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' REPLY BRIEF

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INTRODUCTION

Plaintiffs/Appellants Margie Daniel, Mary Hauser, Donna Glass, and Andrea Duarte ("Plaintiffs") respectfully file this reply brief in support of their appeal of the district court's judgment dismissing virtually all of their claims against Defendant/Appellee Ford Motor Company ("Ford"). As set out below, Ford has failed to rebut Plaintiffs' arguments why the district court committed reversible error in dismissing Plaintiffs' claims. Ford has also failed to present convincing arguments in support

of its plea that the summary judgment in its favor should be affirmed on various alternative grounds.

ARGUMENT

As in the opening brief, we employ the categories used by the district court in resolving the summary judgment motion that is the subject of this appeal: (1) Plaintiffs' two claims for violations of the Consumers Legal Remedies Act and the Unfair Competition Law; (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 then consider (5) the need for the district court to revisit its denial of Plaintiffs' motion for class certification and (6) Ford's alternative grounds, not passed on by the district court, for affirming the judgment in Ford's favor.

I. Plaintiffs' CLRA and UCL Claims.

Plaintiffs' first claim arises under California's Consumers Legal Remedies Act ("CLRA"), and their second claim arises under California's Unfair Competition Law ("UCL"). *See generally* Appellants' Opening Brief ("Opening Br.") 16-31 (Part I). The parties agree that *reliance* is an essential element of these claims. *See* Appellee's Brief on Appeal ("Ford Br.") 18 (CLRA), 46 (UCL). The parties further agree that Plaintiffs' CLRA and UCL claims are based on Ford's nondisclosures or omissions and that in order to "prove reliance on an omission, '[o]ne need only prove that, had

the omitted information been disclosed[,] one would have [1] been aware of it and [2] behaved differently.'" *Id.* at 18 (quoting *Mirkin v. Wasserman*, 5 Cal. 4th 1082, 1093 (1993)).

Plaintiffs have previously explained, and documented with citations to the record, why there is "no serious question that Plaintiffs adduced sufficient evidence to satisfy the second prong of this test at the summary judgment stage." Opening Br. 17; *see also id.* n.2 (quoting Plaintiffs' declarations). Ford has not contradicted that explanation, and so it must be accepted that each Plaintiff "would have 'behaved differently' . . . had she been informed of [the Focus's] characteristic suspension defect." *Id.* at 17.

As for the first prong of the applicable test for reliance on an omission, Plaintiffs similarly "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.'" Opening Br. 19; *see also id.* n.3 (also quoting Plaintiffs' declarations). Again, Ford has not contradicted that factual point, and so it must be accepted as true for purposes of summary judgment.

What Ford does contradict, and what divides the parties on appeal, is whether disclosure by Ford's "authorized" dealerships is a means that should be considered in assessing whether a plaintiff "would have been aware" of a required-but-omitted disclosure. As to this issue, Plaintiffs discussed at length what hypothetical means of

disclosure should "count" in assessing a plaintiff's awareness, ultimately concluding 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." Opening Br. 23. That formulation accords with the limited caselaw addressing the subject and with California law more generally, and it draws a sensible line between innocent plaintiffs and manufacturer defendants who failed to meet their disclosure obligations. *See id.* Note that determining what is *plausible* is not strictly a matter of "evidence": it "requires the reviewing court to draw on its judicial experience and common sense." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). Ford neither offers any alternative formulation of the correct legal standard nor otherwise contradicts Plaintiffs' legal analysis in this regard.

Applying the legal standard to the present case, the question is "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." Opening Br. 23. Plaintiffs provided three compelling reasons for an affirmative answer to this question. One, as a matter of experience and common sense, it is indisputable that purchasers of Ford vehicles expect to receive, and indeed will receive, relevant information about those vehicles when they visit "authorized" Ford dealers, especially information regarding the characteristics, benefits, and quality of the Ford vehicles in

which they express an interest. Two, *Ford itself* suggested various plausible means of disclosure, and several of those means constitute materials — "warranty or maintenance booklets" and "brochures" — that are necessarily received by consumers *at Ford's "authorized" dealerships*. Three, California law recognizes that manufacturers routinely deal with consumers "indirectly" through networks of wholesalers and retailers like dealerships. *See generally* Opening Br. 23-25.

Yet again, Ford does not contradict any of this, other than to offer two patent non sequiturs. First, Ford repeats the district court's charge that "Plaintiffs fail . . . to offer any legal support for the notion that the local dealership salesmen . . . were obligated to verbally disclose the alleged defect on behalf of defendant." Ford Br. 23 (quoting 1 E.R. 13:13-16). But Plaintiffs' point is not that salesmen at Ford's authorized local dealerships were "obligated" by law or by contract to disclose the defect. No, *Ford* was obligated to disclose the defect. Rather, Plaintiffs' point is that if Ford had decided to comply with its obligation, disclosure through such salesman would have been a *plausible* means of disclosure. Is Ford really suggesting that, *had it so chosen*, it lacked the ability to have salesmen at its authorized dealerships communicate specified information to customers? That suggestion is belied by the "experience and common sense" on which this Court is to draw. *Iqbal*, 556 U.S. at 679.

Second, Ford suggests that Plaintiffs are contending that "causation can be established by showing that if Ford had disclosed the alleged defect to its dealers, the

dealers would in turn have voluntarily disclosed it to consumers." Ford Br. 23. Not so. The mere disclosure of the defect to dealers — without *ensuring* that the information was passed along to consumers — obviously would not have satisfied Ford's obligation under either of the governing statutes. Thus, the question is whether disclosing the defect to dealerships, and *ensuring* that they in turn disclose it to retail customers, is a plausible means for automobile manufacturers like Ford to comply with their disclosure obligations. For the reasons set forth above, it is indeed.

In the end, Ford's charge that Plaintiffs "have not even articulated a comprehensible theory, let alone provided evidence to support it," Ford Br. 24, is bombastic. In truth, Plaintiffs' legal theory — that a court should, in asking whether a plaintiff "would have been aware" of a mandated-but-omitted disclosure, examine means or sources that "could *plausibly* contain the allegedly omitted fact," *see* Opening Br. 21-23 — is not only comprehensible; it is uncontradicted. Likewise uncontradicted is the common-sense notion that disclosure through authorized dealerships at the time of purchase was a plausible means for Ford to have satisfied its disclosure obligations to consumers like Plaintiffs. Finally, if "evidence" is required, there is certainly record evidence that *Ford itself* believes that plausible means of disclosure include disclosure through authorized dealerships, namely, the written materials that consumers necessarily receive at such dealerships (and sometimes *only* there). *See* 2 E.R. 67:1, 85:8, 252:5-11.

Having failed to rebut the substance of Plaintiffs' arguments, Ford takes refuge in two procedural sideshows. As elaborated below, neither of these provides a basis for rejecting the conclusion that Plaintiffs established reliance by demonstrating that had Ford disclosed the suspension defect in the Focus through its "authorized" dealerships at the time of purchase, Plaintiffs would have been aware of that information.

A. Ford's "Interrogatory" Argument.

As its first non-merits reason for affirming the district court's dismissal of the CLRA and UCL claims for failure to show reliance, Ford essentially urges this Court to impose a discovery sanction on Plaintiffs for their supposedly defective answer to one of Ford's interrogatories. *See* Ford Br. 18-21. In particular, Ford contends that under Federal Rule of Civil Procedure 37(c)(1), "Plaintiffs are precluded from pursuing theories and relying upon evidence not disclosed in response to discovery requests." Ford Br. 20. Ford's contention is meritless and should be rejected.

First, Ford's interrogatory in the district court and Plaintiffs' legal arguments regarding reliance in this Court do not address the same subject. The interrogatory asked how Plaintiffs contended Ford's required disclosures "should have been made." 3 Supplemental Excerpts of Record ("S.E.R.") 721:27 (emphasis added). Plaintiffs did not — and do not — have a contention in that regard. *See* 3 S.E.R. 722:2-3. In particular, and contrary to Ford's assertion, Plaintiffs do ***not*** (and never did) contend that "Ford should have made its disclosure through 'a Ford salesman' or a 'Ford sales

representative.'" Ford Br. 19. (No doubt there were numerous ways for Ford to have complied with its duty under California law to disclose the suspension defect in the Focus; Ford should have, but did not, choose at least one of them.) Instead, as discussed above, Plaintiffs' point about reliance is that Ford plausibly could have made its disclosure through such means, i.e., "disclosures by Ford's authorized dealerships and their sales representatives are plausible *hypothetical* means of Ford's satisfying its own disclosure obligations." Opening Br. 20 (emphasis altered). Despite the fact that the two words rhyme, there is a world of semantic difference between *should* and *could*. In short, Ford's interrogatory and Plaintiffs' answer thereto simply have no bearing on the relevant issue of reliance for purposes of the CLRA and the UCL.

Second, even if (contrary to fact) Ford's interrogatory had some relevance to the present issue, Ford has no basis for obtaining a "sanction" under Rule 37(c)(1). That rule authorizes a limited *evidentiary* sanction: preclusion of the previously undisclosed "information or witness to supply *evidence* on a motion, at a hearing, or at a trial" (emphasis added). The only true evidence on which Plaintiffs rely, *see* Opening Br. 17-19 & nn.2-3 (citing Plaintiffs' declarations at 2 E.R. 145-62), was ***not*** the subject of Ford's interrogatory and was, in any event, made available to Ford before the close of discovery.[1] As for the notion that Rule 37(c)(1) precludes parties "from

[1] The cited declarations were attached to Plaintiffs' opposition to Ford's motion for summary judgment, filed on May 2, 2013. *See* 2 E.R. 144:4-5. Discovery closed on May 17, 2013. *See* Doc. 53, at 3:10-11 (filed Apr. 1, 2013).

pursuing *theories* [in the sense of legal arguments] . . . not disclosed in response to discovery requests," Ford Br. 20 (emphasis added), that notion finds no support even in the scant (unpublished) authority Ford was able to dredge up.[2] In essence, Ford is demanding that, five months prior to Ford's motion for summary judgment, Plaintiffs should have anticipated the precise contents of the motion and provided Ford with their anticipated *legal arguments* in opposition. That demand has no basis in law.

Third, if (contrary to fact) any of this amounted to a genuine discovery dispute, Ford should have attempted to resolve that dispute in the proper forum, namely, the district court. As Ford acknowledges, Plaintiffs advanced their reliance-related argument on May 2, 2013, in their opposition to Ford's motion for summary judgment. *See* 2 E.R. 111, 132, 136, 139, *cited in* Ford Br. 19. Had Ford suffered any real prejudice, it could have sought additional discovery (which remained open, *see supra* note 1); it could have sought to continue the hearing on its motion; or it could have sought additional relief, such as the aforementioned sanctions under Rule 37(c)(1).

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[2] Consistent with the text of Rule 37(c)(1), both of the cases cited by Ford involved the exclusion of *evidence* as a discovery sanction. As Ford acknowledges, *Rispoli v. King County*, 297 F. App'x 713, 715 (9th Cir. 2008), affirmed a "trial court's exclusion of *evidence* pertaining to adverse employment actions." Ford Br. 20 (emphasis added). Likewise, *Apple v. Samsung Electronics Co. Ltd.*, No. 11-CV-01846-LHK, 2012 WL 3155574, at *5 (N.D. Cal. Aug. 2, 2012), "exclud[ed] portions of *expert reports*." Ford Br. 20 (emphasis added). Finally, *Spellbound Development Group, Inc. v. Pacific Handy Cutter*, No. SACV 09-00951 DOC, 2011 WL 5554312, at *5-6 (C.D. Cal. Nov. 14, 2011), *cited in* Ford Br. 20-21, involved not Rule 37(c)(1), but Rule 16(f)(1)(C), which authorizes sanctions for failure to obey a scheduling order.

But Ford sought none of these, and so its untimely complaint in this Court should not be heard.[3]

B. Ford's "Evidence" Argument.

As its second non-merits reason for affirming the district court's dismissal of the CLRA and UCL claims for failure to show reliance, Ford asserts that Plaintiffs presented "no evidence" to support their contentions. Ford Br. 21-24. Plaintiffs have already addressed the main thrust of this point: first, experience and common sense, not "evidence" per se, are what count in determining plausibility; and second, Plaintiffs presented evidence in any case. *See supra* pp. 4-6. The rest of Ford's argument is directed to the distracting issue of "agency." We briefly address that issue below.

The district court believed that in determining reliance under the CLRA and UCL, it was relevant "whether the salesmen employed by Ford's authorized dealer-

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[3] Plaintiffs have found no decision of this Court saying so precisely, but the federal courts of appeals agree that "[w]hether to impose [discovery] sanctions . . . is a question for the district court in the first instance." *Nemir v. Mitsubishi Motors Corp.*, 381 F.3d 540, 552 (6th Cir. 2004) (quoting *Bacou Dalloz USA, Inc. v. Continental Polymers, Inc.*, 344 F.3d 22, 31 n.6 (1st Cir. 2003)); *accord, e.g., Ashby v. McKenna*, 331 F.3d 1148, 1149 (10th Cir. 2003) (holding that "in light of the discretionary authority the district judge has over trial court sanctions, it is not for this appellate court to decide in the first instance whether or what sanctions should be imposed on Ashby for other discovery violations"); *Applewood Landscape & Nursery Co. v. Hollingsworth*, 884 F.2d 1502, 1507 (1st Cir. 1989) ("The power to impose sanctions for violations of discovery rules and pretrial orders lies in the district court, not this court."); *Watts v. SEC*, 482 F.3d 501, 507 (D.C. Cir. 2007) ("[S]upervising the to-and-fro of district court [discovery] litigation falls within the expertise, in the first instance, of district courts and not courts of appeals.").

ships were Ford's 'agents.'" Opening Br. 20 (citing 1 E.R. 13:14-15). Plaintiffs, by contrast, believe that "the relevant question here is not strictly one of agency," *id.* at 20-21, because the legal standard for reliance on an omission is satisfied in this case "regardless of whether [Ford's authorized] dealerships were Ford's 'agents' in some strict sense," *id.* at 23. Ford offers no disagreement on the relevance of agency; that is, Ford does not argue, and certainly adduces no authority for the proposition, that agency should be determinative in assessing reliance for purposes of the CLRA and UCL. If this Court agrees that agency is irrelevant — and it should agree — then the issue of agency can rightly be set aside, and Plaintiffs' discussion of agency "in the alternative" in Section I.B of their opening brief (at 26-30) can be disregarded.

If, on the other hand, this Court "determines to resolve the reliance issue with reference to formal principles of agency," Opening Br. 26, then the Court should reject Ford's argument that "having failed to raise agency in opposition to Ford's motion in the trial court, Plaintiffs cannot now raise agency as an alternative argument on appeal." Ford Br. 21. Ford acknowledges that neither party briefed the issue of agency in connection with Ford's motion for summary judgment, and that the issue did not arise at the nearly three-hour hearing on parties' various motions. *See* Ford Br. 23 n.5. In short, agency became an issue *for the very first time* when the district court issued its opinion granting Ford's motion for summary judgment on Plaintiffs' CLRA and UCL claims. Thus, regardless of how this case otherwise might resemble

Norse v. City of Santa Cruz, 629 F.3d 966 (9th Cir. 2010) (en banc), *cf.* Ford Br. 23 n.5, the above-described procedural history did not afford Plaintiffs anything like a "full and fair opportunity to ventilate the issues prior to the district court's summary judgment on [their] claims." 629 F.2d at 972-73. In these circumstances, Plaintiffs should be permitted to argue agency "in the alternative."

On the merits of the issue, Plaintiffs offer brief responses to Ford's three main points. *First*, Ford asserts that "Plaintiffs did not even plead 'ostensible agency'" but "did plead actual agency." Ford Br. 22 n.4. This assertion is inaccurate: Plaintiffs pled 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, ¶ 15. This allegation was not restricted to *actual* agency, and California law is clear that "[a]n agency is either actual or ostensible." Cal. Civ. Code § 2298.

Second, Ford asserts that the above-quoted allegations by Plaintiffs — which Ford did ***not*** deny, see 3 E.R. 319, ¶ 15 — are "nothing more than legal conclusions of the type prohibited by *Iqbal* and *Twombly*." Ford Br. 22 n.4 (quoting *Imageline, Inc. v. CafePress.com, Inc.*, No. CV 10-9794 PSG (MANx), 2011 WL 1322525, at *4 (C.D. Cal. Apr. 6, 2011)). In so asserting solely on the basis of one federal district court opinion, Ford simply ignores governing California law, which makes clear that the "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).

Third, Ford insinuates that this Court has settled the issue as a matter of law in holding that contracts between automobile manufacturers and their dealerships "do not create a relationship of agency, but rather one of buyer and seller." Ford Br. 22 (quoting *Stansifer v. Chrysler Motors Corp.*, 487 F.2d 59, 65 (9th Cir. 1973)). But *Stansifer* did not involve the question of agency for purposes of selling new vehicles to consumers, but for purposes of determining whether Fisher (a direct distributor) "was a 'straw man' or agent of Chrysler, [such] that the agreements between Fisher and Stansifer [an indirect distributor] were in fact between Chrysler and Stansifer." *Id.* at 64. In contrast to the present case, moreover, the record in *Stansifer* contained evidence that answered the very question under consideration: the relevant contract stated expressly that, "This Agreement does not create the relation of principal and agent between [CHRYSLER] and DISTRIBUTOR, and under no circumstances is either party to be considered the agent of the other." *Id.* The relevant precedent from this Court is not *Stansifer* but *American Casualty Co. v. Krieger*, 181 F.3d 1113 (9th Cir. 1999), which 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.* at 1121 (alterations in original).

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 information

had it been disclosed to them by Ford's "authorized" dealerships at the time of purchase, Plaintiffs satisfied their burden. The dismissal of Plaintiffs' CLRA and UCL claims must be reversed.

II. Plaintiffs' Implied Warranty Claims.

Plaintiffs' third claim arises under California's Song-Beverly Consumer Warranty Act ("Song-Beverly Act"). *See generally* Opening Br. 31-40 (Part II). The Act imposes an "implied warranty that [certain retail] goods are merchantable." Cal. Civ. Code § 1792. Plaintiffs acknowledge that the statute on its face imposes a categorical outside limitation on the "duration" of the implied warranty: "one year following the sale of new consumer goods to a retail buyer." Cal. Civ. Code § 1791.1(c). The issue, however, is whether that one-year limitation is equitably tolled where, as here, "the consumer has not discovered or could not have discovered the breach within the duration period." *Mexia v. Rinker Boat Co., Inc.*, 174 Cal. App. 4th 1297, 1310 (2009) (emphasis deleted). In the cited *Mexia* case, the California Court of Appeal resolved that issue *in favor of* equitable tolling, holding that the duration provision of the Act "does not create a [categorical] deadline for discovering *latent* defects or for giving notice to the seller." *Id.* at 1301 (emphasis added).

Like some (but not all) district courts in California, the court below refused to follow that holding on the basis that it "renders meaningless any durational limits on implied warranties." 1 E.R. 17:13-14 (quoting *Marchante v. Sony Corp. of America*,

801 F. Supp. 2d 1013, 1022 (S.D. Cal. 2011), *quoted in* Ford Br. 50). Ford adds its own attacks, charging that *Mexia*'s holding is "inconsistent . . . with the express language of the statute," that it "reflects unfamiliarity with the relevant legal principles and commonly accepted commercial practice," and that (deep down) it is just plain "non-sensical." Ford Br. 51-52.

This is all beside the point. Ford does not dispute the long-standing 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)). Such convincing evidence is found only in "rare instances," *Owen*, 713 F.2d at 1465, and Ford has not come close to finding it here. In the first place, Ford has not pointed to a single decision of the California Supreme Court with which *Mexia* is in conflict. Indeed, as Plaintiffs have previously observed, the supreme court denied a petition for review of the *Mexia* decision and a request to render the *Mexia* opinion non-precedential. *See* Opening Br. 37.

Like various district courts, Ford posits a conflict between *Mexia* and *Atkinson v. Elk Corp. of Texas*, 142 Cal. App. 4th 212 (2006). *See* Ford Br. 53. Yet tellingly, Ford has no answer to the obvious point that while *Atkinson* did concern the statute containing the one-year limitation, Cal. Civ. Code § 1791.1(c), *Atkinson* simply did

not consider whether the statute should be equitably tolled in cases of latent defects.[4] Nor does Ford have a response to the point that no California court has found a conflict between *Mexia* and *Atkinson*, or to the point that it is inherently implausible to find any such conflict when *Mexia* expressly relied on *Atkinson* no fewer than four times without even hinting at any inconsistency.

The U.S. Supreme Court has long 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). This Court recently held that "the statute of limitations in [the Federal Tort Claims Act] may be equitably tolled" in certain circumstances. *Kwai Fun Wong v. Beebe*, 732 F.3d 1030, 1033 (9th Cir. 2013) (en banc). For the California Court of Appeal in *Mexia* to hold that equitable tolling likewise applies to the time requirements in the Song-Beverly Act is hardly surprising, let alone "non-sensical." In the absence of *convincing evidence* that the California Supreme Court would hold otherwise, *Mexia*'s holding must be followed on this question of state law. There is no such evidence here — particularly when the California Supreme Court has called the Act a "strongly pro-consumer" statute that

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[4] Ford parses the *Atkinson* opinion in a game attempt to demonstrate that "the case plainly involved a latent defect not discovered until many years after the sale." Ford Br. 53 n.9. But the relevant question is not whether the case "involved" a latent defect; the relevant question is whether the court's opinion *addressed and resolved* the legal issue whether a latent defect would equitably toll the one-year limitation stated in Civil Code § 1791.1(c). The answer to that question is unquestionably *no*.

"should be given a construction calculated to bring its benefits into action." *Murillo v. Fleetwood Enterprises, Inc.*, 17 Cal. 4th 985, 990 (1998).

Therefore, in refusing to adhere to *Mexia*'s interpretation of the Song-Beverly Act, the district court erred, and its dismissal of Plaintiffs' implied warranty claims under that Act must be reversed.

III. Plaintiffs' Express Warranty Claims.

Plaintiffs' fifth claim is for breach of the express warranties that Ford provided with their respective vehicles. *See generally* Opening Br. 41-46 (Part III). Ford proffers two reasons why the district court correctly granted summary judgment to Ford on Plaintiffs' express warranty claims. Neither reason has merit.

First, Ford argues that "Plaintiffs simply ignore that portion of the warranty that expressly provides that it 'does not cover . . . worn out tires.'" Ford Br. 56; *see also* 1 S.E.R. 121 ("The New Vehicle Limited Warranty does not cover normal wear or worn out tires"). If Plaintiffs were complaining just about Ford's failure to replace their "worn out tires," Ford might have a point. But Plaintiffs actually complain that Ford breached its contractual obligations by "refusing to honor the express warranty by repairing or replacing, free of charge, *the vehicle components affected by the Suspension Defect*, including [*but not limited to*] the tires, and instead charging for repair and replacement parts." 3 E.R. 370:10-12, ¶ 130(c) (emphasis added); *accord, e.g.*, 3 E.R. 371:9-10, ¶ 134(c) (praying for, among other relief, an order that Ford "repair

the *defective components* in the Class Members' vehicles and/or replace them with a suitable alternative" (emphasis added)). These "vehicle components affected by the Suspension Defect" — predominantly the upper control arm and other aspects of the rear suspension of the Focus, *see, e.g.*, 3 E.R. 312-13 — fall comfortably *outside* the exclusion for "worn out tires."

Second, Ford contends that "the district court was correct in holding that the New Vehicle Limited Warranty covered only *manufacturing* defects." Ford Br. 56 (emphasis added). As did the district court, Ford naturally focuses on the language of the warranty that refers to malfunctions or failures "due to a manufacturing defect in factory-supplied materials or factory workmanship." *Id.* (quoting Opening Br. 42). Plaintiffs have acknowledged that this language — standing alone — is reasonably construed to exclude *design* defects from the warranty's coverage.

But that language does *not* stand alone. Rather, it is *immediately* followed by clarifying language:

> 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.

Opening Br. 42 (quoting 3 E.R. 295, 300).

This is not, as Ford would have the Court believe, merely "language which appears later in the booklet" or language that "does not purport to set forth the terms of

the [warranty]." Ford Br. 56-57. To the contrary, the above-quoted explanation immediately follows the initial description of the warranty, and it constitutes the second full paragraph in a section that specifies exactly "**WHAT IS COVERED**" by Ford's warranty. Later paragraphs in that section contain substantive clarifications, e.g., that the consumer's remedy "is limited to repair, replacement, or adjustment of defective parts." 3 E.R. 295, 300. It is inconceivable that Ford would treat *these* clarifications as meaningless fluff, as opposed to enforceable warranty "terms." The above-quoted clarification on which Plaintiffs rely deserves the same respect.

On the actual meaning of such clarification, Ford has no answer to the obvious reading that the warranty is provided to remedy "*any*" of the defects that Ford may have "introduced into vehicles during the *design* and manufacturing processes." Particularly when combined with the "rule that any ambiguities caused by the draftsman of the contract must be resolved against that party," that language is readily construed to cover *design* defects as well as manufacturing defects. *Neal v. State Farm Insurance Cos.*, 188 Cal. App. 2d 690, 695 (1961) (observing that this rule "applies with peculiar force in the case of the contract of adhesion" like the one here).

A recent unpublished disposition of this Court appears to say otherwise: "In California, express warranties covering defects in materials and workmanship exclude defects in design." *Troup v. Toyota Motor Corp.*, No. 11-56637, 2013 WL 6085809, at *1 (9th Cir. Nov. 20, 2013), *quoted in* Ford Br. 57. With due respect to the *Troup*

panel, that proposition rests on a misreading of California authority and should not be followed. *Cf.* Circuit Rule 36-3(a) (providing that with exceptions not relevant here, "[u]npublished dispositions and orders of this Court are not precedent").

As its only authority, *Troup* quoted two sentences from *Daugherty v. American Honda Motor Co.*, 144 Cal. App. 4th 824, 830 (2006): "[Plaintiff] argues . . . that a defect that exists during the warranty period is covered, particularly where it results from an 'inherent design defect,' if the warrantor knew of the defect at the time of the sale. We disagree." As subsequent discussion in *Daugherty* makes clear, however, that court's "disagree[ment]" was not with the notion that a *design* defect could be covered by an express warranty but rather with "the proposition that a latent defect, *discovered outside the limits of a written warranty*, may form the basis for a valid express warranty claim if the warrantor knew of the defect at the time of sale." *Id.* (emphasis added). That is, *Daugherty* here concerned not the *nature* of the defects covered by applicable warranty (i.e., manufacturing versus design) but the *timing* of the manifestation of the defect (i.e., before versus after the warranty's term). *See id.* at 832 (ruling as a matter of law that in providing its express warranty, Honda "did not agree . . . to repair latent defects that lead to a malfunction *after the term of the warranty*" (emphasis added)). Thus, *Daugherty* essentially ruled that no defect — manufacturing or design — is covered by an express warranty unless it manifests itself within the warranty period. This rule simply does not speak to the issue at hand.

Accordingly, the district court's dismissal of the express warranty claims of Ms. Duarte and Ms. Daniel must be reversed.

IV. Plaintiffs' Magnuson-Moss Claims.

Plaintiffs' fourth claim is for breach of warranty under the Magnuson-Moss Warranty Act. *See generally* Opening Br. 46-47 (Part IV). Plaintiffs have previously explained why, "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." *Id.* at 47. Ford has not contradicted that explanation.

V. Plaintiffs' Motion for Class Certification.

Recall that 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 generally* Opening Br. 47-49 (Part V). Plaintiffs have previously explained why, "if this Court reverses the dismissals of Plaintiffs' claims (as argued in Parts I-IV above), the district court must necessarily reconsider its class certification ruling." *Id.* at 48. Ford has not contradicted that explanation, and so the district court should be instructed to reconsider its ruling.

VI. Ford's Alternative Reasons for Affirming the Judgment Below Lack Merit and Should Be Rejected (or Left for the District Court to Resolve).

Ford offers this Court numerous grounds, scattered throughout its answering brief, for affirming the district court's grant of summary judgment notwithstanding the errors identified above. As to these grounds, Ford is correct that this Court "may affirm the district court's summary judgment on any ground supported by the record, regardless of whether the district court relied upon, rejected, or even considered that ground." Ford Br. 17 (quoting *In re ATM Fee Antitrust Litigation*, 686 F.3d 741, 748 (9th Cir. 2012), *cert. denied*, 134 S. Ct. 257 (2013)). Even so, the Court has discretion to decline to address issues not passed on below. *See, e.g., Goodman v. Staples The Office Superstore, LLC*, 644 F.3d 817, 827-28 (9th Cir. 2011).

For the most part, in contrast to the purely legal issues discussed above, Ford argues repeatedly that "there is no genuine issue as to any material fact" as to some element of Plaintiffs' claims, Ford Br. 17 (quoting Fed. R. Civ. P. 56(c)), typically because (in Ford's view) there was "no evidence" to support that element. Although this is a perfectly appropriate argument for a defendant to make, it must be viewed through the proper lens: in assessing whether there are "genuine" issues of material fact, the Court must view "the evidence in the light most favorable to the non-moving party," here, Plaintiffs. *Far Out Products, Inc. v. Oskar*, 247 F.3d 986, 992 (9th Cir. 2001). This means that the Court must rule in favor of Plaintiffs "if there is sufficient

evidence for a reasonable fact finder to find for the non-moving party." *Id.* In other words, Plaintiffs must prevail if their evidence "is enough to create a factual dispute" on a material point. *Lopez v. Smith*, 203 F.3d 1122, 1132 (9th Cir. 2000) (en banc). With these principles in mind, we turn to the six particular issues raised by Ford.

A. Ford's Duty of Disclosure (CLRA and UCL).

Ford argues that summary judgment in its favor on Plaintiffs' CLRA and UCL claims should be upheld on the alternative ground that Ford owed Plaintiffs no duty to disclose the rear suspension defect in the Focus under those two statutes. *See* Ford Br. 24 (CLRA), 46 (UCL). This argument has two prongs: Ford owed Plaintiffs no duty of disclosure because (1) the undisclosed facts were not "material," *see id.* at 25; and (2) Ford did not have "exclusive knowledge" of the allegedly material facts when Plaintiffs purchased their vehicles, *see id.* at 33. We consider these prongs in turn.

1. Non-Disclosure of "Material" Facts.

Plaintiffs concur with Ford that generally "information about [automobile] defects is not 'material' under California law unless the defects create an unreasonable safety hazard." Ford Br. 25 (citing *Wilson v. Hewlett-Packard Co.*, 668 F.3d 1136, 1143 (9th Cir. 2012)). The question is thus whether Plaintiffs adduced sufficient evidence in opposition to Ford's motion for summary judgment to establish a "genuine dispute" (Fed. R. Civ. P. 56(a)) as to whether the rear suspension defect in the Focus created an unreasonable safety hazard.

Ford confidently asserts that "Plaintiffs do not have a scintilla of evidence that the defect alleged relates to safety." Ford Br. 25. But Ford goes on to acknowledge that "it can be dangerous to let the tires *on any vehicle* become excessively worn before replacing them." *Id.* Indeed, and a rational finder of fact could readily conclude that this acknowledged "danger" is unreasonably heightened in vehicles which (like the Focus) have a rear suspension defect that causes tires to become excessively worn *prematurely* and, consequently, *more frequently*. *See, e.g.*, 3 E.R. 306 (Plaintiffs' expert opinion in support of this point). That conclusion is buttressed by Ford's own treatment of those dangers outside the context of litigation. Thus, Ford sent no fewer than three "special service messages" to its thousands of dealers, informing them that the Focus vehicles at issue may exhibit "*vehicle drift when driving on wet or snow covered roads*" in conjunction with premature tire wear. *See* Doc. 58-2, Pages 8-13 of 208 (filed May 2, 2013) (emphasis added).[5]

Finally, Ford purports to show that Plaintiffs' own experts "admitted" that the rear suspension defect in the Focus was not a safety problem. But testimony that "the danger of driving on excessively worn tires was not unique to the Focus and existed on any vehicle," Ford Br. 26 (characterizing the testimony of expert Andrew Webb), does not exonerate Ford: if excessively worn tires are dangerous, and if a suspension

[5] Ford parses these special service messages in an attempt to explain why they don't really concern vehicle safety. *See* Ford Br. 26-27. These finely-honed factual points are appropriate for trial; they are not a sound basis for granting summary judgment.

defect causes such tires to occur prematurely and consequently more frequently, then a rational finder of fact could conclude that the defect implicates vehicle safety. In the same vein, testimony that excessive tire wear can create a safety problem "on any vehicle" if it goes unnoticed and unaddressed, Ford Br. 26, does not exonerate Ford when *the Ford Focus and its defective suspension* create precisely such wear on an accelerated basis. As for Plaintiffs' expert who assertedly testified that "there was no safety-related defect," *id.*, it is apparent from the context of the testimony that the expert simply *had no opinion* on safety-related issues.

Whether the rear suspension defect in the Ford Focus "relates to safety," Ford Br. 25, is a classic issue of fact. When the evidence is viewed in the light most favorable to Plaintiffs, as Ford acknowledges it must be, there is a genuine dispute about that fact. In these circumstances, summary judgment cannot be upheld on the ground that the defect is unrelated to safety, such that Ford owned no duty to disclose it.

2. "Exclusive Knowledge" of Material Facts.

Plaintiffs concur with Ford that under the CLRA, "plaintiffs must sufficiently allege that a defendant was aware of a defect at the time of sale." Ford Br. 33. Ford argues that it did not have the requisite awareness for two reasons.

First, Ford argues that the fact that it "never knew of any *safety issue* related to tire wear [on the Focus] was dispositive and required summary judgment against all Plaintiffs." Ford Br. 34 (emphasis added). This is apparently an argument that

California law requires not only that a manufacturer be "aware of a defect at the time of sale," but also that the manufacturer specifically know that such defect involves a *safety issue*. Ford cites no authority for this proposition, and there is no such authority. The CLRA sensibly imposes liability for failure to disclose material facts only when the defendant *knows* of the facts that it failed to disclose. There is no warrant for exonerating a defendant who (like Ford) buries its head in the sand regarding the safety implications of *known* defects. In any case, the notion that Ford "never" knew of any safety issue related to suspension-related tire wear on Focus vehicles is belied by the previously documented "special service messages" that Ford sent to dealers, informing them the vehicles at issue may exhibit "*vehicle drift when driving on wet or snow covered roads*" in conjunction with premature tire wear. *See supra* p. 24.

Second, Ford engages in a detailed, plaintiff-by-plaintiff recitation of seemingly all of the evidence in favor of the point that it did not have "exclusive knowledge of the alleged defect at the time any of [Plaintiffs] purchased their vehicles." Ford Br. 34. In the lower court, Plaintiffs presented a detailed response to each point, *see* 2 E.R. 108-10, 130-31, 135-36, 138-39 (making numerous citations to the record), but the district court did not resolve this factual dispute, *see* 1 E.R. 12:6-7 ("assuming," without deciding, that Ford "had a duty to disclose the defect and tire wear as safety issues"). In present circumstances, that resolution should be left to the district court on remand.

If this Court determines to reach the issue, it should conclude that there is at least a genuine dispute of material fact about Ford's knowledge. The earliest to purchase her Focus vehicle was Plaintiff Donna Glass, in April 2005. *See* Ford Br. 34. A reasonable jury could readily find that Ford knew of a suspension-related defect in its Focus platform by that time. The evidence includes:

- Steve von Foerster was "Vehicle Programs Director" and was a "chief engineer" for Ford; in the view of his colleagues, "if Mr. von Foerster put something in writing in an email [then] he knew what he was talking about." In an e-mail in February 2005, Mr. von Foerster observed and acknowledged that "[t]ire wear has been a significant problem for the Focus." *See* 2 E.R. 108:6-13 (citing Doc. 58-2, Pages 20, 72:11-13, and 75:2-8 of 208 (filed May 2, 2013)).

- Engineers' awareness of this suspension-related problem went back as far as 2002. *See* 3 E.R. 262:6-22 (citing Doc. 33-3, Pages 6, 9, 20, 23, and 25 of 37 (filed Jan. 11, 2013)).

- As early as 2001, moreover, Ford was receiving independent confirmation of the problem from its dealers: in October 2001, for example, "the dealer technician stated that the customer's 'vehicle has excessive tire wear on the rear tires,' and that '*many of the Focus models are starting to show this*.'" 3 E.R. 263:17-19 (citing Doc. 33-3, Page 27 of 37).

- Finally, the program manager for the Focus was compelled to admit that he was, no later than October 2005, "aware of . . . known concerns on premature tire wear on the Ford Focus." 3 E.R. 263:28-264:2 (citing Doc. 33-4, Pages 672:15-19 and 675:8-13 of 693 (filed Jan. 11, 2013)).

On this evidence, a reasonable jury could find that Ford's *admitted* "aware[ness]" extended back a few months to when Ms. Glass purchased her vehicle in April 2005.

As we move forward to the purchases of Plaintiffs Andrea Duarte and Mary Hauser in February 2007 and October 2008, respectively, *see* Ford Br. 35, evidence

of Ford's awareness only deepens: in 2006, Dan Lavey — who was a "management-level" engineer — reported to his colleagues that the Focus "is out of the box [that is, not within specification on Ford's alignment health chart] for nominal total rear toe at curb and further out of the box at 25 mm into jounce," such that the "total rear toe on a 3 sigma vehicle can be as high as 0.56 degrees at curb and will be at [approximately] 0.86 degrees when loaded. The tire experts report that anything past 0.50 degree *will result in excessive tire wear*." 3 E.R. 262:25-263:2 (citing Doc. 33-4, Page 688:21-25 of 693; Doc. 33-3, Page 11 of 37). In 2007, engineer Paul Roberts reported that Ford was "getting quite a number of calls from [the Ford Customer Service Division] about customer complaints / tires returned to the warranty center involving rear tire wear." 3 E.R. 263:3-5 (citing Doc. 33-3, Page 32 of 37). It is not surprising that Ford has various "explanations" for all of this evidence, *see* Ford Br. 35-36, but sorting through competing explanations in order to make findings of historical facts is precisely the province of the jury. Affirming the summary judgment on this basis, especially when the district court has never grappled with the factual dispute, is highly inappropriate.

That brings us to Ford's knowledge when Plaintiff Margie Daniel purchased her vehicle in January 2011. *See* Ford Br. 36. Here, Ford switches gears, contending not that it lacked knowledge of the defect but rather that Ford's "knowledge of tire wear issues could not possibly have been *exclusive* or even *superior*." *Id.* (emphasis

added). Under California law, a manufacturer has the requisite knowledge triggering a duty to disclose when it "knew of [the] defect while plaintiffs did not, and, given the nature of the defect, it was difficult to discover." *Collins v. eMachines, Inc.*, 202 Cal. App. 4th 249, 256 (2011). Ford can certainly argue to the jury that "whatever Ford knew about tire wear on the Focus in 2011 was also known, necessarily, by the general public," Ford Br. 37, but even "general public" awareness about "tire wear" on the Focus does not make it indisputable as a matter of law that Ms. Daniel herself had any *personal* knowledge that the *rear suspension* of the Focus was defective. By its nature, moreover, that defect was difficult to discover. *See, e.g.*, 3 E.R. 306 (opining that Ford "deviated from acceptable automotive design normals, by designing and producing rear suspensions with excessive toe, camber gradients, toe gradients and camber alignment settings").

For these reasons, the Court should reject Ford's argument that summary judgment in its favor on Plaintiffs' CLRA and UCL claims should be upheld on the alternative ground that Ford owed Plaintiffs no duty to disclose the rear suspension defect in the Focus.

B. Actual Damages (CLRA).

Ford next argues that "[s]ummary judgment was required on Plaintiffs' CLRA claim for actual damages because they could not prove that they have suffered any such damages." Ford Br. 38. As alternative basis for upholding the district court's

dismissal of Plaintiffs' CLRA claims, this argument is a non sequitur. The statute affords standing to "[a]ny consumer who suffers *any* damage as a result of" an unlawful method, act or practice, and it authorizes no fewer than five separate remedies for violations of the statute, only one of which is "*actual* damages." *See* Cal. Civ. Code § 1780(a)(1)-(5) (emphasis added). As the California Supreme Court has explained, "the breadth of the phrase 'any damage' indicates a category that includes, but is greater than, 'actual damages,' i.e., those who are eligible for the remedy of 'actual damages' are a subset of those who have suffered 'any damage.' " *Meyer v. Sprint Spectrum L.P.*, 45 Cal. 4th 634, 640 (2009).

The remedy sought by Plaintiffs under the CLRA — which Ford characterizes as "cost of repair," Ford Br. 40 — fits comfortably under the rubric of the final category of relief authorized by Civil Code § 1780(a), namely, "[a]ny other relief that the court deems proper." This is so whether the repair is ordered pursuant to the district court's broad equitable powers or whether the repair is monetized as fixed amount; both forms of relief are entirely "proper" under California law. *See, e.g., Fletcher v. Security Pacific National Bank*, 23 Cal. 3d 442, 452 (1979) (opining that a "court of equity may exercise its full range of powers 'in order to accomplish complete justice between the parties' "); Cal. Civ. Code § 1794(b)(2) (providing that in certain circumstances involving consumer goods, "the measure of damages shall include the cost of repairs necessary to make the goods conform").

In any event, the premise of Ford's argument that Plaintiffs cannot show actual damages is that the "proper measure of damages for fraudulent conduct that violates the CLRA is 'the difference between the actual value of that with which the defrauded person parted and the actual value of that which he received.'" Ford Br. 38 (quoting Cal. Civ. Code § 3343(a)). That premise is wrong. To begin with, Civil Code § 3343(a) is not the *exclusive* measure of those "actual damages" authorized by the CLRA in Civil Code § 1780(a)(1). Paragraph (b)(2) of § 3343 expressly provides that such statute is not an exclusive remedy: it shall ***not*** "[d]eny to any person having a cause of action for fraud or deceit any legal or equitable remedies to which such person may be entitled." *Accord Steroid Hormone Product Cases*, 181 Cal. App. 4th 145, 156 (2010) (rejecting the defendant's attempt to view § 1780 and the CLRA exclusively through the lens of § 3343).

Ford's premise is wrong for the additional reason that even if § 3343(a) — which prescribes a difference-in-value measure — is the exclusive measure of actual damages under the CLRA, that measure does not categorically exclude evidence of "cost of repair." The one California case cited by Ford states: "While *cost of repairs has some probative worth on the issue of value*, it is not of itself the proper measure of damages." *Central Mutual Insurance Co. v. Schmidt*, 152 Cal. App. 2d 671, 676-77 (1957) (emphasis added), *cited in* Ford Br. 40; *see also, e.g., Wagner Tractor, Inc. v. Shields*, 381 F.2d 441, 444 (9th Cir. 1967) (holding, in a case where the measure

of damages was difference-in-value, that "we can only determine the difference in values by looking at what it cost to correct the deficiencies"). Thus, the costs of repairing Plaintiffs' vehicles to a non-defective state has "some probative worth" even if difference-in-value is the formal measure of damages. Given that worth, and because the evidence must be viewed in the light most favorable to Plaintiffs, summary judgment for Ford on the issue of damages is not warranted.

C. Statutorily-Required Notice (CLRA).

Ford correctly observes that "[u]nder the CLRA, a consumer must provide specified notice to the defendant '[t]hirty days or more prior to the commencement of an action for damages.'" Ford Br. 40 (quoting Cal. Civ. Code § 1782(a)). In addition, Ford correctly observes that "Plaintiffs filed their Complaint seeking CLRA damages before they gave the required notice." *Id.* at 41. As Ford grudgingly acknowledges in a footnote, Plaintiffs corrected this oversight no later than December 13, 2012, or more than *three months* before Ford even *filed* its motion for summary judgment. *See* Ford Br. 43 n.7; 3 E.R. 608-13 (letter received by Ford's counsel on October 15, 2012 and by Ford's corporate agent for service of process on December 13, 2012). That notice both (1) notified Ford "of the particular alleged violations of [the statute]," and (2) demanded that Ford "correct, repair, replace, or otherwise rectify the goods or services alleged to be in violation of [the statute]." Cal. Civ. Code § 1782(a). Ford has not responded to that notice and demand, and Ford has never even suggested that the

notice fails to satisfy the substantive requirements of § 1782(a). Consequently, although Paragraph 98 of Plaintiffs' complaint was not accurate at the time it was filed, that paragraph is now entirely accurate in alleging: "Plaintiffs have provided Ford with notice of their alleged violations of the Consumers Legal Remedies Act pursuant to California Civil Code §1782(a). Ford failed to provide appropriate relief for such violations." 3 E.R. 365, ¶ 98.

Like many other defendants before it, Ford argues if "a complaint for [CLRA] damages is filed before notice is given, or before thirty days after notice have elapsed, the claim must be dismissed." Ford Br. 41. Although one won't learn it from Ford's brief, the California Court of Appeal has squarely faced — and expressly rejected — this very argument. In *Morgan v. AT&T Wireless Services, Inc.*, 177 Cal. App. 4th 1235 (2009), the defendant argued that the "plaintiffs were precluded from seeking damages under the CLRA by failing to comply with the notice requirement before filing the . . . complaint in which they first sought such damages"; that is, plaintiffs' "failure to comply with the notice requirement requires dismissal *with prejudice*." *Id.* at 1260-61. The *Morgan* court expressly "disagree[d]" with this argument, opining that it "fail[s] to properly take into account the purpose of the notice requirement," which is "to allow a defendant to avoid liability for damages if the defendant corrects the alleged wrongs within 30 days after notice, or indicates within that 30-day period that it will correct those wrongs within a reasonable time." *Id.* at 1261. "A dismissal

with prejudice of a damages claim filed without the requisite notice is not required to satisfy this purpose. Instead, the claim must simply be dismissed until 30 days or more after the plaintiff complies with the notice requirements." *Id.*

What would it mean here for the CLRA claim to be "dismissed until 30 days or more after the plaintiff complies with the notice requirements"? Given that Plaintiffs indisputably complied with such requirements *in calendar year 2012*, dismissal would have been (and would be) an idle and pointless act that would "fail to properly take into account the purpose of the notice requirement." That purpose has long been satisfied in the present case: Ford has had not just 30 days, but more than 15 months (and counting), to avoid liability for damages by correcting the alleged wrongs (or by at least indicating that it would do so within a reasonable time). In these circumstances, Civil Code § 1782(a) as authoritatively construed by the California Court of Appeal in *Morgan* demands nothing more, certainly not a *faux* dismissal.

That leaves Ford's discussion of the propriety of Plaintiffs' amending Paragraph 98 of their complaint, including whether such amendment would have violated the district court's scheduling order. *See* Ford Br. 41-43. This discussion is wholly beside the point: by the time Ford raised the issue, an amendment was wholly unnecessary because (as discussed above) that paragraph has been entirely accurate since late 2012. Moreover, Ford has essentially conceded the utter "absence of prejudice" from tardily receiving an otherwise compliant CLRA notice. 2 E.R. 190:15.

The procedural rules governing federal district courts are to "be construed and administered to secure the just . . . determination of every action and proceeding," Fed. R. Civ. P. 1, and the spirit of the rules is that "judgments be founded on facts and not on formalistic defects," *Builders Corp. of America v. United States*, 259 F.2d 766, 771 (9th Cir. 1958). Regarding claims for damages under the CLRA, California law as explicated in *Morgan* evinces a similarly strong preference for determinations on the merits. For all of these reasons, Ford's hypertechnical argument for dismissal of Plaintiffs' CLRA claims should be rejected here just as it was rejected in *Morgan*.

D. Statute of Limitations (CLRA).

Actions under the CLRA "shall be commenced not more than three years from the date of the commission of [an unlawful] method, act, or practice." Cal. Civ. Code § 1783, *quoted in* Ford Br. 44. Ford acknowledges (if grudgingly) that the limitations period "did not begin to run until the plaintiff suspects or should suspect that her injury was caused by wrongdoing." *Id.* Ford asserts that Plaintiff Andrea Duarte "expressly testified that she concluded that the Focus was defective on August 12, 2008, when North Bay Ford told her that her tires required immediate attention after only about 12,000 miles." *Id.* Because this action was filed more than three years later, Ford argues that Ms. Duarte's CLRA must be dismissed on limitations grounds.

In fact, Ms. Duarte did ***not*** "conclude[] that the Focus was defective" on that date. More accurately, Ms. Duarte testified that when her Ford dealer "started with

the tires, saying I needed new tires, that's when I thought, something is not right." 1 S.E.R. 99:6-8. She *also* testified, however, that the same Ford dealer concealed the nature of what precisely was "not right": the dealer "made it sound like it wasn't a problem" with the vehicle, 1 S.E.R. 100:14-15, and it discouraged Ms. Duarte from pursuing any claims by informing her that "the rapid tire wear was caused by [her] daughter's driving habits," 2 E.R. 147, ¶ 4. Ford "customer relations" also discouraged Ms. Duarte by affirmatively misrepresenting to her that "there was no defect in [her] vehicle," 2 E.R. 147, ¶ 6, and that her "tires were simply worn out and that the premature tire wear did not occur due to a defect in [her] vehicle," 2 E.R. 148, ¶ 13.

These facts raise a genuine dispute as to whether Ford is guilty of "fraudulent concealment" of Ms. Duarte's claims, such that the statute of limitations was tolled for her. Under California law as applicable to CLRA claims, when "the defendant is guilty of fraudulent concealment of the cause of action the statute [of limitations] is deemed not to become operative until the aggrieved party discovers the existence of the cause of action." *Yumul v. Smart Balance, Inc.*, 733 F. Supp. 2d 1117, 1131 (C.D. Cal. 2010) (quoting *Unruh-Haxton v. Regents of University of California*, 162 Cal. App. 4th 343, 367 (2008)). That is to say, a "defendant's fraud in concealing a cause of action against him will toll the statute of limitations, and that tolling will last as long as a plaintiff's reliance on the misrepresentations is reasonable." *Id.* (quoting *Grisham v. Philip Morris U.S.A., Inc.*, 40 Cal. 4th 623, 637 (2007)).

Here, a rational jury could find that the Ford dealer — by making premature tire wear "sound like it wasn't a problem" with Ms. Duarte vehicle — concealed material facts that would have disclosed to her the nature of her claim against Ford. Accordingly, though Ms. Duarte knew that "something [was] not right" on August 12, 2008, Ford representatives positively misrepresented that the "something" was her daughter's driving habits or simple wear-and-tear on her tires — anything but the defectively designed suspension of her vehicle. These misrepresentations were in accord with Ford's repeatedly making flatly untrue statements about premature tire wear on class vehicles, as expressly admitted by Ford's Rule 30(b)(6) representative on this issue. *See* 3 E.R. 264:3-265:6 (citing Doc. 33-4, Pages 70, 73, 85, 678:25-679:11, 680:13-20, and 682:6-25 of 693). These positive misrepresentations to Ms. Duarte fraudulently concealed the true nature of the problem with her vehicle, and in particular the fact that she had a right of action against Ford. Because Ms. Duarte did not learn the truth until just a month before this action was filed, *see* 2 E.R. 149, ¶ 17 (declaration); Doc. 58-2, Pages 80:16-81:3 of 208 (deposition), the doctrine of fraudulent concealment sufficiently tolled her claims against Ford.

Ford has essentially two responses. One is that in August 2008, Ms. Duarte "immediately suspected that a defect of some sort could be responsible for her premature tire wear. The fact that she was not aware of the precise nature of the defect is beside the point." Ford Br. 45 (citing, inter alia, *Jolly v. Eli Lilly & Co.*, 44 Cal. 3d

1103, 1111 (1988)). But the above-cited evidence demonstrates that Ms. Duarte did not suspect a "defect" (or to use *Jolly*'s term, "wrongdoing"). Rather, she suspected merely that something was "not right," and Ford's representatives affirmatively deflected her *away from* any suspicion of defect or wrongdoing.

Ford's other response is to invoke the rule that fraudulent concealment does not come into play "if a plaintiff is on notice of a potential claim." Ford Br. 46 (indirectly quoting *Rita M. v. Roman Catholic Archbishop*, 187 Cal. App. 3d 1453, 1460 (1986)). That response, however, simply assumes the conclusion. A reasonable jury could find that the above-cited evidence shows that Ms. Duarte was ***not*** "on notice" of a potential claim, precisely because Ford fraudulently convinced her that *she had no claim*, as her problem resulted merely from driving habits and normal tire wear.

For these reasons, Ford is not entitled to summary judgment on Ms. Duarte's CLRA claim on limitations grounds.

E. Equitable Restitution (UCL).

Ford correctly observes that in *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1146 (2003), the California Supreme Court recognized that "restitution is the only monetary remedy expressly authorized by [the UCL]." Ford Br. 47. Ford argues that it was entitled to summary judgment on Plaintiffs' UCL claims because "Plaintiffs presented no evidence to support a claim for equitable restitution." *Id.* (section heading). This argument has two components, which we address in turn.

First, Ford argues that *Korea Supply* "concluded that the relief requested by the plaintiff in that case did not constitute restitution because 'it would not replace any money or property that the defendants took *directly* from plaintiff.'" Ford Br. 47 (emphasis by Ford) (quoting 29 Cal. 4th at 1149). Because "the funds that Plaintiffs paid for their vehicles went to dealers, not to Ford," Ford argues that Plaintiffs cannot satisfy the *directly* requirement, and so "the relief that Plaintiffs are requesting here . . . is not the type of equitable 'restitution' that can be awarded under the UCL." *Id.*

The California courts, however, have *rejected* the argument that "the availability of restitution under the UCL [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). The California Court of Appeal has explained:

> Nothing in *Korea Supply* conditions the recovery of restitution on the plaintiff having made direct payments to a defendant who is alleged to have engaged in false advertising or unlawful practices under the UCL. . . . Plaintiff in this case has alleged that he paid money to a retailer to purchase [a] product based on false or misleading statements on the product package. This assertion, if true, supports a claim for restitution.

Id.; *see also Clayworth v. Pfizer, Inc.*, 49 Cal. 4th 758, 788 (2010) (citing *Shersher* for the proposition that "indirect purchases may support UCL standing").

Second, Ford argues that restitution under the UCL must be "based on a specific amount found owing," Ford Br. 48 (quoting *Colgan v. Leatherman Tool Group*,

Inc., 135 Cal. App. 4th 663, 699 (2006)), but Plaintiffs failed to identify the specific amounts that they paid to Ford itself (as opposed to Ford's dealerships). Although Plaintiffs have indeed identified the amounts they paid for their vehicles, *see, e.g.*, 2 E.R. 119:24-26 (Plaintiff Donna Glass), it is true that Plaintiffs have not previously identified the "specific amount" that each seeks in restitution from Ford. Yet, while the remedy of restitution undoubtedly "requires substantial evidence to support it," *Colgan*, 135 Cal. App. 4th at 672, Ford cites no authority for the notion that Plaintiffs claiming under the UCL must identify mathematically precise amounts *prior to trial*. Indeed, even at trial, *specific* does not mean *mathematically precise*. For example, in *Nelson v. Pearson Ford Co.*, 186 Cal. App. 4th 983, 1016 (2010), based "on its conclusion that Pearson Ford is liable under the UCL for engaging in an unlawful business practice, the trial court awarded each member of the backdating class restitution in the amount of $50." Both plaintiff and defendant challenged that "rounded" figure on appeal, but the court rejected these challenges and affirmed the restitution award: based on "a reasonable assumption," the trial court "rounded the figure to $50," and the parties "provided no reasoned argument explaining how the trial court abused its discretion under the circumstances." *Id.*

For these reasons, Ford is not entitled to summary judgment dismissing Plaintiffs' UCL claims.

F. Inner-Edge Tire Wear (Warranties).

Ford argues that it is entitled to summary judgment on the Song-Beverly Act claims of Plaintiffs Glass, Duarte, and Hauser because they "presented no evidence that any of them experienced inner-edge rear tire wear at any time, let alone evidence that such wear was caused by the alleged defect." Ford Br. 54. Ford likewise argues that it is entitled to summary judgment on the express warranty claims of Plaintiffs Duarte and Daniel because neither "can prove that [she] ever experienced excessive inboard edge tire wear caused by the alleged defect." Ford Br. 57.

Plaintiffs address first the "causation" aspect of Ford's arguments. The notion that Plaintiffs have "no evidence" that the rear suspension defect in the Focus caused abnormal tire wear on their vehicles is demonstrably false. Plaintiffs' expert Andrew D. Webb opined that the "Ford Focus for MY [model year] 2005 through 2011 has a defective rear suspension," and that the "Ford Focus rear suspension geometry for MY 2005 through 2011 *causes* premature tire wear." 3 E.R. 306 (emphasis added). Plaintiffs' expert Dr. Peter Thomas Tkacik came to the same conclusion: "There is a high probability that the rear suspension design on a 2005 to 2011 Ford Focus will *cause* a high wear rate on the rear tires unless a unique set of circumstances occur simultaneously . . . ." Doc. 33-6, Page 59 of 107 (filed Jan. 11, 2013) (emphasis added). Accordingly, Plaintiffs have come forward with sufficient evidence of causation to withstand summary judgment.

We turn now to Ford's Plaintiff-specific arguments, keeping in mind that the evidence must be viewed in the light most favorable to Plaintiffs.

1. Plaintiff Donna Glass.

Ford asserts that "Plaintiffs presented no evidence that [Ms.] Glass experienced premature *rear* tire wear, or that she was experiencing *uneven* tire wear, at any time." Ford Br. 29. This assertion is belied by the evidence that on *every* occasion for which there is evidence of excessive wear on Ms. Glass's tires, the *rear* tires exhibited comparatively more wear, and the fact that the observations of Plaintiffs' expert Thomas J. Lepper were consistent with this pattern. *See* 2 E.R. 123:5-20 (citing 3 S.E.R. 689, 693, 696; 1 S.E.R. 272:23-273:8). The implications to be drawn from this evidence — like the contrary implications Ford would draw from the alleged fact that the tires "were rotated frequently," Ford Br. 30 — are classic disputed issues of fact not appropriately resolved on summary judgment.

2. Plaintiff Andrea Duarte.

Ford asserts that Ms. Duarte "presented no evidence that she was experiencing uneven inner-edge tire wear while the tires were installed on the rear" of her vehicle. Ford Br. 30. To the contrary, the evidence includes the fact that on August 12, 2008 (at 12,086 miles), North Bay Ford serviced Ms. Duarte's vehicle and returned it to her "with a 'Multi-Inspection Report Card' reporting that the *front* tires . . . had 7/32" of tread left, while the *rear* tires . . . had only 3/32"," meaning that the rear tires were

more worn. 2 E.R. 198:15-18 (emphasis added). The evidence also includes the fact that on December 3, 2010 (at 31,450 miles), Ms. Duarte "purchased a second set of two new Fuzion tires," and the tire dealer "installed this second set of Fuzion tires on the *rear*." 2 E.R. 198:23-26 (emphasis added). Ford offers an explanation (untethered to the record) why this evidence is not what it seems, *see* Ford Br. 30-31, but again this is a classic disputed issue of fact not properly resolved on summary judgment.

3. Plaintiff Mary Hauser.

Ford asserts that "the evidence suggests that [Ms.] Hauser was experiencing *front* tire wear, not rear tire wear." Ford Br. 31. To the contrary, Plaintiffs showed that Ms. Hauser's *rear* tires exhibited more wear, had higher measured temperatures, and more often needed replacement. *See* 2 E.R. 135:1-11 (citing 3 S.E.R. 779, 782-84). Ford complains that "this evidence is meaningless unless tire rotations are taken into account, which Plaintiffs make no attempt to do." Ford Br. 31. That is nothing more than a plea for the Court to ignore record evidence in favor of Ford's non-record speculations about tire rotation. Ford observes that when Ms. Hauser "had to replace her first set of tires at 13,000 miles, it was the front tires that had to be replaced." *Id.* True enough, but as Ford itself suggested below, that replacement seems to have been uniquely "related to the front end" (i.e., a necessary "front-end alignment"), which was in fact done at the time of the replacement. *See* 2 E.R. 208:11-13, 210:13-14. A reasonable jury could readily find for Plaintiffs on this intensely factual issue.

4. Plaintiff Margie Daniel.

Finally, Ford asserts that "there is no evidence that [Ms.] Daniel's vehicle experienced excessive inner edge rear tire wear." Ford Br. 32. Again, this assertion is belied by the record: on August 30, 2011 (at 20,723 miles), technicians at Big Valley Ford found that the vehicle's rear tires were in condition "RED," with "[r]emaining tread depth measured at 3/32 or less"; and on July 27, 2012 (at 42,292 miles), those same technicians found that the new tires which had been purchased at 25,220 miles were already in condition "YELLOW — need attention." 2 E.R. 137:22-25 (citing 3 S.E.R. 626, 628-29). As for "inner edge" wear, the measurements of Plaintiffs' expert Lepper "indicate[d] that the *inside tread row* of the rear tires were running at a higher temperature than the outer tread row," indicating comparatively more wear. 2 E.R. 138:1-2 (emphasis added) (citing 3 S.E.R. 623). Resolution of this factual issue is properly reserved to a jury.

CONCLUSION

For the foregoing reasons and for the reasons set forth in Plaintiffs' opening brief, 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: March 21, 2014.

Respectfully submitted,

s/ Eric Grant
John B. Thomas
Eric Grant
Kelsey McDowell

J. Allen Carney
Tiffany Wyatt Oldham

Counsel for Plaintiffs/Appellants

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief is accompanied by a motion for leave to file an oversize brief pursuant to Circuit Rule 32-2 and that this brief contains 10,994 words, excluding the portions exempted by Fed. R. App. P. 32(a)(7)(B)(iii), if applicable.

Dated: March 21, 2014.

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 March 21, 2014.

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

Counsel for Plaintiffs/Appellants

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' UNOPPOSED MOTION FOR LEAVE TO FILE OVERSIZE BRIEF

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APPELLANTS' UNOPPOSED MOTION FOR LEAVE TO FILE OVERSIZE BRIEF

Pursuant to Federal Rule of Appellate Procedure 27(a) and Circuit Rule 32-2, Plaintiffs/Appellants Margie Daniel, Mary Hauser, Donna Glass, and Andrea Duarte ("Plaintiffs") respectfully move for leave to file an oversize brief, specifically a reply brief that contains 10,994 words. (A copy of the brief that Plaintiffs propose to file is submitted concurrently herewith.) As set forth below, Plaintiffs have "substantial need" for the additional words within the meaning of Rule 32-2. Defendant/Appellee Ford Motor Company ("Ford") does not oppose the motion.

This is an appeal from a final judgment of the district court dismissing twenty-three of the twenty-five claims asserted by five individuals. The dismissals resulted from Ford's largely successful motion for summary judgment. In their opening brief (which consisted of 12,006 words), Plaintiffs raised four issues as to which (Plaintiffs argued) the district court erred in granting Ford's motion. *See* Declaration of Eric Grant ("Grant Decl.") ¶¶ 2-3, at 1 (attached hereto).

In addition to responding to these issues, Ford's answering brief (consisting of exactly 14,000 words) discussed "other reasons advanced by Ford [in support of its summary judgment motion] and not reached by the district court." In particular, although Ford did not formally file a cross-appeal, Ford advanced no fewer than *eight* additional reasons why the judgment of the district court should be affirmed. Ford's

discussion of these eight new issues consumed at least one-half of the argument in its 14,000-word answering brief. *See* Grant Decl. ¶ 4, at 1-2.

Slightly less than one-half of Plaintiffs' proposed reply brief is devoted to replying to Ford's arguments on the issues raised in the opening brief, while slightly more than one-half is devoted to responding to the eight new issues raised in Ford's answering brief. *See* Grant Decl. ¶ 5, at 2. In these circumstances, Plaintiffs' brief is functionally equivalent to an "appellant's response and reply brief" in a cross-appeal, which may contain up to 14,000 words. *See* Fed. R. App. P. 28.1(c)(3), (e)(2)(A)(i).

Plaintiffs are mindful that the Court looks with disfavor on motions for leave to file oversize briefs. On the other hand, Plaintiffs are likewise mindful of Circuit Rule 28-1(b), under which parties may not simply refer the Court to the briefs that they submitted to the district court, but must thoroughly present their arguments in the briefs submitted to this Court. That has been a word-consuming task in this case, especially as to the intensely factual issues raised for the first time in Ford's answering brief. Specifically, the briefing and accompanying exhibits on Ford's summary judgment motion generated thirteen docket entries comprising more than 2,000 pages of material. Moreover, that briefing often referred to Plaintiffs' earlier-filed motion for class certification, which generated more than 1,000 additional pages of material. It is no surprise that Ford submitted a three-volume *Supplemental* Excepts of Record containing more than 800 pages. *See* Grant Decl. ¶¶ 6-8, at 2.

In these circumstances, Plaintiffs have "substantial need" for the additional words requested herein. Their request is comparatively modest and reasonably necessary to adequately represent Plaintiffs' interests and to provide the Court with an intelligible response to the issues raised by Ford's answering brief. *See* Grant Decl. ¶ 9, at 2.

Pursuant to Circuit Rule 27-1(2), Plaintiffs inform the Court that the motion is unopposed. *See* Grant Decl. ¶ 10, at 3.

For these reasons, Plaintiffs should be granted leave to file a reply brief that contains 10,994 words.

Dated: March 21, 2014.

Respectfully submitted,

s/ Eric Grant
John B. Thomas
Eric Grant
Kelsey McDowell

J. Allen Carney
Tiffany Wyatt Oldham

Counsel for Plaintiffs/Appellants

DECLARATION OF ERIC GRANT

I, Eric Grant, declare as follows:

1. I am one of the counsel for Plaintiffs in this action. I make this declaration in support of Plaintiffs' motion for leave to file an oversize reply brief. I make the statements of fact in this declaration of my own personal knowledge. If called as a witness in this proceeding, I could and would competently testify to the facts set forth herein.

2. This is an appeal from a final judgment of the district court dismissing twenty-three of the twenty-five claims asserted by five individuals. The dismissals resulted from Ford's largely successful motion for summary judgment.

3. Plaintiffs' opening brief contained 12,006 words. *See* Appellants' Opening Brief ("Opening Br."), Certificate of Compliance. In that brief, Plaintiffs raised four issues as to which (Plaintiffs argued) the district court erred in granting Ford's motion for summary judgment. *See id.* at i-ii, 16-47.

4. Ford's answering brief consisted of 14,000 words. *See* DktEntry 23-2, Page 2 of 2 (filed Mar. 11, 2014) (corrected Certificate of Compliance). In addition to responding to the issues raised by Plaintiffs, Ford's brief discussed "other reasons advanced by Ford [in support of its summary judgment motion] and not reached by the district court." Appellee's Brief on Appeal ("Ford Br.") 2. Although Ford did not file a cross-appeal, Ford advanced *eight* additional reasons why the judgment of

the district court should be affirmed. *See* Ford Br. 24-46, 47-49, 54-55, 57-58 (Argument Sections I.B.1, I.B.2, I.C, I.D, I.E, II.B, III.B, and IV.B). In the undersigned's estimation, discussion of these eight new issues consumed at least half of the argument in Ford's 14,000-word answering brief.

5. In the undersigned's estimation, slightly less than half of Plaintiffs' proposed reply brief (pp. 2-21) is devoted to replying to Ford's arguments on the issues raised in the opening brief, and slightly more than one-half (pp. 22-44) is devoted to responding to the eight issues raised for the first time in Ford's answering brief.

6. The briefing and accompanying exhibits on Ford's summary judgment motion generated thirteen docket entries comprising more than 2,000 pages of material. *See* Docs. 39, 40, 41, 42, 44, 45, 46, 47, 48, 49, 52, 58, and 75.

7. That briefing often referred to Plaintiffs' earlier-filed motion for class certification, which itself generated more than 1,000 pages of material. *See* Docs. 33, 43, and 68.

8. Ford submitted a three-volume Supplemental Excepts of Record containing more than 800 pages. *See* DktEntry 15-3 (filed Feb. 7, 2014).

9. In the judgment of the undersigned and the rest of Plaintiffs' counsel, the requested additional words are reasonably necessary to adequately represent the interests of their clients and to provide the Court with an intelligible response to the issues raised by Ford's answering brief.

10. In an electronic mail communication to the undersigned earlier today, Ford's counsel Krista L. Lenart stated that Ford does not oppose Plaintiffs' motion.

I declare under penalty of perjury that the foregoing is true and correct. Executed on March 21, 2014.

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 March 21, 2014.

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

Counsel for Plaintiffs/Appellants