

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF CALIFORNIA

3 Erika NUNEZ, et al.,

4 Plaintiffs,

5 v.

6 FORD MOTOR COMPANY, et al.,

7 Defendants.

Case No.: 22-cv-0625-AGS-SBC

**ORDER GRANTING DEFENDANT'S
MOTION TO DISMISS (ECF 10)**

8
9 In this automobile-defect case, defendant Ford Motor Company moves to dismiss
10 the amended complaint on a variety of grounds.

11 **BACKGROUND**

12 On May 20, 2018, defendant Ford warrantied the 2018 Ford Focus at issue. (ECF 9,
13 at 3.) The warranty covers repairs for parts that malfunction due to a “manufacturing defect
14 in factory-supplied materials or factory workmanship.” (ECF 9-1, at 15.) From
15 December 2019 to May 2022—while under warranty—plaintiffs Erika Nunez and Hector
16 Garcia presented the vehicle to Ford’s authorized repair facility at least six times for
17 various concerns, including “engine,” “transmission,” and “electrical system” problems.
18 (ECF 9, at 4–7; ECF 9-1, at 14.) Ford serviced the vehicle each time, once keeping it over
19 two months. (ECF 9, at 7.) Yet after each repair the vehicle continued to “experience
20 symptoms.” (*Id.*)

21 Plaintiffs sued Ford under the Song-Beverly Consumer Warranty Act. (*See generally*
22 ECF 1); *see* Cal. Civ. Code § 1790 *et seq.* In their amended complaint, plaintiffs allege that
23 Ford violated its express warranties by: (1) failing to replace or repurchase the new vehicle
24 when a covered defect was not remedied “after a reasonable number of [repair] attempts,”
25 Cal. Civ. Code § 1793.2(d); (2) failing to commence “service and repair . . . within a
26 reasonable time” and failing to complete repairs of covered defects “within 30 days,” *id.*
27 § 1793.2(b); and (3) failing to make “sufficient service literature and replacement parts”
28 available to its “authorized service and repair facilities . . . during the express warranty

1 period,” *id.* § 1793.2(a)(3). (ECF 9, at 9–11.) In their fourth cause of action, plaintiffs
2 charge that Ford breached its implied warranty of merchantability, Cal. Civ. Code
3 §§ 1791.1, 1794, 1795.5. (ECF 9, at 11–12.) Ford moves to dismiss the amended complaint
4 for multiple reasons. (ECF 10.)

5 DISCUSSION

6 To survive a motion to dismiss, a complaint must contain enough facts to “state a
7 claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009);
8 *see also* Fed. R. Civ. P. 12(b)(6). In other words, it must “give the defendant fair notice of
9 what the claim is and the grounds upon which it rests.” *Bell Atl. Corp. v. Twombly*, 550 U.S.
10 544, 555 (2007) (cleaned up). “Naked assertions devoid of further factual enhancement”
11 will not suffice. *Iqbal*, 556 U.S. at 678 (cleaned up).

12 A. Particularity Requirement for Automobile Defects

13 First, Ford moves to dismiss all four claims on the ground that no defect has been
14 properly alleged. “[T]he level of detail required to allege an automobile defect is an
15 unsettled question in the Ninth Circuit.” *Fitzpatrick v. Ford Motor Co.*, No. 2:22-cv-01924-
16 FWS-JPR, 2022 WL 17037498, at *5 (C.D. Cal. Nov. 15, 2022) (dismissing the same four
17 claims for failing to adequately allege a vehicle defect). “Faced with divergent district court
18 holdings, the Court looks to the general [particularity] guidance provided by the Ninth
19 Circuit.” *Zuehlsdorf v. FCA US LLC*, No. EDCV 18-1877 JGB (KKx), 2019 WL 2098352,
20 at *6 (C.D. Cal. Apr. 30, 2019). That is, a complaint must contain “sufficient allegations
21 of underlying facts to give fair notice and to enable the opposing party to defend itself
22 effectively,” when those allegations “plausibly suggest an entitlement to relief, such that it
23 is not unfair to require the opposing party to be subjected to the expense of discovery and
24 continued litigation.” *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011).

25 “In the context of product defect claims, district courts in the Ninth Circuit have
26 often held that a complaint provides fair notice of the defect if it (1) identifies the particular
27 part or system affected by the defect, and (2) describes the problems allegedly caused by
28 the defect.” *Clark v. Am. Honda Motor Co.*, 528 F. Supp. 3d 1108, 1115 (C.D. Cal. 2021).

1 Plaintiffs need “not indicate how the alleged defect caused the reported symptoms” and
2 “are not required to plead the mechanical details of an alleged defect in order to state a
3 claim.” *Id.* at 1116 (cleaned up).

4 The amended complaint does not appear to satisfy either of these notice
5 requirements. For example, plaintiffs allege that the “engine,” “transmission,” and
6 “electrical system” were defective. (ECF 9, at 4, 6–7.) But they don’t specify the particular
7 part or system at issue. The transmission, for example, is “composed of innumerable
8 component parts and interrelated systems.” *Browning v. Am. Honda Motor Co., Inc.*,
9 549 F. Supp. 3d 996, 1006 (N.D. Cal. 2021). Unless a plaintiff alleges more about “why
10 the symptoms occur or what parts within the [t]ransmission are affected,” defendant would
11 be “open to potentially endless discovery regarding each of these parts and systems.” *Id.*
12 at 1006–07. Similarly, plaintiff describes the problems caused by the defect abstractly as
13 “concerns” or “symptoms,” which offers little guidance about the type or severity of
14 automotive issues. (*See* ECF 9, at 6–7.)

15 Courts within this Circuit have dismissed claims for failing to adequately allege an
16 automobile defect under similar circumstances. *See Fitzpatrick*, 2022 WL 17037498, at *6
17 (dismissing for inadequately alleging a defect when plaintiff claimed the vehicle had
18 “electricals, brakes, cooling system and/or engine, and/or transmission” defects that
19 continued to “experience symptoms” after the repairs); *Browning*, 549 F. Supp. 3d at 1001
20 (dismissing for inadequately alleging a defect when plaintiffs claimed the “transmission”
21 had “design defects” that caused it to have “rough, delayed, or sudden shifting,” “grinding
22 or other loud noises during shifting,” and “sudden loss of power”); *Pelayo v. Hyundai*
23 *Motor Am., Inc.*, No. 8:20-cv-01503-JLS-ADS, 2021 WL 1808628, at *1, *4–5 (C.D. Cal.
24 May 5, 2021) (dismissing for inadequately alleging a defect when plaintiffs claimed the
25 “engine” failed to meet “design specifications” that caused it to have “sudden stalling,
26 excessive oil consumption, and premature engine failure”).

27 By contrast, district courts have found an automobile defect sufficiently alleged
28 when the complaint contained more specific allegations about the particular defect and the

1 problems it caused. *See Williams v. Tesla, Inc.*, 20-cv-08208-HSG, 2021 WL 2531177,
2 at *1, *3 (N.D. Cal. June 21, 2021) (denying motion to dismiss when complaint alleged
3 that the vehicle suffered from “a defect in the front and rear suspension control arm
4 assembly, causing the components of the suspension system to prematurely loosen, wear,
5 crack, or break” that “manifests in one or more of the front upper and lower control arms,
6 front suspension aft-link, front suspension fore-link, rear suspension upper link assembly,
7 and rear suspension lower control arm assembly”); *Zuehlsdorf*, 2019 WL 2098352, at *6,
8 *11 (denying motion to dismiss when complaint alleged that the vehicle “contained
9 defective Jatco JF011E CVTs [Continuously Variable Transmissions] and that the defect
10 caused a number of symptoms, including sudden shaking and jerking, failure to accelerate,
11 overheating, abrupt deceleration, and transmission failure”).

12 In short, each of plaintiffs’ claims fails to adequately allege an automobile defect.
13 Although this issue alone requires the complaint to be dismissed in its entirety, *see*
14 *Fitzpatrick*, 2022 WL 17037498, at *4, the Court will briefly address Ford’s other theories
15 for dismissal.

16 **B. The Express Warranty**

17 Plaintiffs’ failure to specify the alleged defects has a cascading effect on Ford’s
18 express-warranty theories for dismissal. For instance, claim 1 must be dismissed because
19 Ford does not have notice of how many times the car was presented for repair of the same
20 defect. *See Brownfield v. Jaguar Land Rover N. Am., LLC*, 584 F. App’x 874, 875 (9th Cir.
21 2014) (holding that section 1793.2(d) only offers relief if the car was presented “for the
22 repair of that particular problem on more than one occasion”). Similarly, claims 1 to 3 must
23 be dismissed because it is impossible to know whether the unspecified defects involved
24 materials or workmanship—which are covered by the express warranty—or a design
25 defect, which is not. *See Troup v. Toyota Motor Corp.*, 545 F. App’x 668, 668 (9th Cir.
26 2013) (“In California, express warranties covering defects in materials and workmanship
27 exclude defects in design.”); *cf. Clark v. LG Elecs. U.S.A., Inc.*, No. 13-cv-485-JM-JMA,
28 2013 WL 5816410, at *8 (S.D. Cal. Oct. 29, 2013) (dismissing express-warranty claims

1 when “factual allegations” suggested “an overall design defect rather than a [covered]
2 problem with materials or workmanship”).¹

3 **C. The Implied Warranty**

4 According to Ford, the implied-warranty cause of action (claim 4) has a fatal
5 deficiency: Plaintiffs failed to allege that the vehicle was presented for repair within the
6 “one-year implied warranty period.”² (ECF 10-1, at 21–22.) The implied warranty lasts no
7 “more than one year following the sale of new consumer goods to a retail buyer.” Cal. Civ.
8 Code § 1791.1(c). The Ford Focus, however, was first presented for repair over a year and
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10
11 ¹ The Court disagrees with Ford’s contention that the express-warranty claims must
12 be dismissed because plaintiffs have not adequately alleged “substantial impairment” to
13 their vehicle. (See ECF 10-1, at 19.) Plaintiffs assert that their vehicle was once in the repair
14 shop for over two months and that its value is now “worthless and/or de minim[is].” (ECF
15 9, at 4, 7.) This plausibly alleges substantial impairment. See *Watson v. CarMax Auto*
16 *Superstores W. Coast, Inc.*, No. 2:16-cv-09006-SVW (PJW), 2017 WL 3081824, at *2
17 (C.D. Cal. May 4, 2017) (holding that an express-warranty claim of substantial impairment
18 was adequately pleaded based partly on allegations that the “vehicle was in the shop for
19 [an] approximately three month period” and that the “Kelly Bluebook value of the car is
20 significantly less when evaluated with the host of problems the vehicle has”). This
21 argument does not justify dismissal.

22 ² Ford also argues that plaintiffs failed to properly plead that the vehicle was “not fit
23 for its intended purpose.” (ECF 10-1, at 20–21.) The “basic inquiry” for a car’s
24 merchantability “is whether the vehicle was fit for driving.” *McGee v. Mercedes-Benz USA,*
25 *LLC*, 612 F. Supp. 3d 1051, 1060 (S.D. Cal. 2020); see also *In re MyFord Touch Consumer*
26 *Litig.*, 291 F. Supp. 3d 936, 946 (N.D. Cal. 2018) (“Reliability, operability, and substantial
27 freedom from defects related thereto are independent grounds for demonstrating
28 unmerchantability.”). As plaintiffs assert that the car was taken in for repair at least six
times, including once for over two months (ECF 9, at 6–7), they have plausibly alleged that
it was not reliably fit for driving. See *MyFord*, 291 F. Supp. 3d at 946 (noting that
“situations where a defect’s symptoms were persistent and could not be addressed through
repair or replacement of an isolated component” can satisfy unmerchantability); cf.
Treuhaft v. Mercedes-Benz USA, LLC, No. 2:20-cv-11155-SVW-GJS, 2021 WL 2864877,
at *3 (C.D. Cal. July 6, 2021) (finding that a vehicle “taken in for repairs eight times in a
two-year period” was still merchantable because, unlike here, the vehicle was promptly
“restored to working order”).

1 a half after purchase—well beyond the implied-warranty period. (*See* ECF 9, at 3 (warranty
2 contract signed “May 20, 2018”); *id.* at 6 (first warranty repair “December 2, 2019”).)

3 The amended complaint names four varieties of tolling to save this claim—class-
4 action tolling, discovery-rule tolling, the repair doctrine, and fraudulent concealment.
5 (ECF 9, at 5–9.) But plaintiffs never responded to Ford’s argument that these doctrines are
6 inapplicable. (*See* ECF 10-1, at 22; *see generally* ECF 12.) Thus, they have waived any
7 tolling. *See Sarkesian v. Ford Motor Co.*, No. 22-cv-00966-AJB-MDD, 2022 WL
8 20033381, at *3–4 (S.D. Cal. Nov. 1, 2022) (dismissing complaint and holding that
9 plaintiffs waived “class action tolling,” “equitable tolling,” and “the repair doctrine” when
10 they failed to address the defense’s arguments in opposition).

11 Plaintiffs’ last resort then is relying on a latent defect to prove a breach of the implied
12 warranty. A latent defect that was “undiscoverable at the time of sale” violates the implied
13 warranty of merchantability even when it is first detected “years after a sale.” *Mexia v.*
14 *Rinker Boat Co.*, 174 Cal. App. 4th 1297, 1304–05 (2009). But plaintiffs’ only allegation
15 on this score is plainly inadequate: “At the time of entering into the warranty contract, or
16 within one-year thereafter, the Vehicle contained or developed the defects” (ECF 9,
17 at 12.) This conclusory allegation is insufficient to establish a latent defect. *See Iqbal*,
18 556 U.S. at 678 (holding that a complaint is deficient “if it tenders naked assertions devoid
19 of further factual enhancement” (cleaned up)); *see also Fitzpatrick*, 2022 WL 17037498,
20 at *10 (dismissing implied-warranty claim and finding latent-defect allegation insufficient
21 when plaintiff alleged that at “the time of entering into the warranty contract, or within
22 one-year thereafter, the Vehicle contained or developed the defects”).

23 In short, plaintiffs have not alleged any active defect within a year of purchase, nor
24 any latent defect at the time of sale, nor any tolling basis. Claim 4 must be dismissed.

25 **D. The Sale**

26 Ford moves to dismiss all claims on the ground that plaintiffs never “allege a sale of
27 their Focus.” (ECF 10-1, at 17.) Ford expresses frustration with the vague and roundabout
28 way plaintiffs discuss the sale. For example, rather than stating when they bought the car,

1 plaintiffs assert that on “about May 20, 2018, in California, Plaintiffs entered into a
2 *warranty contract*” with Ford. (ECF 9, at 3 (emphasis added).) At another point, the
3 amended complaint shifts to the passive voice, grammatically hiding the buyer’s identity:
4 “the sale of the Vehicle was accompanied by Defendant’s implied warranty of
5 merchantability.” (*Id.* at 12.)

6 Yet at the motion-to-dismiss stage, the standard is mere “facial plausibility.” *Iqbal*,
7 556 U.S. at 678. And this Court must accept “all factual allegations in the complaint as
8 true” and construe them “in the light most favorable to the nonmoving party.” *McGinity v.*
9 *Procter & Gamble Company*, 69 F.4th 1093, 1096 (9th Cir. 2023). Plaintiffs clear this
10 modest hurdle. In addition to their warranty contract with Ford, plaintiffs allege that they
11 “interacted with sales representatives at Perry Ford of National City [California] . . . prior
12 to purchasing the Subject Vehicle.” (ECF 9, at 5.) It is *possible* that this statement means
13 that plaintiffs “interacted with” representatives in National City but later bought the vehicle
14 elsewhere (or that someone else later purchased it for them). But in the light most favorable
15 to plaintiffs, they plausibly allege that they bought the vehicle from Ford in California. The
16 sale-related allegations are imprecise, but do not justify dismissal.

17 **E. Leave to Amend**

18 The Court has discretion to grant leave to amend a complaint a second time “when
19 justice so requires.” Fed. R. Civ. P. 15(a)(2). This discretion is guided by the strong federal
20 policy favoring dispositions on the merits and permitting amendments with “extreme
21 liberality.” *DCD Programs Ltd. v. Leighton*, 833 F.2d 183, 186 (9th Cir. 1987). In deciding
22 whether to grant such leave, courts consider five factors: (1) “undue delay,” (2) “bad faith
23 or dilatory motive on the part of the movant,” (3) “repeated failure to cure deficiencies by
24 amendments previously allowed,” (4) “undue prejudice to the opposing party,” and
25 (5) “futility of amendment.” *Foman v. Davis*, 371 U.S. 178, 182 (1962).

26 Of these factors, undue prejudice is the “touchstone of the inquiry” and “carries the
27 greatest weight.” *Eminence Cap., LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003).
28 “The party opposing amendment bears the burden of showing prejudice.” *DCD Programs*,


1 833 F.2d at 187. Ford has not offered any evidence of undue prejudice, and nothing in the
2 record suggests that a further amendment would unduly prejudice the defense.

3 “Absent prejudice, or a strong showing of any of the remaining *Foman* factors, there
4 exists a *presumption* . . . in favor of granting leave to amend.” *Eminence Cap.*, 316 F.3d
5 at 1052. One argument against such leave is that, after Ford’s initial motion to dismiss,
6 plaintiffs amended their complaint and failed to remedy many of the defects Ford correctly
7 identified. (*See generally* ECF 1, 6, 9, 10.) In addition, Ford may see this latest amended
8 complaint as plaintiffs’ third bite at the apple, because in 2021 plaintiffs brought—and
9 voluntarily dismissed—a very similar action against Ford in state court. (*See* ECF 10-1,
10 at 9.) Nonetheless, the prior amendment was by stipulation of the parties. (ECF 8.) And
11 plaintiffs never previously had the Court’s input on any deficiencies with their operative
12 complaint. Under these circumstances, the *Foman* factors tip in favor of amendment.
13 Plaintiffs may amend the complaint once again on all claims and theories.

14 **CONCLUSION**

15 Ford’s motion to dismiss is **GRANTED**. By October 10, 2023, plaintiffs must file
16 any second amended complaint.

17 Dated: September 12, 2023

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20 Andrew G. Schopler
21 United States District Judge
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