UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	2:19-cv-05984-RGK-AS	Date	July 28, 2020
Title	***Jimmy Banh et al. v. American Honda Motor Company, Inc.***		

Present: The Honorable	R. GARY KLAUSNER, UNITED STATES DISTRICT JUDGE	
Sharon L. Williams	Not Reported	N/A
Deputy Clerk	Court Reporter / Recorder	Tape No.

Attorneys Present for Plaintiff:	Attorneys Present for Defendants:
Not Present	Not Present

Proceedings: **(IN CHAMBERS) Order Re: Plaintiffs' Motion to Certify Class [DE 77]; Motion to Strike Testimony of Steven P. Gaskin [DE 86]; Motion to Strike Testimony of Colin B. Weir [DE 87]; Motion to Strike Testimony of Steve Loudon [DE 89]**

I. INTRODUCTION

On July 11, 2019, Plaintiffs filed this putative class action against Defendant American Honda Motor Co., Inc. ("Honda" or "Defendant"). The named Plaintiffs are individuals who purchased or leased a 2019 or 2020 Acura RDX vehicle (the "Vehicle" or "Vehicles") manufactured by Honda.

Plaintiffs' Second Amended Complaint ("SAC") alleges numerous claims, some of which have been dismissed. (*See* Mot. to Dismiss Order, ECF No. 60.) Plaintiffs' operative claims can be generally grouped into four categories: (1) breach of express warranty, (2) breach of the implied warranty of merchantability, (3) violation of state consumer protection laws, and (4) fraudulent concealment.

Presently before the Court is Plaintiffs' Motion for Class Certification (DE 77), along with Defendant's Motions to Strike the Testimony of Steven Gaskin (DE 86), Colin Weir (DE 87), and Steve Loudon (DE 89). For the following reasons, the Court **GRANTS in part** and **DENIES in part** Plaintiffs' Motion and **DENIES without prejudice** Defendant's Motions.

II. BACKGROUND

The SAC generally alleges the following:

Honda is a California corporation headquartered in Torrance, California. Honda is "responsible for the manufacture, development, distribution, marketing, sales, and servicing of Acura brand

automobiles." (SAC ¶ 301, ECF No. 64.) The named Plaintiffs are individuals who purchased or leased the Vehicle.

A. The Infotainment System Defect

Plaintiffs allege that "the Vehicles contain a defect that causes many of the Vehicles' features associated with the infotainment system (e.g., the navigation system, audio system, backup camera, Bluetooth, Apple CarPlay) to malfunction." (*Id.* ¶ 5.) This defect poses a safety risk because when the infotainment system malfunctions, the driver becomes distracted. (*Id.* ¶ 6.) The defect can also cause safety-related systems such as the backup camera to fail. (*Id.*)

Defendant knew (or should have known) about the issues with the infotainment system based on (1) pre-release design, manufacturing, and testing data; (2) warranty claims data; (3) consumer complaints made directly to Defendant, collected by the National Highway Transportation Safety Administration, and/or posted on public online forums; (4) testing done in response to those complaints; (5) aggregate data and complaints from authorized dealers; and (6) other sources. (*Id.* ¶ 7.) But "Defendant failed to disclose and actively concealed the Vehicles' infotainment system defect from the public, and continues to manufacture, distribute, and sell the Vehicles without disclosing the defect." (*Id.*)

Honda administers a New Vehicle Limited Warranty ("NVLW") for the Vehicles. Under the NVLW, "Honda is required to repair or replace any part that is defective in material or workmanship under normal use." (*Id.* ¶ 8 (internal quotation marks omitted).) The infotainment systems are defective in material or workmanship under normal use. However, Honda has not repaired or replaced the infotainment system. "Instead, Honda tells Vehicle owners to wait for a forthcoming 'software update' to fix the infotainment problems, or alternatively simply replaces defective parts with equally defective parts, thereby leaving consumers caught in a cycle of use, malfunction, and replacement. In fact, Honda's authorized dealerships are routinely discouraging Vehicle owners from bringing their Vehicles to the dealership because there is nothing the dealership can do to repair the defect." (*Id.* ¶ 9.)

B. The Android Auto Feature

"[T]he Vehicles were originally scheduled to launch with both Android Auto and Apple CarPlay connectivity as standard features." (*Id.* ¶ 10.) Before the Vehicles launched, Honda distributed promotional materials to dealers touting the Vehicles' Android Auto compatibility. (*Id.*) Dealers, in turn, shared this information with consumers. (*Id.*) But when the Vehicles went on sale in 2018, they came equipped with only Apple CarPlay. (*Id.*) "Defendant both directly and indirectly through its authorized dealers promised, and continues to promise, prospective buyers that Android Auto would be made

available to all Vehicle owners through a software update 'soon.'" (*Id.*) However, this feature has still not been implemented. (*Id.*)

III. JUDICIAL STANDARD

A. Class Certification Under Rule 23

1. Rule 23(a) Requirements

As a threshold to class certification, the proposed class must satisfy four prerequisites under Federal Rule of Civil Procedure 23(a). First, the class must be so numerous that joinder of all members individually is impracticable. Fed. R. Civ. P. 23(a)(1). "As a general matter, courts have found that numerosity is satisfied when class size exceeds 40 members[.]" *Salas v. Toyota Motor Sales, U.S.A., Inc.*, No. 15-CV-8629-FMO (EX), 2019 WL 1940619, at *3 (C.D. Cal. Mar. 27, 2019) (quoting another source).

Second, there must be questions of law or fact common to the class. Fed. R. Civ. P. 23(a)(2). The commonality requirement is liberally construed. *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998). The Supreme Court has explained that the plaintiffs' "claims must depend upon a common contention…. That common contention, moreover, must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). "The existence of shared legal issues with divergent factual predicates is sufficient, as is a common core of salient facts coupled with disparate legal remedies within the class." *Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168, 1172 (9th Cir. 2010) (quoting *Hanlon*, 150 F.3d at 1019).

Third, the claims or defenses of the class representative must be typical of the claims or defenses of the class as a whole. Fed. R. Civ. P. 23(a)(3). This does not require that the claims of the representative parties be identical to the claims of the proposed class members. *Hanlon*, 150 F.3d at 1020. Rather, typicality focuses on whether the unnamed class members have injuries similar to those of the named plaintiffs, and whether those injuries result from the same injurious course of conduct. *Armstrong v. Davis*, 275 F.3d 849, 869 (9th Cir. 2001).

Fourth, the proposed class representatives and proposed class counsel must be able to fairly and adequately protect the interests of all members of the class. Fed. R. Civ. P. 23(a)(4). The adequacy requirement is satisfied if the named plaintiffs and their counsel will prosecute the action vigorously on

behalf of the class, and do not have interests adverse to unnamed class members. *Hanlon*, 150 F.3d at 1020.

2. Rule 23(b) Requirements

If all four prerequisites of Rule 23(a) are satisfied, the court must then determine whether to certify the class under one of the three subsections of Rule 23(b). Under Rule 23(b), the proposed class must establish that: (1) there is a risk of substantial prejudice from separate actions; (2) declaratory or injunctive relief benefitting the class as a whole would be appropriate; or (3) common questions of law or fact predominate such that a class action is superior to other methods available for adjudicating the controversy at issue. Fed. R. Civ. P. 23(b).

In this case, Plaintiffs seek certification under Rule 23(b)(3). A class action may be maintained under Rule 23(b)(3) if the court finds that (1) the questions of law or fact common to the members of the class predominate over any questions affecting only individual members; and (2) a class action is superior to other available methods for the fair and efficient adjudication of the controversy. Fed. R. Civ. P. 23(b)(3).

The predominance requirement is "far more demanding" than the commonality requirement of Rule 23(a). *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623–24 (1997). When evaluating whether common issues predominate, the operative question is whether a putative class is "sufficiently cohesive" to merit representative adjudication. *Id.* at 623. Though common issues need not be "dispositive of the litigation," *In re Lorazepam & Clorazepate Antitrust Litig.*, 202 F.R.D. 12, 29 (D.D.C. 2001), they must "present a significant aspect of the case [that] can be resolved for all members of the class in a single adjudication" so as to justify "handling the dispute on a representative rather than an individual basis" *Hanlon*, 150 F.3d at 1022.

If the laws of multiple jurisdictions must be applied to certify a litigation class, the district court must consider how variations in state law affect predominance. *See Lozano v. AT&T Wireless Servs., Inc.*, 504 F.3d 718, 728 (9th Cir. 2007). Generally, "[i]f there is no true conflict between or among the substantive laws of the relevant states, the need to apply multiple state laws will not defeat a predominance finding." 1 McLaughlin on Class Actions § 5:46 (15th ed.); *Klay v. Humana, Inc.*, 382 F.3d 1241, 1262 (11th Cir. 2004) ("[I]f a claim is based on a principle of law that is uniform among the states, class certification is a realistic possibility.") "Similarly, if the applicable state laws can be sorted into a small number of groups, each containing materially identical legal standards, then certification of subclasses embracing each of the dominant legal standards can be appropriate." *Klay*, 382 F.3d at 1262; *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 302 (3d Cir. 2011); *In re U.S. Foodservice Inc. Pricing Litig.*, 729 F.3d 108, 127 (2d Cir. 2013). Conversely, "variances—and even nuances—in the substantive law of

the states" tend to defeat predominance and preclude certification. 1 McLaughlin on Class Actions § 5:46 (15th ed.) (collecting cases). Ultimately, it is the party seeking certification who "bears the burden of demonstrating 'a suitable and realistic plan for trial of the class claims.'" *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1189 (9th Cir. 2001) (quoting *Chin v. Chrysler Corp.*, 182 F.R.D. 448, 454 (D.N.J. 1998)); *see also Walsh v. Ford Motor Co.*, 807 F.2d 1000, 1017 (D.C. Cir. 1986) ("[N]ationwide class action movants must creditably demonstrate, through an 'extensive analysis' of state law variances, 'that class certification does not present insuperable obstacles.'" (quoting *In re Sch. Asbestos Litig.*, 789 F.2d 996, 1010 (3d Cir. 1986))).

As for superiority, courts consider several factors to determine whether a class action is superior to other methods of adjudication. These factors include: (1) the interest of each member in "individually controlling the prosecution or defense of separate actions"; (2) the "extent and nature of any litigation already begun"; (3) the "desirability or undesirability of concentrating the litigation of the claims"; and (4) the "likely difficulties in managing a class action." Fed. R. Civ. P. 23(b)(3). "This list is not exhaustive and other factors may be considered." *Wolin*, 617 F.3d at 1175. "[T]he purpose of the superiority requirement is to assure that the class action is the most efficient and effective means of resolving the controversy. Where recovery on an individual basis would be dwarfed by the cost of litigating on an individual basis, this factor weighs in favor of class certification." *Id.* (internal citations and quotation marks omitted).

Finally, in analyzing whether the proposed class meets the requirements for certification, a court must take the substantive allegations of the complaint as true and may consider extrinsic evidence submitted by the parties. *See Blackie v. Barrack*, 524 F.2d 891, 901 (9th Cir. 1975).

B. Federal Rule of Evidence 702

Federal Rule of Evidence 702 states that expert opinion evidence is admissible if: (1) the witness is sufficiently qualified by knowledge, skill, experience, training, or education; (2) the scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine the fact at issue; (3) the testimony is based on sufficient facts or data; (4) the testimony is the product of reliable principles and methods; and (5) the expert has reliably applied the principles and methods to the facts of the case.

The Ninth Circuit has interpreted Rule 702 as requiring expert testimony to be both relevant and reliable. *City of Pomona v. SQM North Am. Corp.*, 750 F.3d 1036, 1043–44 (9th Cir. 2014). Expert opinion testimony is relevant when the knowledge underlying it has a valid connection to the pertinent inquiry. *Id.* at 1044. It is reliable when such knowledge "has a reliable basis in the knowledge and experience of the relevant discipline." *Id.* The court must "screen the jury from unreliable nonsense

opinions, but not exclude opinions merely because they are impeachable." *Alaska Rent-A-Car, Inc. v. Avis Budget Grp., Inc.*, 738 F.3d 960, 969 (9th Cir. 2013).

IV. DISCUSSION

A. The Proposed Classes

Plaintiffs ask the Court to certify seven classes and one subclass. Alternatively, Plaintiffs propose that the Court certify 20 state-specific classes of all persons or entities who purchased or leased a new Vehicle from an authorized Acura dealer in each represented state. As another alternative, Plaintiffs propose that the Court certify a class using the same definition under the laws of two or three states, including California, as part of a "bellwether" trial process that will instruct the decision to certify and try the claims of additional classes. Finally, Plaintiffs ask the Court to appoint 28 named class members as class representatives.

As an initial matter, the Court notes that it will not consider the following Plaintiffs in its certification analysis (the "Inactive Plaintiffs"), as these Plaintiffs have been either dismissed or compelled to arbitration since Plaintiffs filed their Motion.

1. Bartholomew (North Carolina) – arbitration
2. Brumer (New York) – arbitration
3. Chisari (New Jersey) – arbitration
4. Goldman (Florida) – dismissed
5. Jahsman (New York) – arbitration
6. B. Klein (Oregon) – dismissed
7. Lawrence (North Carolina) – arbitration
8. Ortiz (Nevada) – dismissed
9. Peoples (Georgia) – arbitration
10. Pryor (Tennessee) – arbitration
11. Subbarao (Texas) – arbitration

The remaining Plaintiffs—which the Court *will* consider in its analysis—span 13 states and are as follows:

1. Allan (Texas)
2. Banh (California)
3. Bilbrey (Arizona)
4. Denaro (Pennsylvania)
5. Drath (Indiana)
6. Faden (Virginia)
7. Gonzales (Utah)
8. Gratton (Virginia)
9. Gravlin (Missouri)
10. Hanna (Massachusetts)
11. Hines (Virginia)
12. Kleehamer (Ohio)
13. M. Klein (Oregon)
14. Kremer (Missouri)
15. Moss (New Mexico)
16. Quinlan (Illinois)
17. Samaha (Illinois)

Without the Inactive Plaintiffs, the seven proposed classes are set forth below. The proposed subclass is no longer necessary because the two New York Plaintiffs have been compelled to arbitration.

1. The Express Warranty Class: All persons or entities who purchased or leased a new Class Car from an authorized Acura dealer in California, ~~Nevada,~~ Pennsylvania, and Virginia.

2. The Express Warranty Notice to Seller Class: All persons or entities who purchased or leased a new Class Car from an authorized Acura dealer in ~~Georgia~~, Illinois, ~~New Jersey~~, New Mexico, ~~New York~~, ~~North Carolina~~, Ohio, and Oregon.

3. The Implied Warranty Class: All persons or entities who purchased or leased a new Class Car from an authorized Acura dealer in Arizona, California, ~~Florida~~, ~~Georgia~~, Illinois, ~~Indiana~~, Massachusetts, Missouri, ~~Nevada~~, ~~New Jersey~~, ~~New York~~, ~~North Carolina~~, Ohio, Pennsylvania, ~~Tennessee~~, Texas, Utah, and Virginia.

4. The Unfair and Deceptive Conduct Consumer Protection Class: All persons or entities who purchased or leased a new Class Car from an authorized Acura dealer in California, ~~Florida~~, Illinois, Massachusetts, Missouri, ~~New Jersey~~, ~~New York~~, and Ohio.

5. The Omissions Consumer Protection Class: All persons or entities who purchased or leased a new Class Car from an authorized Acura dealer in Illinois, Missouri, ~~Nevada~~, and ~~New Jersey~~.

6. The Unconscionable Acts or Practices Consumer Protection Class: All persons or entities who purchased or leased a new Class Car from an authorized Acura dealer in ~~New Jersey~~, New Mexico, Texas, and Utah.

7. The Fraudulent Concealment Class: All persons or entities who purchased or leased a new Class Car from an authorized Acura dealer in California ~~and New York.~~
    a. ~~The Fraudulent Concealment – Preponderance of the Evidence Subclass: All persons or entities who purchased or leased a new Class Car in California.~~

The Court proceeds with the class certification analysis. The Court begins by considering Plaintiffs' primary request: to certify seven classes, which are grouped together based on purported similarities between state laws. Finding certification of the seven proposed classes inappropriate, the Court turns to Plaintiffs' alternative request to certify 20 (now 13) state-specific classes.

B. <u>The Seven Proposed Classes</u>

1. <u>The Express Warranty Classes</u>

Plaintiffs bring claims for breach of express warranty under the laws of seven states: California, Illinois, New Mexico, Ohio, Oregon, Pennsylvania, and Virginia. Most of these states have adopted a definition of breach of express warranty similar to that of the Uniform Commercial Code ("UCC"). The UCC provides that a seller creates an express warranty in the following ways:

> (a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.
>
> (b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.
>
> (c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.

UCC § 2-313.

Here, the only express warranty at issue is that contained in the NVLW, which states that "Acura will repair or replace any part that is defective in material or workmanship under normal use." (SAC ¶ 354.) Plaintiffs allege that Honda breached the terms of the NVLW because Honda has not repaired or replaced the defective infotainment system. (*See, e.g.*, *id.* ¶ 543.) Instead, Honda "merely replaces a defective part with another defective part." (*Id.* ¶ 342.) In short, Plaintiffs allege that the NVLW "fails in its essential purpose because the contractual remedy is insufficient to make" Plaintiffs whole. (*Id.* ¶ 544).

a. Applicable Law

Because this case involves seven states' laws on breach of express warranty, the Court begins by clarifying the applicable law. *See Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804, 131 (2011) ("Considering whether questions of law or fact common to class members predominate begins, of course, with the elements of the underlying cause of action."); *Lozano*, 504 F.3d at 728.

Generally, to prevail on a claim for breach of express warranty, a plaintiff must prove that: (1) the seller's statement constitutes an affirmation of fact or promise or a description of the goods; (2) the

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statement was part of the basis of the bargain; and (3) the warranty was breached. *See, e.g.*, *Weinstat v. Dentsply Internat., Inc.*, 180 Cal. App. 4th 1213, 1227 (2010). However, the elements of this test vary state-to-state. For example, some states require privity of contract between seller and buyer (a potential problem in this case because Honda did not directly sell the Vehicles to Plaintiffs, Acura dealerships did). Other states require privity but carve out exceptions. Also, many states require that a buyer give notice to the seller of the alleged breach. States differ, however, on what type of notice is sufficient. And some states require a buyer to show that they relied on the seller's representation. Other states do not have a standalone "reliance" requirement, but instead merge the reliance inquiry with the requirement that a statement be part of the basis of the bargain. The differences in how the relevant states approach these requirements—privity, reliance and notice—are discussed in greater detail below.

i. Benefit of the Bargain/Reliance

First, consider the "benefit of the bargain" requirement. "There is a clear split of authority among the jurisdictions as to whether a buyer must show reliance on a statement or representation for it to be considered part of the 'basis of the bargain.'" *Cole v. Gen. Motors Corp.*, 484 F.3d 717, 726 (5th Cir. 2007). One state, Illinois, generally requires a strict showing of reliance. *Id*. Four states—New Mexico, Ohio, Oregon, and Virginia—do not appear to have any reliance requirement. *Porcell v. Lincoln Wood Prod., Inc.*, 713 F. Supp. 2d 1305, 1319 (D.N.M. 2010); *Houston-Starr Co. v. Berea Brick & Tile Co.*, 197 F. Supp. 492, 499 (N.D. Ohio 1961); *Larrison v. Moving Floors, Inc.*, 127 Or. App. 720, 724 (1994); *Martin v. Am. Med. Sys., Inc.*, 116 F.3d 102, 105 (4th Cir. 1997). Meanwhile, Pennsylvania applies a rebuttable presumption of reliance. *Cole*, 484 F.3d at 726. Finally, California requires reliance only if there is no privity of contract. *Coleman v. Bos. Sci. Corp.*, No. 1:10-CV-01968-OWW, 2011 WL 3813173, at *5 (E.D. Cal. Aug. 29, 2011).

Further, this is only a bird's-eye view of the relevant laws and does not fully capture the nuances that exist. For example, in California, there is some disagreement over the reliance requirement. *In re Nexus 6P Prod. Liab. Litig.*, 293 F. Supp. 3d 888, 915 (N.D. Cal. 2018) ("Although some district courts have reached that conclusion [that privity is required], multiple others have interpreted California law not to require a showing of reliance even if privity is lacking.") So too in Illinois. *Id.* at 917 (noting that "[w]hether a plaintiff must plead reliance under Illinois law is slightly unclear" and concluding that "[u]nder Illinois law…a plaintiff must plead reliance if he does not adequately allege privity with the defendant."); *Heisner ex rel. Heisner v. Genzyme Corp.*, No. 08-C-593, 2008 WL 2940811, at *8 (N.D. Ill. July 25, 2008) (noting that "Illinois courts have not been consistent in interpreting the 'basis of the bargain' language in § 2-313 to require proof that a plaintiff actually relied on the warranty.") And while New Mexico does not impose an independent reliance requirement, "it does require evidence that the representation entered into the buyer's decision to purchase the defendant's product, and evidence that

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the representation did not enter into the buyer's decision will defeat a claim that a representation gave rise to an express warranty." *Porcell*, 713 F. Supp. 2d at 1319 (internal quotation marks omitted).

ii. Privity

The Court next turns to the privity requirement. Generally, privity of contract is required under the laws of California, Illinois, and Virginia. *Park-Kim v. Daikin Indus., Ltd*, No. 2:15-CV-09523-CAS (KKX), 2016 WL 5958251, at *14 (C.D. Cal. Aug. 3, 2016) (quoting *Arnold v. Dow Chem. Co.*, 91 Cal. App. 4th 698, 720 (2001)); *Caterpillar, Inc. v. Usinor Industeel*, 393 F. Supp. 2d 659, 677 (N.D. Ill. 2005); Va. Code Ann. § 8.2-318. Meanwhile, privity is not required in Ohio, Oregon, and Pennsylvania. *Cancino v. Yamaha Motor Corp., U.S.A.*, No. 3:04-CV-274, 2010 WL 2607251, at *12 (S.D. Ohio June 24, 2010); *Larrison*, 127 Or. App. at 724; *Goodman v. PPG Indus., Inc.*, 849 A.2d 1239, 1246 n.6 (Pa. 2004). It is unclear whether New Mexico requires privity. *Bellman v. NXP Semiconductors USA, Inc.*, 248 F. Supp. 3d 1081, 1151 (D.N.M. 2017) (noting that the New Mexico Supreme Court "has not squarely addressed" the issue of whether vertical privity is required). But again, this is the tip of the iceberg. For example, although California generally requires privity, a plaintiff may still recover without privity if she can show reliance. *Fundin v. Chicago Pneumatic Tool Co.*, 152 Cal. App. 3d 951, 957 (1984). In addition, Illinois, Pennsylvania, and Virginia provide exceptions to the privity requirement. *Rosenstern v. Allergan, Inc.*, 987 F. Supp. 2d 795, 805 (N.D. Ill. 2013); *Goodman*, 849 A.2d at 1246; Va. Code Ann. § 8.2-318.

iii. Notice

Finally, consider the notice requirement. The relevant states generally require a plaintiff to provide some notice to the manufacturer in order to bring a breach of warranty claim. Cal. Com. Code § 2607(3)(A); 810 ILCS 5/2-607(3)(a); N.M. Stat. Ann. § 55-2-607; Ohio Rev. Code Ann. § 1302.65; Or. Rev. Stat. Ann. § 72.6070(3); 13 Pa. Cons. Stat. Ann. § 2607(c)(1); Va. Code Ann. § 8.2-607. But "[s]tate law varies on what constitutes reasonable notice and to whom notice should be given, and other courts considering the issue in the class certification context have noted that these variations impact predominance." *Cole*, 484 F.3d at 727. For example, Pennsylvania provides that the filing of a complaint is adequate notice. *Precision Towers, Inc. v. Nat–Com, Inc.*, No. 2143, 2002 WL 31247992, at *5 (Pa. Com. Pl. Sept. 23, 2002). Meanwhile, in New Mexico, it is somewhat unclear whether filing a complaint satisfies the notice requirement. *In re Santa Fe Nat. Tobacco Co. Mktg. & Sales Practices & Prod. Liab. Litig.*, 288 F. Supp. 3d 1087, 1271 (D.N.M. 2017) (acknowledging that "[n]o New Mexico case has determined whether filing a complaint satisfies the notice requirement" but finding, under the circumstances, that notice via an amended complaint was sufficient.)

b. *Analysis*

Upon review of the relevant laws pertaining to breach of express warranty, the Court finds that although Plaintiffs' express warranty claims may implicate common questions, Plaintiffs have not met their burden to demonstrate "a suitable and realistic plan for trial[.]" *Zinser*, 253 F.3d at 1189.

Plaintiffs have not offered a workable solution as to how the Court can adequately instruct the jury on the relevant states' express warranty laws. Plaintiffs submit proposed instructions to the Court, but these instructions do not even address the privity requirement, and they fail to account for differences in state law. (*See* Pls.' App'x A, ECF No. 77-1.) It would be one thing if these differences were immaterial. But Plaintiffs have not shown that they are. Indeed, several courts have considered this issue and found that there are material differences in the states' express warranty laws. *See Tasion Commc'ns, Inc. v. Ubiquiti Networks, Inc.*, 308 F.R.D. 630, 638 (N.D. Cal. 2015) (considering a nationwide class and finding that "there are material differences amongst the jurisdictions with respect to a claim for breach of express warranty[.]"); *Darisse v. Nest Labs, Inc.*, No. 5:14-CV-01363-BLF, 2016 WL 4385849, at *31 (N.D. Cal. Aug. 15, 2016) (concluding that "the differences in the states' express warranty law is material"; comparing, for example, California's reliance requirement with that of Virginia); *see also In re Hitachi TV Optical Block Cases*, No. 08-CV-1746-DMS (NLS), 2011 WL 9403, at *18 (S.D. Cal. Jan. 3, 2011) ("[T]here are material conflicts between California warranty law and the warranty law of the other forty-nine states.")

Faced with so much variation in state law, the Court will "face an impossible task of instructing a jury on the relevant law." *In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1085 (6th Cir. 1996) (cited favorably in *Zinser*, 253 F.3d at 1189); *see Castano v. Am. Tobacco Co.*, 84 F.3d 734, 741 (5th Cir. 1996) ("In a multi-state class action, variations in state law may swamp any common issues and defeat predominance."). Indeed, the proposed express warranty class would encompass one state that applies a rebuttable presumption of reliance (Pennsylvania), another with no reliance requirement (Virginia), and yet another that would only require reliance if the Plaintiffs could not establish privity (California). Similarly, the proposed express warranty notice-to-seller class would include one state with a strict reliance requirement (Illinois), two states with no reliance requirement (Ohio and Oregon), and a fourth with an unsettled approach to reliance (New Mexico).

Thus, the Court has essentially two options. On the one hand, craft complex jury instructions which account for the differences in state laws but are exceedingly difficult for a jury to apply (if it is possible to craft such instructions). On the other hand, oversimply the law, thereby depriving Defendant of "the benefit of the appropriate substantive law applicable to their claims[.]" *In re Hyundai & Kia Fuel Econ. Litig.*, 926 F.3d 539, 574 (9th Cir. 2019) (Ikuta, J., dissenting) ("Because the Rules Enabling Act forbids interpreting Rule 23 to abridge, enlarge or modify any substantive right, a court cannot certify a

class if doing so would deprive litigants of the benefit of the appropriate substantive law applicable to their claims, even if a class action would provide the most secure, fair, and efficient means of compensating plaintiffs" (internal citations and quotation marks omitted).) Neither approach is tenable in this case.

Accordingly, because Plaintiffs have not proposed a suitable and realistic plan for instructing the jury on the applicable legal standards at trial, the Court declines to certify Plaintiffs' proposed express warranty classes.

2. <u>The Implied Warranty Class</u>

The Court next turns to the proposed implied warranty class.

a. Applicable Law

Plaintiffs bring claims for breach of implied warranty under the laws of ten states: Arizona, California, Illinois, Massachusetts, Missouri, Ohio, Pennsylvania, Texas, Utah, and Virginia. These states generally apply some version of the UCC test for breach of implied warranty. *See* UCC § 2-314. They require, by and large, that the plaintiff prove: (1) the defendant is a manufacturer or seller of the product; (2) the plaintiff is a foreseeable user of the product; (3) the product was unmerchantable or unfit for its ordinary use at the time the product left defendant's possession; (4) the defendant's breach caused plaintiff to suffer damages or lose money; and (5) the defendant received notice within reasonable time of plaintiff's damage or loss. (*See* Pls.' App'x B, ECF No. 77-2.) Again, however, these state laws vary in meaningful ways. *See Walsh*, 807 F.2d at 1016 (acknowledging variation in state implied warranty laws and noting that "[t]he Uniform Commercial Code is not uniform."); *Osborne v. Subaru of Am., Inc.*, 198 Cal. App. 3d 646, 656 (1988) ("While the nationwide adoption of the Uniform Commercial Code provides this cause of action in virtually all states, it is not applied in the same fashion everywhere"); *Feinstein v. Firestone Tire & Rubber Co.*, 535 F. Supp. 595, 605 (S.D.N.Y. 1982) (describing plaintiffs' contention that the UCC provides the implied warranty standard for 49 states as "an over-simplification; even within the UCC [*sic*] implied warranty umbrella, state law may differ in such significant areas as vertical privity and the availability of punitive damages.")

For example, privity of contract is generally required under the laws of Arizona, California, Illinois, Ohio, Utah, and Virginia. *Post v. Ford Motor Co.*, No. CV-09-00628-PHX (ROS), 2010 WL 11628014, at *1 (D. Ariz. Dec. 6, 2010); Cal. Comm. Code § 2314; *Rothe v. Maloney Cadillac, Inc.*, 119 Ill. 2d 288, 292 (1988); *Cancino*, 2010 WL 2607251, at *10; *Davencourt at Pilgrims Landing Homeowners Ass'n v. Davencourt at Pilgrims Landing, LC*, 221 P.3d 234, 252 (Utah 2009); *Pulte Home Corp. v. Parex, Inc.*, 265 Va. 518, 525 (2003).

Meanwhile, privity is generally not required in Massachusetts, Missouri, Pennsylvania, or Texas. *Jacobs v. Yamaha Motor Corp., U.S.A.*, 420 Mass. 323, 328 (1995); *Collegiate Enterprises, Inc. v. Otis Elevator Co.*, 650 F. Supp. 116, 118 (E.D. Mo. 1986); *Wineburgh v. Jaxon Int'l, LLC*, No. 18-CV-3966, 2020 WL 1986453, at *2 (E.D. Pa. Apr. 27, 2020) (citing *Moscatiello v. Pittsburgh Contractors Equip. Co.*, 595 A.2d 1198, 1203–04 (Pa. Super. Ct. 1991)); *Nobility Homes of Texas, Inc. v. Shivers*, 557 S.W.2d 77, 81 (Tex. 1977).

Also, exceptions apply. In California, privity is not required when the plaintiff relies on written labels or advertisements of a manufacturer. *Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017, 1023 (9th Cir. 2008). And in Utah, "privity of contract is not necessary where a direct relationship exists." *Davencourt*, 221 P.3d at 245; *Rollolazo v. BMW of N. Am., LLC*, No. 16-CV-966-BRO (SSX), 2017 WL 1536456, at *17 (C.D. Cal. Feb. 3, 2017) (applying this exception). Also, although privity is required under California's Commercial Code, it is less clear whether privity is required under California's Song-Beverly Act. *Keegan v. Am. Honda Motor Co.*, 838 F. Supp. 2d 929, 947 (C.D. Cal. 2012) (collecting cases). Plaintiffs bring implied warranty claims under both statutes.

b. Analysis

Again, the Court finds that Plaintiffs have not met their burden to demonstrate a suitable and realistic plan for trial of the implied warranty claims. If the Court were to certify Plaintiffs' proposed implied warranty class, the class would include Plaintiffs from states that require privity, do not require privity, have exceptions to the privity requirement, and have unsettled legal standards. Plaintiffs have not met their burden to show that the differences in the privity requirement are immaterial, nor have Plaintiffs proposed a workable solution to instructing the jury on these different standards. Indeed, the parties themselves disagree about the relevant laws. For example, Plaintiffs submit that Missouri requires privity, while Defendant contends that it does not. (*Compare* Pls.' App'x B *with* Def.'s App'x 2, ECF No. 2.) Plaintiffs also aver that Ohio has no privity requirement, while Defendant argues the opposite. (*Id.*) That the parties cannot agree on the relevant laws underscores that differences in state implied warranty laws will predominate over common issues and make a class action unmanageable. The Court thus declines to certify Plaintiffs' proposed implied warranty class.

3. <u>The Consumer Protection Classes</u>

Plaintiffs allege violations of the consumer protection laws of eight states—California, Illinois, Massachusetts, Missouri, New Mexico, Ohio, Texas, and Utah—and seek to certify three consumer protection classes: (1) an unfair and deceptive conduct class, (2) an omissions class, and (3) an unconscionable acts or practices class.

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Plaintiffs originally brought their fraud claims on two theories: fraudulent misrepresentation and fraudulent omission. The Court has dismissed many of Plaintiffs' fraudulent misrepresentation claims with leave to amend. (Mot. to Dismiss Order.) Now, it is somewhat unclear whether Plaintiffs intend to proceed on both theories. In their Reply brief, Plaintiffs appear to concede that they bring these claims on an omission theory only. (*See* Reply at 5–6, ECF No. 108 (distinguishing Defendant's cited cases by arguing "these cases are inapposite because this Court has already dismissed Plaintiffs' misrepresentation-based claims and upheld the omissions-based claims" and proceeding to exclusively discuss case law in the omission context).) The Court thus presumes for purposes of this Motion that Plaintiffs intend to proceed only on an omission theory.

To state a claim for a fraudulent omission, a plaintiff must generally allege that: (1) the defendant concealed or suppressed a material fact, (2) the defendant was under a duty to disclose that fact to the plaintiff, (3) the defendant intentionally concealed or suppressed the fact with the intent to defraud the plaintiff, (4) the plaintiff was unaware of the fact and would not have acted as he did if he had known of the concealed or suppressed fact, and (5) as a result of the concealment or suppression of the fact, the plaintiff sustained damage. *See, e.g.*, *SCC Acquisitions Inc. v. Cent. Pac. Bank*, 207 Cal. App. 4th 859, 864 (2012). Here, the crux of Plaintiffs' fraudulent omission theory is that Defendant knew that the Vehicles suffered a defect yet failed to disclose this information to the public.

a. The Unfair and Deceptive Conduct Class

Plaintiffs' seek to certify an unfair and deceptive conduct class, which includes Plaintiffs from California, Illinois, Massachusetts, Missouri, and Ohio.

i. Applicable Law

The Court begins with the applicable law, focusing on the states' approaches to scienter, reliance, causation, and materiality.

a. California

California has two consumer protection statutes: the Unfair Competition Law ("UCL") and the Consumer Legal Remedies Act ("CLRA"). The UCL prohibits "any unlawful, unfair or fraudulent business act or practice[.]" Cal. Civ. Code § 17200. This statute is three-pronged—"Each of these three adjectives [unlawful, unfair, or fraudulent] captures a separate and distinct theory of liability." *Beaver v. Tarsadia Hotels*, 816 F.3d 1170, 1177 (9th Cir. 2016) (internal quotation marks omitted). Meanwhile,

the CLRA prohibits "unfair methods of competition and unfair or deceptive acts or practices[.]" Cal. Civ. Code § 1770(a).

Scienter: California courts have found that neither the UCL nor the CLRA imposes a scienter requirement. *See, e.g.*, *Mazza v. Am. Honda Motor Co., Inc.*, 666 F.3d 581, 591 (2012) (stating the UCL and CLRA "have no scienter requirement"). However, the plaintiffs must show the defendant's knowledge of an undisclosed defect at the time of sale. *Wilson v. Hewlett-Packard Co.*, 668 F.3d 1136, 1145 n.5 (9th Cir. 2012) (under the UCL, the "the failure to disclose a fact that a manufacturer does not have a duty to disclose, i.e., a defect of which it is not aware, does not constitute an unfair or fraudulent practice"); *Williams v. Yamaha Motor Co. Ltd.*, 851 F.3d 1015, 1025 (9th Cir. 2017) (under UCL and CLRA, a party must allege "that the manufacturer knew of the defect at the time a sale was made.")

Reliance/Causation: To recover under either statute, a plaintiff must generally show that she relied on the Defendant's act or omission. *Tucker v. Pac. Bell Mobile Servs.*, 208 Cal. App. 4th 201, 221 (2012) (CLRA); *Backhaut v. Apple, Inc.*, 74 F. Supp. 3d 1033, 1047–48 (N.D. Cal. 2014) (UCL). "To prove reliance on an omission, a plaintiff must show that the defendant's nondisclosure was an immediate cause of the plaintiff's injury-producing conduct." *Daniel v. Ford Motor Co.*, 806 F.3d 1217, 1225 (9th Cir. 2015). The "plaintiff need not prove that the omission was the only cause or even the predominant cause, only that it was a substantial factor in his decision." *Id.* The "plaintiff may do so by simply proving that, had the omitted information been disclosed, one would have been aware of it and behaved differently." *Id.* (internal quotation marks omitted).

Materiality: If an omission is material, the Court can infer reliance and causation (i.e., that one would have behaved differently). *Id.*; *In re Vioxx Class Cases*, 180 Cal. App. 4th 116, 129 (2009) ("Causation, on a class-wide basis, may be established by *materiality*. If the trial court finds that material misrepresentations [or omissions] have been made to the entire class, an inference of reliance arises as to the class."). An omission is material if it is likely to mislead a reasonable consumer. *Stearns v. Ticketmaster Corp.*, 655 F.3d 1013, 1022 (9th Cir. 2011). "Alleged defects that create 'unreasonable safety risks' are considered material." *Daniel*, 806 F.3d at 1225.

b. Illinois

Illinois' Consumer Fraud and Deceptive Business Practice Act ("ICFA") prohibits "[u]nfair methods of competition and unfair or deceptive acts or practices ... in the conduct of any trade or commerce[.]" 815 ILCS 505/2. To recover under the ICFA, a plaintiff must show: (1) a deceptive act or practice by the defendant, (2) defendant's intent that the plaintiff rely on the deception, (3) the occurrence of the deception in a course of conduct involving trade or commerce, and (4) actual damage to the plaintiff that is (5) a result of the deception." *De Bouse v. Bayer*, 235 Ill.2d 544, 550 (2009).

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Scienter: Illinois requires proof of scienter—that is, that the defendant intended the plaintiff to rely on the allegedly deceptive conduct. *Id.*

Reliance/Causation: Illinois does not require a plaintiff to show that she actually relied on the defendant's omission. *Connick v. Suzuki Motor Co.*, 174 Ill. 2d 482, 501 (1996) ("Plaintiff's reliance is not an element of statutory consumer fraud[.]") However, the plaintiff must show that the defendant's deception proximately caused her damage. *Id.*

Materiality: Illinois requires that a representation or omission be material. *Id.* at 505. "A material fact exists where a buyer would have acted differently knowing the information, or if it concerned the type of information upon which a buyer would be expected to rely in making a decision whether to purchase." *Id.* This is essentially a "reasonable person" standard. *See In re ConAgra Foods, Inc.*, 90 F. Supp. 3d 919, 996 (C.D. Cal. 2015).

c. *Massachusetts*

Massachusetts' Consumer Protection Act ("CPA"), prohibits "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce[.]" Mass. Gen. Laws Ann. ch. 93A, § 2m. A plaintiff alleging a violation of the CPA must establish (1) an unfair or deceptive act or practice, (2) an injury, and (3) a causal connection between the injury and the defendant's unfair or deceptive act. *Geanacopoulos v. Philip Morris USA Inc.*, No. 98-6002-BLS1, 2016 WL 757536, at *12 (Mass. Super. Feb. 24, 2016).

Scienter: Massachusetts does not require proof of scienter "or even knowledge on the part of the defendant that the representation was false." *Id.* (quoting *Aspinall v. Philip Morris Companies, Inc.*, 442 Mass. 381, 394 (2004)).

Reliance/Causation: Massachusetts does not require the plaintiff to prove reliance. *Sebago, Inc. v. Beazer E., Inc.*, 18 F. Supp. 2d 70, 103 (D. Mass. 1998). However, the evidence must warrant "a finding of a causal relationship between the misrepresentation and the injury to the plaintiff." *Fraser Eng'g Co. v. Desmond*, 26 Mass. App. Ct. 99, 104 (1988).

Materiality: Under the CPA, "an act or practice is deceptive if it possesses a tendency to deceive and if it could reasonably be found to have caused a person to act differently from the way he [or she] would have acted." *Moreira v. Citimortgage, Inc.*, No. 15-13720-LTS, 2016 WL 4707981, at *3 (D. Mass. Sept. 8, 2016).

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d. Missouri

Missouri's Merchandising Practices Act ("MMPA") proscribes "[t]he act, use or employment by any person of any deception, fraud, false pretense, false promise, misrepresentation, unfair practice or the concealment, suppression, or omission of any material fact in connection with the sale ... of any merchandise in trade or commerce." Mo. Rev. Stat. § 407.020.1. To prevail under the MPA, plaintiffs must establish that they (1) purchased merchandise from the defendant; (2) for personal, family or household purposes; and (3) suffered an ascertainable loss of money or property; (4) as a result of an act declared unlawful under the MPA. *Murphy v. Stonewall Kitchen, LLC*, 503 S.W.3d 308, 311 (Mo. Ct. App. 2016)

Scienter: Scienter is required only in cases involving material omissions. *Hope v. Nissan N. Am., Inc.*, 353 S.W.3d 68, 84 (Mo. Ct. App. 2011) (noting "some MMPA claims do not require scienter while others do"); *Hays v. Nissan N. Am. Inc.*, 297 F. Supp. 3d 958, 963 (W.D. Mo. 2017) ("A claim for omission of a material fact under the MMPA has a scienter requirement.") This means that the plaintiffs must be able to show: (1) the defendant was aware of the alleged defect, (2) when the defendant became aware, and (3) that the defendant purposefully omitted this fact in representations to each individual class member. *Hope*, 353 S.W.3d at 84.

Reliance/Causation: Reliance is not required under the MMPA. *Murphy*, 503 S.W.3d at 311.

Materiality: The MMPA prohibits the "omission of any *material* fact." Mo. Rev. Stat. § 407.020.1 (emphasis added). The Eighth Circuit has stated that "the definition of 'material fact' in the applicable MMPA regulations is broader than the materiality requirement of common law fraud." *Huffman v. Credit Union of Texas*, 758 F.3d 963, 968 (8th Cir. 2014).

e. Ohio

Ohio's Consumer Sales Practices Act ("CSPA") provides that "[n]o supplier shall commit an unfair or deceptive act or practice in connection with a consumer transaction." Ohio Rev. Code Ann. § 1345.02.

Scienter: Ohio does not impose a scienter requirement. *Rose v. Zaring Homes, Inc.*, 122 Ohio App. 3d 739, 745 (1997) ("Intent to deceive is not an element required for a violation of the deceptive-practices portion of the [CSPA].")

Reliance/Causation: The plaintiff must show that the alleged act or omission impacted the plaintiff's decision to purchase the item at issue. *In re Porsche Cars N. Am., Inc.*, 880 F. Supp. 2d 801, 868 (S.D. Ohio 2012).

Materiality: Materiality is required to prevail on an omission theory. *Id.* at 871 ("Omissions are actionable under the OCSPA if they 'concern a matter that is or is likely to be material to a consumer's decision to purchase the product or service involved.'")

ii. Analysis

As demonstrated above, the consumer protection statutes implicated in Plaintiffs' proposed unfair and deceptive conduct class differ in several ways. For example, consider the scienter requirement. Plaintiffs' proposed instructions do not include any scienter requirement. But this requirement varies among the five applicable jurisdictions. California's consumer protection statutes do not have a scienter requirement, but they do require the plaintiff to show that the defendant had knowledge of an undisclosed defect at the time of sale. Massachusetts and Ohio do not impose any scienter requirement, while Illinois and Missouri require proof of scienter.

State approaches to reliance and materiality also differ in ways not captured by Plaintiffs' proposed instructions. California's CLRA and UCL both require a plaintiff to show that she relied on a defendant's omission, but this requirement is subject to an exception: if a plaintiff can show an omission is material, the Court can infer reliance. Meanwhile, Illinois, Massachusetts, and Missouri do not require reliance, but do require materiality. And Ohio requires both reliance and materiality.

Plaintiffs have not met their burden to show that these differences are immaterial, nor have Plaintiffs demonstrated that these differences can be accounted for in a manageable way at a trial. To be sure, Plaintiffs argue that scienter issues—in particular—are immaterial because the Court can ask the jury specific questions geared to the relevant statutes. (Reply at 10 (citing *In re Pharm. Indus. Average Wholesale Price Litig.*, 252 F.R.D. 83, 103 (D. Mass. 2008).) But Plaintiffs have not submitted any samples of these questions. The Court "cannot rely [merely] on assurances of counsel that…problems with predominance or superiority can be overcome." *Castano*, 84 F.3d at 741. Further, differences in the relevant state laws appear to be material. Indeed, in *Mazza*, the Ninth Circuit considered differences in state approaches to scienter and reliance and found that they were "not trivial or wholly immaterial[.]" *Mazza*, 666 F.3d at 591 (explaining, for example, that "[i]n cases where a defendant acted without scienter, a scienter requirement will spell the difference between the success and failure of a claim.")

Accordingly, the Court concludes that Plaintiffs have not met their burden to demonstrate that common issues of law predominate for the proposed unfair and deceptive conduct class. *See id.* at 596

("Because the law of multiple jurisdictions applies here to any nationwide class of purchasers or lessees of Acuras…variances in state law overwhelm common issues and preclude predominance for a single nationwide class."); *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1018 (7th Cir. 2002) ("Because these [consumer-protection] claims must be adjudicated under the law of so many jurisdictions, a single nationwide class is not manageable.")

b. The Omissions Class

The Court next turns to Plaintiffs' proposed omissions class, which would include Plaintiffs from Illinois and Missouri. Both states' laws are set forth above. They are substantially similar with respect to scienter, reliance, causation, and materiality. Because there is little difference between the ICFA and the MMPA, the Court finds that differences in these states' laws do not predominate.

c. The Unconscionable Acts or Practices Class

Finally, the Court considers Plaintiffs' proposed unconscionable acts or practices class, which would include Plaintiffs from New Mexico, Texas, and Utah.

i. Applicable Law

a. New Mexico

New Mexico's UPA prohibits "[u]fair or deceptive trade practices and unconscionable trade practices in the conduct of any trade or commerce[.]" N.M. Stat. Ann. § 57-12-3.

Scienter: New Mexico does not require that a misrepresentation be "intentionally made, but it must be knowingly made." *Stevenson v. Louis Dreyfus Corp.*, 112 N.M. 97, 100 (1991). "The 'knowingly made' requirement is met if a party was actually aware that the statement was false or misleading when made, or in the exercise of reasonable diligence should have been aware that the statement was false or misleading." *Id.* at 100–01.

Reliance/Causation: Under the UPA, the plaintiff need not show reliance. *Smoot v. Physicians Life Ins. Co.*, 135 N.M. 265, 267 (2003) ("[D]etrimental reliance is not an essential element to the relief provided for violations of the New Mexico Unfair Practices Act[.]") As for causation, in a class action, the court "may award members of the class such actual damages as were suffered by each member of the class *as a result of* the unlawful method, act or practice." N.M. Stat. Ann. § 57-12-10(E) (emphasis added).

Materiality: The UPA "imposes a duty to disclose material facts reasonably necessary to prevent any statements from being misleading. The existence of a duty is dependent on the materiality of the facts." *Smoot*, 135 N.M. at 269 (internal citation omitted).

b. Texas

Texas' Deceptive Trade Practices-Consumer Protection Act ("DTPA") prohibits "[f]alse, misleading, or deceptive acts or practices in the conduct of any trade or commerce[.]" Tex. Bus. & Com. Code Ann. § 17.46(a).

Scienter: Scienter is generally not required under the DTPA. *Smith v. Herco, Inc.*, 900 S.W.2d 852, 859 (Tex. App. 1995) ("Intent to misrepresent, or knowledge that a representation is untrue, has never been an element of a DTPA 'laundry list' claim unless the specific provision requires intent"; "No duty to know the facts are true arises when the seller does not make representations, but merely fails to reveal information about which he does not know.")

Reliance/Causation: Reliance is generally required under the DTPA. *Robinson v. Match.com, L.L.C.*, No. 3:10-CV-2651-L, 2012 WL 5007777, at *8 (N.D. Tex. Oct. 17, 2012) ("Reliance by the consumer is an element of DTPA claims that are based on false, misleading, or deceptive practices or section 17.46's laundry list violations."); Tex. Bus. & Com. Code Ann. § 17.50(a)(1)(B).

Materiality: While a misrepresentation must be material to be actionable, *Drury Sw., Inc. v. Louie Ledeaux #1, Inc.*, 350 S.W.3d 287, 291 (Tex. App. 2011), it does not appear than an omission needs to be material.

c. Utah

Utah's Consumer Sales Practices Act ("CSPA") prohibits deceptive and unconscionable acts or practices by suppliers. Utah Code Ann. §§ 13-11-4, 13-11-5.

Scienter: Utah's CSPA imposes a scienter requirement. *See Rawson v. Conover*, 20 P.3d 876, 883 (Utah 2001); *Midland Funding LLC v. Sotolongo*, 325 P.3d 871, 881 (Utah 2014), *abrogated on other grounds by Gonzalez v. Cullimore*, 417 P.3d 129 (Utah 2018).

Reliance/Causation: Utah does not appear to impose a reliance requirement. However, the plaintiff must suffer loss "as a result of" violations of the CSPA. Utah Code Ann. §§ 13-11-19(2); 13-11-19(4)(a).

Materiality: It is unclear whether Utah has a materiality requirement.

ii. Analysis

As shown above, New Mexico, Texas, and Utah differ with respect to scienter, reliance, and materiality. First, consider scienter. Texas does not require any proof of scienter, while Utah does. Meanwhile, New Mexico takes essentially a middle-ground approach: a misrepresentation need not be intentionally made, but it must be knowingly made. As for reliance, New Mexico and Utah do not appear to impose a reliance requirement, while Texas does. Finally, materiality is required under Utah law, but it is not required for omissions under Texas law. And it is unclear whether Utah has a materiality requirement.

Plaintiffs have not met their burden to show that the differences set forth above are immaterial, nor have they proposed a manageable way to instruct the jury as to this proposed class. For the same reasons discussed above—namely, the differences in the relevant states' laws—the Court denies Plaintiffs' request to certify the proposed unconscionable acts or practices class.

4. The Fraudulent Concealment Class

Finally, Plaintiffs seek to certify a fraudulent concealment class of Californians who leased or purchased the Vehicle. To prevail on this claim, Plaintiffs will have to show: (1) a material representation or omission by Defendant of a presently existing or past fact; (2) knowledge or belief by Defendant of its falsity or concealment and a duty to disclose based on exclusive or superior knowledge; (3) an intention that the other person rely on it; (4) justifiable reliance thereon by the other person; and (5) resulting damages. (Pls.' App'x D, ECF No. 77-4.) Because this class involves only one state, there are no differences in state law that raise issues of predominance or superiority. To be sure, Defendant argues that certification of this proposed class is not appropriate for a separate reason—namely that Plaintiffs cannot show reliance on a classwide basis. But the Court addresses this argument in the following section, in the context of Plaintiffs' request for 13 state-specific classes.

C. Plaintiffs' Proposed Alternative of State-Specific Classes

As an alternative to the seven proposed classes, Plaintiffs ask the Court to certify 13 state-specific classes. This proposal obviates the issue of instructing a jury on multiple states' different legal standards, but other hurdles remain.

Plaintiffs' Motion primarily addresses predominance in the context of their request for seven multi-state classes. It is only in passing that Plaintiffs ask the Court to alternatively certify 13 state-

specific classes. Thus, Plaintiffs fail to adequately address how the predominance analysis will play out in this alternative scenario. For example, one of Defendant's primary objections to certification of the proposed classes has to do with reliance. Put simply, Defendant argues that to demonstrate reliance, Plaintiffs will have to use individualized evidence. Plaintiffs disagree, arguing that the relevant states permit reliance to be established on a classwide basis using common proof. Specifically, Plaintiffs contend that "[n]one of the included statutes requires an individualized showing of reliance for material omissions claims; rather, courts apply an objective materiality test to determine whether the practice was likely to deceive a consumer acting reasonably." (*See* Mot. at 14–15, ECF No. 77.) In support, Plaintiffs include in their Motion a footnote with a string cite of cases from some—but not all—of the relevant jurisdictions. (*See id*. at 15 fn. 10.)[1] This footnote does not, however, permit the type of "rigorous" analysis required before the Court can certify a class. *See Zinser*, 253 F.3d at 1186.

For one, the footnote glosses over meaningful differences in state approaches to the reliance requirement. Take, for example, the difference between California and Texas. Plaintiffs correctly observe that California permits reliance to be proven on a classwide basis through evidence of materiality, but they omit that Texas law is not so favorable. *Compare, e.g.*, *Ehret v. Uber Techs., Inc.*, 148 F. Supp. 3d 884, 902 (N.D. Cal. 2015) ("reliance [in the CLRA context] can be established on a class-wide basis by materiality") *with Sw. Bell Tel. Co. v. Mktg. on Hold Inc.*, 308 S.W.3d 909, 921 (Tex. 2010) ("Texas courts have been reluctant to certify a class when proof of reliance is required as an element of a claim."); *see also Texas S. Rentals, Inc. v. Gomez*, 267 S.W.3d 228, 237 (Tex. App. 2008) (noting that "although the [Texas] supreme court in *Schein* did not entirely preclude class actions in which reliance was an issue, . . . it did make such cases a near-impossibility"; questioning "whether given the individualized nature of reliance, any class action could ever be certifiable under *Schein*"; and acknowledging that, as of 2008, "no court since *Schein* has ever found evidence of class-wide reliance." (internal quotation marks omitted)). The failure to meaningfully grapple with differences in state approaches to reliance is fatal to Plaintiffs' request for certification of 13 state-specific classes.

Ultimately, the Court *is* satisfied that Plaintiffs have adequately briefed their request for a California-specific class. Both parties' briefing contains ample citations to California authority and extensive discussion of the applicable case law. The Court thus addresses whether certification of such a class is appropriate below. The Court denies Plaintiffs' request to certify the remaining twelve state-specific classes without prejudice.

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[1] Specifically, the footnote lacks a citation to Utah law.

1. *Numerosity, Commonality, Typicality, and Adequacy*

Numerosity, commonality, typicality, and adequacy are all satisfied as to the proposed California class.

First, Defendant does not dispute that the proposed class has well over forty members. Numerosity is therefore satisfied. *See Salas*, 2019 WL 1940619, at *3.

Second, "[t]he claims of all prospective class members involve the same alleged defect, covered by the same warranty, and found in vehicles of the same make and model." *Wolin*, 617 F.3d at 1172 (finding commonality satisfied in automobile defect case). Thus, commonality is satisfied. *See Hanlon*, 150 F.3d at 1019–20 (finding commonality satisfied where plaintiffs' claims "stem[med] from the same source: the allegedly defective designed rear liftgate latch"); *Edwards v. Ford Motor Co.*, 603 F. App'x 538, 540 (9th Cir. 2015) (affirming district court's holding that "whether a defect existed and whether Ford had a duty to disclose the defect were both questions common to the class").

Third, typicality is also satisfied. Defendant argues that typicality is not satisfied because Plaintiff Banh (California) "complains of alleged representations from salespersons at independent, third-party dealerships that Android Auto was coming in a few weeks or months but absurdly has not even attempted to use Android Auto since it was made available by software update." (Opp. at 13 n.6, ECF No. 96 (internal quotation marks and citation omitted).) But Defendant does not explain how this makes Banh's claims atypical of the proposed class. In any event, Plaintiffs concede that they are proceeding only on an omission theory. Thus, this issue is irrelevant, as it bears only on Plaintiffs' abandoned misrepresentation theory.

Finally, Defendant does not dispute that adequacy is satisfied. The Court thus finds that all of the requirements of Rule 23(a) have been met.

2. *Predominance*

The Court next turns to predominance.

a. *Breach of Warranty*

The Court first considers predominance in the context of the breach of warranty claims. Defendant argues that predominance is not satisfied as to these claims because Plaintiffs "have failed to provide evidence that all class members are substantially certain to experience a malfunction from the

alleged defect." (*Id.* at 14.) In support, Defendant cite *Torres v. Nissan N. Amer. Inc.*, 2015 WL 5170539 at *5 (C.D. Cal. Sept. 1, 2015), which itself relied on two cases: *Wolin* and *American Honda*.

In *Wolin*, the plaintiffs brought both Michigan and Florida consumer protection and breach of warranty claims based on a purported geometry defect in the Land Rover's LR3's alignment that caused premature tire wear. The district court denied the plaintiffs' motion for class certification and, on appeal, the Ninth Circuit reversed, holding that "[t]he district court erred when it concluded…that certification [wa]s inappropriate because [plaintiffs] did not prove that the defect manifested in a majority of the class's vehicles." *Wolin*, 617 F.3d at 1173. The Court explained that "proof of the manifestation of a defect is not a prerequisite to class certification." *Id.*

"Less than a year after the *Wolin* decision, the California Court of Appeal[] addressed a nearly identical situation and differed in its conclusion." *Torres*, 2015 WL 5170539, at *4 (citing *Am. Honda Motor Co. v. Superior Ct.*, 199 Cal. App. 4th 1367 (2011)). There, the plaintiff moved to certify a class under California law, alleging California breach of warranty claims arising out of transmission defects that caused his vehicle to lurch unsafely on the road. *Id.* The defendant argued that class certification was improper because the plaintiff had failed to prove that all class vehicles contained the same "inherent defect which is substantially certain to result in malfunction during the useful life of the product." *Id.* (quoting *Am. Honda*, 199 Cal. App. 4th at 1373). Ultimately, the California Court of Appeal held that a breach of warranty claim in California "cannot result if the product operates as it was intended to and does not malfunction during its useful life." *Am. Honda*, 199 Cal. App. 4th at 1376. "Accordingly, a breach of warranty claim requires 'substantial evidence of a defect that is substantially certain to result in malfunction during the useful life of the product.'" *Torres*, 2015 WL 5170539, at *4 (citing *Am. Honda*, 199 Cal. App. 4th at 1376).

Since *American Honda*, district courts have been divided on whether a plaintiff moving for class certification of warranty claims must demonstrate "a defect that is substantially certain to result in malfunction during the useful life of the product." *Am. Honda*, 199 Cal. App. 4th at 1376; *Victorino v. FCA US LLC*, No. 16CV1617-GPC(JLB), 2018 WL 2455432, at *16 (S.D. Cal. June 1, 2018) (collecting cases). For example, in *Torres*, a district court denied class certification, finding that the plaintiffs "failed to provide evidence that all class members [were] substantially certain to experience a malfunction from the alleged defect." *Torres*, 2015 WL 5170539, at *5. Meanwhile, in *Keegan*, the court found that it was "bound to apply *Wolin*" and refused to require plaintiffs, at the class certification stage, to "adduce evidence that [the] defect [wa]s substantially certain to arise in all class vehicles during the vehicles' useful life." *Keegan*, 284 F.R.D. at 535.

"The Court finds *Keegan*'s reasoning persuasive as it applies federal procedural law on class certification." *Victorino*, 2018 WL 2455432, at *17. The Ninth Circuit has cautioned that district courts

should not determine the merits of any claims at the class certification stage. *Id.* "The requirement of *American Honda* that a plaintiff must demonstrate that all class members' vehicles' defect will substantially be certain to experience a malfunction from the alleged defect during its useful life is a determination on the merits which this Court does not find proper on class certification." *Id.* Accordingly, "the Court concludes that Plaintiffs do not have to demonstrate a manifestation of a current defect or that there is a substantial certainty of manifestation in the future but only to show that their [breach of warranty claims] are susceptible to common proof." *Id.*

In this case, Plaintiffs' expert, Steve Loudon ("Loudon"), opines that all of the Vehicles contain the same defects at the time of sale. Defendant, however, challenges Loudon's report under Federal Rule of Evidence 702. Specifically, Defendant argues that (1) Loudon offers opinions outside his areas of expertise, and (2) Loudon's report is not based on reliable or accurate analyses of data and technical information.

Defendant's arguments may well gain traction at the appropriate juncture. Defendant persuasively points out that Loudon's expert report appears in some respects shaky. Shakiness, however, does not require exclusion. *Primiano v. Cook*, 598 F.3d 558, 564 (9th Cir. 2010). The question at this time is not "whether the expert is right or wrong, just whether his [or her] testimony has substance such that it would be helpful to a jury." *Alaska Rent-A-Car*, 738 F.3d at 969. Here, the expert testimony at issue appears to meet this standard—at least for now. The Court therefore denies Defendant's Motion to exclude Loudon's testimony and opinions without prejudice.

In sum, the Court finds that common issues predominate as to the warranty claims in the proposed California Class.

b. Consumer Protection and Fraudulent Concealment

The Court next considers predominance in the context of Plaintiffs' CLRA, UCL, and California fraudulent concealment claims. Defendant argues that predominance is not satisfied as to these claims because Plaintiffs will be unable to show reliance and causation on a classwide basis. Plaintiffs disagree—correctly observing that where, as here, Plaintiffs proceed on an omission theory, they may show reliance and causation on a classwide basis by establishing materiality. *Daniel*, 806 F.3d at 1225; *Keegan*, 284 F.R.D. at 531 ("Defendants allegedly provided the same information to the entire class, i.e., no information…As long as plaintiffs can prove that this omission was material, therefore, they will have met their burden of proving causation as to the entire class.") Under California law, "[a]n omission is material if a reasonable consumer would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question." *Daniel*, 806 F.3d at 1225 (quoting another source).

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Here, Plaintiffs contend that they can show materiality on a classwide basis through a choice-based conjoint ("CBC") analysis prepared by their expert, Steven Gaskin ("Gaskin"), as well as "Plaintiffs' averments that they would not have…bought their cars (or would have paid less) had Honda disclosed the defect." (Reply at 6.) A CBC analysis is a survey method designed to determine how much consumers will pay for a given product attribute. Here, Gaskin designed and implemented a conjoint survey to measure the difference in the market value of an Acura RDX with the defect and the value of an otherwise identical car without the defect at the point of first purchase. He then conducted a Hierarchical Bayes regression to calculate the relative influence each attribute had on the respondents' purchase decisions. According to Gaskin, the results of this survey confirm that Honda's omissions were material and resulted in overcharging class members for the Vehicles.

Defendant contends that Gaskin's CBC analysis is flawed for several reasons and asks the Court to exclude it. First, Defendant argues that the CBC analysis accounts only for the demand side of the "fair market value" equation (what a willing purchaser would pay for a vehicle with a given set of attributes) without considering the supply side (what a willing seller, under no obligation to sell, would accept). In a similar vein, Defendant identifies multiple errors that Gaskin allegedly made when preparing his report. Finally, Defendant also argues that Plaintiffs failed to provide critical data that Gaskin relied on in his report, in violation of Federal Rule of Civil Procedure 26(a).

Again, although Defendant's arguments may well gain traction at the appropriate juncture, Gaskin's testimony does not require exclusion at this stage. First, most of Defendant's arguments go to the weight of Gaskin's CBC analysis, not its admissibility. *Accord Sanchez-Knutson v. Ford Motor Co.*, 181 F. Supp. 3d 988, 995 (S.D. Fla. 2016) (declining to exclude Gaskin's CBC analysis in another case and noting that defendant could address weaknesses with Gaskin's report through cross-examination).

As for Defendant's procedural argument, Rule 26(a) requires a retained expert to provide a written report that "must contain (i) a complete statement of all opinions the witness will express and the basis and reasons for them; and (ii) the facts or data considered by the witness in forming [those opinions]." Fed. R. Civ. P. 26(a)(2)(B)(i)–(ii). Rule 37 "gives teeth to these requirements by forbidding the use at trial of any information required to be disclosed by Rule 26(a) that is not properly disclosed." *Hoffman v. Constr. Protective Servs., Inc.*, 541 F.3d 1175, 1179 (9th Cir. 2008), *as amended* (Sept. 16, 2008). "Under Rule 37, exclusion of evidence not disclosed is appropriate unless the failure to disclose was substantially justified or harmless." *Id.* "The burden to prove harmlessness is on the party seeking to avoid Rule 37's exclusionary sanction." *Goodman v. Staples The Office Superstore, LLC*, 644 F.3d 817, 827 (9th Cir. 2011).

Upon review, the Court agrees with Plaintiffs that any failure to produce evidence was harmless. As set forth in the Declaration of Sean Matt, Plaintiffs did inadvertently fail to produce some materials during discovery (*See* Matt Decl., ECF No. 113-1.) However, Plaintiffs ultimately produced these materials at the request of Defendant. (*See id.*) Further, many of the materials requested by Defendant were purportedly not considered by Gaskin in forming his opinions. (*Id.* ¶ 10.) The Court thus declines to exclude Gaskin's testimony under Rule 37.

Accordingly, the Court finds that common issues predominate with respect to Plaintiffs' CLRA, UCL, and California fraudulent concealment claims. These common issues include: whether Defendant was aware of the alleged defect, whether Defendant had a duty to disclose the defect, whether the failure to disclose would be material to a reasonable consumer, and whether Defendant's actions violated California law.

c. Damages

Finally, Defendant avers that certification is inappropriate because Plaintiffs have failed to present a reliable method for assessing damages on a classwide basis, as required by *Comcast Corp. v. Behrend*. 569 U.S. 27, 34 (2013) (finding that "individual damages calculations w[ould] inevitably overwhelm questions common to the class" where plaintiffs failed to establish that damages were "capable of measurement on a classwide basis.")

In this case, Plaintiffs propose that damages can be calculated based on the difference in market value between the Vehicle as represented (with a perfectly functioning infotainment system) and the Vehicles that Plaintiffs purchased (with a defective infotainment system). Gaskin has purportedly measured this overpayment at 12.7% using his CBC analysis. As set forth above, the Court does not find it appropriate to exclude Gaskin's CBC analysis in its entirety at this juncture. The Court thus finds that Plaintiffs have satisfied their burden to show that damages can be assessed on a classwide basis.

3. Superiority

Finally, superiority is also satisfied as to the proposed California class. Trying the claims of the proposed California class is "the most efficient and effective means of resolving the controversy[,]" given that recovery on an individual basis will likely be "dwarfed by the cost of litigating on an individual basis[.]" *Wolin*, 617 F.3d at 1175.

4. *Conclusion as to Proposed State-Specific Classes*

Based on the foregoing, the Court grants Plaintiffs' request to certify a California Class and denies Plaintiffs' request to certify the 12 remaining state-specific classes without prejudice. Rather than have Plaintiffs re-file here, however, the Court finds it appropriate to sever these claims and transfer them to more appropriate forums.

D. The Court Severs the Remaining Plaintiffs and Transfers Their Claims

The Court finds it appropriate to sever the claims of the remaining non-California Plaintiffs and transfer them to their home states. Under Federal Rule of Civil Procedure 21, the court has authority to sever parties or claims from an action *sua sponte*. Fed. R. Civ. P. 21. "Courts have broad discretion regarding severance under Rule 21." *Jones v. California Dep't of Corr.*, No. 1:08-CV-01383-LJO-SMS-PC, 2008 WL 4845219, at *1 (E.D. Cal. Nov. 7, 2008) (citing *Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1297 (9th Cir. 2000)). "As long as there is a discrete and separate claim, the district court may exercise its discretion and sever it." *Rice v. Sunrise Express, Inc.*, 209 F.3d 1008, 1016 (7th Cir. 2000).

A court may also transfer a case *sua sponte*. *See Jarvis Christian Coll. v. Exxon Corp.*, 845 F.2d 523, 528 (5th Cir. 1988). The venue statute provides that a court may transfer a civil action to any other district "[f]or the convenience of the parties and witnesses, in the interest of justice," so long as the transferee district is one where the case "may have been brought." 28 U.S.C. § 1404(a). To determine whether a transfer is appropriate, the Court considers a number of public and private interest factors, none of which are dispositive. *See Jones v. GNC Franchising, Inc.*, 211 F.3d 495, 498–99 (9th Cir. 2000).

First, Plaintiffs *could* have brought their claims in the judicial districts where they are located. Honda is a California corporation headquartered in California. However, the Vehicles were sold to Plaintiffs in each of their home states. "The forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297–98 (1980). Since Defendant sold the Vehicles to Plaintiffs in their home states, district courts in the transferee states would have personal jurisdiction over Defendant.

Second, the public and private interest factors weigh strongly in favor of transfer. The public interest factors include "(1) the local interest in the lawsuit, (2) the court's familiarity with the governing law, (3) the burden on local courts and juries, (4) congestion in the court, and (5) the costs of resolving a dispute unrelated to a particular forum." *Bos. Telecommunications Grp., Inc. v. Wood*, 588 F.3d 1201,

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1211 (9th Cir. 2009). The first factor weighs in favor of transfer, as the transferee courts have the more compelling interest than California. For example, the district of Utah has a more compelling interest than California in applying Utah law to vindicate the rights of Utah citizens. *But see id.* at 1212 (noting that California has an interest in preventing fraud from taking place within its borders). So too for the other transferee courts. Similarly, the second factor weighs in favor of transfer because district courts in the transferee districts are more familiar than this Court with the application of their respective state laws. *See Trout Unlimited v. U.S. Dep't of Agric.*, 944 F. Supp. 13, 19 (D.D.C. 1996) (transferring a case to Colorado and remarking that "[t]he district court in Colorado is more familiar than this court with the application of Colorado law."). The third factor also weighs in favor of transfer. The local interest in applying, say, Missouri law to a class of Missouri plaintiffs is low and the potential jurors of California should not be forced to bear the burden of trying such a dispute, particularly as the state grapples with an increasingly severe public health crisis that impacts the ability of the judicial system to function. The fourth factor weighs heavily in favor of transfer, as the Central District of California is extremely congested, with one of the busiest dockets in the country. *See* United States District Courts – National Judicial Caseload Profile, https://www.uscourts.gov/sites/default/files/data_tables/fcms_na_distprofile0331.2020.pdf (last visited July 23, 2020). Finally, the fifth factor weighs in favor of transfer, given that the costs this Court will incur to resolve disputes largely unrelated to this forum.

The private interest factors include: "(1) the residence of the parties and the witnesses; (2) the forum's convenience to the litigants; (3) access to physical evidence and other sources of proof; (4) whether unwilling witnesses can be compelled to testify; (5) the cost of bringing witnesses to trial; (6) the enforceability of the judgment; and (7) all other practical problems that make trial of a case easy, expeditious and inexpensive." *Bos. Telecommunications*, 588 F.3d at 1206–07. These factors tip in favor of transfer because although Defendant is located in California, Plaintiffs and the proposed class members reside in the states embracing the transferee districts. The convenience of the Plaintiffs is thus better served by trying the cases in their home states.

The primary private interest factor that counsels in favor of retaining venue here is that the Central District of California is Plaintiffs' preferred forum, which is typically entitled to deference. However, when a plaintiff is not a resident of the chosen forum, a court gives less deference to a plaintiff's choice. *See Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255 (1981) (the presumption in favor of the plaintiff's choice of forum "applies with less force when the plaintiff" is foreign); *Rimkus Consulting Grp., Inc. v. Balentine*, 693 F. Supp. 2d 681, 690 (S.D. Tex. 2010).

Accordingly, the Court will sever the non-California Plaintiffs based on their state of origin and transfer them to the states their claims derive from. The Court notes, however, that this case involves

seven states that embrace multiple district courts: Illinois, Indiana, Missouri, Ohio, Pennsylvania, Texas, Virginia. The Court therefore **ORDERS** the parties to provide supplemental briefing on what districts within these states are most appropriate for transfer. The parties shall file a joint brief **not to exceed 3 pages no later than August 3, 2020**. The parties' joint brief shall identify the district in each state that embraces the location where the named Plaintiffs reside. For example, if Plaintiff Alan resides in the Western District of Texas, the joint brief shall so state.

V. CONCLUSION

For the foregoing reasons, the Court **ORDERS** as follows:

1. Plaintiffs' Motion for Class Certification is **DENIED without prejudice** as to the Plaintiffs that have been compelled to arbitration.

2. Plaintiffs' Motion for Class Certification is **DENIED as moot** as to the Plaintiffs that have been dismissed.

3. Plaintiffs' Motion for Class Certification is **DENIED** insofar as it seeks certification of the seven proposed classes.

4. Plaintiffs' Motion for Class Certification is **GRANTED in part** and **DENIED in part** insofar as it seeks certification of thirteen state-specific classes:

    a. The Motion is **GRANTED** to the extent it seeks certification of a California Class. The Court appoints Plaintiff Banh as class representative. The California Class is defined as follows: "All persons or entities who purchased a new Class Car from an authorized Acura dealer in California."

    b. The Motion is **DENIED** in all other respects.

5. Defendant's Motions to Strike are **DENIED without prejudice**.

6. Plaintiffs' claims are **SEVERED** and **TRANSFERRED** as follows:

    a. Bilbrey's claims are hereby severed and transferred to the District of Arizona.

    b. Gonzales' claims are hereby severed and transferred to the District of Utah.

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c. Hanna's claims are hereby severed and transferred to the District of Massachusetts.

d. M. Klein's claims are hereby severed and transferred to the District of Oregon.

e. Moss' claims are hereby severed and transferred to the District of New Mexico.

7. The remaining claims of the non-California Plaintiffs shall be severed and transferred once the parties have completed the supplemental briefing requested above.

8. The deadline to file Motions in Limine and other pre-trial materials is hereby **CONTINUED** for 30 days.

IT IS SO ORDERED.

______ : ______

Initials of Preparer __________