NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

IN RE FORD MOTOR CO. E-350 VAN PRODUCTS LIABILITY LITIGATION (NO. II)	)	Hon. Esther Salas Civil Action No. 03-4558 MDL No. 1687 **OPINION**

SALAS, District Judge:

This matter comes before the Court on the renewed class certification motion (Doc. No. 375) filed by Plaintiffs, various owners of Ford's E-350 vans. Also before the Court is Ford's motion to amend (Doc. No. 393) its Answer to include an affirmative defense asserting that any implied warranties were limited by the terms of the express warranties issued with its vehicles. The Court has considered the parties' submissions and decided the matter without oral argument pursuant to Federal Rule of Civil Procedure 78. For the following reasons, the Court will grant Ford's motion to amend and deny class certification.

Background

On June 16, 2005, the Judicial Panel on Multidistrict Litigation transferred five actions to this District for consolidated pretrial proceedings pursuant to 28 U.S.C. § 1407. *In re Ford Motor Co. E-350 Van Prods. Liab. Litig. (No. II)*, 374 F. Supp. 2d 1353 (J.P.M.L. 2005). Following the MDL transfer, Plaintiffs filed a Consolidated Amended Class Action Complaint ("Complaint"). In the Complaint, Plaintiffs alleged that their Ford E-350 "15-passenger" vans were defectively designed due to a high center of gravity that leads to an unusually high rollover rate and, consequently, an increased risk of death or injury. No Plaintiffs or members of the

proposed class have actually suffered a rollover; indeed, the proposed class specifically excluded those who claim damages for personal injury as a result of purchasing or leasing a Ford E-350 van. (Compl. ¶ 63). Plaintiffs claim economic harm because the alleged defect purportedly makes the E-350 vans unsuitable and unfit for transporting 15 passengers. The Complaint purported to bring claims on behalf of Plaintiffs and a putative nationwide class that includes: "all persons and entities who purchased or otherwise lawfully acquired E350 '15-passenger' vans (a/k/a E350 Super Club Wagons, Econoline '15-passenger' vans, or E350 Super Duty Extended Length passenger vans) manufactured by Defendant Ford Motor Company . . . model years 1991-2005, and who reside in the fifty states and/or the District of Columbia." (Compl. ¶ 1).

The Complaint initially asserted claims on behalf of various named Plaintiffs from five states: Alabama, Arkansas, California, Illinois, and New Jersey. Ford moved to dismiss the entire Complaint. In an Opinion and Order dated September 2, 2008 (amended September 3, 2008), the Hon. Harold A. Ackerman, Senior District Judge, granted in part and denied in part Ford's motion. *In re Ford Motor Co. E-350 Van Prods. Liab. Litig. (No. II)*, No. 03-4558, MDL No. 1687, 2008 WL 4126264, at *29 (D.N.J. Sept. 2, 2008) ("MTD Opinion"). Judge Ackerman applied the law of the Plaintiffs' home states to their respective claims, except where no material difference existed between the various states' laws, and he dismissed the following claims: 1) the Alabama, Arkansas, and Illinois Plaintiffs' express warranty claims; 2) the Alabama, Arkansas, and Illinois Plaintiffs' implied warranty claims; 3) the Alabama and Arkansas Plaintiffs' respective state consumer fraud statutory claims; and 4) one of the three state consumer fraud statutory claims advanced by the California Plaintiff. *Id.* at *3, 29-30. After Judge Ackerman resolved Ford's motion to dismiss, the parties in November 2008 agreed to the joinder of newly

named Plaintiffs from many new jurisdictions. (Doc. No. 150). Subsequently, this matter was reassigned to the Hon. Garrett E. Brown, Jr., Chief District Judge, in August 2009. Following extensive discovery, Ford filed twenty-one separate motions for summary judgment seeking judgment against all named Plaintiffs on all claims. Chief Judge Brown resolved these motions with three separate decisions, applying the law of the forum state to respective Plaintiffs' claims. First, Chief Judge Brown granted two of Ford's motions and dismissed two named Plaintiffs by Opinion and Order of November 18, 2009. *In re Ford Motor Co. E-350 Van Prods. Liab. Litig. (No. II)*, No. 03-4558, 2009 WL 4117359, at *1-2 (D.N.J. Nov. 18, 2009). Subsequently, Chief Judge Brown resolved the majority of the remaining motions with a second, omnibus Opinion and Order filed July 9, 2010. *See In re Ford Motor Co. E-350 Van Prods. Liab. Litig. (No. II)*, No. 03-4558, 2010 WL 2813788, at *80 (D.N.J. July 9, 2010) ("July 9 Opinion") (summarizing the rulings as to each motion and party). The July 9 Opinion permitted supplemental discovery and ordered six Plaintiffs from four jurisdictions to present evidence that they had conferred a benefit to Ford, in order to sustain their unjust enrichment and state consumer fraud act claims. *Id.* at *17-18, 33, 43-44, 56. These Plaintiffs responded to the orders to show cause, and Chief Judge Brown issued a third opinion that granted in part and denied in part Ford's summary judgment motions as to these claims. *See In re Ford Motor Co. E-350 Van Prods. Liab. Litig. (No. II)*, No. 03-4558, 2011 WL 601279, at *11 (D.N.J. Feb. 16, 2011) ("February 16 Opinion"). As a result of these three summary judgment opinions, the following claims remain.

State	Plaintiff	Express Warranty	Implied Warranty	Consumer Fraud Statute	Unjust Enrichment
CA	First United				√
NJ	Macedonia		√		
	Faith Tabernacle		√		
	Social Clubhouse		√		
	Bethany Baptist		√		
GA	Allen Temple	√	√		√
PA	Bethel		√		√ **(2001 van)**
	Hickman Temple		√		
	Mt. Airy		√		
FL	Diaz			√	
	Mestre			√	
MI	Conant Avenue		√		
NY	Bishop Anderson		√	√	
TX	St. Luke's			√ **(non-disclosure theory)**	

The omnibus July 9 Opinion denied Plaintiffs' initial motion for class certification, but granted Plaintiffs leave to re-file in light of the court's summary judgment rulings. Following Chief Judge Brown's third and final summary judgment ruling, Plaintiffs renewed their motion for class certification. This matter was reassigned to the undersigned by Order of June 15, 2011.

Plaintiffs' Proposed Classes

The renewed motion for class certification proposes the following claim-based classes ("claim classes"):

> All persons or entities residing in the States of Georgia, Michigan, New Jersey, New York and Pennsylvania, who purchased or otherwise acquired and currently own a Ford E-350 van, new or used, model years 1991-2005, and assert BREACH OF IMPLIED WARRANTY claims under their respective state laws and all persons or entities residing in the State of Georgia who purchased the subject vehicles and assert a BREACH OF EXPRESS WARRANTY claim.
>
> All persons or entities residing in the States of Florida, New York and Texas, who purchased or otherwise acquired and currently own a Ford E-350 van, new or used, model years 1991-2005, and assert VIOLATION OF CONSUMER PROTECTION ACTS in their respective states.
>
> All persons or entities residing in the States of California, Georgia and Pennsylvania, who purchased or otherwise acquired and currently own a Ford E-350 van, new or used, model years 1991-2005 and assert UNJUST ENRICHMENT under their respective state laws.

(Pls.' Br. at 11). In response to Ford's opposition argument, Plaintiffs have limited their proposed unjust enrichment class to "purchasers of *new* Ford E-350 vans *prior* to April 2004." (Pls.' Reply Br. at 35 & n.22) (emphasis added). As an alternative to these three classes, Plaintiffs seek certification of eight, state-based classes ("state classes") consisting of:

> All persons or entities residing in the State of [state] who purchased or otherwise acquired and currently own a Ford E-350 van, new or used, model years 1991-2005.

(*Id.*). Plaintiffs contend these proposed classes satisfy the numerosity, commonality, typicality, and adequacy requirements of Federal Rule of Civil Procedure 23(a), and that common questions of law and fact predominate over individual considerations, rendering class litigation a superior method of adjudication for purposes of Federal Rule 23(b)(3). Alternatively, Plaintiffs seek class certification pursuant to Federal Rule 23(b)(2), arguing that the "core of the relief sought by Plaintiffs in this case is equitable in nature." (Pls.' Br. at 61). To assist the Court's review of their proposed classes, Plaintiffs submit a proposed trial plan. Ford objects to all of Plaintiffs

proposed classes.

The main thrust of Plaintiffs' certification argument is that Chief Judge Brown's summary judgment rulings have pared down the initial proposed classes into manageable groups, and that the new proposed classes satisfy the predominance requirement of Federal Rule 23(b)(3). For the remaining implied warranty claims, which derive from each state's version of UCC § 2-314, Plaintiffs contend that they can present common proof of a design defect, the existence of an implied warranty, causation, and a common injury measured by the difference in value between the product as warranted and the product as received per UCC § 2-714. Although Plaintiffs suggested measuring their common injury by the cost of retrofit in their initial motion for class certification (*see* Doc. No. 254 at 47 n.15), Plaintiffs now set forth a uniform retrofit cost of $2,100 as their common proof of injury. With regard to the remaining consumer fraud claims, Plaintiffs assert that they can present common proof of Ford's alleged misrepresentations, deception, ascertainable loss, and causation. Conversely, Plaintiffs argue that they do not need to make individual showings of reliance in order to establish their consumer fraud claims. Finally, with regard to the remaining unjust enrichment claims, Plaintiffs state that they can present common proof of unjust benefit to Ford, stemming from the fact that Ford did not disclose the E-350 van's defect (inability to carry fifteen passengers).

Ford contests Plaintiffs' assertion that they can establish their remaining claims with common proof under the applicable law of the remaining jurisdictions. Ford argues that many of the elements necessary to establish Plaintiffs' claims—such as deception and causation—will require individualized inquiries into the circumstances of each class member's claims. In addition to these individualized inquiries on the elements of Plaintiffs' claims, Ford argues that

its statute of limitations defenses will require additional individual inquiries to determine whether specific class members' claims are time-barred. The prevalence of individualized inquiries, Ford argues, defeats the predominance requirement of Federal Rule 23(b)(3).

Motion to Amend

During the briefing of the renewed class certification motion, Plaintiffs objected to Ford's argument predicated on the factual contention that the express warranty issued with every new E-350 van limited the duration of any implied warranty. Plaintiffs argued that this line of implied warranty defense was foreclosed, because Ford failed to raise it as an affirmative defense in its Answer to the Complaint, or in any of the summary judgment motions. (Pls.' Reply Br. at 13). In response, Ford moved to amend its Answer to include this affirmative defense, which Plaintiffs oppose on the ground of waiver.

Ford now seeks to include the following "durational limitation" implied warranty affirmative defense to its Answer:

> All of the vehicles in the purported classes were sold to their initial purchaser with an express warranty provided by Ford that validly limited the duration of the implied warranty of merchantability to the period of the express warranty, i.e., 3 years or 36,000 miles, whichever comes first. Accordingly, the claims of Plaintiffs or some members of the purported classes are barred because they never suffered a legally cognizable injury, damages, and/or loss within 3 years or 36,000 miles of the initial purchase of the vehicle.

(Doc. No. 393, Ex. A). Ford contends that this amendment is warranted, because the substance of the proposed affirmative defense appeared in Ford's Answer as a response to an allegation in Plaintiffs' Class Action Complaint. Furthermore, Ford points out that it invoked this defense in its original motion to dismiss before Judge Ackerman, and again in its opposition to Plaintiffs'

renewed class certification motion. In light of these uses of the defense, Ford contends that it would not prejudice Plaintiffs to allow Ford to redesignate the defense as an affirmative defense.

Plaintiffs respond that allowing the affirmative defense nearly three years after Ford's Answer, and well after the close of discovery and summary judgment motions, would be prejudicial. Plaintiffs contend that Ford abandoned this "durational limitation" implied warranty defense after Judge Ackerman decided the motion to dismiss in September 2008, and that Ford has not shown grounds for excusing its undue delay in seeking the amendment. As a result, Plaintiffs state that they did not explore the factual issues pertinent to this "durational limitation" defense in discovery. Plaintiffs also argue that Ford's proposed amendment would be futile. In this regard, Plaintiffs note that Judge Ackerman rejected Ford's durational limitation argument at the motion to dismiss stage, and claim that Ford's disclaimers are not sufficiently conspicuous to be enforceable under UCC § 2-316(2).

The Federal Rules of Civil Procedure allow for flexibility when it comes to a party's pleadings, placing greater emphasis on substance than technical form. Federal Rule of Civil Procedure 15(a)(2) provides that leave to amend a party's pleadings should be "freely give[n] . . . when justice so requires." Federal Rule 8(e) instructs that "[p]leadings must be construed so as to do justice." Similarly, "[i]f a party mistakenly designates a defense a counterclaim, or a counterclaim as a defense, the court must, if justice requires, treat the pleading as though it were correctly designated, and may impose terms for doing so." Fed. R. Civ. P. 8(c)(2). The decision regarding whether or not to grant leave to amend rests with the district court's sound discretion. "[A]ffirmative defenses can be raised by motion, at any time (even after trial), if plaintiffs suffer no prejudice." *Cetel v. Kirwan Fin. Grp., Inc.*, 460 F.3d 494, 506 (3d Cir. 2006). "A district

court may deny leave to amend a complaint if a plaintiff's delay in seeking amendment is undue, motivated by bad faith, or prejudicial to the opposing party," but delay alone is an insufficient ground for denying leave to amend. *Cureton v. Nat'l Collegiate Athletic Ass'n*, 252 F.3d 267, 272-73 (3d Cir. 2001). The Court will allow Ford's proposed amendment, because Plaintiffs' assertion of undue delay and prejudice is overstated, and Plaintiffs' attack on the merits of the warranty disclaimers is premature.

Plaintiffs cannot claim unfair surprise at this defense, because Plaintiffs opened the door on the issue of the enforceability of Ford's implied warranty disclaimers in their Complaint. In fact, Paragraph 85 of the Complaint aptly anticipated Ford's "durational limitation" defense and preemptively countered that defense by stating that any such disclaimers were unconscionable and unenforceable. That paragraph states:

> Any express limitation or negation of Ford's implied warranties that the E350 vans were fit to accommodate and safely transport 15 passengers, when such was not the case, would be unreasonable and unconscionable and, accordingly, is unenforceable pursuant to UCC § 2-316.

(Consolidated Am. Class Action Compl. ¶ 85). It is undisputed that Ford initially opposed this contention in the motion to dismiss before Judge Ackerman (Ford's MTD Br. at 31), and then subsequently denied this contention in its Answer. (Answer ¶ 85). In ruling on the motion to dismiss, Judge Ackerman addressed both Ford's "durational limitation" defense and Plaintiffs' anticipatory response that such disclaimers were unconscionable, concluding that it would be inappropriate to rule on disclaimers and unconscionability at the motion to dismiss stage. MTD Opinion, 2008 WL 4126264, at *20 (D.N.J. Sept. 2, 2008). This Court agrees that Ford's "durational limitation" defense should have been affirmatively stated as an affirmative defense,

see Fed. R. Civ. P. 8(c), but Plaintiffs cannot claim unfair surprise. Nor can Plaintiff claim *undue* delay. It appears that neither party addressed the warranty disclaimer or unconscionability in the summary judgment motions. However, when Plaintiffs objected to Ford's assertion of this defense in its opposition to the renewed class certification, Ford promptly sought leave to amend six days later. (*See* Doc. Nos. 392-93).[1]

To the extent that Plaintiffs assert that Ford's implied warranty disclaimers are inconspicuous and therefore unenforceable, Plaintiffs have not sufficiently addressed the particulars of the various warranty disclaimers issued by Ford for different model years. Typically, the futility of a motion to amend is determined by reference to the motion to dismiss standard of Federal Rule of Civil Procedure 12(b)(6). *See, e.g.*, *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1434-35 (3d Cir. 1997). Thus, this Court must consider whether the proposed amendment "contain[s] sufficient factual matter, accepted as true, to 'state a claim to

[1] The Court is puzzled by Plaintiffs' suggestion that they did not investigate Ford's awareness of the alleged defect and each Plaintiff's relative bargaining power and ability to detect the defect (*see* Pls.' Opp'n to Mot. to Amend at 2-3), because those factual issues are constituent parts of Plaintiffs' claim that Ford failed to disclose the E-350 van's latent defect, and that this omission deceived Plaintiffs. Indeed, as Plaintiffs recognize in their renewed class certification brief, the seller's awareness of the underlying defect and misrepresentation is a necessary element for many consumer fraud statutes. (Pls.' Renewed Class Cert. Br. at 32) ("To prove 'unlawful conduct' in this case, Plaintiffs must 'prove that [defendant] knew or should have known' that the E-350 van, as designed, could not safely transport 15 passengers, and that Ford 'either affirmatively misrepresented or omitted that fact when marketing' the vehicle.") (citation omitted).; *see also Gennari v. Weichert Co. Realtors*, 148 N.J. 582, 605 (1997) (explaining that non-disclosure liability under the consumer fraud statute required a showing that "the defendant acted with knowledge"); *Kowalsky v. Hewlett-Packard Co.*, 771 F. Supp. 2d 1156, 1162 (N.D. Cal. 2011) (dismissing California UCL claim, because plaintiff failed to show that the defendant had knowledge of the defect, and thus defendant's representations could not have been deceptive). Likewise, the purchaser's ability to detect the van's alleged defect factors into the deception and causation elements of Plaintiffs' consumer fraud and implied warranty claims, as well as Ford's statute of limitations defenses.

relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The plausibility standard requires that "the plaintiff plead[] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged" and demands "more than a sheer possibility that a defendant has acted unlawfully." *Id.* at 1949 (citing *Twombly*, 550 U.S. at 556). Plaintiffs do not contest that Ford's "durational limitation" defense sets forth a plausible basis for denying relief on some of Plaintiffs' claims, but instead generally argue that Ford's disclaimers are unenforceable as a matter of law. Such an argument, addressed to specific disclaimers issued with particular model-year E-350 vans (as opposed to a generic attack on all of Ford's warranty disclaimers), is properly raised in a motion for summary judgment. It does not, however, show futility.

Plaintiffs identified the same "durational limitation" defense now proposed by Ford and preemptively countered the same in paragraph 85 of their Complaint. Because Plaintiffs have not shown unfair surprise, undue delay, prejudice, or futility, the Court will permit Ford to redesignate its "durational limitation" defense as an affirmative defense.

Class Certification

Federal Rule of Civil Procedure 23 governs class certification. The party seeking class certification must satisfy both the conjunctive requirements of subpart (a) and one of the requirements of subpart (b). Fed. R. Civ. P. 23; *In re Schering Plough Corp. ERISA Litig.*, 589 F.3d 585, 596 (3d Cir. 2009). The Supreme Court succinctly described the Rule 23(a) requirements applicable to all class actions in *Amchem Products, Inc. v. Windsor*: "(1) numerosity (a 'class [so large] that joinder of all members is impracticable'); (2) commonality

('questions of law or fact common to the class'); (3) typicality (named parties' claims or defenses 'are typical . . . of the class'); and (4) adequacy of representation (representatives 'will fairly and adequately protect the interests of the class')." 521 U.S. 591, 613 (1997). Under subpart (b), Plaintiffs primarily seek certification pursuant to subpart (b)(3), which requires a finding 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). Alternatively, Plaintiffs seek certification pursuant to subpart (b)(2), which is appropriate 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." Fed. R. Civ. P. 23(b)(2).

The Third Circuit provided detailed guidance on litigation class certification analysis in *In re Hydrogen Peroxide Antitrust Litigation*, 552 F.3d 305 (3d Cir. 2009). The *Hydrogen Peroxide* court recognized that federal law vests district courts with "broad discretion to control proceedings and frame issues for consideration under Rule 23," but noted that "proper discretion does not soften the rule: a class may not be certified without a finding that each Rule 23 requirement is met." 552 F.3d at 310. A federal court may only certify an action for class litigation if it concludes, after a "rigorous analysis," that the party seeking class certification has satisfied all of the prerequisites of Rule 23. *Behrend v. Comcast Corp.*, 655 F.3d 182, 190 (3d Cir. 2011) ("The district court must conduct a 'rigorous analysis' of the evidence and arguments in making the class certification decision."); *Hydrogen Peroxide*, 552 F.3d at 309 (citing *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 161 (1982); *Amchem*, 521 U.S. at 615; *Beck v. Maximus,*

Inc., 457 F.3d 291, 297 (3d Cir. 2006)). "'A class certification decision requires a thorough examination of the factual and legal allegations.'" *Id.* (quoting *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 166 (3d Cir. 2001)). In this regard, "the requirements set out in Rule 23 are not mere pleading rules"; "[t]he court may delve beyond the pleadings to determine whether the requirements for class certification are satisfied." *Id.* at 316 (internal quotation marks and citations omitted). The class certification decision "calls for findings by the court, not merely a 'threshold showing' by a party, that each requirement of Rule 23 is met," and "the court must resolve all factual or legal disputes relevant to class certification, even if they overlap with the merits—including disputes touching on elements of the cause of action." *Id.* at 307; *see also Hohider v. United Parcel Serv., Inc.*, 574 F.3d 169, 197 (3d Cir. 2009) (explaining that "rigorous analysis" under *Hydrogen Peroxide* requires the district court to "determine what elements plaintiffs would have to prove under [their] theory to reach a finding of liability and relief, and then assess whether this proof can be made within the parameters of Rule 23"). "Factual determinations necessary to make Rule 23 findings must be made by a preponderance of the evidence." *Hydrogen Peroxide*, 552 F.3d at 320.[2]

[2]More recently, the Third Circuit set forth a detailed analysis for class *settlement* certification, following and explaining its holding in *Hydrogen Peroxide*. *See Sullivan v. DB Invs., Inc.*, No. 08-2784, 2011 U.S. App. LEXIS 25185, at *68-69 (3d Cir. Dec. 20, 2011) ("We explained in *Hydrogen Peroxide* that an examination of the elements of plaintiffs' claim is sometimes necessary, not in order to determine whether each class member states a valid claim, but instead to determine whether the requirements of Rule 23—namely, that the elements of the claim can be proved 'through evidence common to the class rather than individual to its members'—are met.") (quoting *Hydrogen Peroxide*, 552 F.3d at 311-12). Aware of the scope and importance of the Third Circuit's decision in *Sullivan*, and in light of the fact that the parties' briefs were submitted before the Third Circuit filed its decision in *Sullivan*, this Court held a telephone status conference with the parties on January 4, 2012 to ask whether they wanted to supplement their briefing. The parties declined. Counsel for Plaintiffs stated that *Sullivan* raises no new issues with respect to Plaintiffs' papers and supports Plaintiffs' current arguments.

Plaintiffs challenge the *Hydrogen Peroxide* standard on two fronts. Plaintiffs first argue that "*Hydrogen Peroxide* left intact . . . the rule in the Third Circuit that Rule 23 should receive a liberal construction." (Pls.' Br. at 12). Next, Plaintiffs contend that Ford's reading of *Hydrogen Peroxide* is contrary to the Supreme Court's recognition that class certification analysis does not involve an inquiry into whether individual plaintiffs will prevail on the merits (Pls.' Reply Br. at 6 (citing *Eisen v. Carlisle & Jacqueline*, 417 U.S. 156, 177-78 (1974)). Both contentions lack merit, because the Third Circuit rejected both of Plaintiffs' contentions in *Hydrogen Peroxide*, 552 F.3d at 316-17 & n.18, 321-22; *see also Merlo v. Federal Express Corp.*, No. 07-4311, 2010 WL 2326577, at *3-4 (D.N.J. May 7, 2010) (assessing and rejecting similar arguments under *Hydrogen Peroxide*).

With regard to Plaintiffs' argument that this Court should apply a liberal construction that favors class certification in close cases, the *Hydrogen Peroxide* court explained that this rule, stemming from cases such as *Eisenberg v. Gagnon*, 766 F.2d 770, 785 (3d Cir. 1985) and *Kahan v. Rosenstiel*, 424 F.2d 161, 169 (3d Cir. 1970), predated the 2003 amendments to Rule 23 that "reject[ed] tentative decisions on certification and encourage[d] development of a record sufficient for informed analysis." *Hydrogen Peroxide*, 552 F.3d at 321 (citing Fed. R. Civ. P. 23 advisory committee's note, 2003 Amendments ("A court that is not satisfied that the requirements of Rule 23 have been met should refuse certification until they have been met.")). As a result of these amendments, the Third Circuit has instructed that courts "should not suppress

---

Counsel for Defendants agreed that *Sullivan* raises no new issues and that the decision is distinguishable because it relates to settlement certification and not litigation class certification. The Court agrees, and therefore decides this motion on the papers before it, citing *Sullivan* where appropriate.

'doubt' as to whether a Rule 23 requirement is met—no matter the area of substantive law." *Id.*; *see also In re Schering Plough Corp. ERISA Litig.*, 589 F.3d at 600 n.14. Plaintiffs cite the 2009 case *In re Constar Int'l Inc. Sec. Litig.*, 585 F.3d 774 (3d Cir. 2009) to suggest that *Hydrogen Peroxide* "left intact" the prior "liberal construction" rule (Pls.' Br. at 12), but Plaintiffs misrepresent what *Constar* held. Far from an endorsement of the "liberal construction" rule expressly repudiated by *Hydrogen Peroxide*, *Constar* considered whether the special master's and district court's passing references to the "liberal construction" rule in their decisions that predated *Hydrogen Peroxide* rendered the class certification analysis invalid after the Court of Appeals decided *Hydrogen Peroxide*. The *Constar* court found the error harmless, because the district court did not actually apply the "liberal construction" rule and the substance of the district court's analysis complied with the standard pronounced in *Hydrogen Peroxide*. 585 F.3d at 781-82 (explaining that references to the "liberal construction" rule "were not conclusions, but rather a preface to further analysis").

As for Plaintiffs' suggestion that the Supreme Court's decision in *Eisen* forbids merits inquiries at the class certification stage, *Hydrogen Peroxide* explained that this reading of *Eisen* is at odds with prior and subsequent Supreme Court decisions that recognized that "the class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action." *Hydrogen Peroxide*, 552 F.3d at 317 (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 (1978)) (internal quotation marks omitted); *see also Falcon*, 457 U.S. at 160-61 (explaining that "actual, not presumed, conformance with Rule 23(a) remains . . . indispensable," and instructing courts to conduct a "rigorous" Rule 23 analysis); *Behrend*, 655 F.3d at 199 ("[A] district court may inquire into the merits only insofar

as it is 'necessary' to determine whether a class certification requirement is met."). Previously, our Circuit explained in *Newton* that the circumstances of *Eisen* support a narrow reading of its holding, because the preliminary merits inquiry encountered by the *Eisen* Court involved a district court's decision to shift costs (notification of class members) to the defendant that was based on that court's determination that the plaintiff was likely to succeed on the merits of his claim. *Newton*, 259 F.3d at 166. Accordingly, our Circuit has determined that "*Eisen* is best understood to preclude only a merits inquiry that is not necessary to determine a Rule 23 requirement." *Hydrogen Peroxide*, 552 F.3d at 317 (citing *Newton*, 259 F.3d at 166-69). The *Hydrogen Peroxide* court bolstered this portion of its ruling by noting that the Courts of Appeals for the First, Second, Fourth, Fifth, and Seventh Circuits have similarly construed *Eisen* not to preclude consideration of the merits to the extent necessary to make Rule 23 findings. 552 F.3d at 317 n.17 (citing *In re New Motor Vehicles Canadian Exp. Antitrust Litig.*, 522 F.3d 6, 24 (1st Cir. 2008); *In re Initial Pub. Offering Sec. Litig.*, 471 F.3d 24, 41 (2d Cir. 2006); *Gariety v. Grant Thornton, LLP*, 368 F.3d 356, 366 (4th Cir. 2004); *Oscar Private Equity Invs. v. Allegiance Telecom, Inc.*, 487 F.3d 261, 268 (5th Cir. 2007); *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 677 (7th Cir. 2001)). Recently, the Third Circuit echoed its *Hydrogen Peroxide* decision. *See Sullivan v. DB Invs., Inc.*, 2011 U.S. App. LEXIS 25185, at *68 (3d Cir. Dec. 20, 2011) ("[A] district court may inquire into the merits of the claims presented in order to determine whether the requirements of Rule 23 are met, but not in order to determine whether the individual elements of each claim are satisfied.").

This Court sees nothing about *Hydrogen Peroxide* that contradicts specific Supreme Court guidance. In fact, the Supreme Court's decision in *Wal-Mart Stores, Inc. v. Dukes*, 131 S.

Ct. 2541 (2011) is consistent with the *Hydrogen Peroxide* rule. *See Behrend*, 655 F.3d at 190 n.6 ("The Supreme Court confirmed [the Third Circuit's] interpretation of the Rule 23 inquiry in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 180 L. Ed. 2d 374 (2011)."). *Wal-Mart* begins with a reminder that "[t]he class action is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'" *Id.* at 2550 (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700-701 (1979)). *Wal-Mart* further recognized that "rigorous analysis" under Rule 23 "[f]requently . . . will entail some overlap with the merits of the plaintiff's underlying claim. That cannot be helped." *Id.* at 2551. The *Wal-Mart* Court also addressed the limited scope of *Eisen*'s prohibition on merits inquiries, explaining that the preliminary merits inquiry conducted by the trial judge in that case had no bearing on the class certification analysis. *Id.* at 2552 n.6. "To the extent the [*Eisen*] statement goes beyond the permissibility of a merits inquiry for any other pretrial purpose," the *Wal-Mart* Court stated, "it is the purest dictum and is contradicted by our other cases." *Id.*; *see also Sullivan*, 2011 U.S. App. LEXIS 25185, at *49 ("[T]he focus is on whether the defendant's conduct was common as to all of the class members, not on whether each plaintiff has a 'colorable' claim.") (quoting *Wal-Mart*, 131 S. Ct. at 2551).

Here, in order to conduct "rigorous analysis," this Court must necessarily consider the substantive elements of Plaintiffs' causes of action in order to determine the relevant Rule 23 issue: whether common issues, susceptible to common proof, predominate over individualized issues. Unlike a summary judgment decision, this limited merits inquiry, as explained by *Sullivan*, *Behrend*, and *Hydrogen Peroxide*, does not entail consideration of whether plaintiffs, collectively or individually, actually have meritorious claims. But this Court must resolve legal

disputes regarding the substantive elements of Plaintiffs' claims in order to make a qualitative assessment of whether or not Plaintiffs can prove their claims with common evidence.

With the above considerations in mind, the Court turns to Ford's challenges to Plaintiffs' proposed classes. Ford addresses its objections to Plaintiffs' showings under subparts (b)(2) and (b)(3). First, Ford objects that Plaintiffs' proposed classes fail to exclude named class members whose claims were previously dismissed on the merits by Chief Judge Brown's summary judgment opinions. Second, Ford contests Plaintiffs' proposed classes for each jurisdiction on a claim-by-claim basis, arguing that individualized fact issues defeat predominance under Rule 23(b)(3) with regard to each proposed class. Third, Ford argues that Plaintiffs cannot avail themselves of Rule 23(b)(2), because Plaintiffs primarily seek monetary relief, and because the same individual issues that defeat predominance under Rule 23(b)(3) preclude certification under Rule 23(b)(2). The Court considers each argument in turn.

I. CLASS DEFINITIONS & PREVIOUSLY DISMISSED CLAIMS

Ford points out that Plaintiffs' proposed classes fail to exclude the following named Plaintiffs and claims, which were dismissed by Chief Judge Brown's summary judgment opinions: (1) all claims by New York Plaintiff Barrett; (2) the misrepresentation-based consumer fraud claim of Texas Plaintiff St. Luke's; (3) the unjust enrichment claims of Pennsylvania Plaintiffs Hickman Temple and Mt. Airy; and (4) the consumer fraud claim of Florida Plaintiff Blandon. Based on Chief Judge Brown's summary judgment opinions, the Court agrees that these claims must be excluded from Plaintiffs' proposed classes.

With regard to New York Plaintiff Barrett, Chief Judge Brown granted summary judgment in favor of Ford on all claims, concluding that Barrett had not presented evidence of

actual injury as required by *Frank v. DaimlerChrysler Corp.*, 741 N.Y.S.2d 9 (App. Div. 2002). July 9 Opinion, 2010 WL 2813788, at *71-72, 75. Because Barrett has no remaining claims in this case, he must necessarily be excluded from Plaintiffs' proposed classes. The Court will therefore consider Plaintiffs' proposed New York classes as if they had excluded Barrett.

Turning to the Texas consumer fraud claim under the Texas Deceptive Trade Practices-Consumer Protection Act (DTPA), Tex. Bus. & Com. Code § 2.313 *et seq.*, Chief Judge Brown granted summary judgment in favor of Ford on Texas Plaintiff St. Luke's claim that Ford's description of the E-350 van as a "15-passenger van" misrepresented the van's ability to safely carry 15 passengers. July 9 Opinion, 2010 WL 2813788, at *54. Chief Judge Brown left intact, however, St. Luke's omission-based theory of a DTPA violation under § 17.46(b)(24). *Id.* at *55. Plaintiffs' proposed classes do not distinguish between class members having a misrepresentation-based consumer fraud claim and an omission-based consumer fraud claim. Yet, the July 9 Opinion differentiated between the underlying factual predicates for these claims, and why omission was the only viable theory under the DTPA. With regard to Plaintiffs' claim that Ford implicitly represented that the E-350 van could safely carry 15 passengers by describing, or "packaging" the E-350 van as a "15-passenger" van, Chief Judge Brown concluded that this representation was too vague under Texas law to be actionable under DTPA §§ 17.46(b)(5), (b)(7), and (b)(9). *Id.* at *54 ("An imprecise or vague representation amounts to mere opinion or puffing. Here, under the particular undisputed facts of this case, Ford's description of the E-350 van as a 15-passenger van did not include any representation of safety, and does not rise to the level required for a violation of [DTPA] § 17.46(b)(5)."") (citation omitted). Not only did this ruling eliminate the only named Texas Plaintiff's DTPA

misrepresentation claim, but it categorically rejected the contention that any Texas Plaintiff could bring such a claim. Conversely, as Plaintiffs' recognize in their reply brief (Pls.' Reply Br. at 27 n.18, 29) (citing Compl. ¶ 31), the surviving omission claim under DTPA § 17.46(b)(24) was predicated on allegations that Ford failed to disclose to consumers that, due to stability issues, the E-350 van should only be driven by "trained experienced drivers." *See* July 9 Opinion, 2010 WL 2813788, at *55. Plaintiffs recognize that they cannot proceed with a DTPA misrepresentation claim in light of the July 9 Opinion. (*See* Pls.' Reply Br. at 27-29). Thus, to the extent that Plaintiffs seek certification of a DTPA claim on behalf of Texas class members, the Court will assess Rule 23(b)(3) predominance for Plaintiffs' proposed class through the lens of the § 17.46(b)(24) omission claim permitted by the July 9 Opinion.[3]

As for the Pennsylvania unjust enrichment claim, Plaintiffs do not dispute that the July 9 and February 16 Opinions disposed of the unjust enrichment claims of Pennsylvania Plaintiffs Mt. Airy and Hickman Temple. Chief Judge Brown rejected these claims for different reasons. Mt. Airy's claim failed because the record established that this Plaintiff purchased its E-350 van in 2005, after Plaintiffs conceded that the artificial market for the van eroded. Meanwhile, Hickman Temple's claim failed because Plaintiffs did not show that Hickman Temple's purchase of a used vehicle conferred a benefit upon Ford. *See* July 9 Opinion, 2010 WL 2813788, at *44 (Mt. Airy); February 16 Opinion, 2011 WL 601279, at *6 (Hickman Temple). In their reply brief, Plaintiffs seek to bypass these problems by modifying their unjust enrichment class to apply only to "purchasers of *new* Ford E-350 vans *prior to* April 2004." (Pls.' Reply Br. at 35 &

[3]As noted in this Court's extensive discussion of "rigorous analysis" under Rule 23, the Court limits its merits analysis to whether Plaintiffs can satisfy the requirements of Rule 23 for the relevant claim, and does not presently consider whether Plaintiffs have meritorious claims.

n.22) (emphasis added). Accordingly, the Court will conduct Rule 23 analysis on Plaintiffs' modified unjust enrichment class, as proposed in the reply brief.

Finally, Plaintiffs do not deny that Florida Plaintiff Blandon's consumer fraud claim was terminated in the July 9 Opinion. *See* July 9 Opinion, 2010 WL 2813788, at *49. Chief Judge Brown reasoned that Blandon could not show actual deception, because the undisputed record established "that Blandon assertedly knew that the vehicles were unsafe but nonetheless purchased two vehicles." *Id.* Because Blandon has no remaining claims in this case, she must necessarily be excluded from Plaintiffs' proposed classes. The Court will therefore consider Plaintiffs' proposed Florida class as if they had excluded Blandon.

II. CERTIFICATION UNDER RULE 23(b)(3)

As noted above, class certification under Rule 23(b)(3) requires a finding that common issues of law and fact predominate over issues affecting individual members, and that class litigation is superior to other methods of adjudication. In other words, subpart (b)(3) breaks down into a predominance requirement and a superiority requirement, both of which must be met in order for the district court to grant class certification.

The predominance requirement of subpart (b)(3) "'tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation,'" and is a "'far more demanding'" requirement than the commonality requirement of subpart (a). *Hydrogen Peroxide*, 552 F.3d at 311 (quoting *Amchem*, 521 U.S. at 623-24). Predominance "requir[es] more than a common claim," and "[i]ssues common to the class must predominate over individual issues[.]" *Id.* (citation omitted). "Because the nature of the evidence that will suffice to resolve a question determines whether the question is common or individual, a district court must formulate some

prediction as to how specific issues will play out in order to determine whether common or individual issues predominate in a given case[.]" *Id.* (internal quotation marks and citations omitted). Notably, "'[i]f proof of the essential elements of the cause of action requires individual treatment, then class certification is unsuitable.'" *Id.* at 311 (quoting *Newton*, 259 F.3d at 172).

Meanwhile, the superiority requirement of subpart (b)(3) is guided by the following "pertinent" considerations: "(A) the class members' interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action." Fed. R. Civ. P. 23(b)(3)(A)-(D).

Ford argues that Plaintiffs have not met the predominance requirement for any of their proposed classes, because each suffers from a multitude of individualized issues. Ford also argues that the various jurisdictions' statutes of limitations, as well as plaintiff-specific equitable tolling doctrines that Plaintiffs will invoke to counter such defenses, support denying class certification of all proposed classes. The Court addresses Ford's specific predominance objections by jurisdiction and claim. Consistent with Judge Ackerman's undisputed choice-of-law determination, the Court will consider the law of the forum jurisdiction in evaluating whether Plaintiffs' respective claims satisfy Rule 23(b)(3)'s predominance requirement. The Court addresses Ford's statute of limitations affirmative defenses separately in Part II.H, *infra*.[4]

[4]The Court notes that Plaintiffs sorted their arguments by claim and not by jurisdiction. The Court has endeavored to match Plaintiffs' opposition arguments to Ford's jurisdiction-specific objections.

A. New York

After Chief Judge Brown's omnibus July 9 Opinion, Plaintiff Anderson is the sole remaining representative of the proposed New York classes, and only his implied warranty and consumer fraud claims remain. July 9 Opinion, 2010 WL 2813788, at *75. Ford objects to Plaintiffs' proposed New York classes on the grounds that Plaintiffs cannot prove their New York consumer fraud and implied warranty claims with common proof. The Court agrees on both counts.

1. Consumer Fraud, N.Y. Gen. Bus. Law § 349[5]

"To successfully assert a section 349(h) claim, a plaintiff must allege that a defendant has engaged in (1) consumer-oriented conduct that is (2) materially misleading and that (3) plaintiff suffered injury as a result of the allegedly deceptive act or practice." *City of New York v. Smokes-Spirits.Com, Inc.*, 911 N.E.2d 834, 838 (N.Y. 2009) (citation omitted). Ford argues that Plaintiffs cannot show predominance because Plaintiffs do not have common classwide proof for any of these elements.

First, Ford argues that Plaintiffs have no common proof of a uniform misrepresentation. Ford notes that different class members would present different proofs based on their individual experiences: some class members claim to have seen representations that the E-350 was a "15-passenger van" in sales brochures, others may have bought a model year van that included the description "15-passenger" in the name of the vehicle, and some may have seen no representation

[5]The Court notes that Plaintiffs' Complaint asserted a claim under GBL § 350, but Plaintiffs' renewed class certification briefs and trial plan all appear to abandon that claim. Plaintiffs present no distinct arguments to support their claims under § 350, and the Court therefore concludes that Plaintiffs have not shown predominance for any remaining § 350 claim.

that the van would carry 15 passengers. (Ford's Resp. Br. at 16) (citing Pls.' Br. at 33). Second, Ford argues that this individualized proof of the alleged representation will necessarily require individualized determinations concerning whether certain class members were actually deceived. Third, Ford argues that Plaintiffs disregard Chief Judge Brown's ruling that New York law requires actual injury in the form of limitation on use or out-of-pocket expenses. (Ford's Resp. Br. at 24). Under this standard, Ford contends that Plaintiffs cannot rely on a generalized assertion of diminution in value, and, thus, the presiding court would need to conduct individualized inquiries to determine if a particular class member incurred actual losses in the form of out-of-pocket expenses or loss of use, and whether these losses were proximately caused by the alleged defect in the van or other, unrelated causes. (*Id.*). Finally, with regard to causation, Ford states that, while New York law does not require a showing of reliance, it does require a showing of actual deception. Toward this end, Ford notes that Chief Judge Brown granted summary judgment against Pentecostal Temple's Illinois consumer fraud claim for lack of actual deception and proximate causation, because the undisputed record revealed that Pentecostal Temple never received or observed any misrepresentations from Ford. (Ford's Resp. Br. at 26) (citing July 9 Opinion, 2010 WL 2813788, at *23).

Plaintiffs respond that they do have common proof to address each of these requirements. Plaintiffs contend that they have common proof of misrepresentations, by virtue of the fact that Ford marketed the E-350 van as a "15 passenger" van and outfitting the van with 15 seats. Plaintiffs assert that an objective standard applies to the alleged misrepresentations, and deduce that "evidence in the form of the vehicle's name, number of seats and so forth can be submitted to the jury for a determination whether *reasonable* consumers would understand it to mean *safe*

transportation." (Pls.' Reply Br. at 27). Plaintiffs further argue that deception is measured by an objective standard, because New York law does not require a showing of reliance. Citing Florida case law, Plaintiffs state that "causation may be established with proof that Ford's conduct 'was likely to deceive a consumer acting reasonably in the same circumstances.'" (Pls.' Br. at 36; Pls.' Reply Br. at 26) (citations omitted). Finally, Plaintiffs contend that they have presented common evidence of injury in the form of an inherent design defect that manifests on every vehicle—an inability to "safely carry 15 passengers." (Pls.' Br. at 36; *see also* Pls.' Reply Br. at 33). Plaintiffs point to two decisions of the New York Court of Appeals that they claim enable them to present common proof of deception and causation under GBL § 349. First, Plaintiffs argue that *Oswego Fund v. Marine Midland Bank* set an objective "reasonable consumer" standard for determining whether or not an alleged representation was deceptive. *See* 647 N.E.2d 741 (N.Y. 1995). Second, Plaintiffs invoke *Stutman v. Chemical Bank* for the proposition that they can show common proof of causation simply by showing that the alleged misrepresentations were "material." *See* 731 N.E.2d 608 (N.Y. 2000). With regard to injury, Plaintiffs cite *Ackerman v. Coca-Cola Co.*, No. 09-0395, 2010 WL 2925955 (E.D.N.Y. July 21, 2010) and *In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litigation*, 55 F.3d 768 (3d Cir. 1995), for the proposition that they can claim a common, benefit-of-the-bargain, or diminution in value, injury.

The Court agrees that Plaintiffs have not met the predominance requirement for its New York consumer fraud claims under GBL § 349, because resolution of Plaintiffs and putative class members' claims will require numerous individualized inquiries into the material misrepresentation, deception and causation, and actual injury.

a. Misrepresentation

As is evident by Chief Judge Brown's summary judgment opinions, different Plaintiffs were exposed to different representations at different times. Some received sales brochures from Ford describing the van as a "15-passenger van" (First United), others saw that description as part of the vehicle packaging, such as the window sticker (First United), some were simply told that the E-350 was a "15-passenger van" by a salesperson (Charles St. AME, Greater All Nation), some were assured that the E-350 was the "best vehicle going" (Charles St. AME), and it appears that some did not see or hear any representation regarding the van's passenger capacity or relative safety (Pentecostal Temple). *See* July 9 Opinion, 2010 WL 2813788, at *4-5, 19-20, 75. The Court further notes that Ford's safety disclaimers in the E-350 owner's guides evolved over time. Whereas the 2000-2002 model-year owner's guides alerted consumers that they should take "extra precautions" because "[l]oaded vehicles, with a higher center of gravity, may handle differently," the 2003-2005 model-year owner's guides stated that "[t]he risk of a rollover crash increases as the number of people and load in the vehicle increase," and specifically advised that "[t]he van should be operated by an experienced driver." (*See* Doc. No. 292, Smith Decl. Ex. 12). Moreover, Plaintiffs recognize in their Complaint that Ford issued a safety advisory in September 2002 instructing consumers to use trained drivers for the E-350 van. (Compl. ¶ 31). Given these variations among the named Plaintiffs and the evolving disclosures by Ford, the Court may easily deduce that putative class members would rely on different theories of misrepresentation.

Plaintiffs' only apparent response to these variations is that all consumers received an implicit representation that the vans could safely carry 15 passengers by virtue of the fact that

each van was equipped with 15 seats. (*See* Pls.' Reply Br. at 27) ("In a nutshell, that is Plaintiffs' claim under the New York, Texas and Florida consumer protection statutes."). This answer is not satisfactory, because Plaintiffs have not shown that the mere presence of seats conveys a common message about passenger capacity or relative safety.[6] Preliminarily, the Court does not understand Plaintiffs to assert that all E-350 vans in the proposed class had 15 individual seats, but rather some combination of front seats and rearward benches that can accommodate 15 passengers. (*See* Pls.' Br. at 7). Absent other representations and presuming a two-front seat, four-rearward bench layout (*see* Carr Report, Doc. No. 290, at 3/36), reasonable consumers could draw differing inferential conclusions regarding passenger capacity and relative safety *vis-a-vis* other multi-passenger vehicles.[7] Such conclusions may reflect different consumers' individual vehicle needs, which may be guided by such factors as the number and size of expected passengers, as well as cargo needs.[8]

---

[6]Notably, Plaintiffs do not submit any evidence that individual Plaintiffs understood the number and layout of the E-350's seats to constitute a representation that the van could safely carry 15 passengers.

[7]Plaintiffs base much of their defect argument on the notion that the E-350 van was not *safe* to carry 15 passengers, but Plaintiffs do not attempt to delineate the contours of the safety threshold they assert. Surely an extended passenger van, like a large SUV or truck, cannot be expected to have the same handling characteristics as a sedan or sports car. Yet with the present motion, Plaintiffs do not present qualitative evidence comparing the handling, safety restraint, and crash characteristics of the E-350 to other extended passenger vans, or other large, multi-passenger vehicles.

[8]This Court *does not presently address the merits* of Plaintiffs' allegations of deceptive representations, but this Court recognizes that Chief Judge Brown has already ruled that some of these alleged misrepresentations were mere puffery or otherwise too vague to be actionable. *See, e.g.*, July 9 Opinion, 2010 WL 2813788, at *40-41 (granting summary judgment against Hickman Temple's express warranty claim, because salesperson's statement that the van was "the vehicle that you want to do the job because it was safe and it would deliver" was puffery), 54 (granting summary judgment against St. Luke's misrepresentation theory of consumer fraud

This Court finds instructive the Appellate Division's ruling in *Solomon v. Bell Atlantic Corp.*, which denied class certification because, *inter alia*, the plaintiff consumers had not demonstrated that all class members had seen the allegedly deceptive advertisements. 777 N.Y.S.2d 50, 55 (App. Div. 2004). Similar to this case, in *Solomon* "the record show[ed] that the individual plaintiffs did not all see the same advertisements; some saw no advertisements at all before deciding to [purchase the product]." *Id.* Also similar to this case, the content of the seller's advertisements in *Solomon* "varied widely and not all the advertisements contained the alleged misrepresentations." *Id.* The *Solomon* court explained that "[class certification] under GBL §§ 349 and 350 may be appropriate where the plaintiffs allege that all members of the class were exposed to the same misrepresentations," but emphasized that "class certification is not appropriate where the plaintiffs do not point to any specific advertisement or public pronouncement by the [defendants] which was undoubtedly seen by all class members." *Id.* (citations and internal quotation marks omitted).

This Court recognizes that a federal court in New York has suggested that a class of consumers did not have to show common misrepresentations when the alleged deceptive act was an omission. *See Oscar v. BMW of N. Am., LLC*, No. 09-11, 274 F.R.D. 498, 512-13 (S.D.N.Y. June 7, 2011) (denying class certification for consumer claiming that car manufacturer failed to

---

violation under the DTPA, because "15-passenger van" description, without more, was too vague to be actionable under the DTPA), 73 (granting summary judgment against Barrett's express warranty claim, because "15-passenger van" description, without more, was puffery), 79 (granting summary judgment against Charles St. AME's express warranty claim, because "Ford's description of the E-350 as a 15-passenger van does not constitute an express warranty of safety in transporting 15-passengers," and "best vehicle going" statement was puffery). These rulings not only revealed that different consumers were exposed to different representations about the E-350 van, but that the nature of the alleged misrepresentation is material to whether or not the consumer has a valid claim.

disclose defects and disadvantages of run-flat tires). The import of this observation is difficult to discern, because the *Oscar* court devoted little attention to the alleged omissions, and proceeded to deny class certification for a number of other reasons. *See id.* It remains unclear whether New York courts will adopt this lesser standard for claims based on omissions. Regardless, the record in this case reveals that there was not a common omission. As noted above, Ford's owner's guides for certain model years gave different advisories regarding the vehicle's handling characteristics. Further, Plaintiffs' individual purchase experiences reflect that there was not a uniform omission. Plaintiff Barrett, for instance, "expressly told the salesman that these vehicles should not be driven by an inexperienced driver, and stated that a friend of his had a roll over with a Ford van." July 9 Opinion, 2010 WL 2813788, at *69 (citing Barrett Dep. at 106:16-23). Such a consumer cannot claim that Ford failed to disclose material information about the van's handling. Thus, resolution of Plaintiffs' claims will require numerous individualized inquiries into the alleged misrepresentation, whether it be an affirmative representation or omission. *Cf. Thorogood v. Sears, Roebuck & Co.*, 547 F.3d 742, 747 (7th Cir. 2008) (decertifying class of consumers claiming that distributor misrepresented the design of a clothes dryer, because resolution of the claims would require individual inquiries regarding what each class member "understands to be the meaning of a label or advertisement that identifies a clothes dryer as containing a stainless steel drum"); *Newman v. RCN Telecom Servs., Inc.*, 238 F.R.D. 57, 75 (S.D.N.Y. 2006) (Report and Recommendation adopted by court) (denying certification of a class of consumers claiming that an internet service provider misrepresented the speed of the internet service, because resolution would require "an examination of each subscriber's understanding of the [provider's] a la carte pricing system and whether that understanding was reasonable").

Plaintiffs' proposed class makes no attempt to limit the class to persons who saw or heard a common misrepresentation, and the record reveals that various named Plaintiffs were exposed to different representations, if at all, about the E-350 van's seating capacity and overall safety. Distinguishing between the different representations made to putative class members would require individualized inquiries not suitable for class litigation. Accordingly, this element supports denying class certification.

b. Deception & Causation

The parties agree that, while New York's consumer fraud law does not require a showing of reliance, it does require a showing of deception and causation. *See, e.g.*, *Oswego*, 647 N.E.2d at 745 ("[W]hile the statute does not require proof of justifiable reliance, a plaintiff seeking compensatory damages must show that the defendant engaged in a material deceptive act or practice that caused actual, although not necessarily pecuniary, harm."). Plaintiffs argue that they can show common proof of deception and causation, because *Oswego* adopted an objective "reasonable consumer" standard for determining consumer deception under GBL § 349. Yet, the issue of deception is less clear than Plaintiffs would have this Court believe. True, the *Oswego* court stated that it was adopting "an objective definition of deceptive acts and practices," *id.* at 745, but in applying that standard, the court considered "whether a reasonable consumer *in plaintiffs' circumstances* might have been misled," *id.* (emphasis added) (finding record inconclusive). Elsewhere, the court reasoned that "the [defendant] Bank's liability under the statute will depend, in part, on whether plaintiffs possessed or could reasonably have obtained the relevant information they now claim the Bank failed to provide." *Id.* These statements suggest that, while a reasonable consumer standard applies, some consideration of the plaintiff's

circumstances would inhere in that analysis. Subsequent New York decisions have characterized *Oswego*'s reasonable consumer standard in this manner. *E.g.*, *Solomon v. Bell Atl. Corp.*, 777 N.Y.S.2d at 54 ("Deceptive or misleading representations or omissions are defined objectively as those 'likely to mislead a reasonable consumer acting reasonably under the circumstances,' i.e., the plaintiff's circumstances."). Regardless of whether *Oswego* sets a purely objective standard or not, individualized circumstances will necessarily seep into the deception analysis in this case, because there is no uniform misrepresentation.

Assuming *arguendo* that Plaintiffs could present common proof of a misrepresentation and deception, Plaintiffs do not have common proof of causation. For purposes of causation, "[t]he plaintiff . . . must show that the defendant's 'material deceptive act' caused the injury." *Stutman*, 731 N.E.2d at 612 (citation omitted). Courts in New York have recognized that a consumer cannot show causation when he or she was not exposed to the alleged misrepresentation. *E.g.*, *Gale v. Int'l Bus. Machs. Corp.*, 781 N.Y.S.2d 45, 47 (App. Div. 2004) (rejecting GBL §§ 349 and 350 claims for lack of causation where the consumer did not claim to have seen the alleged misrepresentations); *see also Newman*, 238 F.R.D. at 75 (denying class certification of GBL §§ 349 and 350 claims, noting numerous issues of causation, including whether each class member saw the alleged misrepresentations). As noted above, Chief Judge Brown's summary judgment decisions revealed that named Plaintiffs approached their E-350 purchases with differing amounts of information: some purchased their vans with knowledge of the van's unique handling problems from personal experience (Barrett, Blandon), and some discerned no representations about the van's passenger capacity or safety at the time of purchase

(Pentecostal Temple). *See* July 9 Opinion, 2010 WL 2813788, at *19-20, 45, 68-69.[9] It cannot be denied that these Plaintiffs' injuries were caused by any representation or omission by Ford, and, accordingly, these Plaintiffs' claims have been dismissed. For remaining Plaintiffs and putative class members, the presiding court would need to conduct individualized inquiries to determine if their claims similarly lacked causation, and Plaintiffs offer no common proof to overcome this hurdle. *See, e.g.*, *In re Currency Conversion Fee Antitrust Litig.*, 230 F.R.D. 303, 310-11 (S.D.N.Y. 2004) (denying certification of class of consumers claiming that credit card provider misrepresented and/or failed to disclose its policy for charging currency conversion fees on international transactions, because each plaintiff had to show causation, and "[s]uch a showing entails individual inquiries, including an examination of each cardholder's understanding [of the credit terms]"); *Newman*, 238 F.R.D. at 75 (same, noting numerous issues of causation, including whether each class member saw the alleged misrepresentations, was influenced by the same, and the availability of alternative information).

The Court further notes that the numerous public reports, articles, and broadcasts concerning the handling problems of the E-350 van identified by Plaintiffs' Complaint support this Court's conclusion that Plaintiffs do not have common proof of causation. In their Complaint, Plaintiffs note, *inter alia*, that the National Highway Traffic Safety Administration

[9]Most telling was New York Plaintiff Barrett, who negotiated down the price of his used 1997 E-350 van after telling the sales agent that the van should not be driven by an inexperienced driver, and that he knew of a prior instance where an E-350 van had experienced a rollover. July 9 Opinion, 2010 WL 2813788, at *69 (citing Barrett Dep. at 48:11-49:13, 106:16-23). Barrett further "testified that if he had heard the news reports regarding the Ford E-350 van's tendency to rollover before he purchased the used 2001 van in October 2006, he still would have bought the van because he and his customers like Ford vehicles and he trusted his driving abilities." *Id.* (citing Barrett Dep. at 26:10-19; 35:2-14).

released a study concerning the rollover propensity of 15-passenger vans (including the E-350 van) in April 2001, that Ford issued a safety advisory in September 2002 instructing consumers to use trained drivers for the E-350 van, and that CBS aired a news segment about the dangers of the E-350 van in an episode of "Sixty Minutes II" in September 2002. (Compl. ¶¶ 28, 31, 38, 61(e)). Considering that Plaintiffs' primary theory of damages at the class certification stage is a common benefit-of-the-bargain injury, it stands to reason that the consumers who saw these reports and understood the E-350 van to have significant handling problems will have a difficult time proving causation, and in doing so, they would not rely on common proof. This observation is not mere speculation; the record reflects that a number of Plaintiffs reported seeing different news releases at different times. *See, e.g.*, July 9 Opinion, 2010 WL 2813788, at *5 (First United), 34 (Allen Temple). Moreover, Plaintiffs' concede in their reply brief that the various government reports and news articles about the E-350 van "may have disclosed (on a classwide basis no less) 'rollover issues associated with [Extended Passenger Vans.]'" (Pls.' Reply Br. at 31).[10] Plaintiffs' proposed class makes no effort to exclude persons having knowledge of the van's handling problems at the time of purchase. Given the vastly different experiences of named Plaintiffs, it would take individualized causation inquiries to determine which putative class members saw such news reports prior to their purchase of an E-350 and understood the van

[10]Plaintiffs argue that these reports did not "advise consumers of the specific, inherent design defect that manifests in handling and stability issues in ***all*** E-350s when loaded with 10 or more passengers." (Pls.' Reply Br. at 31). Yet, even if the news reports did not identify the *exact* design defect that caused the E-350's handling problems, consumers may have had sufficient knowledge of the handling defect at the time of purchase to defeat causation. *See* July 9 Opinion, 2010 WL 2813788, at *49 (rejecting Florida Plaintiff Blandon's argument that she did not know that the handling problems stemmed from a factory defect, because "[t]his attempt to create a dispute of material fact does not negate the undisputed fact that Blandon assertedly knew that the vehicles were unsafe but nonetheless purchased two vehicles").

to have handling problems.

Plaintiffs cannot bypass the causation ramp under the auspices of *Stutman*. *Stutman* involved homeowners' claim that their lender charged an improper "attorney fee" when they attempted to refinance their homeowners' loan, despite the loan's guarantee that they would not be assessed a prepayment charge. 731 N.E.2d at 612. The Appellate Division dismissed the claim, concluding that the homeowners had not shown "justifiable reliance: that is, that the note's failure to disclose the $275 attorney's fee had any effect on plaintiffs' decision to borrow from defendant in the first place." *Id.* (internal quotation marks omitted). The Court of Appeals affirmed on other grounds, but rejected the Appellate Division's analysis of "justifiable reliance." *Id.* In doing so, the court distinguished between causation, which is required by GBL § 349, and reliance, which is not. The court concluded that the homeowners did not need to allege that they would not have borrowed from the lender if they had known the truth about the fee; rather, the causation requirement had been met, because "plaintiffs allege that because of defendant's deceptive act, they were forced to pay a $275 fee that they had been led to believe was not required." *Id.* at 612. As this Court reads *Stutman*'s causation analysis, Plaintiffs in this case need not show that they would not have purchased the E-350 van if they had known of the handling problems, but only that they incurred a loss as a result of the deceptive act. If Plaintiffs have no knowledge of the allegedly deceptive act (the alleged misrepresentation), or if Plaintiffs have actual knowledge of the handling defect prior to the purchase (and, for instance, simultaneously negotiate a lower price), *Stutman* is inapposite, and these Plaintiffs have not shown causation. Identifying which putative class members purchased under similar circumstances will require individualized inquiries that are impracticable in class litigation.

c. Injury

Chief Judge Brown ruled in the July 9 Opinion that the actual injury requirement recognized in *Frank v. Daimler Chrysler Corp.* applied to Plaintiffs' GBL § 349 claim. July 9 Opinion, 2010 WL 2813788, at *70-72. Under *Frank*, a party does not meet the injury requirement of GBL § 349 unless the allegedly defective product fails and causes personal injury or property damage, *or* the person incurs repair costs or diminished value as a result of the defect. 741 N.Y.S.2d at 17 (affirming dismissal of § 349 claim where the "plaintiffs have not been involved in any accidents and have not suffered any personal injuries or property damage," and "plaintiffs d[id] not allege that any seat has failed, been retrofitted or repaired, nor have plaintiffs attempted to sell, or sold an automobile at a financial loss because of the alleged defect"). In their opposition to summary judgment, Plaintiffs did not argue that they had a common diminution in value injury under New York law that would be measured by the cost of a retrofit. (*See* Doc. No. 247 at 36-37). Instead, Plaintiffs asserted that they had presented some evidence of out-of-pocket repair costs (for Bishop Anderson), and that they would otherwise "rely on expert testimony to determine if, and how much, prices of the new and used vans reflected their publicized problems." (*Id.* at 37). Applying the *Frank* standard to the individual New York Plaintiffs' respective proofs, Chief Judge Brown concluded that Bishop Anderson had shown sufficient proofs of actual injury under *Frank* to create a genuine dispute of fact, but that Barrett had not, because he "1) did not allege any out-of-pocket repair or rental costs; 2) fills his vehicle to capacity when he has sufficient passengers; and 3) stated that he has no plans to sell his van." *Id.* at *71. Chief Judge Brown therefore granted summary judgment against Barrett on all of his claims.

Nevertheless, Plaintiffs now argue that they can present common proof of a uniform retrofit injury, because they have expert testimony reflecting that the handling defects are inherent in the E-350 design. In other words, Plaintiffs contend that they can use the uniform cost of a retrofit ($2,100) as a proxy for the inflated value named Plaintiffs and putative class members paid as a result of Ford's packaging of the E-350 as a "15-passenger van." Plaintiffs' argument runs flat, because Plaintiffs have not sought reconsideration of Chief Judge Brown's *Frank* rulings, which are now law of the case, and because the record reveals that Plaintiffs do not have common proof of actual injuries.

Plaintiffs make no attempt to show that Chief Judge Brown's *Frank* rulings were erroneous applications of New York law, or that they have common proof of actual injury under *Frank*. Instead, Plaintiffs just disregard *Frank* in their opening brief, and it appears that Plaintiffs want this Court to disregard *Frank* as well.[11] This Court cannot do so; the law of the case doctrine prevents this Court from arbitrarily choosing which prior decisions in this case remain in effect. Similar to a motion for reconsideration, courts will only depart from the law of the case when "(1) new evidence is available; (2) a supervening new law has been announced; or (3) the earlier decision was clearly erroneous and would create manifest injustice." *In re City of Phila. Litig.*, 158 F.3d 711, 718 (3d Cir. 1998) (citation omitted); *see also Falor v. G & S Billboard*, No. 04-2373, 2008 WL 5190860, at *2 (D.N.J. Dec. 10, 2008) (characterizing law of the case issues as "the opposite side of the motion for reconsideration coin"). Plaintiffs have not

[11]Plaintiffs' strategy of disregarding *Frank* appears to have changed by the reply brief, where Plaintiffs appear to suggest that Chief Judge Brown concluded that *Frank* did not apply to Plaintiffs' claims. (*See* Pls.' Reply Br. at 33) ("As discussed herein, and as this Court previously found in adjudicating Ford's summary judgment motions, [citations omitted], [sic] does not control here."). But, as noted above, Chief Judge Brown reached the exact opposite conclusion.

presented grounds for departing from the law of the case, and thus this Court must apply *Frank*. This Court is persuaded that, under *Frank*, the presiding court would need to conduct the sort of detailed analysis employed by Chief Judge Brown to resolve the claims of Barrett and Bishop Anderson for each of the thousands of putative class members. Such individualized inquiries are impracticable in class litigation.

However, even if this Court had reason to consider the *Frank* issue *de novo*, Plaintiffs do not present persuasive reasons to disregard *Frank*. Plaintiffs attempt to distinguish *Frank* by claiming that *Frank* was a product risk-of-failure case. Not so in the present case, claim Plaintiffs, because the product defect in this case—the van's design geometry and resultant handling issues when filled with ten or more passengers—was inherent in *every* E-350 van in the proposed classes. Citing the Declaration of Mark Arndt, president of Transportation Safety Technologies, Inc., Plaintiffs argue that "[t]his malfunction is one that . . . would, as a matter of physics, necessarily occur in all E-350's when driven at speed loaded with 15 passengers." (Pls.' Br. at 16-17) (emphasis omitted). Plaintiffs' argument in this regard is not persuasive.

First, this Court is not persuaded by Plaintiff's argument that this case fundamentally differs from a risk-of-failure case. The summary judgment record revealed that some Plaintiffs did not experience any handling problems and/or continued to fill their vans to capacity whenever suitable to their transportation needs. *See* July 9 Opinion, 2010 WL 2813788, at *4 (Greater All Nation: some handling problems, fills van to capacity of 12, based on seat size), 46 (Mestre: some handling problems with one van, filled both vans to capacity during ownership), 51 (St. Luke's: no handling problems, voluntarily limited capacity to 12), 56 (St. James: no handling problems, voluntarily limited capacity to 12), 62 (Conant Avenue: some minor handling

problems, filled to capacity from 2000-2008, voluntarily limited capacity to 12 after reading government safety report in 2008), 69 (Barrett: no handling problems, continues to fill to capacity). Plaintiffs' only claim to injury for consumers that did not experience handling problems and/or continued to fill their vans to capacity is a speculative diminution in value, arising from the fact that the vans have an inherent design defect that manifests with handling problems on all vehicles. Plaintiffs approximate this diminution in value with the cost of a dual-wheel retrofit. Yet, the portions of the Arndt Declaration cited by Plaintiffs do not support the contention that handling defects manifest in every E-350 van under normal driving conditions.[12] In light of the summary judgment record, where some Plaintiffs reported handling problems under full load and others did not, and some have voluntarily limited capacity and others have not, it appears that Plaintiffs are now asserting a "common injury" of a design defect that has increased the likelihood of the van losing stability under normal driving conditions, and that this likelihood has caused a reputational injury to the vehicle in terms of diminished resale value. Yet there are two flaws with this reputational injury, beyond the fact that Plaintiffs did not rely on this injury in opposing Ford's motion for summary judgment: (1) it does not apply to Plaintiffs,

[12]The portions of the Arndt Declaration cited by Plaintiffs assert the following facts: (i) the putative class vans had a rear weight bias; (ii) dynamic testing of the vans in 1992 revealed some oversteer tendencies on the applicable model tires; (iii) that oversteer conditions are dangerous to normal drivers; and (iv) that a Ford engineer issued a report in 1995 stating that Ford vans had a reputation for handling complaints, and that Ford should make suspension and steering changes to better address consumer needs and better compete against a competitor's new extended passenger van. (*See* Arndt Decl. ¶¶ 13-17). While the Arndt Declaration provides an assessment of the E-350's general handling characteristics and a Ford engineer's recommendation that these handling characteristics be addressed, it does not support the contention that unsafe handling defects manifest in every loaded vehicle under normal driving conditions, or compare the E-350 van's handling characteristics with other large vehicles, including competitors' 15-passenger vans.

like Barrett, who have no intention of selling their van; and (2) it is unclear that a dual-wheel retrofit, that would add two additional wheels to the vans' rear axles and affect the vehicle's overall dimensions and handling, will adequately address this reputational injury.

Viewed in light of the summary judgment record, Plaintiffs' asserted "common injury" is not wholly dissimilar from the risk-of-failure claim at issue in *Frank*. *Frank* involved consumers' claims that vehicle seat backrests and their reclining mechanism were inherently defective, such that the seats were subject to a dangerous collapse in the event of a substantial rear-end collision. *Frank*, 741 N.Y.S.2d at 11. The court rejected this latent defect theory of injury, reasoning *inter alia*:

> it would be manifestly unfair to require a manufacturer to become, in essence, an indemnifier for a loss that may never occur. Plaintiffs' argument, basically, is that as an accident becomes foreseeably possible, upon the occurrence of certain contingencies, due to a design aspect of a product, the manufacturer must retrofit the product or otherwise make the consumer whole. However, under such a schematic, as soon as it can be demonstrated, or alleged, that a better design exists, a suit can be brought to force the manufacturer to upgrade the product or pay an amount to every purchaser equal to the alteration cost. Such "no injury" or "peace of mind" actions would undoubtedly have a profound effect on the marketplace, as they would increase the cost of manufacturing, and therefore the price of everyday goods to compensate those consumers who claim to have a better design, or a fear certain products might fail.

Id. at 16-17. In reaching its decision, *Frank* cited with approval a number of appellate decisions that rejected consumer claims for inherent automobile part defects where the consumer did not claim manifestation of the defect. *Id.* at 15 (citing *Carlson v. Gen. Motors Corp.*, 883 F.2d 287 (4th Cir. 1989) (claims of inherently defective diesel engines); *Briehl v. Gen. Motors Corp.*, 172 F.3d 623 (8th Cir. 1999) (claims of inherently defective anti-lock brake systems)). Chief Judge Brown properly recognized that *Frank* stopped short of requiring manifestation of the defect; yet,

in the absence of such manifestation, *Frank* still required the plaintiff to present evidence of an actual injury, in the form of out-of-pocket repair costs or sale at a loss. July 9 Opinion, 2010 WL 2813788, at *71 (distinguishing *Frank* from Arkansas case law). Here, some Plaintiffs did not report detectable handling difficulties[13] or repair costs, and it appears that no Plaintiffs claim to have sold an E-350 van at a loss as a result of the van's handling reputation. *Cf. id.* at *57 (applying *Briehl*, 172 F.3d at 626-29, and granting summary judgment against St. James's claims because "St. James has not sold its vehicles, has no specific plan to do so, and has not identified any reduced resale value"). The speculative nature of the asserted "common injury" is revealed by the fact that Plaintiffs do not offer any evidence of how the E-350's handling compares to its contemporary competitors or industry standards for extended passenger vans. Indeed, Plaintiffs' summary judgment brief stated that it would "rely on expert testimony to determine *if*, and how much, prices of the new and used vans reflected their publicized problems." (Doc. No. 247 at 37) (emphasis added). Under these circumstances, the Court fails to see how Plaintiffs can assert a common, actual injury under *Frank*, without resorting to the sort of speculation that *Frank* was concerned about. Ultimately, this Court does not decide the merits of Plaintiffs' proofs of injury.

[13]This Court does not suggest that the slightest handling discomfort that can be experienced in any vehicle—*i.e.*, light steering feel, light/strong pedal feel, turning radius, torque steer—is sufficient to state an actual injury. At the same time, the Court does not suggest that a consumer had to actually experience a rollover before he or she experiences an actual injury. Further, the Court does not presently weigh consumers' varying claims of handling problems. Rather, this Court relies on the summary judgment record, wherein some Plaintiffs reported detectable handling problems that gave them concern about the van's actual stability under their normal driving circumstances, and others did not. However, the Court suspects that the actual injury and causation analyses would require individualized inquiries into each consumer's driving experience. *See, e.g.*, *Wolin v. Jaguar Land Rover N. Am.*, 617 F.3d 1168, 1174 (9th Cir. 2010) (remanding issue of certification under Land Rover's Tire Warranty, suggesting that individualized inquiries would be necessary to determine whether tire wear was caused by a vehicle defect or individual driving conditions).

See Sullivan, 2011 U.S. App. LEXIS 25185, at *66 ("The question is not what valid claims can plaintiffs assert; rather, it is simply whether common issues of fact or law predominate."); . For present purposes, the Court finds that Plaintiffs' newfound assertion of a common injury under *Frank* lacks merit. In the absence of a common injury susceptible to common proof, class treatment would be inappropriate.

Second, the Court notes that Chief Judge Brown bolstered his *Frank* analysis with the benefit-of-the-bargain analysis provided by a decision from the Southern District of New York that rejected unjust enrichment claims where the product had not malfunctioned. July 9 Opinion, 2010 WL 2813788, at *72 (quoting *In re Canon Cameras*, 237 F.R.D. 357, 359-60 (S.D.N.Y. 2006)). The *Canon Cameras* court reasoned that "[a] plaintiff who purchases a digital camera that never malfunctions over its ordinary period of use cannot be said to have received less than what he bargained for when he made the purchase." 237 F.R.D. at 360. Chief Judge Brown likened this reasoning to the actual injury requirement of *Frank*, and concluded that New York Plaintiff Barrett could not show he was deprived of the benefit-of-the-bargain, because he had not shown that his van malfunctioned, or that he had suffered actual injury. July 9 Opinion, 2010 WL 2813788, at *72.[14] Plaintiffs' primary damages theory is a benefit-of-the-bargain theory, predicated on UCC § 2-714, but Plaintiffs do not address this adverse ruling, and Plaintiffs do not suggest that GBL § 349 has a lower benefit-of-the-bargain threshold than an unjust enrichment claim. Further, Plaintiffs offer no explanation for how class members like

[14]Chief Judge Brown similarly granted summary judgment against Plaintiff St. James' benefit-of-the-bargain theory of injury under Missouri law, reasoning: "St. James has elected to limit its use of its vehicles by limiting capacity, but the defect has not manifested itself and therefore they have received the benefit of their bargain." July 9 Opinion, 2010 WL 2813788, at *58.

Barrett—who negotiated a lower price on his van after expressing concerns about the van's handling characteristics, continues to fill his van to capacity, and has no intention of selling his van—have been deprived of the benefit of their bargain. Or how class members like Blandon, who had personal knowledge of the van's handling problems prior to purchase, were deprived of the benefit of their bargain. Against this authority, the Court fails to see how Plaintiffs can show that they suffered the same benefit-of-the-bargain injury with common proof when some Plaintiffs (and certainly some putative class members) did not experience a handling defect.

Third, this Court notes that Plaintiffs' proposed classes do not reflect the fact that the bubble market on E-350 vans ended, by their own account, in April 2004. *See* July 9 Opinion, 2010 WL 2813788, at *44 ("[A]ll Plaintiffs admitted in their Responses and Objections to Ford's Second Set of Written Interrogatories that '[t]he artificial demand for the E-350 15 passenger vans, as referred to in the Complaint, is believed to have eroded fully by April, 2004, when the [National Highway Traffic Safety Administration] reissued a safety warning concerning 15-passenger vans.'"). Further, as previously noted, Plaintiffs' proposed classes do not take into account the numerous public reports about the E-350's handling problems that they concede were issued between 2000 and 2004. (*See* Compl. ¶¶ 25-47, 61(e)) (identifying numerous public reports and broadcasts that were released between 2000 and 2004). Plaintiffs have modified their proposed unjust enrichment class to exclude vans purchased after April 2004, consistent with their position on the van's bubble market, but Plaintiffs have not modified their other classes in the same way, and Plaintiffs' proposed classes still do not account for the consumers who viewed the news releases prior to purchase. To the extent that Plaintiffs assert that class members who purchased their vans after the first of these public reports (circa 2000) have a common benefit-of-

the-bargain injury with the rest of the class, regardless of whether these class members viewed reports regarding the van's handling problems, Plaintiffs' argument is foreclosed by their concession that some of these class members did not pay a premium for the van because of market knowledge. Ford would be entitled to examine which class members had knowledge of the E-350's handling characteristics at the time of purchase, and the extent of such knowledge, whether the knowledge was derived from personal use or public reports.[15] Thus, the presiding court would need to conduct individual inquiries into putative class members' respective consumer experiences.

Ackerman, 2010 WL 2925955, and *General Motors Corp. Pick-Up Truck Fuel Tank*, 55 F.3d 768, cited by Plaintiffs, do not compel a different conclusion. With regard to *Ackerman*, that court held on a motion to dismiss that "[i]njury is adequately alleged under GBL §§ 349 or 350 by a claim that a plaintiff paid a premium for a product based on defendants' inaccurate representations." 2010 WL 2925955, at *23. The plaintiffs in *Ackerman* alleged that they paid a premium for a beverage marketed "as a fortified beverage, a dietary supplement in liquid form." *Id.* Here, Plaintiffs state they have common proof of an inherent design defect that prevented the E-350 van from being the 15-passenger van they were promised. But as noted above, different Plaintiffs were exposed to different representations, if at all, regarding the van's capabilities, and not all Plaintiffs experienced the alleged handling problems in their use of the van. Further, Plaintiffs concede that post-April 2004 purchasers did not pay a premium on the van. *Ackerman*

[15]This Court's consideration of the news reports issued between 2000 and 2004 should not be construed as a ruling that every consumer who was aware of such an article had actual knowledge of E-350's handling problems. Rather, this Court merely recognizes that a consumer who had seen such a report *may* have had actual knowledge of the E-350's handling defects at the time of purchase, depending on, *inter alia*, the information contained in the article.

did not address the issue of GBL § 349 injury in the context of a motion for class certification and cannot be read to support Plaintiffs' contention that they have common proof of a uniform injury by virtue of their claim of an inherent design defect. The Court further notes that *Ackerman* does not cite *Frank* or any case recognizing New York's actual injury requirement, and that *Ackerman* was decided shortly after Chief Judge Brown's omnibus summary judgment decision of July 9, 2010. To the extent that *Ackerman* departs from the actual injury requirement, this Court remains bound by Chief Judge Brown's *Frank* rulings.

As for *In re General Motors*, that court suggested that "[t]he cost of a retrofit . . . may constitute an alternative measure of the damages arising from [a] breach of warranty." 55 F.3d at 816. At first blush, this case appears to provide strong support for Plaintiffs' argument in this case, because that case involved similar consumer claims of an inherent vehicle design defect (certain GM trucks contained dangerously defective fuel tanks) that affected the resale value of those trucks. However, the court's decision arose in the context of assessing the adequacy of a class settlement. Thus, *In re General Motors* did not address whether the cost of a retrofit constituted sufficient injury under a particular state's law (New York GBL § 349 or otherwise) to state a claim, and, in fact, the court recognized that other jurisdictions have rejected warranty claims asserting diminution in value for damages. *See id.* This Court therefore does not read *In re General Motors*' discussion of using the cost of a retrofit as an alternative measure of damages to displace New York's substantive requirement of actual injury. Indeed, a Maryland decision cited favorably by Plaintiffs, *Lloyd v. General Motors Corp.*, recognized that New York law differed from more lenient jurisdictions by requiring an actual injury showing. 916 A.2d 257, 292-93 (Md. 2007) (citing *Frank* and *Weaver v. Chrysler Corp.*, 172 F.R.D. 96 (S.D.N.Y. 1997)

as examples of cases from "other jurisdictions that have found, in automobile product defects cases, that an allegation of economic loss is not sufficient to articulate an injury").

This Court's conclusion reflects the fact that New York law requires a showing of actual injury, in the form of personal or property damage incurred by the defect, out-of-pocket repair costs, or sale at a loss. The undisputed record in this case reveals that some Plaintiffs experienced handling issues under normal driving conditions with more than 10 passengers and/or incurred repair costs, and others did not. Under New York law, sorting through those that had an actual injury and those that did not would require individualized inquiries.

2. Implied Warranty

In New York, an implied warranty claim requires proof of the following elements: "(1) that the product was defectively designed or manufactured; (2) that the defect existed when the manufacturer delivered it to the purchaser or user; and (3) that the defect is the proximate cause of the accident." *Plemmons v. Steelcase Inc.*, No. 04-4023, 2007 WL 950137, at *3 (S.D.N.Y. Mar. 29, 2007) (internal quotation marks and citations omitted). The implied warranty has been breached when the product is not "fit for the ordinary purposes for which such goods are used." *See* N.Y. U.C.C. § 2-314(2)(c); *Plemmons*, 2007 WL 950137, at *3. Ford argues that Plaintiffs do not have common proof of the existence of an implied warranty, or common proof of any of the above elements.

First, Ford contends that all E-350 vans were sold with an express warranty that limited the duration of the implied warranty of merchantability to the period of the express warranty, three years or 36,000 miles, whichever comes first. Because of this durational limitation disclaimer, Ford contends that class members will have to present individualized proofs

concerning whether the implied warranty existed at the time of purchase, in the case of used E-350 vans, or expired prior to the point when a given class member suffered an actual injury. (Ford Resp. Br. at 28-29). Next, Ford submits that Plaintiffs do not have classwide proof of a design defect, which Ford claims must be determined by reference to a risk-utility balancing test. (*Id.* at 30). Third, Ford contends that Chief Judge Brown's *Frank* rulings demonstrate that Plaintiffs do not have common proof of actual injury, for the same reason that Plaintiffs did not have common proof of actual injury under GBL § 349. (*Id.* at 32-33). Finally, Ford argues that Plaintiffs do not have common proof of causation. (*Id.* at 35-36).

Plaintiffs respond that their implied warranties arose by operation of law, that any disclaimer by Ford is too inconspicuous to be enforceable, and that, in any event, Ford's disclaimers would be subject to common proof. (Pls.' Reply Br. at 12-14). Speaking to defect, Plaintiffs note that the New York Court of Appeals, responding to a certified question by the Second Circuit, expressly rejected the risk-utility analysis advocated by Ford in *Denny v. Ford Motor Company*, 662 N.E.2d 730 (N.Y. 1995). Instead, Plaintiffs argue that *Denny* adopted an objective standard measured by "the expectations for the performance of the product when used in the customary, usual and reasonably foreseeable manners." *Id.* at 736. Under this objective standard, Plaintiffs maintain that they have common proof addressing whether the E-350 van can safely transport 15 passengers when used in the customary, usual, and reasonably foreseeable manner. (Pls.' Reply Br. at 11-12). Last, Plaintiffs respond that issues of causation[16] support

[16]Plaintiffs also appear to assert that Ford should have raised a causation argument as an affirmative defense to Plaintiffs' implied warranty claims or in its prior motions. (Pls.' Reply Br. at 19). Yet this argument is perplexing, considering that causation is an essential element of Plaintiffs' implied warranty claims. *See, e.g.*, N.Y. U.C.C. §§ 2-314 Cmt. 13, 2-316(3)(b); *Androme Leather Co., Inc. v. Consol. Color Co.*, 569 N.Y.S.2d 514, 515 (App. Div. 1991) (citing

class certification, because class treatment would prevent the necessity for hundreds of trials featuring the same expert witnesses, and because Ford has not shown that any class members knew of the defect at the time of purchase. (*Id.* at 19-20).

The Court agrees with Plaintiffs that *Denny* rejected the risk-utility standard sought by Ford, 662 N.E.2d at 736, and it appears that Plaintiffs may be able to satisfy the defect requirement with common proof. The Court further declines to decide the degree to which Ford's implied warranty disclaimers apply to Plaintiffs' claims.[17] Yet, the Court agrees with Ford that individual issues of actual injury and causation predominate, and thus defeat class certification.

Chief Judge Brown's July 9 Opinion recognized that *Frank*'s actual injury analysis applied to implied warranty claims. 2010 WL 2813788, at *70. This Court rejects Plaintiffs' attempt to distinguish *Frank* for the reasons stated above. Plaintiffs cannot invoke more lenient injury requirements from other jurisdictions to save their New York claims. In light of *Frank*'s actual injury requirement—personal or property damage, out-of-pocket repair costs, or sale at a

---

1 White and Summers, Uniform Commercial Code § 9-1, at 436 (3d ed.)). Plaintiffs do not suggest that Ford has ever admitted causation. (*See* Compl. ¶¶ 84-86; Answer ¶¶ 84-86). Indeed, Ford advanced causation-based arguments in support of its motions for summary judgment as to a number of Plaintiffs' other claims.

[17]Although the parties offer generalized arguments about the enforceability of Ford's disclaimers, the parties do not engage in a detailed analysis of the language and context of the specific disclaimers, which varied depending on the model year. In fact, Ford submitted 15 different warranty booklets for the relevant model years (*see* Taylor Decl. Exs. A-O), and even a cursory review reveals that different warranty periods applied for different warranties in different years, and that such warranties appeared with varying degrees of prominence from year to year. Although the Court suspects that individual issues will arise if any of Ford's disclaimers are enforceable, the Court is not prepared to make such a merits judgment on the basis of the parties' limited briefing, and need not do so to rule on the class certification motion.

loss—Plaintiffs' general assertion of an *inherent* defect cannot overcome the disparate experiences of actual Plaintiffs, wherein some experienced handling difficulties and/or repair costs, others did not, and none claim to have sold their vehicles at a loss due to the defect. The presiding court would need to unearth the viable claims via individual inquiries.[18]

Moreover, numerous causation issues preclude certification of the New York implied warranty claim. Like other jurisdictions, New York requires a plaintiff to show that the defect proximately caused the injury in order to state a claim for warranty liability. *See, e.g.*, *Androme Leather Co., Inc. v. Consol. Color Co.*, 569 N.Y.S.2d 514, 515 (App. Div. 1991) (explaining that

[18]By letter of July 14, 2011, Plaintiffs presented supplemental authority for their implied warranty claims: the Eighth Circuit's recent decision in *In re Zurn Pex Plumbing Products Liability Litigation*, 644 F.3d 604 (8th Cir. 2011). Plaintiffs argue, *inter alia*, that *Zurn Pex Plumbing* found that class members had sufficient actual injury, despite the fact that their plumbing had not leaked, because the plumbing contained the defect at the point of installation. (*See* Doc. No. 398). Indeed, a split panel in *Zurn Pex Plumbing* affirmed the district court's certification of a class of homeowners asserting that the defendants' brass plumbing fittings were defective because they were susceptible to stress corrosion cracking ("SCC"). *Id.* 608-09. This class included a group of plaintiffs whose plumbing had not leaked, which the court referred to as "dry plaintiffs." *Id.* at 616. *Zurn Pex Plumbing* is distinguishable, however, because the plaintiffs in that case had presented expert testimony that the plumbing defect begins to develop as soon as the fittings were exposed to water and, thus, "is already manifest in all systems." *Id.* at 617. The plaintiffs further alleged that SCC "afflicts all of the fittings upon use, regardless of water conditions or installation practices," *id.*, and the plaintiffs' expert had further opined that 99% of homes would experience a plumbing leak in one of the fittings within the product's 25-year warranty, *id.* at 609-10. Similarly, Plaintiffs in this case argue that their defect manifests in all vehicles under normal driving conditions, but the expert opinion they cite and the summary judgment record does not support this contention. Indeed, some Plaintiffs have filled the van to capacity for many years and reported no discernable handling problems. *See supra* Part II.A.1.c ("Injury"). Whereas the dry plaintiffs in *Zurn Pex Plumbing* presented evidence that the fittings were practically certain to fail within the warranty period, the Plaintiffs in this case have presented evidence that the E-350 is likely to experience dangerous handling conditions under normal driving conditions. In this case, as in *Frank*, "it would be manifestly unfair to require a manufacturer to become . . . an indemnifier for a loss that may never occur." 741 N.Y.S. 2d at 16.

a plaintiff must "prove cause in fact and proximate causation on the part of a specific defendant") (quoting 1 White and Summers, Uniform Commercial Code § 9-1, at 436 [3d ed.]); *Complaint of Am. Export Lines, Inc.*, 620 F. Supp. 490, 518 (S.D.N.Y. 1985). The varied experiences of named Plaintiffs reveal that some had actual knowledge of the van's handling problems, if not the exact design defect that caused those handling characteristics. For instance, Florida Plaintiff Blandon, prior to purchasing her used 2000 E-350 van in 2006, had lost control while driving another E-350 van and had participated in numerous discussions with co-workers regarding the van's handling characteristics and relative safety. July 9 Opinion, 2010 WL 2813788, at *49-50 (granting summary judgment against Blandon's claims, because of Blandon's actual knowledge of the alleged defect). Similarly, New York Plaintiff Barrett told his E-350 salesman that a friend of his had experienced a rollover, and that the van should not be driven by inexperienced drivers. *Id.* at *69. Class members with similar knowledge of the handling problems—whether from personal experience or from viewing the numerous public reports identified in Plaintiffs' Complaint—would not be able to prove causation under New York law and, more importantly for purposes of this class certification decision, would not share common proof of causation. The proof would consist of their unique, individual consumer experiences.

This Court finds instructive the Second Circuit's decision in *Sobiech v. International Staple & Machine Co.*, which held, under New York law, that the plaintiff could not maintain action for breach of implied warranty because he knew of a product's (vegetable packaging machine) defects from personally using the product on a trial basis prior to purchase. 867 F.2d 778, 782-83 (2d Cir. 1989). In doing so, the *Sobiech* court relied on N.Y. U.C.C. § 2-316(3)(b), which states that there are no implied warranties "with regard to defects which an examination

ought in the circumstances to have [been] revealed" when the buyer has an opportunity to inspect the goods prior to purchase. *See also* N.Y. U.C.C. §§ 2-314 Cmt. 13 ("In an action based on breach of warranty, it is of course necessary to show not only the existence of the warranty but the fact that the warranty was broken and that the breach of the warranty was the proximate cause of the loss sustained."); 2-316 Cmt. 8 ("Of course if the buyer discovers the defect and uses the goods anyway, or if he unreasonably fails to examine the goods before he uses them, resulting injuries may be found to result from his own action rather than proximately from a breach of warranty. . . . The particular buyer's skill and the normal method of examining goods in the circumstances determine what defects are excluded by the examination. A failure to notice defects which are obvious cannot excuse the buyer."). These principles apply with equal force here, where some Plaintiffs knew of the handling issues from personal experience (Barrett, Blandon), and others no doubt knew of the handling issues from the numerous public reports, articles, and broadcast announcements about the E-350 van's rollover propensity that Plaintiffs identified in the Complaint. (*See* Compl. ¶¶ 25-47) (identifying numerous public reports and broadcasts that were released between 2000 and 2004). Plaintiffs argue that Ford has not made a showing that any class members had "actual knowledge" of the defect prior to purchase (Pls.' Reply Br. at 20 n.13), but Plaintiffs' assessment is wholly contradicted by the summary judgment record.[19]

---

[19] *Daffin v. Ford Motor Co.*, 458 F.3d 549 (6th Cir. 2006), cited by Plaintiffs, does not support certification of Plaintiffs' implied warranty classes. In *Daffin*, the court approved certification of the express warranty claims of consumers asserting damages stemming from a defective throttle body assembly that caused the accelerator to stick. *Id.* at 550. Ford had argued that consumers who did not experience a sticky accelerator or sought repair of the problem "cannot 'prove' an express warranty claim under [Ford's] 'repair or replace' warranty." *Id.* at 553. The *Daffin* court rejected this argument, explaining that "[t]he question that forms the basis

In light of this record, the Court concludes that it is likely that a fair number of the putative class members had actual knowledge of the E-350's handling difficulties at the time of purchase, whether from personal experience or from public announcements. These class members would not be able to show causation to support their implied warranty claims.[20] Sorting out those who knew of the defect from personal use from those who learned from public reports, as well as from those having no knowledge, will require numerous individual inquiries. Because of the individual variations in proof for both actual injury and causation, the Court will

---

for Ford's argument is one of contract interpretation: whether Ford's express warranty promises to cover the alleged defect in the throttle body assembly even if no sticking occurs during the warranty period." *Id.* Depending on how the district court interpreted the warranty provision on remand, the Court of Appeals recognized that "the district court may consider at that point whether to modify or decertify the class." *Id.* at 554. With regard to predominance, the *Daffin* court found that the following common issues predominated: "(1) whether the throttle body assembly is defective, (2) whether the defect reduces the value of the car, and (3) whether Ford's express "repair or replace" warranty covers the latent defect at issue in this case." *Id.* The court further reasoned that *Daffin* was "not a case . . . in which different class members were exposed to different products such that the uncommon issue of causation predominated over the lesser shared issues." *Id.*

Here, by contrast, Plaintiffs do not assert an express warranty claim on the basis of any written warranty issued by Ford to replace defective parts. Rather, Plaintiffs have based their sole express warranty claim (Georgia, *see infra* Part II.G) and their several implied warranty claims on Ford's "core description" and/or packaging of the E-350 van as a "15-passenger van." Thus, Plaintiffs' warranty claims do not present a common issue of contract interpretation. Rather, Plaintiffs' warranty claims rest on the various representations of Ford representatives to individual class members. Moreover, this case presents additional issues requiring individual treatment that were not present in *Daffin*: actual injury (New York law), causation, and statutes of limitations.

[20]Plaintiffs argue that Ford's causation argument improperly asks this Court to consider the merits of Plaintiffs' claims. Yet, this Court presently makes no determination regarding whether an individual Plaintiff or class member failed to show causation in fact and proximate causation, with regard to specific consumer transactions. This Court's ruling only recognizes the disparate consumer experiences detailed in Chief Judge Brown's summary judgment opinions, which lead this Court to conclude that Plaintiffs' implied warranty claims are not susceptible to common proof.

deny certification of the New York implied warranty claim.

B. Texas

The sole remaining Texas claim is St. Luke's omission claim under DTPA § 17.46(b)(24). *See* July 9 Opinion, 2010 WL 2813788, at *55. Ford objects that Plaintiffs cannot prove their Texas consumer fraud claims with common proof, because there is no classwide evidence of the elements of the DTPA claim: (1) a uniform omission; (2) deception; (3) actual injury; and (4) causation. The parties generally rely on the same consumer fraud arguments that this Court addressed in the New York section, *supra* Part II.A.1. The Court agrees with Ford that common issues of law and fact do not predominate.

Texas Plaintiffs' omission claim is predicated on allegations that Ford failed to disclose to consumers that, due to stability issues, the E-350 van should only be driven by trained experienced drivers. (*See* Compl. ¶ 31; Pls.' Reply Br. at 27 n.18, 29). As detailed above, the undisputed record in this case reveals that the safety instructions in E-350 owner's manuals changed throughout the proposed class period. For instance, whereas the owner's guides for model-year 2000-2002 E-350 vans included general notices about the vehicle's handling capabilities and urged "[e]xtra precautions, such as slower speeds and increased stopping distance, . . . when driving a heavily loaded vehicle," the owner's guides for model-year 2003-2005 E-350 vans added a "Vehicle Stability and Handling" section, which stated that "[t]he risk of a rollover crash increases as the number of people and load in the vehicle increase," and advised that "[t]he van should be operated by an experienced driver." (*See* Doc. No. 292, Smith Decl. Ex. 12). Naturally, then, Plaintiffs cannot assert a uniform alleged omission, because differing amounts of information were disclosed at different times.

The Court is less sanguine about Ford's deception argument, which primarily relies on case law from other jurisdictions. (*See* Ford's Br. at 42-43). As noted in the discussion of New York law, it is unclear whether New York applies a purely objective or quasi-subjective standard for determining deception. In the absence of clear guidance from Texas cases or statutes, the Court will not weigh this factor against Plaintiffs.

The Court is also hesitant to accept Ford's argument that Texas Plaintiffs cannot show actual injury with common proof under the Texas Supreme Court's ruling in *DaimlerChrysler Corp. v. Inman*, 252 S.W.3d 299 (Tex. 2008). St. Luke's and, presumably, Texas class members seek damages based on diminution in value of the van. St. Luke's also asserts loss of use. Chief Judge Brown distinguished the deficient pleadings in *Inman* from St. Luke's pleadings in this case, explaining "[a]s the Supreme Court of Texas noted, the *Inman* plaintiffs did *not* contend that the allegedly defective 'buckles made their vehicles worth less than they paid for them.'" July 9 Opinion, 2010 WL 2813788, at *52 (quoting *Inman*, 252 S.W.3d at 302). Here, all Plaintiffs, including St. Luke's and putative class members, assert that the defective design of the E-350 van made their vehicles worth less than they paid for them. (*See, e.g.*, Pls.' Br. at 35-36) (stating that Plaintiffs paid for more than they received, in an amount of $2,100). Ford asks for this Court to recognize that the Texas Supreme Court has adopted an actual injury requirement similar to the one articulated in *Frank* (New York). Yet, Chief Judge Brown's ruling did not make this connection, and Ford does not identify Texas authority to support this point. Under these circumstances, the Court will presume that Texas Plaintiffs can present common proof of an injury, sufficient to have standing under *Inman*.

However, the Court agrees with Ford that Plaintiffs cannot present classwide proof of

reliance or causation. As Chief Judge Brown recognized in the July 9 Opinion, "[r]eliance is an essential element of a DTPA claim . . . ." 2010 WL 2813788, at *53 (citing Tex. Bus. & Com. Code § 17.50(a)(1)(B); *Morgan Bldgs. & Spas, Inc. v. Humane Soc'y of S.E. Texas*, 249 S.W.3d 480, 490 (Tex. App. 2008)). Applied to St. Luke's claim, "to satisfy the reliance element for an omission, a plaintiff must show that defendant had intent to induce a transaction through failure to disclose, and that plaintiff would not have entered into the transaction if the information had been disclosed." July 9 Opinion, 2010 WL 2813788, at *55. Ford correctly points out that Texas courts have acknowledged that claims requiring a showing of reliance—including the DTPA—involve many individualized inquiries that usually cannot be resolved through class litigation. Texas courts have reached this conclusion in the aftermath of the Texas Supreme Court's decertification decision in *Henry Schein, Inc. v. Stromboe*, which recognized that class members "are held to the same standards of proof of reliance—and for that matter all the other elements of their claims—that they would be required to meet if each sued individually." 102 S.W.3d 675, 693 (Tex. 2002) (decertifying a class of contract, warranty, and DTPA claims for, *inter alia*, failure to present classwide proof of reliance). In other words, *Schein* held that "[t]he burden on plaintiffs to prove reliance in order to recover on any of these theories is in no way altered by the assertion of claims on behalf of a class." *Id.* After *Schein*, multiple appellate courts in Texas rejected class certification of consumer fraud claims, explaining that "[p]roof of reliance or lack of reliance necessarily requires an *individualized* determination because, under all the same facts and circumstances, one person may have relied on the misrepresentation in reaching a decision while another did not rely on it in reaching the same decision." *Texas South Rentals, Inc. v. Gomez*, 267 S.W.3d 228, 237 (Tex. App. 2008) (quoting *Fid. & Guar. Life Ins.*

Co. v. Pina, 165 S.W.3d 416, 423 (Tex. App. 2005); *Grant Thornton, L.L.P. v. Suntrust Bank*, 133 S.W.3d 342, 355 (Tex. App. 2004)). As of 2008, no Texas appellate court since *Schein* had found evidence of classwide reliance. *Gomez*, 267 S.W.3d at 237 (noting that the courts of appeals had "questioned whether given the individualized nature of reliance, any class action could ever be certifiable under *Schein*"). Ford concedes, however, that the Texas Supreme Court did find classwide proof of reliance last year in *Southwestern Bell Telephone Company v. Marketing On Hold Inc.*, 308 S.W.3d 909 (Tex. 2010). *Southwestern Bell* recognized that "Texas courts have been reluctant to certify a class when proof of reliance is required as an element of a claim" since *Schein*, and restated that class certification is improper "[w]hen evidence existed that individual class members' experiences reasonably could have varied . . . ." *Sw. Bell*, 308 S.W.3d at 921-22. Nevertheless, the *Southwestern Bell* court concluded that the phone service consumers before it had common proof of reliance, because the consumers had no choice but to rely on the phone company's representations by paying the allegedly improper municipal fees on their phone bills. *Id.* at 922. The court reasoned that the phone company would have discontinued phone service if a consumer objected to the fee. *Id.* at 922-23.

In their reply, Plaintiffs make no attempt to place their proposed class within the limited contours of *Schein* and *Southwestern Bell*, nor do Plaintiffs assert that they have common evidence of reliance. Rather, Plaintiffs contend that Chief Judge Brown's July 9 Opinion held that "there is no 'reliance' requirement under the relevant . . . Texas consumer protection laws." (Pls.' Reply Br. at 26). Plaintiffs' argument in this regard is disingenuous, because it flatly contradicts both Texas law and Chief Judge Brown's decision. As noted above, reliance is an essential element of a DTPA claim. July 9 Opinion, 2010 WL 2813788, at *53 (citing Tex. Bus.

& Com. Code § 17.50(a)(1)(B); *Morgan Bldgs.*, 249 S.W.3d at 490). Further, Chief Judge Brown explained how Plaintiffs could satisfy the reliance requirement for their omission claim: "to satisfy the reliance element for an omission, a plaintiff must show that defendant had intent to induce a transaction through failure to disclose, *and* that plaintiff would not have entered into the transaction if the information had been disclosed." July 9 Opinion, 2010 WL 2813788, at *55 (emphasis added). In other words, Plaintiffs must have common proof that class members would not have purchased the E-350 van if Ford had fully disclosed the E-350 van's handling problems to consumers. Not only do Plaintiffs not attempt to make this showing, but Ford correctly notes that the record indicates that some named Plaintiffs would have bought their E-350 vans despite the handling problems. (*See, e.g.*, Barrett 56.1 Statement, Doc. No. 206, Ex. 2, ¶¶ 22-29) (explaining that he would have bought the E-350 van despite the handling issues); (Blandon 56.1 Statement, Doc. No. 190, Ex. 2, ¶¶ 3-6) (explaining that she purchased an E-350 van, despite knowing of its handling problems). No doubt, unidentified members of the proposed Texas class would have similar variations that would be material to whether or not they could state a DTPA claim. Plaintiffs have no answer for how these individual variations can be resolved without individual inquiries.

Plaintiffs have not shown common proof of omission or reliance, and, therefore, common issues of fact and law do not predominate over individual issues. Consequently, the Court will deny certification of Plaintiffs' proposed Texas class.

C. Pennsylvania

The only remaining Pennsylvania claims are the implied warranty claims of Bethel, Hickman Temple, and Mt. Airy, as well Bethel's unjust enrichment claim on its 2001 van. *See*

July 9 Opinion, 2010 WL 2813788, at *44; February 16 Opinion, 2011 WL 601279, at *6. Ford objects to Plaintiffs' proposed Pennsylvania classes on the grounds that Plaintiffs cannot prove their implied warranty and unjust enrichment claims with common proof. The Court agrees on both counts.

1. Implied Warranty

Ford advances essentially the same objections to the proposed Pennsylvania implied warranty class that it presented in opposition to the proposed New York implied warranty class, and Plaintiffs offer essentially the same responses. Accordingly, one would presuppose that the same class certification analysis the Court conducted with regard to the New York implied warranty class would be applicable to the other jurisdictions' implied warranty classes. However, as Chief Judge Brown recognized in the omnibus July 9 Opinion, 2010 WL 2813788, at *41-42, Pennsylvania courts have not yet adopted actual injury requirements akin to *Frank*. The question remains whether Plaintiffs' implied warranty classes survive in jurisdictions with less stringent injury requirements than New York. This Court concludes that the Pennsylvania implied warranty class still suffers from individual issues of causation that render class treatment impracticable.

Like other states, Pennsylvania imposes an implied warranty of merchantability on all contracts for the sale of goods if the seller is a merchant. 13 Pa. Cons. Stat. § 2314(a). The UCC as codified in Pennsylvania states that, in order to be merchantable, the goods must "pass without objection in the trade under the contract description" and be "fit for the ordinary purposes for which such goods are used." *Id.* § 2314(b). The Pennsylvania Supreme Court has held that "[t]he concept of merchantability does not require that the goods be the best quality or

the best obtainable but it does require that they have an inherent soundness which makes them suitable for the purpose for which they are designed, that they be free from significant defects, that they perform in the way that goods of that kind should perform, and that they be of reasonable quality within expected variations and for the ordinary purpose for which they are used." *Gall v. Allegheny Cty., Health Dep't*, 555 A.2d 786, 789-90 (Pa. 1989) (internal citations omitted). Like other jurisdictions, Pennsylvania's UCC requires a showing of causation that can be overcome by knowledge of the defect at the time of purchase. "When the buyer before entering into the contract has examined the goods or the sample or model as fully as he desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him." 13 Pa. Cons. Stat. § 2316(c)(2); *see also id.* Cmt. 8 ("The particular buyer's skill and the normal method of examining goods in the circumstances determine what defects are excluded by the examination. A failure to notice defects which are obvious cannot excuse the buyer."); *id.* § 2314 Cmt. 13 ("Action by the buyer following an examination of the goods which ought to have indicated the defect complained of can be shown as matter bearing on whether the breach itself was the cause of the injury."); *Nufeeds, Inc. v. Westmin Corp.*, No. 04-1071, 2006 WL 1000021, at *18 (M.D. Pa. Apr. 17, 2006). Consequently, this Court's causation reasoning with regard to the New York implied warranty class applies equally to the Pennsylvania implied warranty class. Resolution of these claims will require individualized inquiries into each consumer experience, so as to identify and exclude those consumers who purchased E-350 vans with actual knowledge of its handling problems, whether from personal use or from a variety of reports that were published between 2000 and 2004.

2. Unjust Enrichment

To assert a claim of unjust enrichment under Pennsylvania law, a plaintiff must show that: "(1) benefits conferred on defendant by plaintiff; (2) appreciation of such benefits by defendant; and (3) acceptance and retention of such benefits under such circumstances that it would be inequitable for defendant to retain the benefit without payment of value." *Williams Twp. Bd. of Supervisors v. Williams Twp. Emergency Co.*, 986 A.2d 914, 923-24 (Pa. Commw. Ct. 2009) (citations omitted). Pennsylvania law views unjust enrichment as an equitable remedy based on the law of restitution. *See, e.g.*, *Mitchell v. Moore*, 729 A.2d 1200, 1203-04 (Pa. Super. Ct. 1999); *Powers v. Lycoming Engines*, 328 F. App'x 121, 125 (3d Cir. 2009) (collecting Pennsylvania cases).

Ford argues that Plaintiffs do not have common proof of a benefit conferred upon Ford, that the benefit exceeded the value of the vehicle, or that retention of the benefit by Ford would be unjust. Plaintiffs respond by limiting their proposed unjust enrichment class "to consumer purchases of new vehicles during the time period prior to April 2004," so as to limit the class to consumers who conveyed a benefit upon Ford, and argue that they have common proof of Ford's misconduct, in the form of evidence that Ford disregarded and failed to disclose to consumers an engineering recommendation that Ford should redesign their 15-passenger vans to improve van stability and handling. (Pls.' Reply Br. at 37).

While it appears that the modifications to Plaintiffs' proposed unjust enrichment classes address the first objection raised by Ford (common benefit), the Court agrees with Ford that Plaintiffs cannot satisfy the remaining elements of their unjust enrichment claims with common proof.

As this Court has explained with regard to other proposed classes, the summary judgment record in this case established that different named Plaintiffs had different consumer experiences vis-a-vis their E-350 van. Some were not exposed to any representations about the van's capacity or relative safety, some experienced no discernable handling problems with their vans, some continue to fill their van to capacity, and some incurred no injury whatsoever. At the same time, the E-350 owners' manuals issued by Ford progressively alerted consumers to the van's unique handling characteristics and the need to drive with caution. This Court finds illustrative Chief Judge Brown's rulings with regard to the unjust enrichment claims of Illinois Plaintiff Pentecostal Temple, New York Plaintiff Barrett, and Florida Plaintiff Blandon.

Addressing the former, Chief Judge Brown granted summary judgment against Pentecostal Temple's unjust enrichment claim, reasoning as follows:

> It is undisputed, based on Pastor Edwards's deposition testimony, that no one at Pentecostal Temple received any representations from Ford, saw any Ford marketing materials, or even observed that the E-350 purported to be a 15-passenger van. Pentecostal Temple sold its first E-350 van for reasons unrelated to the handling issues giving rise to this litigation, and it purchased the 1998 van based on the desire for "something that would take more than four or five members at a time" and that would have ease of access for seniors and young people. (Edwards Dep. at 56:16-17; 57:1-19). While other Plaintiffs in this action might have acquired their E-350 vans based on Ford's representations or labeling of the vehicles as 15-passenger vans, the undisputed record shows that Pentecostal Temple did not.

July 9 Opinion, 2010 WL 2813788, at *25. Chief Judge Brown explained that Pentecostal Temple's "unjust enrichment claim fails for the same substantive flaw that dooms its [consumer fraud act] claim: it cannot show deception or other wrongful conduct directed at Pentecostal Temple." *Id.* at *24. Similarly, Chief Judge Brown granted summary judgment against New

York Plaintiff Barrett's unjust enrichment claim, because the undisputed record revealed that Barrett: (i) knew of the handling defects prior to purchase and told his salesman of the same (simultaneously negotiating a lower price that Barrett deemed fair); (ii) did not experience handling problems and continued to fill his van to capacity; (iii) still would have bought the van if he had all the knowledge that he had at the time of his deposition; and (iv) had no intention of selling the van. *Id.* at *71-72 (citing the benefit-of-the-bargain principles of *Canon Cameras* and the actual injury requirement of *Frank*). As this Court observed, *supra*, it cannot be denied that such a class member has been deprived of the benefit of his or her bargain. Chief Judge Brown further granted summary judgment against Florida Plaintiff Blandon's unjust enrichment claim because she purchased her van in 2008 from a private individual after the point in time (April 2004) that Plaintiffs concede that the bubble market for E-350 vans had ended. *Id.* at *50. Beyond the April 2004 end-point conceded by Plaintiffs, it is undisputed that a number of public reports concerning the E-350's handling problems were published and/or broadcast between 2000 and 2004. Such reports would necessarily factor into consideration of the equities for the unjust enrichment claims of those consumers that viewed the reports.

Where individual consumers bargained with varying degrees of knowledge regarding the alleged defect, were exposed to varying representations, if at all, about the van's capacity and relative safety, and filled their vans at varying capacities with varying handling problems, if any, Plaintiffs cannot overcome these individual consumer experiences with the claim that they have common proof that Ford failed to disclose information about the vehicle's handling. The presiding court would need to conduct separate inquiries into the equities of each class member's consumer experience to resolve these claims. *See, e.g.*, *Vega v. T-Mobile USA, Inc.*, 564 F.3d

1256, 1274 (11th Cir. 2009) (explaining that unjust enrichment claims require the reviewing court to "examine the particular circumstances of an individual case and assure itself that, without a remedy, inequity would result or persist," and therefore "courts . . . have found unjust enrichment claims inappropriate for class action treatment"). Common issues of law and fact thus do not predominate over individualized inquiries, and this Court will deny class certification of the Pennsylvania unjust enrichment classes.

D. Florida

The only remaining Florida claims are the Florida Deceptive and Unfair Trade Practices Act (FDUPTA) claims of Diaz and Mestre. *See* July 9 Opinion, 2010 WL 2813788, at *51. Ford argues that Plaintiffs ignore the "central" issue of consumer knowledge, which led to the dismissal of Florida Plaintiff Blandon's FDUPTA claim. Ford also argues that the proposed Florida class fails for the same reasons that the New York and Texas consumer fraud claims fail, because the law of the three jurisdictions are relatively similar. (Ford Resp. Br. at 61). Plaintiffs respond with the essentially the same arguments that they advanced in support of their New York and Texas consumer fraud claims, and emphasize that they do not need to show reliance under Florida law. (Pls.' Reply Br. at 25-35). Although the Court agrees with Plaintiffs that the prevailing Florida authority holds that Plaintiffs do not need to show reliance, the Court agrees with Ford that individualized issues of deception and causation predominate and defeat Plaintiffs' motion for class certification.

"[U]nder FDUTPA, a litigant must demonstrate three elements: (1) a deceptive act or unfair practice; (2) causation; and (3) actual damages." *Pop's Pancakes, Inc. v. NuCO2, Inc.*, 251 F.R.D. 677, 685 (S.D. Fla. 2008) (citing *Rollins, Inc. v. Butland*, 951 So.2d 860, 869 (Fla. 2d

Dist. Ct. App. 2006)). Plaintiffs cite *Fitzpatrick v. General Mills*, 263 F.R.D. 687, 695 (S.D. Fla. 2010) and *Davis v. Powertel, Inc.*, 776 So. 2d 971, 974 (Fla. 1st Dist. Ct. App. 2000), two cases that approved certification of FDUTPA classes, for the proposition that FDUTPA does not require a showing of reliance. The Eleventh Circuit has since vacated the class definition certified in *Fitzpatrick*, but in doing so approved of the district court's predominance analysis, which relied on *Davis*. *Fitzpatrick v. Gen. Mills, Inc.*, 635 F.3d 1279, 1282-83 (11th Cir. 2011). However, the appellate court's decision in *Davis* has since been criticized by multiple appellate decisions and a federal district court for its failure to account for FDUTPA's causation requirement. *Pop's Pancakes*, 251 F.R.D. at 687; *Black Diamond Props., Inc. v. Haines*, 940 So. 2d 1176, 1179 n.1 (Fla. 5th Dist. Ct. App. 2006); *Philip Morris USA, Inc. v. Hines*, 883 So.2d 292, 294 (Fla. 4th Dist. Ct. App. 2003). *Pop's Pancakes* further cited *Egwuatu v. South Lubes, Inc.*, 976 So. 2d 50, 53 (Fla. 1st Dist. Ct. App. 2008), as evidence that the appellate court that issued *Davis* had limited its holding. *Pop's Pancakes*, 251 F.R.D. at 687. The Eleventh Circuit in *Fitzgerald* did not address these developments in Florida law,[21] and it appears that the FDUTPA issue of causation was not raised on appeal.

This Court finds persuasive the deception and causation analysis in *Pop's Pancakes* and *Black Diamond*. Both courts denied class certification of the plaintiffs' respective FDUTPA claims, because resolution of the claims would require individualized deceptive act and causation inquiries. In *Pop's Pancakes*, for instance, the plaintiffs, lessees of beverage equipment, alleged that the defendant lessor had included an illicit administrative fee in its property tax invoices.

[21]Similarly, *Wolin v. Jaguar Land Rover North America*, 617 F.3d 1168 (9th Cir. 2010), which Plaintiffs correctly note approved an FDUTPA class, does not appear to contain any discussion of how Florida courts have interpreted the state's consumer fraud law.

The court ruled that the proposed FDUTPA class "fail[ed] to account for those customers who fall within the class description, who either were told, prior to receiving the property tax invoice, that the invoice included an administrative fee, or, those customers who read the back of the invoice and understood, based upon that reading, that the 'property tax' fee on the front of the invoice included an administrative fee." 251 F.R.D. at 685. Although the plaintiffs in that case characterized the invoice as a uniform misrepresentation, the court disagreed, stating "Plaintiffs fail to acknowledge that whether the invoice was deceptive depends, in part, on the knowledge and/or understanding of each NUCO customer." *Id.* at 686. Meanwhile, in *Black Diamond*, plaintiffs, homeowners in a residential golf community and members of the golf course, alleged that the community developer misrepresented the ownership interest attendant to their golf memberships. 940 So. 2d at 1178. The district court of appeals rejected the homeowners' FDUPTA class, explaining that the class claims:

> alleg[ed] that oral and written misrepresentations took place in 500 separate oral contract transactions spanning many years and involving numerous sales personnel. To prove these allegations, it will be necessary that each plaintiff testify. Additionally, it will be necessary for each plaintiff to offer proof that he or she was damaged as a result of the purported misrepresentations. Finally, given the varied circumstances and span of time over which the transactions occurred, defenses applicable to some plaintiffs will not be applicable to others.

Id. at 1178-79.

Chief Judge Brown found this reasoning persuasive; he cited *Pop's Pancakes* with approval in granting summary judgment against Florida Plaintiff Blandon's FDUTPA claim. July 9 Opinion, 2010 WL 2813788, at *49 (reasoning under FDUTPA, per *Pop's Pancakes*, "a defendant's deceptive practice must cause a plaintiff's injury, and if a plaintiff knew of the safety

issues that Ford's allegedly deceptive sales practices attempted to conceal, her injuries could not have been caused by those practices"). Plaintiffs have not sought reconsideration of this ruling, and it is now law of the case. This Court agrees that the deception and causation analysis of *Pop's Pancakes* and *Black Diamond* controls for the circumstances presented in this case. In light of the varied consumer experiences of Plaintiffs in this case—in terms of exposure to representations of capacity and safety, pre-existing knowledge of the alleged defect from personal use and/or public reports, and manifestation of handling problems at different occupancy levels, *see generally* discussion of New York GBL § 349 class, *supra* Part II.A.1—resolution of Plaintiffs' FDUTPA claims will require individualized deception and causation inquiries. Accordingly, common issues do not predominate, and this Court will deny certification of the Florida class.

E. Michigan & New Jersey

The only remaining Michigan and New Jersey claims are for breach of the implied warranty of merchantability. July 9 Opinion, 2010 WL 2813788, at *33, 67; February 16 Opinion, 2011 WL 601279, at *10. Ford and Plaintiffs present essentially the same class certification arguments as to these proposed classes as they did with regard to the proposed New York and Pennsylvania implied warranty classes. Plaintiffs further rely on *In re Mercedes-Benz Tele Aid Contract Litigation*, 257 F.R.D. 46 (D.N.J. 2009), which certified a class of vehicle owners who brought consumer fraud and unjust enrichment claims against the manufacturer for failing to tell them that the Tele Aid emergency response systems they purchased with their vehicles and paid for with subscription fees would become obsolete.

This Court detects no material differences between Michigan's and New Jersey's implied

warranty law and Pennsylvania's implied warranty law that would compel a different conclusion, and therefore the Court discusses them together. Like Pennsylvania, Michigan and New Jersey require a showing of causation that can be overcome by proof that the consumer had actual knowledge of the defect at the time of purchase. *See, e.g.*, Mich. Comp. Laws §§ 440.2314 Cmt.13, 440.2316(3)(b) & Cmt. 8; *Jodway v. Kennametal, Inc.*, 525 N.W.2d 883, 890 (Mich. Ct. App. 1994) ("A purchaser who has extensive knowledge of a product's inherently dangerous propensities should not be allowed to claim that an implied warranty of merchantability exists as a guaranty against such characteristics."); N.J. Stat. Ann. §§ 12A:2-314 Cmt. 13, 12A:2-316(3)(b) & Cmt. 8; *Henry Heide, Inc. v. WRH Prods. Co.*, 766 F.2d 105, 110 (3d Cir. 1985) (applying New Jersey law and stating that "if a buyer undertakes a reasonable examination of the goods, he is precluded from asserting a claim for breach of implied warranty against anyone who was responsible for a defect that the buyer ought, in the circumstances, to have noticed"). Accordingly, the Court's causation analysis of the New York and Pennsylvania implied warranty classes applies equally here. *See* Parts II.A.2 and II.C.1, *supra*. In light of the summary judgment record, individual issues of causation predominate, and this Court will deny certification of these classes.

In re Mercedes-Benz, cited by Plaintiffs, does not suggest otherwise, because the plaintiffs in that case voluntarily dismissed their implied warranty claims prior to class certification. 257 F.R.D. at 50 n.5. Nor is that case persuasive, because, unlike the present case, the consumer fraud and unjust enrichment allegations in that case were not undercut by differing accounts of misrepresentation, record evidence that some consumers knew of the alleged defect at the time of purchase (both from personal knowledge and from public reports), and there was

no doubt that the defect—the obsolescence of the analog network utilized by the vehicles' emergency response systems—manifested in all class vehicles. *See id.* at 73 ("Each member of the proposed class demonstrated his or her intention to utilize the system by continuing to subscribe until being informed that analog service would be discontinued at the end of 2007, and some Plaintiffs went so far as to purchase a digital upgrade in order to assure that they could continue to use Tele Aid. Thus, each class member got something less than he or she was promised: a vehicle that was meant to last up to 20 years, but contained a Tele Aid system that would become useless at the end of 2007.").

F. California

The only remaining California claim is First United's unjust enrichment claim. July 9 Opinion, 2010 WL 2813788, at *19; February 16 Opinion, 2011 WL 601279, at *6-8. Ford and Plaintiffs generally present the same class certification arguments as to the proposed California class as they did with regard to the proposed Pennsylvania class. This Court detects no distinguishing features of California's law of unjust enrichment that would compel a different conclusion. *See, e.g.*, *Ghirardo v. Antonioli*, 924 P.2d 996, 1003 (Cal. 1996) ("Under the law of restitution, an individual may be required to make restitution if he is unjustly enriched at the expense of another. A person is enriched if he receives a benefit at another's expense. The term 'benefit' 'denotes any form of advantage.' Thus, a benefit is conferred not only when one adds to the property of another, but also when one saves the other from expense or loss.") (citing Restatement of Restitution § 1); February 16 Opinion, 2011 WL 601279, at *5 (recognizing similarities between law of unjust enrichment in Pennsylvania and California). Accordingly, the Court will deny certification of Plaintiffs' proposed California unjust enrichment class for the

same reasons that the Court rejected Plaintiffs' proposed Pennsylvania unjust enrichment class. *See* Part II.C.2, *supra*.[22]

G. Georgia

Georgia Plaintiff Allen Temple seeks certification of its remaining express warranty, implied warranty, and unjust enrichment claims. *See* July 9 Opinion, 2010 WL 2813788, at *38. Allen Temple is the only Plaintiff that still has an active express warranty claim after the summary judgment rulings. The parties present essentially the same arguments in support of the implied warranty and unjust enrichment claims. In addition, the parties dispute whether purchasers of used vans can be included in a warranty class under Georgia law.[23] With regard to the express warranty class, Ford argues that Chief Judge Brown's summary judgment rulings as

---

[22]Two Ninth Circuit decisions cited by Plaintiffs, *Chamberlan v. Ford Motor Co.*, 402 F.3d 952 (9th Cir. 2005) and *Hanlon v. Chrysler Corp.*, 150 F.3d 1011 (9th Cir. 1998), do not support certification of Plaintiffs' California unjust enrichment class. *Chamberlan* denied interlocutory review of the district court's certification of a class under the California Consumers Legal Remedies Act. 402 F.3d at 962. The common issues in that case were: "(1) whether the design of the plastic intake manifold was defective; (2) whether Ford was aware of alleged design defects; (3) whether Ford had a duty to disclose its knowledge; (4) whether it failed to do so; (5) whether the facts that Ford allegedly failed to disclose were material; and (6) whether the alleged failure to disclose violated the CLRA." *Id.* *Chamberlan* did not involve an unjust enrichment class under California law, and its analysis of common issues under California's consumer fraud statute is not applicable to the remaining consumer fraud claims (Florida, New York, Texas) in this MDL action. Likewise, *Hanlon*, which approved a class settlement of product defect claims against a minivan manufacturer, did not address certification of an unjust enrichment claim under California law, and the court's scant predominance analysis did not address any material factual variations among consumers that would require individualized treatment of class members' claims. Thus, *Hanlon* provides minimal support for Plaintiffs' position in this case, where the summary judgment record revealed numerous, material differences from Plaintiffs' respective consumer experiences.

[23]Plaintiffs' reply brief modified the proposed unjust enrichment classes to extend only to purchasers of new E-350 vans, but Plaintiffs have not sought to modify their implied warranty classes in the same vein.

to other named Plaintiffs reveal that different consumers were exposed to different representations about the E-350's seating capacity and relative safety. Consequently, Ford reasons that the presiding court would have to undertake individualized inquiries of putative class members' respective consumer experiences to see if any affirmative representations by Ford became the "basis of the bargain." (Ford Resp. Br. at 65). Plaintiffs do not appear to address Ford's express warranty argument in their reply brief, but in their class certification brief Plaintiffs generally argued that "[w]hether Ford's marketing of the E-350 as a 15-passenger vehicle, its '15 Passenger' name, and 15 installed [sic] seats, constitutes a description and warranty of safe 15-passenger travel turns wholly on how Ford sold the vans, not on any particulars in respect of consumers." (Pls.' Br. at 43). The Court agrees with Ford on all counts.

This Court detects no material differences between Georgia's implied warranty law and Pennsylvania's implied warranty law that would compel a different conclusion. Like Pennsylvania, Georgia's implied warranty law requires a showing of causation that can be overcome by proof that the consumer had actual knowledge of the defect at the time of purchase. *See, e.g.*, Ga. Code Ann. §§ 11-2-314 Cmt. 13, 11-2-316(3)(b) & Cmt. 8; *W.M. Hobbs, Ltd. v. Accusystems of Ga., Inc.*, 339 S.E.2d 646, 647 (Ga. Ct. App. 1986) (rejecting implied warranty claim where consumer had the opportunity to use the copier machine on a trial basis prior to purchase). Accordingly, the Court's causation analysis of the New York and Pennsylvania implied warranty classes applies equally here. *See* Parts II.A.2 and II.C.1, *supra*. Likewise, the Court discerns no material difference between Georgia's law of unjust enrichment and that of Pennsylvania. *See, e.g.*, *Tuvim v. United Jewish Cmtys., Inc.*, 680 S.E. 2d 827, 829-30 (Ga. 2009) ("Unjust enrichment applies when as a matter of fact there is no legal contract, but when

the party sought to be charged has been conferred a benefit by the party contending an unjust enrichment which the benefitted party equitably ought to return or compensate for.") (citation omitted). Accordingly, the Court will deny certification of Plaintiffs' proposed Georgia unjust enrichment class for the same reasons that the Court rejected Plaintiffs' proposed Pennsylvania unjust enrichment class. *See* Part II.C.2, *supra*.

With regard to the proposed express warranty class, the Court agrees with Ford that common issues do not predominate. Like other jurisdictions, Georgia law recognizes express warranties in the following circumstances:

> (a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.
>
> (b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.

Ga. Code Ann. § 11-2-313(1). "It is not necessary to the creation of an express warranty that the seller use formal words such as 'warrant' or 'guarantee' or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty." *Id.* § 11-2-313(2).

> The decisive test, in determining whether language used is a mere expression of opinion or a warranty, is whether it purported to state a fact upon which it may fairly be presumed the seller expected the buyer to rely, and upon which a buyer would ordinarily rely. If the language used is of that character, the fact of reliance on the part of the buyer and the presumption of intent on the part of the seller which the law would raise in such a case would operate to create a warranty.

Smith v. Frazer, 86 S.E. 225, 226 (Ga. 1915) (quoting 30 Am. & Eng. Enc. Law at 142). Chief Judge Brown's omnibus July 9 Opinion rejected other Plaintiffs' contention that Ford's "core description" of the E-350 as a "15-passenger" van created an express warranty of safety under the respective jurisdictions' UCC provisions. *E.g.*, July 9 Opinion, 2010 WL 2813788, at *9 (California Plaintiffs), 31 (New Jersey Plaintiffs), 41 (Pennsylvania Plaintiffs), 73 (Bishop Anderson), 79 (Massachusetts Plaintiff).[24] Plaintiffs have not sought reconsideration of these rulings, and Plaintiffs do not suggest that Georgia law would require a different conclusion. The summary judgment record in this case further revealed that different consumers were exposed to different representations, if at all, at the time of purchase. *See* Part II.A.1.a ("Misrepresentation") & n.7, *supra*. Individual inquiries will be necessary to determine whether Ford representatives made affirmative representations about the E-350's relative safety as a 15-passenger van to specific consumers. Consumers who were not exposed to such representations cannot assert that such representations were a basis for their bargains. *See, e.g.*, *Am. Coach Lines of Orlando, Inc. v. N. Am. Bus Indus., Inc.*, No. 09-999, 2011 WL 653524, at *18 (M.D. Fla. Feb. 14, 2011) (applying Florida and Georgia law, and concluding that statements made after delivery of the product could not have been the basis of the bargain). Plaintiffs have not shown that they can establish their express warranty claim with common proof. Therefore, the Court concludes that common issues of fact do not predominate, and the Court will deny certification of Georgia

[24]Unlike it did with regard to Plaintiffs' other express warranty claims, Ford did not seek summary judgment against Allen Temple's express warranty claim on the ground that Ford's alleged representations were too vague to be actionable as an express warranty. Consequently, Chief Judge Brown did not have occasion to rule on whether Allen Temple had presented colorable evidence that Ford made specific representations about the E-350 van that were actionable as express warranties under Georgia law. July 9 Opinion, 2010 WL 2813788, at *35.

Plaintiff's express warranty class.

In addition to these reasons, the Court agrees with Ford that Plaintiffs' proposed warranty class fails to account for Georgia's treatment of purchasers of used goods. Plaintiffs cite *Georgia Timberlands, Inc. v. S. Airways, Co.*, 188 S.E.2d 108 (Ga. Ct. App. 1972) for the proposition that an implied warranty of merchantability inheres when the used goods are sold by merchants who deal in the subject goods. (Pls.' Reply Br. at 21). Yet, Plaintiffs fail to explain how this rule would apply to consumers that bought used E-350 vans from third-parties, such as private individuals or independent car dealerships. The Court is aware of no Georgia authority that would permit express or implied warranty claims to lie against the manufacturer where the consumer purchased used goods (even a vehicle) from an unrelated third party. *See Gen. Motors Corp. v. Halco Instruments, Inc.*, 185 S.E. 2d 619, 622 (Ga. Ct. App. 1971) (collecting cases for the proposition that there is no implied warranty of merchantability against the manufacturer "[w]hen goods are sold by an original purchaser to a third party as used or second-hand goods"); *Stewart v. Gainesville Glass Co.*, 212 S.E. 2d 377, 377 (Ga. 1975) (stating that, with few exceptions, express warranty claims require privity); *Jones v. Cranman's Sporting Goods*, 237 S.E. 2d 402, 405 (Ga. Ct. App. 1977) (recognizing that privity exists "(W)here an automobile manufacturer, through its authorized dealer issues to a purchaser of one of its automobiles from such dealer"); *see also Cole v. Gen. Motors Corp.*, 484 F.3d 717, 730 (5th Cir. 2007) (citing Georgia as a jurisdiction that does not allow implied warranty claims for used goods against a remote manufacturer). Plaintiffs' proposed warranty class does not exclude consumers who purchased their used vans from third parties, and thus are over-inclusive.

H. Statute of Limitations Defenses

In addition to the jurisdiction- and claim-specific objections discussed above, Ford contends that the individual issues surrounding its statute-of-limitations affirmative defenses, as well as any tolling doctrine advanced by Plaintiffs to counter these defenses, weighs against a finding of predominance. Although the above predominance determinations stand on their own, the Court agrees that the individualized inquiries attendant to Ford's statute-of-limitations defenses as to each jurisdiction-based sub-class support the denial of class certification.[25]

Before the Court can assess the effect of Ford's statute-of-limitations defenses on the predominance inquiry as to each jurisdiction-based sub-class, the Court must determine whether such inquiry is even relevant to the predominance inquiry. The Third Circuit in *Barnes v. American Tobacco Co.* squarely held that affirmative defenses, including statute-of-limitations defenses, are properly considered in determining predominance and cohesion for purposes of class certification under subsections (b)(2) and (b)(3). 161 F.3d 127, 147-49 (3d Cir. 1998) (affirming denial of class certification for putative class of smokers). Indeed, the *Barnes* court cited the individual issues arising under those defenses as part of its reasoning for denying class

---

[25]Additionally, the Court notes that the individualized inquiries necessary to evaluate Ford's statute-of-limitations defenses in light of the variations in state law across multi-jurisdiction claim-based classes would pose significant administrative difficulty in the trial context. *Sullivan*, 2011 U.S. App. LEXIS 25185, at *62 n.28 ("We are aware that there may still be circumstances, as we and other Courts of Appeals have noted, where '[i]n a multi-state class action, variations in state law may swamp any common issues and defeat predominance.'") (citations omitted). In its recent decision, the Third Circuit noted that litigation class certification—as opposed to settlement class certification, which was at issue in *Sullivan*—potentially implicates "'intractable management problems'" and "'insuperable obstacles' that could render class litigation unmanageable." *Id.* at *59-60 (citations omitted). In this case, the Court need not decide whether variations in state law would make class litigation unmanageable, because the Court is persuaded that predominance has been defeated for the independent reasons explained above.

certification. *Id.* at 143 ("We believe that addiction, causation, the defenses of comparative and contributory negligence, the need for medical monitoring and the statute of limitations present too many individual issues to permit certification."), 146-47 (discussing individual issues related to comparative and/or contributory negligence), 149 (citing individual issues attendant to the statute of limitations defense as grounds for denying class certification). However, four years later in *In re Linerboard Antitrust Litigation*, the court affirmed certification of an antitrust class against manufacturers of linerboard, despite the manufacturers' contention that their statute of limitations defenses and consumers' fraudulent concealment tolling theories presented individual issues that defeated predominance. 305 F.3d 145, 160-64 (3d Cir. 2002). In doing so, the *Linerboard* court cited with approval case law and a treatise that suggested that such individual issues did not defeat class certification, but could be dealt with at a subsequent damages stage. *Id.* at 163. Quoting the treatise, the *Linerboard* court explained:

> Challenges based on the statute of limitations, fraudulent concealment, releases, causation, or reliance have usually been rejected and will not bar predominance satisfaction because those issues go to the right of a class member to recover, in contrast to underlying common issues of the defendant's liability.

Id. (quoting Newberg & Conti, Newberg on Class Actions § 4.26 (3d ed.)). Speaking to the federal antitrust claims before it, the *Linerboard* court recognized that individual issues pertaining to fraudulent concealment would arise, but reasoned that "common issues of concealment predominate here because 'the inquiry necessarily focuses on defendants' conduct, that is, what defendants did rather than what plaintiffs did.'" *Id.* (citation omitted). The court further reasoned:

> Key questions will not revolve around whether [the consumers] knew that

> the prices paid were higher than they should have been or whether [they] knew of the alleged conspiracy among Appellants. Instead, the critical inquiry will be whether "defendants successfully concealed the existence of the alleged conspiracy, which proof will be common among the class members in each class."

Id. (citation omitted).

While at first blush *Linerboard* appears inconsistent with *Barnes*, Plaintiffs acknowledge (Pls.' Reply Br. at 23) that *Linerboard* endorsed the First Circuit's reasoning in *Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 296 (1st Cir. 2000):

> Although a necessity for individualized statute-of-limitations determinations invariably weighs against class certification under Rule 23(b)(3), we reject any per se rule that treats the presence of such issues as an automatic disqualifier. In other words, the mere fact that such concerns may arise and may affect different class members differently does not compel a finding that individual issues predominate over common ones. As long as a sufficient constellation of common issues binds class members together, variations in the sources and application of statutes of limitations will not automatically foreclose class certification under Rule 23(b)(3). Predominance under Rule 23(b)(3) cannot be reduced to a mechanical, single-issue test.

Linerboard, 305 F.3d at 162-63 (internal citations from *Waste Management Holdings* omitted). Thus, *Linerboard* cannot be read to prohibit *consideration of the individualized issues* arising from statute-of-limitations defenses for purposes of determining predominance under Rule 23(b)(3). This reading of *Linerboard* is consistent with *Barnes*, which recognized that "the existence of affirmative defenses as to some class members may not by itself [be] enough warrant the denial of certification." *Barnes*, 161 F.3d at 147 n.25.[26] Thus, this Court finds that Ford's statute-of-limitations defenses and Plaintiffs' equitable tolling rejoinders are relevant to

[26]The Court further notes that this interpretation is consistent with *Sullivan*, in which the Third Circuit held that variations in state law do not defeat predominance in the class *settlement* certification context. *See Sullivan*, 2011 U.S. App. LEXIS 25185, at *58-59.

this Court's consideration of predominance with respect to jurisdiction-based sub-classes.

Ford's statute-of-limitations defenses and any applicable discovery rule and/or other equitable tolling doctrine would require inquiries into the individual circumstances of each Plaintiff. As noted above, Chief Judge Brown's summary judgment decisions revealed that named Plaintiffs had widely divergent experiences *vis-a-vis* their E-350 vans; some purchased their vans with knowledge of the van's unique handling problems (Barrett,[27] Blandon), some saw news releases or government reports about the rollover problems (Bishop Anderson, Charles St. AME, Conant Avenue), some experienced handling issues while driving (Charles St. AME, Conant Avenue), others removed seats or limited the van to less than 15 passengers (Bishop Anderson, St. Luke's), and some did not appear to have experienced any handling problems whatsoever (Barrett, St. James, St. Luke's). *See* July 9 Opinion, 2010 WL 2813788, at *45, 51, 57, 62, 68-69, 76. At the same time, the summary judgment opinions revealed that different consumers learned of the E-350 van's handling problems, if at all, in differing degrees, from different sources, and at different times. These individual experiences would be relevant to a determination of accrual in a jurisdiction with the discovery rule, and thus the presiding court would have to conduct countless individualized inquiries. Moreover, for jurisdictions that follow New York's equitable tolling requirement of a subsequent affirmative act, Plaintiffs cannot invoke *Linerboard*'s common proof of fraudulent concealment finding, because each Plaintiff would have to show that Ford committed some act, other than the underlying misrepresentation

[27]Indeed, it is undisputed that Barrett negotiated down the price of his used 1997 E-350 van in the same conversation that he told the sales agent that the van should not be driven by an inexperienced driver, and that he knew of a prior instance where an E-350 van had experienced a rollover. July 9 Opinion, 2010 WL 2813788, at *69 (citing Barrett Dep. at 48:11-49:13, 106:16-23).

of the van's handling abilities, to conceal the original tort. *Ross*, 868 N.E.2d at 198. Contrary to Plaintiffs' suggestion, these nuanced, fact-specific inquiries will require careful examination, and thus cannot be supplemented with concise questionnaire forms. Such inquiries are not amenable to class litigation.

The Court further notes that Plaintiffs' proposed classes appear to include a large number of consumers whose claims would be time-barred under the relevant statute of limitations. Ford argues that the statute of limitations will bar the vast majority of proposed New York, Pennsylvania, and Georgia warranty-claim class members, because the named Plaintiffs from these jurisdictions did not join this MDL until November 2008 (*see* Consent Order of November 5, 2008, Doc. No. 150), and these jurisdictions do not allow cross-jurisdictional tolling. (*See, e.g.*, Ford's Resp. Br. at 38). Ford reasons that, courtesy of the four-year limitations period and the UCC's strict accrual rule for warranty claims (tender of delivery), *see, e.g.*, Ga. Code Ann. § 11-2-725, putative class members for these claims must have purchased and received their qualifying E-350 vans no later than November 2004. Ford further reasons that some of these classes would be deprived of their class representatives, because certain named Plaintiffs purchased their E-350 vans before this date. These arguments fail to account for the class tolling doctrine recognized by the Supreme Court in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974) and *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983). This tolling doctrine recognizes that "the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action," and that the action "remains tolled for all members of the putative class until class certification is denied." *Crown, Cork & Seal*, 462 U.S. at 353-54.

Because the original action in this MDL, filed in August 2003, sought a nationwide class (*see* Doc. No. 1 ¶ 7), it would appear that this doctrine tolled the limitations periods for other named Plaintiffs who were putative class members under the original class. Neither party addressed this class tolling doctrine, and this Court has no occasion to make tolling determinations at the present time. Yet, Ford's argument does carry some weight. Presuming that the limitations periods were tolled for the subsequent actions that joined this MDL, the cut-off line for the warranty classes, courtesy of the first-filed action (New Jersey), would be August 1999. In other words, class members would have needed to have taken delivery of their E-350 vans no later than August 1999 in order to have a timely warranty claim. Such a cut-off line would shrink the warranty classes by approximately 1/3 of the proposed model years (2000-2005 would be excluded),[28] unless individual consumers of earlier models presented grounds for equitable tolling.

This Court has no occasion to rule on the merits of Ford's statute of limitations defenses and Plaintiffs' respective equitable tolling counter-defenses with the present motion. However, the Court agrees that Plaintiffs' proposed warranty classes for these jurisdictions fail to account for the relatively straightforward effect of the respective UCC statute of limitations on the warranty claims. This Court is left to conclude that either a large portion of these proposed classes will not have viable warranty claims, or alternatively, that many putative class members will require individualized inquiries into issues of equitable tolling.

---

[28]This Court recognizes that some new vehicles are released before their designated model year (*i.e.*, a 2012 model can be released in 2011). However, the Court only addresses the flaws of Plaintiffs' proposed classes for present purposes, and does not address the merits of these statute-of-limitations defenses.

I. Summary

The Court's decision to deny class certification should not be read to suggest that Plaintiffs' remaining claims lack merit, or as tacit approval for Ford's design and marketing of the E-350 van. Indeed, this Court is aware that a number of fatal automobile accidents have been linked to occurrences of rollovers in this van, and that these accidents are the subject of other litigation. Rather, this Court's ruling reflects the unique and highly individualistic experiences of consumers, many of whom were not actually deceived and many of whom have suffered no actual injury as a result of Ford's conduct. This Court's conclusions do not address the merits of Plaintiffs' consumer fraud, warranty, and unjust enrichment claims, but draws upon the summary judgment record to assess the nature of the evidence—common or idiosyncratic—that Plaintiffs state they will present to support their class claims.

While a narrowly tailored class limited to particular misrepresentations, excluding persons with knowledge at the time of purchase, cognizant of the respective statute of limitations, and brought in a jurisdiction that did not require actual injury may have been a better candidate for class certification, Plaintiffs have not proposed such a class. As it stands, the massive claim- and jurisdiction-specific classes proposed by Plaintiffs are rife with issues that will require individualized determinations. Common issues of fact and law do not predominate over individualized inquiries, as required by Rule 23(b)(3), and thus Plaintiffs' proposed classes do not withstand "rigorous analysis" under *Hydrogen Peroxide*. Consequently, the Court will deny Plaintiffs' renewed motion for class certification under Rule 23(b)(3) in its entirety.

III. CERTIFICATION UNDER RULE 23(b)(2)

Lastly, the Court addresses Plaintiffs' alternative theory for class certification under

Federal Rule 23(b)(2). As noted above, certification pursuant to subpart (b)(2) is appropriate 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." Fed. R. Civ. P. 23(b)(2). The Supreme Court recently explained in *Wal-Mart v. Dukes*[29] that "[t]he key to the (b)(2) class is 'the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them." 131 S. Ct. 2541, 2557 (2011). Conversely, subsection (b)(2) "does not authorize class certification when each individual class member would be entitled to a different injunction or declaratory judgment against the defendant," or "an individualized award of monetary damages." *Id.* Class certification is inappropriate where "the monetary relief is not incidental to the injunctive or declaratory relief." *Id.*; *cf. Barnes*, 161 F.3d at 142 ("Subsection (b)(2) class actions are 'limited to those class actions seeking primarily injunctive or corresponding declaratory relief.'") (citation omitted); *In re Mercedes-Benz Antitrust Litig.*, 213 F.R.D. 180, 186 (D.N.J. 2003) ("[C]ourts have certified 23(b)(2) classes despite a claim for money damages where the damages were incidental or ancillary to a primary claim for an injunction.").

In addition to a primary focus on injunctive or declaratory relief, the Third Circuit has recognized that class claims under Rule 23(b)(2) must be cohesive. *See, e.g.*, *Gates v. Rohm &*

[29] *Wal-Mart* involved female employees' Title VII sex discrimination claims against their retail store employer, seeking injunctive and declaratory relief, back pay, and punitive damages. 131 S. Ct. at 2547-48, 2561. The Supreme Court, by a 5-4 vote, decertified the class on the grounds that the class-respondents had not met the commonality requirement of Rule 23(a)(2). *Id.* at 2550-57. Yet, the Court ruled unanimously that the class-respondents had not met the requirements for certification under Rule 23(b)(2).

Haas Co., 655 F.3d 255, 263-64 (3d Cir. 2011); *Barnes*, 161 F.3d at 143; *Geraghty v. U.S. Parole Comm'n*, 719 F.2d 1199, 1205-06 (3d Cir. 1983). Although, unlike subsection (b)(3), (b)(2) does not impose distinct predominance and superiority requirements, our Circuit has reasoned that "a (b)(2) class may require more cohesiveness than a (b)(3) class. . . . because in a (b)(2) action, unnamed members are bound by the action without the opportunity to opt out." *Barnes*, 161 F.3d at 142-43; *see also Gates*, 655 F.3d at 265 ("The 'disparate factual circumstances of class members' may prevent a class from being cohesive and, therefore, make the class unable to be certified under Rule 23(b)(2)).") (citing *Carter v. Butz*, 479 F.2d 1084, 1089 (3d Cir. 1973)). Accordingly, our Circuit has held that district courts have the discretion to deny certification under (b)(2) when a given case presents "disparate factual circumstances," or a prevalence of individualized issues. *Barnes*, 161 F.3d at 143 (citation omitted).

In their opening brief, Plaintiffs argue that certification under this Rule is proper because "the core of the relief sought by Plaintiffs in this case is equitable in nature." (Pls.' Br. at 61). Toward this end, Plaintiffs cite a paragraph from the Complaint's Prayer for Relief that seeks an order:

> [r]equiring Ford to correct the design defect so the E-350 vans c[e]ase to be a safety hazard, enjoining Ford from distributing the vehicles without their being so corrected, and requiring Ford to warn all potential purchasers of the unsafe nature of the E-350 through its own dealers and through used car dealers and by such means as the Court determines to be effective and appropriate.

(Complaint, Prayer for Relief ¶ B). From this equitable "core," Plaintiffs contend that "the Court may award Class members a uniform stipend of $2,100.00 each"—the cost of retrofitting the E-350 vans with dual rear wheels—as incidental damages. (Pls.' Br. at 62).

Ford objects that Plaintiffs do not seek primarily injunctive or declaratory relief, and that the individual issues that defeated predominance demonstrate that Plaintiffs' claims are not sufficiently cohesive to warrant (b)(2) certification. Plaintiffs offer no further argument in support of certification under Rule 23(b)(2) in reply.

The Court notes at the onset that the Supreme Court's recent decision in *Wal-Mart* casts a cloud over the continued application of the Third Circuit's cohesion requirement for (b)(2) certification. The *Wal-Mart* Court explained that the (b)(3) "procedural protections" of predominance, superiority, mandatory notice, and the right to opt out did not appear in (b)(2) because they "[are] unnecessary to *a (b)(2) class*." 131 S. Ct. at 2558. According to the Court, "[w]hen a class seeks an indivisible injunction benefitting all its members at once, there is no reason to undertake a case-specific inquiry into whether class issues predominate or whether class action is a superior method of adjudicating the dispute. Predominance and superiority are self-evident." *Id.*; *cf. id.* at 2566 (Ginsburg, J., joined by Breyer, Sotomayor, and Kagan, JJ., concurring in part and dissenting in part) (suggesting that "[i]ndividual [factual] differences should not bar a . . . Rule 23(b)(2) class, so long as the Rule 23(a) threshold is met"). At the same time, the *Wal-Mart* Court expressed doubt regarding whether a class seeking monetary damages could *ever* be certified under Rule 23(b)(2), but declined to answer this question. *See id.* at 2557. While this logic suggests that predominance and superiority are unnecessary considerations for *proper* (b)(2) classes, it is unclear whether a predominance-derived consideration of cohesion may be relevant in determining whether a proposed class presents a proper (b)(2) class. To the extent that cohesion remains a relevant consideration post-*Wal-Mart*, this Court agrees with Ford that the myriad individual issues of fact and law identified in this

Court's (b)(3) predominance analysis *supra—i.e.*, exposure to differing representations, deception, causation, and Ford's statutes of limitations affirmative defenses—reveal that Plaintiffs' proposed classes are not sufficiently cohesive to permit (b)(2) class certification. *See, e.g.*, *Gates*, 655 F.3d at 265, 269 (denying (b)(2) certification of vinyl chloride exposure case, where individualized issues of "members' . . . characteristics and medical histories" made certification inappropriate); *Barnes*, 161 F.3d at 143 (denying (b)(2) certification of tobacco case, where individualized issues of addiction, causation, and affirmative defenses (comparative negligence, statute of limitations) made certification inappropriate). However, to the extent that *Wal-Mart* abrogates the existing Circuit rule regarding cohesion, this Court concludes that (b)(2) certification is nevertheless inappropriate, simply because the monetary damages sought by Plaintiffs are not incidental to a claim for injunctive relief.

Here, the "'core' equitable relief" sought by Plaintiff is an order: (1) requiring Ford to correct the design defect for existing consumers; (2) enjoining Ford from distributing vehicles with the defect; and (3) requiring Ford to warn all potential purchasers of the unsafe nature of the E-350 van through its own dealers and through used car dealers and other means determined by the Court. (*See* Pls.' Br. at 61 & n.27; Complaint, Prayer for Relief ¶ B). Of this proposed equitable relief, only the first remedy compensates the injuries of putative class members, who, according to Plaintiffs' proposed classes, have already purchased or acquired a model-year 1991-2005 E-350 van.[30] Furthermore, Plaintiffs make no attempt to explain how their claims regarding

[30]Presuming that putative class members opted to purchase an additional E-350 van going forward, they would already have knowledge of the defect by virtue of the repairs to their existing van. Thus, the second and third equitable remedies sought by Plaintiffs do not address the injuries of putative class members.

model-year 1991-2005 E-350 vans could justify the broad, perpetual injunctions sought in the Complaint, which would appear to extend to subsequent model years for which no defect has been alleged. Thus, the Court is left to consider Plaintiffs' proposed affirmative injunction requiring Ford to correct the design defect. At the same time that Plaintiffs classify this relief as "equitable" in nature, Plaintiffs concede that "there must be a source of money to pay for the repair or retrofit of the vans" if class members "wish" to have their vehicles repaired. (*Id.* at 59). Elsewhere, Plaintiffs suggest that the Court can simply "award Class members a uniform stipend of $2,100.00 each." (*Id.* at 62). These statements reveal that Plaintiffs primarily seek monetary damages,[31] and even suggests that some class members may choose to receive the costs of repairs instead of the actual repairs. As Ford correctly notes, Plaintiffs cannot simultaneously seek an affirmative injunction requiring the repairs to be made *and* the monetary costs of those repairs. (Ford's Resp. Br. at 69). Plaintiffs present nothing in their reply brief to bolster their (b)(2) claim.

The Supreme Court in *Wal-Mart* emphasized that subpart (b)(2) applies to injunctions and declaratory judgments, not "'equitable' remedies generally." 131 S. Ct. at 2560. The Court further expressed its dissatisfaction with the class-Respondents' argument that (b)(2) certification was appropriate, simply because their claims for injunctive and declaratory relief predominated

[31]This Court's conclusion that Plaintiffs primarily seek monetary damages is supported by the numerous damages theories Plaintiffs have put forth during the course of the motions for summary judgment, ranging from diminution in value to repair costs and incidental costs related to loss of use. Given this procedural history, Plaintiffs saw fit to characterize the "core trial issue[]" of damages in their renewed class certification brief's introductory section as "whether the $2,100 cost of retrofitting the vans with dual rear wheels is an appropriate measure of damages and/or an appropriate measure of restitution to remedy Ford's unjust enrichment." (Pls.' Br. at 4).

over their claims for monetary relief (backpay). The Court responded to this argument as follows:

> [t]he mere "predominance" of a proper (b)(2) injunctive claim does nothing to justify elimination of Rule 23(b)(3)'s procedural protections: It neither establishes the superiority of class adjudication over individual adjudication nor cures the notice and opt-out problems. We fail to see why the Rule should be read to nullify these protections whenever a plaintiff class, at its option, combines its monetary claims with a request—even a "predominating request"—for an injunction.

Id. at 2559. Despite Plaintiffs' argument that "the core of the relief sought by Plaintiffs in this case is equitable in nature" (Pls.' Br. at 61), the record and Plaintiffs' arguments reveal that Plaintiffs do not seek predominantly injunctive or declaratory relief, and that the monetary damages they seek are anything but incidental. In light of the guidance provided by *Wal-Mart*, this Court concludes that it would be inappropriate to permit Plaintiffs to sidestep the (b)(3) requirements under the guise of a (b)(2) class.[32]

[32]The Court notes that Plaintiffs' further propose a "hybrid" (b)(2)/(b)(3) class in their opening brief, but appears to abandon this idea in their reply brief. Plaintiffs present no authority for the proposition that such a "hybrid" class can be certified when the proposed class could not be certified under either subsection (b)(2) or (b)(3). Here, this Court has concluded that certification would be improper under both (b)(2) and (b)(3). Accordingly, the Court will decline to certify a hybrid class under a canopy of both provisions.

Conclusion

For the aforementioned reasons, the Court will grant Ford's motion to amend (Doc. No. 393) and deny Plaintiffs' renewed class certification motion (Doc. No. 375). An appropriate form of order accompanies this Opinion.

Dated: February 6, 2012

s/*Esther Salas*
Esther Salas, U.S.D.J.