No. 13-16476

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARGIE DANIEL, et al.,

Plaintiffs/Appellants,

v.

FORD MOTOR COMPANY,

Defendant/Appellee.

On Appeal from the United States District Court
for the Eastern District of California
Hon. William B. Shubb, District Judge

APPELLANTS' OPENING BRIEF

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TABLE OF CONTENTS

Page

Page

TABLE OF AUTHORITIES

Page

Cases

Page

Page

Page

Statutes

Page

Court Rules

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INTRODUCTION

Plaintiffs/Appellants Margie Daniel, Mary Hauser, Donna Glass, and Andrea Duarte ("Plaintiffs") brought this class action against Defendant/Appellee Ford Motor Company ("Ford") in November of 2011. Plaintiffs allege that the new Ford Focus automobiles that they purchased — like all Focus vehicles for model years 2005 to 2011 — suffer from a common defect in the design of the rear suspension, a defect that results in premature tire wear and safety concerns. Plaintiffs seek monetary and

equitable relief under California and federal law, primarily in the form of repairs that would conform the rear suspensions of their vehicles to the solution implemented by Ford itself beginning in model year 2012. After Plaintiffs moved to certify a class, Ford moved for summary judgment dismissing Plaintiffs' claims with prejudice. The district court granted Ford's motion as to twenty-three of Plaintiffs' twenty-five total claims. With just two claims remaining — held by one Plaintiff for one model year — the court declined to certify a class. The court then entered a final judgment as to the dismissed claims pursuant to Federal Rule of Civil Procedure 54(b).

As demonstrated herein, the district court committed reversible error in dismissing Plaintiffs' claims. First, concerning Plaintiffs' claims that Ford wrongfully failed to disclose the defects in Plaintiffs' vehicles in violation of two of California's consumer protection statutes, the court erroneously refused to credit the undisputed evidence Plaintiffs submitted to establish "reliance" on Ford's omissions. Second, concerning Plaintiffs' claims for breach of implied warranty, the court erroneously refused to adhere to a California appellate court's definitive interpretation of the governing statute. Third and finally, concerning Plaintiffs' claims for breach of express warranty, the court erroneously construed Ford's express warranties for Plaintiffs' vehicles to exclude coverage of the *design* defects alleged by Plaintiffs. These errors mandate reversal of the district court's judgment, a reinstatement of Plaintiffs' dismissed claims, and a reconsideration of Plaintiffs' motion for class certification.

STATEMENT OF JURISDICTION

(a) The district court had subject matter jurisdiction pursuant to 28 U.S.C. § 1332(d)(2)(A), because the matter in controversy exceeds $5,000,000, exclusive of interest and costs, and is a class action in which at least five members of the proposed plaintiff class (all named Plaintiffs) are citizens of California while Defendant Ford is a citizen of Delaware and Michigan. The district court also had subject matter jurisdiction pursuant to 28 U.S.C. § 1332(a)(1), because the matter in controversy exceeds $75,000, exclusive of interest and costs, and is between citizens of California (all named Plaintiffs) and a citizen of Delaware and Michigan (Defendant Ford). *See* 3 E.R. 337:24-338:5, ¶¶ 6-10 (citizenship of Plaintiffs); 3 E.R. 317:24, ¶ 1 (citizenship of Ford); 3 E.R. 288:14-21, ¶¶ 9-10 (class includes more than 82,000 vehicles).[1]

(b) This Court has jurisdiction pursuant to 28 U.S.C. § 1291, as the district court granted summary judgment to Ford dismissing all but two of Plaintiffs' claims; expressly certified pursuant to Federal Rule of Civil Procedure 54(b) that there is "no just reason to delay entry of final judgment on the claims upon which the court has granted summary judgment"; and directed the Clerk of Court to "enter final judgment on [those] claims." 2 E.R. 31:3-10. Final judgment was entered on July 17, 2013.

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[1] "E.R." is short for the Excerpts of Record filed concurrently herewith. Pursuant to Circuit Rule 30-1.6(a), the excerpts are reproduced in multiple volumes consecutively paginated beginning with Page 1. As in the text above, the excerpts will cited in the form, "[Volume] E.R. [Page(s)]."

See 2 E.R. 29; *cf., e.g.*, *Skoog v. County of Clackamas*, 469 F.3d 1221, 1228 (9th Cir. 2006) (finding jurisdiction under § 1291 where the district court "certified [a claim] pursuant to [Rule 54(b)], and entered a final judgment on the claim").

(c) As noted above, the district court entered its judgment on July 17, 2013. *See* 2 E.R. 29. Plaintiffs filed their notice of appeal the following day. *See* 2 E.R. 26-28. Consequently, Plaintiffs' appeal is timely under Federal Rule of Appellate Procedure 4(a)(1)(A), which provides that a notice of appeal in a civil case must be filed within 30 days after the entry of the judgment appealed from.

ISSUES PRESENTED FOR REVIEW

1. Whether, in dismissing Plaintiffs' consumer protection law claims for failure to show reliance, the district court erred in refusing to credit undisputed evidence that Plaintiffs would have been aware of the wrongfully omitted information had it been disclosed by Ford's "authorized" dealerships at the time of purchase.

2. Whether, in dismissing Plaintiffs' implied warranty claims, the district court erred in expressly refusing to follow the California Court of Appeal's concededly definitive interpretation of the California statute that governs those claims.

3. Whether the district court erred in dismissing Plaintiffs' express warranty claims on the basis that Ford's warranties do not cover *design* defects, when those warranties are provided to consumers explicitly to remedy any "[d]efects . . . introduced into vehicles during the *design* and manufacturing processes."

STATEMENT OF THE CASE

Plaintiffs instituted this class action against Ford in the Eastern District of California on November 2, 2011. *See* 3 E.R. 380 (Docket Entry 1). The subject of this action is Ford's midsize automobile the "Focus." Alleging that Ford sold them (and thousands of other individuals) model years 2005 through 2011 Focus vehicles that Ford knew had a design defect in the rear suspension, Plaintiffs asserted five claims:

> (1) for violation of California's Consumers Legal Remedies Act ("CLRA"), Civ. Code §§ 1750, et seq., *see* 3 E.R. 364-65, ¶¶ 84-98;
>
> (2) for violation of California's Unfair Competition Law ("UCL"), Bus. & Prof. Code §§ 17200, et seq., *see* 3 E.R. 366-67, ¶¶ 99-108;
>
> (3) for breach of implied warranty, in violation of California's Song-Beverly Consumer Warranty Act ("Song-Beverly Act"), Civ. Code §§ 1790, et seq., *see* 3 E.R. 367-68, ¶¶ 109-115;
>
> (4) for breach of warranty under the Magnuson-Moss Warranty Act, 15 U.S.C. §§ 2301, et seq., *see* 3 E.R. 368-69, ¶¶ 116-126; and
>
> (5) for breach of express warranty under California Commercial Code § 2313, *see* 3 E.R. 369-70, ¶¶ 127-133.

Plaintiffs proposed to certify a class that generally consisted of all "individuals who purchased or leased any 2005 through 2011 Ford Focus vehicle in California and who currently reside in the United States." *See* 3 E.R. 362, ¶¶ 75-77. On behalf of themselves and that class, Plaintiffs generally sought monetary and equitable relief. *See* 3 E.R. 371, ¶ 134. Consistent with the district court's scheduling order, Plaintiffs filed a motion for class certification on January 11, 2013. *See* 3 E.R. 255.

At the same time as it filed its opposition to Plaintiffs' motion for class certification, Ford filed the motion for summary judgment that is the subject of this appeal. *See* 2 E.R. 163. In its motion, Ford sought dismissal with prejudice of all five claims of each of the four Plaintiffs and then-plaintiff Robert McCabe, or twenty-five claims in all. *See* 2 E.R. 174:11. The district court held a joint hearing on Plaintiffs' motion for class certification, on Ford's motion for summary judgment, and on the parties' respective motions to exclude expert testimony on various evidentiary grounds, including *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). *See* 3 E.R. 385 (Docket Entry 82).

On June 7, 2013, the district court issued a written order resolving both Ford's motion and the motions to exclude. *See* 1 E.R. 1-25. Regarding the latter, the court denied all of the motions and, therefore, excluded no testimony. *See* 1 E.R. 5:8-14. Plaintiffs do not here challenge the denial of their motions to exclude.

Regarding Ford's motion for summary judgment, the district court granted the motion as to twenty-three of Plaintiffs' twenty-five claims, thus dismissing with prejudice all claims save Plaintiff Margie Daniel's claims under the Song-Beverly Act and the Magnuson-Moss Act. *See* 1 E.R. 24:27-25:2. We will examine the district court's order in detail in the appropriate parts of the Argument below.

Having narrowed the action to a single plaintiff (who had purchased a single vehicle from only one of the seven model years at issue) who had just two of her five

original claims remaining, the court later denied Plaintiffs' motion for class certification on the ground that in what little of the action remained, "individual questions will predominate over questions common to the class." 2 E.R. 45:15-16.

Thereafter, the district court expressly certified pursuant to Federal Rule 54(b) that there is "no just reason to delay entry of final judgment on the claims upon which the court has granted summary judgment"; the court thus directed the clerk to "enter final judgment on [such] claims." 2 E.R. 31:3-10. Final judgment was accordingly entered on July 17, 2013, *see* 2 E.R. 29, and Plaintiffs timely filed their notice of appeal the following day, *see* 2 E.R. 26-28.

STATEMENT OF FACTS

According to Ford, the Focus was the "best-selling car model in the world for the first half of 2012," and Ford regularly trumpeted that these best-selling cars were made with "European-inspired suspensions" that provided "exceptional handling finesse" or "exceptional maneuverability." 3 E.R. 261:14-18. But however inspired and however exceptional it might otherwise have been, the rear suspension in the "C170" program or platform — Ford's name for all Focus vehicles manufactured for model years 2000 through 2011 — suffered from a fundamental and chronic problem: as Ford engineers candidly recorded on a suspension-related "Alignment Health Chart" they created in 2009 (a decade after the C170 Focus was first sold): "Pre-mature tire wear is an ongoing issue for C170 program." 3 E.R. 261:24-262:3. Paul Roberts, a

Ford engineer who worked at the plant that manufactured the Focus, made the point more colorfully in 2010: "*This car is a tire eater*." 3 E.R. 262:4-5.

Richard Bonifas, a "program manager" for the Focus who was "responsible to monitor [each Focus] vehicle in customers' hands and provide feedback to engineering or manufacturing," admitted that he was, no later than October of 2005, "aware of . . . known concerns on premature tire wear on the Ford Focus." 3 E.R. 263:11-13, 264:1-2. As late as October of 2007, however, Ford's technicians were telling Ford's dealers the very opposite. *See* 3 E.R. 264:3-18. Mr. Bonifas had literally no answer to the obvious questions as to why Ford's technicians responded to dealer inquiries in this fashion:

> Q. . . . . Why would the technicians continue to say that when it wasn't true?
>
> A. I don't know.
>
> . . . .
>
> Q. . . . [D]id you ever reach out to them and say that they should not be communicating something that wasn't true?
>
> A. No.
>
> Q. Why? Why not?
>
> A. I don't have an answer for that.

3 E.R. 264:20-265:3; *see also* 3 E.R. 303 (audiovisual clip of foregoing testimony).

Eventually, Ford did alert its dealer network to the rear suspension problem in the C170 platform, informing that network that 2005-2011 Focus vehicles (i.e., the entire class period) may exhibit not only premature tire wear but also "*vehicle drift when driving on wet or snow covered roads*." 3 E.R. 266:24-267:4. Ford pointedly did *not* so inform existing or potential customers. *See* 3 E.R. 267:5-15. Indeed, Ford never did inform its customers about the suspension defect, denying to this day that the 2005-2011 Focus is in any way defective. *See, e.g.*, 3 E.R. 320:19-21, ¶ 41.

Notwithstanding that denial, Ford did eventually correct the problem that had resulted in premature tire wear and safety concerns for tens of thousands of vehicles. In particular, the rear suspension of the Focus was re-designed — please pardon the technical jargon — such that "the toe gradient for the new version in 2012 is more subdued than the prior models"; this more subdued gradient "will help back off [i.e., reduce] tire wear" on newly manufactured Focus vehicles. 3 E.R. 268:1-13. As part of the proposed classwide relief, Plaintiffs' experts engineered a similar solution to retrofit class vehicles already on the road (i.e., 2005-2011 model year vehicles). *See, e.g.*, 3 E.R. 307 (paragraphs 7 and 8), 312-13.

All four Plaintiffs purchased new Focus vehicles (each for a different model year) from "authorized" Ford dealers in California. *See* 3 E.R. 357-60, ¶¶ 46, 55, 59, 67 (so alleging); 3 E.R. 321-23, ¶¶ 46, 55, 59, 67 (so admitting). As set out in Part I of the Argument below (pp. 18-19 & n.3), Plaintiffs had substantive discussions with

representatives of their authorized dealers regarding the features, particularly including safety-related features, of those vehicles prior to their purchases. But at no time and in no form was the rear suspension defect in the Focus disclosed to Plaintiffs.

SUMMARY OF ARGUMENT

1. Plaintiffs' claims under California's CLRA and UCL are grounded on Ford's knowing nondisclosure of the suspension defect in the Focus. These statutes require Plaintiffs to prove "reliance" — "had the omitted information been disclosed, [they] would have [1] been aware of it and [2] behaved differently." There is no dispute that each Plaintiff satisfied the second requirement by declaring that she would *not* have purchased a Ford Focus had she been informed of the suspension defect.

As for the first requirement, Plaintiffs also declared that before purchasing their vehicles, they engaged in substantive discussions with salesmen at their "authorized" Ford dealers about the features, particularly including safety-related features, of those vehicles. Thus, Plaintiffs credibly demonstrated — and neither Ford nor the district court disputed as a matter of fact — that had the omitted information been disclosed *by Ford's "authorized" dealerships at the time of purchase*, Plaintiffs "would have been aware of it." But the district court ruled that this demonstration was insufficient as a matter of law because Plaintiffs did not also establish that "the local dealership salesmen were *agents* of [Ford] or were obligated to verbally disclose the alleged defect on behalf of [Ford]." This ruling was error for two independent reasons.

a. First, *agency* is legally irrelevant in this context. Plaintiffs do not seek to hold Ford liable for any act or omission by Ford's authorized dealerships or their salesman; it is *Ford's own* omission, *Ford's own* nondisclosure of the suspension defect, that animates Plaintiffs' CLRA and UCL claims. The relevant question is not whether Ford's authorized dealerships were Ford's agents in some strict sense, but whether Ford *plausibly* could have made the requisite disclosures about the defective suspension by means of salesmen at its authorized dealerships. That standard accords with both existing caselaw and the more general principle of California law that reliance is a matter not of metaphysical certainty but of "reasonable probability."

Plaintiffs satisfied this standard. When they visit authorized Ford dealers, prospective purchasers of Ford vehicles no doubt receive pertinent information about the "characteristics," "benefits," and "quality" of such vehicles within the meaning of the CLRA. Moreover, several of the various plausible means of disclosure suggested by Ford and the district court — "warranty or maintenance booklets" and "brochures" — are received by consumers *at Ford's "authorized" dealerships*. Finally, California law (the UCL in particular) rejects the notion that consumer protection statutes exclude those (like Plaintiffs) who do not buy *directly* from manufacturers (like Ford).

b. Second and alternatively, if "agency" is required, Plaintiffs satisfied that requirement. Plaintiffs alleged that the various dealers through whom they purchased their vehicles were Ford's "agents" with respect to those purchases, and

Ford failed to deny the allegation. In any event, a reasonable jury could find that the dealerships were Ford's *ostensible* agents under California law. To establish a triable issue of fact in this regard, Plaintiffs needed to produce "some evidence" that Ford itself "caused or allowed [Plaintiffs] to believe the agent possesse[d] such authority." That evidence is present here. As Ford has admitted, all of the dealerships were expressly "authorized" ones, and Ford failed to deny agency. In addition, many of the various written materials that Ford asserted *could have* satisfied its disclosure obligations were received by Plaintiffs from and at Ford's dealerships.

In light of this Court's recognition that "ostensible authority is for a trier of fact to resolve" and "should not . . . [be] decided by an order granting a summary judgment," the foregoing alone should be sufficient to create a triable issue of fact with respect to ostensible authority. If this Court believes that additional evidence is necessary, it should give Plaintiffs the opportunity to develop that evidence on remand, given that Ford did not identify "agency" as an issue in its summary judgment papers; that no issue of agency arose at the hearing on that motions; and that the district court did not otherwise give Plaintiffs any notice or time to respond on the issue. Such evidence is easily developed from readily accessible sources like Ford's own website.

In sum, to establish reliance, Plaintiffs had to show that had Ford disclosed the rear suspension defect in the Focus, Plaintiffs would have been aware of such information. In showing that they would have been aware of the information had it been

disclosed by Ford's "authorized" dealerships at the time of purchase, Plaintiffs satisfied their burden. Dismissal of Plaintiffs' CLRA and UCL claims must be reversed.

2. California's Song-Beverly Act imposes an implied warranty of merchantability for certain consumer goods, including the Focus vehicles at issue here. On its face, the statute imposes a categorical outside limitation on the duration of this implied warranty, namely, "*one year* following the sale of new consumer goods to a retail buyer." But in a published decision in *Mexia v. Rinker Boat Co.*, the California Court of Appeal held that this limitation was subject to a form of equitable tolling: the duration provision "does not create a deadline for discovering latent defects or for giving notice to the seller"; that is, where the defect is "latent," the Song-Beverly Act affords "a 'reasonable' time within which to notify the seller only after the point the purchaser *knew or should have known* of the breach" of warranty. Neither Ford nor the district court disputed that Plaintiffs' Song-Beverly Act claims were timely asserted under this interpretation of the statute.

The district court, however, refused to follow that decision and so dismissed those claims for failure to satisfy the statute's duration provision. This was manifest error. It has long been the rule that, on questions of state law, federal courts "must follow the decision of the intermediate appellate courts of the state unless there is convincing evidence that the highest court of the state would decide differently." Neither Ford nor the district court even tried to adduce such evidence, and it simply does not

exist: the California Supreme Court denied review of the *Mexia* decision and refused a request to "depublish" the subject opinion. Whatever might be the attitude of federal district courts, no California court has even criticized or questioned that opinion. Therefore, the dismissal of Plaintiffs' Song-Beverly Act claims must be reversed.

3. Plaintiffs asserted claims for breach of the express warranties that Ford provided with their vehicles. Noting that Plaintiffs "rely exclusively upon a theory of *design* defect" (as opposed to *manufacturing* defect), the district court dismissed the claims of Plaintiffs Daniel and Duarte on the ground that their express warranties simply "do not cover *design* defects." The district court erred in so ruling.

In delineating "what is covered" thereunder, the warranties provided to those Plaintiffs acknowledge that defects "may be unintentionally introduced into vehicles during the *design* and manufacturing processes and such defects could result in the need for repairs." The warranties go on to explain that "Ford provides the New Vehicle Limited Warranty in order to remedy *any such defects* that result in vehicle part malfunction or failure during the warranty period." Under California law, *any* means "without limit and no matter what kind," and the "rule that any ambiguities caused by the draftsman of the contract must be resolved against that party applies with peculiar force in the case of the contract of adhesion" like a new automobile warranty. Thus, the applicable warranties expressly cover *design* defects. The erroneous dismissals of the express warranty claims of Plaintiffs Daniel and Duarte must be reversed.

4. The parties agree that Plaintiffs' claims for breach of warranty under the Magnuson-Moss Warranty Act "stand or fall" with their express and implied warranty claims under California law. Consequently, if the district court's dismissals of the latter claims are reversed (as argued above), its dismissals of Plaintiffs' Magnuson-Moss claims must be reversed as well.

5. The district court's denial of Plaintiffs' motion for class certification was intimately bound up with the rulings challenged in this appeal. In particular, given the previous dismissals of twenty-three of Plaintiffs' twenty-five claims, the ruling on class certification was necessarily limited to two claims by one plaintiff. In these circumstances, the district court must reconsider its denial of class certification if one or more of Plaintiffs' claims are reinstated by this Court.

For these reasons, the judgment of the district court should be reversed.

ARGUMENT

In resolving Ford's motion for summary judgment, the district court grouped together (1) Plaintiffs' two claims for violations of the Consumers Legal Remedies Act and the Unfair Competition Law, and it treated separately (2) Plaintiffs' claims for breach of implied warranty in violation of the Song-Beverly Consumer Warranty Act, (3) Plaintiffs' claims for breach of express warranty, and (4) Plaintiffs' claims under the Magnuson-Moss Warranty Act. We employ these same categories in the following sections below, showing how the district erred as to each category.

I. In Dismissing Plaintiffs' CLRA and UCL Claims for Failure to Show Reliance, the District Court Erred in Refusing to Credit Undisputed Evidence that Plaintiffs Would Have Been Aware of the Wrongfully Omitted Information Had It Been Disclosed by Ford's "Authorized" Dealerships at the Time of Purchase.

Plaintiffs' first claim arises under California's Consumers Legal Remedies Act ("CLRA"), codified at Civil Code §§ 1750, et seq. Plaintiffs alleged that Ford violated the CLRA "[b]y failing to disclose and concealing the defective nature of the [Focus] Vehicles from Plaintiffs and prospective Class Members," which nondisclosure constituted "unfair and deceptive acts or practices." 3 E.R. 364:18-21, ¶¶ 88-89. Plaintiffs' second claim arises under California's Unfair Competition Law ("UCL"), codified at Business and Professions Code §§ 17200, et seq. Plaintiffs alleged that by its knowing nondisclosure of the vehicles' suspension defect, "Ford has engaged in unfair competition and unlawful, unfair, and fraudulent business practices" in violation of the UCL. 3 E.R. 367:1-2, ¶ 105.

It is not disputed that both statutes impose the requirement of "actual reliance" in the present circumstances. *See Cohen v. DIRECTV, Inc.*, 178 Cal. App. 4th 966, 980 (2009) ("actual reliance must be established for an award of damages under the CLRA"); *In re Tobacco II Cases*, 46 Cal. 4th 298, 326 (2009) (the statute "imposes an actual reliance requirement on plaintiffs prosecuting a private enforcement action under the UCL's fraud prong"). Under California law, reliance "is proved by showing that the defendant's misrepresentation or nondisclosure was 'an immediate cause'

of the plaintiff's injury-producing conduct," which is proved in turn "by showing that in its absence the plaintiff 'in all reasonable probability' would not have engaged in the injury-producing conduct." *Id.* (quoting *Mirkin v. Wasserman*, 5 Cal. 4th 1082, 1110-11 (1993) (Kennard, J., concurring in part and dissenting in part)).

Where, as here, the allegedly wrongful conduct is the "nondisclosure" of facts that the defendant was under a duty to disclose, the plaintiff must "prove reliance on an omission." *Mirkin*, 5 Cal. 4th at 1093. Although such proof may seem counter-intuitive on first glance, the standard is well-established and oft-quoted: "One need only prove that, had the omitted information been disclosed, one would have [1] been aware of it and [2] behaved differently." *Id.*, *quoted in* 1 E.R. 9:6-8.

There is no serious question that Plaintiffs adduced sufficient evidence to satisfy the second prong of this test at the summary judgment stage. Under penalty of perjury, each Plaintiff declared in essence that she would have "behaved differently" — that is, she would *not* have purchased a Ford Focus — had she been informed of that model's characteristic suspension defect.[2] Ford did not offer any contradictory

[2] *See* 2 E.R. 156:17-18, ¶ 3 (declaration of Margie Daniel that "[i]f I had known any of this information [regarding the defect], I would not have purchased the 2011 Ford Focus"); 2 E.R. 152:14-15, ¶ 2 (declaration of Mary Hauser that "I would not have purchased the 2009 Ford Focus if I had been told such important information about the vehicle"); 2 E.R. 161:20-22, ¶ 2 (declaration of Donna Glass that "if I had been told such information, . . . I would have decided against purchasing a Ford Focus and gone elsewhere to purchase a new vehicle"); 2 E.R. 149:10-11, ¶ 16 (declaration of Andrea Duarte that had "I been told such critical information [regarding the defect], I would not have purchased the 2007 Ford Focus").

evidence (or even argument), and the district court did not dispute that Plaintiffs had satisfied this prong of the *Mirkin* standard.

Instead, the district court ruled that Plaintiffs failed to satisfy the first prong, i.e., that had Ford disclosed the vehicle's suspension defect, Plaintiffs "would have been aware of it." The court found "no evidence that plaintiffs researched the maintenance history of Ford Focuses, read the warranty or maintenance booklets before buying their vehicles, or otherwise saw Ford materials which could have plausibly contained any disclosure had it been made." 1 E.R. 12:6-10. Lacking such evidence, Plaintiffs could not (in the district court's view) "establish that had the information been included [in any of defendant's materials they] would have been aware of it and behaved differently." 1 E.R. 13:2-4 (alteration by district court) (quoting *Withers v. eHarmony, Inc.*, No. CV 09-2266-GHK (RCx), 2011 WL 8156007, at *2 (C.D. Cal. Mar. 4, 2011)).

It is true that Plaintiffs did not "research" the history of the Focus or read the "booklets" that consumers typically read only when something goes wrong long *after* they have purchased their vehicles. Instead, Plaintiffs interacted with Ford's authorized dealerships, both test driving the vehicles they ultimately purchased and engaging in substantive discussions with their respective salesmen regarding the features, particularly including safety-related features, of those vehicles; however, at no time during those test drives or those discussions was the suspension defect disclosed to

Plaintiffs in any form.[3] Thus, Plaintiffs credibly demonstrated that "had the omitted information been disclosed" *by Ford's "authorized" dealerships at the time of purchase*, Plaintiffs "would have been aware of it." *Mirkin*, 5 Cal. 4th at 1093.

The district court did not disagree *as a matter of fact*. That is, the court did not gainsay that a reasonable jury could find that Plaintiffs would have been aware of the suspension defect had Ford sales representatives disclosed the information at the time Plaintiffs purchased their vehicles. Indeed, the court acknowledged that "plaintiffs' declarations might be sufficient to create a presumption or inference of reliance on another entity's omissions," namely, omissions by Ford's authorized dealerships. 1

[3] *See* 2 E.R. 156:12-17, ¶ 3 (declaration of Margie Daniel that "I test drove the Focus and discussed general features of the vehicle with the Ford sales representative, such as certain safety features and gas mileage"; however, that representative "did not tell me that there was a known suspension defect, tire wear problem, or safety issue with the Ford Focus, nor did he "indicate to me that previous owners had made complaints about premature tire wear"); 2 E.R. 152:6-12, ¶ 2 (declaration of Mary Hauser that she and the Ford sales representative "took the Focus on a test drive, and afterwards discussed the purchase price and general features of the vehicle"; however, the Ford representative did not inform me that there was a known suspension defect, tire wear problem, or safety issue with the Ford Focus," nor was she told that "there had been numerous complaints made by Ford Focus owners concerning premature tire wear"); 2 E.R. 161:7-11, ¶ 2 (declaration of Donna Glass that she and a Ford sales representative "took the Focus on a test drive for about ten miles" and "discussed the purchase price and general features of the vehicle"; however, that representative "did not inform me that there was a known suspension defect, tire wear problem, or safety issue with the Ford Focus"); 2 E.R. 149:5-8, ¶ 16 (declaration of Andrea Duarte that at the time she purchased her vehicle, "the Ford representative and I discussed certain vehicle features and the purchase price"; however, "at no time did the Ford representative "tell me that there was a known suspension defect, tire wear problem, or safety issue with the Focus or that there had been numerous complaints from previous Ford Focus owners regarding tire wear").

E.R. 13:17-19. Rather, the district court disagreed with Plaintiffs *as a matter of law*: "Plaintiffs fail . . . to offer any legal support for the notion that the local dealership salesmen were agents of defendant or were obligated to verbally disclose the alleged defect on behalf of defendant" itself; as a consequence, "plaintiffs' discussions with local dealership salesmen do not establish a presumption of reliance on *defendant's* alleged omission." 1 E.R. 13:13-21.

In so ruling, the district court erred. In the first place, the relevant question is not whether Ford's authorized dealerships were strictly Ford's "agents" or whether salesman at those dealerships had an independent, affirmative obligation to "verbally disclose" the suspension defect. Instead, the relevant question is whether, in the circumstance where Ford has not otherwise met its disclosure obligations, disclosures by Ford's authorized dealerships and their sales representatives are *plausible* hypothetical means of Ford's satisfying its own disclosure obligations. In the alternative, there is a genuine dispute precluding summary judgment regarding whether Ford's "authorized" dealerships are Ford's "ostensible" agents within the meaning of California Civil Code § 2300.

A. Ford's "Authorized" Dealerships Are Sufficiently Connected to Ford for Purposes of Establishing Plaintiffs' Reliance on Ford's Omissions.

Although the district court framed the question as whether the salesmen employed by Ford's authorized dealerships were Ford's "agents," 1 E.R. 13:14-15, the

relevant question here is not strictly one of agency. That is, Plaintiffs are not seeking to hold Ford liable for the conduct or the omissions of Ford's dealerships; rather, it is *Ford's own* omission, *Ford's own* nondisclosure of the suspension defect, that forms the basis for Plaintiffs' claims under the CLRA and UCL. In particular, Plaintiffs are *not* alleging that Ford itself made all of the disclosures it was required to make, but that Ford's dealerships failed to make some *additional* required disclosures. No, it is Ford Motor Company and Ford Motor Company alone whose nondisclosure is the basis for liability here.

To answer the relevant question, we must return to the counterfactual posed by *Mirkin*: "had the omitted information been disclosed, [would Plaintiffs] have been aware of it"? 5 Cal. 4th at 1093. And to answer this question, one really must know the *means* of the hypothesized disclosure, that is: had the omitted information been disclosed by means *X*, would Plaintiffs have been aware of it? In essence, this case poses the issue of what means "count," i.e., what means may a plaintiff hypothesize in order to establish the requisite reliance under *Mirkin*.

In certain cases, this issue is easily resolved, because there exists but one plausible means of hypothesized disclosure; in such cases, whether the plaintiff read (or heard or viewed) that one means is dispositive. *Withers v. eHarmony, Inc.*, the principal case on which both the district court and Ford relied, is a ready example. The defendant in *Withers* operated an "online dating service" to which individuals could

subscribe; as part of the subscription process, the defendant provided "terms and conditions" that "outlined the terms of service." 2011 WL 8156007, at *1, 3. The plaintiff based his UCL and CLRA claims on the allegation that such terms and conditions fraudulently omitted certain material information concerning the dating service. *See id.* at *1. Logically, the awareness prong was simple: in order to prove that "had the omitted information been disclosed, [he] would have been aware of it," the plaintiff necessarily had to prove that he had read the very "terms and conditions" that allegedly omitted material information. In fact, however, the plaintiff "admit[ted] he did *not* read the terms and conditions provided by Defendant"; thus, it was easy to conclude that the plaintiff could *not* "establish that had the information been included he would have been aware of it and behaved differently." *Id.* at *3. (emphasis added).

In the present case, however, there is no *one* plausible means of hypothesized disclosure. To the contrary, the district court suggested *several* sources that "could plausibly contain the allegedly omitted fact" or that "could have plausibly contained any disclosure had it been made," namely, Ford's "website" or "advertisement[s]" or "warranty or maintenance booklets." 1 E.R. 9:23-24, 12:9-11. Ford itself suggested several alternative plausible means. *See* 2 E.R. 67:1-2, 85:8 (alluding to disclosures on "Ford's website, in advertising, in a brochure, or in any other publication" and to disclosures in "the owner's guide, [or] in the warranty booklet").

We submit that the district court's formulation of the standard for what means "count" in this context — means or sources that "could *plausibly* contain the allegedly omitted fact" or that "could have *plausibly* contained any disclosure had it been made" — is the correct one. That formulation accords with the limited caselaw addressing the subject. *See Ehrlich v. BMW of North America, LLC*, 801 F. Supp. 2d 908, 920 (C.D. Cal. 2010) (finding failure to satisfy *Mirkin* where the complaint "is devoid of allegations that Plaintiff would have *plausibly* been aware of the cracking defect before he purchased his [automobile] had BMW publicized this information" (emphasis added)). The district court's formulation also accords with the more general principle of California law that reliance is a matter of "reasonable probability," not metaphysical certainty. *Tobacco II*, 46 Cal. 4th at 326 (quoting *Mirkin*, 5 Cal. 4th at 1110-11 (opinion of Kennard, J.)). Last but not least, the "plausibly" formulation sensibly refrains from imposing too great a burden on innocent consumer plaintiffs and thereby rewarding manufacturer defendants that have, by definition, failed to live up to their disclosure obligations.

Returning to the present case, the question is thus whether Ford *plausibly* could have made the requisite disclosures about the defective suspension of the Focus by means of sales representatives at its "authorized" dealerships — regardless of whether those dealerships were Ford's "agents" in some strict sense. The answer to that question is obviously *yes*. Most fundamentally, is there any debate that prospective

purchasers of Ford vehicles expect to receive, and indeed will receive, relevant information about those vehicles when they visit "authorized" Ford dealers? Is there any debate that consumers who visit "authorized" Ford dealerships will hear — perhaps more than they want to hear — about the "characteristics," "benefits," and "quality," CLRA, Cal. Civ. § 1770(a)(5), (7), of the Ford vehicles in which they express an interest? *No* on both counts.

Ford's "authorized" dealerships and their sales representatives are a plausible means of Ford's making required disclosures of information for yet another obvious reason. As documented above, the district court and Ford suggested various plausible means of disclosure by Ford. Several of these means constitute written materials — "warranty or maintenance booklets" and "brochures" — that are necessarily received by consumers *at Ford's "authorized" dealerships*. *See, e.g.*, 2 E.R. 252:5-11 (examination of Plaintiff Mary Hauser by *Ford's* counsel: "Q. All right. Now, when you bought the car, did you drive it off the lot that day then? A. Yes, I did. Q. All right. *And it had, like all new cars, a bunch of — we call them glove box materials, owner's manual, warranty guide, things like that?* A. Correct." (emphasis added)). If warranty or maintenance booklets given to consumers at Ford's "authorized" dealerships "could have plausibly contained [Ford's] disclosure had it been made," 1 E.R. 12:11, why can't the same be said for oral information given to consumers by salesmen at those same dealerships?

Finally, California law is consistent with the conclusion that Ford's "authorized" dealerships are a plausible means of Ford's making required disclosures of information (such that Plaintiffs' dealings with such dealerships can establish reliance), regardless of whether there is a strict "agency" relationship between Ford and those dealerships. Manufacturers like Ford have sought to insulate themselves from consumer protection statutes on the theory that consumers of their products did not deal "directly" with the manufacturers but only with the intermediate retailers like dealerships. Under the UCL, however, California courts have *rejected* the argument that restitution is "limited to direct purchasers and exclude[s] plaintiffs . . . who purchased [the relevant] product from a retailer." *Shersher v. Superior Court*, 154 Cal. App. 4th 1491, 1494 (2007) (emphasis added). Therefore, "the plaintiff in a UCL action may obtain restitution from a defendant with whom the plaintiff did not deal directly." *Id.* at 1499. This principle recognizes the economic reality that, in order to "distribute their [products], Manufacturers depend on a network of wholesalers and retailers." *Clayworth v. Pfizer, Inc.*, 49 Cal. 4th 758, 788 (2010). Purchasers who "had indirect business dealings with Manufacturers" through such networks are protected by the UCL. *Id.*

Plaintiffs credibly demonstrated that "had the omitted information been disclosed" *by Ford's "authorized" dealerships at the time of their purchases*, Plaintiffs "would have been aware of it." Such hypothesized disclosures were *plausible* means

of Ford's satisfying its disclosure obligations under the CLRA and the UCL, and so Plaintiffs have established the requisite reliance under those two statutes.

B. In the Alternative, a Reasonable Jury Could Find that Ford's "Authorized" Dealerships Were Ford's Ostensible Agents Under California Law.

If the Court's determines to resolve the reliance issue with reference to formal principles of agency, the district court's grant of summary judgment to Ford on this issue must nonetheless be reversed. In the first place, Plaintiffs expressly alleged that "Ford's 'authorized' dealerships are . . . Ford's agents with respect to the sales and leases of the Defective Vehicles described herein." 3 E.R. 338:19-20, ¶ 15. Ford did not deny this allegation; it rather attempted to duck the issue by stating that the "allegations of paragraph 15 of the complaint are legal conclusions requiring no response from Ford." 3 E.R. 319:4-5, ¶ 15. But Ford is wrong: under California law, "[t]he existence of agency is a *question of fact* for the trial court." *Burr v. Capital Reserve Corp.*, 71 Cal. 2d 983, 995 (1969) (emphasis added); *accord, e.g., Garlock Sealing Technologies, LLC v. NAK Sealing Technologies Corp.*, 148 Cal. App. 4th 937, 965 (2007) (opining that the "existence of an agency relationship is a factual question for the trier of fact"). Therefore, Ford's non-denial should be taken as an admission that Ford's "authorized" dealerships are Ford's agents for present purposes.

In any event, a reasonable jury could certainly find that those dealerships are Ford's "ostensible" agents with respect to selling new Focus vehicles to individual

consumers like Plaintiffs. Ostensible agency arises under California law "when the principal intentionally, or by want of ordinary care, causes a third person to believe another to be his agent who is not really employed by him." Cal. Civ. § 2300.[4] To establish a triable issue of fact as to whether the dealerships were Ford's ostensible agents (and thus possessed the requisite authority to act on behalf of Ford) for purposes of selling new Focus vehicles, Plaintiffs needed to produce "some evidence" that Ford itself "caused or allowed [Plaintiffs] to believe the agent possesse[d] such authority." *American Casualty Co. v. Krieger*, 181 F.3d 1113, 1121 (9th Cir. 1999) (quoting *Preis v. American Indemnity Co.*, 220 Cal. App. 3d 752, 761 (1990)). As particularly pertinent here, this Court has recognized that "ostensible authority is 'for a trier of fact to resolve . . . . [It] should not . . . [be] decided by an order granting a summary judgment.'" *Id.* (alterations in original) (quoting *Thompson v. Occidental Life Insurance Co.*, 276 Cal. App. 2d 559, 564 (1969)).

The requisite "some evidence" the dealerships had authority from Ford with respect to sales of Focus vehicles to Plaintiffs is present here. As Ford has admitted, all of the relevant dealerships were expressly "authorized" ones. *See* 3 E.R. 321:7-8

[4] Although established by different means, an "ostensible" agency is the same as an "actual" agency in terms of holding the principal responsible for the agent's actions or omissions. *See, e.g., Krumme v. Mercury Insurance Co.*, 123 Cal. App. 4th 924, 946 (2004) ("These undisputed findings are sufficient to establish that the brokers are the ostensible agents of Mercury and Mercury is therefore vicariously responsible for them." (citing, inter alia, Cal. Civ. Code §§ 2298, 2300, 2315, 2317, 2338)).

("Ford admits that Big Valley Ford was an authorized Ford dealer."), 322:2-3 ("Ford admits that Walnut Creek Ford was an authorized Ford dealer."), 322:12-13 ("Ford admits that Ukiah Ford, Inc. was an authorized Ford dealer."), 323:2-3 ("Ford admits that North Bay Ford Lincoln was an authorized Ford dealer."). As discussed above (p. 26), moreover, Ford has failed to deny Plaintiffs' allegation that these authorized dealerships were in fact "Ford's agents with respect to the sales and leases of the Defective Vehicles" at issue here. As also discussed above (p. 24), many of the various written materials that Ford asserted *could have* satisfied Ford's disclosure obligations were received by Plaintiffs from and at Ford's authorized dealerships.

We submit that the foregoing alone is sufficient to create a triable issue of fact with respect to ostensible authority. If this Court believes that additional evidence is necessary, the Court should give Plaintiffs the opportunity to develop that evidence. Ford did not identify "agency" as an issue in its summary judgment brief or its statement of undisputed facts. *See* 2 E.R. 174-242. Nor did the issue of "agency" arise at the nearly three-hour hearing on the parties' various motions. *See* Reporter's Transcript of Proceedings: Motion Hearing 1-98 (June 3, 2013).

In these circumstances, granting summary judgment because Plaintiffs failed to offer support for the notion that local Ford dealerships were agents of Ford, *see* 1 E.R. 13:13-15, arguably violates the precept of Federal Rule 56(f)(2) that a district court may grant summary judgment "on grounds not raised by a party" *only* "[a]fter

giving notice and a reasonable time to respond." Granting summary judgment on this ground without affording Plaintiffs the opportunity to develop the requisite evidence certainly violates this Court's mandate that litigants must have a "full and fair opportunity to ventilate the issues prior to the district court's summary judgment on [their] claims." *Norse v. City of Santa Cruz*, 629 F.3d 966, 972-73 (9th Cir. 2010) (en banc) (quoting *Greene v. Solano County Jail*, 513 F.3d 982, 990 (9th Cir. 2008)).

Such evidence is easily developed. While perhaps not quite judicially noticeable under Federal Rule of Evidence 201(b), it is a fact well known to anyone who has ever purchased a new automobile as an individual consumer that a local dealer is an indispensable part of the purchase. Indeed, even in the age of up-to-the-minute pricing through the Internet, an individual consumer cannot even obtain the true price of new Ford automobile *without going through an authorized local dealership*. If you try to "Get an Internet Price" for a new Focus from Ford's website, you will receive a notice that "[y]our quote request for the 2014 Focus has been sent to the following Dealer near you," and that a representative from that dealer "will contact you within one business day to," inter alia, "arrange an appointment to visit the Dealership." *See* http://www.quickquote.ford.com/2014-Ford-Focus?branding=1&lang=en (visited Nov. 20, 2013). Ford's website likewise warns potential purchasers that "[a]ny calculation of any price, tax, incentive, lease or finance terms is for your reference only, is an estimate, and may not be completely accurate"; thus, you must "[c]ontact your

selected dealer for the actual price of any vehicle and applicable terms and conditions that may apply" to your contemplated purchase. *See* http://www.ford.com/help/terms (visited Nov. 20, 2013). Properly authenticated, this would surely qualify as "some evidence" that Ford's authorized dealerships had authority to act for Ford in connection with sales of new automobiles to individual consumers, that is to say, evidence that Ford "caused or allowed [consumers like Plaintiffs] to believe the [dealerships] possesse[d] such authority." *American Casualty* , 181 F.3d at 1121.

Therefore, if an agency relationship between Ford and its "authorized" dealerships is to be required, a reasonable jury could find that such dealerships were Ford's ostensible agents under California Civil Code § 2300. Summary judgment for failure to establish "agency" was therefore not warranted.

* * * * *

To establish reliance, Plaintiffs needed to show that had Ford (contrary to fact) disclosed the rear suspension defect in the Focus, Plaintiffs would have been aware of that information. In showing that they would have been aware of the omitted information had it been disclosed by Ford's "authorized" dealerships at the time of purchase, Plaintiffs satisfied their burden. This is true whether the Court asks if these disclosures were a "plausible" means of Ford's satisfying its disclosure obligations (they were), or if the Court asks if the dealerships were Ford's ostensible agents for purposes of selling new Focus vehicles to Plaintiffs (they were). In either event, the

district court erred in granting summary judgment to Ford on the ground that Plaintiffs failed to establish reliance. The dismissal of Plaintiffs' CLRA and UCL claims must be reversed.

II. In Dismissing Plaintiffs' Implied Warranty Claims, the District Court Erred in Expressly Refusing to Adhere to the California Court of Appeal's Concededly Definitive Interpretation of the Statute that Governs Those Claims.

Plaintiffs' third claim arises under California's Song-Beverly Consumer Warranty Act ("Song-Beverly Act"), codified at Civil Code §§ 1790, et seq. Under the Song-Beverly Act, generally "every sale of consumer goods that are sold at retail in this state shall be accompanied by the manufacturer's and the retail seller's implied warranty that the goods are merchantable." Cal. Civ. Code § 1792. This "implied warranty of merchantability" means, inter alia, that the relevant goods "[a]re fit for the ordinary purposes for which such goods are used." *Id.* § 1791.1(a)(2). Plaintiffs alleged that Ford breached the Song-Beverly Act implied warranty because the Focus vehicles manufactured and sold by Ford "were not fit for their ordinary and intended purpose [of] providing Plaintiffs and Class Members with reliable, durable, and safe transportation"; instead, such vehicles were "defective." 3 E.R. 368:5-7, ¶ 114.

In accord with Ford's arguments in support of summary judgment, the district court focused principally on the "duration" of the implied warranty imposed by the Song-Beverly Act. As to that issue, the Act provides in pertinent part:

> The duration of the implied warranty of merchantability . . . shall be coextensive in duration with an express warranty which accompanies the consumer goods, provided the duration of the express warranty is reasonable; but in no event shall such implied warranty have a duration of less than 60 days *nor more than one year* following the sale of new consumer goods to a retail buyer.

Cal. Civ. Code § 1791.1(c) (emphasis added). On its face, this statute imposes a categorical outside limitation on the duration of the implied warranty of merchantability, namely, "*one year* following the sale of new consumer goods to a retail buyer." *Id.* (emphasis added).

Courts have long struggled, however, to reconcile seemingly categorical time requirements imposed by statute with equitable considerations that take account of "excusable" delays. As to federal statutes, the federal courts have consistently held that "[t]ime requirements in lawsuits between private litigants are customarily subject to 'equitable tolling.'" *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 95 (1990) (citing *Hallstrom v. Tillamook County*, 493 U.S. 20, 27 (1989)). Indeed, this precept is now "hornbook law" in the U.S. Supreme Court. *Holland v. Florida*, 130 S. Ct. 2549, 2560 (2010) (quoting *Young v. United States*, 535 U.S. 43, 49 (2002)). Thus, "a nonjurisdictional federal statute of limitations is normally subject to a 'rebuttable presumption' *in favor* 'of equitable tolling.'" *Id.* (quoting *Irwin*, 498 U.S. at 95-96); *see also, e.g.*, *Kwai Fun Wong v. Beebe*, 732 F.3d 1030 (9th Cir. 2013) (en banc) (applying this presumption to hold that the statute of limitations in the Federal Tort Claims Act may be equitably tolled).

Is the above-quoted time requirement of the Song-Beverly Act — i.e., the one-year statutory limitation on the implied warranty of merchantability imposed by Civil Code § 1791.1(c) — subject to any kind of equitable tolling? The district court ruled that it was *not*: where "the alleged defect manifested itself . . . after the one-year period, the Song-Beverly implied warranty claims must be dismissed." 1 E.R. 15:15-17 (quoting *Henderson v. Volvo Cars of North America, LLC*, Civ. No. 09-4146 (DMC) (JAD), 2010 WL 2925913, at *13 (D.N.J. July 21, 2010)). In accordance with that categorical ruling — and given the undisputed fact that "the alleged suspension defect became manifest, and therefore the vehicles allegedly became unmerchantable, in Glass, Duarte, and Hauser's vehicles" *more than one year* following their respective purchases, 1 E.R. 17:28-18:8 — the district court dismissed the implied warranty claims of Ms. Glass, Ms. Duarte, and Ms. Hauser. *See* 1 E.R. 18:8-19.[5]

If the interpretation of the Song-Beverly Act's limitation of the implied warranty of merchantability were a matter of first impression, Plaintiffs would endeavor to convince this Court to interpret Civil Code § 1791.1(c) as being subject (like the Federal Tort Claims Act and other statutes) to equitable tolling or a similar doctrine potentially excusing plaintiffs from a categorical application of the statute's one-year

[5] Because Ms. Daniel "was told to replace her tires and did indeed replace them within one year of purchasing her vehicle," 1 E.R. 18:22-23, the district court excluded her Song-Beverly Act implied warranty claim from this dismissal. The district court ultimately denied Ford's motion for summary judgment as to that specific claim, *see* 1 E.R. 20:16-17, and therefore it is not before this Court on appeal.

limitation. But the proper interpretation of the duration of the implied warranty imposed by the Song-Beverly Act is indisputably *not* a matter of first impression. To the contrary, the California Court of Appeal considered this precise issue in *Mexia v. Rinker Boat Co., Inc.*, 174 Cal. App. 4th 1297 (2009).

In that case, "Mexia alleged that he purchased from Miller a boat manufactured by Rinker that was unmerchantable due to a latent defect, which subsequently caused the boat's engine to corrode." *Id.* at 1300-01. Like Ford here, the *Mexia* defendants argued that "the duration provision should be construed so as to bar Mexia's implied warranty claim," because by "the time Mexia brought the boat for repairs, the implied warranty had already expired by over a year." *Id.* at 1308. Under the defendants' interpretation of the statute, "the duration provision precludes an action for breach of the implied warranty of merchantability under the Song-Beverly Act when the action is based upon a latent condition that is not discovered by the consumer and reported to the seller within the duration period." *Id.* at 1308-09. In light of the superficially categorical language of Civil Code § 1791.1(c), this period "could be as little as 60 days and is *never longer than one year*." *Id.* at 1309 (emphasis added).

The California Court of Appeal expressly and emphatically rejected these arguments. In particular, the court rejected any interpretation of the Song-Beverly Act that "would create a notification deadline that would apply *even if the consumer has not discovered or could not have discovered the breach within the duration period*."

Id. at 1310 (emphasis in original). To the contrary, the court held that the Act gives consumers at least as much time as that given by the California Uniform Commercial Code, i.e., "a 'reasonable' time within which to notify the seller *only after the point the purchaser knew or should have known of the breach*." *Id.* (same). Accordingly, the duration provision "merely creates a limited, *prospective* duration for the implied warranty of merchantability; it does not create a deadline for discovering latent defects or for giving notice to the seller." *Id.* at 1301 (emphasis added).

According to the California Court of Appeal, the contrary "categorical" interpretation advanced by the defendants "would narrow and restrict the rights and remedies available to consumers vis-à-vis the purchasers of goods under the California Uniform Commercial Code. Indeed, the curtailment of the remedy for those who purchase products with latent defects could be severe." *Id.* at 1310-11. Thus, a categorical interpretation "conflicts with the policy repeatedly expressed by California courts of the need to construe the Song-Beverly Act so as to implement the legislative intent to *expand* consumer protection and remedies." *Id.* at 1311 (emphasis in original) (citing *Murillo v. Fleetwood Enterprises, Inc.*, 17 Cal. 4th 985, 990 (1998); and *Kwan v. Mercedes-Benz of North America, Inc.*, 23 Cal. App. 4th 174, 184 (1994)). In short, that interpretation "is unsupported by the text of the statute, legal authority, or sound policy." *Id.* Accordingly, the Court of Appeal reversed the superior court's dismissal of Mexia's Song-Beverly Act claim. *See id.* at 1312.

Here, the relevant defect — the defectively-designed rear suspension of Plaintiffs' Focus vehicles — was obviously a "latent" one, and Ford's summary judgment motion did not assert otherwise. In opposing Ford's motion, Plaintiffs observed that "Ford does not argue that [Ms. Glass, Ms. Duarte, or Ms. Hauser] discovered, or could have discovered, the defect within the one-year duration period." 2 E.R. 121:23-24. Ford did not contradict that observation in its reply brief. *See* 2 E.R. 54-94. Nor did the district court take issue with the applicability of *Mexia* to these three Plaintiffs' implied warranty claims.

Instead, the district court expressly refused to adhere to *Mexia* and its interpretation of the duration provision of Civil Code § 1791.1(c). *See* 1 E.R. 17:23-24 ("The court . . . declines to adopt *Mexia*'s holding."). The district court gave two reasons for refusing to follow a decision of the California Court of Appeal construing a California statute: "Despite [its] having been decided almost four years ago, no other California Court of Appeal appears to has cited *Mexia* favorably for its holding on the duration of implied warranties under the Song-Beverly Act. In addition, multiple federal district courts — including a recently issued decision in this district — have declined to apply *Mexia*." 1 E.R. 16:3-8 (footnote omitted); *but see* 1 E.R. 17:1-11 (citing decisions of three federal district courts that *did* follow *Mexia*).

This was manifest error. It has long been the rule that, on questions of state law, federal courts "must follow the decision of the intermediate appellate courts of

the state unless there is convincing evidence that the highest court of the state would decide differently." *In re Schwarzkopf*, 626 F.3d 1032, 1038 (9th Cir. 2010) (quoting *Owen ex rel. Owen v. United States*, 713 F.2d 1461, 1464 (9th Cir. 1983)); *accord, e.g., Stoner v. New York Life Insurance Co.*, 311 U.S. 464, 467 (1940) (reaffirming that "where jurisdiction rests on diversity of citizenship, federal courts . . . must follow the decisions of intermediate state courts in the absence of convincing evidence that the highest court of the state would decide differently"). Such evidence is found only in "rare instances." *Owen*, 713 F.2d at 1465.

The district court did not even purport to adduce "convincing evidence" that the California Supreme Court would have decided *Mexia* differently from the California Court of Appeal. Indeed, the evidence is to the contrary. First of all, in *Mexia* itself, the supreme court denied the defendants' petition for review of the appellate court's decision and likewise denied a non-party's request for "depublication" of the appellate court's opinion (i.e., a request to render the opinion non-precedential). *See* No. S174901, 2009 Cal. LEXIS 9238 (Aug. 26, 2009), http://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=0&doc_id=1914874&doc_no=S174901.

Moreover, *Mexia* stands in marked contrast to the decisions of the California Court of Appeal that, in rare instances, this Court has declined to follow. That is to say, *Mexia* is not in "plain conflict" with other decisions of the Court of Appeal, particularly with decisions that have been cited with approval by the California Supreme

Court. *Owen*, 713 F.2d at 1465. To be sure, Ford has argued (in accord with some federal district courts) that *Mexia* conflicts with *Atkinson v. Elk Corp. of Texas*, 142 Cal. App. 4th 212 (2006), but we are mystified by this argument.

Atkinson involved roof tiles that began showing cracks more than five years after installation. *See id.* at 217. The plaintiff sued under the Magnuson-Moss Warranty Act, and the issue on appeal was whether his "breach of the implied warranty of merchantability claim under Magnuson-Moss [was] barred by the statute of limitations." *Id.* at 226. *Atkinson* ruled that this claim was indeed barred, holding along the way that "Civil Code section 1791.1 controls the length of the implied warranty of merchantability under Magnuson-Moss," *id.* at 231, and such length "is limited to one year," *id.* at 230. Crucially, *Atkinson* did not address *any claim* under the Song-Beverly Act, the plaintiff's claims under that statute having been dismissed in a prior appeal. *See id.* at 219 & n.7. Thus, *Atkinson* could not conceivably address the question at the heart of *Mexia*, i.e., the Song-Beverly Act's treatment of *latent* defects; the term did not even appear in the *Atkinson* opinion. *Cf. Ehrlich*, 801 F. Supp. 2d at 924 n.10 (observing that "there is no indication that the plaintiff in *Atkinson* alleged that a latent defect existed at the time of installation"). Finally, it is implausible to find a conflict between *Mexia* and *Atkinson* — certainly no California court has found one — when *Mexia* expressly relied on *Atkinson* no fewer than four times without even hinting at any inconsistency. *See Mexia*, 174 Cal. App. 4th at 1309.

When this Court in *Owen* declined to follow a decision of the California Court of Appeal, this Court relied not only on the "plain conflict" with other intermediate appellate decisions but also on the fact that "[t]wo of the courts that have applied the [disputed decision's] test have expressed dissatisfaction with that test's results," one going so far as to observe that it " 'is fundamentally unfair, and *cannot be what the Legislature intended*.' " *Owen*, 713 F.2d at 1465 (emphasis by this Court) (quoting *Cardio Systems, Inc. v. Superior Court*, 122 Cal. App. 3d 880, 891 (1981)). Here, by contrast, *no California court* has expressed dissatisfaction with *Mexia* in more than four years.[6] Moreover, the Justices who decided *Mexia* acknowledged that their "primary duty when interpreting a statute is to determine and effectuate the Legislature's intent," 174 Cal. App. 4th at 1309 (quoting *Van Horn v. Watson*, 45 Cal. 4th 322, 326 (2008)), and those Justices believed that their handiwork did in fact effectuate "the legislative intent to *expand* consumer protection and remedies," *id.* at 1311 (emphasis in original). Indeed, as definitively interpreted by the California Supreme Court, the Song-Beverly Act "is manifestly a remedial measure, intended [by the California Legislature] for the protection of the consumer," such that the Act "should be given

[6] As quoted above, the district court justified its refusal to follow *Mexia* in part on the basis that, in the intervening four years, "no other California Court of Appeal appears to has cited *Mexia* favorably" in relevant respect. 1 E.R. 16:3-5. This reasoning turns the governing standard on its head. Certainly, *a mere absence of favorable citation* (coupled with *no* unfavorable citations) cannot constitute "convincing evidence that the highest court of the state would decide differently." *In re Schwarzkopf*, 626 F.3d at 1038.

a construction calculated to bring its benefits into action." *Murillo*, 17 Cal. 4th at 990 (quoting *Kwan*, 23 Cal. App. 4th at 184).

Finally, when this Court in *Owen* declined to follow a decision of the California Court of Appeal, this Court observed (with evident disapproval) that the decision had "essentially written equity out of the [relevant statutory] test." *Owen*, 713 F.2d at 1465. But writing equity out of the Song-Beverly Act is precisely what the district court has done by refusing to follow *Mexia*. A categorical construction of the one-year limitation in Civil Code § 1791.1(c) — no extensions for any reason! — is the very opposite of an "equitable" approach. Furthermore, it is the very opposite of "a construction calculated to bring [the Act's] benefits into action," as called for by the highest court of the state. *Murillo*, 17 Cal. 4th at 990.

In these circumstances, this Court cannot be "convinced that the highest court of California would be *compelled* to adopt the interpretation advanced" by Ford and by the district court. *Estrella v. Brandt*, 682 F.2d 814, 817 (9th Cir. 1982) (emphasis added). In other words, there is *no* "convincing evidence that the highest court of the state would decide [the issue] differently" from *Mexia*. *In re Schwarzkopf*, 626 F.3d at 1038. Consequently, the federal courts "must follow" the decision in *Mexia* as to the duration of the implied warranty imposed by the Song-Beverly Act. *Id.* In refusing to do so, the district court erred as a matter of law, and therefore its dismissal of Plaintiffs' Song-Beverly Act implied warranty claims must be reversed.

III. Because Ford's Express Warranties Are Provided Explicitly to Remedy Any "Defects . . . Introduced into Vehicles During the *Design* and Manufacturing Processes," the District Court Erred in Dismissing Plaintiffs' Express Warranty Claims on the Basis that Ford's Warranties Do Not Cover *Design* Defects.

Plaintiffs' fifth claim is for breach of the express warranties that Ford provided with their respective vehicles. Plaintiffs alleged that Ford breached these warranties by "refusing to honor the express warranty by repairing or replacing, free of charge, the vehicle components affected by the Suspension Defect, including the tires, and instead charging for repair and replacement parts." 3 E.R. 370:10-12, ¶ 130(c). As to the nature of the alleged defect, the district court rightly observed that "plaintiffs' theory is that 'all class vehicles, *by design*, have a suspension defect,'" meaning that "plaintiffs rely exclusively upon a theory of *design* defect," as opposed to a theory of *manufacturing* defect. 1 E.R. 22:24-27 (emphasis added). But as discussed below, the district court held as a matter of law that the relevant provisions of Ford's express warranties simply "do not cover *design* defects." 1 E.R. 23:24-25 (emphasis added). Therefore, and on that basis alone, the court dismissed the express warranty claims of Ms. Glass, Ms. Duarte, and Ms. Daniel. *See* 1 E.R. 23:28-24:1.[7]

Given the peculiar wording of her warranty, Ms. Glass does not challenge this dismissal. Ms. Duarte and Ms. Daniel, however, submit that the district court erred

[7] For reasons unrelated to the following discussion, Ms. Hauser did not oppose summary judgment on her express warranty claim, *see* 1 E.R. 20:19-23, and therefore it is not before this Court on appeal.

in holding that their express warranties do not cover *design* defects. To explain why, we begin with the text of those warranties, which are identical in pertinent part (italic emphasis added):

> **WHAT IS COVERED?**
>
> Your NEW VEHICLE LIMITED WARRANTY gives you specific legal rights. You may have other rights that vary from state to state. Under your New Vehicle Limited Warranty if:
>
> — your Ford vehicle is properly operated and maintained, and
>
> — was taken to a Ford dealership for a warranted repair during the warranty period,
>
> then authorized Ford Motor Company dealers will, without charge, repair, replace, or adjust all parts on your vehicle that malfunction or fail during normal use during the applicable coverage period *due to a manufacturing defect in factory-supplied materials or factory workmanship*.
>
> This warranty does not mean that each Ford vehicle is defect free. *Defects may be unintentionally introduced into vehicles during the design and manufacturing processes* and such defects could result in the need for repairs. For this reason, *Ford provides the New Vehicle Limited Warranty in order to remedy any such defects* that result in vehicle part malfunction or failure during the warranty period.

3 E.R. 295 (2007 model year warranty given to Ms. Duarte); 3 E.R. 299-300 (2011 model year warranty given to Ms. Daniel).

Ford naturally focuses on the first italicized passage quoted above, arguing that such language "expressly applies only to parts that malfunction or fail during the warranty period 'due to a *manufacturing* defect in factory supplied materials or factory

workmanship.'" 2 E.R. 87:17-19 (emphasis added). If the warranty ended with that passage, Ford might have a point. But the warranty does not end: it goes on to acknowledge that "[d]efects may be unintentionally introduced into vehicles during the *design* and manufacturing processes"; that is to say, the warranted vehicles may have *both* design defects *and* manufacturing defects. What, then, is Ford's promise with respect to such defects? It is both simple and categorical: "Ford provides the New Vehicle Limited Warranty in order to remedy *any such defects*." Therefore, the warranty is provided to remedy *any* of the defects that Ford may have "introduced into vehicles during the design and manufacturing processes." Such a warranty is clear and unequivocal in covering design defects as well as manufacturing defects.[8]

Ford would walk away, nay drive away, from its own language. According to Ford, the last-quoted portion of the warranty is only "general explanatory language," which "if interpreted as Plaintiffs do, would effectively rewrite this contractual language to eliminate the word 'manufacturing.'" 2 E.R. 87:19-21. Such a rewriting, according to Ford, "would be improper," for the "operative language is clear and unequivocal, and as a contract it must be enforced as written." 2 E.R. 87:21-22.

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[8] It probably goes without saying, but in California jurisprudence "[t]he word 'any' means without limit and no matter what kind." *People v. Dunbar*, 209 Cal. App. 4th 114, 117 (2012) (quoting *Delaney v. Superior Court*, 50 Cal. 3d 785, 798 (1990)); *accord California State Automobile Association Inter-Insurance Bureau v. Warwick*, 17 Cal. 3d 190, 195 (1976) ("From the earliest days of statehood we have interpreted 'any' to be broad, general and all embracing.").

Ford's attempt to disclaim its own language is untenable. However "general" that language might be, it certainly is "explanatory." Indeed, the language explains exactly "**WHAT IS COVERED**" by Ford's warranty: *any* defects "introduced into vehicles during the *design* and manufacturing processes." 3 E.R. 295 (second emphasis added). As for how Plaintiffs have "interpreted" the language, Ford offers no competing interpretation, and there simply is no other reasonable interpretation. *Cf., e.g., Neal v. State Farm Insurance Cos.*, 188 Cal. App. 2d 690, 695 (1961) ("The rule that any ambiguities caused by the draftsman of the contract must be resolved against that party applies with peculiar force in the case of the contract of adhesion." (citation omitted)). As for eliminating the word "manufacturing," it is *Ford* that wrote a more stingy provision followed by a more generous provision; the latter does not eliminate the former, it supplements it.[9] Finally, we enthusiastically agree with Ford that the "operative language" — which includes *all* of the above-quoted warranty language — "is clear and unequivocal, and as a contract it must be enforced as written." As written, Ford's express warranties to Ms. Duarte and Ms. Daniel cover *any* defects "introduced into vehicles during the *design* and manufacturing processes," i.e., *any design defects*. That coverage must be enforced.

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[9] In other words, Ford promised to do *A*, and then it promised to do *A* + *B*. Perhaps this is an awkward formulation, but it is neither logically nor physically impossible. Ford can easily comply with both promises by doing both *A* and *B*, i.e., by remedying both design defects and manufacturing defects through its warranty repair process.

The district court briefly addressed the warranty language on which Plaintiffs rely. The court asserted that such language "only expresses the *general aims* of the NVLW [New Vehicle Limited Warranty]." 1 E.R. 23:14-15 (emphasis added). We do not see the significance of this point. However "general" such language might otherwise be, it is sufficiently specific to convey to a consumer of ordinary intelligence that the warranty covers (to repeat ourselves) *any* defects "introduced into vehicles during the *design* and manufacturing processes," i.e., *any design defects*. As for expressing the "aims" of the warranty, the language might indeed do that — but *not only* that. The language is not in a footnote or appendix or postscript; instead, it is a full-fledged paragraph in the text that explains exactly "**WHAT IS COVERED**" by the New Vehicle Limited Warranty.

The district court also asserted that it "would be contrary to the common understanding of automobile warranties to extend warranty coverage to design defects absent clear language providing for such coverage." 1 E.R. 23:19-22 (citing *In re Toyota Corp. Unintended Acceleration Litigation*, 754 F. Supp. 2d 1145, 1180-81 (C.D. Cal. 2010)). In the first place, the "absent clear language" standard essentially construes the warranty in favor of Ford and against consumers, exactly the *opposite* of the governing "rule that any ambiguities caused by the draftsman of the contract must be resolved against that party," a rule that "applies with peculiar force in the case of the contract of adhesion" like an automobile warranty. *Neal*, 188 Cal. App. 2d at

695. In any event, the language on which Plaintiffs rely is sufficiently "clear" in providing coverage for any design defects, as elaborated above. Finally, the court offered no evidence of any "common understanding of automobile warranties" that would exclude coverage for design defects when the manufacturer explicitly states that it is providing its warranty to remedy "any such defects." Certainly, *In re Toyota Corp.* does not purport to rest on a "common understanding" of warranties, but instead on a particular warranty that did *not* contain the language on which Plaintiffs rely here.

In sum, the district court failed to give effect to the clear and unequivocal language of Ford's express warranties to Ms. Duarte and Ms. Daniel. On their face, and especially as construed to resolve any ambiguities in favor of consumers, those two warranties cover the *design* defects alleged by Plaintiffs. In holding to the contrary, the district court erred, and therefore its dismissal of the express warranty claims of Ms. Duarte and Ms. Daniel must be reversed.

IV. The District Court Erroneously Dismissed Some of Plaintiffs' Magnuson-Moss Claims Based on Its Erroneous Dismissals of Plaintiffs' Other Warranty Claims.

Plaintiffs' fourth claim is for breach of warranty under the Magnuson-Moss Warranty Act, 15 U.S.C. §§ 2301, et seq. *See* 3 E.R. 368-69, ¶¶ 116-126. The district court correctly observed that "the parties agree that, as in *Clemens v. Daimler-Chrysler Corp.*, 534 F.3d 1017 (9th Cir. 2008), plaintiffs' Magnuson-Moss Act claims 'stand or fall with [their] express and implied warranty claims under state law.' " 1

E.R. 24:8-11. In light of this agreed-upon principle, and given the court's previous dismissals of both the implied warranty (Song-Beverly Act) claims and express warranty claims of Plaintiffs Donna Glass, Andrea Duarte, and Mary Hauser, the court dismissed those three Plaintiffs' Magnuson-Moss Act claims as well. *See* 1 E.R. 24.

It is apparent that if the district court's dismissals of the implied and express warranty claims of Ms. Glass, Ms. Duarte, and Ms. Hauser are reversed (as argued in Parts II and III above), then the dismissals of their Magnuson-Moss Act claims must be reversed as well. If the latter claims "fell" with the former, then the latter claims must "stand" with the former when the former are reinstated.

V. The District Court Should Be Instructed to Reconsider Its Denial of Plaintiffs' Motion for Class Certification in Light of This Court's Disposition.

After dismissing twenty-three of Plaintiffs' twenty-five claims in response to Ford's motion for summary judgment, the district court denied Plaintiffs' motion for class certification. *See* 2 E.R. 35-45. In brief, the court ruled that "individual questions will predominate over questions common to the class," such that the proposed class could not satisfy Federal Rule 23(b)(3). 2 E.R. 45:15-17.

That ruling was intimately bound up, both expressly and by necessary implication, with the fact that the court had previously dismissed virtually all of Plaintiffs' claims. Expressly, in that the court observed up front that it had previously "granted defendant's motion for summary judgment on all claims except Daniel's claims for

breach of a Song-Beverly Act implied warranty and violation of the Magnuson-Moss Warranty Act." 2 E.R. 33:9-11. Strictly speaking, therefore, the court had before it a class certification motion asserted on behalf of *only* Ms. Daniel, and *only* with respect to two of her five claims.

The class certification ruling was bound up with the dismissals by necessary implication as well, in that the district court's consideration of potentially common questions was confined to just *one* kind of claim (implied warranty) of just *one* plaintiff. *See* 2 E.R. 39-45 (discussing three questions, all relating to Ms. Daniel's claim under the Song-Beverly Act implied warranty of merchantability). On one of these questions, moreover, the court's analysis was premised on its view of the "duration" of the Song-Beverly Act's implied warranty, *see* 2 E.R. 41-43, a view that we have shown was erroneous as a matter of law, *see supra* Part II (pp. 31-40). Indeed, the court opined that the "over inclusive nature of the proposed class is demonstrated by the court's analysis in the [summary judgment order], in which three of the original plaintiffs' claims were dismissed due to a manifestation of the alleged defect after the one-year period had expired." 2 E.R. 43:23-26 (citing 1 E.R. 17:25-18:26). Again, these are the very dismissals challenged in Part II above.

In these circumstances, it is apparent that if this Court reverses the dismissals of Plaintiffs' claims (as argued in Parts I-IV above), the district court must reconsider its class certification ruling. As the Court recently observed in vacating such a ruling

in light of clarification of the governing law, "Rule 23 provides district courts with broad authority at various stages in the litigation to revisit class certification determinations and to redefine or decertify classes as appropriate." *Wang v. Chinese Daily News*, No. 08-55483, 2013 WL 4712728, at *5 (9th Cir. Sept. 3, 2013) (published). That authority is appropriately exercised here, and the district court should therefore be instructed to exercise it on remand.

CONCLUSION

For the foregoing reasons, and with the sole exception of the express warranty claim asserted by Ms. Glass, the judgment of the district court dismissing Plaintiffs' claims should be reversed and the case remanded for further proceedings in light of that reversal.

Dated: December 9, 2013.

Respectfully submitted,

s/ Eric Grant
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STATEMENT OF RELATED CASES

Plaintiffs/Appellants are aware of no related cases within the meaning of Circuit Rule 28-2.6.

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 12,006 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

Dated: December 9, 2013.

s/ Eric Grant
Eric Grant

Counsel for Plaintiffs/Appellants

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on December 9, 2013.

I hereby certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Eric Grant
Eric Grant

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