CASE NO. 13-16476

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MARGIE DANIEL, et al.,

Plaintiffs-Appellants,

v.
FORD MOTOR COMPANY

Defendant-Appellee.

APPELLEE'S BRIEF ON APPEAL

On Appeal from the United States District Court
For The Eastern District of California
District Court Case No. 2:11-02890 WBS EFB

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1(a) of the Federal Rules of Appellate Procedure, Defendant Ford Motor Company ("Ford"), by and through undersigned counsel, states that it has no parent corporation. State Street Corporation, a publicly traded company whose subsidiary State Street Bank and Trust Company is the trustee for Ford common stock in the Ford defined contribution plans master trust, has disclosed in filings with the U.S. Securities and Exchange Commission that as of December 31, 2012, it holds 10% or more of Ford's stock.

Dated: February 7, 2014

DYKEMA GOSSETT PLLC

By: /s/ John M. Thomas
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JURISDICTIONAL STATEMENT

(a) Ford agrees that the district court had subject matter jurisdiction pursuant to 28 U.S.C. § 1332(d)(2)(A).

(b) Ford agrees that this Court has jurisdiction pursuant to 28 U.S.C. § 1291.

(c) Ford agrees that Plaintiffs' appeal is timely under Fed. R. App. P. 4(a)(1)(A).

INTRODUCTION

Plaintiffs in this case assert multiple claims against Ford based on a suspension defect that, if it existed, would cause uneven, inner-edge wear on the *rear* tires of 2005 and later model Focus vehicles. Plaintiffs' own expert conceded that the suspension design was safe and that the alleged defect did not relate to safety. Thus, under California law, all of the claims asserted by Plaintiffs required them to prove that they actually experienced uneven, inner-edge wear while their tires were installed on the rear. And yet, none of them could make this showing. Further, Plaintiffs' claims based on Ford's failure to disclose the alleged defect also required them to prove that Ford had exclusive or superior knowledge of the alleged defect at the time they purchased their vehicles. But the uncontroverted evidence shows that when Plaintiffs purchased their vehicles, the data available to Ford revealed no unusual tire wear issue, forcing most Plaintiffs to rely on evidence with respect to vehicles sold before 2005. These issues alone required

summary judgment in Ford's favor, but Ford's motion raised numerous other issues, including Plaintiffs' inability to establish damages, the statute of limitations, and Plaintiffs' failure to give proper notice.

The district court did not need to reach these issues to enter summary judgment on the claims at issue here. Instead, the district court granted summary judgment on Plaintiffs' omission-based claims because Plaintiffs could not show that they would have been aware of a disclosure, if made. It granted summary judgment on the implied warranty claims because Plaintiffs did not experience the alleged defect within the one-year implied warranty period. And it granted summary judgment on the express warranty claims because the express warranty covered only manufacturing defects.

The district court ruled correctly on these issues. But even if it erred in one or more respects, the order granting summary judgment was correct for all of the other reasons advanced by Ford and not reached by the district court.

STATEMENT OF THE ISSUES

1. Whether Ford was entitled to summary judgment on Plaintiffs' omission-based claims under the California Consumer Legal Remedies Act.

a. Whether the district court correctly ruled that Plaintiffs presented no evidence that the alleged omission caused them any harm because they failed to show they would have seen a disclosure, if made.

b. Whether Ford was entitled to summary judgment because Plaintiffs presented no evidence that Ford owed them a duty of disclosure.

i. Whether Plaintiffs presented any evidence to establish that the alleged defect created an unreasonable risk of harm.

ii. Whether Ford owed a duty to disclose defects unrelated to safety.

iii. Whether Plaintiffs presented any evidence that Ford knew of the alleged tire wear issues at the time Glass, Duarte, and Hauser purchased their vehicles.

iv. Whether Plaintiffs presented any evidence that Ford's knowledge of alleged tire wear issues was exclusive or superior at the time Daniel purchased her vehicle.

c. Whether Ford was entitled to summary judgment because Plaintiffs presented no evidence of actual damages.

d. Whether Ford was entitled to summary judgment because Plaintiffs failed to give the statutorily-required notice before filing their Complaint and failed to show good cause to amend their Complaint.

e. Whether Duarte's claim is barred by the statute of limitations.

2. Whether Ford was entitled to Summary Judgment on Plaintiffs' omission-based claims under the Unfair Competition Law.

a. Whether the district court correctly ruled that Plaintiffs presented no evidence that the alleged omission caused them any harm because they failed to show they would have seen a disclosure, if made.

b. Whether Ford was entitled to summary judgment because Plaintiffs presented no evidence that Ford owed them a duty of disclosure.

c. Whether Ford was entitled to summary judgment because Plaintiffs presented no evidence to support their entitlement to equitable restitution.

3. Whether Ford was entitled to summary judgment on the Song-Beverly implied warranty claims of Glass, Duarte, and Hauser.

a. Whether the district court correctly held that summary judgment was required because Glass, Duarte, and Hauser experienced no problems within the one-year warranty period.

b. Whether summary judgment was required because Glass, Duarte, and Hauser cannot prove that they experienced uneven inner-edge rear tire wear caused by the alleged defect at any time.

4. Whether Ford was entitled to summary judgment on the express warranty claims of Duarte and Daniel.

a. Whether the district court correctly held that the express warranty applies only to manufacturing defects.

b. Whether summary judgment was required because the express warranty excludes worn out tires.

c. Whether summary judgment was required because Duarte and Daniel presented no competent evidence that they ever experienced uneven inner-edge rear tire wear caused by the alleged defect.

STATUTORY ADDENDUM

Pertinent statutory provisions are included in a separately-bound addendum to this brief.

STATEMENT OF THE CASE

A. Procedural History

In November 2011, Donna Glass, Andrea Duarte, Mary Hauser, and Margie Daniel ("Plaintiffs") filed a purported class action against Ford Motor Company ("Ford") alleging a defect in the rear suspension geometry of their Ford Focus vehicles. (3 E.R. 339 at ¶17.)[1] This defect, if it existed, would cause premature and uneven inboard-edge wear on the rear tires. (1 S.E.R. at 8.)[2]

Plaintiffs' Complaint sought recovery for themselves and on behalf of a class for (1) violation of the Consumers Legal Remedies Act ("CLRA"), Cal. Civ. Code § 1750, *et seq.*; (2) violation of the California Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code § 17200, *et seq.*; (3) breach of implied warranty under the Song-Beverly Consumer Warranty Act, Cal. Civ. Code § 1790, *et seq.*; (4) breach of warranty under the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301, *et seq.*; and (5) breach of express warranty. (3 E.R. 364-370, ¶¶ 84-133.) Plaintiffs' CLRA and UCL claims were based on Ford's failure to disclose the alleged defect to Plaintiffs before they purchased their vehicles.

Ford moved for summary judgment on all of the claims asserted by all Plaintiffs.

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[1] Plaintiffs are not pursuing the claims of a fifth Plaintiff, Robert McCabe.

[2] Pursuant to Circuit Rule 30-1.7, supplemental excerpts of record are filed with appellee's brief; citations thereto in the form [vol.] S.E.R. [page].

The district court denied Ford's motion for summary judgment on Daniel's Song-Beverly implied warranty claim (and the related Magnuson-Moss warranty claim), holding that the evidence created a genuine issue of material fact with respect to whether Daniel experienced premature rear tire wear. With respect to the other Plaintiffs, the court did not address this issue. Instead, the district court granted summary judgment on the Song-Beverly implied warranty claims (and the related Magnuson-Moss claims) of all Plaintiffs (except Daniel) because their tires outperformed the one-year Song-Beverly implied warranty period.

The district court granted summary judgment against all Plaintiffs on their express warranty claim because the express warranty applied only to manufacturing defects and Plaintiffs alleged only a design defect. Finally, the district court granted summary judgment on all Plaintiffs' CLRA and UCL claims because they could not prove that any of them would have seen a disclosure by Ford.

By agreement of the parties, the district court entered final judgment pursuant to Fed. R. Civ. P. 54(d) on all claims of all parties except the Song-Beverly implied warranty claim of Daniel (and her related Magnuson-Moss claim). Plaintiffs appealed.[3]

[3] Plaintiffs on appeal do not challenge the entry of summary judgment against Glass and Hauser on their express warranty claims. No final judgment has been entered on Daniel's Song-Beverly claim or her related Magnuson-Moss claim, so those claims are not before this Court.

B. Statement of Facts.

1. The Focus.

Designed in Europe with a European-style suspension, the Focus—or "C170," as it was referenced internally—was introduced in North America in 1999 as a 2000 model year vehicle. (1 S.E.R. 292:22-25, 294:11-18.) It was received with rave reviews, particularly for its handling. (2 E.R. 226.) In fact, Car and Driver selected the Focus as one of its ten best cars of the year for 2000 and for the four following years. (*Id.*)

But the Focus was not perfect; no vehicle is. Like every vehicle model in the world, the Focus experienced a variety of issues leading to warranty repairs. For example, among the concerns leading to the most warranty repairs were issues with lock cylinders, halfshafts, the fuel injection system, heating and air conditioning batteries, fuel pumps, etc. (2 S.E.R. 492.) Tire wear was 37th on the list of most common warranty repairs. (*Id.*)

Thus, there was room for improvement in many respects; there always is. With respect to tire wear, the Focus was tested prior to production and it met or exceeded all of Ford's requirements. (2 S.E.R. 306.) But data gathered after the Focus was introduced and sold showed that warranty claims for tire wear were somewhat worse than the corporate average (6.7 repairs per thousand (R/1000) versus the corporate average of about 5.13). (2 S.E.R. 531-532.)

Ford investigated several potential ways to improve tire wear on the Focus. It considered the design of the suspension system and its alignment parameters, particularly static toe (the extent to which the front of the tires point to the right or left of center in a vehicle at rest) and toe gradient (the extent to which toe changes as the vehicle goes over bumps in a road surface). (2 S.E.R. 507-529.) But testing done in 2005 and earlier revealed that reducing static toe was "unacceptable for steering and handling characteristics" and that reducing toe gradient resulted in no significant improvement in tire wear. (2 S.E.R. 540-541.)

Ford did identify a manufacturing issue: a rear knuckle was being produced in a manner that was leading to high variability in rear bump steer. Ford made changes to the manufacturing process to reduce variability and the potential for high negative camber (and, therefore, the potential for a higher toe gradient). (2 S.E.R. 543-544.)

By May 31, 2005—just one month after Glass purchased her vehicle—Ford's data showed that the manufacturing changes made by Ford had been successful: the tire wear warranty rate for the 2005 Focus was almost thirty percent *better* than the corporate average, which had improved since 2004 (1.37 R/1000 for the Focus vs. 4.8R/1000). (2 S.E.R. 553.)

2. Glass And Her 2005 Focus.

Glass purchased a new 2005 Focus sedan on April 24, 2005, after these manufacturing improvements had been implemented. (1 S.E.R. 43:9-17, 52.) Glass did not do any research before purchasing her vehicle. (1 S.E.R. 38:25-39:12.) She does not allege that she saw any Ford advertisements or brochures prior to purchasing her vehicle. (1 S.E.R. 38:13-21; 40:13-21; 42:7-21.)

Glass's vehicle came with a twelve-month/12,000-mile warranty for uneven or rapid tire wear. (1 S.E.R. 65-82.) Glass had no relevant problem with her tires during this period or during the following eight months. (3 S.E.R. 593, 599.) The tires were rotated several times. On January 4, 2007, at 20,044 miles, Ukiah Ford provided her with a Multi-Point Inspection Report Card showing that the rear tires were worn and needed to be replaced. (1 S.E.R. 60-64.) But that dealer also rotated the tires before returning the vehicle to Glass, and Plaintiffs presented no evidence that the measurements on the Report Card referred to the location of the tires before or after rotation, i.e., no evidence that the wear occurred while the tires were on the rear. (*Id.*)

Glass replaced all four of her tires. Over the next several years, she had her tires rotated multiple times, installed more new tires (some of which were the wrong size), had the vehicle aligned, installed new tie rod ends and inner tie rod

sockets, had the thrust angle adjusted, and had additional work done. (3 S.E.R. 557-592.)

When Plaintiffs' expert, Thomas Lepper, inspected Glass's vehicle, he found that the right rear tire was "well worn and near the end of its service life." (3 S.E.R. 689.) Lepper further believed that the left rear tire was a "wonderful" and "perfect" example of the uneven inner-edge tire wear Plaintiffs claim is caused by the alleged defect. (1 S.E.R. 273:9-18.) But Lepper also opined that the tires had been rotated "recently" and that "the front tires and wheels had been moved to the rear." (3 S.E.R. 689.) In other words, Lepper's testimony suggested the unusual wear experienced by Glass was occurring on the front, not the rear, and was not consistent with Plaintiffs' defect theory.

3. Duarte And Her 2007 Focus.

In September 2005, Ford conducted testing that showed that a new tire planned for the 2007 model year, the Hankook 15" tire, would have even better wear characteristics than the 15" Goodyear tire currently in production. (2 S.E.R. 540-541.) In February 2006, Ford's Vehicle Dynamics engineers ran their full battery of handling tests on prototype 2008 vehicles with reduced toe gradient. (3 S.E.R. 725-726 ¶¶ 7,8.) The testing revealed that the reduction in toe gradient resulted in unacceptable adverse changes in handling characteristics. (*Id*. at. ¶ 8.)

Duarte purchased a new 2007 Ford Focus in February 2007. (1 S.E.R. 89:24-90:2.) Duarte's vehicle came equipped with the new 15" Hankook tires. (3 S.E.R. 793-794, 801-802.) Duarte's vehicle also came with Ford's New Vehicle Limited Warranty ("NVLW"). (1 S.E.R. 93, 112-133.) This warranty expressly provides coverage for "manufacturing defects" but also expressly states that it "does not cover normal wear or worn out tires." (1 S.E.R. 121.)

On August 12, 2008, at 12,086 miles, a Ford dealer rotated the tires and informed Duarte that two tires were worn out and required immediate attention. (1 S.E.R. 108.) There is no evidence that these worn-out tires were ever on the rear of the vehicle until after they were rotated by that dealer on that same day. Four days later, Duarte purchased two new Fuzion tires and had them installed on the rear. (1 S.E.R. 91:5-92:16; 1 S.E.R. 226.) These tires were still on the rear of the vehicle when, on December 3, 2010, at 31,450 miles, Duarte purchased a second set of two new Fuzion tires. (1 S.E.R. 101:20-102:8; 1 S.E.R. 227.) The original set of Fuzion tires were moved to the front and the second set was installed on the rear. (3 S.E.R. 607.) At this time, the first set of Fuzion tires had been driven on the rear for more than 19,000 miles. (1 S.E.R. 104, 227.)

More than a year later, after the first set of Fuzion tires had been driven on the front for more than 11,000 additional miles, Plaintiffs' expert, Lepper, found that they were still only "approximately half way through their service life." (3

S.E.R. 656.) Thus, at the rate these tires were wearing on the rear, they would have lasted more than 40,000 miles if they had remained on the rear. In contrast, the second set of replaced tires spent most of the time on the front of the vehicle and wore out in 31,450 miles or less. In other words, the tires were wearing faster when on the front than on the rear.

4. Hauser And Her 2009 Focus.

Hauser purchased a 2009 Ford Focus sedan with 15" Hankook tires in October 2008. (1 S.E.R. 137:20-25, 138:17-22, 139:20-23; 3 S.E.R. 792, 796.) In January 2010, at 13,000 miles, prior to any rotation, Hauser noticed that both *front* tires were bald on the inside. (1 S.E.R. 140:22-142:12, 149:13-17, 154.) Jackson Tire Service aligned the front end and installed two new tires on the front. (1 S.E.R. 147:22-148:2, 154.)

Over the next two years, Hauser purchased eight more tires for her vehicle. She did not know whether the premature tire wear she experienced occurred in the front or the rear. (1 S.E.R. 151:24-152:5.) But the wear she observed after the front end was aligned was not unusual or uneven; rather, the tires were wearing "straight across." (1 S.E.R. 150:5-8.)

5. Daniel And Her 2011 Focus.

Daniel purchased a new 2011 Ford Focus on January 2, 2011. (1 S.E.R. 176:24-177:2; 1 S.E.R. 195-196.) Her warranty was identical in relevant respects

to Duarte's warranty. Daniel had her tires rotated at every oil change. (1 S.E.R. 172:11-13.) On August 30, 2011, at 20,723 miles, after several tire rotations, Daniel was told she needed four new tires, because the tread on all four tires was worn to 3/32 of an inch. (1 S.E.R. 178:5-22.) The tire dealer also recommended an alignment. (1 S.E.R. 212.) Daniel elected not to have this work performed at this time. (1 S.E.R. 182:14-183:14.)

On December 8, 2011, at 25,220 miles—about a month after this case was filed—Daniel took her vehicle to another tire dealer. The dealer found that an alignment was necessary and performed an alignment. (1 S.E.R. 190:20-191:9.) It also installed four new tires. (1 S.E.R. 192, 219.) Daniel did not preserve the tires that were removed from her vehicle. (1 S.E.R. 219.)

More than seven months later, on July 9, 2012, Plaintiffs' expert Lepper inspected Daniel's vehicle. He found no evidence of inboard-edge tire wear on either of Daniel's rear tires. (1 S.E.R. 265:25-266:3; 3 S.E.R. 624.)

SUMMARY OF ARGUMENT

The district court properly held Ford was entitled to summary judgment on Plaintiffs' omission-based CLRA and UCL claims because Plaintiffs failed to satisfy their burden of showing they would have seen a disclosure, if made. While Plaintiffs now recognize that this is a critical issue, during discovery Plaintiffs insisted that they had no contention with respect to how Ford should have made a

disclosure. Then, when Ford sought summary judgment based on Plaintiffs' inability to prove this element of their claim, Plaintiffs finally revealed that they did in fact have a contention—that Ford could have disclosed the information through salespersons employed by independent Ford dealerships. Plaintiffs did not argue that these salespersons were agents of Ford, and now they insist that agency principles are "legally irrelevant." And as the district court held, Plaintiffs offered nothing to support their claim that dealership salespersons were otherwise "obligated to verbally disclose the alleged defect on behalf of defendant." (1 E.R. 13.)

Plaintiffs' CLRA and UCL claims also fail because Ford owed Plaintiffs no duty to disclose the alleged defect absent any evidence that it created an unreasonable risk of harm. In fact, Plaintiffs' own expert witness opined that the rear suspension system was safely designed. There is no duty to disclose defects that do not relate to safety, and (contrary to the suggestion of some courts) there can be no logical exception for defects that occur in a plaintiff's vehicle after sale but within the express warranty period. In any event, Plaintiffs cannot prove that they experienced the alleged defect during the warranty period. Nor is there any evidence that Ford had exclusive knowledge of the allegedly material facts at the time Plaintiffs purchased their vehicles. Plaintiffs also failed to present any evidence that they suffered any actual damages or to support a claim for equitable

restitution. In addition, Plaintiffs failed to give the notice required by the CLRA before filing their Complaint, and they failed to show good cause to amend their complaint to allege proper notice. Duarte's CLRA claim was also barred by the applicable statutes of limitations.

The district court also properly granted summary judgment to Ford on the Song-Beverly implied warranty claims of Hauser, Glass, and Duarte, because there was no evidence that any of these Plaintiffs experienced problems as a result of the alleged defect at any time, let alone within the statutory one-year implied warranty period. Plaintiffs' argument that the warranty was breached because a latent defect existed in the vehicles at the time of sale would effectively nullify the one-year durational limit.

Finally, summary judgment was properly granted to Ford on Duarte's and Daniel's express warranty claims, because that warranty covers only manufacturing defects and expressly excludes "worn tires." Further, there was no evidence that these Plaintiffs ever experienced premature wear on the inner edges of their vehicles' rear tires. The district court's decision should be affirmed.

STANDARD OF REVIEW

This Court reviews the granting of summary judgment *de novo*, using the same standard as the district court. *Clevo Co. v. Hecny Transp., Inc.*, 715 F.3d 1189, 1193 (9th Cir. 2013). Summary judgment is appropriate if, viewing the

evidence in a light most favorable to the nonmoving party, the Court determines that "there is no genuine issue as to any material fact." Fed. R. Civ. P. 56(c). A dispute about a material fact is "genuine" only "if there is sufficient evidence for a reasonable fact finder to find for the non-moving party." *Far Out Prods., Inc. v. Oskar*, 247 F.3d 986, 992 (9th Cir. 2001).

Once the moving party presents sufficient evidence or argument to support the motion, the non-movant must "go beyond the pleadings and by [the movant's] own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986) (quoting Rule 56(c)). The non-moving party cannot simply rely on alleged deficiencies in the moving party's evidence; rather, the non-moving party "must present affirmative evidence in order to defeat a properly supported motion for summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986); *see also*, *e.g.*, *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1315 (9th Cir. 1995).

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.'" *In re ATM Fee Antitrust Litig.*, 686 F.3d 741, 748 (9th Cir. 2012), *cert. denied*, 134 S. Ct. 257 (2013).

ARGUMENT

I. THE DISTRICT COURT CORRECTLY HELD THAT FORD WAS ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFFS' CLRA OMISSION CLAIM.

A. The District Court Correctly Held That Summary Judgment Was Required Because Plaintiffs Could Not Prove That Any Of Them Would Have Seen A Disclosure, If Made.

To prevail on their CLRA claims, Plaintiffs must prove that they suffered damage "as a result of" Ford's alleged omission, i.e., that the alleged omission caused an injury. Cal. Civ. Code § 1780(a). Thus, a plaintiff must establish reliance as an essential element for a claim. *E.g.*, *Withers v. eHarmony, Inc.*, No. CV 09-2266-GHK RCX, 2011 WL 8156007, at *2 (C.D. Cal. Mar. 4, 2011). Here, Plaintiffs' CLRA claims are based solely on omissions. To prove reliance on an omission, "[o]ne need only prove that, had the omitted information been disclosed one would have been aware of it and behaved differently." *Mirkin v. Wasserman*, 5 Cal. 4th 1082, 1093 (1993); *see also Withers* at *3. The district court correctly granted summary judgment because Plaintiffs could not prove that they would have been aware of a disclosure.

1. Plaintiffs Should Not Be Permitted To Rely On Contentions They Refused To Disclose During Discovery.

On appeal, Plaintiffs admit that, under *Mirkin*, the relevant question is whether, "'had the omitted information been disclosed, [would Plaintiffs] have been aware of it.'" (Plaintiffs' Opening Brief ("PB") at 21, bracketed material in

original.) Moreover, on appeal, Plaintiffs recognize that "to answer this question, one really must know the *means* of the hypothesized disclosure." (PB at 21, emphasis in original.) For this very reason, Ford specifically asked Plaintiffs in discovery to identify the *means* by which they contended Ford should have made a disclosure. (3 S.E.R. 721-722.) Plaintiffs did not object to the interrogatory. Instead, they *answered* it by stating unequivocally that "Plaintiffs do not have a contention regarding how the disclosure identified [in a previous response] should have been made." (*Id.*) In November 2012, Ford specifically asked Plaintiffs to supplement this answer and advised them of its intention to move for summary judgment if they did not. (3 S.E.R. 766.) But Plaintiffs elected not to supplement their response.

Instead, more than six months later—just fifteen days before discovery closed, when Ford's opportunity to serve additional written discovery had passed—Plaintiffs filed a brief in opposition to Ford's motion for summary judgment. There, for the first time, they disclosed that they did have a contention after all: Ford should have made its disclosure through "a Ford salesman" or a "Ford sales representative." (2 E.R. 111, 132, 136, 139.)

Courts are understandably reluctant to bind parties to answers to contention interrogatories served early in discovery, and liberally allow timely supplementation or amendment of such answers. *See generally*, 8B CHARLES

ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2181 (3d ed. 1998). Here, however, Plaintiffs never argued that Ford's contention interrogatory was premature or that they needed additional discovery to provide an answer; and they never served amended answers, notwithstanding Ford's specific request that they do so, even after discovery was all but complete, experts reports had been exchanged, and expert depositions completed. Instead, they simply said they had no contention at all with respect to a question they now recognize "must" be answered.

Under Fed. R. Civ. P. 37(c), Plaintiffs are precluded from pursuing theories and relying upon evidence not disclosed in response to discovery requests. *See, e.g.*, *Rispoli v. King County*, 297 F. App'x 713, 715 (9th Cir. 2008) (affirming trial court's exclusion of evidence pertaining to adverse employment actions other than those events identified in the plaintiff's interrogatory response); *see also Apple v. Samsung Electronics Co. Ltd.*, No. 11-CV-01846-LHK, 2012 WL 3155574, at *5 (N.D. Cal. Aug. 2, 2012) (excluding portions of expert reports due to party's failure to timely supplement answers to contention interrogatories pertaining to the bases of certain legal theories). If Plaintiffs are allowed to simply ignore their interrogatory answers under these egregious circumstances, then contention interrogatories are useless and the answers meaningless. *See Spellbound Dev. Grp., Inc. v. Pac. Handy Cutter*, No. SACV 09-00951 DOC, 2011 WL 5554312, at

*6 (C.D. Cal. Nov. 14, 2011) ("Plaintiff is bound by its [answers to contention] interrogatories as of the date Defendants filed their summary judgment motion because Plaintiff did not demonstrate diligence in updating its interrogatories.").

2. Plaintiffs Presented No Evidence To Support Their Undisclosed Contentions.

Assuming Plaintiffs are permitted to rely on contentions that they refused to disclose during discovery, the district court was correct in ruling that those contentions were unsupported by any evidence. On appeal, as below, Plaintiffs contend that Ford could have made a disclosure to Plaintiffs "by means of its sales representatives at its 'authorized' dealerships." But the meaning of this contention is unclear at best.

Plaintiffs emphatically do *not* mean on appeal (and presumably did not mean below) that dealer sales representatives are agents of Ford, and that Ford is vicariously liable for the omissions of those agents. In fact, according to Plaintiffs, "agency is irrelevant in this context" and they "are not seeking to hold Ford liable for the conduct or the omissions of Ford's dealerships." (PB at 11.) Moreover, 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. *See Alaska Airlines, Inc. v. United Airlines, Inc.*, 948 F.2d 536, 546 n. 15 (9th Cir. 1991) ("It is well established that an appellate court will not reverse a district court on the basis of a theory that was not raised below."); *Dumas v. New United Motor*

Mfg., Inc., 305 F. App'x 445, 449 n.3 (9th Cir. 2008) ("[i]t is a well-settled rule that a party opposing a summary judgment motion must inform the trial judge of the reasons, legal or factual, why summary judgment should not be entered. If it does not do so, and loses the motion, it cannot raise such reasons on appeal.") (internal quotation marks and citations omitted). In any event, Plaintiffs cite no authority to support their argument on appeal that dealers are agents of a manufacturer, "ostensible" or otherwise, simply because they are "authorized," and Ford is aware of none.[4] Indeed, case law, including from this Court, is to the contrary. *See*, *e.g.*, *Stansifer v. Chrysler Motors Corp.*, 487 F.2d 59, 65 (9th Cir. 1973) ("In construing similar contracts [authorizing sale of the manufacturer's motor vehicles] the courts have held consistently that controls of the kinds reserved by Chrysler do not create a relationship of agency, but rather one of buyer and seller."). And Plaintiffs concede that the only other "evidence" on the issue is not properly subject to judicial notice and was not presented to the district court below. (PB at 29-30.) Thus, their arguments based on this evidence cannot properly be considered. *See Nicholson v. Hyannis Air Service*, *Inc.*, 580 F.3d 1116, 1128 (9th

[4] Plaintiffs did not even plead "ostensible agency." They did plead actual agency, but Plaintiffs cannot rely upon the conclusory allegation that Ford dealerships are "Ford's agents"; such allegations are "nothing more than legal conclusions of the type prohibited by *Iqbal* and *Twombly*." *Imageline, Inc. v. CafePress.com, Inc.*, No. CV 10-9794 PSG MANX, 2011 WL 1322525, at *4 (C.D. Cal. Apr. 6, 2011). To the extent Plaintiffs pleaded facts supporting a conclusion of agency, Ford denied those facts. (3 E.R. 319 at ¶ 14.) Where a party denies the factual allegations on which a legal conclusion rests, courts will not deem the legal conclusion admitted. *See Barnes v. AT&T Pension Ben. Plan-Nonbargained Program*, 718 F. Supp. 2d 1167, 1175 (N.D. Cal. 2010).

Cir. 2009) (pursuant to Fed. R. App. P. 10(a)(1), disregarding all arguments that depended on materials that were not filed in the district court).[5]

If Plaintiffs are not contending that Ford is liable for the omissions of Ford's dealerships, it is not at all clear *what* they are contending. They might be claiming that Ford had a contractual right to dictate what independent dealer sales representatives are required to say to prospective customers. But as the district court held, "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." (1 E.R. 13.) Besides, Plaintiffs presented no *evidence* to support such a contention.

Alternatively, Plaintiffs might simply mean 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. But according to Plaintiffs themselves, Ford *did* disclose the alleged defect to its dealers. (PB at 9.)

[5] Plaintiffs argue that they were deprived of a "full and fair opportunity to ventilate" the agency issue and "develop the requisite evidence" prior to summary judgment. (PB at 29). This is nonsense. Ford did not "identify 'agency' as an issue in its summary judgment brief" (PB at 28) because Plaintiffs did not disclose this issue in their response to Ford's contention interrogatory. Agency did not arise "at the nearly three-hour hearing on the parties' various motions" (PB at 28) because Plaintiffs did not raise it in *any* of their briefs on those motions, probably because they believed at the time, as they do now, that the issue was "legally irrelevant." And if Plaintiffs believed they had not been given sufficient opportunity to conduct discovery on this irrelevant issue, they could have opposed Ford's motion based on Rule 56(d). They did not. Thus, this case bears no resemblance to *Norse v. City of Santa Cruz*, 629 F.2d 966 (9th Cir. 2010) (PB at 29), in which summary judgment was entered against the plaintiff (1) sua sponte (2) without briefing and (3) after a hearing of which the plaintiff had only two days' notice and at which the plaintiff was prohibited from presenting testimony.

And yet, those dealers did not disclose it to Plaintiffs. Or, finally, Plaintiffs might mean something else altogether; if so, they have not even articulated a comprehensible theory, let alone provided evidence to support it.

Plaintiffs essentially argue that all they have to do to avoid summary judgment is to advance a "plausible" theory with respect to how Ford might have disclosed information to Plaintiffs, without actually providing evidence to support such a theory. (PB at 20-25.) But Plaintiffs have not even advanced a plausible theory. Further, Plaintiffs seek to apply the standard applicable to motions to dismiss under Rule 12(b)(6) to motions for summary judgment under Rule 56. But "summary judgment is the 'put up or shut up' moment in a lawsuit," when Plaintiffs can no longer rely on pleadings, however plausible, and must instead produce affirmative evidence to support their contentions. *Rush v. Denco Enterprises, Inc.*, 857 F. Supp. 2d 969, 974 (C.D. Cal. 2012); *accord*, *e.g.*, *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1315 (9th Cir. 1995).

B. Summary Judgment Was Required Because Ford Owed Plaintiffs No Duty Of Disclosure.

A manufacturer cannot be held liable for failure to disclose a fact under the CLRA unless the plaintiff establishes that the manufacturer had a duty to disclose that fact. *Smith v. Ford Motor Co.*, 749 F. Supp. 2d 980, 987, 996-97 (N.D. Cal. 2010), *aff'd* 462 F. App'x 660, 662 (9th Cir. 2011). Under California law, there are four circumstances in which an obligation to disclose may arise, but Plaintiffs

rely on only one: a duty to disclose arises when the defendant had exclusive knowledge of material facts not known to the plaintiff. *See Smith*, 749 F. Supp. 2d at 987. Plaintiffs presented no evidence to support this claim.

1. Ford Owed No Duty Of Disclosure Because The Undisclosed Facts Were Not Material.

(a) Alleged defects unrelated to safety are not material.

"Defects can, and do, arise with complex instrumentalities such as automobiles." *Thiedemann v. Mercedes-Benz USA, LLC*, 872 A.2d 783, 794 (N.J. 2005). As a general rule, information about such defects is not "material" under California law unless the defects create an unreasonable safety hazard. *Wilson v. Hewlett-Packard Co*., 668 F.3d 1136, 1143 (9th Cir. 2012); *accord*, *e.g.*, *In re Sony Grand Wega KDF-E A10/A20 Series Rear Projection HDTV Television Litig.*, 758 F. Supp. 2d 1077, 1096 (S.D. Cal. 2010) (if an alleged defect has no impact on the safe use of the product, "information about it [is] immaterial for the purpose of stating a CLRA claim.").

(b) Plaintiffs presented no evidence that the alleged defect is related to safety.

Plaintiffs do not have a scintilla of evidence that the defect alleged relates to safety, except in the sense that it can be dangerous to let the tires on *any* vehicle become excessively worn before replacing them. In the district court, Plaintiffs *agreed* that "[a]ll vehicles, including vehicles with non-defective suspension systems, can experience tire wear at relatively low mileage for a *host of reasons*,

including underinflation, overinflation, misalignment, aggressive driving, aggressive road surfaces, etc." (2 E.R. 105.) Therefore, tire wear must be monitored regularly on all vehicles, including vehicles with non-defective suspension systems. There is no evidence that the normal, routine monitoring required for all vehicles will not detect tread wear in Plaintiffs' vehicles long before it reaches the point where it becomes dangerous.

Plaintiffs served three expert reports, but none of these reports addressed any safety issues. One of these experts, Webb, testified that the danger of driving on excessively worn tires was not unique to the Focus and existed on any vehicle. (3 S.E.R. 738:10-739:12.) Another of Plaintiffs' experts, Lepper, agreed that excessive wear can create a problem on any vehicle if it goes unnoticed and unaddressed. (1 S.E.R. 258:25-259:11.) And Plaintiffs' third expert, Tkacik, expressly testified there was no safety-related defect:

> Q. All right. Do you have an opinion that there is any defect related to safety in the rear suspension of the Ford Focus?
>
> A. No, no, I think that the suspension is a safe design.

(1 S.E.R. 282:4-8.)

In the district court, Plaintiffs tried to contradict the testimony of their experts by relying on special service bulletins sent to Ford dealers informing them that Focus vehicles may exhibit "premature front/rear tire wear and/or a vehicle

drift condition when driving on wet or snow packed roads." (2 E.R. 106.) But these bulletins were directed to both front and rear tire wear, not to inner-edge rear tire wear, and the solution suggested was simply to ensure the vehicle was correctly aligned. Thus, on its face, these bulletins are unrelated to the alleged defect in this case, which if it existed would cause *rear* tire wear. *See Grodzitsky v. Am. Honda Motor Co., Inc.*, No. 2:12-CV-1142-SVW-PLA, 2013 WL 690822, at *7 (C.D. Cal. Feb. 19, 2013) ("Not only is this problem different from the one alleged by Plaintiffs, but it occurred in both power and manual windows, suggesting that the problem had little to do with the power window regulator at issue in this suit.").

But even if these bulletins were applicable, the testimony of Plaintiffs' own expert confirmed that they do not address any safety issue. As explained by Webb, "drift" is simply the tendency of a vehicle going down a straight, flat road to "go to one side over a period of time." (3 S.E.R 733:16-20.) Webb testified that drift is *acceptable* as long as it takes eight seconds or more to change lanes at fifty-five miles per hour, and that it is simply a customer satisfaction issue "unless it's abrupt, you know, completely to the left or to the right, then it can be a safety issue." (3 S.E.R. 175:15-21, 735:1-6.) There is no evidence that a Focus will experience this type of "abrupt" drift under any circumstances.

Plaintiffs also relied on handling complaints made by consumers to Ford dealers or directly to Ford contained in two Ford databases, known as MORS and CQIS. (2 E.R. 106-107.) But statements by consumers or dealers recorded in MORS and CQIS constitute hearsay within hearsay and are not admissible to prove the truth of the matter asserted. *Smith*, 749 F. Supp. 2d at 990 (CQIS records are inadmissible hearsay); *Hendricks v. Ford Motor Co.*, No. 4:12cv71, 2012 WL 4478308, at *2 (E.D. Tex. Sept. 27, 2012) (MORS reports are inadmissible hearsay). Inadmissible hearsay cannot be used to defeat summary judgment. *Anheuser-Busch, Inc. v. Natural Beverage Distribs.*, 69 F.3d 337, 345 n. 4 (9th Cir. 1995). Further, without admissible evidence of the condition of the vehicles and the condition of the tires, Plaintiffs cannot prove what caused *any* of these alleged handling problems, making them irrelevant. *See Smith*, 749 F. Supp. 2d at 990.

(c) <u>There can be no exception for defects unrelated to safety that occur during the warranty period.</u>

Some cases recognize the general rule that there is no duty to disclose non-safety defects but suggest, without necessarily holding, that an exception may exist where the defect occurs during the warranty period. *See Wilson*, 668 F.3d at 1143. Plaintiffs below relied on this purported exception, but such an exception cannot logically exist. If the law requires manufacturers to disclose a particular defect at the time of sale only to those consumers who will later experience that defect during the warranty period, manufacturers will require a crystal ball to determine

which potential defects should be disclosed to which consumers. Of course, no such crystal ball exists, so the only way a manufacturer could comply with such a duty would be to disclose to all consumers all of the potential defects that might occur in their products. This, in turn, would inundate consumers with useless information that tells them nothing that they do not already know: things might go wrong with any product during and after the warranty period; the manufacturer will be responsible for those things that go wrong during the warranty period; and the consumer will be responsible for those things that go wrong after the warranty period.

(d) Assuming an exception exists for defects that occur during the warranty period, Plaintiffs cannot prove that they ever experienced the alleged defect.

Assuming nevertheless that a duty to disclose a non-safety defect exists at the time of sale if the defect later occurs in the plaintiff's vehicle during the warranty period, summary judgment was still required as to all Plaintiffs.

Glass. The purported exception to the general rule plainly is not applicable to Glass because her tires outperformed the twelve-month/12,000-mile warranty period applicable to worn tires by about nine months and about 8,000 miles. Plaintiffs below did not contend otherwise.

Besides, Plaintiffs presented no evidence that Glass experienced premature *rear* tire wear, or that she was experiencing *uneven* tire wear, at any time. The

records show that she replaced her tires with unusual frequency, but they show nothing about whether wear occurred while the tires (which were rotated frequently) were on the front or the rear, or whether the wear was occurring evenly or unevenly. Moreover, Plaintiffs' expert, Lepper, found that the excessive and uneven wear was occurring on tires that had, until recently, been on the *front* of Glass's vehicle. (3 S.E.R. 689.)

Duarte. Like Glass, Duarte presented no evidence that she was experiencing uneven inner-edge tire wear while the tires were installed on the rear. In fact, Duarte presented no evidence that the first set of worn-out tires, replaced at 12,086 miles, were *ever* on the rear (except perhaps for four days between the first rotation and subsequent replacement of the original tires). Moreover, the evidence is undisputed that the first set of replacement tires were installed on the rear and remained on the rear for more than 19,000 miles—and after they were moved to the front and used there for more than two years and several thousand miles they still had *more* than half of their tread life remaining. In other words, at the rate those tires were wearing while they were on the rear, they would have lasted in excess of 40,000 miles. Plaintiffs' own expert, Webb, defined premature tire wear to mean tires that wear out before 40,000 miles. (1 S.E.R. 102:2-5.) In contrast, the second set of replaced tires spent most of the time on the front of the vehicle and wore out in 31,450 miles or less. Thus, not only did Plaintiffs fail to prove that

Duarte experienced premature rear tire wear, but also the undisputed evidence establishes that the front tires were wearing at a faster rate than the rear.

Hauser. Just like the evidence with respect to Glass and Duarte, the evidence suggests that Hauser was experiencing *front* tire wear, not rear tire wear. In fact, Plaintiffs conceded below that when Hauser had to replace her first set of tires at 13,000 miles, it was the front tires that had to be replaced, with no evidence of a prior rotation. (2 E.R. 135.)

To support their argument that the wear that Hauser experienced thereafter occurred on the rear, Plaintiffs below relied on the fact that on two occasions Walmart installed new tires on the rear. (2 E.R. 135.) But this evidence is meaningless unless tire rotations are taken into account, which Plaintiffs make no attempt to do. Plaintiffs also rely on the fact that on three occasions Walmart measured the tread depth of the rear tires as less than the front (on one occasion a mere 1/32" less). (2 E.R. 135.) Again, this evidence is meaningless unless tire rotations and tire replacements are taken into account.

Plaintiffs below offered no other evidence in support of their position other than meaningless and inconsistent temperature measurements by Lepper. (2 E.R. 135.) In some of Lepper's measurements, the temperatures on the rear tires were higher than on the front, but on other occasions the temperatures on the inner edge of the rear tires were equal to or lower than the temperatures on the inner edge of

the front tires. (3 S.E.R. 779.) In addition, Lepper also observed higher temperatures on the inner edge of Plaintiffs' modified, allegedly non-defective Focus. (3 S.E.R. 743, 761-763.) Besides, Plaintiffs simply ignored Hauser's testimony that, after the first replacement of her front tires, there was no unusual wear and that the wear she observed was not uneven but "straight across." (1 S.E.R. 150:5-7.)

Daniel. Finally, as with the other Plaintiffs, there is no evidence that Daniel's vehicle experienced excessive inner edge rear tire wear. On the contrary, all of the evidence indicates that Daniel's tires wore evenly, and all four tires were worn to 3/32 of an inch at 20,723 miles (when Daniel was also told she needed to have her vehicle aligned). (1 S.E.R. 178:5-22.) Even Plaintiffs' expert Lepper was unable to find any evidence of inboard-edge tire wear on the rear tires of Daniel's vehicle. (1 S.E.R. 265:25-266:3.)

The district court addressed this issue with respect to Daniel (but not with respect to the other Plaintiffs) in connection with her Song-Beverly implied warranty claim, and it concluded that the evidence created a genuine issue of material fact. (1 E.R. 18-20.) The principal evidence on which the district court relied was testimony from Lepper, who said he observed inboard tire wear on photographs provided by Daniel. (1 E.R. 19-20.) But a mere two days after the Complaint in this litigation was filed, Daniel had the tires in the photographs

removed from her vehicle and destroyed. (1 S.E.R. 219.) This was at a time when her duty to preserve evidence had been triggered and any reasonable person would have known how critical the tires were to the fair litigation of her claims. Plaintiffs themselves understood that they could not rely on Daniel's photographs under these circumstances (*see*, *e.g.*, *In re Napster, Inc. Copyright Litigation*, 462 F. Supp. 2d 1060, 1067 (N.D.Cal.2006)), and they expressly disclaimed any reliance on them. (2 E.R. 138 n.9.) The district court apparently overlooked the fact that Plaintiffs could not properly rely, and were not in fact relying, on these photographs. And without those photographs, Plaintiffs have no evidence at all to support their claim.

2. Ford Owed No Duty Of Disclosure Because It Did Not Have Exclusive Knowledge Of The Allegedly Material Facts When Plaintiffs Purchased Their Vehicles.

Under the CLRA, "plaintiffs must sufficiently allege that a defendant was aware of a defect at the time of sale to survive a motion to dismiss." *Wilson*, 668 F.3d at 1145. In the district court, Ford pointed out that it has produced thousands of pages of documents in this case that show, indisputably, that Ford has been looking at issues relating to tire wear in all of its vehicles, including the Focus, at least since model year 2000, and that some Ford employees, particularly after 2008, expressed concern about tire wear in the Focus. Whether those concerns were ever warranted with respect to model years 2005 and later is a matter of

debate, but one fact cannot be disputed: in all of the thousands of pages of documents produced by Ford, not a single Ford employee with responsibility for the suspension or the tires has *ever* expressed any concern that any tire wear issue in the Focus as marketed and sold would create any safety concern. As discussed above, Ford had no duty to disclose non-safety defects. Therefore, the indisputable fact that Ford never knew of any safety issue related to tire wear was dispositive and required summary judgment against all Plaintiffs.

But even assuming this was not dispositive, summary judgment was still required because Plaintiffs presented no substantial evidence that Ford had exclusive knowledge of the alleged defect at the time any of them purchased their vehicles.

Glass. When Glass purchased her vehicle in April 2005, Ford's tire-wear testing showed that Focus tires met all of Ford's standards and there was no data from the field to indicate that tire wear was a problem. (2 S.E.R. 306, 514-515, 523-526.) Warranty claims for tire wear in earlier model Focuses had been somewhat worse than the corporate average, but Ford made manufacturing changes and by the time Glass purchased her vehicles warranty rates for the 2005 Focus were *better* than the corporate average. (2 S.E.R. 553.) These are facts, plain and simple; they are supported by contemporaneous documents and they are not reasonably subject to dispute. *Id.* Plaintiffs presented no evidence that in April

2005 any Ford engineer believed that the suspension in Focus vehicles was defective because of a potential for excessive wear of any kind, let alone evidence that any such nonexistent defect created a safety hazard.

Duarte. Duarte purchased her vehicle in February 2007. At that time, Ford engineers responsible for studying the issue continued to believe that "[w]arranty data indicates no significant tire wear issues for the 2005-2006 MY." (2 S.E.R. 540.) Warranty data for 2007 was consistent with this. (2 S.E.R. 550.) Testing conducted in 2005 showed that reduction in toe gradient (the extent that toe increases during jounce) would not significantly improve tread life but would significantly degrade handling. (3 S.E.R. 725-726.) Moreover, testing in 2005 also showed that the 15" Hankook tires planned for the 2007 model year—i.e., Duarte's tires—would have even *better* wear characteristics than the 15" Goodyear tire in production at that time. (2 S.E.R. 540.) Plaintiffs presented no evidence controverting these indisputable facts.[6]

Hauser. Hauser purchased her 2009 Focus in October 2008. The evidence of Ford's knowledge at this time is not significantly different, with one exception. In August 2008, before Hauser purchased her vehicle, one Ford engineer, Paul Roberts, wrote an e-mail saying "we have a historic problem with tire wear on C170—especially the rear." (2 S.E.R. 546.) But Roberts referred to no data to

[6] In response to these arguments with respect to Glass and Duarte, Plaintiffs below relied on Ford's knowledge with respect to pre-2005 problems.

support such a conclusion with respect to 2005 models and later. And there never was any such data, let alone data in existence when Hauser purchased her vehicle two months later. In any event, Roberts was just one individual, not the personification of Ford Motor Company, and his naked opinion, unsupported by data, cannot represent what Ford "knew" at the time. This is particularly true since he had no responsibility for the Focus until March 2007 (1 S.E.R. 231:20-232:2) and thus had no involvement in the successful effort to reduce tire wear warranty for the 2005 model year, the tests that showed no additional tire wear improvement with reduced toe gradients, or the tests showing that reduced toe gradients resulted in unacceptable handling.

Daniel. Daniel purchased her vehicle in January 2011. With respect to Daniel, Ford did not argue for summary judgment on grounds that Ford was unaware of a tire wear problem at that time (although it will contend at any trial that it was never aware of a tire wear problem). Instead, as to Daniel, Ford argued that its knowledge of tire wear issues could not possibly have been exclusive or even superior. By the time Daniel purchased her vehicle, the Focus had been on the market in the United States for more than eleven years, and vehicles within the class had been on the road for more than six years. There is simply no evidence from which a reasonable jury could conclude that under such circumstances, Ford still had "exclusive" knowledge of any tire wear problems that may have existed.

Indeed, one court has characterized a substantially similar contention as "absurd." *Gray v. Toyota Motor Sales USA*, *Inc.*, No. CV 08-1690 PSG (JCx), 2012 WL 313703, at *9 (C.D. Cal. Nov. 13, 2012) (granting summary judgment because "the Court nonetheless finds absurd the idea that Toyota could have retained exclusive, or even superior knowledge of the Prius's real-world fuel performance over a three-year Class period in which hundreds of thousands of the vehicles were driven daily under the conditions at issue.").

Plaintiffs' own allegations refute any claim that Ford had exclusive knowledge of the Focus's tire wear performance in 2011. (2 E.R. 221.) In their motion for class certification Plaintiffs asserted that by 2010, Ford technicians were freely informing consumers that rapid tire wear was "a normal characteristic" of the Focus. (3 E.R. 265.) Further, Plaintiffs asserted that by 2010 there was "widespread acknowledgement among Ford dealers that the C170 Focus was indeed a tire eater," and dealership personnel were readily passing that information on to customers. (3 E.R. 266.) Indeed, a former plaintiff (McCabe) claimed that by September 2009, the tire wear issue in Focuses was so widely known that he was told by technicians at Les Schwab Tires that "Focuses were known for wearing out tires early." (1 S.E.R. 164:21-165:15.)

In short, whatever Ford knew about tire wear on the Focus in 2011 was also known, necessarily, by the general public.

C. Summary Judgment Was Required Because Plaintiffs Cannot Prove Actual Damages.

Summary judgment was required on Plaintiffs' CLRA claim for actual damages because they could not prove that they have suffered any such damages. 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, together with any additional damage arising from the particular transaction . . ." Cal. Civ. Code § 3343(a); *see Paz v. Playtex Products, Inc.*, No. 07CV2133 JM (BLM), 2008 WL 111046, at *3 (S.D. Cal. Jan. 10, 2008). Plaintiffs presented no evidence that the actual value of the vehicles they received was less than the actual price they paid.

Ford's economist, Dr. Bruce Strombom, examined resale values for 2005-2011 model year Focus vehicles and compared them to resale values of comparable vehicles without the allegedly defective rear suspension. He found that depreciation patterns for Plaintiffs' vehicles show no abnormal or excessive depreciation compared to "non-defective" vehicles, demonstrating that the market does not value the vehicles less because of the alleged defect. (2 S.E.R. 352.) Plaintiffs presented no evidence to the contrary.

Moreover, Dr. Strombom's conclusion is consistent with common sense and the realities of the marketplace. A consumer simply cannot buy a vehicle that is free of the potential for defects to occur. As the New Jersey Supreme Court has

observed, "[d]efects can, and do, arise with complex instrumentalities such as automobiles" and the "mere fact that an automobile defect arises does not establish, in and of itself, an actual and ascertainable loss to the vehicle purchaser." *Thiedemann*, 872 A.2d at 794. Indeed, Ford's warranty, which promises to repair defects if they occur within the warranty period, "is a recognition of potential defects (in a statistical sense, the inevitability of defects) in the seller's product and an allocation of risk associated with such defects." *Neuser v. Carrier Corp.*, No. 06-645, 2007 WL 484779, at *5 (W.D. Wis. Feb. 9, 2007); *accord*, *e.g.*, *In re Ford Ignition Switch Prods. Liab. Litig.*, MDL No. 1112, 1999 WL 33495352, at *6 (D.N.J. May 14, 1999) (Ford's warranty "acknowledge[s] the possibility of defects in factory-supplied materials or workmanship"); *Herbstman v. Eastman Kodak Co.*, 342 A.2d 181, 187 (N.J. 1975) (express warranty "contemplated that such defects might occur").

In other words, the price paid by all consumers for all vehicles—and, specifically, the price paid by Plaintiffs for their Focuses—necessarily reflects the potential for defects to occur. That this is true is easily demonstrated in another way: the fact that extended warranties are available, but only at additional cost. A vehicle without an extended warranty is worth less—*and the buyer will pay less*—than a vehicle with such a warranty. On the other hand, a vehicle that comes with

an extended warranty against defects is worth more than a vehicle with a shorter warranty, and the price paid by the consumer would reflect that fact.

In fact, Plaintiffs in this case do not even allege that they paid more for their vehicles than they were worth. Instead, they seek to recover the "cost of repair," i.e., the cost of retroactively redesigning their vehicle to eliminate the alleged defect. (3 E.R. 269.) Cost of repair, however, is not the proper measure of damages under Cal. Civ. Code § 3343. *Cent. Mut. Ins. Co. v. Schmidt*, 152 Cal. App. 2d 671, 676-77 (1957). In some cases (where there has been actual physical damage to a product, for example), the cost of restoring a product to its original condition is a useful method of measuring a compensable loss that is otherwise shown to have occurred. But in this case, there is no evidence of any loss at all that requires measurement. The potential for defects not covered by warranty was already factored into the price of Plaintiffs' vehicles; they paid for a warranty that covered uneven or rapid tire wear, if at all, only for a limited period of time. To award Plaintiffs the cost of repairing the alleged defect would in effect provide them with an extended warranty covering tire wear for an indefinite period at no additional cost.

D. Summary Judgment Was Required Because Plaintiffs Failed To Give The Statutorily-Required Notice.

Under 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." Cal.

Civil Code § 1782(a). If a complaint for damages is filed before notice is given, or before thirty days after notice have elapsed, the claim must be dismissed "until 30 days or more after the plaintiff complies with the notice requirements." *Morgan v. AT & T Wireless Services, Inc.*, 177 Cal. App. 4th 1235, 1261 (2009); *see also In re Bello*, Nos. SC-11-1541-JuBaPa, 10-16981, 10-90528, 2013 WL 2367796, at *4 n.6 (B.A.P. 9th Cir. May 30, 2013) (identifying the debtor's failure to allege that he had sent a timely CLRA notice as an alternative basis for dismissal of his CLRA damages claim); *Doe 1 v. AOL LLC*, 719 F. Supp. 2d 1102, 1110 (N.D. Cal. 2010) ("There is no dispute between the parties that Plaintiffs failed to provide AOL with the requisite notice under § 1782(a) or that such failure requires the dismissal of Plaintiffs' CLRA claim, insofar as it seeks damages.").

Here, there is no dispute that Plaintiffs filed their Complaint seeking CLRA damages before they gave the required notice. (3 S.E.R. 608.) Ordinarily, the remedy would be to dismiss the complaint with leave to file an amended complaint thirty days after proper notice is given. But in this case, the district court's scheduling order precluded filing an amended complaint. That order provides that "[n]o . . . amendments to the pleadings will be permitted except with leave of court, good cause having been shown under Federal Rule of Civil Procedure 16(b). *See Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604 (9th Cir. 1992)."

The district court's reference to *Johnson* is significant. In *Johnson*, this Court distinguished the liberal standard for allowing amendments under Rule 15(a) and the good cause required to amend a scheduling order required by Rule 16(b):

> Unlike Rule 15(a)'s liberal amendment policy which focuses on the bad faith of the party seeking to interpose an amendment and the prejudice to the opposing party, Rule 16(b)'s "good cause" standard primarily considers the diligence of the party seeking the amendment. The district court may modify the pretrial schedule "if it cannot reasonably be met despite the diligence of the party seeking the extension." Moreover, carelessness is not compatible with a finding of diligence and offers no reason for a grant of relief. Although the existence or degree of prejudice to the party opposing the modification might supply additional reasons to deny a motion, the focus of the inquiry is upon the moving party's reasons for seeking modification. *If that party was not diligent*, *the inquiry should end*.

Johnson, 975 F.2d at 609 (citations omitted).

Here, Plaintiffs' conduct demonstrates the carelessness and lack of diligence that precludes an amended complaint under the *Johnson* standard. Plaintiffs filed their Complaint on November 2, 2011, specifically but falsely alleging in paragraph 98 that they had provided the notice required by the CLRA. (3 E.R. 365 at ¶98.) Ford answered on January 19, 2012, expressly *denying* the allegations of paragraph 98. (3 E.R. 326 at ¶98.) A month later, on February 20, 2012, the parties filed a joint Rule 26(f) report in which Plaintiffs suggested they might amend to allege a nationwide class, but proposed no other possible amendments.

Eight months then elapsed. Finally, on October 15, 2012, Plaintiffs sent a letter to Ford's counsel admitting that "[a]s of this date Plaintiffs have not sent Ford the notice and demand required by [the CLRA]."[7] (3 S.E.R. 608.)

Plaintiffs have no excuse for any of this. If, upon receiving Ford's answer, Plaintiffs had immediately given the required notice, and thirty days later moved to amend the complaint, they might have been able to argue good cause. Instead, notwithstanding Ford's denial on January 19, 2012, it took Plaintiffs until October 15, 2012—*nine months*—to admit that they failed to give the required notice. They have no excuse other than carelessness, and under *Johnson*, "carelessness is not compatible with a finding of diligence and offers no reason for a grant of relief." 975 F.2d at 609.

When Plaintiffs purported to respond to this argument in the district court, they ignored both the district court's scheduling order and this Court's decision in *Johnson*—in effect not responding at all. Plaintiffs here were not diligent, and the inquiry should end there. Summary judgment was required on Plaintiffs' CLRA claim for actual damages.

[7] Plaintiffs finally did serve what purported to be a CLRA notice letter, but not until December 1, 2012. This letter was sent after the Complaint seeking damages was filed, not before as required by the statute, and is therefore a nullity. (3 S.E.R. 612-613.)

E. Duarte's CLRA Claim Was Barred By The Statute Of Limitations.

The CLRA provides that "[a]ny action brought under the specific provisions of section 1770 shall be commenced not more than three years from the date of the commission of such method, act or practice." Cal. Civ. Code § 1783. Assuming this statute of limitations is subject to the "discovery rule," the statute did not begin to run until "the plaintiff suspects or should suspect that her injury was caused by wrongdoing." *Ries v. Arizona Beverages USA LLC*, 287 F.R.D. 523, 534 (N.D. Cal. 2012).

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. (1 S.E.R. 99:2-11.) Thus, the three-year statute began to run no later than August 12, 2008. *See Ries* at 534. This action was not filed until November 2, 2011, more than three years later. Therefore, summary judgment against Duarte was required on her CLRA claim.

In the district court, Plaintiffs sought to avoid the statute of limitations because the "Ford dealer concealed the nature of the problem" by telling her that "the rapid wear was caused by [her] daughter's driving habits." (2 E.R. 127.) She also alleges that a Ford customer relations representative "likewise discouraged Ms. Duarte by affirmatively misrepresenting to her that 'there was no defect in [her] vehicle.'" (2 E.R. 127.)

But the fraudulent concealment doctrine on which Plaintiffs rely tolls the statute of limitations "only for that period during which the claim is undiscovered by plaintiff or until such time as plaintiff, by the exercise of reasonable diligence, should have discovered it." *Sanchez v. S. Hoover Hosp.*, 18 Cal. 3d 93, 99 (1976). Plaintiffs admitted that Duarte immediately suspected that "something was not right" and that it might have been the tires (2 E.R. 128)—thereby confirming that 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. *Stickrath v. Globalstar, Inc.*, No. C07-1941 TEH, 2008 WL 5384760, at *6 (N.D. Cal. Dec. 22, 2008) ("That he lacked technical knowledge of the cause of his phone's defective operation does not mean he lacked knowledge of the phone's defects."); *see generally Jolly v. Eli Lilly & Co.*, 44 Cal. 3d 1103, 1111 (1988) ("A plaintiff need not be aware of the specific 'facts' necessary to establish the claim; that is a process contemplated by pretrial discovery. Once the plaintiff has a suspicion of wrongdoing, and therefore an incentive to sue, she must decide whether to file suit or sit on her rights. So long as a suspicion exists, it is clear that the plaintiff must go find the facts; she cannot wait for the facts to find her").

In short, Duarte "was already on notice of her potential claim," and the fraudulent concealment doctrine on which Plaintiffs rely "does not apply."

Santangelo v. Bridgestone/Firestone, Inc., 499 F. App'x 727, 730 (9th Cir. 2012). "The doctrine of fraudulent concealment [for tolling the statute of limitations] does not come into play, whatever the lengths to which a defendant has gone to conceal the wrongs, if a plaintiff is on notice of a potential claim." *Id.* (quoting *Rita M. v. Roman Catholic Archbishop*, 187 Cal. App. 3d 1453, 1460 (1986)); *accord California Sansome Co. v. U.S. Gypsum*, 55 F.3d 1402, 1409 n. 12 (9th Cir. 1995).

II. THE DISTRICT COURT CORRECTLY HELD THAT FORD WAS ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFFS' UCL OMISSION CLAIM.

A. Summary Judgment Was Required On Plaintiffs' UCL Claim Because Ford Owed No Duty Of Disclosure And Because Plaintiffs Could Not Prove They Would Have Seen A Disclosure.

Like their CLRA claim, Plaintiffs' UCL claim is premised solely on Ford's failure to disclose the alleged defect. A failure to disclose is not actionable under the UCL, just as it is not actionable under the CLRA, absent a duty to disclose. *See*, *e.g.*, *Daugherty v. Am. Honda Motor Co.*, 144 Cal. App. 4th 824, 835, 838 (2006); *Smith*, 749 F. Supp. 2d at 996-97. Further, Plaintiffs have no standing to pursue a UCL claim unless they can prove that the failure to disclose caused an injury, which in turn requires proof that they relied on the omission. *See*, *e.g.*, *In re Tobacco II*, 46 Cal. 4th 298, 326-27 (2009). As discussed above in connection with Plaintiffs' CLRA claim, Ford had no duty of disclosure and Plaintiffs cannot

prove reliance. Accordingly, summary judgment was required on Plaintiffs' UCL claim, just like it was required on their CLRA claim.

B. Summary Judgment Was Required On Plaintiffs' UCL Claim Because Plaintiffs Presented No Evidence To Support A Claim For Equitable Restitution.

The UCL authorizes a court to make such orders "necessary to restore to any person in interest any money or property . . . which may have been acquired" by means of such acts. Cal. Bus. & Prof. Code §§17200, 17203. 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]." It 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" and "cannot be traced to any particular funds in [the defendant's] possession." *Id.* at 1149, 1150 (emphasis added).

In this case, the funds that Plaintiffs paid for their vehicles went to dealers, not to Ford, and Plaintiffs made no attempt to trace any portion of these funds to Ford. Therefore, the relief that Plaintiffs are requesting here is not equitable in nature, and it is not the type of equitable "restitution" that can be awarded under the UCL. *See In re Ford Motor Co. E-350 Van Prods. Liab. Litig. (No. II)*, No. 03-4558 (GEB), 2010 WL 2813788, at *15 (D.N.J. July 9, 2010) (where the record

"lacks any evidence that Ford received any funds from the [plaintiff's] vehicle transaction," plaintiff's "damages claims under the California UCL . . . depend upon precluded legal damages, rather than equitable restitution"). Plaintiffs must "identify money or property that they owned, which was unlawfully, unfairly, or fraudulently obtained by [defendant]." *Fresno Motors, LLC v. Mercedes-Benz USA, LLC*, 852 F. Supp. 2d 1280, 1317-18 (E.D. Cal. 2012) (emphasis in original). Moreover, restitution must be "based on a specific amount found owing," and this measurable amount of restitution due must be supported by substantial evidence. *Colgan v. Leatherman Tool Group, Inc.*, 135 Cal. App. 4th 663, 699-700 (2006). UCL restitution recovery requires plaintiff to identify money or property that can "clearly be traced to money or property in the defendant's possession." *Colgan*, 135 Cal. App. 4th at 699; *see also Groupion, LLC v. Groupon, Inc.*, 859 F. Supp. 2d 1067 (N.D. Cal. 2012) (dismissing all UCL money damage claims at summary judgment).

In the district court, Plaintiffs conceded that they were required to "identif[y] the 'sums Plaintiffs or any other party paid to [the defendant],' . . . either (as set out above) directly or indirectly." (2 E.R. 119, quoting *Fresno Motors*, 852 F. Supp. 2d at 1317-18.) But then, inexplicably, Plaintiffs abandoned any attempt to identify the amount paid to Ford, either directly or indirectly, and pointed instead to the total amounts they paid to dealerships, with no attempt to trace any of that

amount to Ford. Absent any evidence at all to support their claim for equitable restitution, summary judgment was required. *See Groupion*, 859 F. Supp. 2d at 1083 (summary judgment granted on UCL claims where "Groupion has not submitted any evidence, or even argument, to show that Groupon obtained money from Groupion or that Groupion otherwise has an ownership interest of any of Groupon's profits").

III. THE DISTRICT COURT CORRECTLY HELD THAT FORD WAS ENTITLED TO SUMMARY JUDGMENT ON THE SONG-BEVERLY IMPLIED WARRANTY CLAIMS OF GLASS, DUARTE, AND HAUSER.

A. Summary Judgment Was Required Because Glass, Duarte, and Hauser Did Not Have To Replace Their Tires Until After The One-Year Warranty Period Had Expired.

The implied warranty of merchantability arising under the Song-Beverly Act is expressly limited by statute to a period of one year. Civ. Code § 1791.1(c) ("in no event shall such implied warranty have a duration of . . . more than one year following the sale of new consumer goods to a retail buyer"). Glass, Duarte, and Hauser did not have to replace their tires until after this one-year period had expired. The district court correctly granted summary judgment against Glass, Duarte, and Hauser for this reason. *See*, *e.g.*, *Tietsworth v. Sears, Roebuck & Co.*, 720 F. Supp. 2d 1123, 1142 (N.D. Cal. 2009); *Henderson v. Volvo Cars of North America, Inc.*, No. 09-4146 (DMC)(JAD), 2010 WL 2925913, at *13 (D.N.J. 2010); *Marchante v. Sony Corp. of America, Inc.*, 801 F. Supp. 2d 1013, 1022

(S.D. Cal. 2011); *Hovsepian v. Apple, Inc.*, Nos. 08-5788 JF (PVT), 09-1064 JF (PVT), 2009 WL 2591445, at *8 (N.D. Cal. Aug. 21, 2009); *Atkinson v. Elk Corp. of Texas*, 142 Cal. App. 4th 212, 231-232 (2006).

Here, as in the district court, Plaintiffs rely on *Mexia v. Rinker Boat Co.*, 174 Cal. App. 4th 1297 (2009), to support a position that would effectively nullify the one-year limit on the duration of the implied warranty. (2 E.R. 120-121.) As Plaintiffs interpret the Act, a consumer who did not experience a latent defect until ten or twenty years after sale—or, indeed who has never experienced the alleged defect at all—can still recover for breach of the Song-Beverly implied warranty. Under Plaintiffs' interpretation of the Act, if a consumer can prove that the defect existed at the time of sale, the consumer can maintain an action. If the consumer cannot prove that a defect existed at the time of sale, the consumer's claim would be barred for that reason. In either case, the one-year limitation on the duration of the warranty would be rendered meaningless. Thus, as numerous courts have recognized, Plaintiffs' interpretation of the Song-Beverly Act would "render [] meaningless any durational limits on implied warranties. Every defect that arises could conceivably be tied to an imperfection existing during the implied warranty period." *Marchante*, 801 F. Supp. 2d at 1022; *accord Hovsepian*, 2009 WL 2591445, at *8 n.7 ("any component failure could be characterized as having been caused by a latent defect, and thus if [mere existence during the warranty period

were sufficient] the time limitation imposed by § 1791.1(c) would be meaningless"). In fact, one court has characterized the same basic argument as "non-sensical." *Cannon Technologies*, *Inc. v. Sensus Metering Systems*, *Inc.*, 734 F. Supp. 2d 753, 762-763 (D. Minn. 2010).[8]

"Non-sensical" as it may be, Plaintiffs' argument does find some arguable support in the California Court of Appeal's decision in *Mexia.* But read as Plaintiffs read it, *Mexia* is inconsistent both with established California law and with the express language of the statute. *See*, *e.g.*, *Atkinson*, 142 Cal. App. 4th 212 (2006); *Rossi v. Whirlpool Corp.*, No. 12-CV-125-JAM-JFM, 2013 WL 1312105, at *5 (E.D. Cal. Mar. 28, 2013) ("*Mexia* is an outlier and [the court] declines to apply it in this case."); *Marchante*, 801 F. Supp. 2d at 1022 ("And in that vein, *Mexia* enjoys the limelight as a case 'contrary to established California case law with respect to the duration of the implied warranty of merchantability.'"); *Hovsepian*, 2009 WL 2591445, at *8 n.7 ("the *Mexia* decision appears to be contrary to established California case law with respect to the duration of the implied warranty of merchantability").

Plaintiffs' position is that limitations on the duration of the implied warranty are so inequitable that the California legislature could not have intended to impose

[8] *Cannon Technologies* involved a time-limited express warranty rather than a time-limited implied warranty, but for present purposes this distinction is irrelevant. In either case the time limit would become meaningless if the mere presence of a latent defect during the express or implied warranty period were actionable.

such a drastic limitation. But this argument reflects unfamiliarity with the relevant legal principles and commonly accepted commercial practice. The Uniform Commercial Code, as adopted by most state legislatures, expressly allows the *complete disclaimer* of implied warranties. UCC § 2-316. With respect to consumer goods, the Magnuson-Moss Warranty Act adopted by Congress also permits the *complete disclaimer* of implied warranties in those cases where the seller does not provide an express warranty. 15 U.S.C. § 2308. Even in those cases where the seller does provide an express warranty, Magnuson-Moss expressly permits the seller to limit the duration of the implied warranty. *Id.* Sellers commonly do limit the duration of the implied warranty—and courts routinely enforce such limitations. *See*, *e.g.*, *Bush v. Am. Motors Sales Corp.*, 575 F. Supp. 1581, 1583 (D. Colo. 1984) ("[T]here are numerous examples where warranties such as the one in the present case have been found to be reasonable and conscionable.").

In adopting the Song-Beverly Act, the California legislature struck a balance by (1) creating an implied warranty that could not be disclaimed and that could be enforced without regard to privity, but (2) limiting that warranty to one year. Even so limited, consumers still have the remedies provided by the UCC's implied warranty of merchantability and any express warranties provided by the manufacturer. Nothing about this scheme even suggests an inequity so profound

that courts would be justified in rewriting the Act to effectively eliminate the one-year durational limit.

Plaintiffs purport to be mystified by the reliance placed on *Atkinson* by several federal courts, including the district court here, because *Atkinson* involved a claim made under the Magnuson-Moss Act. But Plaintiffs admit that the *Atkinson* court held that Civil Code § 1791—the same Song-Beverly provision on which Ford relies here—controlled the length of the implied warranty for purposes of the Magnuson-Moss claim. (PB at 38.) Based on its interpretation of that provision, the court in *Atkinson* affirmed the trial court's decision that the claim was barred because the alleged breach occurred more than one year after sale. Thus, the many federal courts that have held that *Mexia* is contrary to *Atkinson* were unquestionably correct.[9]

Under these circumstances, this Court's decision in *Owen ex rel. Owen v. United States*, 713 F.2d 1461 (9th Cir. 1983), relied on by Plaintiffs, actually supports Ford. Here, as in *Owen*, there is a "plain conflict" with another appellate

[9] Plaintiffs rely on *Ehrlich v. BMW of North America, LLC*, 801 F. Supp. 2d 908, 924 n.10 (C.D. Cal. 2010), which distinguished *Atkinson* in a cursory footnote on the basis that "there is no indication that the Plaintiff in *Atkinson* alleged that a latent defect existed at the time of installation." This truly is mystifying. The *Atkinson* opinion makes it clear that the plaintiff did allege that the shingles were defective. *Atkinson*, 142 Cal. App. 4th at 218 ("The analysis conducted by Elk revealed that the shingles were defective . . . ."). The opinion also makes it clear that the shingles were sold in 1992 and that the damage caused by the defect was not discovered until 1998. *Id.* at 217 ("On August 15, 1992, Atkinson contracted with Pacific to re-roof his family home . . . . In January 1998, while cleaning the gutters in his roof, Atkinson noticed cracks in many of shingles . . . .). Thus, the case plainly involved a latent defect not discovered until many years after the sale.

decision, and the decision on which Plaintiffs rely would essentially write an important term out of the statutory language. This constitutes convincing evidence that the California Supreme Court would not follow Plaintiffs' interpretation of *Mexia*.

B. Summary Judgment Was Required Because Plaintiffs Glass, Duarte, and Hauser Cannot Prove That They Experienced Rear Inner-Edge Tire Wear Caused By The Alleged Defect.

Assuming that Glass, Duarte, and Hauser can somehow avoid the one-year limitation imposed by statute, summary judgment was nevertheless required. For all of the reasons discussed in detail above, Plaintiffs 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.

In the district court, Plaintiffs argued that to recover on this claim Plaintiffs did not need to prove that they *ever* experienced the defect, regardless of how much time has elapsed since the sale. (2 E.R. 122.) Thus, Plaintiffs confirmed that that their interpretation of the Song-Beverly Act would render the one-year durational limit completely meaningless.

But Plaintiffs were wrong, even disregarding the durational limit. The principles applicable specifically to implied warranty claims were explored in detail in *American Honda Motor Co. v. Superior Court*, 199 Cal. App. 4th 1367 (2011). The California Court of Appeal in that case recognized that a "breach of

[implied] warranty cannot result if the product operates as it was intended to and does not malfunction during its useful life." *Id.* at 1375. Thus, a plaintiff seeking to recover for breach of implied warranty must establish that the defect has caused the product to malfunction, unless the plaintiff can prove that the defect is "substantially certain" to result in malfunction during the useful life of the product. *Id.*.[10]

Here, Plaintiffs (1) did not argue in opposition to summary judgment that the defect was "substantially certain" to occur and (2) did not cite or rely on any *evidence* that the defect is "substantially certain" to occur. Plaintiffs therefore were required to present evidence that Glass, Duarte, and Hauser's vehicles actually experienced the defect at some point. Because they failed to present such evidence, summary judgment was properly granted.

IV. THE DISTRICT COURT CORRECTLY HELD THAT FORD WAS ENTITLED TO SUMMARY JUDGMENT ON THE EXPRESS WARRANTY CLAIMS OF DUARTE AND DANIEL.

A. Summary Judgment Was Required Because The Express Warranty Applies Only To Manufacturing Defects And Does Not Apply To Worn Out Tires.

Plaintiffs' express warranty claim is predicated on a design defect in the rear suspension that caused their tires to wear out prematurely. But the warranty

[10] It is not clear, and the court in *American Honda* did not explain, how allowing recovery for a defect that has never occurred, but that is substantially certain to occur at some indefinite time in the future, can be reconciled with the one-year durational limit of the Song-Beverly implied warranty.

provided by Ford expressly excludes worn out tires. Moreover, as the district court held, that warranty expressly applies only to "manufacturing defects." Thus, this claim has no merit. *See Cooper v. Samsung Electronics Am., Inc.*, 374 F. App'x 250, 253-54 (3d Cir. 2010) (dismissing express warranty claim based on design defect where "the plain language of the Warranty covers only 'manufacturing defects in materials and workmanship . . . .'").

On appeal, as below, Plaintiffs simply ignore that portion of the warranty that expressly provides that it "does not cover . . . worn out tires." Further, the district court was correct in holding that the NVLW covered only manufacturing defects. The warranty booklet provided by Ford expressly identifies the operative terms of the NVLW:

> 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 dealerships will, without charge, repair, replace, or adjust all parts on your vehicle that malfunction or fail during the applicable coverage period *due to a manufacturing defect in factory supplied materials or factory workmanship*.

(PB at 42.) Plaintiffs rely on language which appears later in the booklet:

> 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.

Id. On its face, this language refers to the NVLW but does not constitute the NVLW and does not purport to set forth the terms of the NVLW. As the district court held, it does not purport to expand the coverage set forth in the NVLW, and it merely "expresses the general aims of the [New Vehicle Limited Warranty]." As the district court further noted (1 E.R. 21), this interpretation of the warranty is consistent with the general rule that "express warranties covering defects in materials and workmanship exclude defects in design." *Troup v. Toyota Motor Corp.*, --- F. App'x ----, 2013 WL 6085809, at *1 (9th Cir. Nov. 20, 2013) (citing *Daugherty*, 144 Cal. App. 4th at 830). *See also In re Toyota Corp. Unintended Acceleration Litig.*, 754 F. Supp. 2d 1145, 1181 (C.D. Cal. 2010).

B. Summary Judgment Was Required Because Plaintiffs Duarte and Daniel Cannot Prove That They Experienced Uneven Inner-Edge Rear Tire Wear Caused By The Alleged Defect.

Even assuming that the warranty can somehow be interpreted to cover worn out tires caused by design defects, summary judgment was still required because, for all of the reasons discussed in detail above, neither Duarte nor Daniel can prove that they ever experienced excessive inboard edge tire wear caused by the alleged defect. *See*, *e.g.*, *Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017, 1022-23 (9th

Cir. 2008) (express warranty does not cover repairs made after applicable time period); *Daugherty*, 144 Cal. App. 4th at 830-31 (same).

CONCLUSION

The judgment of the district court should be affirmed in all respects.

Dated: February 7, 2014

Respectfully submitted,

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STATEMENT OF RELATED CASES

Ford is 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 13,908 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

Dated: February 7, 2014

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9th Circuit Case Number(s) 13-16476

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