the credibility of a named plaintiff must be supported by *admissible* evidence. *Id.* at 728. Wholly unrelated criminal history does not fit that bill.

See FED. R. EVID. 609(b) (a conviction's probative value must substantially outweigh its prejudicial effect in order to introduce it to impeach a witness over 10 years after his release); *e.g.*, *United States v. Rogers*, 542 F.3d 197, 201 (7th Cir. 2008).

Beaton's various "lies" during discovery underlie Speedy's next attempt to discredit him. Some of these alleged discrepancies are minor, such as his omitting a marijuana conviction when asked about his criminal background. Beaton's supposed inconsistency in describing his laptop usage—that he uses his laptop primarily for personal reasons but also for business ones—is nothing of the sort; in fact, his statements are consistent. Speedy does, however, point out one relevant discrepancy. In both the complaint and his first set of interrogatories, Beaton professed to have purchased the software for $39.94, while his credit card statement says that he paid only $9.97. The district court did not abuse its discretion, however, in concluding that Beaton's credibility was not *severely* undermined by this detail. See *CE Design*, 637 F.3d at 728. We see no reason to disturb the court's determination that Beaton was an acceptable class representative.

Speedy also throws barbs at plaintiff's counsel, Edelson PC, citing allegations of wrongdoing made against the firm in another case. Yet Speedy points to no evidence that Edelson is unqualified, has created a conflict between the firm and the putative class, or has violated a specific ethical rule. Speedy may dislike Edelson PC, and we can assume it is not a fan of class actions, but "general distaste for the class-action device" will not preclude certification. *Mejdrech v. Met-Coil Sys. Corp.*, 319 F.3d 910, 912 (7th Cir. 2003). Nothing in this record persuades us to consider Speedy's request for sanctions under Federal Rule of Appellate Procedure 38. The request is, in any

event, procedurally irregular: Rule 38 requires sanctions requests to be filed in separate motions, see *Vexol, S.A. de C.V. v. Berry Plastics Corp.*, 882 F.3d 633, 638 (7th Cir. 2018), and it does not contemplate sanctions against *appellees*.

IV

After clearing the hurdles posed by Rule 23(a), a person wishing to bring a class action must also demonstrate that the action fits under one of the three subsections of Rule 23(b). As we said, the only one that applies to Beaton is Rule 23(b)(3), the common-question variant. It requires the putative class representative to show that questions of law or fact common to the class members predominate, and that the class device is the superior method for adjudicating those claims.

A

The guiding principle behind predominance is whether the proposed class's claims arise from a common nucleus of operative facts and issues. *Messner*, 669 F.3d at 815. This requires more than a tally of common questions; the district court must consider their relative importance. *Parko v. Shell Oil Co.*, 739 F.3d 1083, 1085 (7th Cir. 2014). On the other hand, not every issue must be amenable to common resolution; individual inquiries may be required after the class phase. *Kleen Prods. LLC v. Int'l Paper Co.*, 831 F.3d 919, 922 (7th Cir. 2016).

Speedy identified 10 individual issues that allegedly defeated predominance. The district court was not persuaded. It found that some were best addressed on a class-wide basis, and they outweighed the remaining individualized inquiries.

The district court did not abuse its discretion in so concluding. For example, it will be easy to ascertain from whom the class members purchased the software. The court found

that they all bought it through the portal at the end of the free trial that redirected customers to two payment platforms. Similarly, the court found that users saw the same representations about the software's capabilities, and so a common answer to the question whether a reasonable customer would be deceived is possible. And based on the court's preliminary determination that the software's diagnostic mechanisms operated uniformly across devices, the trier of fact could reach a single answer on the software's functionality and value. Speedy insists that the court needs to inquire individually about each customer's level of satisfaction with the product. But dissatisfaction is not an element of any of the certified claims. If the product truly serves none of its functions, its users' subjective satisfaction is likely evidence of misrepresentation, not that the users were not harmed. See *In re Aqua Dots Prods. Liab. Litig.*, 654 F.3d 748, 750–51 (7th Cir. 2011) (purchasers suffered financial loss by paying more for products than they would have had they known the products' true quality).

Admittedly, some individualized questions remain. For instance, what was the class member's purpose (business or personal?) in buying the software? Did the class member seek a refund? What are each customer's damages? Speedy reminds us that we have frowned upon class treatment as a poor fit for warranty and fraud claims because they can involve so many individualized issues. See *Szabo*, 249 F.3d at 674. But these theories do not automatically fail the predominance test. See *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997) (certain consumer-fraud cases readily establish predominance); *Suchanek v. Sturm Foods, Inc.*, 764 F.3d 750, 759–60 (7th Cir. 2014) (the fact that "[e]very consumer fraud case involves individual elements" does not preclude class actions). Speedy misreads Supreme Court precedent in arguing

that *liability* with regard to all class members must be resolved in a single stroke. See *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011) (requiring resolution in "one stroke" of a "common contention" central to the common claim); see also *Suchanek*, 764 F.3d at 759–60; *Pella Corp. v. Saltzman*, 606 F.3d 391, 394 (7th Cir. 2010).

The district court recognized that individualized inquiries could be handled through "streamlined mechanisms" such as affidavits and proper auditing procedures. We agree. Defendants' due process rights are not harmed by such case-management tools. *Mullins v. Direct Dig., LLC*, 795 F.3d 654, 667–72 (7th Cir. 2015). Speedy's attempts to distinguish *Mullins* as merely about proving class membership, and not liability, are unavailing. The company makes the obvious point that it can neither cross-examine an affidavit nor depose every class member. But Speedy will still have the opportunity to challenge the class members' credibility. See *Mullins*, 795 F.3d at 671. It can obtain the testimony of a representative sample of the class members and, if necessary, present evidence contradicting statements found in particular affidavits.

Speedy also contends that there is a fatal lack of uniformity in the purpose for which each person acquired its software. We do not see that as a barrier to class treatment, however. It is true that the law of British Columbia insists that a particular purpose be brought clearly to the seller's attention. Compare *Kobelt Mfg. Co. v. Pac. Rim Engineered Prods. (1987) Ltd.* (2011), 84 B.L.R 4th 189, para. 104 (Can. B.C. Sup. Ct.) (leaky brakes did not violate an implied warranty because no implied communication that purchasers intended to use

the brakes on drawworks), with *Wharton v. Tom Harris Chevrolet Oldsmobile Cadillac Ltd.* (2002), 97 B.C.L.R. 3d 307, para. 59–60 (Can. B.C. App. Ct.) (buzzing sound system violated implied warranty where salesman knew purchasers wanted a luxury vehicle). But we do not see that flaw here. The people who used the free trial and then bought SpeedyPC Pro were all concerned about the health and performance of their computers. Why they owned a computer is beside the point. To the extent it is relevant, each user's specific reason for buying the software can be established through affidavits, subject to the defendant's right to challenge them with evidence.

B

Finally, the district court had several reasons for concluding that a class action was the superior way to resolve this dispute. All are well-supported. First, common questions of fact and law predominate. Speedy insists that we should categorically reject class treatment for implied warranty and consumer fraud claims because of the choice-of-law clause. See, *e.g.*, *Szabo*, 249 F.3d at 674; *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1020 (7th Cir. 2002). But that makes no sense here, since all parties agree that British Columbia law controls for the nationwide class and Illinois law for the subclass. And there is no risk of inconsistent rules with respect to recognition of the contractual choice-of-law clause, because that follows the forum, Illinois. See *Martin v. Reid*, 818 F.3d 302, 308 (7th Cir. 2016).

Second, the amount of damages to which each plaintiff would be entitled is so small that no one would bring this suit without the option of a class. *Suchanek*, 764 F.3d at 759–60. "Rule 23(b)(3) was designed for situations such as this, in

which the potential recovery is too slight to support individual suits, but injury is substantial in the aggregate." *Murray v. GMAC Mortg. Corp.*, 434 F.3d 948, 953 (7th Cir. 2006). The fact that others have not sued over this software is more likely because "only a lunatic or a fanatic sues for $30," *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004), than it is because the software is flawless. Consumer class actions are a crucial deterrent against the proliferation of bogus products whose sticker price is dwarfed even by a court filing fee (now $400 for a civil case in federal district court). Though punitive damages may also deter, few litigants would risk filing suit on the off-chance that punitive damages would be recovered after years of litigation. See *Hughes v. Kore of Ind. Enter., Inc.*, 731 F.3d 672, 677–78 (7th Cir. 2013). The district court did not abuse its discretion in finding the class-action device superior.

V

Defendants spend much time and money fighting Rule 23 certifications to the hilt. Yet "certification is largely independent of the merits … and a certified class can go down in flames on the merits." *Schleicher v. Wendt*, 618 F.3d 679, 685 (7th Cir. 2010). We say this not to imply that the merits in this case favor either party, but simply to remind defendants that the class-action glass is sometimes half-full: dismissed claims of a certified class end litigation once and for all. That, after all, is why settlement classes are so popular.

Finding no abuse of discretion in the district court's decisions to certify the nationwide class and the Illinois subclass, we AFFIRM the court's certification orders.

EXHIBIT E-4

NEW GM'S LETTER TO THE MDL COURT REGARDING *BEATON* V. *SPEEDYPC SOFTWARE*, 2018 WL 5623931 (7TH CIR. Oct. 31, 2018)

[MDL ECF NO. 6274] (FILED NOVEMBER 9, 2018)

KIRKLAND & ELLIS LLP
AND AFFILIATED PARTNERSHIPS

300 North LaSalle
Chicago, Illinois 60654

Andrew B. Bloomer, P.C.
To Call Writer Directly:
(312) 862-2482
andrew.bloomer@kirkland.com

(312) 862-2000

www.kirkland.com

Facsimile:
(312) 862-2200

November 9, 2018

The Honorable Jesse M. Furman
United States District Court for the
Southern District of New York
500 Pearl Street
New York, NY 10007

Re: In re: General Motors LLC Ignition Switch Litigation, 14-MD-2543

Dear Judge Furman:

We write in response to Plaintiffs' November 2, 2018 Letter, (Dkt. 6258), regarding the decision in *Beaton v. SpeedyPC Software*, No. 18-1010, 2018 WL 5623931 (7th Cir. Oct. 31, 2018) which plaintiffs now rely on in support of their motion for class certification (Dkt. 5845). That case, however, does not help them. It's inapposite because, among other reasons, the claims in that case were (1) based on an affirmative misrepresentation made uniformly to all class members, (2) about a product that functioned in the same way for all class members, and (3) implied warranty claims that were made under a uniform choice-of-law provision. Given these fundamental differences, the *Beaton* opinion is irrelevant to the reasons why no class should be certified here, as explained in New GM's Amended Memorandum in Opposition to Economic Loss Plaintiffs' Motion to Certify Bellwether Classes (Dkt. 6132) and more fully below.

First, the *Beaton* district court relied on its factual finding that all class members saw the same alleged affirmative misrepresentations about the product's capabilities, *Beaton*, Slip Op. at 18 (Ex. 1 to Dkt. 6258). Such a finding cannot be reached here, especially where the named plaintiffs disclaim reliance on any misrepresentation and either admittedly saw no New GM representation, or in contrast, identify a series of non-uniform representations made by different means and persons. (See Dkt. 6132, at 9-10.)

Second, and similarly, the statements in *Beaton* about proof of "functionality and value" were based on the district court's preliminary finding that the product's "diagnostic mechanisms operated uniformly across [all class members'] devices," (Slip Op. at 18), and are irrelevant here, where it is undisputed that the named plaintiffs' experiences in purchasing and driving the subject vehicles varied widely, including as to whether each plaintiff experienced a recall-related manifest defect. (*See* Dkt. 6132 at 12.) Furthermore, if the product in *Beaton* failed to function for all class members—*i.e.*, it allegedly had zero value—then all class members allegedly suffered harm (Slip Op. at 18), while in this case, the named plaintiffs admitted that their vehicles continued to

function, and plaintiffs' own expert evidence establishes that a substantial portion of the putative classes has no injury or damages. (*See, e.g.*, Dkt. 6132 at 26.)

Third, the opinion in *Beaton* does not support plaintiffs' proposal for deciding individual issues—*i.e.*, obtaining a *class-wide judgment*, and later conducting a "self-identification" process to determine whether plaintiffs can establish injury and other necessary elements of their claims. (*See, e.g.*, Doc. 6181, at 45 ("Which Class members satisfy [the manifest defect] requirement and who therefore may collect damages can be addressed in post-judgment administrative proceedings.).) In *Beaton*, the plaintiff proposed to use affidavits as a *pre-judgment* case-management tool, "subject to defendant's right to challenge them through evidence." Slip Op. at 19. Nothing in the opinion suggests that a class can be certified where individual liability issues will be determined *after* judgment. Indeed, the plaintiffs' suggested approach has it backwards, and violates the Rules Enabling Act and *Amchem* and its progeny, as New GM has outlined in various of its briefs. *See Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 613 (1997); 28 U.S.C. §2072; *see also, e.g.*, Dkt. 6132 at 24-32, Dkt. 6194 at 16.

Finally, *Beaton* involved certification of implied warranty claims under the substantive law of a single jurisdiction (British Columbia) based on a choice-of-law provision not present in this case. In addition, plaintiffs do not even seek certification of implied warranty claims for Texas and Missouri.

In sum, plaintiffs' reliance upon and citation to *Beaton* is unhelpful and inapposite to this case.

Respectfully submitted,

/s/ Richard C. Godfrey, P.C.
/s/ Andrew B. Bloomer, P.C.

Counsel for Defendant General Motors LLC

cc: MDL Counsel of Record

EXHIBIT E-5

THE MDL PLAINTIFFS' REPLY LETTER TO THE MDL COURT REGARDING *BEATON* V. *SPEEDYPC SOFTWARE*, 2018 WL 5623931 (7TH CIR. OCT. 31, 2018)

[MDL ECF NO. 6276] (FILED NOVEMBER 9, 2018)

HAGENS BERMAN

Lieff Cabraser Heimann & Bernstein
Attorneys at Law

HMG
HILLIARD MUÑOZ GONZALES L.L.P.
TRIAL ATTORNEYS

November 9, 2018

BY ECF

The Honorable Jesse M. Furman
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 10007

RE: ***In re: General Motors LLC Ignition Switch Litigation***,
14-MD-2543 (JMF); 14-MC-2543

Dear Judge Furman:

Plaintiffs respectfully respond to GM's letter brief (Dkt. No. 6274) regarding *Beaton v. SpeedyPC Software*, No. 18-1010, 2018 WL 5623931 (7th Cir. Oct.31, 2018). Plaintiffs appropriately set forth this case as supplemental authority without argument, but are compelled to address GM's unauthorized brief in response. The *Beaton* opinion contains a number of relevant points and GM's statements to the contrary are misplaced:

1. As *Beaton* held, implied warranty and consumer fraud claims are suitable for class certification because common issues include how a product is represented, how it performs (i.e., what it actually is), and whether *reasonable* consumers would be deceived. GM notes that *Beaton* involved the law of Illinois, not the bellwether states, but this is an irrelevant point because all bellwether states' laws are in accord. GM also argues that Beaton involves fraudulent misrepresentation, whereas this case involves fraudulent omissions, but the point is the uniformity and materiality of the message and concealment.

2. As *Beaton* held, individuals' purchase of products through different channels and for different intended uses does not defeat typicality or predominance, especially where, as here, purchasers are exposed to the same omission/same message and care about the relevant feature of a product. "The [purchasers] were all concerned about the health and performance of their computers. Why they owned a computer is beside the point." *Id.* at 20[1] (discussing predominance); *see also id.* at 12 (discussing typicality). Here, similarly, and contrary to GM's suggestion, the law and the facts are clear that safety is material.

3. A defendant's enumeration of even multiple (purportedly) individual issues does not mean that those issues predominate. In *Beaton*, the Seventh Circuit held that certain of the allegedly individual issues were "best addressed on a class-wide basis"[2] and they "outweighed

[1] Plaintiffs cite to the version of the case submitted to the Court.
[2] For example, "the trier of fact could reach a single answer on the software's functionality and value." *Id.* at 18. In so holding, Judge Wood rejected defendants' argument that subjective

the remaining individual inquiries"—particularly because the remaining issues "could be handled through 'streamlined mechanisms' such as affidavits and proper auditing procedures" and that "[d]efendants' due process rights are not harmed by such case-management tools." *Id.* at 19. The same is true here. Plaintiffs made these points in their class certification briefing, and GM has no real argument in response.

4. In *Beaton*, the cost of individual litigation far outweighed the potential recovery, showing the superiority of class treatment. While Plaintiffs' economic loss claims are more valuable than those involving defective software, the catastrophic costs of litigating against a company like GM dwarf any potential individual recovery. *See id.* at 21 ("Consumer class actions are a crucial deterrent against the proliferation of bogus products whose sticker price is dwarfed even by a court filing fee…."). Surely the same deterrence policies are implicated by GM's sale of cars with hidden safety defects.

5. Finally, Judge Wood observed that "certification is largely independent of the merits." *Id.* (quoting *Schleicher v. Wendt*, 618 F.3d 679, 685 (7th Cir. 2010)). A certified class would not represent a rejection of GM's merits defenses, it would simply and appropriately ensure that any ensuing class trial would allow Plaintiffs to win or lose as a group given the common questions, evidence, and conduct.

Respectfully submitted,

Steve W. Berman
Hagens Berman Sobol Shapiro LLP
1918 Eighth Ave.
Suite 3300
Seattle, WA 98101

-and-

555 Fifth Avenue
Suite 1700
New York, NY 10017

Elizabeth J. Cabraser
Lieff Cabraser Heimann & Bernstein, LLP
275 Battery Street
29th Floor
San Francisco, CA 94111-3339

-and-

250 Hudson Street
8th Floor
New York, NY 10013-1413

Robert C. Hilliard
Hilliard Martinez Gonzales LLP
719 S Shoreline Blvd.
Suite 500
Corpus Christi, TX 78401

1661239.1

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product satisfaction was a predominating individual issue; "dissatisfaction is not an element of any of the certified claims." *Id.* This is akin to GM's incorrect argument that different individual willingness-to-pay is relevant. Just as Plaintiffs, via experts and other evidence, have shown that all Class members *overpaid in fact* for defective cars and that GM was able to charge more based on its fraud, the class members in *Beaton* presented a common, class-wide issue of the value of the product regardless of what any class member felt about the product or its value.

EXHIBIT E-6

NEW GM'S LETTER TO THE MDL COURT REGARDING *ZAKARIA* V. *GERBER PRODS. CO.*, 2018 WL 5977897 (9TH CIR. NOV. 14, 2018)

[MDL ECF NO. 6358] (FILED DECEMBER 17, 2018)

KIRKLAND & ELLIS LLP
AND AFFILIATED PARTNERSHIPS

300 North LaSalle
Chicago, Illinois 60654

Andrew B. Bloomer, P.C.
To Call Writer Directly:
(312) 862-2482
andrew.bloomer@kirkland.com

(312) 862-2000

www.kirkland.com

Facsimile:
(312) 862-2200

December 17, 2018

The Honorable Jesse M. Furman
United States District Court for the
Southern District of New York
500 Pearl Street
New York, NY 10007

Re: In re: General Motors LLC Ignition Switch Litigation, 14-MD-2543

Dear Judge Furman:

In *Zakaria v. Gerber Products Co.*, No. 17-56509, 2018 WL 5977897 (9th Cir. Nov. 14, 2018) (Ex. 1), the Ninth Circuit became the first Court of Appeals to address whether a conjoint analysis alone could prove class-wide liability or damages under California consumer protection law. The Ninth Circuit held, as a matter of law, that it could not because the "subjective value" measured by a conjoint analysis did not prove the market price of a product; thus, the putative class of consumer good purchasers could not create a genuine issue of material fact regarding liability or damages under California law, much less prove legally required class-wide liability or damages, resulting in class decertification and summary judgment for defendants. *Id.* at *1.

Importantly for this case, the *Zakaria* court addressed—and rejected—the same arguments and authorities plaintiffs rely on here. As explained below, the factual record before the Ninth Circuit was similar to the record in this case, though the evidence here presents an even stronger case for summary judgment and denial of class certification. Applying the holding and rationale of *Zakaria* to this case leads to the same result—the conjoint analyses endorsed by Mr. Boedeker and Dr. Gans do not prove individual or class-wide liability or benefit of the bargain damages because plaintiffs' damage models are disconnected from essential market proofs. Therefore, this Court should grant New GM's motion for summary judgment and *Daubert* motions to exclude the opinions of Mr. Boedeker and Dr. Gans, and deny plaintiffs' motion for class certification.

1. The *Zakaria* Court Held That A Conjoint Analysis That Does Not Account For "Supply-Side Considerations And Marketplace Realities That Would Affect Product Pricing" Cannot Establish Liability Or Damages.

In *Zakaria*, the Ninth Circuit affirmed the district court's rulings: (i) granting the defendant summary judgment on plaintiff's California state law claims arising from plaintiff's purchase of mislabeled infant formula, and (ii) decertifying the class. The Court of Appeals held that to prove

liability or damages under California consumer protection law, a plaintiff must prove "the actual ***market price***" of a defendant's product ***with and without*** the relevant disclosure. Ex. 1, *Zakaria*, 2018 WL 5977897, at *1 (emphasis added). Supporting and echoing New GM's arguments here,[1] the court explained that Zakaria could not meet the burden of proving "the actual market price" with and without the relevant label solely with a conjoint analysis that measured how much consumers were "willing to pay." Why? Because such a demand-based analysis does not "reflect the supply-side considerations and marketplace realities that would affect product pricing":

> Under California consumer protection laws, plaintiffs can measure class-wide damages using methods that evaluate what a consumer would have been willing to pay for the product had it been labeled accurately. ***Such methods must, however, reflect supply-side considerations and marketplace realities that would affect product pricing***. . . . Dr. Howlett's conjoint analysis did not reflect market realities and prices for infant formula products. [It] showed only how much consumers subjectively valued the 1st and Only Seal, ***not what had occurred to the actual market price of Good Start Gentle with or without the label***. Thus, regardless whether consumers were willing to pay a higher price for the labelled product, the expert's opinion did not contain any evidence that such [a] higher price was actually paid; hence, no evidence of restitution or actual damages was proffered.

Id. (emphasis added, internal citations omitted). The court concluded that because the "subjective value" purportedly measured by a conjoint analysis "does not set the price" of a product, it does not create a genuine issue of material fact regarding liability or damages. *Id.* As "no damages at all could be proven," the Ninth Circuit affirmed the district court's refusal "to proceed with a liability-only class." *Id.* at *2.

Boedeker's conjoint in this case likewise reflects only "subjective value." It does *not* include the elements *Zakaria* held are required under California law: (i) "actual market prices" — both "with" and "without" the alleged misrepresentation, (ii) "marketplace realities that would affect product pricing," (iii) prices "actually paid" for vehicles, or (iv) the required "supply side considerations."[2] As a result, plaintiffs cannot establish alleged benefit of the bargain damages

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[1] *See* New GM Summ. J. Reply, Dkt. 6194 at 15–16; New GM Am. Class Opp'n., Dkt. 6132 at 32–39; New GM Am. Boedeker *Daubert* Br. & Reply, Dkt. 6131 at 24–38; Dkt. 6294 at 13-23; New GM Am. Gans *Daubert* Br. & Reply, Dkt. 6130 at 3–12; Dkt. 6294 at 1–7.

[2] *See* New GM Summ. J. Reply, Dkt. 6194 at 2, 11; New GM Am. Class Opp'n, Dkt. 6132 at 33-35; New GM Am. Boedeker *Daubert* Br. & Reply, Dkt. 6131 at 24-29, 37-38; Dkt. 6294 at 15-19. Purported damages produced by a conjoint analysis divorced from market realities (including willingness to sell *at purported actual and but-for prices*), lead to absurd results, such as damages potentially far exceeding the market price a consumer paid. *See* Dkt. 6194 at 12-13 (plaintiff Hamilton paid $3,500 for a 12-year old Oldsmobile Alero but under Boedeker's method would receive up to $4,714); *see also* Dkt. 6131 at 46 (Boedeker's estimated the same per vehicle damages for predominantly *new*

under California law—much less class-wide injury or damages.

2. The *Zakaria* Plaintiff's Conjoint Analysis Failed To Prove Liability Or Damages As A Matter Of Law.

In *Zakaria*, the district court's ruling on plaintiff's early class certification motion (a decision it later reversed) was based on plaintiff's expert's "*proposed* methods" for calculating class-wide damages, described in the expert's declaration *promising* to use "data" from "Defendant's business records" and "market research." Ex. 2, *Zakaria v. Gerber Prod. Co.*, 2016 WL 6662723, at *15 (C.D. Cal. Mar. 23, 2016) (emphasis added). The district court stated that the expert's study "was premised on sufficiently valid methods for surveying customers and determining *potential* price premiums," but held that the study *as implemented* was not a valid method to determine whether customers *actually* paid those premiums, and was invalid to establish injury or damages. Ex. 3, *Zakaria v. Gerber Prod. Co.*, 2017 WL 9512587, at *13 (C.D. Cal. Aug. 9, 2017) ("*Zakaria* district court") (emphasis added). The court determined that the expert's report failed to do what her pre-certification declaration had promised, including failing to "consider the actual prices paid by consumers for the product, or the preferences that consumers might have had for competing products that were available." *Id.* at *20; see also n. 2, *supra*.

Similarly, in rejecting the conjoint analysis, the district court revisited objections defendant raised in the defendant's motion to exclude the evidence—"limited sample size and lack of market data or additional studies confirming the results, including a hedonic regression analysis"—and concluded that these and other issues "raise[d] concerns" about the reliability of the expert's results. *Id.* at *11, *20. The admissibility of the evidence, however, was beside the point and purely academic given the the district court's (and Ninth Circuit's) holding that the conjoint analysis was invalid to prove injury or damages as a matter of law.[3]

In this case, as in *Zakaria*, the technical and factual record confirms that the experts' analysis, even after multiple supplements, is fundamentally deficient and does not provide the necessary proof of "supply-side considerations and marketplace realities that would affect product pricing" with and without the relevant disclosures. *See* Ex. 1, 2018 WL 5977897 at *1. For all the reasons New GM has previously expressed and the Ninth Circuit's reasoning in *Zakaria*, the

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2010-2014 Camaros and for pre-2005 vehicles, mostly purchased *used*).

[3] The admissibility of the expert's evidence was not before the Ninth Circuit on appeal. Nevertheless, as in the district court, the absence of marketplace data was addressed in oral argument in the Ninth Circuit both in connection with the admissibility and the sufficiency of the expert's evidence. *See* Ex. 4, Ninth Cir. Arg. Tr. at 11-13 (Judge Royal identifying the expert's failure to "evaluate empirical marketplace data to determine whether customers actually paid a premium based on the challenged language" as rendering the evidence inadmissible; Plaintiff's Counsel: "There's no cross appeal on the issue of whether or not the witness should have been excluded under *Daubert*.").

record supports denying class certification and granting New GM's motion for summary judgment.

3. Boedeker's Opinions Suffer From The Same Defects As In *Zakaria* Plus Many More.

Boedeker's opinions in this case suffer from many of the same case-ending defects identified in *Zakaria—but this case has even more flaws than Zakaria.*[4] For example: (a) while the *Zakaria* survey was about the product at issue (infant formula), here in contrast Boedeker's survey related to hypothetical scenarios consisting of safety features and information, not the recalled vehicles—or any vehicle—at all; (b) the *Zakaria* survey included actual prices at which the product was sold in the marketplace, Ex. 3, 2017 WL 9512587, at *10, unlike here where Boedeker used arbitrary prices for his "scenarios"; (c) the *Zakaria* survey was limited to those who purchased the product, unlike here where the survey population likely included substantial numbers of pickup-truck and other irrelevant buyers; (d) the product in *Zakaria* was a low-cost product with relatively standardized pricing, unlike here where prices paid for vehicles vary widely due to vehicle-specific differences and individual price negotiations; and (e) the product in *Zakaria* was only purchased new by consumers, unlike here where the majority of the putative class members acquired used vehicles. *See* Ex. 3, 2017 WL 9512587, at *9-10. Nevertheless, the district court and Appeals Court held that the conjoint methodology in *Zakaria* "does not present a reliable method" and could not establish legally recognized liability or damages. *Id.* at *20.

4. *Zakaria* Rejects The Arguments Made By Plaintiffs Here.

The Ninth Circuit was unpersuaded by the *Zakaria* plaintiff's attempt to account for "supply-side considerations" by *multiplying* the demand-side result of a conjoint analysis by the total quantity of products actually sold. *See* Ex. 5, *Zakaria* Pl's Opening Br., 2018 WL 1763768, at *17 ("[I]f the price premium for the Product is determined on a dollar basis, the calculation of classwide damages will be: $Price Premium x Qty Unit Sold = Damages."); Ex. 1, 2018 WL 5977897, at *1 (conjoint did "not reflect supply-side considerations."). Plaintiffs in this case propose the same "multiplication" method to account for supply-side considerations, but that method fails for the same reasons as in *Zakaria*. *See* Dkt. 6187 (Pls.' Boedeker *Daubert* Opp'n.) at 6 ("Using the demand curves, he estimated Class-wide economic losses for each of the defects at issue by *multiplying* the quantity of recalled vehicles for each recall by the median economic losses" (emphasis added)); Dkt. 6184 (Pls.' Dr. Gans *Daubert* Opp'n.) at 14 ("The median differences in demand . . . were then *multiplied* by the quantity of Class vehicles actually sold, that is, the supply. That is the proper way to model the interaction between supply and demand")

[4] *See* New GM Summ. J. Br. & Reply, Dkt. 5859 at 22-24; Dkt. 6194 at 10-11; New GM Am. Class Opp'n, Dkt. 6132 at 30-32, 35-37; New GM Am. Boedeker *Daubert* Br. & Reply, Dkt. 6131 at 14-17, 46-50; Dkt. 6294 at 6-13, 25.

(emphasis added).[5]

The Ninth Circuit held that the expert's analysis failed to account for "market realities and prices," Ex. 1, 2018 WL 5977897, at *1, notwithstanding that the highest price used in the expert's survey ($1.10) was "close to the common price . . . cited by Defendant [$1.08]." *See* Ex. 3, 2017 WL 9512587, at *10. Similarly, here, Boedeker's conjoint analysis does not reflect "market realities and prices." His rebuttal report purports to cite after-market prices for *some* of the safety features included in his "scenarios," relying on after-market quotes from "Consumer Reports," *etc.* *See* Dkt. 6187 (Pls.' Boedeker *Daubert* Opp'n.) at 2; Dkt. 6294 (New GM Boedeker *Daubert* Reply) at 9. But Boedeker reported no prices at all for "vehicles," or for the packages of safety features used in his survey "scenarios." Dkt. 6294 (New GM Boedeker *Daubert* Reply) at 6-7. Nor did he report *any* prices for many of the features in those "scenarios," such as anti-glare windshields, active head constraints, adaptive cruise control, *etc.* *See* Dkt. 6225 at 17–21 (New GM List *Daubert* Opp'n.); Ex. 45 at 29, 41. And of the few safety features for which Boedeker did state "market prices," some did not exist in the real world, and for others a consumer would have no choice to purchase at any price because they were not options. *See* Dkt. 6225 at 17–21. For the "informational" component of his scenarios (*e.g.*, a guarantee that an *entire vehicle* is "safe as is" and will not be recalled for *any* reason), Boedeker included no real-world price data. *Id.*

Finally, the plaintiffs here and in *Zakaria* rely on the same principal cases.[6] The Ninth Circuit's rejection of Zakaria's arguments undermines plaintiffs' reliance upon those cases here. Moreover, in affirming the district court, the Ninth Circuit was unpersuaded by the *Zakaria* plaintiff's efforts to distinguish the authorities cited by New GM in this case.[7]

Zakaria, in short, confirms New GM's objections to Boedeker's damages methodology, undercuts plaintiffs' reliance on various district court cases, and shows that—as a matter of law—the conjoint analysis or methodology upon which plaintiffs rely cannot support a certified class much less class-wide liability and damages.

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[5] Boedeker's "regression" analysis simply generated lines connecting data points he had already derived. Ex. 146, 2/7/18 Dep. at 358:4-8 ("You do a regression that basically fits to the—the blue dots, a demand curve. And then you do a regression that fits to the orange dots, a demand curve, correct? A. That is correct."); Dkt. 6294 at 16 & n.25.

[6] *See* Ex. 5, *Zakaria*, Pl.-Appellant Opening Br., 2018 WL 1763768, at *26-27 (citing, among others, *Guido v. L'Oreal, USA, Inc.*, 2014 WL 6603730 (C.D. Cal. July 24, 2014); *Sanchez-Knutson v. Ford Motor Co.*, 2016 WL 1658801, at *5-6 (S.D. Fla. Apr. 5, 2016); *In re: Lenovo Adware Litig.*, 2016 WL 6277245, at *21 (N.D. Cal. Oct. 27, 2016); *In re Myford Touch Consumer Litig.*, 2016 WL 7734558, at *16 (N.D. Cal. Sept. 14, 2016)); *see also* Dkt. 5846 (Pls.' Class Br.) at 29-30; Dkt. 6181 (Pls.' Class Reply) at 36-37; Dkt. 6059 (Pls.' Summ. J. Opp'n.) at 28-29; Dkt. 6187 (Pls.' Boedeker *Daubert* Opp'n.) at 1, 4-5, 35-38; Dkt. 6184 (Pls.' Gans *Daubert* Opp'n.) at 7, 14-18.

[7] *See* Ex. 6, *Zakaria*, Pl.-Appellant Reply Br., 2018 WL 3477325, at *7-11 (discussing *In re NJOY Consumer Class Action Litig.*, 120 F. Supp. 3d 1050 (C.D. Cal. 2014), *Saavedra v. Eli Lilly and Co.*, 2014 WL 7338930 (C.D. Cal. Dec. 18, 2014), and *Apple, Inc. v. Samsung Elecs. Co.*, 2014 WL 976898 (N.D. Cal. Mar. 6, 2014)).

KIRKLAND & ELLIS LLP

Respectfully submitted,

/s/ Richard C. Godfrey, P.C.
/s/ Andrew B. Bloomer, P.C.

Counsel for Defendant General Motors LLC

cc: MDL Counsel of Record

Exhibit 1

2018 WL 5977897
Only the Westlaw citation is currently available.
This case was not selected for publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of App. 9th Cir. Rule 36-3.
United States Court of Appeals, Ninth Circuit.

Oula ZAKARIA, individually as a representative the class, Plaintiffs-Appellants,
v.
GERBER PRODUCTS CO., a corporation, d/b/a Nestle Nutrition, Nestle Infant Nutrition, and Nestle Nutrition North America Defendant-Appellee,

No. 17-56509
|
Submitted October 9, 2018 Seattle, Washington
|
Filed November 14, 2018

Attorneys and Law Firms

Stephen J. Fearon, Jr., Squitteri & Fearon, LLP, New York, NY, Daniel L. Keller, Esquire, Attorney, Stephen M. Fishback, Esquire, Attorney, Keller, Fishback & Jackson, LLP, Agoura Hills, CA, for Plaintiff-Appellant

Geoffrey White Castello, III, Esquire, Attorney, Kelley Drye & Warren LLP, Parsippany, NJ, Kenneth David Kronstadt, Attorney, Kelley Drye & Warren LLP, Los Angeles, CA, for Defendant-Appellee

Appeal from the United States District Court for the Central District of California, Kronstadt, J., District Judge, Presiding, D.C. No. 2:15-cv-00200-JAK-E

Before: PAEZ and BEA, Circuit Judges, and ROYAL,* District Judge.

MEMORANDUM**

***1** Oula Zakaria appeals the district court's grant of summary judgment to defendant Gerber Products Co. (Gerber) on her California state law claims for restitution and actual, punitive, and statutory damages as well as its order decertifying a putative class of purchasers of Gerber's Good Start Gentle infant formula.

We review the district court's decision to decertify the class for abuse of discretion and its grant of summary judgment de novo. *Leyva v. Medline Indus. Inc.*, 716 F.3d 510, 513 (9th Cir. 2013); *Metoyer v. Chassman*, 504 F.3d 919, 930 (9th Cir. 2007). We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

1. The district court did not abuse its discretion by decertifying the class on the ground that Zakaria had failed to provide an adequate basis to calculate restitution under California's Unfair Competition Law ("UCL"), False Advertising Law ("FAL"), or Consumer Legal Remedies Act ("CLRA"), and actual damages under the CLRA.

As a threshold matter, the district court committed no legal error by assessing the validity of Dr. Howlett's conjoint analysis

after first deciding that Zakaria's damages theory matched her theory of liability under *Comcast Corp. v. Behrend*, 569 U.S. 27, 133 S.Ct. 1426, 185 L.Ed.2d 515 (2013). *See Lambert v. Nutraceutical Corp.*, 870 F.3d 1170 (9th Cir. 2017) (holding that difficulties with calculating class-wide damages will not defeat class certification, but only if "a valid method has been proposed for calculating those damages").

Under California consumer protection laws, plaintiffs can measure class-wide damages using methods that evaluate what a consumer would have been willing to pay for the product had it been labeled accurately. *See Pulaski & Middleman, LLC v. Google, Inc.*, 802 F.3d 979, 989 (9th Cir. 2015). Such methods must, however, reflect supply-side considerations and marketplace realities that would affect product pricing. Accordingly, the district court's subsequent holding that Dr. Howlett's conjoint analysis was inadequate for measuring class-wide damages was not illogical, implausible, or without support in the record. *See United States v. Hinkson*, 585 F.3d 1247, 1263 (9th Cir. 2009). Dr. Howlett's conjoint analysis did not reflect market realities and prices for infant formula products. Dr. Howlett's conjoint analysis showed only how much consumers subjectively valued the 1st and Only Seal, not what had occurred to the actual market price of Good Start Gentle with or without the label. Thus, regardless whether consumers were willing to pay a higher price for the labelled product, the expert's opinion did not contain any evidence that such higher price was actually paid; hence, no evidence of restitution or actual damages was proffered.

2. Dr. Howlett's deposition testimony, viewed in the light most favorable to Zakaria, does not support a justifiable inference to the contrary. Indeed, Gerber has adduced undisputed evidence to show that it did not raise the price of Good Start Gentle because of the 1st and Only Seal.

Pulaski does not support a contrary result. *Pulaski* involved a putative class of online internet advertisers who brought false advertising claims against Google based on its AdWords program, an auction-based program through which advertisers would bid for Google to place their advertisements on websites. There, the plaintiffs proposed to measure damages via Google's own algorithm for setting the price of advertising space—a method that "directly addresse[d] Google's alleged unfair practice." *Pulaski*, 802 F.3d at 989. Because Google's AdWords program was auction-based, the advertisers' bids—i.e., demand—fixed the price for online advertising space. Here, by contrast, the subjective value consumers place on the 1st and Only Seal does not set the price for Good Start Gentle. Dr. Howlett's conjoint analysis alone therefore does not create a genuine issue of material fact regarding the amount of restitution or actual damages.[1]

***2** Because Zakaria's claim for actual damages is unavailing,[2] her claim for punitive damages cannot succeed. "It is a well-settled rule that there can be no award of punitive damages without a finding of actual damages." *Contento v. Mitchell*, 28 Cal. App. 3d 356, 357, 104 Cal.Rptr. 591 (1972). Zakaria is also not entitled to statutory damages under Cal. Civ. Code § 1780(a). The $1,000 award contemplated by the statute is available only "in a class action." *Id.* Because "the class ha[d] been decertified," the district court's summary judgment analysis "applie[d] only to Plaintiff's individual claims." *See Zakaria v. Gerber Products Co.*, 2017 WL 9512587, at *22 n.13 (C.D. Cal. Aug. 9, 2017).

3. Finally, the district court did not abuse its discretion by declining to proceed with a liability-only class where no damages at all could be proven. Here, had Gerber marked up the price on Good Start Gentle, it would have imposed the same price mark-up on all buyers. Zakaria has not adduced sufficient evidence from which to infer what that premium might be, and Gerber has adduced uncontroverted evidence that it did not raise the price of Good Start Gentle because of its use of the 1st and Only Seal. On these facts, the district court committed no error in de-certifying the class.

AFFIRMED.

All Citations

--- Fed.Appx. ----, 2018 WL 5977897

Footnotes

[*] The Honorable C. Ashley Royal, Senior United States District Judge for the Middle District of Georgia, sitting by designation.

[**] This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

1 Zakaria also contends that she is entitled to restitution to deter false advertising. But while restitution serves a "dual purpose[ ] of restoration and deterrence," restitution may not be ordered "merely to achieve this deterrent effect." *In re Tobacco Cases II*, 240 Cal. App. 4th 779, 795, 192 Cal.Rptr.3d 881 (2015). Rather, "[r]estitution under the UCL and FAL must be of a measurable amount to restore to the plaintiff what has been acquired by violations of the statutes, and that measurable amount must be supported by evidence." *Pulaski*, 802 F.3d at 988 (citations and internal quotation marks omitted).

2 The district court correctly held that "actual damages" is "the difference between the actual value of that with which the defrauded person parted and the actual value of that which he received." *Colgan v. Leatherman Tool Group, Inc.*, 135 Cal. App. 4th 663, 675, 38 Cal.Rptr.3d 36 (2006). In arguing for a broader conception of "actual damages," Zakaria mistakenly relies on cases that define the phrase "any damage," which sets out the standing requirement for bringing a CLRA claim ("any consumer who suffers any damage"). Those cases are inapposite when deciding whether a plaintiff has adduced sufficient evidence of "actual damages."

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EXHIBIT E-7

THE MDL PLAINTIFFS' LETTER TO THE MDL COURT REGARDING *ZAKARIA* V. *GERBER PRODS. CO.*, 2018 WL 5977897 (9TH CIR. NOV. 14, 2018)

[MDL ECF NO. 6357] (FILED DECEMBER 17, 2018)

HAGENS BERMAN

Lieff Cabraser Heimann & Bernstein
Attorneys at Law

December 17, 2018

The Honorable Jesse M. Furman
United States District Court
Southern District of New York

Re: *In re: General Motors LLC Ignition Switch Litig.*, 14-MD-2543 (JMF); 14-MC-2543

Dear Judge Furman:

Zakaria v. Gerber Prods. Co., 2018 WL 5977897 (9th Cir. Nov. 14, 2018), an unpublished decision, has no bearing on these proceedings. In *Zakaria*, the Ninth Circuit upheld the district court's finding that an expert's conjoint analysis that only considered consumers' subjective willingness-to pay for infant formula and did not evaluate supply-side factors *at all* was inadequate to measure either restitution or damages under California consumer protection laws. Here, by contrast, as Plaintiffs' experts Stefan Boedeker and Dr. Joshua Gans have explained, Mr. Boedeker's conjoint analysis clearly and properly considers supply-side factors. Thus, *Zakaria* does not help GM.

A. Dr. Elizabeth Howlett's reports in *Zakaria* did not estimate demand curves and address supply.

The plaintiff in *Zakaria* alleged that Gerber falsely advertised its infant formula when asserting that "Good Start Gentle is the first and only general infant formula that: (i) reduces the risk for infants developing allergies; (ii) reduces the risk of their developing atopic dermatitis; and (iii) has been endorsed by the [FDA]." *Zakaria v. Gerber Prods. Co.*, 2016 WL 6662723, at *1 (C.D. Cal. Mar. 23, 2016). In support of class certification, Plaintiffs submitted a report from Dr. Elizabeth Howlett in which she proposed to perform a choice-based conjoint survey, the results of which would be input to Sawtooth Software that would then "calculate the relative values (or 'partworths') associated with attributes that comprise infant formula." *See Zakaria* Dkt. 220-2 (attached hereto as Exhibit A). Although Dr. Howlett concluded that her proposed conjoint analysis would be a valid and effective method to identify a price premium associated with Gerber's allegedly false claims, she also proposed hedonic regression as a second methodology. *Id*. at ¶¶ 51-71. But Dr. Howlett did not perform either a conjoint analysis or hedonic regression in connection with her class certification report. Nor did her report even mention "supply" or "willingness-to-sell." Nonetheless, the district court certified a class, finding that the proposed methods for calculating damages were sufficient and explaining that common issues predominated even though the plaintiff had not completed the damages calculations. *Zakaria*, 2016 WL 6662723, at *16.

Dr. Howlett then prepared an eleven-page merits report. *Zakaria* Dkt. 220-3 (attached hereto as Exhibit B). A market research company conducted a conjoint survey, *id.* at 7-9, and then Dr. Howlett used software to calculate "the 'partworths' or conjoint utilities for each attribute

level." *Id.* at 10. She stated that "partworths for changes to the price of the product provide a measure of the relative importance of a price change. The price premium that is associated with a more preferred product attribute levels can be calculated from the partworth conjoint utility measures." *Id.* She concluded that "the results of the analyses show that consumers are willing to pay $.4186 ($.06189 * 6.764) per ounce more for a product that is the 1st and only formula to reduce an infant's risk of developing allergies compared to an identical product that does not reduce an infant's allergy risk." *Id.* In her merits report, Dr. Howlett again did not mention "supply" or "willingness-to-sell." She did not estimate any demand curves. She did not perform any market simulations. Moreover, she did not perform a hedonic regression.[1]

The court later decertified the class and granted summary judgment for Gerber. The court agreed with Gerber's contentions that "Howlett only evaluated consumers' subjective willingness to pay as an abstract concept" and, because the report "did not measure the actual price premium paid, it cannot be used as an accurate measure of damages." *Zakaria v. Gerber Prods. Co.*, 2017 WL 9512587, at *18 (C.D. Cal. Aug. 9, 2017); *see also id.* at *21. As support for its decision, the court relied on *In re NJOY, Inc. Consumer Class Litig.*, 2016 WL 787415 (C.D. Cal. Feb. 2, 2016), *Apple, Inc. v. Samsung Elecs. Co.*, 2014 WL 976898, at *12 (N.D. Cal. Mar. 6, 2014), and *Saavedra v. Eli Lilly & Co.*, 2014 WL 7338930 (C.D. Cal. Dec. 18, 2014)—cases in which the plaintiffs' experts similarly did not take supply into account at all in measuring class damages. *See Zakaria*, 2017 WL 9512587, at *18-19.

In an unpublished single-page decision, the Ninth Circuit affirmed the district court. It explained that "Dr. Howlett's conjoint analysis showed only how much consumers subjectively valued the 1st and Only Seal, not what had occurred to the actual market price of Good Start Gentle with or without the label." *Zakaria*, 2018 WL 5977897, at *1. Thus, "regardless whether consumers were willing to pay a higher price for the labelled product, the expert's opinion did not contain any evidence that such higher price was actually paid; hence, no evidence of restitution or actual damages was proffered." *Id.*

B. Mr. Boedeker modeled demand and accounted for supply in his conjoint analysis in these proceedings.

In contrast to Dr. Howlett's conjoint analysis in *Zakaria*, Mr. Boedeker did not merely calculate part-worths. Instead, his analysis employed a three-step scientific and widely accepted method to estimate class damage. *First*, he computed part-worths for each respondent for every safety attribute and price level in the survey. Ex. 214 at ¶ 107. (*This is where Dr. Howlett stopped*.) *Second*, Mr. Boedeker performed market simulations "to estimate demand curves for products with varying attributes" across all respondents (*i.e.*, in the aggregate, not individually) at different price points. Ex. 214 at ¶ 110.[2] *Third*, he estimated "the change in price that would be necessary to reach

[1] Dr. Howlett also prepared a third report, but it was immaterial because it was not a conjoint or a discussion of her conjoint, but instead was a discussion of certain documents produced in discovery. 2017 WL 9512587, at *9 (citing *Zakaria* Dkt. 218-7).

[2] As Mr. Boedeker explained in paragraph 27 of his report (Ex. 214), "After the data are collected, conjoint market simulators let the researcher define specific competitive contexts (specific products in competition with another) and project the share of choices (shares of preference), given respondent's estimated utility scores. These simulators let

the same demand" for GM vehicles if a defect were disclosed, by comparing demand curves with and without knowledge of a defect and the timing of any recall. *Id*. at ¶ 112. This step was repeated for all possible combinations of product attributes with the median selected as the most reliable estimate of economic loss for each defective vehicle. *Id*. at ¶ 115.

In short, unlike Dr. Howlett, Mr. Boedeker estimated overall demand for GM vehicles *with* consumer knowledge of the defects at the time of sale (the but-for world) and overall demand for GM vehicles *without* consumer knowledge of the defects at the time of sale (the actual world). He then measured the downward shift in the demand curve when consumers learn of defects at the time of sale. This empirically-determined downward shift, with supply fixed at the number of vehicles actually sold by GM to Class members, provided Class-wide proof of the losses suffered by Class members. In other words, Mr. Boedeker's three steps turned raw survey data into an appropriate estimate of Class-wide damages for each vehicle, while Dr. Howlett merely calculated part-worth utilities without conducting any market simulations or calculating any demand curves or taking supply into account in any respect whatsoever.

Further, as explained at pages 34-35 of Plaintiffs' Opposition to GM's *Daubert* Motion to Exclude the Opinions of Stefan Boedeker (Dkt. No. 6187), many courts have accepted conjoint models that consider supply but hold it fixed, and no court has held that Mr. Boedeker's use of a steady supply to measure damages is impermissible. As further explained at page 36 of that brief, *NJOY* and *Saavedra*—decisions relied upon by the *Zakaria* court—are commonly distinguished on the grounds that the experts in those cases, like Dr. Howlett (and unlike Mr. Boedeker), did not consider supply at all. *See Hadley v. Kellogg Sales Co*., 324 F. Supp. 3d 1084, 1086 (N.D. Cal. Aug. 17, 2018) ("[C]ontrary to Kellogg's view, Gaskin's proposed conjoint analysis adequately accounts for supply-side factors and does not merely measure demand-side willingness-to-pay…. Consequently, Gaskin's proposed conjoint analysis is materially distinguishable from the conjoint analyses that were rejected in *In re NJOY* and *Saavedra* for failure to account for supply-side factors."); *In re Dial Complete Mktg. & Sales Practices Litig.*, 320 F.R.D. 326, 334 (D.N.H. 2017) (unlike in *NJOY* and *Saavedra*, "Boedeker's model does account for the supply side") (emphasis in original); *Fitzhenry-Russell v. Dr. Pepper Snapple Grp., Inc.*, 326 F.R.D. 592, 606 (N.D. Cal. June 26, 2018) (unlike the experts in *Saavedra* and *NJOY*, plaintiff's "conjoint survey does consider supply-side factors"); *Davidson v. Apple, Inc.*, 2018 WL 2325426, at *22 (N.D. Cal. May 8, 2018) ("This examination of the supply side of the market distinguishes Plaintiffs' expert from" *Saavedra* and *NJOY*.)

Zakaria addresses an issue not present in this action—whether a conjoint analysis that evaluates only part-worth utilities without estimating demand curves and without considering

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researchers and managers test a variety of what-if scenarios. The market simulator works like a voting machine, to predict which products the market would most likely select if they were available in the real world. Even though a respondent may evaluate just a small fraction of the possible product concepts within the questionnaire, the market simulator can predict the respondent's preferences for any possible combination of attribute levels. In other words, Simulators transform raw conjoint utility scores into simulated market choices. Simulators allow researchers and managers to analyze potential demand in a competitive market context, and see how various changes to competing product profiles might impact demand."

supply in any respect is adequate for measuring damages or restitution under California law. Consequently, *Zakaria* is wholly inapposite.

C. *Zakaria* is not precedential.

Ninth Circuit Rule 36-3(a) provides that unpublished decisions are not precedent: "Unpublished dispositions and orders of this Court are not precedent, except when relevant under the doctrine of law of the case or rules of claim preclusion or issue preclusion." GM, without citing the rule, attempted to finesse the issue by declaring, in its December 10 letter to this Court (Dkt. No. 6341), that the "*Zakaria* decision has 'persuasive value' in this case because it 'indicates how the Ninth Circuit applies binding authority' to similar arguments and claims at issue in MDL 2543." But, as detailed above, *Zakaria*, in addition to not being precedential, has no persuasive value here given the vast differences between the experts' approaches.

This point is driven home by *D.B. Zwirn Spec. Opportunities Fund, L.P. v. Tama Broad., Inc.*, 550 F. Supp. 2d 481 (S.D.N.Y. 2008), on which GM relies. The court in *Zwirn* relied on an unpublished Ninth Circuit decision only because the facts were "strikingly similar" and "directly on point." *Id.* at 493.[3] But *Zakaria* does not involve facts that are strikingly similar to this case: Dr. Howlett merely analyzed part-worth utilities, did not construct demand curves, and did not consider supply; whereas, Mr. Boedeker conducted thorough market simulations and then calculated demand curves to measure the downward shift in the demand curve, with supply fixed at the number of vehicles actually sold by GM to Class members, to provide Class-wide proof of the losses suffered by Class members. *See also Singh v. U.S. Citizenship & Immigration Servs.*, 2016 WL 1267796, at *5 n.3 (S.D.N.Y. Mar. 30, 2016) (Court distinguished an "unpublished one-page memorandum opinion" by the Ninth Circuit as involving different facts).[4]

D. Conclusion

The brief, unpublished decision by the Ninth Circuit in *Zakaria* has neither precedential nor persuasive value. The Court assessed an expert analysis that measured only consumers' subjective willingness to pay, so it has no bearing on this Court's analysis of Mr. Boedeker's conjoint analysis, in which the calculation of part-worth utilities is merely the first step in his multi-step analysis of the market effect of GM's alleged misrepresentations.

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[3] In its December 10 letter, GM also cited *Irving v. Lennar Corp.*, 2014 WL 1573552 (E.D. Cal. Apr. 17, 2014), in which the plaintiffs tried to distinguish their allegations from the facts at issue in an unpublished Ninth Circuit decision, but the district court explained that "these allegations are not part of the Third Amended Complaint." *Id.* at *4. As a result, the relevant facts in *Irving* were the same as the facts in the unpublished Ninth Circuit decision, unlike here.

[4] *See also Gusevs v. AS Citadele Banka*, 2017 WL 8232802, at *3 (C.D. Cal. May 11, 2017) (unpublished Ninth Circuit decision "is simply a case that reached a different result based on different facts"); *In re Cathode Ray Tube (CRT) Antitrust Litig.*, 27 F. Supp. 3d 1002, 1006 n.2 (N.D. Cal. 2014) (rejecting as "uncompelling" an unpublished decision that "was based on different facts and arguments"); *Pierce v. Kaiser Found. Hosp.*, 2009 WL 4673861, at *3 (N.D. Cal. Dec. 3, 2009) (rejecting reliance on "dicta from an unpublished district court decision" in which "the factual allegations there were different from those asserted here").

Respectfully,

/s/ Steve W. Berman
Steve W. Berman
Hagens Berman Sobol Shapiro LLP
1301 Second Ave.
Suite 2000
Seattle, WA 98101

-and-

555 Fifth Avenue
Suite 1700
New York, NY 10017

/s/ Elizabeth J. Cabraser
Elizabeth J. Cabraser
Lieff Cabraser Heimann & Bernstein, LLP
275 Battery Street
29th Floor
San Francisco, CA 94111-3339

-and-

250 Hudson Street
8th Floor
New York, NY 10013-1413

cc: MDL Counsel of Record