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 FOR CLASS CERTIFICATION

REDACTED

Re: Dkt. No. 173

Plaintiffs William Philips, Jaime Goodman, and Alison Colburn (collectively, "Plaintiffs")[1] bring this action against Defendant Ford Motor Company ("Defendant" or "Ford").

[1] Plaintiffs Philips, Goodman, and Colburn allege only California claims. In addition to these Plaintiffs, the third amended complaint ("TAC") 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. ECF No. 114 ¶¶ 200–230. In ruling on Ford's first motion to dismiss, the Court addressed all fifty-one causes of action in the FAC, which included nationwide class claims and class claims brought under the laws of six states. ECF No. 46. After this ruling, however, the Court decided to proceed by addressing the California claims first. Id. To that end, the parties stipulated that "[a]lthough the [second amended complaint and any subsequent pleadings] may contain both California and non-California claims," any future motions to dismiss "shall address only . . . California [Plaintiffs'] claims." ECF No. 51 at 1. Thus, every order subsequent to the first motion to dismiss has addressed only California claims. Accordingly, this Order is limited to the causes of action brought by California Plaintiffs in the

Before the Court is Plaintiffs' motion for class certification. Having considered the submissions and oral arguments of the parties, the relevant law, and the record in this case, the Court DENIES Plaintiff's motion for class certification.

I. BACKGROUND

A. Factual Background

The following facts are from Plaintiffs' Third Amended Complaint and the evidence produced in support of Plaintiffs' motion for class certification. Plaintiffs seek to represent three classes of statewide consumers who purchased or leased Ford Fusion vehicles, model years 2010 through 2014, or Ford Focus vehicles, model years 2012 through 2014 (collectively, "Class Vehicles").[2] Plaintiffs allege that these Vehicles are equipped with a defective Electronic Power Assisted Steering ("EPAS") system. TAC ¶ 1. The following chart summarizes the named 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

Id. ¶¶ 32–53. Power steering systems supplement the torque that the driver must apply to the steering wheel, thus making it easier for the driver to turn the wheel. *Id.* ¶ 75. Instead of using a traditional power steering pump, Ford's EPAS system uses a power steering control motor, electronic control unit, torque sensor, and steering wheel position sensor. *Id.* ¶ 2. Plaintiffs allege, however, that Ford's EPAS system suffers from a "systemic defect" that "renders the system prone to sudden and premature failure during ordinary and foreseeable driving situations." *Id.* Specifically, Plaintiffs claim that "[w]hen developing the requirements for its EPAS system, Ford . . . ignored sound engineering judgment by incorporating unreliable electromechanical relays, which are foreseeably prone to failure, into the design." Mot. at 1–2. This defect, Plaintiffs

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TAC.

[2] The TAC specifies that the "Vehicles include the following models: 2010–2014 Ford Fusion; 2010–2014 Ford Fusion Hybrid; 2013–2014 Ford Fusion Energi; 2012–2014 Ford Focus; and 2012–2014 Ford Focus Electric." TAC ¶ 68.

contend, causes drivers of the Class Vehicles to "experience significantly increased steering effort and an increased risk of losing control of their vehicles when the EPAS system fails" and "defaults to manual steering." Id. ¶¶ 3, 100.

1. The Named Plaintiffs' Personal Experiences with EPAS Failure

i. Plaintiff Philips

The named Plaintiffs allege that they paid more for their vehicles than they would have if Ford has disclosed that their vehicles' EPAS systems were defective. Specifically, William Philips ("Plaintiff Philips") states that he "reviewed Ford's promotional materials and other information" and that he "would not have purchased his 2011 Ford Fusion, or would not have paid the purchase price charged" had Ford "disclosed the EPAS system defects and failures." Id. ¶ 34. Philips also alleges that he experienced "problems with the steering system in his Fusion." Id. ¶ 36. After lodging multiple complaints with Ford, Plaintiff Philips was informed during a dealership visit in 2013 "that it would cost approximately $2,000 to fix the problem," through an EPAS system replacement. Id. Plaintiff Philips declined to repair his vehicle at that time. In July 2015, Plaintiff Philips received a notice from Ford alerting him that his "vehicle [was] subject to a safety recall," and asking Plaintiff Philips to bring his vehicle to a dealership for further inspection. ECF No. 97-5 at 192. After receiving this notice, Plaintiff Philips brought his vehicle in for an inspection, at which time Ford replaced the EPAS system in Plaintiff Philips's vehicle.

ii. Plaintiff Goodman

Jaime Goodman ("Goodman") claims that, prior to "purchasing her 2011 Ford Fusion," she "(a) viewed television advertisements concerning the vehicles; (b) viewed material concerning the Fusion on Ford's website; (c) reviewed the window sticker on the vehicle she would purchase; and (d) received and reviewed a brochure concerning the Fusion." TAC ¶ 40. "The window sticker," Plaintiff Goodman says, "indicated that the vehicle she would purchase was equipped with power steering." Id. "Nowhere in these materials did Ford disclose the EPAS system defects and failures," and had Ford done so, Plaintiff Goodman alleges that she "would not have purchased her 2011 Ford Fusion, or would not have paid the purchase price charged." Id. ¶¶ 40–

41. In addition, Plaintiff Goodman claims that in 2014 she "began having intermittent problems with the steering system in her 2011 Ford Fusion and experienced difficulty steering." Id. ¶ 43.

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

In July 2015, Plaintiff Goodman received "a letter from Ford Motor Company concerning the 2011 Fusion and a recall for the [Fusion's] EPAS [system]." Id. at 49. Pursuant to this letter, Plaintiff Goodman took her vehicle to a Ford dealership in August 2015, expecting that Ford would replace the EPAS system in her vehicle free of charge. During this August 2015 visit, however, the dealership declined to perform a system replacement and instead simply reprogrammed the computer in Plaintiff Goodman's vehicle.

In October 2015, Plaintiff Goodman once again experienced problems with her vehicle's power steering. "On November 2, 2015, Ford's counsel contacted Plaintiffs' counsel to inform them that based on a review of the attached service records . . . , it appears that Jaime Goodman is eligible for a steering gear replacement." ECF No. 94-6 at 10. Plaintiff Goodman thereafter scheduled an appointment to replace her vehicle's EPAS system on November 12, 2015. "A few hours after dropping off [her] vehicle" on November 12, 2015, however, Plaintiff Goodman "received a call from a service associate . . . and was informed that . . . [her vehicle] was no longer eligible for a free replacement under Ford's recall program." ECF No. 95-4 at 2. After "Ford refused to replace [Goodman's] EPAS system," Plaintiffs' counsel once again reached out to Ford. Id. at 3. On November 24, 2015, Ford finally replaced the EPAS system in Plaintiff Goodman's vehicle.

iii. Plaintiff Colburn

Finally, prior to "purchasing her 2010 Ford Fusion," Alison Colburn ("Plaintiff Colburn") claims that, like Plaintiff Goodman, she "(a) viewed television advertisements concerning the vehicles; (b) viewed material concerning the Fusion on Ford's website; (c) reviewed the window sticker on the vehicle she would purchase; and (d) received and reviewed a brochure concerning the Fusion," and that "[t]he window sticker indicated that the vehicle she would purchase was equipped with power steering." TAC ¶ 47. "Nowhere in these materials did Ford disclose the EPAS system defects and failures." Id. Had Ford done so, Plaintiff Colburn alleges that she "would not have purchased her 2010 Ford Fusion, or would not have paid the purchase price charged." Id. ¶ 48. Plaintiff Colburn alleges that the power steering in her vehicle failed in October 2014. Id. ¶ 52. Later that month, she took her vehicle to a Ford dealership and paid $990.19 to replace her vehicle's EPAS system. Id. ¶ 53.

2. The Nature of the Alleged Defect

In their complaint, Plaintiffs point to various possible defects in EPAS systems in Ford vehicles. Id. ¶ 79. However, after considerable discovery, Plaintiffs have narrowed their theory for the purposes of their motion for class certification of their California claims. As relevant to the instant motion, Plaintiffs assert that the EPAS systems in 2010-2012 Fusion vehicles and 2012-2014 Focus vehicles are defective because the EPAS systems contain unreliable electro-mechanical relays.

Ford began to use electro-mechanical relays in EPAS systems in 2009 to produce the 2010 Fusion. Pascarella Rpt., Ex. A to Opp., at 3. The EPAS system is manufactured by a Ford supplier called TRW and includes two electro-mechanical relays: a "link relay" and a "star point" relay. Arora Rpt., Ex. B to Opp., at 28. The link relay controls power to the EPAS system, and the star point relay controls power to the steering motor. Id. at 36, 40. These relays control power through a circuit that is completed when two metal plates in the relays make contact. Ex. 3 to Mot., at 55–58. When the metal plates are in contact, the circuit is closed and power is engaged. Id. When the metal plates are separated, the circuit is opened and power is cut off. Id. Occasionally, these relays

experience "faults," meaning the circuits open and power is cut off at unexpected times. When a fault occurs, power steering is cut off and the vehicle reverts to manual steering. Ex. B, at 36–40. These faults are indicated by "diagnostic trouble codes" to assist in diagnosis and repair. A code number B43 indicates a fault in the link relay, and a code number B3A indicates a fault in the star point relay. Ex. B, at 40; Report of Dr. Marthinius van Schoor, Ex. 2 to Mot., at 8.

Plaintiffs claim that Ford knew as early as 2007 that electro-mechanical relays were unfit for use in EPAS systems. Mot. at 2. In their Motion for Class Certification and the exhibits attached to that motion, Plaintiffs point to many Ford emails suggesting that Ford employees believed that electro-mechanical relays were subject to issues such as thermal expansion and sensitivity to variations in manufacturing. Mot. at 4; Ex. 15 to Mot. at 114. Other internal Ford emails suggested that Ford hoped to "remove electro-mechanical relays out of EPS products." Ex. 16 to Mot., at 122. Nevertheless, Plaintiffs claim that because of budgetary issues, Ford decided not to change the design to omit electro-mechanical relays. Mot. at 5; Ex. 4 to Mot., at 63.

Ford continually diagnosed and assessed relay problems, and Ford began to make some changes to the EPAS systems in 2011. Mot. at 5; Opp. at 5. However, according to Plaintiffs, none of these changes addressed the ultimate cause of the EPAS system's unusually high failure rates: inclusion of unreliable electro-mechanical relays. During this time, Ford also received an unusual number of complaints regarding sudden and unexpected failures of power steering systems. Opp. at 17. At the time, Ford concluded that there were several causes for the power steering issues, but the main cause was the fact that "ribbon cables" in the EPAS systems were sometimes damaged during assembly. Opp. at 5, Ex. B at 48–49. After the National Highway Transportation Safety Administration (NHTSA) opened an investigation into reports of power steering failures in Fusion vehicles, Ford began a recall of certain Fusion vehicles based on the ribbon-cable issues. Opp. at 6. However, according to Plaintiffs, this recall does not address their concerns because even after replacement, the EPAS systems are still defective because they incorporate unreliable electro-mechanical relays. Plaintiffs claim that Ford knew that inclusion of the unreliable relays posed safety concerns and that other feasible designs would not pose the same dangers. Mot. 7–9.

Based on the evidence outlined above, Plaintiffs allege that Ford fraudulently concealed the alleged defect in the EPAS systems. Despite press releases and web-based "promotional materials" touting "EPAS as a reliable and beneficial product," Ford knew as early as 2007 that the EPAS system was "prone to sudden, premature failure," and yet took no remedial action. Id. ¶ 11. Plaintiffs further claim that "Ford concealed the fact that the EPAS system [was] prone to sudden and premature failure from consumers so that the warranty period on the Defective Vehicles would expire before consumers became aware of the problem." Id. ¶ 24. Had Ford disclosed the alleged defect, 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 large." Id. ¶ 6.

B. Procedural History

On June 27, 2014, Plaintiffs filed the original complaint in this putative class action. ECF No. 1. Plaintiffs filed the first amended complaint ("FAC") on September 8, 2014. ECF No. 15 ("FAC"). At a hearing on February 12, 2015, the Court granted Ford's motion to dismiss the FAC with leave to amend. ECF No. 46.

As to Plaintiffs' implied warranty claims, brought under California's Song-Beverly Consumer Warranty Act ("Song-Beverly Act") and the Magnuson-Moss Warranty Act ("Magnuson-Moss Act"), the Court found "that Plaintiffs ha[d] sufficiently alleged that the EPAS system defect made the [Vehicles] unfit for their ordinary purpose." ECF No. 48, at 5. However, the Court also found that an "implied warranty claim is [also] limited in duration . . . and Plaintiffs [had] not allege[d] a defect within the warranty period." Id. In reaching this decision, the Court declined to follow the California Court of Appeal's decision in Mexia v. Rinker Boat Co., Inc., 95 Cal. Rptr. 3d 285 (Ct. App. 2009), which the Court characterized as being an "outlier." ECF No. 48, at 5. The Court instead found more persuasive several federal district court decisions, including Daniel v. Ford Motor Company, 2013 WL 2474934 (E.D. Cal. June 7, 2013). The

Court granted Plaintiffs leave to amend their implied warranty claims because "there [we]re factual allegations that the Plaintiffs could allege that could cure th[e] deficienc[ies] [identified]." ECF No. 48, at 10.

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

With this understanding in mind, Plaintiffs filed a second amended complaint ("SAC") on March 27, 2015. The SAC asserted four causes of action under California law: (1) violation of the unlawful and unfair prongs of California's Unfair Competition Law ("UCL"); (2) violation of the fraud prong of the UCL; (3) violation of California's Consumer Legal Remedies Act ("CLRA"); and (4) common law fraudulent concealment.

On April 30, 2015, Ford moved to dismiss the SAC, ECF No. 58, which the Court granted in part and denied in part, ECF No. 69. Specifically, the Court granted with prejudice Ford's motion to dismiss Plaintiffs' UCL claims and Plaintiffs' CLRA claim for injunctive relief, holding that Plaintiffs were not entitled to equitable relief because they had an adequate remedy at law. Id. at 30. The Court also granted with prejudice Ford's motion to dismiss Ian Colburn, Alison Colburn's son, as a named Plaintiff. Id. at 31. Two claims—the common law fraudulent concealment claim and the CLRA claim for damages—survived Ford's second round motion to dismiss. Id. Ford answered the SAC on August 6, 2015. ECF No. 78.

On October 28, 2015, Ford filed a second motion to dismiss the SAC. ECF No. 84. In this motion, Ford argued for dismissal under the prudential mootness and primary jurisdiction doctrines. ECF No. 105 at 8. Ford also argued that Plaintiffs lacked "standing to pursue their claims as to the 2012–2014 Focus and 2013–2014 Fusion." Id. at 9. The Court denied this motion

in its entirety. Id. at 25.

On February 18, 2016, the parties filed a joint case management statement in advance of the February 25, 2016 case management conference. ECF No. 104. In this statement, Plaintiffs stated their intent to file a "motion for leave to amend to reassert their claims for breach of [implied] warranty." Id. at 2. According to Plaintiffs, in light of the Ninth Circuit's December 2, 2015 decision in Daniel v. Ford Motor Company, 806 F.3d 1217 (9th Cir. 2015), the Court had erred in dismissing Plaintiffs' implied warranty claims on February 12, 2015. After reviewing the Daniel decision, the Court agreed with Plaintiffs, and granted Plaintiffs leave to amend at the February 25, 2016 case management conference. ECF No. 108.

Plaintiffs filed the TAC on March 4, 2016. The TAC includes two new claims: an implied warranty claim asserted under the Song-Beverly Act, TAC ¶¶ 154–170, and an implied warranty claim asserted under the Magnuson-Moss Act, id. ¶¶ 140–153. On March 24, 2016, Ford moved to dismiss these implied warranty claims. On May 3, 2016, the Court denied Ford's motion to dismiss. ECF No. 134. The Court held that under the Ninth Circuit's recent decision in Daniel v. Ford Motor Company, 806 F.3d 1217 (9th Cir. 2015), Plaintiffs had stated a claim for relief under the Song-Beverly Act and the Magnuson-Moss Act for breach of implied warranty. Id. at 16. The Court also found that Plaintiffs had not waived these claims by failing to replead the claims in the SAC, id. at 20, and that Plaintiff Colburn's claims fell within the applicable four year statute of limitations because Plaintiff Colburn had sufficiently alleged tolling of the statute of limitations because of fraudulent concealment, id. at 26.

On July 29, 2016, Plaintiffs filed a motion for class certification under Federal Rule of Procedure ("Rule") 23. ECF No. 173. Ford filed an opposition to the motion for class certification on September 19, 2016. ECF No. 194. On September 26, 2016, Ford filed a Daubert motion to exclude the expert report of Dr. Jonathan Arnold, ECF No. 196, and a Daubert motion to exclude the expert report of Dr. Marthinius van Schoor, ECF No. 197. On November 8, 2016, Plaintiffs filed an opposition to the motion to exclude the expert report of Dr. Jonathan Arnold, ECF No. 201, and an opposition to the motion to exclude the expert report of Dr. Marthinius van Schoor,

ECF No. 202. On November 14, 2015, Plaintiffs filed a reply to Ford's opposition to the motion for class certification. ECF No. 204. On November 22, 2016, Ford filed replies to Plaintiffs' oppositions to Ford's Daubert motions. On December 6, 2016, Ford filed a notice of supplemental authority in support of its opposition to the motion for class certification. ECF No. 216. On December 8, 2016, the Court held a hearing on Plaintiffs' motion for class certification and on Ford's Daubert motions. ECF No. 219.

C. Proposed Classes

In their motion for class certification, Plaintiffs move to certify the following three classes:

(1) New Vehicle Class: All residents of California who, at any time, purchased or leased a new 2010-2012 Ford Fusion or 2012-2014 Ford Focus vehicle from Ford Motor Company or through a Ford Motor Company dealership.

(2) Out-of-Pocket Class: All residents of California who incurred expenses in connection with the diagnosis, repair, or replacement of the Electronic Power Assisted Steering system in a 2010-2012 Ford Fusion or 2012-2014 Ford Focus vehicle.

(3) Current Owner/Lessee Class: All residents of California who currently own or lease a 2010-2012 Ford Fusion or 2012- 2014 Ford Focus vehicle.

Plaintiffs seek to certify the New Vehicle Class and the Out-of-Pocket Class under Rule 23(b)(3), Reply at 11, and seek to certify the Current Owner-Lessee Class under Rule 23(b)(2), id.

On behalf of the New Vehicle Class, Plaintiffs assert CLRA claims, implied warranty (Song-Beverly Act and Magnuson-Moss Act) claims, and fraudulent concealment claims and seek benefit-of-the-bargain damages. On behalf of the Out-of-Pocket Class, Plaintiffs assert CLRA claims, implied warranty (Song-Beverly Act and Magnuson-Moss Act) claims, and fraudulent concealment claims and seek reimbursement for money spent diagnosing and repairing the allegedly defective EPAS systems. On behalf of the Current/Owner Lessee Class, Plaintiffs assert only an implied warranty claim and seek an injunction requiring Ford

to replace the allegedly defective EPAS systems.

At the December 8, 2016 hearing on Plaintiffs' Motion for Class Certification, Plaintiffs agreed that the Current Owner/Lessee Class should be revised to include only individuals who purchased new vehicles in California for personal, family, or household purposes. Hr'g Tr. at 19:16–21. Plaintiffs also agreed that for the purposes of their CLRA claims and their implied warranty claims, the New Vehicle Class and the Out-of-Pocket Class should be revised to contain only individuals who purchased new vehicles in California for personal, family, or household purposes.[3] Hr'g Tr. at 35–36.

II. LEGAL STANDARD

Class actions are governed by Rule 23 of the Federal Rules of Civil Procedure. Rule 23 does not set forth a mere pleading standard. To obtain class certification, Plaintiffs bear the burden of showing that they have met each of the four requirements of Rule 23(a) and at least one subsection of Rule 23(b). Zinser v. Accufix Research Inst., Inc., 253 F.3d 1180, 1186, amended by 273 F.3d 1266 (9th Cir. 2001). "A party seeking class certification must affirmatively demonstrate . . . compliance with the Rule[.]" Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350 (2011).

Rule 23(a) provides that a district court may certify a class only if: "(1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a). That is, the class must satisfy the requirements of numerosity, commonality, typicality, and adequacy of representation to maintain a class action. Mazza v. Am. Honda Motor Co., Inc., 666 F.3d 581, 588 (9th Cir. 2012). Further, while Rule 23(a) is silent as to whether the class must be ascertainable, courts have held that the Rule implies this requirement as well. See, e.g., In re Yahoo Mail Litig., 308 F.R.D. 577, 596 (N.D. Cal. 2015) (party seeking class certification under Rule 23(b)(3) "must demonstrate that an identifiable and

[3] Plaintiffs believe that such a limitation would not be appropriate for the fraudulent concealment claims asserted by the New Vehicle Class and the Out-of-Pocket Class. Hr'g Tr. at 35–36, 19.

ascertainable class exists"); Herrera v. LCS Fin. Servs. Corp., 274 F.R.D. 666, 672 (N.D. Cal. 2011).

If all four prerequisites of Rule 23(a) are satisfied, the Court must also find that Plaintiffs "satisfy through evidentiary proof" at least one of the three subsections of Rule 23(b). Comcast Corp. v. Behrend, 133 S. Ct. 1426, 1432 (2013). Rule 23(b) sets forth three general types of class actions. See Fed. R. Civ. P. 23(b)(1)–(b)(3). Of these types, Plaintiffs seek certification under Rule 23(b)(3) and Rule 23(b)(2). The Court can certify a class under Rule 23(b)(3) if the Court finds that "questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). The Court can certify a Rule 23(b)(2) class if "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2).

"[A] court's class-certification analysis must be 'rigorous' and may 'entail some overlap with the merits of the plaintiff's underlying claim[.]'" Amgen Inc. v. Conn. Ret. Plans & Trust Funds, 133 S.Ct. 1184, 1194 (2013) (quoting Dukes, 564 U.S. at 351); see also Mazza, 666 F.3d at 588 ("'Before certifying a class, the trial court must conduct a 'rigorous analysis' to determine whether the party seeking certification has met the prerequisites of Rule 23.'" (quoting Zinser, 253 F.3d at 1186)). This "rigorous" analysis applies to both Rule 23(a) and Rule 23(b). Comcast, 133 S. Ct. at 1432 (stating that Congress included "addition[al] . . . procedural safeguards for (b)(3) class members beyond those provided for (b)(1) or (b)(2) class members (e.g., an opportunity to opt out)" and that a court has a "duty to take a 'close look' at whether common questions predominate over individual ones").

Nevertheless, "Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage." Amgen, 133 S. Ct. at 1194–95. "Merits questions may be considered to the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied." Id. at 1195. If a court concludes that the moving

party has met its burden of proof, then the court has broad discretion to certify the class. Zinser, 253 F.3d at 1186.

III. DISCUSSION

The Court begins by discussing the requirements under Rule 23(a). The Court then discusses the requirements under Rule 23(b)(3) and Rule 23(b)(2). Although the Court finds that Plaintiffs have met the Rule 23(a) requirements, the Court finds, as set forth below, that Plaintiffs have not met the predominance requirement of Rule 23(b)(3) or the requirements for certification under Rule 23(b)(2).

A. Rule 23(a) Requirements

1. Numerosity

Pursuant to Rule 23(a)(1), Plaintiffs must show that "the class is so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). Plaintiffs need not state the precise number of potential class members, nor is there a specific minimum threshold requirement. In re Rubber Chems. Antitrust Litig., 232 F.R.D. 346, 350–51 (N.D. Cal. 2005). Rather, the Court must examine the specific facts of each case to determine whether the numerosity requirement is met. Gen. Tel. Co. of Nw., Inc. v. EEOC, 446 U.S. 318, 330 (1980).

Ford does not contest that the numerosity requirement is met in the instant case, and "general knowledge and common sense indicate" that the number of 2010-2012 Fusion and 2012-2014 Focus owners in California is "large" and that joinder is therefore impractical. Perez-Olano v. Gonzalez, 248 F.R.D. 248, 256 (C.D. Cal. 2008); see also In re Beer Distrib. Antitrust Litig., 188 F.R.D. 557, 562 (N.D. Cal. 1999) (holding that 25 class members satisfied numerosity requirement). This is sufficient to satisfy the numerosity requirement.

2. Commonality

Rule 23(a)(2) requires that there be "questions of law or fact common to the class." Dukes, 564 U.S. at 349. To satisfy the commonality requirement, Plaintiffs must show that the class members have suffered "the same injury," meaning that class members' claims must "depend upon a common contention" of such a nature that "determination of its truth or falsity will resolve

an issue that is central to the validity of each [claim] in one stroke." Id. at 350 (quotation marks and citation omitted). Plaintiffs must demonstrate not merely the existence of a common question, but rather "the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation." Id. (quotation marks omitted) (emphasis in original). Nevertheless, the "common contention need not be one that will be answered, on the merits, in favor of the class." Alcantar v. Hobart Serv., 800 F.3d 1047, 1053 (9th Cir. 2015) (internal quotation marks omitted). Additionally, "for purposes of Rule 23(a)(2), even a single common question will do." Dukes, 564 U.S. at 359 (alteration and quotation marks omitted).

In the instant case, Plaintiffs have alleged that the EPAS systems installed in all Class Vehicles suffer from a common defect. "In automobile defect cases, commonality is often found when the most significant question concerns the existence of a defect." Parkinson v. Hyundai Motor Am., 258 F.R.D. 580 (C.D. Cal. 2008). Plaintiffs have set forth several issues that are common to the class, including the existence of a defect, whether Ford knew of the alleged defect, whether Ford had a duty to disclose its knowledge and breached that duty, whether the failures to disclose were material, and whether those failures violated the law. Mot. at 13; see Chamberlan v. Ford Motor Co., 402 F.3d 952, 962 (9th Cir. 2005) (holding that similar common questions met the commonality requirement).

In determining commonality, "[t]he existence of shared legal issues with divergent factual predicates is sufficient, as is a common core of salient facts coupled with disparate legal remedies within the class." Hanlon v. Chrysler Corp., 150 F.3d 1011, 1019 (9th Cir. 1998). Thus, although as discussed below Plaintiffs fail to show that common issues predominate under Rule 23(b)(3), Plaintiffs have identified at least some common issues. Thus, the Court finds that issues such as the existence of a defect and Ford's knowledge of the defect are enough to meet "the relatively 'minimal' showing required to establish commonality." Ries v. Ariz. Beverages USA LLC, 287 F.R.D. 523, 537 (N.D. Cal. 2012) (citing Hanlon, 150 F.3d at 1020).

3. Typicality

Under Rule 23(a)(3) a representative party must have claims or defenses that are "typical

of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). Typicality is satisfied "when each class member's claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendants' liability." Rodriguez v. Hayes, 591 F.3d 1105, 1122 (9th Cir. 2010) (citations omitted). This requirement is "permissive and requires only that the representative's claims are reasonably co-extensive with those of the absent class members; they need not be substantially identical." Hanlon, 150 F.3d at 1020. Claims that are reasonably co-extensive with the claims of absent class members will satisfy the typicality requirement, but the class must be limited to "those fairly encompassed by the named plaintiff's claims." Dukes, 131 S.Ct. at 2550. "[C]lass certification is inappropriate where a putative class representative is subject to unique defenses which threaten to become the focus of the litigation." Hanon, 976 F.2d at 508 (citations omitted). "The purpose of the typicality requirement is to assure that the interest of the named representative aligns with the interests of the class." Id.

The named Plaintiffs assert that they meet the typicality requirement because "all class members are alleged to have suffered injury as a result of the same conduct" by Ford. Mot. at 14 (quoting Doyle v. Chrysler Group LLC, 2014 WL 7690155, at *7 (C.D. Cal. Oct. 9, 2014). Therefore, according to Plaintiffs, the named Plaintiffs' claims are "reasonably co-extensive with those of absent class members" because the named "Plaintiffs and all class members allegedly suffered the same injury, entitling them to relief under the same legal theories." Hanlon, 976 F.2d at 508.

Ford argues that the named Plaintiffs do not meet the typicality requirement for several reasons. First, Ford argues that the evidence shows that the alleged EPAS failures were due to individual causes, and not to a classwide defect in the EPAS system. Opp. at 24. Second, Ford argues that the named Plaintiffs owned only Fusion vehicles, but the class also covers the "materially different" Focus vehicles as well. Opp. at 25. Third, Ford argues that the named Plaintiffs are subject to various defenses that are not typical of the class. Opp. at 25–26.

The Court first addresses a threshold issue regarding Plaintiff Philips, after which the Court addresses each of Ford's arguments in turn.

i. Plaintiff Philips is Not a Member of Any of the Proposed Classes

Before the Court addresses Ford's arguments, the Court notes that Plaintiff Philips is not a member of any of the proposed classes and therefore must be dismissed. Plaintiff Philips purchased a used vehicle, and therefore Plaintiff Philips is not a member of the New Vehicle Purchaser Class. TAC ¶ 33 ("Plaintiff Philips owns a 2011 Ford Fusion, which he purchased used from Salinas Valley Ford in March 2012."). Plaintiff Philips also does not allege that he paid for diagnosis or repair for his vehicle's EPAS system, and therefore Plaintiff Philips is not a member of the Out-of-Pocket Class. See id. (containing no allegation of payment for diagnosis or repair). Additionally, as discussed above, Plaintiffs concede that the Current Owner/Lessee class must be revised to include only those who own Class Vehicles and who purchased those vehicles new. As stated above, Plaintiff Philips purchased his vehicle used. Therefore, Plaintiff Philips is not a member of the Current Owner/Lessee Class as revised.

"[T]ypicality requires that the named Plaintiffs be members of the class they represent," and thus Plaintiff Phillips cannot represent any of the proposed classes. Torres v. Goddard, 314 F.R.D. 644, 656 (D. Ariz. 2010); see also Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 156 (1982) ("We have repeatedly held that "a class representative must be part of the class . . . ."). Therefore, the Court dismisses Plaintiff Philips from the action. Nevertheless, even without Plaintiff Philips, each of the proposed classes contains at least one of the named Plaintiffs. Plaintiffs Colburn and Goodman are members of the New Vehicle Class. TAC ¶ 45, 38. Plaintiff Goodman is a member of the Current Owner/Lessee Class. Id. ¶ 38 ("Plaintiff Goodman owns a 2011 Ford Fusion"). Plaintiff Colburn is a member of the Out-of-Pocket Class. Id. ¶ 53 (alleging that Plaintiff Colburn spent $990.19 to repair her vehicle's EPAS system).

Therefore, the Court finds that the dismissal of Plaintiff Philips does not require dismissal of the action, because "if [an] action is brought by . . . several representative parties, it only is necessary that one of them be a qualified member of the class as long as the other prerequisites of Rule 23(a) are satisfied." See Aiken v. Obledo, 442 F. Supp. 628, 658 (E.D. Cal. 1977) (quoting 7 Wright and Miller, Federal Practice and Procedure, § 1761 (1st ed. 1972)).

Therefore, the Court considers each of Ford's arguments against typicality in turn. In doing so, the Court does not consider Ford's arguments regarding Plaintiff Philips because Plaintiff Philips has been dismissed.

i. Differences in the Experiences of Plaintiffs Goodman and Colburn

Ford claims that the evidence shows that Plaintiff Goodman and Plaintiff Colburn's EPAS systems did not fail because of any class-wide defect, but instead each of their EPAS systems failed for a different, atypical reason. Plaintiff Jaime Goodman experienced intermittent power steering failures in her 2011 Fusion. Deposition of Jaime Goodman, Ex. N to Opp., at 58:4–6. According to Ford's expert Dr. Ashish Arora, an inspection of Goodman's vehicle showed a "relay-related" fault code (code B43), but the inspection "ruled out a faulty relay" as the cause of the fault. Opp. at 7, 9, Ex B., at 48–55. Plaintiff Alison Colburn gave her 2010 Fusion to her son, who experienced a power steering failure. Opp. at 9–10. According to Dr. Arora, Colburn's vehicle showed an excessive friction code and also showed "one [code] related to anti-lock braking, but no relay-related codes." Ex. B., at 51. Essentially, Ford claims that Plaintiff Goodman and Plaintiff Colburn are atypical because Plaintiff Coburn's vehicle did not experience a "relay-related" fault at all, and although Plaintiff Goodman's vehicle experienced a "relay-related" fault, that fault was not due to failure of the relay.

In short, Ford claims that the named Plaintiffs are not typical because they did not actually suffer harm from the allegedly defective EPAS systems. The Ninth Circuit addressed a similar argument in Wolin v. Jaguar Land Rover North America, LLC, 617 F.3d 1168, 1174 (9th Cir. 2010). In Wolin, the plaintiffs argued that certain vehicles were defective because the vehicles had a "defective alignment geometry" that caused the tires to wear more quickly than usual. Id. at 1170. Land Rover argued against class certification on the grounds that the named plaintiffs' "claims are not typical because their tires indicate wear that is not the kind attributable to vehicle alignment." Id. at 1175.The Ninth Circuit rejected this argument and noted that the named plaintiffs alleged that they, "like all prospective class members, were injured by a defective alignment geometry in the vehicles." Id. The Court held that even if Land Rover were correct that

the wear on the named plaintiffs' tires was due to a different cause than the wear on class members' tires, the named plaintiffs, "like the rest of the class, may have a viable claim regardless of the manifestation of the defect." Id. In other words, even though named plaintiffs' tires may have been worn for other reasons, plaintiffs' theory was that their vehicles still suffered from the same alignment defect, and this was sufficient to make the named plaintiffs' claim typical of the proposed class.

The same is true here. As described in more detail below, Plaintiffs' theory of harm is that Plaintiffs overpaid for their vehicles under the mistaken belief that the vehicles contained defect-free EPAS systems. If this theory of harm is correct, then the named Plaintiffs were harmed at the moment they purchased a Class Vehicle, even if their power steering ultimately failed for reasons unrelated to the relays. In short, as in Wolin, the named Plaintiffs in the instant case, "like the rest of the class, may have a viable claim regardless of the manifestation of the defect." Id.[4]

Under Wolin, Plaintiffs meet the typicality requirement if they allege the same claims based on the same defect as the absent class members. In the instant case, Plaintiff Goodman and Plaintiff Colburn, like the other prospective class members, purchased vehicles that contained EPAS systems that were allegedly defective because the EPAS systems contained allegedly unreliable electro-mechanical relays. Although Ford argues that Plaintiffs cannot prevail on these claims, at the class certification stage, a court need not "determine whether class members could

[4] Ford cites Sandoval v. Pharmacare US, Inc., 2016 WL 3554919, at *5 (S.D. Cal. June 10, 2016), to support its argument that the named Plaintiffs are atypical because the power steering in their vehicles failed for reasons other than unreliable relays. Opp. at 24. In Sandoval, the court held that the named plaintiffs were unrepresentative partly because although the plaintiffs alleged that the product at issue falsely claimed to improve sexual-health problems, the "[p]laintiffs testified at their depositions that they did not suffer from the sexual-health problems they claim [the product] falsely claimed to improve." Id. at *5. Thus, the Court found that the named plaintiffs could not have relied on the product's allegedly false claims to improve sexual-health problems, and therefore the named plaintiffs did not have claims typical of class members who were misled by such claims. In the instant case, on the other hand, Ford does not assert that Plaintiff Goodman and Plaintiff Colburn could not have been misled by Ford's allegedly fraudulent omissions or had atypical expectations for the vehicles that they purchased. Instead, Ford claims that Plaintiff Goodman and Plaintiff Colburn are atypical because they suffered a different manifestation of the defect. However, this argument is foreclosed by Wolin, which held that differences in manifestation of defects do not defeat typicality. Wolin, 617 F.3d at 1175; see also Sandoval, 2016 WL 3554919, at *5 (citing Wolin as setting out the test for typicality).

actually prevail on the merits of their claims." Ellis v. Costco Wholesale Corp., 657 F.3d 970, 983 n.8 (9th Cir. 2011). Instead, it is enough to know that Plaintiff Goodman and Plaintiff Colburn's claims are "reasonably co-extensive with those of the absent class members." Hanlon, 150 F.3d at 1020.

As the Ninth Circuit has held, "[t]ypicality refers to the natures of the claim or defense of the class representative, and not to the specific facts from which it arose." Ellis v. Costco Wholesale Corp., 667 F.3d 970, 984 (9th Cir. 2011) (quoting Hanon, 976 F.2d at 508). Thus, under Ninth Circuit law the named Plaintiffs in the instant case assert the same claims as the prospective class members, and this is enough to meet Rule 23(a)'s typicality requirement.

ii. Differences Between Fusion and Focus Vehicles

Ford also argues that Plaintiff Goodman and Plaintiff Colburn are atypical because they owned Fusion vehicles, not Focus vehicles. Ford argues that Focus vehicles are "materially different" from Fusion vehicles, and the relays in Focus vehicles are "subject to different operating conditions that would affect the risks involved." Opp. at 25. Thus, Ford claims, Plaintiff Goodman and Plaintiff Colburn's claims are not typical of the claims of owners of Focus vehicles.

In ruling on Ford's motion to dismiss the Second Amended Complaint, the Court has already held that Plaintiffs have standing to assert claims about Focus vehicles because Plaintiffs "have adequately alleged that the supposedly defective EPAS system is substantially similar across the Vehicles." ECF No. 69, at 12. Of course, at the class certification stage, unlike the motion to dismiss stage, the Court does not "construe the pleadings in the light most favorable to the nonmoving party." Manzarek v. St. Paul Fire & Marine Ins. Co., 519 F.3d 1025, 1031 (9th Cir. 2008). Nevertheless, as discussed further in analyzing predominance under Rule 23(b)(3), the evidence at this stage of the litigation supports Plaintiffs' claim that the EPAS system is substantially similar between Fusion and Focus vehicles. Although Ford has pointed to some differences between Fusion and Focus vehicles, such as the placement of the relays within the EPAS systems and the size of the power steering motor, these differences have only minor relevance to Plaintiffs' claims and are unlikely to be a significant focus of litigation. See infra Part

III.B.2.iv.

Despite minor differences between Fusion and Focus vehicles, Plaintiffs' argument remains that the EPAS systems are defective because they incorporate electro-mechanical relays. Plaintiffs and their experts claim, and Ford agrees, that an EPAS system incorporating electro-mechanical relays existed in both Fusion and Focus vehicles. As discussed further below, the evidence and argumentation in this case will focus on whether the inclusion of electro-mechanical relays rendered the EPAS systems defective. Thus, even though Plaintiff Goodman and Plaintiff Colburn owned only Fusion vehicles, their claims are typical of the claims of owners of Focus vehicles because the same defect is alleged to exist in both vehicles.

In short, the evidence at this stage of the litigation suggests that the EPAS systems in Fusion and Focus vehicles are substantially similar. Therefore, the named Plaintiffs' claims are "reasonably co-extensive" with the claims of Focus owners. Hanlon, 150 F.3d at 1020 (holding that the typicality requirement is "permissive and requires only that the representative's claims are reasonably co-extensive with those of the absent class members; they need not be substantially identical"). Thus, differences between Fusion and Focus vehicles do not defeat typicality.

iii. Unique Defenses

Finally, Ford argues that "[e]ach of the three plaintiffs may be subject to unique defenses" that undermine typicality. Opp. at 25. To support this argument, Ford points to several facts that could give rise to "unique defenses." First, Ford points to factual distinctions about whether or how the alleged defect manifested in Plaintiff Goodman and Plaintiff Colburn's vehicles. Second, Ford argues that Plaintiff Goodman is atypical because she reviewed part of the owner's manual before buying her Fusion vehicle. Third, Ford argues that there are "potential issues as to the extent of [Plaintiff Colburn's] damages" because Plaintiff Colburn gave her vehicle to her son and because Plaintiff Colburn is a member of both the New Vehicle Class and the Out-of-Pocket Class. Opp. at 26. The Court addresses these arguments in turn.

First, Ford's distinctions about how the defects manifested in Plaintiff Goodman and Plaintiff Colburn's vehicles are irrelevant to Plaintiffs' theory of liability. As discussed above,

Plaintiffs' theory is that they were harmed at the point of purchase, and therefore each of the named Plaintiffs may have a valid claim "regardless of the manifestation of the defect." Wolin, 671 F.3d at 1174. Thus, differences in manifestation of the defect in the instant case are not enough to defeat typicality. See Wolin, 617 F.3d at 1173 ("[P]roof of the manifestation of a defect is not a prerequisite to class certification.").

Second, Ford claims that Goodman may be subject to a "unique defense" because Plaintiff Goodman read some portion of the owner's manual before buying her Fusion. However, in its arguments against predominance under Rule 23(b)(3), Ford asserts that some class members likely read the owner's manual. Opp. at 19. Thus, Ford's argument against typicality on the basis that Plaintiff Goodman read some portion of the owner's manual lacks merit.

Finally, Ford argues that the fact that Plaintiff Colburn gave her vehicle to her son and the fact that Plaintiff Colburn is a member of both the Out-of-Pocket Class and the New Vehicle Class may have an impact on how her damages will be determined. Opp. at 25–26. Ford claims that these unique damages calculations make Plaintiff Colburn's claims atypical. However, although as discussed below, Plaintiffs must present a damages model that shows that damages can be measured on a class-wide basis to meet the predominance requirement of Rule 23(b)(3), Comcast Corp., 133 S. Ct. at 1433, the calculation of damages applying such a model "is invariably an individual question and does not defeat class action treatment," Leyva v. Medline Indus. Inc., 716 F.3d 510, 513 (9th Cir. 2013) (emphasis added); see also McCarthy v. Kleindienst, 741 F.2d 1406, 1415 (D.C. Cir. 1984) ("[T]he mere fact that damages awards will ultimately require individualized fact determinations is insufficient by itself to preclude class certification."). Thus, the fact that Plaintiff Colburn's damages calculations may be different than the calculations for some class members does not defeat typicality because Plaintiff Colburn will share with class members a strong interest in proving liability.

In short, Plaintiff Goodman and Plaintiff Colburn do not have unique defenses that "threaten to become the focus of the litigation." Hanon, 976 F.2d at 508. Plaintiff Goodman and Plaintiff Colburn assert claims that are "reasonably co-extensive with those of absent class

members." Hanlon, 150 F.3d at 1020. Therefore, the Court finds that Rule 23(a)'s typicality requirement is met.

4. Adequacy

In the Ninth Circuit, to test the adequacy of a class representative, a court must answer two questions: "(1) do the named plaintiffs and their counsel have any conflicts of interest with other class members; and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" Staton v. Boeing Co., 327 F.3d 938, 957 (9th Cir. 2003) (citing Hanlon, 150 F.3d at 1020).

Ford does not contest adequacy. As discussed above, the Court has dismissed Plaintiff Philips from the instant case because Plaintiff Philips is not a member of any of the proposed classes as properly defined. Nevertheless, the Court finds that Plaintiff Goodman and Plaintiff Colburn are adequate class representatives. Plaintiff Goodman and Plaintiff Colburn and the proposed class share the same claims and interest in obtaining relief, and Plaintiff Goodman and Plaintiff Colburn are vigorously pursuing relief on behalf of the proposed class. Plaintiff Goodman and Plaintiff Colburn share an interest with members of the proposed class in proving that the EPAS systems were defective and that the proposed class was damaged by the defects. Ford does not argue that Plaintiff Goodman and Plaintiff Colburn have any conflicts of interest with other class members. Therefore, the Court finds that Plaintiff Goodman and Plaintiff Colburn meet the adequacy requirement.

Additionally, the Court finds that Plaintiffs' counsel has experience in prosecuting consumer protection actions involving claims similar to those in the instant case. See Pifko Decl. ¶ 41, Ex. 40 to Mot. (firm resume of Baron & Budd, P.C.); id. ¶ 42, Ex. 41 to Mot. (firm resume of Grant & Eisenhofer P.A.); id. ¶ 43, Ex. 42 to Mot. (firm resume of Spilman Thomas & Battle). Plaintiffs' counsel has vigorously litigated this case from the beginning, and Ford does not contest that Plaintiffs' counsel will continue to do so. Thus, the Court finds that Plaintiffs' counsel meets the adequacy requirement.

5. Ascertainability

In addition to the four requirements explicitly provided in Rule 23(a), courts have held that Rule 23(a) also contains an "implied prerequisite" that the class be ascertainable. Xavier v. Philip Morris USA Inc., 787 F. Supp. 2d 1075, 1089 (N.D. Cal. 2011); see also, e.g., In re Yahoo Mail Litig., 308 F.R.D. at 596; Herrera, 274 F.R.D. at 672. A class definition is sufficient if the description of the class is "definite enough so that it is administratively feasible for the court to ascertain whether an individual is a member." *O'Connor v. Boeing N. Am. Inc.,* 184 F.R.D. 311, 319 (C.D. Cal. 1998) (internal citation omitted). In addition, "the court must be able to [determine that] class members are included or excluded from the class by reference to objective criteria." 5 Moore's Federal Practice, § 23.21[3] (3d ed. 1997). In its opposition to Plaintiffs' motion for class certification, Ford does not contest ascertainability.

In the instant case, the proposed classes are defined by objective criteria. Specifically, the classes are defined as individuals who have purchased or currently own or lease a Class Vehicle, as well as individuals who have made out-of-pocket expenditures to repair an EPAS system in a Class Vehicle. Plaintiffs claim that those who purchased or leased a new Class Vehicle can be identified through CONCEPS, Ford's corporate database that includes the contact information for everyone who purchases a new Ford vehicle from a Ford dealership. Mot. at 11; Ex. 38 to Mot. at pp. 229–30. Ford does not contest that Class Vehicle purchasers can be identified in this manner.

Plaintiffs also claim that Ford can obtain the names and contact information for current owners and lessees through the third party company that Ford uses to administer recalls. Mot. at 11; Ex. 38, at pp. 233–35. Again, Ford does not contest that this method is practical.

Finally, the Out-of-Pocket Class can be identified through affidavits and documentation submitted by potential class members. "[C]ourts in this circuit ha[ve] found proposed classes ascertainable even when the only way to determine class membership is with self-identification through affidavits." Melgar v. CSK Auto, Inc., 2015 WL 9303977, at *8 (N.D. Cal. Dec. 22, 2015) (citation omitted). In the instant case, the out-of-pocket costs that potential class members incurred were likely fairly large. Plaintiff Colburn, for example, spent $990.19 to replace her vehicle's EPAS system. TAC ¶ 6. These are the kinds of expenditures for which class members are likely to

keep records, and therefore self-identification in this case would be practical. Red v. Kraft Foods, Inc., 2012 WL 8019257, at *5 (C.D. Cal. Apr. 12, 2012) ("[S]elf-identification alone has been deemed sufficient to render a class ascertainable . . . where the relevant purchase was a memorable bigticket item."). Therefore, the Court finds that it is "administratively feasible" to identify members of the Out-of-Pocket Class and that the class is therefore ascertainable. Newton v. Am. Debt Serv., Inc., 2015 WL 3614197, at *5 (N.D. Cal. June 9, 2015).

B. Rule 23(b)(3): Predominance

1. Principles Governing the Predominance Analysis

Under Rule 23(b)(3), plaintiffs must show "that the questions of law or fact common to class members predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3). "The Rule 23(b)(3) predominance inquiry" is meant to "tes[t] whether proposed classes are sufficiently cohesive to warrant adjudication by representation." Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 623 (1997). The Ninth Circuit has held that "there is clear justification for handling the dispute on a representative rather than an individual basis" if "common questions present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication." Hanlon, 150 F.3d at 1022. In ruling on a motion for class certification based on Rule 23(b)(3), a district court must conduct a rigorous analysis to determine whether the class representatives have satisfied both the predominance and superiority requirements. See Zinser, 253 F.3d at 1186. The predominance analysis focuses on "the legal or factual questions that qualify each class member's case as a genuine controversy" to determine "whether proposed classes are sufficiently cohesive to warrant adjudication by representation." Amchem Prods., 521 U.S. at 623; see also Fed. R. Civ. P. 23(b)(3) (to certify a class, the court must find that "questions of law or fact common to class members predominate over any questions affecting only individual members").

This Court has previously identified five principles that guide the Court's predominance inquiry:

> First, and most importantly, the critical question that this Court must answer is whether common questions predominate over individual questions. Amgen, 133 S. Ct. at 1191. In essence, this Court must determine whether common evidence and common methodology could be used to prove the elements of the underlying cause of action. Id. Second, in answering this question, this Court must conduct a "rigorous" analysis. Comcast Corp., 133 S. Ct. at 1432. This analysis may overlap with the merits, but the inquiry cannot require Plaintiffs to prove elements of their substantive case at the class certification stage. Amgen, 133 S. Ct. at 1194. Third, this Court must determine not only the admissibility of expert evidence that forms the basis of the methodology that demonstrates whether common questions predominate. Ellis, 657 F.3d at 982. Rather, this Court must also determine whether that expert evidence is persuasive, which may require the Court to resolve methodological disputes. Id.; see also In re Rail Freight Fuel Surcharge Antitrust Litig., 725 F.3d [244, 255 (D.C. Cir. 2013)]. Fourth, the predominance inquiry is not a mechanical inquiry of "bean counting" to determine whether there are more individual questions than common questions. Butler v. Sears, Roebuck & Co., 727 F.3d 796, 801 (7th Cir. 2013)]. Instead, the inquiry contemplates a qualitative assessment, which includes a hard look at the soundness of statistical models. Id.; In re Rail Freight Fuel Surcharge Antitrust Litig., 725 F.3d at 255. Fifth, Plaintiffs are not required to show that each element of the underlying cause of action is susceptible to classwide proof. Amgen, 133 S. Ct. at 1196. Rather, they need only show that common questions will predominate with respect to their case as a whole. Id.

In re High-Tech Empl. Antitrust Litig., 985 F. Supp. 2d 1167, 1186–87 (N.D. Cal. 2013). In High-Tech, the Ninth Circuit denied the defendants' petition under Rule 23(f) for review of the Court's order applying the foregoing framework to grant class certification. See In re High-Tech Empl. Antitrust Litig., No. 13-80223, ECF No. 18 (9th Cir. Jan. 14, 2014).

2. Analysis

Plaintiffs argue that common issues predominate in the proposed classes for which they seek certification under Rule 23(b)(3). Specifically, Plaintiffs claim that because of the common issues about defect and liability, "one or more of the central issues in the action are common to the class and can be said to predominate." Mot. at 16 (citing *Guido v. L'Oreal USA, Inc.*, 2013 WL 3353857, at *9 (C.D. Cal. July 1, 2013)).

Ford argues that common issues do not predominate over individual issues for several reasons. First, Ford argues that the EPAS systems in the class vehicles do not suffer from a common defect. Second, Ford argues that Plaintiffs have not shown that materiality and reliance, which are relevant to Plaintiffs' CLRA and negligent misrepresentation claims, are susceptible to proof by common evidence. Third, Ford argues that Plaintiffs cannot prove their fraudulent

concealment or CLRA claims using common evidence because Ford's knowledge about the alleged defect varied between class vehicles and over the class period. Fourth, Ford argues that Plaintiffs cannot show on a common basis that class vehicles were unmerchantable. Fifth, Ford argues that Plaintiffs have not presented a damages model that aligns with Plaintiffs' legal theory. Each of Ford's arguments applies to both the New Vehicle Class and the Out-of-Pocket Class. The Court addresses each of these arguments in turn.[5] Ultimately, as discussed below, the Court finds that although Plaintiffs have alleged a common defect, individual issues will predominate in determining reliance for Plaintiffs' CLRA and fraudulent concealment claims and Plaintiffs have not offered a damages model that is consistent with their theory of liability for any of the proposed classes or claims.

i. Common Defect (CLRA, Fraudulent Concealment, and Implied Warranty Claims)

Both parties agree that existence of a defect is an element of Plaintiffs' CLRA claim, fraudulent concealment claim, and implied warranty claim. Plaintiffs argue that they can prove this element of each claim on a class-wide basis because the EPAS systems installed in Class Vehicles suffer from a common defect: the inclusion of unreliable electro-mechanical relays.[6] Ford argues that Plaintiffs' allegations do not relate to a uniform defect that is susceptible to class-

[5] In its opposition, Ford also argues that Plaintiffs' Song-Beverly claims do not meet Rule 23(b)(3)'s predominance requirement because the proposed classes are overbroad. Specifically, Ford argues that the proposed classes include many class members who could not assert a claim under the Song-Beverly Act, which applies to "any new product or part thereof that is used, bought, or leased" in California "for use primarily for personal, family, or household purposes." Cal. Civ. Code § 1791(a). However, as discussed above, Plaintiffs concede that the classes should be revised to avoid this overbreadth, and therefore the Court need not reach Ford's argument.

[6] In their Third Amended Complaint, Plaintiffs discuss various possible problems with the Class Vehicles' EPAS systems and allege that "[t]hese defects, individually and/or collectively, render the EPAS System prone to failure." TAC ¶ 79. However, Plaintiffs seek class certification based only on the theory that "use of the [electromechanical] relays in an EPAS system is the design defect common to all class vehicles." Opp. at 4; see also Mot. at 1–2 ("This case centers on . . . the "poor design" of the [EPAS] systems in all of the 2010-2012 model-year Fusion and 2012–2014 model-year Focus vehicles at issue here. . . . When developing the requirements for its EPAS system, Ford . . . ignored sound engineering judgment by incorporating unreliable electromechanical relays, which are foreseeably prone to failure, into the design."). At the December 8, 2016 hearing, Plaintiffs confirmed that their claims now allege this single design defect. Hr'g Tr. at 18–19.

wide proof. Instead, Ford claims, failure of the EPAS system is due to several unrelated failures that are not susceptible to common proof.

As discussed above, the EPAS systems in Class Vehicles include two electro-mechanical relays: a "link relay" and a "star point" relay. Ex. B, at 28. These relays sometimes experience "faults," meaning the circuits open and power is cut off at unexpected times. Ex. B, at 36–40. These faults are indicated by "diagnostic trouble codes" to assist in diagnosis and repair. A code number B43 indicates a fault in the link relay, and a code number B3A indicates a fault in the star point relay. Ex. B, at 40; Ex. 2, at 8.

Ford argues that Plaintiffs and their expert incorrectly assume that every fault in either relay indicates a failure of the relay itself. Ford claims that this is mistaken; even if the electro-mechanical relays in the EPAS system often experience faults, this is not because the relays themselves are defective. Instead, these faults are a normal and proper response to the relays detecting a failure *elsewhere* in the EPAS system. *See* Opp. at 3 ("These relays are designed to open when certain faults are detected in the EPAS system, cutting off power and returning the vehicle to manual steering.") The "root causes" of the relay faults, Ford argues, include various problems such as [redacted] Opp. at 5; Deposition of Matthew Surella, Ex. G to Opp., at 167:19–170:24. Thus, Ford argues, the question whether the EPAS system was defectively designed is not susceptible to common proof because the relay faults do not have a common cause.

Plaintiffs' legal theory, as discussed above, is that the EPAS systems in class vehicles are defective because they incorporate unreliable electro-mechanical relays. To prove this theory, Plaintiffs intend to use evidence about the design of the EPAS system and the relays, which are substantially the same for all class vehicles. *See* Ex. 2, at 8 ("The Class Vehicles' EPAS systems use electro-mechanical relays, which are the same in all of the Class Vehicles."); Ex. B, at 10 ("The EPAS system in the proposed class of vehicles is designed with two electro-mechanical relays.").

The Ninth Circuit faced a similar situation in *Wolin v. Jaguar Land Rover North America,*

LLC, 617 F.3d 1168 (9th Cir. 2010). As discussed above, in Wolin, the plaintiffs argued that certain vehicles were defective because the vehicles had a "defective alignment geometry" that caused the tires to wear more quickly than usual. Id. at 1170. The defendant argued that common issues did not predominate for the purposes of class certification because "the evidence w[ould] demonstrate that the prospective class members' vehicles do not suffer from a common defect, but rather, from tire wear due to individual factors such as driving habits and weather." Id. at 1173.

The Ninth Circuit rejected the defendant's argument and noted that the plaintiffs "assert[ed] that the defect exists in the alignment geometry, not in the tires, [and] that Land Rover failed to reveal material facts in violation of consumer protection laws." Id. The Ninth Circuit held that "[a]lthough individual factors may affect premature tire wear, they do not affect whether the vehicles were sold with an alignment defect" and thus "all of [the plaintiffs'] allegations are susceptible to proof by generalized evidence." Id.

The same is true in the instant case. Individual factors may affect the performance of the EPAS systems in different class vehicles, but these individual factors do not affect the ultimate question whether the vehicles were sold with a defective EPAS system. Like the defendant in Wolin, what Ford argues in the instant case "is whether class members can win on the merits." Id. Plaintiffs argue that the EPAS systems are defective because they incorporate electro-mechanical relays that are unreliable because they are subject to thermal expansion, mechanical fatigue, and vibration, and are "very sensitive to manufacturing variability." Mot. at 4; Pifko Decl. at ¶ 16, Ex. 15 to Mot. at p. 114. Ford, on the other hand, contends that "there is no basis for the contention that simply using [electro-mechanical] relays . . . was a 'design defect.'" Opp. at 13.

The Court need not decide at this stage which party is correct. See Amgen Inc. v. Connecticut Retirement Plans and Trust Funds, 133 S. Ct. 1184, 1194–95 (2013) ("Merits questions may be considered to the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied."). In order to determine whether Rule 23(b)(3)'s predominance requirement is met, the Court needs only to consider Plaintiffs' theory of the case and the type of evidence that Plaintiffs will use to prove this

theory. Plaintiffs' allegations are that Class Vehicles suffered from a single design defect, and as in Wolin, whether this allegation is true can be proven on a common basis. Thus, Ford's argument that there was no common defect does not defeat predominance for Plaintiffs' CLRA, fraudulent concealment, and implied warranty claims under Rule 23(b)(3).

ii. Materiality and Reliance (CLRA and Fraudulent Concealment Claims)

Next, the Court addresses Ford's argument that Plaintiffs have not shown that materiality and reliance, which both parties agree are elements of Plaintiffs' CLRA and fraudulent concealment claims, are susceptible to common evidence. Specifically, Ford argues that extensive individual inquiries will be necessary to decide whether the alleged omissions were material to class members and whether class members "took action" based on these omissions or "would have acted differently had a required disclosure been made." Opp. at 18.

Plaintiffs argue that materiality and reliance are subject to common proof based on the Ninth Circuit's decision in Daniel v. Ford Motor Co., 806 F.3d 1217 (9th Cir. 2015).[7] According to Daniel, materiality can be determined on an objective standard because under the California Supreme Court's decision in Tobacco II, "[a]n omission is material if a reasonable consumer 'would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question.'" Daniel, 806 F.3d at 1225 (quoting In re Tobacco II Cases, 46 Cal. 4th 298 (2009)). Thus, contrary to Ford's suggestion, in the instant case the Court will not need to consider purchasing preferences on an individual basis to determine materiality. Instead, materiality can be determined on a classwide basis using a "reasonable consumer" standard. Id.

Additionally, under Daniel, a court can often infer reliance. Id. at 1225 ("That one would have behaved differently can be presumed, or at least inferred, when the omission is material.") (citing Tobacco II, 46 Cal. 4th 298). However, the Ninth Circuit has also held that the presumption

[7] Ford seeks to distinguish Daniel on the grounds that Daniel involved summary judgment, not class certification. Opp. at 18. However, although Daniel was decided on summary judgment, 806 F.3d at 1220, Daniel discussed what type of proof is necessary to show materiality and reliance, which is directly relevant to the question of whether this proof can be shown on a common basis. Therefore, the Court may properly look to Daniel in deciding whether class certification is appropriate.

of reliance is not always appropriate. In Mazza v. American Honda Motor Company, 666 F.3d 581 (9th Cir. 2012), the Ninth Circuit held that the district court was wrong to presume that class members relied on particular omissions and misleading statements by Honda regarding Honda's Collision Mitigation Braking System. The Ninth Circuit held that although a presumption of reliance is sometimes appropriate, such a presumption was unjustified in Mazza for two reasons. First, "the limited scope of th[e] advertising" that was allegedly deceptive and allegedly omitted pertinent information "ma[de] it unreasonable to assume that all class members viewed" the advertisements. Id. at 596. Second, the advertisements "d[id] not deny that limitations exist" in the system, and thus even class members who were exposed to the campaign were unlikely to have relied on an expectation that the system would work without flaws. Id. at 596.

Plaintiffs argue that Mazza is inapplicable because the instant case involves Ford's omissions despite a duty to disclose, rather than misleading advertising. Reply at 10 n.8. However, the holding in Mazza cannot be so limited; Mazza itself involved alleged omissions as well as allegedly misleading advertising. 666 F.3d at 585 ("Plaintiffs allege that certain advertisements misrepresented the characteristics of the [Collision Mitigation Braking System] and omitted material information on its limitations."). More generally, in the context of a case involving both misleading statements and omissions, the Ninth Circuit has held that if class members "were exposed to quite disparate information from various representatives of the defendant," a presumption of reliance may not be justified. Stearns v. Ticketmaster Corp., 655 F.3d 1013, 1020 (9th Cir. 2011).

In the instant case, class members were not exposed to uniform representations. Most importantly, as Ford points out, a warning about sudden EPAS system failure was present in the owner's manuals for all class vehicles, and it would require extensive individualized inquiries to know which class members had the opportunity to read these portions of the owner's manuals before purchasing their vehicles. Ex. Q to Opp., at 5–6 ("The EPS has diagnostics checks that continuously monitor the EPS to ensure proper operation of the electronic system. When an electronic error is detected, the message POWER STEERING ASSIST FAULT will be displayed

in the message center. If this happens, stop the vehicle in a safe place, and turn off the engine." . . . "If your vehicle loses electrical power while you are driving . . ., you can steer the vehicle manually, but it takes more effort. Extreme continuous steering may increase the effort it takes for you to steer.").

Plaintiff argues that these disclosures were insufficient because they did not specifically warn that the EPAS systems in Class Vehicles were defective for including electro-mechanical relays. Reply at 9. However, as discussed below, Plaintiffs argue that they were harmed and suffered damages because they paid more for EPAS systems than they would have paid if they had known that the EPAS systems posed a danger because they might fail suddenly. Mot. at 22 ("Plaintiffs' theory of harm is that because Ford failed to disclose known defects in vehicles' EPAS system to Class members, which put their safety at risk, Ford unlawfully forced Class members to accept a risk they did not bargain for.") (quoting Ex. 43 at 293). Thus, even though Ford did not disclose the specific cause of the defect in the owner's manual, Ford did disclose that the EPAS systems might fail and pose a safety danger. A class member who read the owner's manual may therefore have no damages.[8]

Like the class members in Mazza, a class member who read the warnings in Class Vehicles' owner's manuals would be aware that "limitations exist" and that the EPAS system may fail unexpectedly. Mazza, 666 F.3d at 596. Additionally, as in Mazza, the information to which class members were exposed was not uniform because some unknown number of class members was exposed to Ford's warnings in the Class Vehicles' owner's manuals. See Darisse v. Nest Labs, Inc., 2016 WL 4385849, at *6 (N.D. Cal. Aug. 15, 2016) (denying class certification where "[t]he representations were not uniform, and not all of them were misrepresentations"). Furthermore, Plaintiffs have not shown whether consumers read the manuals before purchase or

[8] Plaintiffs' argument that Ford should have disclosed the specific cause of the defect is also undercut by Plaintiffs own complaint, which asserts five different causes of the defect that "individually and/or collectively, render the EPAS System prone to failure, causing marked difficult in steering the car." TAC ¶ 79. Only in their motion for class certification have Plaintiffs narrowed the cause of the defect to the existence of electro-mechanical relays in the EPAS systems.

whether Ford dealerships discuss the contents of owner's manuals in a sufficiently uniform way that the Court can determine on a classwide basis whether class members knew about the warnings in the owner's manuals. See English v. Apple Inc., 2016 WL 1188200 (N.D. Cal. Jan. 5, 2016) ("English has not shown that the way in which Apple employees talk about the service plans is sufficiently uniform to support an inference of classwide reliance or materiality."). In these circumstances, the Court finds that as in Mazza, in the instant case class members were exposed to "quite disparate information," some of which explicitly acknowledged the limitations of the EPAS systems, and thus a presumption of reliance is inappropriate.

Therefore, in the instant case the Court finds that "the issue of . . . reliance is a matter that would vary from consumer to consumer," Webb v. Carter's Inc., 272 F.R.D. 489, 502 (C.D. Cal. 2011) (quoting In re Vioxx Class Cases, 180 Cal.App.4th 116 (2009)), and that individual issues will predominate over common issues in determining reliance for the purposes of Plaintiffs' CLRA and fraudulent concealment claims. This alone warrants the denial of class certification for Plaintiffs' CLRA and fraudulent concealment claims.

iii. Variations in Ford's Knowledge (CLRA and Fraudulent Concealment Claims)

As part of Plaintiffs' CLRA and fraudulent concealment claims, Plaintiffs allege that Ford knew as early as 2007 that Class Vehicles' EPAS systems were defective because they included unreliable electro-mechanical relays and that Ford unlawfully failed to disclose this fact. However, Ford argues that its knowledge cannot be proven using common evidence because Ford's knowledge varied over the class period. Specifically, Ford claims that "when loss-of-assist complaints began to increase, Ford had to investigate many possible causes, and this took time." Opp. at 17. Ford continued its investigation throughout the class period, and thus what Ford knew about the EPAS system changed over time. Therefore, Ford claims, the "date of purchase will create an individualized issue" and the Court will inevitably be overwhelmed deciding what Ford knew at different points in time between 2010 and 2014. Opp. at 17.

Plaintiffs allege and have produced evidence that well before the beginning of the class

period, Ford knew that the EPAS systems were defective because they included unreliable relays. See Ex. 44 to Mot. (providing a timeline of Ford emails and internal documents discussing Ford's knowledge of problems with the relays). In Dr. van Schoor's expert report, Dr. van Schoor refers to several internal Ford emails from as early as 2008 and 2009 stating that Ford "may eliminate this relay" in the future, concluding that "this relay is a poor design" that should "not [be] allow[ed] . . . in our products," and suggesting that "the thousands of hours chasing relays so far justifies us taking a hard look" at "alternative designs that delete the motor and link relay." Ex. 2, at 15–16 (discussing emails dated March 28, 2008, September 4, 2009, and September 25, 2009); see also Ex. 2, at 13 ("It is clear from my review of the documents and deposition testimony that Ford believe[d] that safer, more reliable alternatives were available at least as early as 2007 and throughout the time period when the Class Vehicles were sold to the public."). Additionally, as this Court has held, it is reasonable to infer that these emails "were pr[ec]eded by an accretion of knowledge by Ford."[9] ECF No. 69, at 18 (quoting In re MyFord Touch Consumer Litig., 46 F. Supp. 3d 936, 958 (N.D. Cal. 2014)).

In short, Plaintiffs' allegation is that Ford knew that the EPAS systems were defective for including unreliable electro-mechanical relays well before the first consumer purchased a class vehicle sometime in late 2009. See Opp. at 3 ("Production of a particular 'model year' begins during the previous year, usually in June."). The facts relevant to this allegation, and Ford's knowledge of these facts, did not change over time. See Ex. B, at 10 ("The EPAS system in the proposed class of vehicles is designed with two electro-mechanical relays.").

Here again, Ford's argument is essentially that Plaintiffs cannot succeed on the merits of their claims. Ford argues that "Ford's knowledge varied over time . . . because there was never a single common 'defect' at issue, but rather a series of engineering challenges and responses." Opp. at 1. However, as discussed above and as the Ninth Circuit held in Wolin, at the class certification stage the Court should decide only whether Plaintiffs' allegations are susceptible to generalized

[9] This inference is particularly appropriate in this case because one of the emails discussed the "thousands of hours chasing relays so far." Ex. 2 to Mot., at 16.

proof. Plaintiffs allege that the EPAS systems were defective because they included electromechanical relays, and Ford's knowledge about the appropriateness of using electromechanical relays did not change substantially over the class period. Additionally, Ford's argument that its knowledge varied over time is undercut by its argument that it consistently disclosed the risk of EPAS system failure in the owner's manuals of each of the Class Vehicles.[10] Opp. at 5–6, 17. Thus, the Court finds that Plaintiffs' "allegations are susceptible to proof by generalized evidence" with respect to the knowledge element of Plaintiffs' CLRA and fraudulent concealment claims. Id.

iv. Unmerchantability (Implied Warranty Claim)

Ford also argues that Plaintiffs' claims for breach of the implied warranty of merchantability under the Song-Beverly Act and the Magnuson-Moss Act are not susceptible to common proof because whether Class Vehicles were unmerchantable is an individual issue. Opp. at 15–16. Ford argues that under California law, a product is unmerchantable only if the alleged defect is "substantially certain to result in malfunction during the useful life of the product," Am. Honda Motor Co. v. Superior Court, 199 Cal. App. 4th 1367, 1375 (2011). As discussed above, Ford claims that several features of the EPAS system varied throughout the class period. Ford argues that this variation in features may affect the likelihood that a defect will manifest. Opp. at 16. Ford also claims, without elaboration, that manifestation of the alleged defect may differ between the Focus and Fusion. Id.

Under Wolin, "proof of the manifestation of a defect is not a prerequisite to class certification." 617 F.3d at 1173; see also Keegan v. Am. Honda Motor Co., 284 F.R.D. 504, 536

[10] Ford argues that the warnings in the owner's manual are relevant to Ford's knowledge because a class member who read the owner's manual could not establish that Ford's knowledge of the defect was "superior" to the consumer's knowledge, which Ford claims is necessary to establish a duty to disclose. Opp. at 17. However, as in Mazza, Ford's argument is more properly considered in the context of Plaintiffs' reliance than Ford's knowledge. See Mazza, 666 F.3d at 596 (considering the defendant's disclosures as part of the reliance inquiry). Therefore, as discussed above, the Court considers Ford's argument in the context of the reliance inquiry.

(C.D. Cal. 2012) ("Applying Wolin, and having considered the analysis in . . . American Honda Motor Co., the court cannot discern why, at the class certification stage, plaintiffs must adduce evidence that a defect is substantially certain to arise in all class vehicles during the vehicles' useful life."). However, as Plaintiffs agree, even under Wolin, the Court must still decide whether the "substantial certainty" question "c[an] be shown with common proof, which is the correct focus of Rule 23." Reply at 8 n.6.

Plaintiffs have produced evidence showing that "substantial certainty" will be a common question. For example, Dr. van Schoor's expert report states that "the EPAS systems used in the Class Vehicles are essentially the same. . . . Specifically, the electromechanical Link Relays in the Class Vehicles' EPAS system[s] are identical and the electromechanical Motor Relays (Star Point Relays) in the Class Vehicles' EPAS systems are identical." Ex. 2, at 9–10. Additionally, Ford's own engineer has admitted that the relays are essentially the same throughout the Class Vehicles, and that any differences between them are not material. See Deposition of Matthew Surrella, Ex. G to Opp., at 180 ("Q: . . . [F]or purposes of this relay issue, to the extent there are differences, they're not material to the issue, correct? MR. KELLY: Object to the form. THE WITNESS: The relays are the same, right? The relays, I've said multiple times, the relays are the same."). Furthermore, Ford has argued that the Class Vehicles' owner's manuals contained consistent warnings about the risk of a sudden failure in the Class Vehicles' EPAS systems. Opp. at 5–6, 17. Thus, the evidence suggests that the relays and the EPAS systems are likely to function and fail in the same way, and thus the "substantial certainty" of manifestation of a defect is an issue susceptible to common proof.

Ford seeks to undermine this evidence by suggesting that even if the "part numbers of the relays" are the same for all Class Vehicles, variations in the specifications of the EPAS systems in class vehicles and changes in procedure over time will present numerous individual issues in determining "the life of the relays and the probability of their failures in the field." Ex. B to Opp., at 60, 64. However, most of the variations and changes in procedure would have only a minor effect on manifestation. For example, Ford argues that the EPAS systems in the Focus and Fusion

are aligned slightly differently and have different sized motors. However, Ford has not explained how these differences might affect the probability of manifestation of a defect, and Ford's supplier's Rule 30(b)(6) representative described these differences between Fusion and Focus vehicles as "minor." TRW 30(b)(6) Deposition, Ex. 3 to Mot., at 54. Similarly, changes in procedure—such as the use of gloves to prevent contamination and spot inspections for cracks in certain relay parts—may slightly affect defect manifestation, but the effect is likely to be small. Ex. 2, at 24–25.

Ford points to only one difference between Class Vehicles that may be significant. Specifically, Ford states that in 2012, Ford's supplier began using solid silver contacts instead of silver-plated contacts in the relays to reduce failures due to corrosion. Id. at 25. According to Ford's documents, and as Plaintiffs' expert agrees, short-term warranty returns for steering issues in Focus Vehicles were somewhat reduced after this change. Id. However, Plaintiffs' expert states that these measures were "inadequate" and Ford's Electric Power Steering Supervisor admitted that there was never a time during the class period "when the relay issues went away." Mrozek Depo. at 152. Thus, even if the issue of solid silver contacts does make a difference in whether there was a "substantial certainty" or defect manifestation, this one issue is unlikely to predominate over common issues, such as the function of the relays, which were "the same" for all Class vehicles. Ex. G to Opp., at 180.

In short, the variations that Ford points out, either individually or taken together, may have some effect on the likelihood that a defect would manifest in the Class Vehicles. However, it appears based on the evidence produced at this stage of the litigation that the most important issue regarding manifestation is the basic function of both link relays and motor relays, which is a common issue. See Keegan, 284 F.R.D. at 537 (certifying a class asserting a claim under the Song-Beverly Act because although the vehicles at issue had somewhat different specifications, these differences "did not necessarily lead to tremendous variation in the way in which class vehicles manifested the alleged defect"). Indeed, one of Ford's own engineers conceded that the differences between the EPAS systems in Class Vehicles are "not material" for "the purposes of this relay

issue." Ex. G to Opp. at 180. Thus, it appears that although individual issues will exist in determining merchantability, common issues will predominate.

v. Damages Model (CLRA, Fraudulent Concealment, and Implied Warranty Claims)

Finally, Ford argues that although Plaintiffs seek damages as part of all three of their CLRA, fraudulent concealment, and implied warranty claims, Plaintiffs have failed to "offer a damages model capable of measuring, on a common basis, only the economic harm actually caused to class members by alleged misconduct." Opp. at 20. Specifically, Ford claims that the damages model offered by Plaintiffs' expert Dr. Arnold does not provide a model of damages that conforms to Plaintiffs' legal theory. For the reasons discussed below, the Court agrees with Ford's argument.

Although individual damages calculations alone do not make class certification inappropriate, see Leyva v. Medline Indus., Inc., 716 F.3d 510, 514 (9th Cir. 2013) ("[T]he amount of damages is invariably an individual question and does not defeat class action treatment."), the United States Supreme Court has held that Plaintiffs have the burden to offer a damages model showing that "damages are susceptible of measurement across the entire class for purposes of Rule 23(b)(3)." Comcast Corp. v. Behrend, 133 S. Ct. 1426, 1433 (2013). Such a damages model "must measure only those damages attributable to" Plaintiffs' theory of liability. Id. If Plaintiffs do not offer a plausible damages model that matches their theory of liability, "the problem is not just that the court will have to look into individual situations to determine the appropriate measure of damages; it is that Plaintiffs have not even told the Court what data it should look for." In re MyFord Touch Consumer Litig., Case No. 3:13-cv-03072-EMC, Dkt. 279 (N.D. Cal. Sept. 14, 2016). Thus, the Court can certify the proposed classes only if Plaintiffs offer a model of damages for each class that matches Plaintiffs' legal theory of liability.[11]

The theory of damages that Plaintiffs offer is the theory described by their expert witness

[11] The Court need not address the Current Owner/Lessee Class, because for the class Plaintiffs seek only injunctive relief and certification under Rule 23(b)(2).

Dr. Arnold. As Dr. Arnold explains, and as Plaintiffs state explicitly in their motion for class certification, "Plaintiffs' theory of harm is that because Ford failed to disclose known defects in the vehicles' EPAS system to Class members, which put their safety at risk, Ford unlawfully forced Class members to accept a risk they did not bargain for." Ex. 43 to Mot., at 297. Dr. Arnold states that "[f]rom an economics perspective, [members of the New Vehicle Class] were injured at the time of purchase because they were not informed about the known defects in the accused EPAS system," and therefore are entitled to "the amount they paid for a defective EPAS system, as a component of the overall price of a Class vehicle." Id. at 293.

Because Plaintiffs' theory of harm is that Ford forced class members to accept a risk they did not bargain for, Dr. Arnold states that an "expected utility" framework is the proper model for class members' damages. Id. at p. 294. In explaining this framework, Dr. Arnold states that consumers discount the amount they are willing to pay for a product based on their perception of how likely the product is to be defective. Id. at 294. For example, if consumers know that a product is 60% likely to fail, then consumers will discount the amount they would be willing to pay for the product if it were certain not to fail by 60%. Id. at 294–95. An "expected utility" framework measures consumers' perceptions of the risk of failure and calculates consumers' willingness to pay based on these measurements.

Thus, Dr. Arnold concludes, class members would not have agreed to pay full price for an EPAS system in their vehicles if class members had known that there was a likelihood that the EPAS systems would fail. Id. at 293. Instead, class members would have discounted the price they were willing to pay by the probability that the EPAS systems would fail and paid only for the "expected utility" of the EPAS systems. Id. at 294.

Dr. Arnold then goes further and states that class members would likely have been willing to pay less than this "expected utility" for two reasons. First, Dr. Arnold points out that if an EPAS system fails, a consumer suffers "more than simply the failure to receive the value the consumer places on the product." Id. at 296. Instead, the consumer also faces added "disutility" because when an EPAS system fails, it may endanger the consumer's safety. Id. Second, Dr. Arnold states

that because most consumers are "risk averse," consumers would pay less than the "expected utility" because they are forced to take on risk. Id. ("[A] risk-averse customer would prefer to obtain $40 with certainty instead of assuming a risk that may yield $100 with 40 percent chance and $0 with 60 percent chance.").

Ford agrees that calculating damages based on expected utility and disutility because of safety concerns and risk aversion is economically sound. However, as Ford points out, although Dr. Arnold states that expected utility is the correct model to apply, Dr. Arnold does not apply the expected utility model at all. Indeed, in his deposition testimony, Dr. Arnold explicitly stated, "I'm not calculating the expected value." Deposition of Dr. Jonathan Arnold, Ex. R to Opp., at 75. Instead, Dr. Arnold's report "quantif[ies] damages in this case based on the amount Ford charged its dealers for the EPAS systems." Ex. 43 to Mot., at p. 298. In other words, Dr. Arnold's report offers the total price of a new EPAS system as the only measure of damages.

As Plaintiffs concede, this conclusion assumes that "the average reasonable consumer would ascribe $0 value to the defective [EPAS] system." Reply at 13. Plaintiffs attempt to defend this conclusion by arguing that, "as Dr. Arnold explains in his report," valuing the EPAS system at $0 is reasonable "given the 'disutility' associated with the risk of a dangerous, sudden failure of the EPAS system." Id.

However, contrary to Plaintiffs' assertion, Dr. Arnold's report never states that an average consumer would value the EPAS system at $0. Instead, Dr. Arnold states only that an average consumer would discount the price for an EPAS system by some unspecified amount because of the risk of a failure and the disutility associated with safety concerns and risk aversion. Dr. Arnold never attempts to quantify any of those factors—the risk of failure or the disutility associated with safety concerns—and never concludes that discounting the price of an EPAS system for all of those reasons yields a value of $0. See Caldera v J.M Smucker Co., 2014 WL 1477400, at *4 (C.D. Cal. Apr. 15, 2014) ("[A] full refund would only be appropriate if not a single class member received any benefit from the products.").

Moreover, Ford has produced evidence showing that the expected failure rate for the Class

Vehicles due to the use of electro-mechanical relays was at most "approximately 1 percent" and that when accidents did occur due to EPAS system failures, "[n]one of the injury claims indicated medical attention was required." National Highway Transportation Safety Administration, ODI Closing Resume, Ex. J to Opp., at 2. In these circumstances, it is unlikely that "not a single class member received any benefit from" the EPAS systems. Caldera, 2014 WL 1477400, at *4.

The Court faced a similar situation in Brazil v. Dole Packaged Foods, LLC, 2014 WL 2466559 (N.D. Cal. May 30, 2014). In Brazil, the plaintiffs argued that Dole had made false and misleading statements on food labels. In support of their motion for class certification, the plaintiffs submitted an expert damages report that concluded that the plaintiffs should receive a full refund for the "entire purchase . . . price of the challenged product." Id. at *15. The Court rejected this model, finding that the proper measure of damages was "[t]he difference between what the plaintiff paid and the value of what the plaintiff received." Id. The Court concluded that the "full refund model is deficient because it is based on the assumption that consumers receive no benefit whatsoever from purchasing the identified products." Id. The plaintiffs in Brazil had given no reason to believe that this assumption was correct, and therefore the Court determined that a damages model based on that assumption could not carry the plaintiffs' burden to show that damages could be measured on a class-wide basis. Id. The Ninth Circuit affirmed this aspect of the Court's decision and held that because damages are properly measured as "the difference between the prices customers paid and the value of the fruit they bought . . . , a plaintiff cannot be awarded a full refund unless the product she purchased was worthless." Brazil v. Dole Packaged Foods, 2016 WL 5539863, at *2 (9th Cir. Sept. 30, 2016). Therefore, the Ninth Circuit found that "[b]ecause Brazil did not explain how this [price] premium could be calculated with proof common to the class, the district court did not abuse its discretion by granting Dole's motion to decertify." Id. at *3.

The same is true in the instant case. As Plaintiffs recognize, Dr. Arnold's calculation of damages relies on the assumption that the true value of the EPAS systems was $0. However, Dr. Arnold never even states, let alone justifies, the conclusion that this assumption is correct.

Plaintiffs have stated that at trial, they "will show that each class member was injured at the point of sale upon paying a premium price." Reply at 13. However, neither Plaintiffs nor their expert make any attempt to demonstrate what this "premium" is, or how the "premium" could be determined on a class-wide basis. See also Vaccarino v. Midland Nat. Life Ins. Co., 2014 WL 572365, at *10 (C.D. Cal. Feb. 3, 2014) (denying class certification on a Unfair Competition Law claim because "plaintiffs' damages model . . . does not compare what the [products at issue] were worth to what plaintiffs paid.").

Plaintiffs argue that another court recently accepted this same damages methodology in another report by Dr. Arnold. In re MyFord Touch Consumer Litig., Case No. 3:13-cv-03072-EMC, Dkt. 279 at 8 (N.D. Cal. Sept. 14, 2016). However, the MyFord Touch court only accepted Dr. Arnold's report in conjunction with a second report by another expert that faithfully measured class members' expected utility. In the instant case, in contrast, Plaintiffs have not submitted any damages report that even attempts to measure consumers' expected utility, which is the basis of Plaintiffs' theory of liability. Additionally, MyFord Touch involved an alleged defect that caused the onboard computer system to freeze and crash. Id. at 3. This is the type of defect that is visible to consumers and about which consumers are likely to have preferences. In the instant case, in contrast, consumers are probably not aware of the use of electro-mechanical relays in their vehicles' EPAS systems, and thus expected utility will be significantly more difficult to measure. Thus, the Court finds that MyFord Touch is not persuasive precedent showing that damages can be measured on a class-wide basis using only Dr. Arnold's unstated and unexplained assumption that the EPAS systems are worth $0.

Thus, Plaintiffs have failed to produce a damages model that is "consistent with [their] liability case." Comcast, 133 S. Ct. at 1433. Ironically, Dr. Arnold's report itself accurately describes what such a theory might look like. As Dr. Arnold states, a damages model consistent with Plaintiffs' theory of harm in the instant case would attempt to measure the expected utility of a defective EPAS system, as well as the disutility that an average consumer attributes to safety issues and risk aversion. As in MyFord Touch, Plaintiffs could have used survey data and other

empirical studies to show how consumers value the EPAS systems with and without the alleged defect. See Case No. 3:13-cv-03072-EMC, Dkt. 279 at 8. ("Dr. Boedeker conducted a survey and employed a conjoint analysis to infer the value customers placed on the [computer system] at the time of purchase, how this value would have changed had customers known of the [computer system]'s defects, and how this value would have changed if customers knew these defects may affect their ability to safely operate their vehicles."). However, Dr. Arnold offers no such data. Instead, after stating what a proper damages model would look like, Dr. Arnold then offers an entirely different model that does not attempt to measure expected utility, but instead assumes without even explicitly stating that the expected utility is $0.

Plaintiffs have only produced one damages model in support of class certification, and that model "falls far short of establishing that damages are capable of measurement on a classwide basis." Id. Therefore, plaintiffs "cannot show Rule 23(b)(3) predominance: Questions of individual damage calculations will inevitably overwhelm questions common to the class." Comcast, 133 S. Ct. at 1433. For this reason, the Court finds that Plaintiffs' New Vehicle Class does not meet Rule 23(b)(3)'s predominance requirement.

Similarly, the Out-of-Pocket Class seeks reimbursement of the full amount paid for replacement or repair of Class Vehicles' EPAS systems. Reply at 11; Hr'g Tr. at 30:11–12 ("The damages model is, what you pay is what you get."). However, as with the New Vehicle Class, a damages model based on full reimbursement assumes that the replacement EPAS systems or the repairs were completely valueless. Hr'g Tr. at 32:1 (explaining that Plaintiffs' theory of harm for the Out-of-Pocket Class is essentially "the same thing" as Plaintiffs' theory of harm for the New Vehicle Class). Recovering the full amount of replacement and repair costs would be justified only "if not a single class member received any benefit" from those replacements or repairs. Caldera, 2014 WL 1477400, at *4. Plaintiffs provide no support, either in Dr. Arnold's report or elsewhere, for the unstated assumption that no class member received any benefit from the replacements or repairs.

Similarly, Plaintiffs stated at the December 8, 2016 hearing that the theory of liability for

the Out-of-Pocket Class is "the same thing" as Plaintiffs' theory of liability for the New Vehicle Class, which was based on consumers' expected utility. Hr'g Tr. at 32:1. As explained above, a damages model based on full reimbursement does not match a theory of liability based on expected utility. Therefore, as with the New Vehicle Class, Plaintiffs have not offered a model for the Out-of-Pocket Class that "even attempts" to "measure only those damages attributable to [Plaintiffs'] theory" of liability. Comcast, 133 S. Ct. at 1433. The failure of Plaintiffs' damages model alone warrants denial of Rule 23(b)(3) class certification.

vi. Summary

Under Mazza a presumption of reliance is inappropriate because an unknown number of class members saw warnings regarding EPAS system failure in the owner's manual for Class Vehicles. Thus, the Court would be forced to conduct individual inquiries to discover which class members read the owner's manual and which did not. Moreover, Plaintiffs' damages model is inconsistent with their theory of liability and thus Plaintiffs "cannot possibly establish that damages are susceptible of measurement across the entire class for purposes of Rule 23(b)(3)." Comcast, 133 S. Ct. at 1433. Because Plaintiffs' proposed New Vehicle Class and proposed Out-of-Pocket Class do not meet Rule 23(b)(3)'s predominance requirement, the Court DENIES Plaintiffs' motion for class certification under Rule 23(b)(3).[12]

C. Rule 23(b)(2)

Plaintiffs also move for class certification under Rule 23(b)(2). Plaintiffs seek to certify under (b)(2) only the "Current Owner/Lessee Class," which consists of California residents who currently own or lease a 2010-2012 Ford Fusion or 2012-2014 Ford Focus Vehicle that the individual purchased new in California for personal, family, or household purposes. See supra at 10; Mot. at 35. Moreover, Plaintiff asserts that they only move to certify this class's claims for injunctive relief. Reply at 21. Specifically, "Plaintiffs seek a mandatory injunction requiring Ford to uniformly repair and/or replace the defective EPAS system in each of the Class Vehicles of the

[12] Because Plaintiffs have not met the predominance requirement under Rule 23(b)(3), the Court need not consider whether Plaintiffs have met Rule 23(b)(3)'s superiority requirement.

Current Owner/Lessee Class." Mot. at 35.

1. Standard for Class Certification Under Rule 23(b)(2)

"Rule 23(b)(2) allows class treatment when 'the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Dukes, 564 U.S. at 360 (quoting Fed. R. Civ. P. 23(b)(2)). "[U]nlike Rule 23(b)(3), a plaintiff does not need to show predominance of common issues or superiority of class adjudication to certify a Rule 23(b)(2) class." In re Yahoo Mail Lit., 308 F.R.D. 577, 587 (N.D. Cal. 2015). Rather, "[i]n contrast to Rule 23(b)(3) classes, the focus [in a Rule 23(b)(2) class] is not on the claims of the individual class members, but rather whether [Defendant] has engaged in a 'common policy.'" Id. at 599.

2. Analysis

Ford's primary argument in response to Plaintiffs' motion to certify a Rule 23(b)(2) class is that class certification is inappropriate under Rule 23(b)(2) because this Court has already dismissed Plaintiffs' claims for equitable and injunctive relief based on the fact that Plaintiffs have an "adequate remedy at law." Opp. at 33; ECF No. 48, at 10. In their Reply, Plaintiffs admit that the Court previously dismissed all of Plaintiffs' UCL, FAL, CLRA, and unjust enrichment claims for equitable relief because Plaintiffs had an "adequate remedy at law." However, Plaintiffs assert that this is not fatal to their motion for class certification because Plaintiffs are now seeking injunctive relief under the Magnusson-Moss Act and the Song-Beverly Act, as alleged in Plaintiffs' TAC, and the Court has not ruled yet on whether Plaintiffs have an adequate remedy at law for these Magnusson-Moss Act and Song-Beverly Act claims. Reply at 21; see TAC ¶¶ 140–170.

However, the Magnusson-Moss Act claim in Plaintiffs' TAC contains no allegations regarding injunctive or equitable relief. See generally TAC ¶¶ 140–153. Instead, Plaintiffs allege in their Magnusson-Moss Act claim only that "California Plaintiffs, individually and on behalf of the members of the California Class, seek all damages permitted by law, including diminution in value of their vehicles." TAC ¶ 153. Accordingly, the Court finds that Plaintiffs have not asserted

under the Magnusson-Moss Act any entitlement to injunctive relief, but have rather alleged only Plaintiffs' entitlement to monetary relief. See id. Plaintiffs thus cannot rely on the Magnusson-Moss Act thus in seeking class certification for injunctive claims.

In contrast, the Song-Beverly Act claim in Plaintiffs' TAC does mention "legal and equitable relief." Id. ¶ 169. At the December 8, 2016 hearing on Plaintiffs' motion for class certification, Plaintiffs stated that this portion of the TAC was the ground for Plaintiffs' request for an injunction requiring Ford to "institute a recall or free replacement program and/or otherwise repair the Defective Vehicles." TAC at 39; Hr'g Tr. at 25–27. However, for the reasons discussed below, the Court finds that Plaintiffs have not met their burden to show that Rule 23(b)(2) certification is warranted for the Current Owner/Lessee Class's Song-Beverly Act claim.

Most importantly, as the Court held with regards to Plaintiffs' other equitable and injunctive claims, Plaintiffs have an "adequate remedy at law" for Ford's alleged violation of the Song-Beverly Act. See ECF No. 48, at 10. This is shown by Plaintiffs' own complaint, which seeks damages as a remedy for the same Song-Beverly Act violations for which Plaintiffs' seek an injunction.

Specifically, the Song-Beverly Act claim in Plaintiffs' TAC alleges that Defendant "breached the implied warranty of merchantability" and that this has caused "California Plaintiffs and members of the California Class to not receive the benefit of their bargain." TAC ¶ 165. Plaintiffs further allege that "members of the California Class received goods whose dangerous condition substantially impairs their value." TAC ¶ 167. In order to remedy these alleged violations, Plaintiffs allege that "members of the California Class are entitled to damages . . . ." TAC ¶ 169. However, in their class certification briefing, Plaintiffs argue that in addition to damages, they are also entitled to an injunction granting them replacement EPAS systems because they did not receive the "benefit of their bargain" when they purchased vehicles with defective EPAS systems. This is the same theory and cause of action as Plaintiffs' request for damages. Thus, as these allegations show, Plaintiffs have an obvious "adequate remedy at law" for Defendant's breach of implied warranty: "benefit-of-the-bargain" damages as requested in the

TAC.

Indeed, not only do Plaintiffs have an adequate remedy at law, Plaintiffs are seeking to certify a class asserting that adequate remedy at law. As discussed above, Plaintiffs are seeking to certify under Rule 23(b)(3) the "New Vehicle" Class's Song-Beverly Act claim for "benefit of the bargain" monetary damages. As Plaintiffs conceded at the hearing on Plaintiffs' class certification motion, the "Current Owner/Lessee Class" is a subclass of the "New Vehicle" class. Hr'g Tr. at 13:8–11. Thus, Plaintiffs contend that the same individuals who are entitled to a "mandatory injunction requiring Ford to uniformly repair and/or replace the defective EPAS system" are simultaneously entitled to monetary damages that remedy Plaintiffs' claimed harm of "not receiv[ing] the benefit of their bargain." TAC ¶ 165. In fact, Plaintiffs have admitted that the damages that they seek and the injunction that they seek are "alternative forms of relief." Hr'g Tr. at 25:14–15. Thus, Plaintiffs' own arguments demonstrate that the "Current Owner/Lessee" Class has an "adequate remedy at law," just as the Court held in dismissing Plaintiffs' other claims for injunctive and equitable relief. See ECF No. 69, at 30.

At the class certification hearing, the only authority that Plaintiffs offered in support of the proposition that they can receive a mandatory injunction requiring repair or replacement, despite having an adequate remedy at law, is the Song-Beverly Act's language that "[a]ny buyer of consumer goods who is damaged by a failure to comply with any obligation under this chapter . . . may bring an action for the recovery of damages and other legal and equitable relief." Cal. Civ. Code § 1794 (emphasis added); Hr'g Tr. at 28. However, Plaintiffs point to no caselaw, and the Court is aware of none, granting an injunction for a recall under similar circumstances. See also McManus v. Fleetwood Enterpr., Inc., 320 F.3d 545, 554 (5th Cir. 2003) (noting, where a proposed Rule 23(b)(2) class sought an injunction for supplemental braking equipment as a remedy for breach of an implied warranty, that the court "could find no case where injunctive relief was awarded under comparable circumstances"). To the contrary, California caselaw suggests that, because Plaintiffs' allege only breach of an implied warranty, Plaintiffs are not entitled under the Song-Beverly Act to have Ford replace their EPAS systems. Specifically, the

California Supreme Court has explained that a buyer's "right to replacement or restitution is qualified [in § 1794 of the Song-Beverly Act] by the phrase 'as set forth in subdivision (d) of section 1793.2" of the Song-Beverly Act, which states that "replacement/restitution remedy is available only for breach of an express warranty." Gavaldon v. DaimlerChrysler Corp., 90 P.3d 752, 804 (Cal. 2004) (emphasis added).

Class certification under Rule 23(b)(2) is inappropriate where, as here, "the ordinary relief for [plaintiff's] lawsuit would be money damages, not injunctive relief." McManus, 320 F.3d at 554; see also Walsh v. Ford Motor Co., 130 F.R.D. 260, 266 (D.D.C. 1990) (refusing to certify a (b)(2) class for a "recall and retrofit" of Ford vehicles because "monetary damages are more suitable in this litigation, particularly in view of the practical limitations which the proposed equitable relief presents"). As discussed above, Plaintiffs' TAC and class certification motions demonstrate that "the ordinary" and more appropriate relief for Plaintiffs' Song-Beverly Act claim is monetary damages, not a mandatory injunction requiring "Ford to uniformly repair and/or replace the defective EPAS system in each of the Class Vehicles." Mot. at 35; see also McManus, 320 F.3d at 554 ("[O]therwise inappropriate injunctive relief does not become appropriate for class treatment merely because the more permissive Rule 23(b)(2), as opposed to (b)(3), contemplates injunctive relief."); Walsh , 130 F.R.D. at 266.

Indeed, it is also unclear why Plaintiffs ask Ford to "uniformly repair and/or replace the defective EPAS system in each of the Class Vehicles," Mot. at 35, when Ford has already conducted a safety recall. In fact, Plaintiff Philips and Plaintiff Goodman both had their EPAS systems replaced as part of Ford's recall. ECF No. 97-5 at 192; ECF No. 95-4 at 2. Plaintiffs contend that Ford's recall is insufficient because "the recall simply replaces the defective relays" with "updated" electromechanical relays "which are equally defective." Reply at 16. Accordingly, Plaintiffs state that Ford should place "next generation systems" into their Class Vehicles. Id. However, Plaintiffs do not define "next generation systems." Id. Additionally, Plaintiffs provide no indication that their request that Ford place undefined "next generation" power-steering systems into older model vehicles is feasible. Thus, the Court finds that Plaintiffs

have not met their burden to establish that certification of an injunctive class under Rule 23(b)(2) is appropriate. Therefore, the Court DENIES Plaintiffs' motion for class certification under Rule 23(b)(2).

IV. DAUBERT MOTIONS

Defendants move to exclude the expert report and testimony of Dr. Arnold and the expert report and testimony of Dr. van Schoor in support of Plaintiff's Motion for Class Certification for failing to meet the standards required by Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), and Rule 702 of the Federal Rules of Evidence. ECF Nos. 196–97. The Court GRANTS Ford's motion to exclude the expert report and testimony of Dr. Arnold and DENIES Ford's motion to exclude the expert report and testimony of Dr. van Schoor.

When considering expert testimony offered pursuant to Rule 702, the trial court acts as a "gatekeeper" by "making a preliminary determination of whether the expert's testimony is reliable." Elsayed Mukhtar v. Cal. State Univ., Hayward, 299 F.3d 1053, 1063 (9th Cir. 2002) (overruled on other grounds by Estate of Barabin v. AstenJohnson, Inc., 740 F.3d 457, 467 (9th Cir. 2014)); see Kumho Tire Co. v. Carmichael, 526 U.S. 137, 150 (1999); Daubert, 509 U.S. at 597. Expert testimony is admissible if: (1) "the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;" (2) "the testimony is based on sufficient facts or data;" (3) "the testimony is the product of reliable principles and methods;" and (4) "the expert has reliably applied the principles and methods to the facts of the case." Fed. R. Evid. 702. "Shaky but admissible evidence is to be attacked by cross examination, contrary evidence, and attention to the burden of proof, not exclusion." Primiano v. Cook, 598 F.3d 558, 564 (9th Cir. 2010) (citing Daubert, 509 U.S. at 594, 596). The Ninth Circuit has approved of the application of the standard in Daubert to expert reports in support of or in opposition to motions for class certification. See Ellis v. Costco Wholesale Corp., 657 F.3d 970, 982 (9th Cir. 2011) ("In its analysis of Costco's motions to strike, the district court correctly applied the evidentiary standard set forth in Daubert.").

Ford does not argue that Dr. Arnold is unqualified to offer an expert opinion.[13] Instead, Ford moves to exclude the expert report of testimony of Dr. Arnold because Dr. Arnold has failed to apply valid economic methodology in calculating damages. As discussed above, the Court finds that the "expected utility" model that Dr. Arnold describes is economically sound. Nevertheless, the Court agrees with Ford that after describing an economically sound "expected utility" model, Dr. Arnold offers an analysis that does not apply this model. As Dr. Arnold stated in his deposition, he was "not calculating the expected value" of the allegedly defective EPAS systems, but instead was merely calculating "the amount that consumers paid for the EPAS." Deposition of Dr. Jonathan Arnold, Ex. 1 to ECF No. 196, at 74. As discussed above, the Court finds that this calculation does not follow the model that Dr. Arnold describes and therefore does not offer a theory of damages consistent with Plaintiffs' theory of liability in the case. Therefore, the Court GRANTS Ford's motion to exclude the expert report and testimony of Dr. Arnold. As a practical matter, however, the Court has already considered Dr. Arnold's report. [14]

Ford does not argue that Dr. van Schoor is unqualified to offer an expert opinion.[15] Ford moves to exclude the expert report and testimony of Dr. van Schoor for two reasons. First, Ford argues that Dr. van Schoor's opinions are not based on "scientific, technical, or otherwise specialized knowledge" as required by Rule 702, because Dr. van Schoor has relied solely on his interpretations of statements in documents produced by Ford. ECF No. 197, at 1. However, at this stage of the litigation, the Court needs only to understand Plaintiffs' theory of the case and the evidence Plaintiffs intend to use to prove that theory. As Ford concedes, Dr. van Schoor has examined electro-mechanical relays and understands their basic function. Id. at 2. The Court finds

[13] Dr. Arnold's expert report contains a list of his qualifications, which include a Ph.D, M.B.A., and B.A. from the University of Chicago, as well as a long career in economic analysis. Ex. 43, at 288.

[14] Excluding the report at this stage means that Plaintiffs may not rely on it for the remainder of the litigation.

[15] Dr. van Schoor's expert report contains a list of his qualifications, which include a Ph.D and Master's degree from the Massachusetts Institute of Technology, extensive work in mechanical engineering, and a patent in the field of electro-mechanical hydraulic power assist steering. Ex. 2, at 7.

that Dr. van Schoor's technical expertise is helpful in explaining how the relays function and why a power steering system incorporating those relays may be defective. In other words, Dr. van Schoor helps to explain the technical details of Plaintiffs' theory of the case and what evidence Plaintiffs might use to prove that theory; this is all that the Court needs to decide at the class certification inquiry. Second, Ford states that "[t]o the extent Dr. van Schoor does rely on data," he has analyzed the data incorrectly and his conclusions are therefore unreliable. Id. at 4. Ford's arguments on this point refute Dr. van Schoor's diagnosis of certain fault codes. The Court has reviewed Ford's objections to Dr. van Schoor's methodology and finds that they are not so serious as to warrant exclusion, but instead should be "attacked by cross examination, contrary evidence, and attention to the burden of proof." Primiano, 598 F.3d at 564. Thus, the Court DENIES Ford's Motion to Exclude the Report and Testimony of Dr. van Schoor.

V. CONCLUSION

For the foregoing reasons, the Court finds that although Plaintiffs have satisfied all of the requirements of Rule 23(a), Plaintiffs have not satisfied the requirements of Rule 23(b)(2) with respect to the proposed Current Owner/Lessee Class and have not satisfied the requirements of Rule 23(b)(3) with respect to the proposed New Vehicle Class or the proposed Out-of-Pocket Class. Accordingly, the Court DENIES Plaintiffs' Motion for Class Certification.

IT IS SO ORDERED.

Dated: December 22, 2016

Lucy H. Koh

LUCY H. KOH
United States District Judge