

For the reasons set forth below, Defendant’s motion to dismiss is **GRANTED** in part and **DENIED** in part as follows: Plaintiffs’ California Consumer Legal Remedies Act (the “CLRA”) claim (Count I) is dismissed without prejudice; Plaintiffs’ breach of express warranty claim under Cal. Com. Code § 2313 (Count V) is dismissed without prejudice, except it is dismissed with prejudice insofar as it arises from Defendant’s alleged failure to repair or replace a component suffering from a design defect; Plaintiffs’ Magnuson-Moss Warranty Act (the “MMWA”) claim (Count IV) arising from their breach of express warranty claim is dismissed without prejudice, except it is dismissed with prejudice insofar as it is based on Defendant’s alleged failure to repair or replace a component with a design defect; Plaintiffs’ MMWA claim (Count IV) arising from their Song-Beverly Consumer Warranty Act (the “Song-Beverly Act”) breach of implied warranty claim is dismissed with prejudice only as to those Class members who purchased their Class Vehicles outside of California; Plaintiffs’ California Unfair Competition Law (the “UCL”) claim (Count II) for fraudulent business practices is dismissed without prejudice; and Plaintiffs’ remaining UCL claim (Count II) is dismissed with prejudice to the extent that Plaintiffs seek to enjoin Defendant to perform a recall of the Class Vehicles “pursuant to applicable NHTSA guidelines.” Plaintiffs’ remaining claims survive.

I. Procedural and Factual Background

The following allegations are taken from Plaintiffs’ Amended Complaint and are assumed as true for the purposes of this motion to dismiss. FCA, also known as Fiat Chrysler Automobiles, designs, manufactures, markets, distributes, services, repairs, sells, and leases passenger vehicles, nationwide and in California. Am. Compl. ¶ 44. A number of the models that Defendant produces

Civil Code § 1761(d).” *Id.* The “Implied Warranty Sub-Class” is comprised of “[a]ll members of the Class who purchased or leased their vehicles in the State of California.” *Id.*

are equipped with the ZF 9HP Automatic Transmission (the “Class Vehicles”), which Plaintiffs allege, based on information and belief, “contains one or more design and/or manufacturing defects in that the transmission exhibits rough, delayed, or sudden shifting or failure to shift; grinding or other loud noises during shifting; harsh engagement of gears; sudden or harsh accelerations/decelerations; sudden loss of power; premature transmission wear; and transmission failure” (the “Transmission Defect”). Am. Compl. ¶ 10.

The ZF 9HP Automatic Transmission differs from a traditional transmission, because it employs a “9.8 ratio spread, as opposed to a 6, allowing for shorter shifts between gears, keeping the engine speed as low as possible, and contributing to greater fuel-efficiency” and “engages the dog clutches with computer software commands from an electronic control unit[, the transmission control module,] in order to save space and ensure that the complex transmission actually fits inside the vehicles.” Am. Compl. ¶ 7. Plaintiffs allege, “based on information and belief acquired through publicly available information,” that the Transmission Defect “stems from the Transmission Control Module and its software.” Am. Compl. ¶ 11. Plaintiffs further allege, on information and belief, that all FCA vehicles that are equipped with the ZF 9HP Automatic Transmission suffer from the Transmission Defect, including, but not limited to, the 2014 Jeep Cherokee, the 2015 Jeep Cherokee, the 2015 Chrysler 200, and the 2015 Jeep Renegade. Am. Compl. ¶ 1

Nava is a citizen of the State of California, who resides in Oceanside, California. Am. Compl. ¶ 35. On or about June 17, 2014, Nava purchased a new 2014 Jeep Cherokee, equipped with a ZF 9HP Automatic Transmission, from an authorized FCA dealer in San Diego County, California. Am. Compl. ¶ 36. The vehicle was manufactured, sold, distributed, advertised, marketed, and warranted by Defendant. Am. Compl. ¶ 37. Within the first nine months of

purchase, Nava noticed symptoms of a transmission defect with her vehicle, including shuddering, jerking, hesitating before accelerating and before a stop, and jolting forward when the gears actually engaged. Am. Compl. ¶ 40. On or about May 6, 2015, with approximately 23,332 miles on the odometer, Nava brought her vehicle to an authorized FCA dealer in Carlsbad, California, complaining that “the vehicle was hesitating when accelerating from a stop, followed by ‘jerking’ when the vehicle actually did accelerate.” Am. Compl. ¶ 41. According to Plaintiffs, in response to Nava’s complaints, the dealership updated the software of the powertrain control module and the transmission control module. *Id.* Plaintiffs allege that despite this software update, Nava continues to experience the same symptoms of a transmission defect, including shuddering, vibrating, rough shifting, jerking, and sudden acceleration and deceleration. Am. Compl. ¶ 42.

The Granillos are citizens of the State of California, who reside in Hesperia, California. Am. Compl. ¶ 25. On or about October 4, 2014, the Granillos purchased a new 2015 Jeep Cherokee, equipped with a ZF 9HP Automatic Transmission, from an authorized FCA dealer in San Bernadino County, California. Am. Compl. ¶ 26. The vehicle was manufactured, sold, distributed, advertised, marketed, and warranted by Defendant. Am. Compl. ¶ 27. Within the first month of their purchase, the Granillos noticed symptoms of a transmission defect, including rough and erratic shifting and loud clunking noises that occurred during shifting. Am. Compl. ¶ 30. On November 19, 2014, the Granillos brought their vehicle back to the dealer, complaining that the vehicle “was not shifting” and was “making a clunk nosie [sic].” Am. Compl. ¶ 31. At the time, the vehicle’s odometer read approximately 1,316 miles. *Id.* An FCA-certified service technician inspected the Granillos’ vehicle, and “confirmed that the vehicle was ‘stuck in 4th gear.’” *Id.* In an attempt to repair these problems, the technician updated the software on the powertrain and transmission control modules. *Id.* Nonetheless, on December 11, 2014, with approximately 1,780

miles on the odometer, the transmission in the Granillos' vehicle completely shut down while driving on a major freeway. Am. Compl. ¶ 32. The Granillos returned to the dealer with their vehicle. *Id.* The dealer's technician completely replaced the transmission in the Granillos' vehicle and determined that no further actions were required. *Id.* According to Plaintiffs, however, even with the replacement transmission, the Granillos continued to experience symptoms of a transmission defect, including shuddering, rough shifting, and jerking. Am. Compl. ¶ 33.

Plaintiffs allege, based on information and belief, that as early as October 2013,

FCA knew about the Transmission Defect through sources not available to consumers, including the following: pre-release testing data; early consumer complaints about the Transmission Defect to Defendant's dealers who are its agents for vehicle repairs; warranty claim data related to the defect; aggregate data from FCA's dealers and reports to FCA's Service Technical Assistance Resource ("STAR") Center, its engineer/technical team; consumer complaints to the NHTSA and resulting notice from NHTSA; early consumer complaints on websites and internet forums; dealership repair orders; testing conducted in response to owner or lessee complaints; technical service bulletins ("TSBs") applicable to the Class Vehicles; and other internal sources of aggregate information about the problem.

Am. Compl. ¶ 63. Specifically, Plaintiffs allege that according to news reports, the initial release of the 2014 Jeep Cherokee was delayed, "due to glitches in 'the software that controls how the SUV's nine-speed transmission interact[s] with its innovative disconnecting drivetrain.'" Am. Compl. ¶ 52. Additionally, Plaintiffs list 45 alleged Class Vehicle user complaints, taken from third-party websites, of symptoms similar to those experienced by Plaintiffs. Am. Compl. ¶¶ 59-60. These complaints were publicly posted between January 23, 2014 and June 30, 2015. *Id.* Finally, Plaintiffs allege that between November 14, 2013 and March 4, 2015, Defendant issued six technical service bulletins ("TSBs") to its dealers in the United States, regarding various defects with the ZF 9HP Automatic Transmission.² Am. Compl. ¶¶ 65-67. The bulk of these TSBs appear

² According to the Amended Complaint, Defendant issued the following TSBs:

to address problems with the software of the transmission control module in the transmissions of certain of the Class Vehicles. *Id.* The TSBs instruct dealers to update the transmission control module's software to resolve these problems. *Id.* Only one of the TSBs appears to address a physical defect with the ZF 9HP Automatic Transmission in some 2014-2015 Jeep Cherokees and 2015 Chrysler 200s. Am. Compl. ¶ 67. The provided solution to this defect is to remove,

(1) On or around November 14, 2013, Defendant issued TSB #SB-21-013-13 to its dealers, covering the 2014 Jeep Cherokee, and "informed them of the procedure to be followed in the event customers 'indicate that their transmission shift quality does not meet their expectations' and poor shift quality is identified during 'New Vehicle Preparation 'Road Test.'"

Am. Compl. ¶ 65.

(2) On or around December 19, 2013, Defendant issued TSB #SB-21-014-13 to its dealers, covering the 2014 Jeep Cherokee, and informed them that "ON SOME JEEPS, WITH NEW SOFTWARE ROBUSTNESS IMPROVEMENTS, EXPERIENCING INCONSISTENT AND/OR HARSH1-2 or 2-3 UPSHIFTS."

Am. Compl. ¶ 65.

(3) On or around May 15, 2014, Defendant issued TSB #21-018-14, "which supersedes the December 2013 TSB (#SB-21-014-13) previously mentioned, addressed customer complaints regarding the 2014 Jeep Cherokee transmission's poor shifting and included a 'five-minute software reset' and, in some cases, a 78-minute 'adaptive drive learn' test performed by the service technician to ensure appropriate shifting."

Am. Compl. ¶ 66.

(4) On or around October 1, 2014, Defendant issued TSB #81-016-1053, covering the 2014-2015 Jeep Cherokees and 2015 Chrysler 200, informing dealers that the "TRANSMISSION MAY NOT ALLOW THE TRANSAXLE TO SHIFT GEAR DUE TO TRANSMISSION CONTROL MODULE SOFTWARE."

Am. Compl. ¶ 67.

(5) In February 2015, Defendant issued TSB #21-008-15, covering the 2014-2015 Jeep Cherokees and 2015 Chrysler 200, providing to dealers "INFORMATION REGARDING AN ISSUE, ON SOME VEHICLES, WHEREBY 5-4 DOWNSHIFTING, IS LESS THAN DESIRED AND MALFUNCTION INDICATOR LAMP (MIL) WILL ILLUMINATE AND REMOVING, DISASSEMBLING AND REPLACING C-CLUTCH SNAP RING AND TRANSMISSION."

Am. Compl. ¶ 67.

(6) On or around March 4, 2015, Defendant issued TSB #21-015-15, relating to its release of a third transmission software update for vehicles equipped with the ZF 9HP Automatic Transmission, in response to consumer complaints reporting conditions such as "sudden lunges from unexpected downshifts, a lack of kickdown upon entering highways, front-axle vibration in low gears, and complete failures in which the transmission shifts into neutral while driving and lights up the dash with warning lights."

Am. Compl. ¶ 67.

disassemble, and replace the C-clutch snap ring and the transmission. Am. Compl. ¶ 67. Based on (1) the delay of the 2014 Jeep Cherokee's release, (2) consumer complaints posted on third-party websites, and (3) TSBs issued by Defendant, Plaintiffs allege that Defendant had knowledge of the Transmission Defect, at least as early as October 2013.

According to Plaintiffs, despite knowledge of the Transmission Defect, Defendant continued to sell and lease Class Vehicles, including the vehicles purchased by the Granillos and Nava, without disclosing the Transmission Defect or its associated symptoms to purchasers. Am. Compl. ¶ 22. Plaintiffs further allege that Defendant actively concealed the Transmission Defect and its symptoms from Plaintiffs and Class Members at the time of purchase, lease, repair, and thereafter. Am. Compl. ¶ 71. Plaintiffs allege, based on information and belief, that after Defendant attempted to fix the Transmission Defect through TSBs and software updates, consumers continued to experience problems with their vehicles. Am. Compl. ¶ 74. Plaintiffs further allege, on information and belief, that the software upgrades outlined by the TSBs issued by Defendant were ineffective at addressing the alleged defect. Am. Compl. ¶ 77.

Plaintiffs bring five causes of action against Defendant: (1) Violation of California's Consumer Legal Remedies Act (the "CLRA"), Cal. Civ. Code § 1750, *et seq.*; (2) Violation of California's Unfair Competition Law (the "UCL"), Cal. Bus. & Prof. Code § 17200, *et seq.*; (3) Breach of Implied Warranty Pursuant to Song-Beverly Consumer Warranty Act (the "Song-Beverly Act"), Cal. Civ. Code §§ 1792, 1791.1, *et seq.*; (4) Breach of Implied and Express Warranty under the Magnuson-Moss Warranty Act (the "MMWA"), 15 U.S.C. § 2303, *et seq.*; and (5) Breach of Express Warranty under Cal. Com. Code § 2313. As relief, Plaintiffs seek (1) a declaration that Defendant is "financially responsible" for notifying vehicle owners of the alleged defect and the need for "periodic maintenance"; (2) an order enjoining Defendant "from further

deceptive distribution, sales, and lease practices with respect to the Class Vehicles”; (3) an order compelling Defendant to “issue a recall” of the Class Vehicles “pursuant to the applicable NHTSA [National Highway Traffic Safety Administration] guidelines”; (4) an order compelling Defendant to “remove, repair and/or replace the ZF 9HP Automatic Transmission”; (5) an order enjoining Defendant “from selling the Class Vehicles with misleading information”; (6) an order compelling Defendant “to reform its warranty . . . to cover the injury alleged”; (7) an order that Defendant “comply with” and “make all . . . disclosures” required by the Song-Beverly Act; (8) an order compelling Defendant to disgorge profits or make “full restitution” to Plaintiffs and the Class; and (9) compensatory damages, exemplary damages, statutory damages, attorneys’ fees, and interest. Am. Compl. ¶ 159.

On July 28, 2015, Plaintiffs filed suit against Defendant in the Superior Court of California. On November 11, 2015, Plaintiffs amended their Complaint. On September 30, 2015, Defendant removed the case to the Federal District Court in the Central District of California. The matter was transferred to the District of New Jersey on January 11, 2016. On January 21, 2016, Defendant filed the instant motion to dismiss all counts of the Amended Complaint, pursuant to Federal Rule of Civil Procedure 12(b)(6). For the reasons set forth below, Defendant’s motion to dismiss is **GRANTED** in part and **DENIED** in part.

II. Standard of Review

A. Rule 12(b)(6)

Under Rule 12(b)(6), a complaint may be dismissed for “failure to state a claim upon which relief can be granted.” Fed. R. Civ. P. 12(b)(6). When reviewing a motion to dismiss on the pleadings, courts “accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the complaint,

the plaintiff may be entitled to relief.” *Phillips v. Cnty. of Allegheny*, 515 F.3d 224, 233 (3d Cir. 2008) (quotations omitted). Under such a standard, the factual allegations set forth in a complaint “must be enough to raise a right to relief above the speculative level.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Indeed, “the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). “[A] complaint must do more than allege the plaintiff’s entitlement to relief. A complaint has to ‘show’ such an entitlement with its facts.” *Fowler v. UPMC Shadyside*, 578 F.3d 203, 211 (3d Cir. 2009).

However, Rule 12(b)(6) only requires a “short and plain statement of the claim showing that the pleader is entitled to relief” in order to “give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.” *Twombly*, 550 U.S. at 555. The complaint must include “enough factual matter (taken as true) to suggest the required element. This does not impose a probability requirement at the pleading stage, but instead simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of the necessary element.” *Phillips*, 515 F.3d at 234 (citation and quotations omitted); *Covington v. Int’l Ass’n of Approved Basketball Officials*, 710 F.3d 114, 118 (3d Cir. 2013) (“[A] claimant does not have to set out in detail the facts upon which he bases his claim. The pleading standard is not akin to a probability requirement; to survive a motion to dismiss, a complaint merely has to state a plausible claim for relief.”) (citation and quotations omitted).

In sum, under the current pleading regime, when a court considers a dismissal motion, three sequential steps must be taken: first, “it must take note of the elements the plaintiff must plead to state a claim.” *Connelly v. Lane Const. Corp.*, 809 F.3d 780, 787 (3d Cir. 2016) (quotations and brackets omitted). Next, the court “should identify allegations that, because they are no more than

conclusions, are not entitled to the assumption of truth.” *Id.* (quotations omitted). Lastly, “when there are well-pleaded factual allegations, the court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.” *Id.* (quotations and brackets omitted).

B. Rule 9(b)

Additionally, Fed. R. Civ. P. 9(b) “imposes a heightened pleading requirement of factual particularity with respect to allegations of fraud.” *In re Rockefeller Ctr. Properties, Inc. Sec. Litig.*, 311 F.3d 198, 216 (3d Cir. 2002); *see also* Fed. R. Civ. P. 9(b) (“In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person’s mind may be alleged generally.”). To satisfy this heightened pleading standard, a plaintiff must state the circumstances of his alleged cause of action with “sufficient particularity to place the defendant on notice of the ‘precise misconduct with which [it is] charged.’” *Frederico v. Home Depot*, 507 F.3d 188, 200 (3d Cir. 2007) (quoting *Lum v. Bank of America*, 361 F.3d 217, 223-24 (3d Cir. 2004)). Specifically, the plaintiff must plead or allege the “date, time and place of the alleged fraud or otherwise inject precision or some measure of substantiation into a fraud allegation.” *Id.* at 200 (citing *Lum*, 361 F.3d at 224). Indeed, the Third Circuit has advised that, at a minimum, Rule 9(b) requires a plaintiff to allege the “essential factual background that would accompany ‘the first paragraph of any newspaper story’—that is, the ‘who, what, when, where and how’ of the events at issue.” *In re Suprema Specialties, Inc. Sec. Litig.*, 438 F.3d 256, 276-77 (3d Cir. 2006) (quoting *In re Rockefeller*, 311 F.3d at 216).

III. Analysis

A. California's Consumer Legal Remedies Act (Count I)

Plaintiffs allege that Defendant has violated Sections 1770(a)(5) and (7) of the CLRA “[b]y failing to disclose and concealing the defective nature of the transmissions from Plaintiffs and prospective Class Members . . . as they represented that the Class Vehicles and their transmissions had characteristics and benefits that they do not have and represented that the Class Vehicles and their transmissions were of a particular standard, quality, or grade when they were of another.” Am Compl. ¶ 94.

Under the CLRA, businesses are prohibited from using “unfair methods of competition and unfair or deceptive acts or practices undertaken by any person in a transaction intended to result or which results in the sale or lease of goods or services to any consumer.” Cal. Civ. Code § 1770(a). Section 1770(a)(5) specifically prohibits “[r]epresenting that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have” Cal. Civ. Code § 1770(a)(5). Section 1770(a)(7) prohibits “[r]epresenting that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another.” Cal. Civ. Code § 1770(a)(7).

Here, Plaintiffs concede that they are not pursuing a CLRA claim under an affirmative misrepresentation theory. Pls.’ Opp’n to Def.’s Rule 12(b)(6) Mot. to Dismiss Pls.’ Am. Compl. (“Pls.’ Opp’n Br.”) 17. Indeed, Plaintiffs base their CLRA claim entirely on the assertion that Defendant had a duty to disclose the existence of the Transmission Defect and its symptoms to Plaintiffs and Class Members, but failed to do so. *Id.* Accordingly, because Plaintiffs’ CLRA claim is “grounded in fraud,” the pleading as a whole must satisfy the particularity requirement of Rule 9(b). *Kennedy v. Samsung Elecs. Am., Inc.*, Civ. No. 14-4987, 2015 U.S. Dist. LEXIS 58554, at

*6 (D.N.J. May 5, 2015); *see also Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1122, 1127 (9th Cir. 2009).

However, the Third Circuit has cautioned that “[c]ourts must be sensitive to the fact that application of Rule 9(b) prior to discovery “may permit sophisticated defrauders to successfully conceal the details of their fraud.” *Craftmatic Sec. Litig. v. Kraftsow*, 890 F.2d 628, 645 (3d Cir. 1989) (quoting *Christidis v. Pennsylvania Mortgage Trust*, 717 F.2d 96, 99-100 (3d Cir. 1983)); *see also Rolo v. City Investing Co. Liquidating Trust*, 155 F.3d 644, 658 (3d Cir. 1998) (“Courts should . . . apply the rule with some flexibility and should not require plaintiffs to plead issues that may have been concealed by the defendants.”). Consequently, although typically fraudulent concealment must be pled with particularity under Rule 9(b), *Byrnes v. DeBolt Transfer, Inc.*, 741 F.2d 620, 626 (3d Cir. 1984), where the facts of the fraud “are peculiarly within the defendant’s knowledge or control,” courts relax the application of this rule, *Craftmatic*, 890 F.2d at 645. Generally, in cases involving corporate fraudsters, “plaintiffs cannot be expected to have personal knowledge of the details of corporate internal affairs.” *Id.* “Nonetheless, even under a non-restrictive application of the rule, pleaders must allege that the necessary information lies within [the defendant’s] control, and their allegations must be accompanied by a statement of the facts upon which the allegations are based.” *Id.*

Under California law, “[t]he well-known elements of a cause of action for fraud are: (1) a misrepresentation, which includes a concealment or nondisclosure; (2) knowledge of the falsity of the misrepresentation, i.e., scienter; (3) intent to induce reliance on the misrepresentation; (4) justifiable reliance; and (5) resulting damages.” *Cadlo v. Owens-Ill., Inc.*, 125 Cal. App. 4th 513, 519 (Cal. Ct. App. 2004); *see also Kearns*, 567 F.3d at 1126 (applying the elements of common law fraud to a CLRA claim); *Kennedy*, 2015 U.S. Dist. LEXIS 58554, at *6 (same). However,

because a plaintiff asserting a claim for fraudulent concealment is alleging a failure to act, instead of an affirmative act, she is not required to “specify the time, place, and specific content of an omission as would a plaintiff in a false representation claim.” *Kennedy*, 2015 U.S. Dist. LEXIS 58554, at *8 (quoting *MacDonald v. Ford Motor Co.*, 37 F. Supp. 3d 1087, 1096 (N.D. Cal. 2014)). Rather, given the inherent limitations of an omission claim, it suffices for a plaintiff to allege these facts more generally. *Kennedy*, 2015 U.S. Dist. LEXIS 58554, at *8; *MacDonald*, 37 F. Supp. 3d at 1096.

Defendant argues that Plaintiffs have failed to allege with sufficient specificity (1) the cause of the Transmission Defect and (2) Defendant’s knowledge of the Transmission Defect.³ Plaintiffs counter that these facts were peculiarly within the control of Defendant, and therefore assert that they have successfully pleaded these elements under a relaxed Rule 9(b) standard. The Court finds that Plaintiffs have not stated a CLRA claim, even under a relaxed Rule 9(b) standard,

³ Defendant also argues that Plaintiffs have failed to plead facts which “describe the content of the omission and where the omitted information should or could have been revealed as well as provide representative samples of advertisements, offers, or other representations that plaintiff relied on to make their purchases and that failed to include the allegedly omitted information.” FCA US LLC’s Br. in Supp. of its Rule 12(b)(6) Mot. to Dismiss Pls.’ Am. Compl. (“Def.’s Supp. Br.”) 17-18 (internal brackets omitted). However, contrary to Defendant’s assertions, Plaintiffs are not required to plead such facts to survive a motion to dismiss. *See MacDonald*, 37 F. Supp. 3d at 1096. And, indeed, Defendant improperly relies on inapplicable case law to assert such. *See id.* (“As other courts have recognized, the *Marolda* requirements are not necessarily appropriate for all cases alleging a fraudulent omission.”). Where, as here, the plaintiffs alleging omission-based fraud “cannot point out the specific moment when the Defendant failed to act,” they are not required to specify “the time, place, and specific content of an omission as would a plaintiff in a false representation claim.” *Id.* Given the inherent limitations of an omission claim, it is sufficient in the instant case, that Plaintiffs allege “who” – Defendant, “what” – knowledge of the Transmission Defect and the associated symptoms, “when” – prior to the sale of the Class Vehicles to Plaintiffs, and “where” – the various of channels of information through which Defendant sold the Class Vehicles, including Defendant’s website. *See id.* (“In short, the ‘who’ is Ford, the ‘what’ is its knowledge of a defect, the ‘when’ is prior to the sale of Class Vehicles, and the ‘where’ is the various channels of information through which Ford sold Class Vehicles.”).

because they have not pled facts supporting an inference that Defendant had knowledge of the Transmission Defect and its associated symptoms prior to Plaintiffs' purchase of their Jeep Cherokees.

Defendant asserts that to plead a CLRA fraudulent omission claim with sufficient particularity, Plaintiffs cannot allege generally that the ZF 9HP Automatic Transmission is defective based on the symptoms they have experienced, but rather, Plaintiffs must specifically identify the way in which the transmission is defective. Defendant insists that without more specific allegations regarding the cause of the Transmission Defect, Defendant cannot effectively defend itself, because it "cannot even tell if Plaintiffs are putting a manufacturing or design defect at issue, or whether the defect is actually one in the transmission." Defs.' Supp. Br. at 13. However, contrary to Defendant's assertions, to successfully bring a CLRA fraudulent omission claim, Plaintiffs do not need to specifically identify the defect in the ZF 9HP Automatic Transmission. This is because a CLRA claim turns on whether a defendant concealed or suppressed a material fact. *See Collins v. eMachines, Inc.*, 202 Cal. App. 4th 249, 255 (Cal. Ct. App. 2011). And, in the instant matter, the alleged material fact at issue is not the cause of the Transmission Defect, but rather that the Class Vehicles had been exhibiting rough, delayed, or sudden shifting, failure to shift, grinding or other loud noises during shifting, harsh engagement of gears, sudden or harsh accelerations/decelerations, sudden loss of power, premature transmission wear, and transmission failure. Regardless of what is causing these symptoms, if information about these symptoms' existence is "material" to a consumer, then fraudulent concealment of this information may form the basis of a CLRA claim. *See id.* at 256.

Under the CLRA, a fact is deemed "material" if a "reasonable consumer would deem it important in determining how to act in the transaction at issue." *Id.* (internal quotations and

brackets omitted). Plaintiffs allege that they would not have purchased their Jeep Cherokees, or would have paid less for them, had they known that their vehicles would experience the symptoms of the Transmission Defect. Am. Compl. ¶ 23. Indeed, any reasonable consumer would find the alleged symptoms material, especially because such symptoms raise safety concerns – they purportedly caused Plaintiffs’ vehicles to behave erratically and the Granillos’ vehicle to shut down on the freeway. *See Falk v. GMC*, 496 F. Supp. 2d 1088, 1096 (N.D. Cal. 2007) (finding the fact that a speedometer was faulty would be material to the reasonable consumer, driver, and passenger, because it could lead to travelling at unsafe speeds and moving violation penalties). Accordingly, contrary to Defendant’s assertions, to state a CLRA claim with specificity under Rule 9(b), it is sufficient for Plaintiffs to plead that Defendant fraudulently concealed the fact that the Class Vehicles were exhibiting the specific symptoms experienced by Plaintiffs.

Next, Defendant asserts that Plaintiffs have not pled sufficient facts to support their allegation that, “based on information and belief,” Defendant had knowledge, as early as October 2013, of the Transmission Defect and its associated symptoms. As stated *supra*, under Rule 9(b), “[m]alice, intent, knowledge, and other condition of mind of a person may be averred generally.” Fed. R. Civ. P. 9(b). However, “[w]hile state of mind may be averred generally, plaintiffs must still allege facts that show the court their basis for inferring that the defendants acted with ‘scienter.’” *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1418 (3d Cir. 1997). “As the Supreme Court has made clear, a complaint gives rise to a ‘strong inference’ of scienter ‘only if a reasonable person would deem the inference of scienter cogent and at least as compelling as any opposing inference one could draw from the facts alleged.’” *Key Equity Inv’rs Inc. v. Sel-Leb Mktg.*, 246 F. App’x 780, 785 (3d Cir. 2007) (quoting *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 324 (2007)). And furthermore, “pleading upon information and belief is [only]

permissible where it can be shown that the requisite factual information is peculiarly within the defendant's knowledge or control—so long as there are no boilerplate and conclusory allegations and plaintiffs accompany their legal theory with factual allegations that make their theoretically viable claim plausible.” *McDermott v. Clondalkin Grp., Inc.*, Civ. No. 15-2782, 2016 U.S. App. LEXIS 9316, at *9 (3d Cir. May 18, 2016) (internal quotations, brackets, and ellipses omitted) (quoting *In re Rockefeller*, 311 F.3d at 216). Thus, to allege, based on “information and belief,” that by October 2013, Defendant had knowledge of the Transmission Defect and its symptoms, Plaintiffs must (1) allege facts showing that information regarding Defendant's knowledge is peculiarly within Defendant's control and (2) allege facts that plausibly support an inference that Defendant had such knowledge at the time alleged. Plaintiffs have failed to do both.

First, under the facts alleged, it is reasonable to infer that Defendant has access to information regarding its own knowledge. And, furthermore, Plaintiffs “cannot be expected to have personal knowledge of the details of [Defendant's] corporate internal affairs.” See *Craftmatic*, 890 F.2d at 645. Accordingly, under the facts alleged, information regarding Defendant's knowledge of the Transmission Defect and its symptoms is peculiarly within Defendant's control.

However, as explained more fully below, Plaintiffs have failed to allege facts supporting an inference that, prior to June 17, 2014 and October 4, 2014, the dates on which Plaintiffs purchased their Jeep Cherokees, Defendant had knowledge that the alleged Transmission Defect was causing the ZF 9HP Automatic Transmissions to experience the alleged symptoms of transmission failure. In that regard, Plaintiffs allege facts indicating that prior to June 17, 2014, Defendant had knowledge of several defects in the ZF 9H Automatic Transmission's software that caused certain Class Vehicles to exhibit some of the symptoms exhibited by Plaintiffs' vehicles.

Importantly, however, Plaintiffs have failed to plead a connection between these alleged software defects and the Transmission Defect at issue in this case. Put differently, Plaintiffs must allege facts indicating that these alleged software defects and the Transmission Defect, are one in the same. Without this connection, Plaintiffs have failed to allege that Defendant had knowledge of the specific defect and associated symptoms at issue in this case.

Plaintiffs claim, on information and belief, that Defendant knew about the Transmission Defect since at least October 2013, because allegedly, Defendant became aware of the defect through pre-release testing data, early consumer complaints to dealers, data from dealers, warranty claim data, customer complaints to various third-party websites, dealership repair orders, testing conducted in response to owner or lessee complaints, TSBs, and “other internal sources of aggregate information about the problem.” Am. Compl. ¶ 63. However, of this long list of methods by which Defendant may have become aware of the Transmission Defect and its alleged symptoms, Plaintiffs only plead specific facts regarding three items on the list: (1) pre-release testing data, (2) consumer complaints to third-party websites, and (3) TSBs.

Regarding pre-release testing data, Plaintiffs allege that according to news reports, Defendant delayed the release of the 2014 Cherokee “due to glitches in ‘the software that controls how the SUV’s nine-speed transmission interact[s] with its innovative disconnecting drivetrain.’” Am. Compl. ¶¶ 51-53, 64. However, such allegations do not support an inference that when Defendant finally released the Class Vehicles, Defendant had not fully resolved all software defects known to it at the time. Furthermore, Plaintiffs’ pleadings do not indicate that the software glitches that allegedly delayed the release of the 2014 Jeep Cherokee are related to the Transmission Defect. Indeed, Plaintiffs do not even allege that the symptoms of these software glitches are the same symptoms experienced by Plaintiffs. For these reasons, Plaintiffs’ pleadings

regarding the delay in the release of the 2014 Jeep Cherokee do not support their allegation “on information and belief” that Defendant had knowledge of the Transmission Defect and its attendant symptoms.

Plaintiffs also include in their Amended Complaint a list of forty-five alleged Class Vehicle user complaints, taken from third-party websites, of symptoms similar to those experienced by Plaintiffs. Am. Compl. ¶¶ 59-60. However, none of these alleged complaints were posted before October 2013, only six of the complaints were posted before June 17, 2014, and only fifteen of the complaints were posted before October 4, 2014. *Id.* Firstly, these complaints certainly cannot support an inference that Defendant had the requisite knowledge as of October 2013, because they were posted after this date. *See Oliver v. Funai Corp.*, Civ. No. 14-cv-04532, 2015 U.S. Dist. LEXIS 169998, at *10 (D.N.J. Dec. 21, 2015) (consumer complaints posted after date product was purchased do not support allegation of pre-sale knowledge); *Stevenson v. Mazda Motor of Am., Inc.*, Civ. No. 14-5250 (FLW)(DEA), 2015 U.S. Dist. LEXIS 70945, at *19 (D.N.J. June 2, 2015) (consumer complaints to NHTSA made after plaintiff purchased vehicle could not show pre-sale knowledge). Moreover, regarding those few complaints that were allegedly posted prior to Plaintiffs’ purchase of their vehicles, Plaintiffs have not alleged that Defendant tracked, or was even aware of, complaints posted to the cited third-party websites. Courts in this district have repeatedly found that consumer complaints on third-party websites are not sufficient to infer a manufacturer’s knowledge of a product defect where there are no allegations that the manufacturer saw such complaints. *See Oliver*, 2015 U.S. Dist. LEXIS 169998, at *12 (“[I]mputing knowledge of a defect to a manufacturer based upon an internet posting would mean that virtually every consumer product company would be subject to fraud claims and extensive discovery. All any plaintiff would be required to show is that a product broke once and that someone had complained

about it on the internet.”) (internal quotations omitted); *Morris v. BMW of N. Am., LLC*, Civ. No. 13-4980 (JLL), 2014 U.S. Dist. LEXIS 24211, at *20 (D.N.J. Feb. 21, 2014); *Wiseberg v. Toyota Motor Corp.*, Civ. No. 11-3776 (JLL), 2012 U.S. Dist. LEXIS 45849, at *38 (D.N.J. Mar. 30, 2012) (“While anonymous Internet complaints could be relevant to the issue of knowledge, it must be shown that Toyota was aware of these complaints.”); *Rait v. Sears*, Civ. No. 08-2461 (JLL), 2009 U.S. Dist. LEXIS 70217, at *13 (D.N.J. Aug. 10, 2009). For these reasons, the consumer complaints cited by Plaintiffs do not support an inference that Defendant was aware of the Transmission Defect and its symptoms prior to Plaintiffs’ purchase of their vehicles.

Finally, Plaintiffs allege that between November 14, 2013 and March 4, 2015, Defendant issued six TSBs to its dealers in the United States, regarding various defects with the ZF 9HP Automatic Transmission. Am. Compl. ¶¶ 65-67. None of these TSBs were issued prior to October 2013, only three were issued prior to Nava’s purchase of her vehicle, and only four were issued prior to the Granillos’ purchase of their vehicle. *Id.* These four TSBs appear to address defects in the transmission control module’s software, and provide software updates to address these problems. *Id.*

First, for the same reasons that consumer complaints posted after the date of sale cannot support an inference of pre-sale knowledge, those TSBs issued after Plaintiffs purchased their vehicles do not indicate that Defendant had pre-sale knowledge of the content of those TSBs. And, certainly, none of the TSBs cited by Plaintiffs support an inference that Defendant had knowledge as of October 2013. Furthermore, even though some of the symptoms described in the TSBs are similar to those experienced by Plaintiffs, Plaintiffs have failed to allege facts indicating that the software defects addressed in the TSBs are related to the alleged Transmission Defect they experienced. *See Stevenson*, 2015 U.S. Dist. LEXIS 70945, at *14 (TSBs not evidence of

knowledge of defect at issue in case if plaintiff does not allege facts indicating that TSBs addressed the specific defect at issue in case).

Moreover, it is unclear from the Complaint that the software upgrades issued with the TSBs did not resolve all software defects known to Defendant prior to Plaintiffs' purchase of their Jeep Cherokees. Plaintiffs allege, on information and belief, that the software upgrades issued with the TSBs were ineffective at addressing these software defects. Am. Compl. ¶ 77. However, as stated *supra*, allegations based on information and belief must be accompanied by allegations of fact that render the allegation plausible. *See McDermott*, 2016 U.S. App. LEXIS 9316, at *9. Plaintiffs provide no allegations to support their bald assertion that Defendant's software updates were ineffective. And, insofar as Plaintiffs plead that their personal transmission difficulties were not resolved by the software updates provided by their dealers, this may actually indicate that the Transmission Defect originates from a different issue than the glitches that the software updates sought to address. In short, Plaintiffs have alleged no facts tying the Transmission Defect and its alleged symptoms to the software defects identified in the four pre-sale TSBs. Accordingly, these TSBs do not support an inference that Defendant had knowledge of the Transmission Defect and its resulting symptoms, prior to Plaintiffs' purchase of their vehicles.

In sum, Plaintiffs have not alleged facts sufficient to support an inference "on information and belief" that Defendant had knowledge of the alleged Transmission Defect and its symptoms, prior to Plaintiffs' purchase of their Jeep Cherokees. Consequently, Plaintiffs' CLRA claim is dismissed without prejudice.

B. Song-Beverly Consumer Warranty Act (Count III)

Plaintiffs bring a claim against Defendant for breach of the implied warranty of merchantability, in violation of the Song-Beverly Act. The Song-Beverly Act provides in pertinent

part: “[u]nless disclaimed in the manner prescribed by this chapter, every sale of consumer goods that are sold at retail in this state shall be accompanied by the manufacturer’s and the retail seller’s implied warranty that the goods are merchantable.” Cal. Civ. Code § 1792. The Song-Beverly Act is intended to protect buyers of “consumer goods” purchased in California, and defines “consumer goods” as “any new product or part thereof that is used, bought, or leased for use primarily for personal, family, or household purposes, except for clothing and consumables.” Cal. Civ. Code § 1791(a). Defendant does not dispute that Plaintiffs’ Jeep Cherokees constitute consumer goods under the Song-Beverly Act.

The Song-Beverly Act expressly creates an implied warranty of merchantability, which requires that consumer goods: “(1) pass without objection in the trade under the contract description; (2) are fit for the ordinary purposes for which such goods are used; (3) are adequately contained, packaged, and labeled; and (4) conform to the promises or affirmations of fact made on the container or label.” Cal. Civ. Code § 1791.1(a). “The core test of merchantability is fitness for the ordinary purpose for which such goods are used. Such fitness is shown if the product is in safe condition and substantially free of defects.” *Mexia v. Rinker Boat Co., Inc.*, 174 Cal. App. 4th 1297, 1303 (Cal. Ct. App. 2009) (internal quotations, brackets, and citations removed).

Plaintiffs claim that their Jeep Cherokees, and the Class Vehicles in general, “are not fit for their ordinary purpose of providing reasonably reliable and safe transportation” because they “suffered from an inherent defect at the time of sale and thereafter. . .” Am. Compl. ¶ 125. Defendant argues that Plaintiffs’ Song-Beverly breach of implied warranty claim should be dismissed because Plaintiffs have failed to plead that the vehicles were unmerchantable.

In order for a new vehicle to be merchantable under the Song-Beverly Act, in addition to providing transportation, it must also be “in safe condition and substantially free from defects.”

Brand v. Hyundai Motor Am., 226 Cal. App. 4th 1538, 1545-56 (Cal. Ct. App. 2014). Defendant asserts that under the facts alleged, Plaintiffs' vehicles are fit for the purpose of providing safe and reliable transportation, because, according to the pleadings, Plaintiffs continued to drive their vehicles even after purportedly experiencing symptoms of the Transmission Defect. However, the mere fact that a plaintiff continues to drive her allegedly defective vehicle, does not mean that the vehicle is in safe condition, is substantially free of defects, or that it can provide reliable transportation. *See Isip v. Mercedes-Benz USA, LLC*, 155 Cal. App. 4th 19, 27 (Cal. Ct. App. 2007) ("We reject the notion that merely because a vehicle provides transportation from point A to point B, it necessarily does not violate the implied warranty of merchantability."). Importantly, many of the symptoms allegedly experienced by Plaintiffs, such as rough, delayed, and sudden shifting, failure to shift, sudden or harsh accelerations/decelerations, sudden loss of power, and transmission failure raise serious safety concerns. And indeed, under the facts alleged, the Granillos' vehicle does not even appear fit to provide transportation, because it allegedly shut down while the Granillos were driving it on the highway. As such, Plaintiffs have sufficiently alleged that their vehicles are not merchantable within the meaning of the Song-Beverly Act. Accordingly, Defendant's motion to dismiss Plaintiffs' Song-Beverly Act claim is denied.

C. Breach of Express Warranty (Count V)

Plaintiffs bring a claim against Defendant for breach of express warranty, in violation of Cal. Com. Code. § 2313. Under California law, to state a claim for a breach of express warranty, a plaintiff must allege: "(1) the seller's statements constitute an affirmation of fact or promise or a description of the goods; (2) the statement was part of the basis of the bargain; and (3) the warranty was breached." *Weinstat v. Dentsply Internat., Inc.*, 180 Cal. App. 4th 1213, 1227 (Cal. Ct. App. 2010) (internal quotations omitted). "Some cases mention a fourth element: the breach caused

injury to the plaintiff.” *Wilson v. Metals USA, Inc.*, Civ. No. 2:12-CV-00568-KJM-CKD, 2016 U.S. Dist. LEXIS 86861, at *27 (E.D. Cal. July 1, 2016) (citing *Asghari v. Volkswagen Grp. of Am., Inc.*, 42 F. Supp. 3d 1306, 1333 (C.D. Cal. 2013) and *Williams v. Beechnut Nutrition Corp.*, 185 Cal. App. 3d 135, 142 (Cal. Ct. App. 1986)). “A manufacturer’s liability for breach of an express warranty derives from, and is measured by, the terms of that warranty.” *Stearns v. Select Comfort Retail Corp.*, 763 F. Supp. 2d 1128, 1144 (N.D. Cal. 2010) (quoting *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 525 (1992)).

Plaintiffs allege that Defendant provided all purchasers and lessees of the Class Vehicles with a New Vehicle Basic Limited Warranty and Power Train Limited Warranty. Am Compl. ¶¶ 152-53. According to Plaintiffs, under the New Vehicle Basic Limited Warranty, Defendant warranted to

“cover[] . . . all parts and labor needed to repair any item on [the] vehicle when it left the manufacturing plant that is defective in material, workmanship or factory preparation” . . . [and] promised to cover “any item on [the] vehicle” with the exception of tires and unwired headphones . . . for “36 months from the date it begins or for 36,000 miles on the odometer, whichever occurs first.”

Am Compl. ¶ 152. Additionally, Plaintiffs allege that under the Power Train Limited Warranty, Defendant warranted that it would

“cover[] . . . the costs of all parts and labor needed to repair a powertrain component listed in [the] section . . . below that is defective” . . . [including,] powertrain components[,] . . . the transmission and [the] transmission control module, “for up to 5 years or 100,000 miles on the odometer, whichever occurs first.”

Am Compl. ¶ 153. The express language of these warranties states that service, repairs, and part replacements under the warranties may only be provided by “an authorized Chrysler, Dodge, Jeep

or Ram dealer.”⁴ Certification of Kathleen N. Fenelly (“Fenelly Cert.”), Ex. 1 at 23, Ex. 2 at 23. In short, these warranties, with certain exceptions, promise to repair and/or replace any part of Plaintiffs’ vehicles that is “defective in material, workmanship, or factory preparation,” within a specified number of years/miles on the odometer, since the date of sale.

Under the facts alleged, when Nava and the Granillos purportedly began experiencing symptoms of the Transmission Defect, they presented their vehicles to authorized FCA dealers well within both warranties’ respective limits of 3 years/36,000 miles and 5 years/100,000 miles. Am. Compl. ¶¶ 31-32, 41. The Granillos allegedly brought their vehicle to an authorized dealer first on November 19, 2014, with approximately 1,316 miles on its odometer, and again on December 11, 2014, with approximately 1,780 miles on the vehicle’s odometer. Am. Compl. ¶¶ 31-32. Nava allegedly brought her vehicle to an authorized dealer on or about May 6, 2015, with approximately 23,332 miles on its odometer. Am. Compl. ¶ 41.

According to the Amended Complaint, every time Plaintiffs presented their vehicles to FCA authorized dealers for repair, the dealers made repairs to or replaced the apparently damaged or defective parts of Plaintiffs’ vehicles. Am. Compl. ¶¶ 31-32, 41-42. On the Granillos’ first visit to the dealer, the dealer’s technician determined that their vehicle was “stuck in 4th gear,” and attempted to resolve the issue by updating the software in the vehicle’s powertrain and transmission control modules. Am. Compl. ¶ 31. Similarly, when Nava first visited her dealer

⁴ Although Plaintiffs did not attach to the Complaint copies of the Warranty Information booklets for 2014 Jeep Cherokee and 2015 Jeep Cherokee, which contain the New Vehicle Basic Limited Warranty and Power Train Limited Warranty, the Court finds that it may properly consider both documents on this motion to dismiss, as these documents are integral to the pleadings. *See In re Burlington*, 114 F.3d at 1426 (A “document integral to or explicitly relied upon in the complaint may be considered without converting the motion [to dismiss] into one for summary judgment.”) (quotations omitted).

complaining of the alleged symptoms of the Transmission Defect, the dealer's technician attempted to resolve these problems by updating the software in the vehicle's powertrain control module and the transmission control module. Am. Compl. ¶ 41. When the Granillos returned to their dealer a second time, after allegedly continuing to experience symptoms of the Transmission Defect, the dealer replaced their vehicle's entire transmission. Am. Compl. ¶ 32. Nothing in the Amended Complaint indicates that Plaintiffs were ever charged for these services. According to Plaintiffs, notwithstanding these repairs, they continued to experience symptoms of the Transmission Defect, including shuddering, rough shifting, and jerking. Am. Compl. ¶ 33, 42. Plaintiffs do not allege that they ever returned to their dealers for further repairs to their vehicles, despite the fact that Plaintiffs allegedly continued to experience these symptoms.

In the instant action, Plaintiffs do not base their breach of express warranty claim on allegations that Defendant or its authorized dealers expressly refused to repair or replace a defective component in Plaintiffs' vehicles. Nor do Plaintiffs allege that the warranties at issue obligated Defendant to repair a defect on its first attempt, and that by failing to do so, Defendant breached the warranties. Rather, Plaintiffs assert "on information and belief" that Defendant breached the warranties by having its authorized dealers "perform[] illusory repairs" – that is "purporting to repair the transmission and its component parts by replacing the defective or damaged transmission components with the same defective components and/or instituting temporary fixes, on information and belief, to ensure that the Transmission Defect manifests outside of the Class Vehicles' express warranty period." Am. Compl. ¶ 154. Defendant argues that Plaintiffs' breach of express warranty claim should be dismissed in full or in part for the following reasons: (1) Plaintiffs did not give Defendant a reasonable opportunity to fulfill its obligations under the warranty and repair Plaintiffs' vehicles; (2) Plaintiffs plead a design defect, and the

warranties at issue exclude design defects; and (3) insofar as Plaintiffs allege a defect in the ZF 9HP Automatic Transmission's software, this part of the Class Vehicles is not covered under the Power Train Limited Warranty. For the reasons set forth below, the Court finds that Plaintiffs have failed to plead a breach of either the New Vehicle Basic Limited Warranty or the Power Train Limited Warranty, because they have failed to allege facts supporting the inference that the dealers did not make good faith attempts to repair their vehicles, but rather, purposefully made "illusory repairs." In addition, the warranties at issue do not cover design defects, so Plaintiffs' breach of express warranty claim shall be dismissed with prejudice, insofar as it pertains to design defects.

i. Alleging Illusory Repairs on Information and Belief

As stated *supra*, to plead a fact based "on information and belief" Plaintiffs must "show[]" that the requisite factual information is peculiarly within the defendant's knowledge or control" and "so long as there are no boilerplate and conclusory allegations," Plaintiffs must "accompany their legal theory with factual allegations that make their theoretically viable claim plausible." See *McDermott*, 2016 U.S. App. LEXIS 9316, at *9 (internal quotations, brackets, and ellipses omitted) (quoting *In re Rockefeller*, 311 F.3d at 216). Plaintiffs have failed to plead the latter.

First, like information regarding Defendant's knowledge of the Transmission Defect and its symptoms, under the facts alleged, it is reasonable to infer that Defendant has access to information regarding its directions to its authorized dealers regarding repairs to the Class Vehicles.⁵ And, furthermore, Plaintiffs "cannot be expected to have personal knowledge of the details of [Defendant's] corporate internal affairs." See *Craftmatic*, 890 F.2d at 645. Accordingly,

⁵ The Court notes that it is somewhat unclear from the pleadings if the actions of the dealers can be attributed to Defendant as its agents. The parties, however, have not raised this issue in their briefings, and therefore I will not address it in this Opinion.

under the facts alleged, information regarding Defendant's internal policies regarding repairs of the Class Vehicles is peculiarly within Defendant's control.

However, Plaintiffs have not pled sufficient factual information to support an inference "on information and belief" that Defendant's dealers performed illusory repairs on Plaintiffs' vehicles to cause the Transmission defect to manifest outside the warranties' coverage period. Specifically, Plaintiffs allege that after they took their vehicles to Defendant's dealers for repairs, they continued to experience the same symptoms of the Transmission Defect. Am. Compl. ¶¶ 33, 42. And, according to the Amended Complaint, replacing the Granillos' entire transmission did nothing to resolve the symptoms of shuddering, rough shifting, and jerking that the Granillos' vehicle exhibited. Am. Compl. ¶ 33. While these facts support an inference that the dealers' repairs were ineffective, they do not tend to show that they were made in bad faith. Furthermore, these allegations weigh against an inference that the technicians were trying to "to ensure that the Transmission Defect manifests outside of the Class Vehicles' express warranty period."

Indeed, if, as Plaintiffs assert, the dealers were performing these illusory repairs for the sole purpose of ensuring that the Transmission Defect manifested outside the period covered by the warranties, one would expect at least some delay in the re-emergence of the symptoms of the defect after the illusory repair. But, according to Plaintiffs, the symptoms of the Transmission Defect returned soon after the dealers performed the repairs to Plaintiffs' vehicles. Furthermore, the repairs on Plaintiffs' vehicles were performed relatively early in the warranty periods – the Granillos' brought their vehicle in for repairs at 1 month/1,316 miles and 2 months/1,780 miles, while Nava brought her vehicle in to be repaired at 10 months/23,332 miles. Given that, at the time the repairs were made, the Granillos could still expect to enjoy almost the full 3 years/36,000 miles and 5 years/100,000 miles covered by the warranties, it defies all logic to assert that the dealer

replaced their entire transmission in an attempt to ensure that the Transmission Defect would only manifest outside these warranty periods. Similarly, although to a somewhat lesser extent, Nava's vehicle was still well within coverage period when Defendant's dealer allegedly pretended to repair her vehicle's software. Accordingly, the Court finds it wholly implausible that the dealer was attempting to ensure that the symptoms exhibited by Nava's vehicle would manifest again, but only 2 years/10,000 miles or 4 years/75,000 miles later.

In sum, Plaintiffs have not alleged sufficient facts to plausibly support an inference that the dealers that performed repairs on their vehicles purposefully abandoned their duties under the New Vehicle Basic Limited Warranty and the Power Train Limited Warranty for the purpose of ensuring that the Transmission Defect manifested outside the period covered by the warranties. Moreover, Plaintiffs have alleged no other theory under which Defendant may have breached its duties under these express warranties. Accordingly, Plaintiffs have failed to state a breach of express warranty claim.

ii. Design Defect Not Covered By Warranties

Defendant also argues that under the New Vehicle Basic Limited Warranty and Power Train Limited Warranty, it is not obligated to repair or replace those parts of Plaintiffs' vehicles that suffer from a design defect, but rather, it need only repair or replace those parts that suffer from manufacturing defects. Defendant further contends that under the facts alleged, the Transmission Defect appears to be a design defect. Thus, Defendant argues that Plaintiffs' breach of express warranty claim should be dismissed, because the defect at issue is not covered by the New Vehicle Basic Limited Warranty and the Power Train Limited Warranty. Plaintiffs disagree on both counts, arguing that (1) the warranties promise to repair and replace parts suffering from

both design and manufacturing defects and (2) in any case, Plaintiffs have alleged that the Transmission Defect may be a manufacturing defect and/or a design defect.

The New Vehicle Basic Limited Warranty and Power Train Limited Warranty each limit warranty coverage only to parts that are respectively, “defective in material, workmanship or factory preparation” or “defective in workmanship and materials.” Fenelly Cert., Ex. 1 at 5, 9, Ex. 2 at 5, 9. Under California law, “[a] manufacturing defect occurs when a product does not conform to the manufacturer’s intended design; a design defect occurs either when the design of the product fails to meet consumer expectations as to safety or when, on balance, the risk of danger inherent in the challenged design outweighs the benefits of the design.” *Carlin v. Superior Court*, 13 Cal. 4th 1104, 1121 (Cal. 1996) (internal citations omitted). “In California, express warranties covering defects in materials and workmanship exclude defects in design.” *Troup v. Toyota Motor Corp.*, 545 F. App’x 668, 668 (9th Cir. 2013) (citing *Daugherty v. Am. Honda Motor Co., Inc.*, 144 Cal. App. 4th 824, 830 (Cal. Ct. App. 2006)); *see also Mack Trucks, Inc. v. Borgwarner Turbo Sys., Inc.*, 508 F. App’x 180, 184 (3d Cir. 2012) (observing in applying Pennsylvania law, that absent specific language to the contrary, design defects cannot be encompassed within the meaning of defects in workmanship or materials). Thus, clearly, the Powertrain Limited Warranty, which applies only to parts “defective in workmanship and materials,” is limited to parts with manufacturing defects.

However, in addition to covering parts that are “defective in material [and] workmanship,” the New Vehicle Basic Limited Warranty also covers parts that are “defective . . . in factory preparation.” Plaintiffs argue that the addition of this “in factory preparation” language expands the coverage of the New Vehicle Basic Limited Warranty to include design defects. The Court disagrees.

Like the term “workmanship,” inherent in the terms “factory preparation,” is an implication that there are two separate steps in vehicle manufacture: (1) design and (2) assembly at a factory. *See Mack Trucks*, 508 F. App’x at 184 (“As made clear by its focus on the ‘manual’ ‘execution’ of a product, the definition of ‘workmanship’ presupposes that the product being made or assembled has already been designed. Design is an earlier and distinct phase of product production not captured by the workmanship warranty.”). As such, because the design of a vehicle is something that occurs prior to and distinct from its assembly by workmen at a factory, a “defect in factory preparation” can only be a manufacturing defect. *See e.g. Garcia v. Chrysler Grp. LLC*, 127 F. Supp. 3d 212, 226 (S.D.N.Y. 2015) (“The Basic Limited Warranty exclusively covers manufacturing defects e.g. in “‘material, workmanship or factory preparation’”); *Cali v. Chrysler Grp. LLC*, 2011 U.S. Dist. LEXIS 5220, at *6-7 (S.D.N.Y. Jan. 18, 2011) (“The terms ‘material,’ ‘workmanship,’ or ‘factory preparation,’ on the other hand, refer to the mechanical process of implementing that design.”); *Sater v. Chrysler Grp. LLC*, Civ. No. EDCV 14-00700-VAP (DTBx), 2015 U.S. Dist. LEXIS 21022, at *11 (C.D. Cal. Feb. 20, 2015). Therefore, coverage under the New Vehicle Basic Limited Warranty is also limited to vehicle parts with manufacturing defects.

Because both the New Vehicle Basic Limited Warranty and the Powertrain Limited Warranty are limited to vehicle parts with manufacturing defects, Plaintiffs’ breach of express warranty claim must fail insofar as it is based on an alleged design defect in the ZF 9HP Automatic Transmission. However, as discussed *supra*, Plaintiffs do not specifically identify the cause of the Transmission Defect in the Amended Complaint, and indeed broadly allege “that the ZF 9HP Automatic Transmission contains one or more design and/or manufacturing defects” that may stem from “the Transmission Control Module (“TCM”) and its software.” Am. Compl. ¶¶ 10-11. Defendant argues that despite the fact that Plaintiffs expressly allege that both design and

manufacturing defects may be the source of the Transmission Defect, Plaintiffs plead only a design defect, not a manufacturing defect. According to Defendant, “Plaintiffs’ claims are premised squarely on the notion that all vehicles with a ZF 9 Speed transmission are defective; no *facts* support the notion that Plaintiffs believe that only some vehicles were subject to a random manufacturing error.” Defs.’ Reply. Br. at 26-27. However, contrary to Defendant’s assertions, it is plausible that a manufacturing defect might occur on a sufficiently wide scale to affect all, or nearly all of the Class Vehicles. A manufacturing defect is simply a defect that “occurs when a product does not conform to the manufacturer’s intended design.” *Carlin*, 13 Cal. 4th at 1121 (internal citations omitted). Although this type of defect is more likely to occur sporadically, it is entirely possible that some grave error in material or workmanship during assembly caused all Class Vehicles to deviate from Defendant’s intended design. As such, Plaintiffs have plausibly alleged that the ZF 9HP Automatic Transmissions in their vehicles suffer from a design and/or a manufacturing defect, based on the rough, delayed, or sudden shifting or failure to shift, grinding or other loud noises during shifting; harsh engagement of gears, sudden or harsh accelerations/decelerations, sudden loss of power; premature transmission wear, and transmission failure that Plaintiffs have allegedly experienced. Accordingly, Plaintiffs’ breach of express warranty claim is dismissed with prejudice only insofar as it is based on a design defect.

iii. Software Defect Covered by Powertrain Limited Warranty

Finally, Defendant argues that Plaintiffs’ express warranty claim should be dismissed to the extent that it is based on the alleged Powertrain Limited Warranty, because this warranty does not cover defective software, and under the facts alleged, the Transmission Defect appears to stem from defective software in the transmission control module. Plaintiffs counter that even though the transmission control module’s software is not separately listed as a covered component under the

Powertrain Limited Warranty, because the transmission control module itself is covered by the warranty, its software is also covered as “part and parcel” of this component.

The Powertrain Limited Warranty only covers repairs for a specific list of components. Fenelly Cert., Ex. 1 at 9-10, Ex. 2 at 9-10. Those parts of the transmission that are covered by the Powertrain Limited Warranty include “transmission case and all internal parts; torque converter; drive/flex plate; transmission range switch; speed sensors; pressure sensors; transmission control module; bell housing; oil pan; seals and gaskets for listed components only.” Fenelly Cert., Ex. 1 at 10, Ex. 2 at 10. Clearly, “software” is not an item included on this discrete list of covered components. However, the transmission control module is included on the list. And, because the warranty does not limit its definition of “transmission control module” to only the mechanical parts of this component, the Court reads the Powertrain Limited Warranty as covering all parts of the transmission control module, including its software. Accordingly, Plaintiffs may bring a breach of express warranty claim under the Powertrain Limited Warranty for alleged defects in the transmission control module’s software.⁶

In sum, for the reasons set forth above, Plaintiffs’ breach of express warranty claim is dismissed without prejudice, but it is dismissed with prejudice insofar as it arises from Defendant’s alleged failure to repair or replace a component suffering from a design defect.

⁶ Defendant also argues that “Plaintiffs’ allegations of one or two repairs cannot support a breach for the additional reason that the warranties require presentment for repair at an authorized dealership, and then, if necessary to ensure a repair is done, direct contact with FCA US.” FCA US LLC’s Reply in Supp. of its Rule 12(b)(6) Mot. to Dismiss Pls.’ Am. Compl. (“Defs.’ Reply. Br.”) 11. However, contrary to Defendant’s assertion, the portions of the warranties that Defendant cites to do not require direct contact with Defendant to “ensure that a repair is done.” Rather, the warranties merely “recommend” that consumers contact the Chrysler Customer Assistance Center if they are not satisfied with their dealer’s response to a problem. Fenelly Cert., Ex. 1 at 30, Ex. 2 at 29.

D. Magnuson- Moss Warranty Act (Count IV)

Under the MMWA a consumer may assert a civil cause of action to enforce the terms of an implied or express warranty. 15 U.S.C. § 2310(d). The MMWA provides that “a consumer who is damaged by the failure of a supplier, warrantor, or service contractor to comply with any obligation under this chapter, or under a written warranty, implied warranty, or service contract, may bring suit for damages and other legal and equitable relief.” 15 U.S.C. § 2310(d)(1). “Magnuson-Moss claims based on breaches of express and implied warranties under state law depend upon those state law claims.” *Cooper v. Samsung Elecs. Am., Inc.*, Civ. No. 07-3853 (JLL), 2008 U.S. Dist. LEXIS 75810, at *18 (D.N.J. Sep. 29, 2008) *aff’d*, 374 F. App’x 250 (3d Cir. 2010); *see also In re Ford Motor Co. Ignition Switch Prods. Liability Litig.*, 19 F. Supp. 2d 263, 267 (D.N.J. 1998) (“in order for plaintiffs to state a claim for relief against Ford under the Magnuson-Moss Act, they must first establish a claim for breach of express warranty, under an applicable state law”).

Because Plaintiffs have successfully pled a breach of implied warranty claim, pursuant to the Song-Beverly Act, Plaintiffs have likewise pled a MMWA claim arising from this state law claim. However, because Plaintiffs’ entire breach of express warranty claim is dismissed without prejudice, and additionally dismissed with prejudice insofar as it arises from alleged failure to repair or replace a component with a design defect, Plaintiffs’ MMWA claim is dismissed to the same extent.

Defendant argues that Plaintiffs’ MMWA claim arising from their Song-Beverly Act claim, should be dismissed to the extent that it applies to members of the Class who did not purchase their Class Vehicles in California, because the Song-Beverly Act only applies to products purchased in

California.⁷ Plaintiffs do not dispute that a Song-Beverly Act claim can proceed only if the defendant sold the plaintiff a consumer good in California. *See Galicia v. Country Coach, Inc.*, 324 F. App'x 687, 688 (9th Cir. 2009). And indeed, Plaintiffs only bring their Song-Beverly Act claim on behalf of the Implied Warranty Sub-Class, which is comprised only of those members of the Class who purchased or leased their Class Vehicles in the State of California. Am. Compl. ¶ 81. Nonetheless, Plaintiffs assert that “the Magnuson-Moss Act creates an independent federal cause of action for breach of state law express and implied warranty claims.” Pls.’ Opp’n Br. 28. Thus, Plaintiffs argue that their MMWA claim should not be limited only to those members of the Class who could bring an underlying state law breach of warranty claim.

Plaintiffs’ argument, however, runs counter to clearly established law. As explained *supra*, because a MMWA claim is derived from a state law breach of implied or express warranty claim, a plaintiff cannot bring an MMWA claim without an underlying state law claim. *Cooper*, 2008 U.S. Dist. LEXIS 75810 at *18; *In re Ford Motor Co.*, 19 F. Supp. 2d at 267; *Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017, 1022 n. 3 (9th Cir. 2008). Plaintiffs do not assert state law

⁷ Defendant also argues that Plaintiffs’ MMWA claim arising from their Cal. Com. Code § 2313 breach of express warranty claim, should be dismissed to the extent that it applies to members of the Class who did not purchase their Class Vehicles in California. However, Defendant cites to no law indicating that a Cal. Com. Code § 2313 breach of express warranty claim may only be brought by a consumer who purchased a product in California. Indeed, the sole legal authority that Defendant relies on, *Route v. Mead Johnson Nutrition Co.*, Civ. No. CV 12-7350-GW(JEMx), 2013 U.S. Dist. LEXIS 35069, at *22 (C.D. Cal. Feb. 21, 2013), is completely inapplicable to the case at hand, because it involves the question of whether it is appropriate to apply California law to a nationwide class. Ultimately, the court in *Route* determined that it was inappropriate to certify a nationwide class with California breach of express warranty claims, because under California’s choice-of-law rules, “California law may only be used on a classwide basis if the interests of other states are not found to outweigh California’s interest in having its law applied.” 2013 U.S. Dist. LEXIS 35069, at *25 (internal citations omitted). This has no bearing on whether a class of California residents who bought a product outside of California, may bring a breach of express warranty claim under Cal. Com. Code § 2313.

breach of implied warranty claims on behalf of those Class members that purchased their Class Vehicles outside of California. Consequently, Plaintiffs cannot assert, on behalf of these Class members, MMWA claims derived from state law breach of implied warranty claims. In short, Plaintiffs cannot assert MMWA claims arising from state law claims that are not pled in the Amended Complaint.

For these reasons, Plaintiffs' MMWA claim arising from their breach of express warranty claim is dismissed without prejudice, except it is dismissed with prejudice insofar as it is based on Defendant's alleged failure to repair or replace a component with a design defect. Additionally, Plaintiffs' MMWA claim arising from their Song-Beverly Act breach of implied warranty claim is dismissed with prejudice only as to those Class members who purchased their Class Vehicles outside of California.

E. California's Unfair Competition Law (Count II)

Under the UCL, businesses cannot engage in any "unlawful, unfair or fraudulent business act or practice" that would result in unfair competition. Cal. Bus. & Prof. Code § 17200. The California Supreme Court has described the UCL's coverage as "sweeping," because it embraces "anything that can properly be called a business practice and that at the same time is forbidden by law." *Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co.*, 20 Cal. 4th 163, 180 (Cal. 1999). A business practice is "unlawful" under the UCL, if it violates any law, "be it civil or criminal, federal, state, or municipal, statutory, regulatory, or court-made." *Saunders v. Superior Court*, 27 Cal. App. 4th 832, 838-39 (Cal. Ct. App. 1994). A practice or act is "unfair" in the context of a manufacturer-consumer relationship, when the seriousness of the harm to the consumer outweighs the utility of the manufacturer's conduct. *People ex rel. Renne v. Servantes*, 86 Cal. App. 4th 1081, 1095 (Cal. Ct. App. 2001); *c.f. Cel-Tech*, 20 Cal. 4th at 187 (establishing the test for conduct that

is unfair to competitors). And, finally, an act is considered “fraudulent” when “the plaintiff was likely to be deceived and suffered economic injury as a result of the deception.” *Zhang v. Superior Court*, 57 Cal. 4th 364, 380 (Cal. 2013).

A plaintiff may bring a private cause of action against a business for violation of the UCL if he has “suffered injury in fact and [has] lost money or property as a result of . . . unfair competition.” *Id.* at 372 (quoting Cal. Bus. & Prof. Code § 17204). Plaintiffs bring claims against Defendant under the UCL for (1) unfair and fraudulent business practices through Defendant’s alleged fraudulent omission of the Transmission Defect and its symptoms and (2) unlawful business practices in violation of the CLRA, the Song-Beverly Act, and Cal. Com. Code. § 2313. Defendant argues that Plaintiffs’ claim for fraudulent business practices under the UCL should be dismissed for the same reasons that their CLRA claim for fraudulent omission should be dismissed.⁸

“Generally, the standard for deceptive practices under the fraudulent prong of the UCL applies equally to claims for misrepresentation under the CLRA, and courts often analyze the two statutes together.” *MacDonald*, 37 F. Supp. 3d at 1097-98 (citing *Consumer Advocates v. Echostar Satellite Corp.*, 113 Cal. App. 4th 1351, 1360 (Cal. Ct. App. 2003)). Here, the parties do not dispute that Plaintiffs’ UCL claim for fraudulent practices rises and falls with their CLRA claim for fraudulent omission. Accordingly, because I have dismissed Plaintiffs’ CLRA claim without prejudice, for the same reasons, I likewise dismiss without prejudice Plaintiffs’ UCL claim for fraudulent business practices. Nonetheless, because Plaintiffs have successfully stated a claim

⁸ The Court notes that Defendant does not address in its briefings whether Plaintiffs’ UCL claims for unfair or unlawful business practices should be dismissed.

against Defendant for violation of both the Song-Beverly Act and Cal. Com. Code. § 2313, they have likewise stated a claim for unlawful business practices under the UCL.

F. Injunctive Relief in the Form of a Recall

In the Amended Complaint, Plaintiffs request, *inter alia*, an order compelling “Defendant to issue a recall for the Class Vehicles pursuant to applicable NHSTA guidelines” Am. Compl. ¶ 159(d). Plaintiffs assert that such relief is appropriate under § 17203 of the UCL,⁹ which provides courts with the authority to “make such orders or judgments, including the appointment of a receiver, as may be necessary to prevent the use or employment by any person of any practice which constitutes unfair competition.”¹⁰ Cal. Bus. & Prof. Code § 17203.

Defendant argues that the Court should dismiss this request for injunctive relief for two reasons (1) the National Traffic and Motor Safety Act (the “Safety Act”), 49 U.S.C. 30101, *et seq.*, provides the NHTSA with exclusive jurisdiction over motor vehicle recalls, and therefore preempts any state law in the field of automotive recalls and (2) a recall “pursuant to applicable NHTSA guidelines” would necessarily require the NHTSA to supervise the recall process, in violation of the constitutional bar against the states regulating federal governmental functions. Plaintiffs counter that the requested relief would not constitute inappropriate state regulation of a federal agency, because the NHTSA would not need to be involved in a *voluntary* recall of the Class Vehicles. Plaintiffs do not address Defendant’s preemption theory. For the reasons set forth below,

⁹ Plaintiffs also argue that such equitable relief is appropriate under the CLRA. However, this is unavailing, because I have dismissed Plaintiffs’ CLRA claim.

¹⁰ The Court notes that Defendant does not raise the question of whether a recall of the Class Vehicles falls within the scope of remedies provided under Cal. Bus. & Prof. Code § 17203.

the Court dismisses Plaintiffs' request for a recall under the applicable NHTSA guidelines, as an improper regulation by a state of the activities of the federal government.¹¹

In its historic decision in *McCulloch v. Maryland*, the Supreme Court ruled that pursuant to the Supremacy Clause of the United States Constitution, "[t]he States have no power, by taxation, or otherwise, to retard, impede, burden, or in any manner control the operations of the constitutional laws enacted by Congress, to carry into effect the powers vested in the national government." 17 U.S. (4 Wheat.) 316, 400 (1819). This decision forms the bedrock of the doctrine

¹¹ The Court declines to reach the broader question of whether any automotive recall, made pursuant to state law, is categorically preempted by the Safety Act. However, in that connection, the Court notes that several courts have analyzed the question of whether such relief under a state law would be preempted, and have come to differing conclusions. Compare, e.g., *In re Bridgestone/Firestone Inc., ATX, ATX II & Wilderness Tires Prods. Liab. Litig.*, 153 F. Supp. 2d 935, 940 (S.D. Ind. 2001) (dismissing claim to the extent that it sought to impose a court-ordered recall of tires due to preemption by the Safety Act); *Lilly v. Ford Motor Co.*, Civ. No. 00 C 7372, 2002 U.S. Dist. LEXIS 910 (N.D. Ill. Jan. 22, 2002) ("A nationwide court-ordered recall would conflict directly with and frustrate the Safety Act."); *Cox House Moving, Inc. v. Ford Motor Co.*, Civ. No. 7:06-1218-HMH, 2006 U.S. Dist. LEXIS 55490, 2006 WL 2303182, at *9 (D.S.C. Aug. 8, 2006) (same); with, e.g., *In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices, & Prods. Liab. Litig.*, 754 F. Supp. 2d 1145, 1197 (C.D. Cal. 2010) (denying motion to dismiss claim seeking injunction to install fail-safe mechanism in all affected vehicles, because the requested injunction was not shown to actually conflict with the intent of Congress in passing the Safety Act); *Stroderd v. Yamaha Motor Corp., U.S.A.*, No. 04-3040, 2005 U.S. Dist. LEXIS 17797, at *15 (E.D. La. Aug. 4, 2005) (allowing claim for redhibition to proceed and rejecting the argument that "any state suit concerning the administration of a motor vehicle recall conflicts with the Safety Act and is precluded"). And, although not directly addressing the issue of preemption, the Third Circuit has previously observed in *dicta* that logistical concerns would not bar a court's order of a recall by injunction, pursuant to state law. *In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 811 n. 30 (3d Cir. 1995) ("The fact that no court has [issued a recall] before and that there may be some logistical issues to surmount do not themselves support the court's conclusion [that it lacks the power to order a recall]; other class actions and complex litigation settlements have developed mechanisms for supervising and enforcing compliance with detailed affirmative injunctions."). Importantly, contrary to the instant action, these cases did not address a request for a recall that requires action on the part of a federal agency. Here, because Plaintiffs specifically seek a recall "pursuant to applicable NHTSA guidelines," rather than a recall pursuant to a court- or state-prescribed system, the pending motion to dismiss may be resolved on the Court's determination that federal governmental immunity from state law bars this Court from ordering the NHTSA to supervise a recall, pursuant to state law.

of intergovernmental immunity, which dictates that, except to the extent that Congress expressly provides otherwise, “states may not directly regulate the federal government’s operations or property.” *Treasurer of N.J. v. United States Dep’t of the Treasury*, 684 F.3d 382, 410 (3d Cir. 2012) (citing *Hancock v. Train*, 426 U.S. 167, 178-80, (1976)). Pursuant to this doctrine, “[i]n the absence of Congressional consent, ‘there is an implied constitutional immunity of the national government from . . . state regulation of the performance, by federal officers and agencies, of governmental functions.’” *Rousseau v. United States Dep’t of the Treasury*, Civ. No. 04-4368 (MLC), 2010 U.S. Dist. LEXIS 9945, at *29 (D.N.J. Feb. 5, 2010) (quoting *Penn Dairies, Inc. v. Milk Control Comm’n*, 318 U.S. 261, 269 (1943)). “A state regulation is invalid only if it regulates the United States directly or discriminates against the Federal Government or those with whom it deals.” *N.D. v. United States*, 495 U.S. 423, 435 (1990). Here, the requested injunctive relief under the UCL clearly violates the doctrine of intergovernmental immunity, because it would directly regulate the actions of the NHTSA, a federal agency.

A recall of motor vehicles cannot be conducted pursuant to the NHTSA’s guidelines without the involvement of, and action being taken by, the NHTSA. This is because the NHTSA’s guidelines require, among other things, that when a vehicle manufacturer conducts any recall it must: furnish a report to the NHTSA containing certain specified information about the vehicle defect, 49 C.F.R. § 573.6; furnish quarterly reports to the NHTSA about the progress of the recall, 49 C.F.R. § 573.7; and submit a copy of its proposed consumer notice of the recall to the NHTSA prior to disseminating it, 49 C.F.R. § 577.5, 49 C.F.R. § 577.7. The NHTSA’s guidelines also require the NHTSA to take certain actions in relation to every recall, including: provide for public access to a recall program by publishing it in the Federal Register, 49 U.S.C. § 30120(d); monitor the progress of the recall to evaluate whether to require an acceleration of the recall remedy, 49

U.S.C. § 30120(c), 49 C.F.R. § 573.14; receive the proposed consumer notice of the recall before it is distributed, 49 C.F.R. § 577.5, 49 C.F.R. § 577.7; and, upon request by the public, determine whether to conduct hearings to decide if the manufacturer has complied with the NHTSA's guidelines, 49 U.S.C. § 30120(e).

Plaintiffs protest that they are not seeking an involuntary recall, which must be initiated by the NHTSA, but rather a voluntary recall, which may be initiated by the manufacturer itself. *See Winzler v. Toyota Motor Sales U.S.A., Inc.*, 681 F.3d 1208, 1213 (10th Cir. 2012) ("Some recalls are initiated 'voluntarily' when a manufacturer alerts NHTSA to the defect. 49 U.S.C. § 30118(c). Others are initiated 'involuntarily' when the government discovers a defect after its own investigation. 49 U.S.C. § 30118(a)."). Plaintiffs argue that unlike an involuntary recall, a voluntary recall does not require NHTSA involvement. However, setting aside the fact that the Amended Complaint does not specify whether Plaintiffs seek a voluntary or involuntary recall, Plaintiffs argument is problematic for two reasons.

First, the Safety Act only provides two avenues for recalls to be initiated: (1) (involuntary) if the NHTSA decides, pursuant to certain noncompliance proceedings, that a vehicle or equipment "contains a defect related to motor vehicle safety or does not comply with an applicable motor vehicle safety standard prescribed under [the Safety Act]" or (2) (voluntary) if a manufacturer "*decides in good faith*" that a vehicle or equipment "contains a defect related to motor vehicle safety," or "does not comply with an applicable motor vehicle safety standard prescribed under [the Safety Act]." 49 U.S.C. § 30118(b), (c) (emphasis added); *see also* 49 U.S.C. § 30120(a) ("when notification of a defect or noncompliance is required under section 30118(b) or (c) of this title [49 USCS § 30118(b) or (c)], the manufacturer of the defective or noncomplying motor vehicle or replacement equipment shall remedy the defect or noncompliance without charge when

the vehicle or equipment is presented for remedy”). Neither of these options, provides for commencement of a vehicle recall at the order of a court. And, importantly, to institute a voluntary recall, a manufacturer must itself decide, in good faith, that the requisite defect exists. Thus, it is apparent that it is impossible for this Court to *order* a “voluntary” recall, pursuant to the NHTSA guidelines and the Safety Act.

Second, under the NHTSA guidelines, even a voluntary recall requires NHTSA involvement and action. Indeed, “[w]hether the recall ball gets rolling under the voluntary or involuntary recall section, the result is the same; either way, the same notice, recall, and repair mandates follow; either way, the same oversight and enforcement tools are at play.” *Winzler*, 681 F.3d at 1213 (citing 49 U.S.C. §§ 30118(e), 30119, 30120, 30165 and *Ctr. for Auto Safety & Pub. Citizen, Inc. v. Nat’l Highway Traffic Safety Admin.*, 371 U.S. App. D.C. 422, 426 (D.C. Cir. 2006)). Importantly, Plaintiffs are not merely seeking to enjoin Defendant to submit an *application* to the NHTSA to institute a recall, Plaintiffs seek to enjoin Defendant to *carry out and complete* a recall under the NHTSA’s supervision. Such an order would not allow the NHTSA to refuse to participate in the recall process, but would rather require the NHTSA’s full cooperation and participation. Accordingly, contrary to Plaintiffs’ assertions, Plaintiffs’ requested relief would be, in essence, an order that the NHTSA supervise and facilitate a recall of the Class Vehicles.

Plaintiffs have not pointed to any “clear congressional mandate” that would allow the states to direct when the NHTSA must supervise a vehicle recall. *Hancock*, 426 U.S. at 179. And, although the Safety Act’s savings clause “specifically states that compliance with federal [motor vehicle safety] standards does not exempt persons from common law liability,” *Buzzard v. Roadrunner Trucking, Inc.*, 966 F.2d 777, 780 (3d Cir. 1992) (citing 15 U.S.C. § 1397(k)), this is not a license for states to direct the NHTSA to supervise vehicle recalls when a recall is deemed

necessary under state law. Accordingly, Plaintiffs' UCL claim is dismissed with prejudice as an improper intrusion into federal governmental operations by state law, to the extent that Plaintiffs seek to enjoin Defendant to perform a recall of the Class Vehicles "pursuant to applicable NHTSA guidelines."

IV. Conclusion

In conclusion, Defendant's motion to dismiss is **GRANTED** in part and **DENIED** in part as follows: Plaintiffs' CLRA claim (Count I) is dismissed without prejudice; Plaintiffs' breach of express warranty claim under Cal. Com. Code § 2313 (Count V) is dismissed without prejudice, except it is dismissed with prejudice insofar as it arises from Defendant's alleged failure to repair or replace a component suffering from a design defect; Plaintiffs' MMWA claim (Count IV) arising from their breach of express warranty claim is dismissed without prejudice, except it is dismissed with prejudice insofar as it is based on Defendant's alleged failure to repair or replace a component with a design defect; Plaintiffs' MMWA claim (Count IV) arising from their Song-Beverly Act breach of implied warranty claim is dismissed with prejudice only as to those Class members who purchased their Class Vehicles outside of California; Plaintiffs' UCL claim (Count II) for fraudulent business practices is dismissed without prejudice; and Plaintiffs' remaining UCL claim (Count II) is dismissed with prejudice to the extent that Plaintiffs seek to enjoin Defendant to perform a recall of the Class Vehicles "pursuant to applicable NHTSA guidelines." Plaintiffs' remaining claims survive.

Plaintiffs may amend the Amended Complaint, consistent with this Opinion, within thirty days.

Date: August 29, 2016

/s/ Freda L. Wolfson
Freda L. Wolfson
U.S. District Judge