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PORSCHE CARS NORTH AMERICA, INC.

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

ROY JONES and ALYCE RUBINFELD, individually and on behalf of a class of similarly situated individuals,

Plaintiffs,

v.

PORSCHE CARS NORTH AMERICA, INC.,

Defendant.

Civil Action No.: 2:15-CV-05766-GW-SS
Assigned to the Hon. George H. Wu

MEMORANDUM OF POINTS AND AUTHORITIES FILED IN SUPPORT OF THE MOTION TO DISMISS THE AMENDED COMPLAINT PURSUANT TO FEDERAL RULES OF CIVIL PROCEDURE 12(B)(1) AND 12(B)(6)

Complaint Served: June 30, 2015

Hearing:
Date: October 15, 2015
Time: 8:30 a.m.
Courtroom: 10

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I. SUMMARY OF THE ARGUMENT

This is a putative class action about the relationship between glass and light. All transparent glass is reflective. All automotive windshields are made of transparent glass and are therefore reflective. For these reasons, all automotive windshields, to some degree, reflect transparent images of the dashboard and items placed on it. These reflected, transparent images are open and obvious to consumers from their first encounter with a car.

Through the First Amended Class Action Complaint ("FAC"), Plaintiffs attempt to transform buyer's remorse and frustration with the above-described natural phenomena into a denial of consumer choice for all future purchasers, and claims under California and federal law. Indeed, all of Plaintiffs' claims rest on the overriding and implausible assertion that Defendant, Porsche Cars North America, Inc. ("PCNA"), is somehow responsible for the quality and intensity of sunlight that reflects from the dashboards ***that they chose*** when purchasing their vehicles.

Plaintiffs' claims—raised under the Consumers Legal Remedies Act ("CLRA"), Unfair Competition Law ("UCL"), Song-Beverly Consumer Warranty Act ("Song-Beverly"), and Magnuson-Moss Warranty Act ("MMWA"), and for unjust enrichment—even as amended—each fail as a matter of law. As a threshold matter, these two Plaintiffs lack standing to represent a class that includes individuals who own products other than the vehicles and dashboards they own. And on the merits, the:

- CLRA and UCL claims fail because Plaintiffs have not shown that they engaged in a transaction with PCNA, that PCNA ever misrepresented the quality of their vehicles, or that PCNA knew of the supposed defect;
- Song-Beverly and MMWA claims fail because, as Plaintiffs concede, the alleged defect has not impeded their vehicles' ordinary and intended use; and
- unjust enrichment claim fails because no such independent claim exists under California law.

Further, Plaintiffs have not identified any legal basis for requesting a judicially mandated recall of vehicles, an action reserved for the expertise and exclusive jurisdiction of the National Highway Traffic Safety Administration ("NHTSA").

The FAC should therefore be dismissed in its entirety and with prejudice.

II. STATEMENT OF ALLEGED FACTS

Plaintiffs Alyce Rubinfeld and Roy Jones each reside and purchased their vehicles in California. (*See* FAC, ¶¶ 17, 24.) Rubinfeld allegedly purchased a new 2013 Porsche Cayenne on August 25, 2013, and Jones allegedly purchased a used 2013 Porsche Panamera on March 20, 2014. (*See id.* at ¶¶ 18, 25.) They claim their vehicles are each equipped with a beige dashboard that allegedly creates an "unsafe glare or reflection onto the windshield[.]" (*Id.* at ¶¶ 2, 21, 28.)[1] They also acknowledge—albeit quietly—that the supposed glare defect is caused by and varies based on the quality and intensity of sunlight. (*See, e.g.*, *id.* at ¶ 26 (noting that the alleged "Glare only manifests under certain conditions, for example, when the sun is at a certain angle relative to the dashboard and windshield").)

Plaintiffs do not allege the exact date when they first noticed the supposed defect. They do not allege that the supposed defect has resulted in out-of-pocket damages. They do not allege that the purported glare has in any way prevented them from using either of their respective vehicles. And relatedly, they do not allege that they provided PCNA an opportunity to inspect their vehicles and offer possible repairs or other remedies. Each of those omissions is fatal to their claims.

III. THE FAC FAILS TO STATE ACTIONABLE CLAIMS AND SHOULD THUS BE DISMISSED WITH PREJUDICE

Dismissal pursuant to Rule 12(b)(6) is proper where plaintiffs fail to allege facts sufficient to establish all of the essential elements of their claims. *See Ashcroft*

[1] Plaintiffs identify several "Beige Dashboard[s]" (*i.e.*, "Luxor Beige, Sand Beige, or any other beige dashboard"), but they fail to identify the color of the dashboards actually installed in their respective vehicles. (FAC, ¶¶ 2, 18, 25.)

v. Iqbal, 556 U.S. 662, 666 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-56 (2007). The Court must accept all well-pleaded allegations and the reasonable inferences that may be drawn therefrom, and view them in the light most favorable to Plaintiffs. *Sateriale v. R.J. Reynolds Tobacco Co.*, 697 F.3d 777, 783 (9th Cir. 2013). But the Court need "not accept any unreasonable inferences or assume the truth of legal conclusions cast in the form of factual allegations." *Ileto v. Glock Inc.*, 349 F.3d 1191, 1200 (9th Cir. 2003). Rule 12(b)(6) "requires more than labels and conclusions"—"a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555. It requires more than "unadorned, the-defendant unlawfully-harmed me" accusations and will "not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions." *Iqbal*, 556 U.S. at 678-79.

Moreover, dismissal pursuant to Rule 12(b)(1) is proper where, as here, Plaintiffs fail to allege facts sufficient to show that they have standing to represent the class. *See Cal. Sportfishing Prot. Alliance v. All Star Auto Wrecking, Inc.*, 860 F. Supp. 2d 1144, 1147 (E.D. Cal. 2012). Such "facial attacks" on standing are resolved using the Rule 12(b)(6) standard. *Leite v. Crane Co.*, 749 F.3d 1117, 1121 (9th Cir. 2014).

A. Plaintiffs Do Not Have Standing to Pursue the Class Claims.

Simply put, Plaintiffs lack standing to raise claims related to vehicles and vehicle components (*i.e.*, dashboards) that they do not own because they have not suffered (and cannot suffer) injury associated with those vehicles and components. "Article III, § 2, of the Constitution limits the jurisdiction of federal courts to 'Cases' and 'Controversies,' which restricts the authority of federal courts to resolving 'the legal rights of litigants in actual controversies.'" *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523, 1528 (2013) (citation omitted). Article III requires a litigant to prove standing by tracing a "concrete and particularized" injury to the defendant and by showing that "a favorable decision will redress the injury." *Wolfson v. Brammer*, 616 F.3d 1045, 1056 (9th Cir. 2010). "[N]amed

plaintiffs . . . must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent." *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 40 n.20 (1976).[2]

For those reasons, this Court has held (in the context of Rule 12 motions) that plaintiffs cannot assert consumer fraud claims on products that they did not purchase. For example, in *Hairston v. South Beach Beverage Co., Inc.*, this Court declared that a plaintiff could not "expand the scope of his claims to include a product he did not purchase' . . . because Article III and '[t]he statutory standing requirements of the UCL and CLRA are narrowly prescribed and do not permit such generalized allegations." No. 12-1429, 2012 WL 1893818, at *5 n.5 (C.D. Cal. May 18, 2012) (citations and internal quotation marks omitted); *see also Granfield v. NVIDIA Corp.*, No. 11-5403, 2012 WL 2847575, at *6 (N.D. Cal. July 11, 2012); *Carrea*, 2011 WL 159380, at *5.

Here, the FAC contains a critical standing deficiency: Plaintiffs seek to assert claims on products that they did not purchase. Plaintiffs allegedly own a 2013 Porsche Cayenne and 2013 Porsche Panamera, but they seek to raise claims on all Porsche vehicles that were equipped with a "Beige Dashboard" and sold in California. Their definition of "Class Vehicle" is unbounded by model or model year. That is untenable. PCNA should not be required to "guess which of its products . . . [it] will be required to defend." *Janney v. Gen. Mills*, 944 F. Supp. 2d 806, 818 (N.D. Cal. 2013). And Plaintiffs have not shown (and cannot show) any injury related to other vehicles. *See, e.g.*, *Hairston*, 2012 WL 1893818, at *5 n.5.

[2] Standing is a threshold, jurisdictional issue that may be addressed at the outset of an action. *See Mlejnecky v. Olympus Imaging Am. Inc.*, No. 10-2630, 2011 WL 1497096, at *4 (E.D. Cal. Apr. 19, 2011); *Carrea v. Dreyer's Grand Ice Cream, Inc.*, No. 10-1044, 2011 WL 159380, at *3 (N.D. Cal. Jan. 10, 2011), *aff'd on other grounds*, 475 F. App'x 113 (9th Cir. 2012).

The analyses of Plaintiffs' claims should thus be restricted to the vehicles and components that they purchased. To that end, the FAC should be dismissed with prejudice, insofar as it asserts claims more properly raised by other, absent parties. *See, e.g.*, *Simon*, 426 U.S. at 40 n.20.

B. The FAC Fails to State a Claim under the CLRA.

1. The CLRA claim fails because Plaintiffs have not pleaded that they entered into a transaction with PCNA.

The CLRA claim should be dismissed because Plaintiffs have not alleged a transaction with PCNA. The plain language of the CLRA compels this conclusion. Section 1770 prohibits "unfair or deceptive acts or practices . . . ***in a transaction which results in the sale or lease of goods or services to any consumer***." CAL. CIV. CODE § 1770(a) (emphasis added). A transaction is defined as "an agreement between a consumer and another person . . . and includes the making of, and the performance pursuant to, that agreement." *Id.* § 1761(e). The transaction requirement thus delineates the outer limits of a defendant's CLRA liability: to be liable, the transaction in which the alleged illegal conduct occurs must "***result[] in***" the sale in which the plaintiff was deceived. *Id.* § 1770(a) (emphasis added). No such transaction is—or could be—alleged in the FAC.

The CLRA's legislative history confirms that a transaction between plaintiff and defendant is an essential component of any CLRA claim. Assemblyman James A. Hayes, the CLRA's primary legislative sponsor, explained in a letter transmitting the bill to then-Governor Ronald Reagan for signature that the CLRA "***affects only those transactions between sellers and consumers*** of goods or services. It is not intended to affect transactions between businessmen." (*See* Ex. A, Letter from James A. Hayes, Chairman, Assembly Comm. on Judiciary, to Ronald Reagan, Governor, at 2 ¶ B (Aug. 24, 1970) (emphasis added).)

A report prepared by the Assembly Committee on Judiciary, which considered the bill during the 1970 legislative session, confirms that "[t]he

proposed act is meant to provide consumers with remedies ***against merchants*** employing various deceptive practices in connection with the sale of goods or services." (*See* Ex. B, ASSEMBLY COMM. ON JUDICIARY, THE CONSUMERS LEGAL REMEDIES ACT, at 1 (Cal. Apr. 20, 1970) (emphasis added).) Commentator James S. Reed, who served as chief counsel to the Committee on Judiciary when the CLRA was before the legislature, explained that the statute's emphasis on retail merchants was driven by concern for consumers in low-income neighborhoods, where retail competition is scarce and unscrupulous merchants may take advantage of customers who have few other retail options. (*See* Ex. C, James S. Reed, *Legislating for the Consumer: An Insider's Analysis of the Consumers Legal Remedies Act*, 2 PAC. L. J. 1, 5-7 (1971); *see also* Ex. D, ASSEMBLY COMM. ON JUDICIARY, QUESTIONS & ANSWERS REGARDING A.B. 292, at 2 (emphasizing desire to protect low income consumers from "unconscionable practices of merchants" in their neighborhoods).) That emphasis becomes plain when viewed against the types of conduct offered by the legislature as examples of statutory violations. Those examples include, among other things, advertising an item at a discount while maintaining only a handful of the items in inventory; representing that a product has a celebrity endorsement that it does not have; and refusing to sell an item on the terms previously agreed upon. (*See* Ex. E, ASSEMBLY COMM. ON JUDICIARY, REPORT RELATIVE TO A.B. 292, 1970 ASSEMBLY DAILY J. 8464, 8465-66 (Sept. 23, 1970).) These examples show that the legislature was focused on street-level merchants with whom consumers interact directly, not distributors, such as PCNA, who never engage in consumer transactions.

Modern California courts likewise recognize that a transaction with the defendant forms the crux of a CLRA claim. For instance, the California Court of Appeal has upheld dismissal of a CLRA claim brought by a recipient of a gift against the gift's seller, holding that "[p]laintiff's ownership of the [gift] was not acquired as a result of ***her own consumer transaction with defendant***, and without

an assignment of [the buyer's] rights, she does not fall within the parameters of consumer remedies under the Act." *Schauer v. Mandarin Gems of Cal., Inc.*, 125 Cal. App. 4th 949, 960 (2005) (emphasis added). The United States Court of Appeals for the Ninth Circuit has likewise acknowledged that a "consumer transaction" is an essential component of a CLRA claim, *In re Facebook Privacy Litig.*, 572 F. App'x 494, 494 (9th Cir. 2014), and this Court has summarized the transaction requirement as follows:

> The CLRA does not provide a cause of action for consumers against the supplier of goods and services to a retailer from whom the consumer purchased. In circumstances like those in issue in this case, the manufacturer never transacted business or intended to transact business with the consumer . . . . Thus, the Court finds the legislation clearly contemplates ***consumer*** transactions ***between a consumer and a retail seller***, and does not apply to commercial transactions between a retailer and its vendors to acquire a supply of goods for resale.

Green v. Canidae Corp., No. 09-486, 2009 WL 9421226, at *4 (C.D. Cal. June 9, 2009) (second emphasis added). And others have dismissed CLRA claims absent a transaction between the plaintiff and defendant. *See Robinson v. HSBC Bank USA*, 732 F. Supp. 2d 976, 988 (N.D. Cal. 2010) (finding that plaintiffs lacked a CLRA claim because "plaintiffs do not argue that they ever sought to enter a[] transaction with HSBC"); *Nordberg v. Trilegiant Corp.*, 445 F. Supp. 2d 1082, 1097 (N.D. Cal. 2006) (dismissing CLRA claim because defendant's alleged conduct did not constitute an "agreement" between the parties and was not actionable thereunder).

In sum, the State Legislature enacted the CLRA to rectify a particular problem: to stop unscrupulous retailers from taking advantage of consumer transactions, with an emphasis on those involving underserved and unsophisticated consumers. Plaintiffs would have this Court ignore that intent and write the transaction requirement out of the statute. The Court should not do so. The CLRA was never intended to authorize a legal claim based on a natural phenomenon that is open and obvious to consumers at the time of purchase. Here, Plaintiffs plead no

direct transaction with PCNA. Absent such facts, they fail to state a cognizable CLRA claim, and that claim should be dismissed with prejudice.

2. Plaintiffs do not plead facts to establish that PCNA had knowledge of the alleged defect.

Even if the transaction element were satisfied, Plaintiffs' CLRA claim still fails. Plaintiffs have not alleged facts showing that PCNA knew that Beige Dashboards were "defective" at the time of purchase. Under the CLRA, "plaintiffs must sufficiently allege that a defendant was aware of a defect at the time of sale to survive a motion to dismiss." *Wilson v. Hewlett-Packard Co.*, 668 F.3d 1136, 1145 (9th Cir. 2012). *See also In re Sony Grand Wega FDF-E A10/A20 Series Rear Projection HDTV Television Litig.*, 758 F. Supp. 2d 1077, 1095 (S.D. Cal. 2010) (faulting plaintiffs for not sufficiently alleging knowledge of a supposed defect, and noting that defendant "had no duty to disclose facts of which it was unaware"). Because this claim sounds in fraud, allegations regarding PCNA's knowledge of the supposed defect must be pleaded with particularity required by Rule 9(b). *See Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1124-27 (9th Cir. 2009).

Here, Plaintiffs offer and rely on boilerplate and conclusory allegations. They allege that PCNA was aware of the supposed defect from dealership repair orders, testing data, other unspecified "sources of aggregate information about the problem," and complaints made to the NHTSA, on the internet, and to Porsche-authorized dealerships. (FAC, ¶ 51.) They also attempt to impute knowledge of the supposed defect to PCNA based on a note in an undated German-language "sales brochure" for a model vehicle that neither Plaintiff owns, a Porsche Boxster. (*See id.* at ¶¶ 10, 52.) Plaintiffs' references to those sources are insufficient to establish PCNA's knowledge of the supposed defect.[3]

[3] The Plaintiffs also cite a letter allegedly sent to the CEO of PCNA. (*See* FAC, ¶ 4, Ex. 2.) But Plaintiffs fail to provide the name (or address) of the letter's author, and they fail to otherwise verify that the letter is a genuine or authentic

As the Ninth Circuit has held, allegations regarding knowledge derived from repair orders, testing data, and "other sources of aggregate information" are "merely conclusory" and therefore fail to "suggest how any tests or information could have alerted the [defendant] to the defect." *Wilson*, 668 F.3d at 1147. Thus, allegations regarding "internal testing, records of customer complaints, dealership repair records, and other internal sources" provide **"**little, if any, factual foundation [for the] conclusion that [a vehicle manufacturer] knew of the alleged defect." *Heremans v. BMW of N. Am., LLC*, No. 14-2363, 2014 WL 5017843, at *17 (C.D. Cal. Oct. 3, 2014). Because Plaintiffs have not described PCNA's "testing," the volume and nature of its "dealership repair orders," or the existence (much less the content) of "other internal sources of aggregate information," those allegations cannot satisfy Rules 8(a) and 9(b). (FAC, ¶ 51.) They are "conclusory and deficient" and do "not plausibly indicate that [PCNA] knew of the defect prior to the time it distributed the class vehicles." *Heremans*, 2014 WL 5017843, at *17. *See also Grodzitsky v. Am. Honda Co*., No. 12-1142, 2013 WL 690822, at *6 (C.D. Cal. Feb. 19, 2013) (Plaintiffs' assertions of unspecified "'pre-release testing data' and 'aggregate data from Honda dealers' fails to suggest how this information could have informed Defendant of the alleged defect at the time of sale.").

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document. (*See generally id.* at Ex. 2.) Without such basic information as the author of that letter, PCNA cannot determine its authenticity.

Because the authenticity of that document is not undisputed, it should not be considered now. *See, e.g., Klees v. Liberty Life Assur. Co. of Boston*, --- F. Supp. 3d ----, 2015 WL 3867659, at *2 (C.D. Cal. June 23, 2015) ("[U]nder the 'incorporation by reference' doctrine, a court may consider documents 'whose contents are alleged in a complaint' or that 'plaintiff's claim depends on,'" only where "the authenticity of the document is not disputed."). Moreover, even if authentic, this redacted document constitutes nothing more than an isolated complaint that is insufficient, as a matter of law, to establish either that a defect existed or that PCNA knew about it. *Wilson*, 668 F.3d at 1147-48.

Plaintiffs' allegations regarding customer complaints are similarly deficient. They allege that consumers complained to the NHTSA and on the internet, but they never allege that such complaints were communicated to PCNA. Thus, they have not alleged PCNA's knowledge of such complaints. Such "[r]andom anecdotal examples of disgruntled customers posting their views on websites . . . is not enough to impute knowledge upon defendants." *Oestreicher v. Alienware Corp.*, 544 F. Supp. 2d 964, 975 n.9 (N.D. Cal. 2008), *aff'd*, 322 F. App'x 489 (9th Cir. 2009). *Accord Gotthelf v. Toyota Motor Sales, U.S.A., Inc.*, 525 F. App'x 94, 104 (3d Cir. 2013) (concluding that complaints "filed with NHTSA, [but]not with" the defendant vehicle manufacturer were insufficient to establish the vehicle manufacturer's "knowledge, and alleged concealment of the defect").

Plaintiffs' allegations of complaints made directly to Porsche-authorized dealerships as PCNA's "agents for vehicle repairs" fare no better. (FAC, ¶ 50.) Even if Plaintiffs had alleged the number and nature of such complaints—which they do not—PCNA's purported "[a]wareness of a few customer complaints" would "not establish [] knowledge of an alleged defect." *Baba v. Hewlett-Packard Co.*, No. 09-5946, 2011 WL 317650, at *3 (N.D. Cal. Jan. 28, 2011). *See also Wilson*, 668 F.3d at 1147 (echoing doubt expressed by district courts that "customer complaints in and of themselves adequately support an inference that a manufacturer was aware of a defect").

Finally, Plaintiffs' reference to and reliance on an alleged German-language **"**sales brochure**"** for a Porsche Boxer is misplaced. As recognized in the FAC, PCNA is the American distributor of Porsche-branded vehicles. (*See* FAC, ¶ 31.) Nothing in the FAC suggests that PCNA distributes Porsche vehicles in German-speaking countries or publishes such materials in the United States. Much as Plaintiffs have failed to allege that PCNA was aware of complaints raised on the internet, Plaintiffs have failed to allege facts sufficient to demonstrate that PCNA possessed—or was even aware of—this **"**sales brochure**"** or its contents.

Thus, those sources—either alone or in the aggregate—do not establish that PCNA knew of and failed to disclose the supposed defect, and the CLRA claim should be dismissed with prejudice.

3. The CLRA claim should be dismissed based on Plaintiffs' failure to abide by the notice provisions of the CLRA.

Even if the FAC properly states a CLRA claim—and it does not—then that claim should be dismissed because Plaintiffs failed to provide proper notice.

On May 15, 2015, Plaintiffs mailed a certified letter to PCNA, addressed to both its corporate headquarters in Atlanta, Georgia and its California agent for service of process, CT Corporation System ("CT Corp."). (*See* Ex. F, 5-15-15 Letter from Cody R. Padgett, Plaintiffs' Counsel, to PCNA, at 1.) Plaintiffs styled that letter as notice of violations under the CLRA. (*Id.*) On June 10, 2015, Plaintiffs sent a second certified letter to PCNA's headquarters and to CT Corp., styled as an amended notice of violations under the CLRA. (*See* Ex. G, 6-10-15 Letter from Cody R. Padgett to PCNA, at 1.)

Neither of Plaintiffs' letters satisfy the notice requirements set forth in the CLRA, which provide that such "notice shall be in writing and shall be sent by certified or registered mail, return receipt requested, to the place where the transaction occurred, such person's principal place of business within California, or, ***if neither will effect actual notice, the office of the Secretary of State of California***." CAL. CIVIL CODE § 1782(a) (emphasis added). The CLRA also provides that notice must be provided at least thirty days prior to the filing of a Complaint seeking damages. *Id*. "The CLRA's notice requirement is not jurisdictional, but ***compliance with this requirement is necessary to state a claim***." *Victor v. R.C. Bigelow, Inc.*, No. 13-2976, 2014 WL 1028881, at *19 (C.D. Cal. Mar. 13, 2014) (internal quotation marks omitted). Both state and federal courts have unequivocally stated that the CLRA notice requirements must be "strictly" and "literally" construed. *Von Grabe v. Sprint PCS*, 312 F. Supp. 2d 1285, 1303-04

(S.D. Cal. 2003) (calling for "***strict*** application" of the CLRA notice provision and noting lack of contrary authority); *Outboard Marine Corp. v. Super. Ct.*, 52 Cal. App. 3d 30, 41 (1975) (stating that "clear purpose" of § 1782 could be accomplished only by "literal application of the notice provisions"). Failure to comply with those provisions warrants dismissal with prejudice. *See Von Grabe*, 312 F. Supp. 2d at 1303-04; *cf. Truong v. eBay, Inc.*, No. SC104597, 2010 WL 5636239, at 6-7 (Cal. Super. Ct. Aug. 5, 2011) (granting demurrer with prejudice because plaintiff failed to provide proper notice under CLRA), *aff'd in pertinent part*, No. B225828, 2011 WL 3716999, at *3 (Cal. Ct. App. Aug. 24, 2011).

Here, Plaintiffs' purported letters were not transmitted in strict, literal compliance with the CLRA. They were not sent to "the place where the transaction occurred" (*i.e.*, the dealerships where Plaintiffs purchased their vehicles), to PCNA's "principal place of business within California" (which does not exist), or through "the office of the Secretary of State of California." CAL. CIV. CODE § 1782. Furthermore, Plaintiffs' purported amended notice—their letter of June 10, 2015, which suffers from the same deficiencies—was sent less than 30 days before June 25, 2015, when Plaintiffs commenced this lawsuit in state court. Accordingly, Plaintiffs' CLRA claim should be dismissed with prejudice. *See Von Grabe*, 312 F. Supp. 2d at 1303-04; *Truong*, 2010 WL 5636239, at 6-7.

4. If the CLRA Claim Survives Dismissal, then Plaintiffs' Failure to Provide PCNA an Opportunity to Inspect Their Vehicles Bars Them from Seeking Monetary Damages.

Even if the CLRA claim were otherwise proper, Plaintiffs would still be precluded from raising a claim for monetary damages because they denied PCNA the opportunity to inspect their vehicles and offer settlement.

After receipt of each of Plaintiffs' letters, PCNA responded by reserving its right to offer settlement under § 1782(b) of the CLRA. It stated:

> As you are surely aware, no private action for damages under the CLRA may be maintained "if an appropriate correction, repair,

> replacement, or other remedy is given, or agreed to be given within a reasonable time, to the consumer within 30 days after receipt" of notice under Section 1782. CLRA § 1782(b). PCNA seeks to exercise its rights under that section. Accordingly, we request that Ms. Rubinfeld and Mr. Jones bring their vehicles to an authorized Porsche dealership of their choosing. At that time, we will have their vehicles inspected for the "windshield glare or reflection" described in your letter, determine whether such a condition exists, and whether an appropriate correction, repair, replacement, or other remedy is warranted. . . .

(Ex. H, 5-28-15 Letter from William F. Kiniry, Jr., PCNA's counsel, to Cody R. Padgett, at 3; *cf.* Ex. I, 6-16-15 Letter from William F. Kiniry, Jr. to Cody R. Padgett, at 1-2.) Plaintiffs did not respond to either of PCNA's letters.

"The clear intent of the [CLRA] is to provide and facilitate pre-complaint settlements of consumer actions wherever possible and to establish a limited period during which such settlement may be accomplished." *Outboard Marine Corp.*, 52 Cal. App. 3d at 41. To that end, the CLRA provides for both notice and an opportunity to cure. *See* CAL. CIV. CODE §§ 1782(a)-(b). Specifically, section 1782(b) provides that "no action for damages may be maintained under Section 1780 if an appropriate correction, repair, replacement, or other remedy is given, or agreed to be given within a reasonable time, to the consumer within 30 days after receipt of the notice" provided pursuant to section 1782(a). As applied here, Plaintiffs' failure to provide such opportunity—*i.e.*, their failure to provide a ***practical*** and ***meaningful*** opportunity to inspect their vehicles, determine the appropriate remedy, and then offer settlement—defeats the very purpose of the Act.

Indeed, the CLRA notice provision is toothless unless it is accompanied by opportunity to effectuate settlement. *See McKinnon v. Dollar Thrifty Auto. Grp., Inc.*, No. 12-4457, 2013 WL 791457, at *5 (N.D. Cal. Mar. 4, 2013) (emphasis added) (***"The purpose of [the notice] requirement is to give defendants the opportunity to cure their alleged violations before they may be held liable for damages."***); *Chapman v. Skype Inc.*, 220 Cal. App. 4th 217, 230 (2013) (emphasis

added) ("A consumer who suffers damage as a result of a prohibited act or practice can sue for damages . . . but before suing for damages must first notify the defendant of the alleged violation ***and allow the defendant an opportunity to remedy it***.").

Plaintiffs should not be permitted to sidestep the remedy provisions of the CLRA without consequence. Because they deprived PCNA of the opportunity to remedy the supposed defects in their vehicles, they should be barred from seeking monetary relief under the CLRA, pursuant to section 1782(b).

C. The FAC Fails to State a Claim Under the Song-Beverly Act.

Plaintiffs' Song-Beverly claim should be dismissed because they have not pleaded, and cannot plead, facts to support it.

As applied to automotive products, the implied warranties of merchantability and fitness for ordinary purpose both require manufacturers and distributors to ensure that vehicles are "'in safe condition and substantially free of defects.'" *Avedisian v. Mercedes-Benz USA, LLC*, 43 F. Supp. 3d 1071, 1079 (C.D. Cal. Sept. 8, 2014) (citation omitted). Accordingly, the Song-Beverly Act does not provide a cause of action whenever a vehicle does not satisfy a plaintiff's expectations. Instead, it requires plaintiffs to demonstrate that an alleged defect "drastically undermine[s] the ordinary operation of the vehicle." *Troup*, 545 F. App'x 668, 669 (9th Cir. 2013). No claim exists when the defect does not "implicate the vehicle's operability at all." *Avedisian*, 43 F. Supp. 3d at 1079.

Here, Plaintiffs have not pleaded a viable implied warranty claim because they have not pleaded facts to establish that the alleged defect prevents them from driving their vehicles. Although both Plaintiffs allege they have observed the reflection of sunlight off the dashboard—a phenomenon that occurs in ***every*** vehicle on the road—they do not suggest that the reflection of sunlight or other ambient light impaired their vehicles' operability, much less "drastically undermined" it. *Troup*, 545 F. App'x at 669. To the contrary, Plaintiffs concede that they have been

able to operate their vehicles normally, notwithstanding the reflection, and have "[a]t all times, . . . driven [their] vehicle[s] in a foreseeable manner and in the manner in which [they were] intended to be used." (FAC, ¶¶ 23, 30.)

Moreover, and as a matter of law, Plaintiffs have not pleaded facts to establish that the supposed defect is actionable. At its core, this claim is premised on a natural phenomenon—the manner in which sunlight reflects from a dashboard and onto a windshield. But light is a natural phenomenon. It occurs under normal circumstances and impacts all vehicles. It can be controlled by the use of sunglasses, and it cannot render a vehicle unmerchantable or unfit for its ordinary purpose. That is especially true where, as here, Plaintiffs have operated their vehicles in the ordinary course and identified no facts suggesting that the supposed defect has resulted in any injury whatsoever. Their implied warranty claims should therefore be dismissed with prejudice.

D. The FAC Fails to State a Claim Under the UCL.

The UCL authorizes a plaintiff to obtain injunctive relief by demonstrating an "unlawful, unfair, or fraudulent business act or practice." CAL. BUS. & PROF. CODE § 17200. Each of those elements provides a separate avenue for relief. But Plaintiffs cannot prevail under any of those three prongs, and, in any event, they cannot show an entitlement to injunctive relief. The UCL claim should thus be dismissed in its entirety and with prejudice.

1. Plaintiffs have not pleaded a claim on the merits of the UCL.

a. They are not entitled to relief under the "unlawful conduct" prong.

The unlawful conduct prong of the UCL permits a plaintiff to obtain relief by showing a violation of another law. *Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co.*, 20 Cal. 4th 163, 180 (1999). Here, Plaintiffs claim that PCNA violated three statutes that establish their right to relief under the UCL: (1) the CLRA; (2) the Song-Beverly Act; and (3) the express warranty provisions of the California

Commercial Code. For the reasons set forth above, the CLRA and Song-Beverly Act cannot support relief under the UCL.

As to an express warranty claim, Plaintiffs have not specified whether that claim rests on the New Car Limited Warranty ("Limited Warranty") issued at the time of original purchase or some other express statement qualifying as a warranty under the Commercial Code. Nor have they explained how PCNA supposedly breached the applicable warranty. "In order to plead a cause of action for breach of express warranty, one must allege the exact terms of the warranty, plaintiff's reasonable reliance thereon, and a breach of that warranty which proximately causes plaintiff injury." *Williams v. Beechnut Nutrition Corp.*, 185 Cal. App. 3d 135, 142 (1986). Plaintiffs' failure to plead any of those elements, either as a standalone cause of action or as a component of UCL relief, is fatal to the UCL claim (as predicated on breach of an express warranty). Accordingly, Plaintiffs have failed to establish any right to relief under the UCL's unlawful prong.

b. They are not entitled to relief under the "fraudulent" conduct prong.

The fraudulent conduct prong of the UCL applies to acts that are either akin to common-law fraud or likely to deceive the public. *In re Tobacco II Cases*, 46 Cal. 4th 298, 312 (2009). It requires a plaintiff to show that a defendant intentionally created a false expectation about its product in the minds of consumers. *Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017, 1025-26 (9th Cir. 2008). Such claims are subject to Rule 9(b). *Bergman v. Fidelity Nat'l Fin., Inc.*, No. 12-5994, 2012 WL 4364327, at *4 (C.D. Cal. Sept. 24, 2012).

In their UCL claim, Plaintiffs baldly assert that PCNA "engaged in . . . fraudulent business practices" (FAC, ¶ 104), but they do not identify particular conduct supposedly meeting that standard. Plaintiffs' UCL claim, as brought under the fraudulent prong, should be dismissed on that basis alone. Moreover, they have failed to plead an essential element of a UCL fraud claim: knowledge of the

supposed defect. *Kowalsky v. Hewlett-Packard Co.*, 771 F. Supp. 2d 1156, 1160-61) (N.D. Cal. 2011). For the reasons set forth *supra* at pages 8-10, their cursory averments of knowledge of the supposed defect are insufficient. Thus, Plaintiffs cannot maintain a claim under the fraudulent conduct prong of the UCL.

c. They are not entitled to relief under the unfairness prong.

The unfairness prong of the UCL requires a plaintiff to show (1) a substantial injury to consumers, (2) that the injury is not counterbalanced by an equivalent or greater benefit to consumers or to competition, and (3) that consumers could not have avoided the injury. *Daugherty v. Am. Honda Motor Co.*, 144 Cal. App. 4th 824, 839 (2006). Plaintiffs state in a conclusory fashion that PCNA engaged in "unfair competition" and "unfair . . . practices," but they make no attempt to identify what those practices might be. (FAC, ¶¶ 104, 105.) The UCL claim should therefore be dismissed under the unfairness prong. Moreover, there can be no harm—much less substantial harm—to consumers or competition when the FAC alleges, at most, that PCNA did not expressly mention dashboard characteristics that are open and obvious, and do not "drastically undermine[]" the operability of Plaintiffs' vehicles. *Troup*, 545 F. App'x at 669. Even if PCNA somehow acted improperly, the reflective quality of a dashboard is readily observable to consumers, who are therefore able to avoid it. *Daugherty*, 144 Cal. App. 4th at 839.

Ironically, Plaintiffs' UCL claim, if successful, would ***harm*** consumers. The reality is that some consumers (for any number of reasons) choose not to purchase vehicles equipped with beige dashboards. Others love that color and so they buy it, installed in Porsche-branded or other manufacturers' vehicles. It is a question of consumer preference—or ***choice***. But Plaintiffs would have the court rob all customers of that choice; they would deny consumers the option to purchase a vehicle equipped with a dashboard that is the same color as the rest of the interior. They have identified no basis for denying customers that choice, particularly because reflectivity manifests in every vehicle on the road and is an open and

obvious vehicle characteristic. Under such circumstances, there can be no UCL violation. Plaintiffs' claim is patently implausible, and it should be dismissed in its entirety and with prejudice.

2. Plaintiffs are not entitled to prospective, injunctive relief.

Moreover, Plaintiffs lack standing to pursue prospective, injunctive relief because they cannot claim a realistic threat of future injury. Necessarily, consumers who allege that they have been defrauded by deceptive practices "will not suffer any ***future*** injury because they will not continue to rely on Defendant['s] marketing or make any further purchases of" its products. *In re 5-hour Energy Mktg. & Sales Practices Litig.*, MDL No. 13-2438, 2014 WL 5311272, at * 10 (C.D. Cal. Sept 4, 2014). Such plaintiffs are unable to offer a showing of the first element of the "irreducible constitutional minimum of standing" because they cannot show that they will suffer "an injury in fact . . . which is (a) concrete and particularized, and (b) actual and imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (citations and internal quotation marks omitted).

That logic applies here with equal force. Because Plaintiffs (1) allege that PCNA engaged in deceptive practices, (2) allege that they are now aware of those practices, and (3) do not allege that they intend to purchase vehicles distributed by PCNA again, they lack standing to pursue prospective, injunctive relief. *5-hour Energy Mktg. & Sales Practices Litig.*, 2014 WL 5311272, at *10-11. Thus, even if Plaintiffs have stated a cognizable UCL claim, that claim should be dismissed with prejudice insofar as it seeks such relief.

E. The FAC Fails to State a Claim Under the MMWA.

Plaintiffs' MMWA Claim fails for two reasons. First, it fails because it is dependent on another, state-law warranty claim (the Song-Beverly claim) that is not viable. Second, it fails because Plaintiffs have not pleaded exhaustion of the mandatory alternative dispute process set forth in the Limited Warranty.

1. The MMWA claim must be dismissed with prejudice because it hinges on a failed state-law warranty claim.

The MMWA creates a federal cause of action for breach of warranties under state law. *See* 15 U.S.C. § 2310(d)(1). It does not create independent warranty obligations; it merely provides a federal remedy for a substantive breach of warranty obligations. *See Milicevic v. Fletcher Jones Imports Ltd.*, 402 F.3d 912, 917 (9th Cir. 2005). Thus, "claims under the Magnuson-Moss Act stand or fall with . . . express and implied warranty claims under state law." *Clemens*, 534 F.3d at 1022; *see also id.* at 1022 n.3. Here, the MMWA claim is premised on the implied warranties covered by the Song-Beverly Act. (*See* FAC, ¶¶ 119-20). Because the Song-Beverly Act claim fails as a matter of law, Plaintiffs' MMWA claim should be dismissed with prejudice. *See Clemens*, 534 F.3d at 1022 & 1022 n.3; *see also In re Sony PS3 Other OS Litig.*, 551 F. App'x 916, 920 (9th Cir. 2014) ("Because Plaintiffs fail to adequately allege a state warranty claim, the MMWA claim fails.").

2. The MMWA claim should be dismissed because Plaintiffs failed to exhaust the alternative dispute process set forth in the Limited Warranty.

The MMWA claim should also be dismissed because Plaintiffs have not demonstrated that they exhausted the mandatory, informal dispute resolution procedures set forth in the Limited Warranty before commencing this lawsuit.

> The [MMWA] contains an explicit congressional policy statement encouraging "warrantors to establish procedures whereby consumer disputes are fairly and expeditiously settled through informal dispute settlement mechanisms." 15 U.S.C. § 2310(a)(1). Pursuant to this policy, a "class of consumers may not proceed in a class action . . . unless the named plaintiffs . . . initially resort to [the warrantor's informal dispute settlement mechanism]." *Id.* § 2310(a)(3)(C)(ii).

In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices, & Prods. Liab. Litig., 754 F. Supp. 2d 1145, 1188 (C.D. Cal. 2010). Those mandatory procedures apply both to claims for breach of express warranty and, as here, to claims for breach of implied warranty.

The Limited Warranty plainly states that consumers "**MUST UTILIZE PORSCHE'S CAP-MOTORS ARBITRATION PROGRAM . . . BEFORE SEEKING TO ENFORCE RIGHTS OR OBTAIN REMEDIES IN COURT**" under the MMWA. (Ex. J, Limited Warranty at 8 (capitalization and bold-face type in original).) Because Plaintiffs were required to use the Cap-Motors Arbitration Program, and because they failed to do so, the MMWA claim must be dismissed with prejudice. *See Toyota Unintended Acceleration*, 754 F. Supp. 2d at 1188; *see also Kearny v. Hyundai Motor Co.*, No. 09-1298, 2010 WL 9093204, at *6 (C.D. Cal. June 4, 2010).

F. "Unjust Enrichment" Is Not a Cognizable Claim For Relief.

Plaintiff's unjust enrichment claim should be dismissed with prejudice because "there is no cause of action in California for unjust enrichment." *See, e.g., Melchior v. New Line Prods., Inc.*, 106 Cal. App. 4th 779, 793 (2003). Indeed:

> [t]he phrase Unjust Enrichment does not describe a theory of recovery, but an effect: the result of a failure to make restitution where it is equitable to do so. [It] is a general principle, underlying various legal doctrines and remedies, rather than a remedy itself.

Id. (citations and internal quotation marks omitted). *See also In re ConAgra Foods Inc.*, 908 F. Supp. 2d 1090, 1114 (C.D. Cal. 2012); *Shein v. Canon U.S.A., Inc.*, No. 08-7323, 2009 WL 1774287, at *5-6 (C.D. Cal. June 22, 2009).

G. The Court Should Not Entertain a Class Vehicle Recall.

Finally, and for two reasons, the FAC should be dismissed insofar as it seeks a court-ordered Class Vehicle recall.

First, the Motor Vehicle Safety Act (the "MVSA") delegates to the Secretary of Transportation and to the NHTSA the authority to regulate automobile manufacturers and set procedures governing automotive recalls. *See* 49 U.S.C. § 30101 *et seq.* It establishes certain reporting and disclosure requirements relating to motor vehicle safety and also establishes "its own extensive array of

administrative remedies for a violation of its notification obligations," including a grant of authority to the NHTSA to order a recall. *Ayres v. Gen. Motors Corp.*, 234 F.3d 514, 522 (11th Cir. 2000). The MVSA does not, however, include a private right of action. *Handy v. Gen. Motors Corp.*, 518 F.2d 786, 788 (9th Cir. 1975) ("Congress did not intend to create private rights of action [under the MVSA] in favor of individual purchasers of motor vehicles when it adopted the comprehensive system of regulation to be administered by the NHTSA."). Although Plaintiffs may seek other forms of injunctive relief, the MVSA does not give them—as it has given the NHTSA—power to seek a recall.

Second, under the doctrine of primary jurisdiction, "[c]ourts may find that an administrative agency has 'primary jurisdiction' over a judicially cognizable claim where 'enforcement of the claim requires the resolution of issues, which, under a regulatory scheme, have been placed within the special competence of an administrative body.'" *Marsikian v. Mercedes Benz USA, LLC*, No. CV 08-4876, 2009 WL 8379784, at *9 (C.D. Cal. May 4, 2009) (citation omitted). Application of the doctrine is appropriate when: "(1) [a] need to resolve an issue that (2) has been placed by Congress within the jurisdiction of an administrative body having regulatory authority (3) pursuant to a statute that subjects an industry or activity to a comprehensive regulatory authority that (4) requires expertise or uniformity in administration." *Clark v. Time Warner Cable*, 523 F.3d 1110, 1115 (9th Cir. 2008).

Plaintiffs' request for a Class Vehicle recall meets all of those criteria. As the federal agency entrusted with motor vehicle safety, the NHTSA is uniquely qualified to evaluate safety issues and has been entrusted—and Congressionally mandated—to address unreasonable risks to highway safety. *See Silvas v. Gen. Motors LLC*, No. 14-89, 2014 WL 1572590, at *2 (S.D. Tex. Apr. 17, 2014). Moreover, Plaintiff's request could result in a recall only of Class Vehicles—*i.e.*, Porsche-branded vehicles sold and/or leased in California. The Court should not entertain a request for a state-specific recall that would, at most, provide relief to

consumers in only one of 50 states. Instead, the Court should defer to the NHTSA and allow that agency to determine whether an investigation and a recall are appropriate.

IV. CONCLUSION

For the reasons stated above, PCNA requests that the Court dismiss the FAC in its entirety and with prejudice.

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Respectfully Submitted By:

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