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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

WILLIAM PHILIPS, et al.,
Plaintiffs,
v.
FORD MOTOR COMPANY,
Defendant.

Case No. 14-CV-02989-LHK

**ORDER DENYING MOTION TO
DISMISS FOR MOOTNESS AND LACK
OF STANDING**

Re: Dkt. No. 84

Plaintiffs William Philips, Jaime Goodman, and Alison Colburn (collectively, “California Plaintiffs”)¹ bring this action against Defendant Ford Motor Company (“Defendant” or “Ford”). Before the Court is Ford’s motion to dismiss California Plaintiffs’ second amended complaint for mootness and lack of standing. *See* ECF No. 55 (“SAC”); ECF No. 84 (“Mot.”). The Court finds

¹ In addition to California Plaintiffs, the SAC also includes the same non-California Plaintiffs from the First Amended Complaint (“FAC”): Jason Wilkinson, Robert Morris, Victoria Jackson, Johnpaul Fournier, and Ryan and Rebecca Wolf. *See* SAC ¶¶ 189–219. Because the FAC contained fifty one causes of action, which included nationwide class claims and class claims brought under the laws of six states, the Court decided to proceed by addressing the California claims first. ECF No. 46. To that end, the parties stipulated that “[a]lthough the SAC may contain both California and non-California claims,” any subsequent motions to dismiss “shall address only . . . California [Plaintiffs’] claims.” ECF No. 51 at 1. Accordingly, this Order is limited to the causes of action brought by California Plaintiffs in the SAC.

1 this matter suitable for decision without oral argument pursuant to Civil Local Rule 7-1(b) and
 2 thus VACATES the motion hearing set for February 25, 2016, at 1:30 p.m. The case management
 3 conference, currently scheduled for February 25, 2016, at 1:30 p.m., remains as set. Having
 4 considered the submissions of the parties, the relevant law, and the record in this case, the Court
 5 DENIES Ford’s motion to dismiss.

6 **I. BACKGROUND**

7 **A. Factual Background**

8 California Plaintiffs seek to represent a class of statewide consumers who purchased or
 9 leased Ford Fusion vehicles, model years 2010 through 2014, or Ford Focus vehicles, model years
 10 2012 through 2014 (collectively, the “Vehicles”).² California Plaintiffs allege that these Vehicles³
 11 are equipped with a defective Electronic Power Assisted Steering (“EPAS”) system. SAC ¶ 1.
 12 The following chart summarizes California Plaintiffs’ purchasing information:

| Plaintiff | Vehicle | Site of Purchase | Date of Purchase |
|-----------------|-------------------------|-----------------------|------------------|
| William Philips | 2011 Ford Fusion (used) | Salinas Valley Ford | March 2012 |
| Jaime Goodman | 2011 Ford Fusion (new) | Future Ford of Clovis | October 2010 |
| Alison Colburn | 2010 Ford Fusion (new) | Galpin Ford | January 2010 |

16 *Id.* ¶¶ 32–54. Power steering systems supplement the torque that the driver must apply to the
 17 steering wheel, thus making it easier for the driver to turn the wheel. *Id.* ¶ 76. Instead of using a
 18 traditional power steering pump, Ford’s EPAS system uses a power steering control motor,
 19 electronic control unit, torque sensor, and steering wheel position sensor. *Id.* ¶ 2. California
 20 Plaintiffs allege, however, that Ford’s EPAS system suffers from a “systemic defect” that “renders
 21 the system prone to sudden and premature failure during ordinary and foreseeable driving
 22 situations.” *Id.* This defect, California Plaintiffs contend, causes drivers of the Vehicles to
 23 “experience significantly increased steering effort and an increased risk of losing control of their

24 _____
 25 ² In addition, the SAC further specifies that the “Vehicles include the following models: 2010–
 26 2014 Ford Fusion; 2010–2014 Ford Fusion Hybrid; 2013–2014 Ford Fusion Energi; 2012–2014
 27 Ford Focus; and 2012–2014 Ford Focus Electric.” SAC ¶ 69.

³ In this Order, the Court uses “Vehicles” only when collectively referring to all vehicles at issue
 in the SAC.

1 vehicles when the EPAS system fails” and “defaults to manual steering.” *Id.* ¶¶ 3, 101.

2 In support of these allegations, California Plaintiffs rely upon three categories of evidence:
3 (1) their own experiences with EPAS failure, (2) a National Highway Traffic Safety
4 Administration’s (“NHTSA”) investigation into the EPAS system of the Ford Explorer, a vehicle
5 not at issue in this action, and (3) complaints to NHTSA by other owners and lessees about power
6 steering failures in the Vehicles.

7 **1. California Plaintiffs’ Personal Experience with EPAS Failure**

8 **i. Philips**

9 As to the first category of evidence, California Plaintiffs allege that the EPAS system in
10 each of their vehicles has failed. Specifically, William Philips (“Philips”) states that he “reviewed
11 Ford’s promotional materials and other information,” and that he “would not have purchased his
12 2011 Ford Fusion, or would not have paid the purchase price charged,” if Ford “had disclosed the
13 EPAS system defects and failures.” *Id.* ¶ 34. Philips also says he experienced “problems with the
14 steering system in his Fusion.” *Id.* ¶ 36. After lodging multiple complaints with Ford, Philips was
15 informed during a dealership visit in 2013 “that it would cost approximately \$2,000 to fix the
16 problem” through an EPAS system replacement. *Id.* According to Philips, “Ford offered to pay
17 50%.” *Id.* Philips declined to repair his vehicle at that time. In July 2015, Philips received a
18 notice from Ford alerting him that his “vehicle was subject to a safety recall,” and asking Philips
19 to take his vehicle to a dealership for further inspection. ECF No. 97-5 at 192. The details of
20 Ford’s recall are discussed at greater length below. After receiving this notice, Philips brought his
21 vehicle in for an inspection, at which time the Ford dealership replaced the EPAS system in
22 Philips’ vehicle.

23 **ii. Goodman**

24 Jaime Goodman (“Goodman”) claims that, prior to “purchasing her 2011 Ford Fusion,”
25 she “(a) viewed television advertisements concerning the vehicles; (b) viewed material concerning
26 the Fusion on Ford’s website; (c) reviewed the window sticker on the vehicle she would purchase;
27 and (d) received and reviewed a brochure concerning the Fusion.” SAC ¶ 40. “The window

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1 sticker,” Goodman says, “indicated that the vehicle she would purchase was equipped with power
2 steering.” *Id.* “Nowhere in these materials did Ford disclose the EPAS system defects and
3 failures,” and had Ford done so, Goodman alleges that she “would not have purchased her 2011
4 Ford Fusion, or would not have paid the purchase price charged.” *Id.* ¶¶ 40–41. In addition,
5 Goodman claims that in 2014 she “began having intermittent problems with the steering system in
6 her 2011 Ford Fusion and experienced difficulty steering.” *Id.* ¶ 43. “The problems first occurred
7 at low speeds, when the steering would lock up while she was attempting to park.” *Id.*

8 Ultimately, Goodman “took [her] vehicle to a Ford dealership [in December 2014] and was
9 told that it would cost \$1,800 to fix the problem with the steering system.” *Id.* As with Philips,
10 the dealership recommended that the EPAS system in Goodman’s vehicle be replaced. Although
11 Goodman contended that her power steering problems were a safety issue, Ford refused to defray
12 the costs of an EPAS system replacement. ECF No. 94-8 at 47. Citing financial hardship,
13 Goodman declined to undertake any repairs to her vehicle at that time, and continued to
14 experience problems with her vehicle.

15 In July 2015, Goodman received “a letter from Ford Motor Company concerning the 2011
16 Fusion and a recall for the [Fusion’s] EPAS [system].” *Id.* at 49. Pursuant to this letter, Goodman
17 took her vehicle to a Ford dealership in August 2015, with Goodman expecting that Ford would
18 now replace the EPAS system in her vehicle free of charge. During this August 2015 visit,
19 however, the dealership declined to perform an EPAS system replacement and instead simply
20 reprogrammed the computer in Goodman’s vehicle.

21 In October 2015, Goodman once again experienced problems with her vehicle’s power
22 steering. Specifically, while attempting to pull out of the parking lot at work, Goodman stated that
23 she “could not turn the vehicle” and had to “turn[] [the vehicle] off.” *Id.* at 52. “On November 2,
24 2015, Ford’s counsel contacted Plaintiffs’ counsel to inform them that based on a review of the
25 attached service records . . . , it appears that Jaime Goodman is eligible for a steering gear
26 replacement.” ECF No. 94-6 at 10. Goodman thereafter scheduled a service appointment for
27 November 12, 2015. During this November 12, 2015 appointment, Goodman was met by a Ford

1 engineer from Detroit, Michigan, sent specifically to inspect Goodman’s vehicle, and by a member
2 of Ford’s counsel. “A few hours after dropping off [her] vehicle,” however, Goodman “received a
3 call from a service associate . . . and was informed that . . . [her vehicle] was no longer eligible for
4 a free replacement under Ford’s recall program.” ECF No. 95-4 at 2. After “Ford refused to
5 replace [Goodman’s] EPAS system on November 12, 2015,” Plaintiffs’ counsel once again
6 reached out to Ford’s counsel. *Id.* at 3. On November 24, 2015, Ford finally replaced the EPAS
7 system in Goodman’s vehicle.

8 **iii. Colburn**

9 Finally, prior to “purchasing her 2010 Ford Fusion,” Alison Colburn (“Colburn”) claims
10 that, just like Goodman, she “(a) viewed television advertisements concerning the vehicles; (b)
11 viewed material concerning the Fusion on Ford’s website; (c) reviewed the window sticker on the
12 vehicle she would purchase; and (d) received and reviewed a brochure concerning the Fusion,”
13 and that “[t]he window sticker indicated that the vehicle she would purchase was equipped with
14 power steering.” SAC ¶ 47. “Nowhere in these materials did Ford disclose the EPAS system
15 defects and failures.” *Id.* Had Ford done so, Colburn alleges that she “would not have purchased
16 her 2010 Ford Fusion, or would not have paid the purchase price charged.” *Id.* ¶ 48.

17 **2. NHTSA Investigation into the Explorer**

18 As to the second category of evidence, California Plaintiffs emphasize documents
19 produced in connection with NHTSA’s Ford Explorer investigation, which began on June 19,
20 2012. *Id.* ¶ 83. In response to NHTSA’s request for information, Ford “produced a database
21 containing 1,173 complaints” regarding loss of power steering, nine of which described “incidents
22 that resulted in a crash.” *Id.* ¶ 89. Ford also produced various internal e-mails which, California
23 Plaintiffs allege, reveal that the Vehicles suffer from the same EPAS system defect as the Explorer
24 and that Ford knew about the defect yet never disclosed it to the public or otherwise took
25 corrective action. *Id.* ¶¶ 90–98.

26 **3. Complaints to NHTSA Concerning Focus and Fusion Vehicles**

27 As to the third category of evidence, California Plaintiffs provide a litany of testimonials
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1 by other Ford owners complaining to NHTSA about alleged power steering failures in the
2 Vehicles. *Id.* ¶¶ 104–32. The two dozen complaints California Plaintiffs detail in the SAC are,
3 according to California Plaintiffs, a mere sampling of the hundreds of complaints that NHTSA
4 received concerning EPAS failures in the Vehicles. *See id.* ¶ 104. For illustrative purposes, two
5 such complaints are reproduced below.

6 On December 11, 2012, a vehicle owner reported a crash in a 2010 Ford Fusion.
7 The Defective Vehicle lost power steering, traction control, and the ability to brake
8 upon entering a freeway on ramp. To stop the vehicle and avoid endangering other
9 drivers, the driver was “forced to crash into the concrete wall barrier on the driver’s
10 side of the ramp.” The driver and one other individual were injured.

11 . . .

12 On October 3, 2012, a vehicle owner reported a crash in a 2011 Ford Fusion. The
13 steering wheel seized while the owner was driving at 35 MPH, causing her to crash
14 into a curb. After the initial accident, the steering of the vehicle continued to fail.
15 The vehicle was taken to a Ford dealer three times, and the dealer refused to help
16 her because the failure could not be replicated. The vehicle owner notified Ford
17 but Ford was unwilling to offer assistance.

18 *Id.* ¶¶ 110, 112. Based on the three categories of evidence outlined above, California Plaintiffs
19 allege that Ford fraudulently concealed the claimed power steering defect. Despite press releases
20 and web-based “promotional materials” touting “EPAS as a reliable and beneficial product,” Ford,
21 according to California Plaintiffs, knew as early as 2010 that the EPAS system was “prone to
22 sudden, premature failure,” and yet took no remedial action. *Id.* ¶ 11. In May 2011, and again in
23 December 2012, Ford allegedly issued technical service bulletins indicating Ford’s awareness of
24 EPAS system failures in the Vehicles. *Id.* ¶¶ 13 (2012 Focus), 19 (2013 Fusion). California
25 Plaintiffs further claim that “Ford concealed the fact that the EPAS system is prone to sudden and
26 premature failure from consumers so that the warranty period on the Defective Vehicles would
27 expire before consumers become aware of the problem.” *Id.* ¶ 24. Had Ford disclosed the alleged
28 defect, California Plaintiffs “would not have purchased . . . th[e] vehicles, or would have paid
substantially less for the vehicles than they did.” *Id.* ¶ 25. Moreover, “Ford’s failure to disclose to
consumers and the public at large the material fact that the EPAS system is prone to premature
failure . . . recklessly risked the safety of occupants of the Defective Vehicles and the public at

1 large.” *Id.* ¶ 6.

2 **B. Procedural History**

3 On June 27, 2014, Plaintiffs filed their original complaint in this putative class action.
4 ECF No. 1. Plaintiffs filed a first amended complaint (“FAC”) on September 8, 2014, which
5 contained fifty one causes of action. ECF No. 15 (“FAC”). On October 24, 2014, Ford moved to
6 dismiss the FAC for failure to state a claim upon which relief could be granted. ECF No. 22; Fed.
7 R. Civ. P. 12(b)(6). At a hearing held on February 12, 2015, the Court granted Ford’s motion to
8 dismiss the FAC with leave to amend. ECF No. 46.

9 In light of the unwieldy nature of the FAC, the parties agreed at the February 18, 2015 case
10 management conference to move forward only on the California claims for any subsequent
11 motions to dismiss. ECF No. 51. If any of the California claims survived, the parties would
12 continue to litigate those claims to resolution before this Court. ECF No. 54 at 9. If, however,
13 none of the California claims survived, then the Court would confer with the parties regarding
14 how to proceed on the non-California claims, with the possibility of transferring this action to a
15 more appropriate jurisdiction. *Id.*

16 With this understanding in mind, California Plaintiffs filed a second amended complaint
17 (“SAC”) on March 27, 2015. The SAC asserted four causes of action under California law: (1)
18 violation of the unlawful and unfair prongs of California’s Unfair Competition Law (“UCL”),
19 SAC ¶¶ 141–49; (2) violation of the fraud prong of the UCL, *id.* ¶¶ 150–59; (3) violation of
20 California’s Consumer Legal Remedies Act (“CLRA”), *id.* ¶¶ 160–71; and (4) common law
21 fraudulent concealment, *id.* ¶¶ 172–85. On April 30, 2015, Ford moved to dismiss the SAC, again
22 arguing that California Plaintiffs had failed to state a claim upon which relief could be granted.
23 ECF No. 58. On July 7, 2015, the Court granted in part and denied in part Ford’s motion to
24 dismiss the SAC. ECF No. 69. Specifically, the Court granted with prejudice Ford’s motion to
25 dismiss California Plaintiffs’ UCL claims and California Plaintiffs’ CLRA claim for injunctive
26 relief, and granted with prejudice Ford’s motion to dismiss Ian Colburn, Alison Colburn’s son, as
27 a named Plaintiff. *Id.* at 31. Two claims—the fraudulent concealment claim and the CLRA claim

1 for damages—survived Ford’s second round motion to dismiss. *Id.* Ford filed an answer to the
2 SAC on August 6, 2015. ECF No. 78.

3 In addition to the various proceedings in the instant action, on October 10, 2014, NHTSA
4 opened a preliminary evaluation into the “loss of power steering assist” as to the 2010–2012
5 Fusion. ECF No. 84-2 at 2. In accordance with NHTSA protocol, NHTSA sent Ford a letter
6 requesting information concerning “Ford’s assessment of the alleged defect in the subject
7 vehicle.” ECF No. 84-3 at 8. Ford responded to NHTSA’s request on December 19, 2014. ECF
8 No. 84-4. In addition, on May 26, 2015, Ford announced a voluntary recall of 2011 and 2012
9 Fusions, ECF No. 84-5. The terms of the recall are as follows:

- 10 • All owners of 2011 and 2012 Fusions have been notified by mail to take their
11 vehicle to a Ford dealership to have the Power Steering Control Module
12 (“PSCM”) checked for Diagnostic Trouble Codes (“DTCs”).
- 13 • If loss of steering assist DTCs are present (indicating that the vehicle has
14 experienced a power steering failure), then the EPAS system will be replaced.
- 15 • If no loss of steering assist DTCs are present, then dealers will update the
16 PSCM software. This software update will provide limited steering assist for
17 owners who experience power steering problems in the future, and will also
18 inform owners to bring their vehicle in for an EPAS system replacement
19 should they experience any such steering problems.
- 20 • Fusion owners who have already paid for an EPAS system replacement are
21 eligible for reimbursement as long as these owners submit a claim for
22 reimbursement prior to December 31, 2015.

23 *Id.* According to Ford, approximately 422,131 vehicles are subject to the recall. ECF No. 97-3 at
24 119. As of December 9, 2015, approximately 51% of these vehicles have been repaired, with
25 8,000 vehicles receiving EPAS system replacements. *Id.* at 121. Following the announcement of
26 Ford’s recall, NHTSA closed its preliminary evaluation. ECF No. 84-1 (“Williams Decl.”) at 6.

27 On October 28, 2015, Ford filed the instant motion to dismiss. In this motion, Ford argues
28 that the Court should dismiss this action because the recall provides California Plaintiffs the relief
they seek under the prudential mootness and primary jurisdiction doctrines, and because California

1 Plaintiffs do not have standing to pursue their claims as to the 2012–2014 Focus and 2013–2014
2 Fusion. California Plaintiffs filed an opposition on December 17, 2015, ECF No. 94-6 (“Opp’n”),
3 and Ford filed a reply on January 14, 2016, ECF No. 97 (“Reply”).

4 **II. LEGAL STANDARD**

5 **A. Prudential Mootness**

6 “Two varieties of mootness exist: Article III mootness and prudential mootness.” *Ali v.*
7 *Cangemi*, 419 F.3d 722, 723 (8th Cir. 2005) (en banc). “Article III mootness arises from the
8 Constitution’s case and controversy requirement: Article III of the United States Constitution
9 limits the jurisdiction of the federal courts to actual, ongoing cases and controversies.” *Id.*
10 (internal quotation marks omitted). “On the other hand, prudential mootness, the cousin of the
11 mootness doctrine, in its strict Article III sense, is a mélange of doctrines relating to the court’s
12 discretion in matters of remedy and judicial administration.” *Id.* at 724 (internal quotation marks
13 and alteration omitted).

14 “Even if a case is not constitutionally moot, a court may dismiss a case under the
15 prudential-mootness doctrine if the case is so attenuated that considerations of prudence and
16 comity for coordinate branches of government counsel the court to stay its hand, and to withhold
17 relief it has the *power* to grant.” *Jordan v. Sosa*, 654 F.3d 1012, 1024 (10th Cir. 2011) (internal
18 quotation marks and alteration omitted). “Prudential mootness . . . addresses not the *power* to
19 grant relief, but the court’s *discretion* in the exercise of that power.” *Id.* (internal quotation marks
20 and alteration omitted). “In general, the prudential mootness doctrine only applies where . . . a
21 plaintiff seeks injunctive or declaratory relief.” *Id.*; *cf. S. Utah Wilderness All. v. Smith*, 110 F.3d
22 724, 727 (10th Cir. 1997) (“We have expressly recognized the doctrine of prudential mootness,
23 and have stated that it has particular applicability in cases . . . where the relief sought is an
24 injunction against the government.”).

25 **B. Primary Jurisdiction**

26 “The primary jurisdiction doctrine allows courts to stay proceedings or to dismiss a
27 complaint without prejudice pending the resolution of an issue within the special competence of

1 an administrative agency.” *Clark v. Time Warner Cable*, 523 F.3d 1110, 1114 (9th Cir. 2008).
2 “Primary jurisdiction applies in a limited set of circumstances.” *Id.* “[T]he doctrine is not
3 designed to secure expert advice from agencies every time a court is presented with an issue
4 conceivably within the agency’s ambit.” *Id.* (internal quotation marks omitted). “Instead, it is to
5 be used only if a claim requires resolution of an issue of first impression, or of a particularly
6 complicated issue that Congress has committed to a regulatory agency and if protection of the
7 integrity of a regulatory scheme dictates preliminary resort to the agency which administers the
8 scheme.” *Id.* (internal quotation marks and citation omitted).

9 Although “no fixed formula exists for applying the doctrine of primary jurisdiction,” courts
10 in the Ninth Circuit traditionally exercise primary jurisdiction “where there is (1) the need to
11 resolve an issue that (2) has been placed by Congress within the jurisdiction of an administrative
12 body having regulatory authority (3) pursuant to a statute that subjects an industry or activity to a
13 comprehensive regulatory scheme that (4) requires expertise or uniformity in administration.”
14 *Davel Commc’ns, Inc. v. Qwest Corp.*, 460 F.3d 1075, 1086–87 (9th Cir. 2006) (internal quotation
15 marks and alteration omitted).

16 **C. Standing**

17 A defendant may move to dismiss an action for lack of subject matter jurisdiction under
18 Federal Rule of Civil Procedure 12(b)(1). “A Rule 12(b)(1) jurisdictional attack may be facial or
19 factual.” *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). “In a facial attack,
20 the challenger asserts that the allegations contained in a complaint are insufficient on their face to
21 invoke federal jurisdiction.” *Id.* The Court “resolves a facial attack as it would a motion to
22 dismiss under Rule 12(b)(6): [after] [a]ccepting the plaintiff’s allegations as true and drawing all
23 reasonable inferences in the plaintiff’s favor, the court determines whether the allegations are
24 sufficient as a legal matter to invoke the court’s jurisdiction.” *Leite v. Crane Co.*, 749 F.3d 1117,
25 1121 (9th Cir. 2014).

26 “[I]n a factual attack,” on the other hand, “the challenger disputes the truth of the
27 allegations that, by themselves, would otherwise invoke federal jurisdiction.” *Safe Air for*

1 *Everyone*, 373 F.3d at 1039. “In resolving a factual attack on jurisdiction,” the Court “may review
2 evidence beyond the complaint without converting the motion to dismiss into a motion for
3 summary judgment.” *Id.* The Court “need not presume the truthfulness of the plaintiff’s
4 allegations” in deciding a factual attack. *Id.* However, “a jurisdictional finding of genuinely
5 disputed facts is inappropriate when the jurisdictional issue and substantive issues are so
6 intertwined that the question of jurisdiction is dependent on the resolution of factual issues going
7 to the merits of an action.” *Id.* (internal quotation marks and alteration omitted).

8 **III. DISCUSSION**

9 **A. Prudential Mootness**

10 On the issue of prudential mootness, Ford argues that “the recall provides an adequate
11 remedy for owners of the 2011–12 Fusion[.]” because the recall “offers free repairs or an extended
12 warranty, and an update to the vehicles’ software.” Mot. at 2. In addition, the recall “reimburse[s]
13 owners who paid for covered repairs before the recall began.” *Id.* Under these conditions, Ford
14 contends that continued litigation would be “unnecessary and wasteful.” *Id.* at 12.

15 The Court disagrees because (1) California Plaintiffs request for relief exceeds the scope of
16 relief provided under the recall, and (2) California Plaintiffs have established a cognizable danger
17 that the recall may fail to provide the relief promised. The Court elaborates upon these reasons
18 below.

19 **1. Request for Relief Exceeds Scope of Recall**

20 First, because prudential mootness is an equitable doctrine, courts have held that the
21 doctrine should apply only to “claims for equitable relief” which “appeal to the remedial discretion
22 of the courts.” *Winzler v. Toyota Motor Sales U.S.A., Inc.*, 681 F.3d 1208, 1210 (10th Cir. 2012).
23 In accordance with this principle, most courts have held that prudential mootness applies only
24 where “a plaintiff seeks injunctive or declaratory relief.” *Jordan*, 654 F.3d at 1024. Here,
25 however, California Plaintiffs seek injunctive relief, declaratory relief, and damages. With respect
26 to California Plaintiffs’ fraudulent concealment claim, for instance, California Plaintiffs request
27 recovery for “the cost of repairing or replacing the EPAS system in their vehicles” and “the

1 diminished value of their Defective Vehicles[] as a result of the [alleged] defects.” SAC ¶ 184.
2 This request for damages thus conflicts with the general understanding that prudential mootness
3 should apply only to situations where the parties request equitable relief.

4 In response to this particular point, Ford argues that the recall does, in fact, reimburse 2011
5 and 2012 Fusion owners who decided to replace their EPAS systems prior to the recall. Per Ford,
6 \$1.7 million in refunds have already been paid to 1,359 Fusion owners. Reply at 9. As such, this
7 provision provides California Plaintiffs with the monetary relief that they seek.

8 There are two flaws with this argument. First, as Ford acknowledges, the recall reimburses
9 only owners who sought reimbursement prior to December 31, 2015. The recall does not
10 reimburse those who did not file a claim or who filed a claim after December 31, 2015.
11 Successful prosecution of this action, however, could result in reimbursement to all owners who
12 paid for an EPAS system replacement out of pocket without regard to this December 31, 2015
13 deadline. This represents a significant difference between the relief that the recall provides
14 (reimbursement for individuals filing before a particular deadline) and the relief that successful
15 prosecution of this lawsuit could provide (reimbursement for all individuals who paid for an EPAS
16 system replacement).

17 Second, California Plaintiffs seek recovery for both “the cost of repairing or replacing the
18 EPAS system in their vehicles” *and* for the loss in “value of their . . . Vehicles[] as a result of the
19 [alleged] defects.” SAC ¶ 184. Although the recall reimburses Fusion owners for EPAS-related
20 repairs, the recall says nothing about reimbursing owners for losses in market value. Thus,
21 California Plaintiffs seek a form of monetary recovery that the recall simply does not provide.

22 Both of these points lead towards the same conclusion: the relief that California Plaintiffs
23 seek and the relief that Ford has provided under the recall are not one and the same. If California
24 Plaintiffs are successful in litigating this action, Ford could be required to (1) provide
25 reimbursement without regard to a particular filing deadline, and (2) provide recovery to owners
26 for losses in market value. Under the recall, Ford is not required to provide either type of
27 recovery. In these circumstances, application of the prudential mootness doctrine is not warranted.

28

1 Case law supports this determination. In *Verde v. Stoneridge, Inc.*, 2015 WL 5915262, *4
 2 (E.D. Tex. Sept. 23, 2015), for instance, the district court declined to apply the prudential
 3 mootness doctrine even though defendants had announced that they would voluntarily undertake a
 4 NHTSA-supervised recall. As the district court explained, “an incomplete offer that does not meet
 5 plaintiff’s full demand does not render claims moot.” *Id.* Specifically, in *Verde*, plaintiff sought
 6 “relief such as the diminished value of the vehicle, incidental damages, and replacement of the
 7 entire clutch hydraulic assembly.” *Id.* at *5. Defendants’ recall, however, did not provide for
 8 such relief. *Id.* As a result, “because [plaintiff] seeks recovery that exceeds what [defendants]
 9 offer[,]” the district court found that plaintiff’s claims were not prudentially moot.

10 Similarly, in *Sater v. Chrysler Group LLC*, No. 14-CV-0700 (C.D. Cal.), defendant also
 11 undertook a NHTSA-supervised recall and also requested that the district court find plaintiff’s
 12 claims prudentially moot. However, as the district court observed, “the class in this case is suing
 13 on theories related to deceptive business practices, lost use of the Class Vehicles caused by the
 14 defect, and diminished resale value due not to a defective part but negative publicity about the
 15 Class Vehicles.” ECF No. 60 at 10. Although “ordering [defendant] to replace the [defective
 16 parts] would duplicate the NHTSA-supervised recall,” “holding [defendant] accountable for the
 17 other alleged injuries affords relief the recall does not provide.” *Id.* at 11. Accordingly, the *Sater*
 18 court declined to find plaintiff’s claims prudentially moot.

19 Finally, looking outside the NHTSA context, the Court finds instructive the Tenth Circuit’s
 20 decision in *Building and Construction Department v. Rockwell International Corp.*, 7 F.3d 1487
 21 (10th Cir. 1993). In *Rockwell*, plaintiffs sought “establishment of a court supervised fund to
 22 finance a program of medical monitoring for” workers exposed “to unsafe levels of radioactive
 23 and non-radioactive hazardous substances.” *Id.* at 1490. After Congress passed legislation
 24 directing the U.S. Department of Energy “to establish a medical monitoring program” for certain
 25 workers “at increased health risk due to exposure to hazardous or radioactive substances,” the
 26 *Rockwell* defendants moved to dismiss the suit under prudential mootness. *Id.* at 1491. The Tenth
 27 Circuit rejected this argument. As the court observed, “[a]ll the cases in which the prudential
 28

1 mootness concept has been applied have involved a request for prospective equitable relief by
 2 declaratory judgment or injunction.” *Id.* at 1492. “Obviously, the suit at issue here is very
 3 different from those in which prudential mootness has been applied.” *Id.* “It is essentially a suit
 4 for damages against private defendants as a remedy for past misconduct.” *Id.* “Thus, the doctrine
 5 of prudential mootness does not apply [to plaintiffs’ claims].” *Id.*

6 As in *Verde*, *Sater*, and *Rockwell*, California Plaintiffs here request relief—damages for
 7 losses in market value and reimbursement without regard to a specific deadline—that Ford’s recall
 8 does not provide. Consistent with these decisions, the Court finds that the instant action is not
 9 prudentially moot.

10 Neither *Winzler v. Toyota Motor Sales U.S.A.* nor *Cheng v. BMW of North America, LLC*,
 11 2013 WL 3940815 (C.D. Cal. July 26, 2013), two cases that Ford discusses at length in its motion,
 12 compel a different finding. In *Winzler*, plaintiff sought only injunctive relief; plaintiff did not seek
 13 damages. 681 F.3d at 1209–10. In finding that Toyota’s voluntary recall rendered plaintiff’s
 14 claims prudentially moot, the Tenth Circuit emphasized the remedial nature of plaintiff’s suit.
 15 *See, e.g., id.* at 1210 (“[O]nce the plaintiff has a remedial promise from a coordinate branch in
 16 hand, we will generally decline to add the promise of a judicial remedy to the heap.”). As the
 17 court observed, because plaintiff sought only injunctive relief, “Congress and the Executive have,”
 18 via NHTSA, “committed to ensure Ms. Winzler precisely the relief she seeks.” *Id.* at 1211.

19 Similarly, in *Cheng*, plaintiff “d[id] not pray for any monetary damages as a result of
 20 Defendants’ violations of the CLRA” in plaintiff’s complaint. 2013 WL 3940815, *4 (alteration
 21 omitted).⁴ Thus, as in *Winzler*, plaintiff’s suit in *Cheng* was limited to a request for equitable
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23 ⁴ With respect to the issue of damages, the *Cheng* court did note that “it is unclear how [p]laintiff
 24 can demonstrate [such] injury in light of BMW’s offer to completely repair the roll away defect.”
 25 2013 WL 3940815, *4. The Court finds this statement unpersuasive. As the Court has noted,
 26 plaintiff in *Cheng* did not request damages in the complaint. Thus, any statements regarding how
 27 the *Cheng* court would have resolved the issue of damages is dicta. In addition, California
 28 Plaintiffs have argued that the various defects at issue here render the EPAS System prone to
 failure. California Plaintiffs further argue that such conditions “vitiat[e] the [market] value of the
 Defective Vehicles.” SAC ¶ 80. California Plaintiffs have thus connected the EPAS defects at
 issue to a resulting economic injury, the loss in market value of their vehicles.

1 relief and not for damages.

2 The circumstances in *Winzler* and in *Cheng* differ materially from the circumstances in this
3 case. Here, California Plaintiffs seek recovery for losses in market value, which were not at issue
4 in either *Winzler* or in *Cheng*. Likewise, depending on the outcome of this suit, California
5 Plaintiffs may be able to recover repair costs for all class members without regard to a particular
6 deadline.

7 The remaining cases Ford relies upon—*Hadley v. Chrysler Group LLC*, 2014 WL 988962
8 (E.D. Mich. Mar. 13, 2014), *In re Aqua Dots Products Liability Litigation*, 270 F.R.D. 377 (N.D.
9 Ill. 2010), and *In re ConAgra Peanut Butter Products Liability Litigation*, 251 F.R.D. 689 (N.D.
10 Ga. 2008)—are equally unavailing. In *Hadley*, defendants sent recall notices to vehicle owners in
11 January 2013. This notice alerted owners that defendants would repair an airbag defect free of
12 charge. Because of a variety of issues, however, defendants failed to obtain replacement parts in a
13 timely manner. Plaintiffs thereafter filed suit in August 2013, seven months after the
14 announcement of the recall. In plaintiffs’ complaint, plaintiffs essentially requested that
15 defendants “fulfill [their] . . . promise to provide [plaintiffs] a free vehicle repair.” 2014 WL
16 988962, *4 (internal quotation marks omitted). The *Hadley* court dismissed plaintiffs’ complaint
17 on the basis of Article III standing. *Id.* at *7. Notably, in deciding to grant defendants’ motion to
18 dismiss, the district court did not discuss or examine the prudential mootness doctrine.

19 The procedural posture and the relief sought in *Hadley* differs significantly from the
20 procedural posture and the relief sought here. In *Hadley*, defendants announced a recall *prior* to
21 the commencement of any litigation. The *Hadley* plaintiffs then brought suit because defendants
22 had failed to implement this recall in a timely manner. The *Hadley* plaintiffs did not seek relief
23 beyond the scope of the recall: instead, the *Hadley* plaintiffs requested only that defendants
24 implement the recall as defendants had initially promised to do. On the other hand, in the instant
25 case, California Plaintiffs brought suit nearly a full year prior to Ford’s decision to implement a
26 voluntary recall. More importantly, unlike the *Hadley* plaintiffs, California Plaintiffs request relief
27 which goes above and beyond the relief provided by Ford under Ford’s recall.

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1 *In re Aqua Dots* and *In re ConAgra* are similarly distinguishable. In both cases, the district
 2 court determined that a class action would not be superior to the relief that defendants had already
 3 offered to putative class members: “a [full] refund—without needless judicial intervention,
 4 lawyer’s fees, or delay.” 270 F.R.D. at 385; 251 F.R.D. at 699. The *In re Aqua Dots* and *In re*
 5 *ConAgra* courts did not discuss or examine prudential mootness, and focused instead entirely on
 6 whether the case should proceed as a class action pursuant to Federal Rule of Civil Procedure
 7 23(b)(3). Fed. R. Civ. P. 23(b)(3) (class action must be “superior to other available methods for
 8 fairly and efficiently adjudicating the controversy.”). In order to reach this decision, both courts
 9 examined case law and authority specific to Rule 23(b)(3) class certification. Because the instant
 10 action has not yet reached the class certification stage, neither *In re Aqua Dots* nor *In re ConAgra*
 11 is of much help to Ford at this point in litigation, and the Court does not rely upon either case in
 12 deciding whether to apply the prudential mootness doctrine.

13 Thus, to summarize, none of the cases cited by Ford compel a finding of prudential
 14 mootness here. The Court therefore does not rely upon these cases and instead finds, consistent
 15 with *Verde*, *Sater*, and *Rockwell*, that the instant action is not prudentially moot.

16 **2. Cognizable Danger**

17 In addition to the issue of damages, California Plaintiffs have also established a
 18 “cognizable danger” that the Ford recall “will fail.” *Winzler*, 681 F.3d at 1211–12. As the Tenth
 19 Circuit explained in *Winzler*, “[i]f the party seeking relief can show that there exists some . . .
 20 cognizable danger that the coordinate branch will fail and she will be left without a complete
 21 remedy, we will continue with the case even in the face of a simultaneous remedial commitment
 22 from another branch.” *Id.* at 1211–12 (internal quotation marks omitted). “To carry the burden of
 23 showing a cognizable danger of failure,” a “plaintiff must identify something more than the mere
 24 possibility of failure.” *Id.* at 1212 (internal quotation marks omitted). The ““cognizable danger”
 25 standard,” however, should represent “a relatively modest hurdle.” *Id.*

26 Here, there is a cognizable danger that Ford’s recall will not be implemented in an efficient
 27 and effective manner. As noted above, Goodman brought her Fusion to a Ford dealership on at

1 least four different occasions: December 4, 2014; August 3, 2015; November 12, 2015; and
2 November 24, 2015. Prior to her August 3, 2015 visit, Goodman had received notice from Ford
3 regarding the recall and understood that, under the terms of Ford’s recall, her vehicle was eligible
4 for an EPAS system replacement. Nonetheless, the Ford dealership refused to replace the EPAS
5 system in Goodman’s vehicle on August 3, 2015. After again receiving confirmation—this time
6 directly from Ford’s counsel—that her Fusion was eligible for an EPAS system replacement,
7 Goodman brought her Fusion to another Ford dealership on November 12, 2015. During this visit,
8 Goodman was met by a Ford engineer sent from Ford and by a member of Ford’s counsel. At the
9 end of Goodman’s visit, Ford once again refused to replace Goodman’s EPAS system.
10 Goodman’s EPAS system was not replaced until a subsequent dealership visit on November 24,
11 2015.

12 In response to this string of incidents, Ford acknowledges that “the dealership should have
13 conducted the steering gear replacement” on either August 3, 2015 or on November 12, 2015.
14 ECF No. 92 at 5. Ford, however, contends that “[d]ealerships are independent businesses, and it is
15 unclear why the dealership declined to replace the steering gear.” *Id.* A single dealership
16 misunderstanding, though, “hardly undermines the recall program as a whole.” *Id.* (internal
17 quotation marks omitted).

18 Such arguments lack merit. Ford repeatedly promised to replace the EPAS system in
19 Goodman’s vehicle. Ford repeatedly failed to deliver upon this promise. Indeed, the Court
20 observes (1) that Goodman is a named Plaintiff in this action, (2) that Ford’s counsel specifically
21 notified Goodman that her vehicle was eligible for an EPAS system replacement, (3) that a
22 member of Ford’s counsel was in fact on site during Goodman’s November 12, 2015 visit, and (4)
23 that Ford *still* refused to conduct an EPAS system replacement on November 12, 2015. It is
24 possible that other putative class members experienced similar treatment and that such treatment
25 discouraged individuals from obtaining the relief promised under the recall. In other words, it is
26 impossible to tell whether Goodman’s experience is unique (as Ford contends) or whether Ford’s
27 inability to effectively implement the recall might have contributed to only 51% of eligible
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1 vehicles being repaired as of December 9, 2015.

2 The *Winzler* court appeared to have this particular scenario in mind when discussing the
3 “cognizable danger” standard. As the Tenth Circuit remarked, “if a plaintiff can show that the
4 remedial mechanisms selected by a coordinate branch aren’t just different but that those
5 differences present a cognizable, a perceptible, a recognizable danger they will lead our coordinate
6 branch to fail to achieve its stated objectives, we can and will proceed with the case.” 681 F.3d at
7 1214–15. In addition, if a plaintiff can establish more than a “conjectural” possibility of failure,
8 then the court should decline to find an action prudentially moot. *Id.* at 1215. Based on Ford’s
9 handling of Goodman’s EPAS system replacement, California Plaintiffs have made this showing.

10 To summarize, California Plaintiffs request relief beyond the scope of Ford’s recall. In
11 addition, California Plaintiffs have demonstrated a cognizable danger that the recall process may
12 fail to provide the relief promised. Under these circumstances, the prudential mootness doctrine
13 does not apply to the instant case. Ford’s motion to dismiss this action as prudentially moot is
14 therefore DENIED.

15 **B. Primary Jurisdiction**

16 Ford also contends that the Court should, in its discretion, “decline to exercise jurisdiction
17 over the 2011–12 Fusion claims in deference to NHTSA’s supervision of the recall, as authorized
18 by the doctrine of primary jurisdiction.” Mot. at 12. “[I]n considering the issue” of primary
19 jurisdiction, courts have traditionally examined factors such as “(1) the need to resolve an issue
20 that (2) has been placed by Congress within the jurisdiction of an administrative body having
21 regulatory authority (3) pursuant to a statute that subjects an industry or activity to a
22 comprehensive regulatory authority that (4) requires expertise or uniformity in administration.”
23 *Davel Commc’ns*, 460 F.3d at 1086–87. Considered together, these factors counsel against
24 application of the primary jurisdiction doctrine to the instant case.

25 **1. Need to Resolve an Issue Within Jurisdiction of an Administrative Body**

26 As to the first two factors—the need to resolve an issue that has been placed by Congress
27 within the jurisdiction of an administrative body—the Court emphasizes that Ford’s recall does

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1 not provide California Plaintiffs with all of the relief that they seek. Indeed, even if the Court
2 were to allow Ford’s NHTSA-supervised recall to run its course, the Court would still need to
3 determine whether California Plaintiffs could recover for losses in market value to their vehicles.

4 The Seventh Circuit addressed an analogous situation in *Ryan v. Chemlawn Corp.*, 935
5 F.2d 129, 131 (7th Cir. 1991), where plaintiff sought both injunctive relief and damages.

6 Although the Seventh Circuit determined that an EPA-supervised program would provide plaintiff
7 with the injunctive relief which plaintiff had requested, the EPA program could not “provide . . .
8 plaintiff with any form of compensatory or punitive damages.” *Id.* Under such circumstances, the
9 Seventh Circuit declined to apply the primary jurisdiction doctrine. *Id.* at 132. In like manner, the
10 fact that California Plaintiffs seek recovery which the recall does not provide weighs against
11 application of the primary jurisdiction doctrine here.

12 **2. Comprehensive Regulatory Authority**

13 Second, as to whether California Plaintiffs’ claims are governed by a comprehensive
14 regulatory authority, Ford concedes that “a number of courts have refused to apply primary
15 jurisdiction in automotive cases.” Mot. at 14. Ford specifically cites cases from the Northern
16 District of California, the Central District of California, the District of New Jersey, the Eastern
17 District of Pennsylvania, and the Southern District of West Virginia as examples where courts
18 have decided not to defer to NHTSA under the primary jurisdiction doctrine. *Id.*

19 Indeed, unlike some federal agencies, which may be charged with the administration of a
20 particular law, *see Clark*, 523 F.3d at 1115 (holding that FCC is charged with administering
21 Federal Communications Act), there is little authority to suggest that Congress intended for
22 NHTSA to have exclusive authority over automobile safety. *See, e.g., Marsikian v. Mercedes*
23 *Benz USA, LLC*, 2009 WL 8379784, *9 (C.D. Cal. May 4, 2009) (“Defendant cites no cases from
24 federal or California courts that analyze the applicability of the primary jurisdiction doctrine in a
25 case involving automobile safety, much less cases that hold that . . . NHTSA does have primary
26 jurisdiction.”); *Kent v. DaimlerChrysler Corp.*, 200 F. Supp. 2d 1208, 1218 (N.D. Cal. 2002)
27 (“[T]he Court does not find that exercise of the doctrine of primary jurisdiction is necessary at this
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1 stage of the case, either to ensure uniformity of regulation or because NHTSA is better-equipped
2 than the Court to address the issues raised by [p]laintiffs’ claims.”).

3 Nonetheless, Ford points to several automobile-defect cases where courts purportedly
4 dismissed claims based on primary jurisdiction. *See* Mot. at 13. None of these cases are on point.
5 In *Chin v. Chrysler Corp.*, 182 F.R.D. 448 (D.N.J. 1998), and *Ford Motor Co. v. Magill*, 698
6 So.2d 1244 (Fla. Dist. Ct. App. 1997), the court did not even discuss primary jurisdiction. Instead,
7 the *Chin* court found class certification inappropriate because plaintiffs had failed to demonstrate
8 superiority, as required under Federal Rule of Civil Procedure 23(b)(3). 182 F.R.D. at 462–65.
9 Similarly, in *Magill*, the Florida District Court of Appeal de-certified a class upon determining
10 that certification was no longer appropriate as a matter of Florida law. 698 So.2d at 1245. As the
11 Court has made clear, California Plaintiffs have not yet filed a motion for class certification, and
12 the Court will not consider class certification issues until California Plaintiffs do so. *See, e.g.*,
13 *Bussian v. DaimlerChrysler Corp.*, 411 F. Supp. 2d 614, 629 (M.D.N.C. 2006) (referring to *Chin*
14 and *Magill* and stating that class certification cases do “not address the issue of primary
15 jurisdiction and are of very little assistance to the Court at this stage in the proceedings.”).

16 In both *Solarz v. DaimlerChrysler Corp.*, 2002 WL 452218 (Pa. Com. Pl. Mar. 13, 2002),
17 and *Coker v. DaimlerChrysler Corp.*, 2004 WL 32676 (N.C. Super. Jan. 5, 2004), the court
18 determined that a NHTSA-supervised recall would provide the very relief sought by plaintiffs.
19 *See Solarz*, 2002 WL 452218, *4 (“[T]o avoid entanglement with . . . NHTSA, this court will not
20 compel DaimlerChrysler to install park brake interlocks.”); *Coker*, 2004 WL 32676, *5 (“If a
21 design defect does in fact exist, the agency has the resources to . . . order a recall to retrofit the
22 minivans. The Court must refrain from entering injunctive relief.”). Here, on the other hand,
23 California Plaintiffs’ request for relief exceeds the scope of relief provided under Ford’s recall.
24 Likewise, in *Silvas v. General Motors, LLC*, 2014 WL 1572590, *3 (S.D. Tex. Apr. 17, 2014),
25 plaintiffs moved for an injunction which, if granted, would have required defendant to take actions
26 in “conflict[] with” defendant’s NHTSA-supervised recall. There is no such conflict here. Ford
27 could readily comply with both the terms of its recall (replacing the EPAS systems) and provide

1 California Plaintiffs with the additional relief that California Plaintiffs seek (damages for losses in
2 market value).

3 Lastly, Ford’s reliance on *Bussian v. DaimlerChrysler Corp.*, 11 F. Supp. 2d 614
4 (M.D.N.C. 2006), is misplaced. In *Bussian*, plaintiff brought suit against defendants because of an
5 alleged safety defect in 1998–2003 Dodge Durangos. During the course of the *Bussian* litigation,
6 NHTSA conducted an investigation into 1998–2003 Durangos and “conclud[ed] that a safety
7 defect in fact exist[ed] with regard to 2000–2003 four-wheel drive Durangos.” 411 F. Supp. 2d at
8 628. Accordingly, defendants agreed to replace all defective parts in all 2000–2003 four-wheel
9 drive Durangos. NHTSA did not find a safety defect “[w]ith regard to 2000–2003 two-wheel
10 drive Durangos and all 1998–1999 Durangos,” and defendants did not take any action as to these
11 vehicles. *Id.* at 628–29. Based on the facts above, the *Bussian* court concluded that “the
12 prospective class . . . could not . . . include present owners and lessees of 2000 to 2003 model year,
13 four-wheel drive Dodge Durangos.” *Id.* at 628.

14 The facts in the instant case differ materially from those in *Bussian*. In *Bussian*, NHTSA
15 undertook a full investigation and made a number of formal findings regarding the safety of 2000–
16 2003 four-wheel drive Durangos. Pursuant to these findings, defendants agreed to replace the
17 defective parts in every 2000–2003 four-wheel drive Durango.

18 Here, on the other hand, NHTSA requested information from Ford regarding the 2010–
19 2012 Fusion. Shortly after providing NHTSA with this information, Ford announced plans to
20 undertake a voluntary recall. On the heels of Ford’s announcement, NHTSA closed its
21 preliminary evaluation and did not collect any additional information from Ford. Thus, unlike
22 what took place in *Bussian*, NHTSA did not undertake a full investigation, did not independently
23 examine Ford’s data, and did not issue any formal findings.

24 In addition, unlike defendants in *Bussian*, Ford has not agreed to replace the allegedly
25 defective part in every 2011–2012 Fusion. Instead, an EPAS system is replaced *only* if the
26 owner’s vehicle reports a particular Diagnostic Trouble Code. In all other instances, Ford simply
27 updates the vehicle’s software and requests that the owner bring the vehicle back to the dealership

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1 should the owner experience power steering issues in the future. By all indications, the recall is a
 2 product of Ford’s own design. Ford has submitted no evidence that it discussed, consulted, or
 3 negotiated with NHTSA over any of the recall’s terms. Moreover, Ford has provided no evidence
 4 regarding whether NHTSA has found the recall—both as designed and as implemented—to be
 5 effective in addressing the problems identified by California Plaintiffs.

6 When presented with a similar set of facts in *In re Toyota Motor Corp. Hybrid Brake*
 7 *Marketing, Sales, Practices and Products Liability Litigation*, 890 F. Supp. 2d 1210 (C.D. Cal.
 8 2011), the *In re Toyota* court found *Bussian* distinguishable. In particular, the *In re Toyota* court
 9 emphasized that “here, in contrast to *Bussian*, there has been no [NHTSA] finding of the efficacy
 10 of the software update for the Class Vehicles, and Plaintiffs take fundamental issue with whether
 11 the software update remedied the braking defect.” *Id.* at 1224. Moreover, it is not “evident from
 12 the face of Toyota’s quarterly reports to . . . NHTSA that [NHTSA] has inquired into the
 13 effectiveness of [Toyota’s] software update.” *Id.* Under such circumstances, the *In re Toyota*
 14 court declined to apply the primary jurisdiction doctrine to plaintiff’s claims.

15 In sum, given the fact that NHTSA did not complete a full investigation and did not make
 16 any formal findings in this case, and given the fact that Ford designed its recall without input or
 17 evaluation from NHTSA, the Court declines to follow *Bussian*. Instead, consistent with *In re*
 18 *Toyota*, the Court finds that it would be inappropriate to defer to NHTSA in the instant case.

19 **3. Uniformity of Administration**

20 As a final matter, with respect to the uniformity of administration, Plaintiffs seek
 21 certification of a nationwide class and sub-classes in California, Ohio, Michigan, Georgia, Illinois,
 22 and Arizona of all Vehicle owners. SAC ¶¶ 226–27. Thus, if Plaintiffs are successful in the
 23 prosecution of this action, Ford will be required to provide relief to all Vehicle owners on a
 24 nationwide and statewide basis. Accordingly, allowing this action to proceed would not
 25 jeopardize the uniformity of administration of relief to Plaintiffs or putative class members.

26 In sum, based on the factors discussed above, the primary jurisdiction doctrine does not
 27 apply to the instant case. Accordingly, Ford’s motion to dismiss this action under the primary

1 jurisdiction doctrine is DENIED.

2 **C. Standing**

3 Finally, Ford acknowledges that California Plaintiffs have standing to bring their claims as
4 to the 2010–2012 Fusion. Ford, however, argues (1) that none of the California Plaintiffs
5 purchased a 2012–2014 Focus or 2013–2014 Fusion, and (2) that the 2012–2014 Focus and 2013–
6 2014 Fusion are not substantially similar to the 2010–2012 Fusion. Accordingly, Ford argues that
7 California Plaintiffs do not have standing to bring their claims as to the 2012–2014 Focus and
8 2013–2014 Fusion.

9 Ford made this same argument in its previous motion to dismiss the SAC as a facial attack.
10 *See Safe Air for Everyone*, 373 F.3d at 1039 (“In a facial attack, the challenger asserts that the
11 allegations contained in a complaint are insufficient on their face to invoke federal jurisdiction.”).
12 The Court found Ford’s argument unavailing. As the Court explained, “a plaintiff may have
13 standing to assert claims for unnamed class members based on products he or she did not purchase
14 so long as the products and alleged misrepresentations are *substantially similar*.” ECF No. 69 at
15 12. “In this particular case, the Court finds that California Plaintiffs have adequately alleged that
16 the supposedly defective EPAS system is substantially similar across the Vehicles.” *Id.*

17 In reaching this determination, the Court relied upon “internal communications between
18 Ford employees where the power steering systems in different vehicles were commonly referred to
19 as ‘the EPAS,’ without any indication that the EPAS system varied across vehicles.” *Id.* In
20 addition, the Court observed that, in the SAC, “California Plaintiffs allege repeatedly that the
21 EPAS systems in all the vehicles are ‘uniform,’ and that the steering defect manifested in similar
22 manners across different models of vehicles.” *Id.* (citations omitted). Because Ford had asserted
23 its standing argument as a facial attack, the Court was required to “[a]ccept[] [California
24 Plaintiffs’] allegations as true and draw[] all reasonable inferences in [California Plaintiffs’]
25 favor.” *Leite*, 749 F.3d at 1121. Accordingly, the Court denied Ford’s motion to dismiss
26 California Plaintiffs’ claims as to the 2012–14 Focus and the 2013–2014 Fusion.

27 Ford has renewed its standing argument in the instant motion to dismiss, but as a factual

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1 instead of a facial attack. *Safe Air for Everyone*, 373 F.3d at 1039 (“[I]n a factual attack, the
2 challenger disputes the truth of the allegations that, by themselves, would otherwise invoke federal
3 jurisdiction.”). “In resolving a factual attack on jurisdiction,” the Court “may review evidence
4 beyond the complaint without converting the motion to dismiss into a motion for summary
5 judgment.” *Id.* The Court may not, however, “resolve genuinely disputed facts where the
6 question of jurisdiction is dependent on the resolution of factual issues going to the merits.” *Plum
7 Creek Timber Co., Inc. v. Trout Unlimited*, 255 F. Supp. 2d 1159, 1162 (D. Id. 2003) (internal
8 quotation marks omitted).

9 Here, with regard to the Focus, California Plaintiffs have submitted emails which suggest
10 that the Fusion and Focus shared a similar EPAS system. In an email sent on January 26, 2012,
11 for example, a Ford representative stated that “[w]e are actively engaged on an EPAS issue which
12 is affecting [the] 2012 Focus, 2012 Fusion and 2012 Explorer (*mostly Focus and Fusion*).” ECF
13 No. 94-8 at 58 (emphasis added). The email continued: “All [of these vehicles use] the same
14 EPAS supplier (TRW) and all use the same electronics.” *Id.* at 59. In addition to this email, Ford
15 engineer Jeffrey Williams acknowledged, at a December 9, 2015 deposition, that similar steering
16 problems which plagued the Fusion might have also plagued the Focus. ECF No. 94-8 at 40–41.
17 These pieces of evidence complement the internal Ford communications identified in the SAC.
18 *See, e.g.*, SAC ¶¶ 14–15 (referring to power steering system as “the EPAS” without indication that
19 the EPAS system varied across vehicles).

20 In response to these arguments, Ford contends that, “while [the Focus] shares some
21 electronic components with the [Fusion], the Focus does not have the same printed circuit board,
22 and the board’s different layout means that the” issues affecting the Fusion were “not a problem in
23 the Focus.” Mot. at 16. In addition, Ford points to the fact that fewer Focus owners filed warranty
24 claims related to the Focus’ EPAS system. *Id.*

25 Both parties have thus presented evidence in support of their respective positions.
26 California Plaintiffs rely upon emails, testimony, and internal communications. Ford relies upon
27 design differences and differences in warranty claim rates. Taken together, this evidence raises

1 several genuine disputes of material fact. In addition, these factual disputes go directly to the
2 merits of California Plaintiffs’ claims. Resolution of these disputes, for instance, is essential to
3 determining what caused the defects at issue, whether and when Ford knew about these defects,
4 and whether these defects were isolated to a single vehicle sold across two model years (as Ford
5 contends) or whether these defects were more widespread (as California Plaintiffs allege). As the
6 Ninth Circuit has observed, “[a] district court is permitted to resolve disputed factual issues
7 bearing upon subject matter jurisdiction in the context of a Rule 12(b)(1) motion *unless* the
8 jurisdictional issue and the substantive issues are so intermeshed that the question of jurisdiction is
9 dependent on decision of the merits.” *Kingman Reef Atoll Invs., L.L.C. v. U.S.*, 541 F.3d 1189,
10 1196–97 (9th Cir. 2008) (internal quotation marks omitted). Accordingly, because Ford’s factual
11 attack as to the Focus is “intermeshed” with the merits of this action, the Court can not resolve the
12 factual disputes discussed above and can not dismiss California Plaintiffs’ claims as to the 2012–
13 2014 Focus.

14 Similarly, with regard to the 2013–2014 Fusion, California Plaintiffs have produced an
15 email, sent on June 26, 2014, where Ford’s EPAS supplier reported that “Loss of [A]ssist” error
16 codes “remain[] high.” ECF No. 94-8 at 90. In response, Ford contends that the steering gear
17 design of the 2013–2014 Fusion is different from the steering gear design of the 2011–2012
18 Fusion. Mot. at 16. Once again, both parties have presented evidence to support their arguments
19 and, once again, these disputes implicate the merits of California Plaintiffs’ claims. Thus,
20 consistent the Court’s determination as to the Focus, the Court can not dismiss California
21 Plaintiffs’ claims as to the 2013–2014 Fusion.

22 In sum, because Ford’s standing argument involves factual disputes that implicate the
23 merits of California Plaintiffs’ claims, the Court DENIES Ford’s motion to dismiss California
24 Plaintiffs’ claims as to the 2012–2014 Focus and the 2013–2014 Fusion.

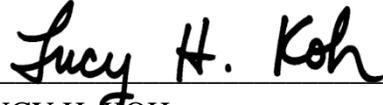
25 **IV. CONCLUSION**

26 For the foregoing reasons, Ford’s motion to dismiss for mootness and lack of standing is
27 DENIED.

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IT IS SO ORDERED.

Dated: February 22, 2016



LUCY H. KOH
United States District Judge