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4 IN THE UNITED STATES DISTRICT COURT  
5 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
6

7 TONY WOO, et al.,

8 Plaintiffs,

9 v.

10 AMERICAN HONDA MOTOR CO.,  
11 INC.,

12 Defendant.

Case No. 19-cv-07042-MMC

**ORDER GRANTING IN PART AND  
DENYING IN PART DEFENDANT'S  
MOTION TO DISMISS FIRST  
AMENDED COMPLAINT; AFFORDING  
PLAINTIFFS LEAVE TO AMEND;  
CONTINUING CASE MANAGEMENT  
CONFERENCE**

13 Before the Court is defendant American Honda Motor Co.'s ("Honda") Motion, filed  
14 February 27, 2020, "to Dismiss the First Amended Class Action Complaint." Plaintiffs  
15 Tony Woo ("Woo"), Daniel Rifkin ("Rifkin"), and Douglas P. Schwert ("Schwert") have  
16 filed opposition, to which Honda has replied. Having read and considered the papers  
17 filed in support of and in opposition to the motion, the Court rules as follows.<sup>1</sup>

18 **BACKGROUND**

19 In the operative complaint, the First Amended Complaint ("FAC"), plaintiffs allege  
20 that Rifkin, on or about April 6, 2017, purchased a new Honda CR-V EX vehicle from an  
21 authorized Honda dealership in Denver, Colorado (see FAC ¶ 96), that Schwert, on or  
22 about December 30, 2017, purchased a new 2018 Honda CR-V Touring vehicle from an  
23 authorized Honda dealership in Chattanooga, Tennessee (see FAC ¶ 119), and that  
24 Woo, on or about January 12, 2019, purchased a new 2018 Honda CR-V EX vehicle from  
25 an authorized Honda dealership in Chico, California (see FAC ¶ 71).

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28 <sup>1</sup>By Clerk's notice filed March 18, 2020, the Court vacated the hearing scheduled  
for April 3, 2020, and took the matter under submission.

1 Plaintiffs allege that each plaintiff's vehicle has a "Display Screen" allowing him to  
2 "access and operate [the] [v]ehicle's safety, information, communication, and  
3 entertainment features[,] such as smartphone integration, hands-free calling, navigation  
4 (if equipped), Bluetooth audio streaming, radio and music controls, rear-view camera and  
5 vehicle settings." (See FAC ¶ 3.) According to plaintiffs, their respective Display Screens  
6 are "defective" in that they "dim and go dark, freeze, or shine at full brightness, causing  
7 driver distraction and rendering the [vehicles'] information center inoperable." (See FAC  
8 ¶ 2.) Plaintiffs allege such "malfunctions" occur "regularly and unexpectedly." (See FAC  
9 ¶ 5.)

10 Plaintiffs also allege that, although Honda "was on actual notice of hundreds,  
11 perhaps thousands, of consumers nationwide complaining about the Display Defect  
12 before any of the [p]laintiffs bought their cars" (see FAC ¶ 36), Honda "failed to disclose  
13 or actively concealed at . . . the time of [plaintiffs'] purchases" the "defects relating to the  
14 Display Screen" (see FAC ¶ 57). Plaintiffs further allege that each of them, after  
15 experiencing the above-referenced "defects," took his vehicle to one or more Honda  
16 dealerships, which, in each instance, was unable to fix the "defect" (see FAC ¶¶ 74-89,  
17 99-111, 122-32, 136-39).

18 Based on the above allegations, plaintiffs, on their own behalf and on behalf of a  
19 putative class, assert nine Causes of Action, each based on one or more of the following  
20 three theories: (1) Honda, by not repairing the alleged defect, breached the express  
21 terms of its "New Vehicle Limited Warranty," which warranty, plaintiffs assert, requires  
22 Honda to "repair original components found to be defective in material or workmanship  
23 under normal use and maintenance" (see FAC ¶ 167); (2) Honda breached the implied  
24 warranty of merchantability, as the alleged defect makes drivers "less safe by detracting  
25 their attention and poses enough of a safety risk that [the] [v]ehicles cannot be said to  
26 provide safe and reliable transportation" (see FAC ¶¶ 193, 195); and (3) Honda engaged  
27 in deceptive and unfair business practices by selling vehicles to plaintiffs "with knowledge  
28 that [the vehicles] contained defects with their Display Screen and knowingly concealed

1 said defects from [p]laintiffs" (see FAC ¶ 207).

## 2 LEGAL STANDARD

3 Dismissal under Rule 12(b)(6) of the Federal Rules of Civil Procedure "can be  
4 based on the lack of a cognizable legal theory or the absence of sufficient facts alleged  
5 under a cognizable legal theory." See Balistreri v. Pacifica Police Dep't, 901 F.2d 696,  
6 699 (9th Cir. 1990). Rule 8(a)(2), however, "requires only 'a short and plain statement of  
7 the claim showing that the pleader is entitled to relief.'" See Bell Atlantic Corp. v.  
8 Twombly, 550 U.S. 544, 555 (2007) (quoting Fed. R. Civ. P. 8(a)(2)). Consequently, "a  
9 complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual  
10 allegations." See id. Nonetheless, "a plaintiff's obligation to provide the grounds of his  
11 entitlement to relief requires more than labels and conclusions, and a formulaic recitation  
12 of the elements of a cause of action will not do." See id. (internal quotation, citation, and  
13 alteration omitted).

14 In analyzing a motion to dismiss, a district court must accept as true all material  
15 allegations in the complaint and construe them in the light most favorable to the  
16 nonmoving party. See NL Indus., Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986). "To  
17 survive a motion to dismiss, a complaint must contain sufficient factual material, accepted  
18 as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S.  
19 662, 678 (2009) (quoting Twombly, 550 U.S. at 570). "Factual allegations must be  
20 enough to raise a right to relief above the speculative level[.]" Twombly, 550 U.S. at 555.  
21 Courts "are not bound to accept as true a legal conclusion couched as a factual  
22 allegation." See Iqbal, 556 U.S. at 678 (internal quotation and citation omitted).

## 23 DISCUSSION

24 In its motion, Honda seeks dismissal of each claim, and, to the extent any such  
25 claim is not dismissed, an order finding plaintiffs may not proceed on behalf of a  
26 nationwide class.

### 27 A. Failure to State a Claim

28 As noted, the FAC includes nine Causes of Action, which the Court next considers

1 in turn.

2 **1. First Cause of Action**

3 In the First Cause of Action, plaintiffs allege that Honda, by failing "to comply with  
4 the written and implied warranties" applicable to their vehicles, violated the Magnusson-  
5 Moss Warranty Act ("MMWA"). (See FAC ¶ 161; see also FAC ¶ 162-64.) By the instant  
6 motion, Honda, in addition to arguing plaintiffs have failed to state a claim for breach of  
7 either express or implied warranty, asserts the Court lacks jurisdiction to consider the  
8 MMWA claim to the extent it is brought on behalf of the putative class.

9 The Court first considers the question of jurisdiction.

10 The MMWA, in 15 U.S.C. § 2310(d), provides: "A consumer who is damaged by  
11 the failure of a . . . warrantor . . . to comply with any obligation . . . under a written  
12 warranty [or] implied warranty . . . may bring suit for damages and other legal and  
13 equitable relief – (A) in any court of competent jurisdiction in any State or the District of  
14 Columbia; or (B) in an appropriate district court of the United States, subject to paragraph  
15 (3) of this subsection." See 15 U.S.C. § 2310(d)(1). The MMWA further provides: "No  
16 claim shall be cognizable in a suit brought under paragraph (1)(B) – (A) if the amount in  
17 controversy of any individual claim is less than the sum or value of \$25; (B) if the amount  
18 in controversy is less than the sum or value of \$50,000 (exclusive of interests and costs)  
19 computed on the basis of all claims to be determined in this suit; or (C) if the action is  
20 brought as a class action, and the number of named plaintiffs is less than one hundred."  
21 See 15 U.S.C. § 2310(d)(3).

22 Here, as the number of named plaintiffs is three, and as neither the initial  
23 complaint nor the FAC includes facts to support a finding that the amount placed in  
24 controversy by the three named plaintiffs is \$50,000 more,<sup>2</sup> the Court finds it lacks federal  
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28 <sup>2</sup>Although plaintiffs seek a refund of the amounts paid for their vehicles, plaintiffs  
do not include any such figure in the FAC.

1 question jurisdiction over the MMWA claim.<sup>3</sup> Indeed, plaintiffs neither alleged in the FAC,  
 2 nor do they argue in their opposition, that the Court has federal question jurisdiction over  
 3 the MMWA claim; rather, plaintiffs, citing five district court cases, contend the Court has  
 4 jurisdiction under the Class Action Fairness Act ("CAFA"). As set forth below, the Court  
 5 is not persuaded by the authority on which plaintiffs rely.

6 Under CAFA, a district court has diversity jurisdiction over a class action wherein  
 7 the parties are minimally diverse and the amount in controversy exceeds \$5,000,000.  
 8 See 28 U.S.C. § 1332(d)(2). The five cited cases, in concluding district courts can  
 9 exercise CAFA jurisdiction over MMWA claims, contain no independent reasoning for  
 10 such determination; instead they either cite to Chavis v. Fidelity, 415 F. Supp. 2d 620 (D.  
 11 S.C. 2006), or other district court cases that have cited to Chavis. See, e.g., Keegan v.  
 12 American Honda Motor Co., 838 F. Supp. 2d 929, 954-55 (C.D. Cal. 2012).

13 In Chavis, the district court appears to have held, where a plaintiff initially files in  
 14 state court an MMWA claim that would not be cognizable if filed in federal court, and the  
 15 matter is later removed to federal court, the district court can, pursuant to  
 16 § 2310(d)(1)(A), exercise CAFA jurisdiction over the removed MMWA claim because  
 17 such district court qualifies as a "court of competent jurisdiction in [a] State." See id. at  
 18 623, 626. If such reasoning were adopted, however, § 2310(d)(1)(B) would be rendered  
 19 a "nullity," a result contrary to "the rule that [a] statute[ ] should not be construed in a  
 20 manner which robs specific provisions of independent effect." See In re Cervantes, 219  
 21 F.3d 955, 961 (9th Cir. 2000). Moreover, as explained by another district court, although  
 22 CAFA provides "a basis for federal courts to exercise jurisdiction over state law disputes  
 23 between diverse parties," it does not "fill in the gaps for missing substantive requirements  
 24 of a federal law." See, e.g., Floyd v. American Honda Motor Co., 2018 WL 6118582, at  
 25 \*3 (C.D. Cal. 2018) (dismissing MMWA claims where plaintiffs failed to meet numerosity

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26  
 27 <sup>3</sup>The Court "has the duty to consider subject matter jurisdiction sua sponte in every  
 28 case, whether the issue is raised by the parties or not." See Spencer Enterprises, Inc. v.  
United States, 345 F.3d 683, 687 (9th Cir. 2003).

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1 requirement of § 2310(d)(3)(C)).

2           Nevertheless, although the Court finds it lacks federal question and diversity  
3 jurisdiction over plaintiffs' MMWA claim, such finding does not end the inquiry. Where, as  
4 here, a plaintiff brings one or more claims over which the court has original jurisdiction,<sup>4</sup>  
5 at least two Courts of Appeals, as well as a number of district courts in the those two and  
6 other Circuits, have held such court has supplemental jurisdiction over an MMWA claim  
7 that "arise[s] from the same controversy." See Voelker v. Porsche Cars North America,  
8 Inc., 353 F.3d 516, 521-22 (7th Cir. 2003) (finding district court properly exercised  
9 supplemental jurisdiction over MMWA claim where court had original jurisdiction over  
10 Truth in Lending Act claim"; citing 28 U.S.C. § 1367(a)); see also Burzlaff v.  
11 Thoroughbred Motorsports, Inc., 758 F.3d 841, 844-45 (7th Cir. 2014) (holding district  
12 court with "original diversity jurisdiction" over state "lemon law" claim had "supplemental  
13 jurisdiction" over MMWA claim); Suber v. Chrysler Corp., 104 F.3d 578, 588 n.12 (3rd Cir.  
14 1997) (noting district court, on remand, "can exercise supplemental jurisdiction" over  
15 MMWA claim if it finds plaintiff "has established diversity jurisdiction with his [state law]  
16 claim"); Pierre v. Planet Automotive, Inc., 193 F. Supp. 3d 157, 170-71 (E.D. N.Y. 2016)  
17 (collecting district court cases exercising supplemental jurisdiction over MMWA claims).  
18 The Court finds the reasoning of those cases persuasive.

19           Accordingly, to the extent Honda argues the Court lacks jurisdiction over the  
20 MMWA claim, the motion will be denied.

21           The Court next turns to the merits of the MMWA claim, which, as noted, is based  
22 on the theory that Honda breached the terms of written and implied warranties.

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28 <sup>4</sup>It is undisputed that the Court has, under CAFA, diversity jurisdiction over the  
Second through Ninth Causes of Action.

1 **a. Breach of Express Warranty**

2 Plaintiffs allege that each plaintiff purchased a new Honda vehicle and that each  
3 such sale was "accompanied with Honda's 3-year/36,000 New Vehicle Limited Warranty"  
4 ("NVLW") (see FAC ¶ 62; see also FAC ¶¶ 71, 96, 119), which provides that "Honda will  
5 repair or replace any part that is defective in material or workmanship under normal use"  
6 (see FAC ¶ 64). As noted, plaintiffs further allege they took their vehicles to a Honda  
7 dealership, which, in each instance, was unable to fix the alleged defect. Based on such  
8 failure to fix the alleged defect, plaintiffs assert Honda, in violation of California law,  
9 Colorado law, and Tennessee law, respectively, breached the express warranty.<sup>5</sup>

10 Honda argues the NVLM, being limited by its terms to defects in "material or  
11 workmanship" (see Shortnacy Decl. Ex. C), only covers manufacturing defects, as  
12 opposed to design defects, and that the FAC includes no facts to support a finding that  
13 the alleged defect is a manufacturing defect.

14 Under California law, a warranty that provides protection against "defects in  
15 materials or workmanship" does not cover design defects. See Troup v. Toyota Motors  
16 Corp., 545 Fed. Appx. 668, 668–69 (9th Cir. 2013) (noting, "[i]n California, express  
17 warranties covering defects in materials and workmanship exclude defects in design");  
18 see also Moss v. Smith, 181 Cal. 519, 520 (1919) (affirming judgment for plaintiff on  
19 breach of warranty claim, where warranty covered "any part that is defective in material  
20 or workmanship" and evidence showed "defective operation of the car was due, not to  
21 the imperfect design of the engine, but to faulty workmanship in its construction");  
22 Paduano v. American Honda Motor Co., 169 Cal. App. 4th 1453, 1467-68 (2009)  
23 (affirming summary judgment for defendant on breach of express warranty claim, where  
24 warranty covered defects in "material or workmanship" and plaintiff failed to offer  
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26  
27 <sup>5</sup>As the MMWA "borrows state law causes of action," such as "express and implied  
28 warranty claims," state law "determines the disposition of [MMWA] claims." See Clemens  
v. DaimlerChrysler Corp., 534 F.3d 1017, 1022 and n.3 (9th Cir. 2008).

1 evidence to show his "low gas mileage [was] the result of a mechanical defect").<sup>6</sup>

2 A "design defect" exists "when the product is built in accordance with its intended  
3 specifications, but the design itself is inherently defective." See McCabe v. American  
4 Honda Motor Co., 100 Cal. App. 4th 1111, 1120 (2002). By contrast, a "manufacturing  
5 defect exists when an item is produced in a substandard condition," i.e., where a  
6 manufacturer "fail[s] to comply with its own design specifications," and is "often  
7 demonstrated by showing the product performed differently from other ostensibly  
8 identical items of the same product line." See id. (internal citation omitted).

9 Here, as Honda points out, plaintiffs allege the claimed defect is one "in material  
10 and/or workmanship" (see FAC ¶ 30), but include no facts to support such conclusory  
11 assertion. Courts are "not bound to accept as true a legal conclusion couched as a  
12 factual allegation." See Iqbal, 556 U.S. at 678. Further, to the extent the FAC includes  
13 facts pertaining to the type of alleged defect, those facts would appear to support a  
14 finding that such defect is one of design. Specifically, plaintiffs, in bringing the action on  
15 behalf of a proposed class of all "owners and lessees" of the "2017-2019 Honda CR-V  
16 models" (see FAC ¶¶ 1, 30), are, in essence, acknowledging plaintiffs' vehicles do not  
17 perform "differently from other ostensibly identical items of the same product line," see  
18 McCabe, 100 Cal. App. 4th at 1120, a fact evidencing a design rather than manufacturing  
19 defect.

20 Accordingly, to the extent the MMWA claim is based on a theory that Honda has  
21 breached the terms of its express warranties, the claim is subject to dismissal.

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24 <sup>6</sup>With respect to the meaning of "materials or workmanship," although plaintiffs, as  
25 noted, seek relief for breach of express warranty under the laws of California, Colorado,  
26 and Tennessee, the parties only cite to authority applying California law or state law other  
27 than that of Colorado or Tennessee. Under such circumstances, the Court, for purposes  
28 of the instant motion only, assumes Colorado and Tennessee law are, as to the meaning  
of "materials or workmanship," no different than the law to which the parties have cited.  
See, e.g., O'Connor v. BMW of North America, LLC, 2020 WL 1303285, at \*4 (D. Colo.  
March 19, 2020) (holding, under Colorado law, "defective in material or workmanship"  
refers to "'manufacturing defects' but not design defects").



1 **b. Breach of Implied Warranty**

2 Plaintiffs allege that Honda, in violation of California and Colorado law, breached  
3 the implied warranty of merchantability.<sup>7</sup>

4 Under California law, "every sale of consumer goods that are sold at retail in  
5 [California] shall be accompanied by the manufacturer's and the retail seller's implied  
6 warranty that the goods are merchantable." See Cal. Civ. Code § 1792. Similarly, under  
7 Colorado law, "a warranty that the goods shall be merchantable is implied in a contract  
8 for their sale if the seller is a merchant with respect to goods of that kind." See Colo.  
9 Rev. Stat. § 4-2-314 (1). Under both California and Colorado law, the term  
10 "merchantability" is defined as "fit for the ordinary purposes for which such goods are  
11 used." See Cal. Civ. Code § 1791.1(a); Colo. Rev. Stat. § 4-2-314(2)(c).

12 According to plaintiffs, Honda breached the implied warranty of merchantability  
13 because the alleged display screen defects render their respective vehicles "unfit for the  
14 ordinary purposes for which such vehicles are used" (see FAC ¶ 193), and Honda has  
15 "failed to remedy [plaintiffs'] [v]ehicles' defects within a reasonable time, and/or a  
16 reasonable number of attempts" (see FAC ¶ 163).

17 Honda argues the alleged display screen defects do not render plaintiffs' vehicles  
18 unfit for transportation, which, it asserts, is the ordinary purpose for which one uses a  
19 vehicle.<sup>8</sup> In response, plaintiffs acknowledge their vehicles can be driven but contend the  
20 defect makes such driving unsafe.

21 Under California law, as interpreted by the Ninth Circuit, a plaintiff can establish a  
22 claim for breach of the implied warranty of merchantability not only by showing the defect  
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24 <sup>7</sup>Plaintiffs do not assert a breach of implied warranty claim under Tennessee law.

25 <sup>8</sup>Honda also argues there is no breach because it "has released an effective  
26 countermeasure for the alleged performance issues at no charge." (See Def.'s Notice of  
27 Mot. at 2:12, 19-20.) Although Honda requests the Court take judicial notice of such  
28 circumstance, there is no recognized legal basis for the Court to do so. Consequently,  
the Court does not consider at this time whether, assuming an "effective  
countermeasure" now exists, the breach of implied warranty claims lack merit.

1 renders the vehicle "inoperable" but, alternatively, by showing the defect "compromise[s]  
 2 the vehicle's safety." See Troup, 545 Fed. Appx. at 669 (citing cases); see also Isip v.  
 3 Mercedes-Benz USA, LLC, 155 Cal. App. 4th 19, 27 (2007) (approving jury instruction  
 4 "[d]efining the [implied] warranty in terms of a vehicle that is 'in safe condition and  
 5 substantially free of defects'"; finding such instruction "consistent with the notion that the  
 6 vehicle is fit for the ordinary purpose for which a vehicle is used").<sup>9</sup>

7 Here, as noted, plaintiffs allege their display screens "dim and go dark, freeze, or  
 8 shine at full brightness, causing driver distraction" (see FAC ¶ 2), and that they "regularly  
 9 and unexpectedly malfunction[ ] while the . . . [v]ehicles are in motion" (see FAC ¶ 5).  
 10 Plaintiffs further allege that, when their screens go into "full bright mode" at night, the  
 11 brightness is "blinding." (See id.; see also FAC ¶ 9.) Consistent therewith, plaintiffs  
 12 quote from a number of consumer complaints made by persons who own the same  
 13 models as plaintiffs, asserting, for example, (1) the display screen unexpectedly goes to  
 14 "full brightness," which "interferes with night driving especially when making right hand  
 15 turns by creating a blinding condition," (2) the screen "blinds [the driver] at night because  
 16 it is very bright so [the driver] can't really see the road"; (3) the screen "will randomly  
 17 flash, dim and beep," causing a "high level of distraction"; (4) "the random brightness  
 18 changes are quite dangerous at night time, when max brightness occurs suddenly"; (5)  
 19 "the brightness of the screen changes by itself," which is "very distracting while driving";  
 20 (6) the screen "will not dim and blinds driver when driving after dark"; and (7) the screen  
 21 "is stuck on hi brightness," causing "safety issue while driving at night" (See FAC ¶ 37.)  
 22 The Court finds the above-cited factual allegations are sufficient to support a finding that  
 23

24 \_\_\_\_\_  
 25 <sup>9</sup>With respect to how a plaintiff may establish a vehicle is not fit for its ordinary  
 26 purposes, although plaintiffs, as noted, bring their claim under the laws of California and  
 27 Colorado, the parties cite to authority applying California law or state law other than that  
 28 of Colorado. Under such circumstances, the Court, for purposes of the instant motion  
 only, assumes Colorado law is no different from the law to which the parties have cited.  
See, e.g., O'Connor, 2020 WL 1303285, at \*4 (holding, under Colorado law, in "vehicle  
 context," implied warranty "is simply a guarantee that [vehicles] will operate in a safe  
 condition and substantially free of defects").

1 the asserted defect compromises plaintiffs' ability to operate their respective vehicles  
2 safely, and, consequently, that plaintiffs have pleaded a claim for breach of the implied  
3 warranty.

4 The Court next considers whether plaintiffs nonetheless have failed to plead such  
5 claim on behalf of Schwert. As noted, plaintiffs base their breach of implied warranty  
6 claim on violations of California and Colorado law, and, as also noted, Schwert  
7 purchased his vehicle in Tennessee. (See FAC ¶ 119.) Although plaintiffs argue  
8 Schwert can state a breach of implied warranty claim under California law, specifically,  
9 California Civil Code § 1792, that statute, as Honda points, only applies to goods sold "in"  
10 California. See Cal. Civil Code § 1792 (providing implied warranty applies to "every sale  
11 of consumer goods that are sold at retail in this state"). Consequently, Schwert cannot  
12 rely on § 1792.

13 Accordingly, to the extent the First Cause of Action is brought on behalf of Woo  
14 and Rifkin and based on a theory that Honda has breached the implied warranty of  
15 merchantability, the claim is not subject to dismissal; in all other respects, the claim is  
16 subject to dismissal.

## 17 **2. Second Cause of Action**

18 In the Second Cause of Action, plaintiffs allege Honda breached their express  
19 warranties, in violation of California Commercial Code § 2313.

20 For the reasons stated above with respect to the First Cause of Action, the claim is  
21 subject to dismissal.

## 22 **3. Third Cause of Action**

23 In the Third Cause of Action, plaintiffs allege, on behalf of Woo only, that Honda  
24 breached the express warranty, in violation of California Civil Code §§ 1791.2 and 1793.

25 For the reasons stated above with respect to the First Cause of Action, the claim  
26 likewise is subject to dismissal.

## 27 **4. Fourth Cause of Action**

28 In the Fourth Cause of Action, plaintiffs allege Honda breached the implied

1 warranty of merchantability, in violation of California Civil Code § 1792.

2 For the reasons stated above with respect to the First Cause of Action, the claim is  
3 not subject to dismissal to the extent it is asserted on behalf of Woo. As § 1792 only  
4 applies to sales made in California, however, see Cal. Civil Code § 1792 (providing  
5 implied warranty applies to "every sale of consumer goods that are sold at retail in this  
6 state"), a claim under § 1792 cannot be asserted on behalf of Rifkin and Schwert, neither  
7 of whom purchased a vehicle in California. (See FAC ¶¶ 96, 119).

8 Accordingly, the Fourth Cause of Action is not subject to dismissal to the extent it  
9 is brought on behalf of Woo and is subject to dismissal to the extent it is brought on  
10 behalf of Rifkin and Schwert.

#### 11 **5. Fifth Cause of Action**

12 In the Fifth Cause of Action, plaintiffs allege Honda violated the Consumers Legal  
13 Remedies Act ("CLRA"), California Civil Code §§ 1750-1784, which Act prohibits "unfair  
14 or deceptive acts or practices undertaken by any person in a transaction intended to  
15 result or which results in the sale or lease of goods or services to any consumer." See  
16 Cal. Civ. Code § 1770(a). According to plaintiffs, Honda violated the CLRA by selling  
17 them vehicles "with knowledge that they contained defects with their [d]isplay [s]creen,"  
18 which knowledge Honda "knowingly concealed." (See FAC ¶ 207.)

19 A plaintiff states a cognizable claim under the CLRA where the plaintiff alleges the  
20 defect poses "an unreasonable safety hazard," see Wilson v. Hewlett-Packard Co., 668  
21 F.3d 1136, 1143 (9th Cir. 2012), and the defendant "was aware of [such] defect at the  
22 time of sale," see id. at 1145. Honda argues plaintiffs have failed to allege sufficient facts  
23 to support a finding that the asserted defect poses an unreasonable safety hazard or that  
24 it was aware of any such defect at the time plaintiffs purchased their respect vehicles.  
25 Additionally, Honda argues the claim sounds in fraud and has not been pleaded in  
26 conformity with Rule 9(b).

#### 27 **a. Safety Hazard**

28 With respect to the issue of safety, the Court finds, for the reasons stated above

1 with respect to the First Cause of Action, plaintiffs have pleaded sufficient facts to support  
2 a finding that the alleged defect poses an unreasonable safety hazard.

3 **b. Knowledge**

4 With respect to the issue of Honda's knowledge of the asserted safety defect,  
5 plaintiffs primarily rely on the following factual allegations: (1) complaints buyers made to  
6 the National Highway Traffic Safety Administration ("NHTSA") (see FAC ¶ 37), and the  
7 fact that Honda "tracks the NHTSA databases for consumer complaints regarding [its]  
8 automobiles" (see FAC ¶ 47); (2) complaints buyers made on "various public online  
9 forums" Honda "regularly monitors" (see FAC ¶¶ 38, 50); and (3) a "Tech Line Summary  
10 Article", titled "Display Audio Screen Dims or Goes Dark by Itself," which article Honda  
11 issued to its dealers on January 23, 2019, and in which it stated it was not aware of a "fix"  
12 at that time, but recommended a "temporary" solution to address the issue (see FAC  
13 ¶¶ 51-53).

14 As to Woo, plaintiffs' allegations are sufficient. In particular, in addition to the  
15 various consumer complaints, the majority of which predate Woo's purchase, Honda, on  
16 January 23, 2019, as noted, acknowledged in the Tech Line Summary Article the  
17 problems with the display screen. (See FAC ¶¶ 51-53.) Although the Article was issued  
18 eleven days after January 12, 2019, the date on which Woo purchased his vehicle, a  
19 reasonable inference can be drawn that Honda had knowledge of the asserted defect  
20 prior to the date on which it issued the Article, given Honda's acknowledgment that, by  
21 such time, it had already developed a "temporary solution." Further, given the short  
22 interval between such issuance and Woo's purchase, one can reasonably infer Honda's  
23 knowledge of the defect existed at the time of Woo's purchase. See Sloan v. General  
24 Motors LLC, 287 F. Supp. 3d 840, 866 (N.D. Cal. 2018) (citing cases).

25 As to Rifkin, however, plaintiffs have failed to allege any facts to support a finding  
26 Honda was aware of the asserted defect on April 6, 2017, the date Rifkin purchased his  
27 vehicle, as every consumer complaint identified in the FAC was made after his purchase  
28 and the Tech Line Summary Article was issued after the purchase. (See FAC ¶¶ 37, 38

1 (listing complaints and dates made, with earliest dated April 28, 2017).)<sup>10</sup>

2 Similarly, as to Schwert, plaintiffs have failed to allege sufficient facts to support a  
3 finding Honda was aware of the asserted defect on December 30, 2017, the date  
4 Schwert purchased his vehicle, the sole difference being plaintiffs' identification of eight  
5 consumer complaints made prior to the date on which Schwert purchased his vehicle. Of  
6 those eight, however, only two complaints appear to describe their experiences as posing  
7 a safety hazard (see FAC at 10:8-13, 22 at 7-12), while the others only describe their  
8 experience as an annoyance (see, e.g., FAC at 21:9-11 (stating screen "went blank but  
9 music still playing"); FAC at 21:12-20 (stating screen made "annoying beeps" and went  
10 "dark" until driver "stopped the engine")). See Baba v. Hewlett-Packard Co., 2011 WL  
11 317650, at \*3 (N.D. Cal. January 28, 2011) (finding "[a]wareness of a few customer  
12 complaints" insufficient to "establish knowledge of an alleged defect"). Moreover, none of  
13 the eight complaints were from persons who identified themselves as drivers of the 2018  
14 CR-V Touring model, the model Schwert purchased.

15 **c. Rule 9(b)**

16 Honda contends, and plaintiffs do not dispute, the CLRA claim sounds in fraud.  
17 (See, e.g., FAC ¶ 207 (alleging Honda "knowingly concealed [the] defects from  
18 [p]laintiffs" with "intent that [p]laintiffs . . . rely upon its concealment"); see FAC ¶ 210  
19 (alleging plaintiffs "were deceived" by Honda's failure to disclose defect); see FAC ¶ 217  
20 (alleging plaintiffs "suffered damages" by Honda's failure to disclose, as they "would not

21 \_\_\_\_\_  
22 <sup>10</sup>Plaintiffs also rely on complaints allegedly made to Honda on its "customer  
23 service hotline," as well as complaints made to Honda dealers (see FAC ¶ 43); as those  
24 complaints are undated, however, they do not give rise to an inference that Honda knew  
25 of the asserted defect at the time of plaintiffs' respective purchases. See Wilson, 668  
26 F.3d at 1148 (holding "undated" consumer complaints insufficient). Plaintiffs additionally  
27 rely on "pre-release testing data" and "testing conducted in response to early consumer  
28 complaints" (see FAC ¶ 43); as plaintiffs allege no facts as to what information Honda  
obtained as a result of the "testing," such conclusory allegations likewise do not give rise  
to an inference that Honda knew of the defect at the relevant times. See Stewart v.  
Electrolux Home Products, Inc., 2018 WL 1784273, at \*9 (E.D. Cal. April 13, 2018)  
(finding allegation that defendant knew of defect from "early warning systems, statistical  
analysis, audits, [and] after-market testing" too "conclusory" to support finding defendant  
knew of asserted defect at time of plaintiff's purchase).

1 have purchased . . . had the defect and associated risks been disclosed to them").) In  
2 light thereof, as Honda notes, Rule 9(b) applies.

3 Under Rule 9(b), "the circumstances constituting the alleged fraud [must] be  
4 specific enough to give defendants notice of the particular misconduct so that they can  
5 defend against the charge and not just deny that they have done anything wrong."  
6 Kearns v. Ford Motor Co., 567 F.3d 1120, 1124 (9th Cir. 2009) (internal quotation,  
7 alteration and citation omitted). Specifically, "[a]verments of fraud must be accompanied  
8 by 'the who, what, when, where, and how' of the misconduct charged." Id. Here, Honda  
9 argues, plaintiffs have failed to sufficiently describe the content of the undisclosed fact,  
10 when and where such omitted information should have been revealed, and why plaintiffs  
11 would have relied on the information had it been made.

12 As plaintiffs point out, however, the FAC does include such factual allegations.  
13 First, the FAC alleges the information not disclosed to Woo,<sup>11</sup> specifically, the above-  
14 described malfunctioning of the display screen. (See FAC ¶¶ 5, 73.) Next, the FAC  
15 alleges when and where the omitted information should have been revealed to him,  
16 specifically, at Wittmeier Honda in Chico, California, on January 12, 2019, at the time  
17 Woo allegedly interacted with a salesperson and then purchased the vehicle. (See FAC  
18 ¶ 73.) Lastly, a plaintiff must show that, "had the omitted information been disclosed, [he]  
19 would have been aware of it and behaved differently." See Daniel v. Ford Motor Co., 806  
20 F.3d 1217, 1225 (9th Cir. 2015) (internal quotation and citation omitted). In that regard,  
21 where, as here, a plaintiff alleges he purchased his vehicle after interacting with a sales  
22 representative at an authorized dealership, the court can infer such plaintiff "would have  
23 been aware of the disclosure if it has been made" by the dealership, see id. at 1226, and  
24 where, as here, a plaintiff alleges a defect "pose[s] safety concerns," the court can infer  
25

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26 <sup>11</sup>As the CLRA claims asserted on behalf of Rifkin and Schwert are subject to  
27 dismissal for failure to allege Honda had knowledge of the asserted defect at the time  
28 those two plaintiffs purchased their respective vehicles, the Court only considers Honda's  
remaining argument as it pertains to Woo.

1 that, had the asserted defect been disclosed, he would have "behaved differently," see id.

2 **d. Conclusion**

3 Accordingly, the Fifth Cause of Action is not subject to dismissal to the extent it is  
4 brought on behalf of Woo and is subject to dismissal to the extent it is brought on behalf  
5 of Rifkin and Schwert.

6 **6. Sixth Cause of Action**

7 In the Sixth Cause of Action, plaintiffs allege Honda violated § 17200 of the  
8 Business & Professions Code. As pleaded, the claim is derivative of the Second through  
9 Fifth Causes of Action. (See FAC ¶ 237.)

10 As set forth above, the Second and Third Causes of Action are subject to  
11 dismissal. Additionally, the Fourth and Fifth Causes of Action are subject to dismissal  
12 except to the extent they are asserted on behalf of Woo.

13 Accordingly, the Sixth Cause of Action is subject to dismissal, except to the extent  
14 it is based on the claims set forth in the Fourth and Fifth Causes of Action as asserted on  
15 behalf of Woo.

16 **7. Seventh Cause of Action**

17 In the Seventh Cause of Action, plaintiffs allege, on behalf of Rifkin only, that  
18 Honda, in violation of Colorado Revised Statutes § 4-2-313, breached the terms of the  
19 express warranty provided to Rifkin.

20 For the reasons stated above with respect to the First Cause of Action, the  
21 Seventh Cause of Action is subject to dismissal.

22 **8. Eighth Cause of Action**

23 In the Eighth Cause of Action, plaintiffs allege, on behalf of Rifkin only, that Honda,  
24 in violation of Colorado Revised Statutes § 4-2-314, breached the implied warranty of  
25 merchantability.

26 For the reasons stated above with respect to the First Cause of Action, the Eighth  
27 Cause of Action is not subject to dismissal.

28 //

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1           **9. Ninth Cause of Action**

2           In the Ninth Cause of Action, plaintiffs allege, on behalf of Schwert only, that  
3 Honda, in violation of Tennessee Code § 47-2-313, breached the terms of the express  
4 warranty provided to Schwert.

5           For the reasons stated above with respect to the First Cause of Action, the Ninth  
6 Cause of Action is subject to dismissal.

7           **B. Whether Plaintiffs May Pursue a Nationwide Class**

8           Plaintiffs seek to proceed on behalf of a "nationwide class" of "[a]ll persons or  
9 entities in the United States who bought or leased a Class Vehicle." (See FAC ¶ 144.) In  
10 the alternative, plaintiffs seek to proceed on behalf of "state classes," specifically, (1) "[a]ll  
11 persons or entities in the State of California who bought or leased a Class Vehicle,"  
12 (2) "all persons or entities in the State of Colorado who bought or leased a Class  
13 Vehicle," and (3) "all persons or entities in the State of Tennessee who bought or leased  
14 a Class Vehicle." (See FAC ¶ 145.)

15           With respect to the putative nationwide class, plaintiffs allege California law should  
16 apply to all claims of all class members. (See FAC ¶ 153.) Honda argues the claims  
17 asserted on behalf of a nationwide class should be dismissed because it is "evident from  
18 the face of the FAC that no single state's law (whether California or any other) could  
19 properly be applied" nationwide. (See Def.'s Mot. at 8:26-27.)

20           As set forth above, there are two cognizable substantive claims arising under  
21 California law, namely, the Fourth Cause of Action, alleging on behalf of Woo a violation  
22 of California Civil Code § 1792, and the Fifth Cause of Action, alleging on behalf of Woo  
23 a violation of the CLRA. As noted, a claim under § 1792 can only be brought by persons  
24 who bought goods in California. Consequently, such claim cannot, by its terms, apply  
25 nationwide, and plaintiffs, in their opposition, clarify that they do not seek to proceed with  
26 such claim on behalf of a nationwide class. (See Pls.' Opp. at 7:27-28.) The Court next  
27 turns to the CLRA claim.

28           In Mazza v. American Honda Motor Co., 666 F.3d 581 (9th Cir. 2012), the Ninth

1 Circuit held that a district court erred by certifying a nationwide class, where the plaintiff  
2 alleged a CLRA claim against Honda, the same defendant named here, and in which the  
3 CLRA claim was based, as here, on a theory that Honda did not warn the plaintiff of an  
4 alleged defect in an automobile. See id. at 587, 590. In particular, the Ninth Circuit found  
5 (1) that the CLRA and the "consumer protection statutes" of other states differ on whether  
6 scienter is required, whether reliance is required, and on the factual showing required to  
7 obtain actual damages and restitution, see id. at 591, (2) that such differences are  
8 "material," see id., (3) that "each state has a strong interest in applying its own consumer  
9 protection laws" to "transactions" within its borders, see id. at 591-92, and (4) that the  
10 state in which the transaction occurred has the strongest interest in applying its law, see  
11 id. at 594. In sum, the Ninth Circuit concluded that "each class member's consumer  
12 protection claim should be governed by the consumer protection laws of the jurisdiction in  
13 which the transaction took place." See id.

14 Plaintiffs argue the analysis set forth in Mazza should not apply at the pleading  
15 stage. In particular, plaintiffs argue, choice of law decisions should await the class  
16 certification stage, at which point a determination can be made as to whether differences  
17 in state law will be material. The Court disagrees. First, material differences exist as to  
18 what the CLRA and statutes of other states require with regard to scienter and/or  
19 reliance, see id. at 591, and it is readily apparent from the allegations in the FAC that  
20 Honda's state of mind will be at issue, as will the question of whether, had putative class  
21 members been advised of the problems with the display screen, they would have acted  
22 differently. In addition, plaintiffs seek to obtain, on behalf of the putative class, remedies  
23 as to which material differences exist among states as to whether and when a plaintiff is  
24 entitled to a particular form of relief. See id.; see also, e.g., Darisse v. Nest Labs, Inc.,  
25 2016 WL 4385849, at \*9 (N.D. Cal. August 15, 2016) (noting material differences  
26 between CLRA and statutes of other states as to whether, and if so circumstances  
27 under which, injunctive relief, punitive damages, and attorney's fees can be awarded).  
28 Moreover, here, just as in Mazza, "the last event[ ] necessary for liability" occurred in the

1 state where each class member purchased his car, and, to the extent those purchases  
2 were not made in California, "California's interest in applying its law to residents of foreign  
3 states is attenuated" and does not outweigh the interests of the jurisdictions in which the  
4 purchase took place. See Mazza, 666 F.3d at 594.

5 Accordingly, to the extent the CLRA claim is asserted on behalf of a nationwide  
6 class, the claim is subject to dismissal.

7 **CONCLUSION**

8 For the reasons stated above, Honda's motion to dismiss is hereby GRANTED in  
9 part and DENIED in part, as follows:

10 1. The First Cause of Action is DISMISSED, except to the extent it is based on a  
11 theory of breach of implied warranty as asserted on behalf of Woo and Rifkin.

12 2. The Second, Third, Seventh, and Ninth Causes of Action are DISMISSED.

13 3. The Fourth and Fifth Causes of Action are DISMISSED, except to the extent  
14 they are asserted on behalf of Woo.

15 4. The Sixth Cause of Action is DISMISSED, except to the extent it is based on  
16 the Fourth and Fifth Causes of Action as asserted on behalf of Woo.


17 5. The Eighth Cause of Action is not subject to dismissal.

18 In the event plaintiffs wish to amend to cure any of the deficiencies identified  
19 above, plaintiffs shall file a Second Amended Complaint no later than June 19, 2020. If  
20 plaintiffs do not file a Second Amended Complaint by said date, the instant action will  
21 proceed on the remaining claims in the FAC, and Honda shall file its answer thereto no  
22 later than July 2, 2020.

23 Lastly, in light of the above, the Case Management Conference is hereby  
24 CONTINUED from June 12, 2020, to July 31, 2020, at 10:30 a.m. A Joint Case  
25 Management Statement shall be filed no later than July 24, 2020.

26 **IT IS SO ORDERED.**

27 Dated: May 28, 2020

28   
MAXINE M. CHESNEY  
United States District Judge

United States District Court  
Northern District of California