No. _____

In The
Supreme Court of the United States

ALIM ADBURAHMAN, *ET AL.*,

Petitioners,

v.

HYUNDAI MOTOR AMERICA, INC., *ET AL.*,

Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

APPENDIX

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PUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 17-1582

JIHAD ADBUL-MUMIT; MATTHEW ABEDI; MONICA ADAIR SARGENT; MARK AGEE; ALIZ AGOSTON; YVONNE ALSTON; DAN AMATRUDA; KRISTY AMBROSE; KIMBERLEY AMICK; WANDA G. AMOS; CHRISTOPHER ARAUZA; CARL ARSENAULT; BROOKE ASHER; MICHELLE ATKINS; RAYMOND O. ATKINS; MATTHEW ATWELL; DAVID AUB; SOHA AYYASH; ASIF AZIZ; SUSAN BAILEY; KAREN BAKER; HAB BAKER, III; TERRY BARNES; JOSEPH BARTELL; HARRY L. BARTON; BENJAMIN BASHAM; MATTHEW BASILONE; JOHN BAXTER; JOHN BEASLEY; TIMM BETCHER; ELIZABETH BELEVAN; BARBARA BELL; JUDY BENDER; AMINE BERBALE; JAMES BERLING; SHARON BISDEE; WILLIAM BONNER; WALTER BORDEAUX; GARY BOYETTE; TODD BRADBURY; KAREN BRADBURY; JOHN BRANCATO; WILLIAM BREWSTER; LORI BRODIE; GLORIA BROOKS; ELSE BROWN; MELANIE BROWN; ANGELA BROWN; GARY BROWN; JEANNE BROWN; SYDNEY BRUMBELOW; JAN BURFORD; SARA BURRUSS; JAMIE BURTON; JOSEPH CALDARELLI; JASON CALL; TODD CARLSON; HOWARD L. CARPENTER; CYNTHIA CARTER; FREDERICK CARTER; JACKLYN CASSELLE-TUPPONCE; JARED CASTRO; REBECCA CATLETT; SUSAN CAVE; KIRT CHAPPELLE;

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WIEN; ROBERT T. WIENER; CHRISTOPHER WILCHER; MINDY WILLIAMS; VINCENT WILLIAMS; HANNAH WILSON; JUANITA WILSON; RIED WILSON; CHARLES WISER; SHARON WISER; MARK WOEHLER; KENNETH WOMACK; EMILY WONG; GREGORY WOODS; KATHERYN WOOSLEY; CAROL WRIGHT; JONATHAN WRIGHT; MARY WRIGHT; THOMAS WRIGHT; TIMOTHY WRIGHT, JR.; LESLIE YAMNICKY; KENNETH YATES; JAMIE YOUNG; SANDRA YOUNG; ROBERT YOUNIE, II; ATEF ZAYD,

Plaintiffs - Appellants,

v.

ALEXANDRIA HYUNDAI, LLC; BROWN'S LEESBURG HYUNDAI, LLC; BROWN'S MANASSAS HYUNDAI, LLC; CHECKERED FLAG IMPORTS, INCORPORATED; CHECKERED FLAG STORE #6, LLC; CRAFT AUTOMOTIVE, INCORPORATED; DUNCAN IMPORTS, INCORPORATED; FAIRFAX HYUNDAI, INCORPORATED; FIRST TEAM, INCORPORATED; GATEWAY HYUNDAI, INCORPORATED; HALL AUTOMOTIVE GROUP, INCORPORATED; HALL HYUNDAI NEWPORT NEWS, LLC; HALL HYUNDAI, LLC; HYUNDAI MOTOR AMERICA, INCORPORATED; MILLER AUTO SALES, INCORPORATED; CAVALIER HYUNDAI, INCORPORATED; HARRISONBURG AUTO MALL, LLC; JAMES CITY COUNTY ASSOCIATES, INCORPORATED; MALLOY HYUNDAI; POHANKA AUTO CENTER, INCORPORATED; PRICE HYUNDAI CORPORATION; PRIORITY GREENBRIER

AUTOMOTIVE, INCORPORATED; PRIORITY IMPORTS NEWPORT NEWS, INCORPORATED; ROBERT WOODALL CHEVROLET, INCORPORATED; TYSINGER MOTOR COMPANY, INCORPORATED; WBM, INCORPORATED, d/b/a West Broad Hyundai; WRIGHT WAY AUTOMOTIVE, INCORPORATED,

Defendants - Appellees.

No. 17-1587

ALIM ADBURAHMAN; JOHN ABEL; LENA ABEL; TAMARA ADAMS; BRANDON ADAMS; ASHRAS AHMADI; WADHAH AL-HADDAD; CLAUDIA ALLEN; PAUL ALLEN; JAMES ALLER; PEGGY ALLER; JIANPING ALLOCCA; NICOLE ALVARADO; GREGORY AMODEO; ROBERT ANDERSON; SHERRY ANDERSON; DENNIS ANDREW; LINDA G. ANDREWS; TINA ANTLEY; PAULINE APISITPAISAN; MONICA ADAIR ARGENT; GAURAV ARORA; RAMON ARROYO; JAMES E. ASHLEY, JR.; BAKAL ASRAT; ELIZABETH AVALAAN; CHERYL AYCOCK; JOANN K. BACHNER; SHANON BAILESS; CHRISTOPHER BAILEY; ANDY BAKER; BRIAN BAKER; CAROL BAKER; GEORGE BAKER; SUSAN BALLARD; DAVID BALMER; JEFF BARBER; SCOTT BARNITT; LINDA BARR; EMMETT BATTEN; SAMANTHA BEARD CURRY; BRIAN BECKER; ROY BECKER; TONYA BECKER; JOHN BECKNER, JR.; GINA BEEBE; KENNETH BELL; PAMELA BELL; WHITNEY BENSON; RAYMOND J. BERNERO; JOHN BESSERER; COLONEL BILLINGSLY; DANA

BISHOP; MICHAEL BIZIK; THOMAS BJERS; PETER BOMBIK; SHARON BONNEAU; VIRGINIA BONNELL; ZESTANN BOOKER; STEPHANIE BORN-NEWTON; JORDAN BOSCH; SHIRLEY BOURNE; CARROL E. BOWEN; JOSEPH BOWE; JANICE BOWLES; JEAN BOWMAN; GRAY BOYCE; RPBERT BRABO, II; CHERYL A. BRADFORD; MARIE BRADLEY; OLIVIA BRADY; PHYLLIS BRANCH; NICOLE BRANDON; JOHNNY W. BRANSON; ELLIOTT ANDREW BRAY; EDMUND P. BREITLING; MARY ANN BRENDEL; MICHELLE BRINDLE; RICHARD BRINDLE; STEVE BRINGHURST; MELANIE BRINK; EDWINA D. BRITT-CRABLE; DANA BROADWAY; BARBARA BROWN; CHRISTINA L. BROWN; DELORES BROWN; JAMES A. BROWN; MATTHEW BROWN; MELANIE BROWN; MELISSA BROWN; NICOLE BROWN; TONY BROWN; PATRICK D. BRYAN; BRIANNE BRYANT; THOMAS J. BULLOCK; BEVERLY W. BURKE; JOYCE BURKE; RICHARD BURKE; MICHAEL BURNAM; JOHN M. BURNETT; DARLENE BURTON; GRACE M. BUTLER; SUZETTE BYRD; JOSEPH CALABRETTA; JAMES CALLIS; CLARE CAMPBELL; DOROTHY CAMPBELL; SETH CAMPBELL; STEVEN CAMPBELL; WHITNEY CAMPBELL; JOYCE CANTRELL; PAUL CAPOZZOLI; PHYLLIS CARIMI; DALE F. CARLEO; DENNIS CARLSON; MARK CARLTON; JAMES CARNEAL; MICHAEL CARPENTER; JOSE CARRASQUILLO; LINDA CARY; LEON CARY; JEFFREY CASH; ILONA CASTRO; ROBERTO CASTRO; JENNY CAVENDER; SHANNON CHAIN; DILIP CHAKRABORTY; BAISHAKHY CHAKRABORTY;

ROGER CHELSEA; PETER CHIAMARDAS; MICHAEL CHRISTOPHER; CHERENE CIMBALIST; BENJAMIN CLARK; DANIEL K. CLARK; ELIZABETH CLARK; LARRY CLEMENTS; ROBBIN CLEMENTS; KENDALL S. CLOETER; JEREMY COBB; QUEEN B. COBBS; GARY COCUZZI; JACK VICTOR COHEN; JULIEANNA COLEMAN; CLINTON COLLINS; AMON R. COLLINS, JR.; COLLIN CONNORS; LOLANDA COOPER; SHARON COOPER; EILEEN CORBIN; MICHAEL CORCORAN; KRISTEN CORLEW; GARY COVERSTON; MARINA M. COX; MOSES COX; TAMMY COX; JUSTIN CRONIN; JILL CROWDER; BELINDA CUBBAGE; KELSEY CUBBAGE; BESSIE CUFFEE; DAN CUOMO; BRENDA CURTIS; ELVIS CYPRIANO; STEPHANIE DAENZER; RICHARD L. DAMEWOOD; JON DANCE; WILLIAM DANIEL; BROOKE DAVIES; ANGELA DAVIS; JODY W. DAVIS; MATTHEW DAVIS; JASON DAWSON; LAURIE DAWSON; NELSON DAWSON; PAUL DAWSON; DESIREE DEAN; ANTWAIN DEBERRY; BLAIR DEEM; JENNIFER DEGRAFF; WILLIAM DEJOHN; JOE DELGADO; TOM DELPOZZO; ANTHONY DEPAUL, JR.; MICHAEL DESOUTO; STACY DOBSON; DAVID DOBSON; SONYA DODSON; DAVID DODSWORTH; MASON DOERMANN; YVONNE DOVER; MINNIE DUNFORD; SANDRA K. DUNTON; CHRIS C. DUTTON; DEBORAH EDGEFIELD; KASEY EIKE; MIRIAH EISENMAN; KATHY ELDRETH; TIMOTHY ELLIOTT; THOMAS ENGLISH; KEITH EPPS; CINDY FABER; MASE FABER; LUIS FALCON; JOHN FARMER; BRANDON FARRELL;

CHRIS D. FERGUSON; FARANDA FERGUSON; WANDA FERGUSON; JUNE FERRARA; MICHAEL FERTICH; JAMES FICKLE; SHIRLEY FICKLE; JOSELYN FIELDS; JODI FILIPEK; BEVERLY FINTCH; JENNIFER FLEURET; SUSAN FOFI; RANDALL FOFI; LAURI FOUTZ; TIMOTHY FOUTZ; KATHLEEN FOWLER; THOMAS ROBERT FRANCO; GREG FRANK; JOHN FRANKLIN; RONALD FRASIER; CATHLEEN FREIBURGER; SHARON FRITH; MICHAEL FRUITMAN; ALICIA FUSCO; ADLYN FUTRELL; DOUGLAS FUTRELL; GUILLERMO GALARZA; ANTHONY GALLARDY; IVAN GALLOWAY, JR.; PETER GARTNER; CYNTHIA GASTLEY; SHEILA GAY; JESSICA S. GEARHART; PAMELA EDWARDS; JOHN WILLIAM GENTRY; MARK GEORGE; JOHN GILBERT; DANIELLE KAY GILLELAND; ANGELA GIONIS; JACQUELINE GIOVANNELLI; ADAM G. GOLDSMITH; RICHARD GOULD; CARRINE GRAHAM; CHERYL GRAHAM; RAY GRAHAM; TAMMY B. GRAHAM; KAMERON GRAY-HAROLD; ADAM GRAYBERG; AYNDRIA GREEN; LISA D. GREEN; THOMAS GREICO; ROBERT GRIMES; DAVID GROSS; JOE GROSS; JESSICA GROVES; MEGAN GUILLAUME; MICHAEL GUILLAUME; KELLI GUNTER; LAUREN HAGY; RICHARD HALL; DOROTHY HALPIN; PETE HALSETH; DAVID HAMMOND; RICHARD HAMNER; STACY HARDY; JIM HARNEY; TERESA R. HAROLD; AQUISI HARRIS; ASHLEY HARRIS; CHAD HARRIS; ERVIN M. HARRIS; MARY HARRIS; WILLIAM HARRIS; BRIANNA HARRISON; PATRICIA HARRISON; SHARON HARRISON; JESSE HATHAWAY; CLAUDIA HAVEKOST; DAVID HAYNES; LESLIE

HEARN; KATHLEEN HEDRICK; ADAM HEIDEL; TINY L. HENLEY; AMBER HERNANDEZ; ZACHACY HERRERA; F. DALE HERRON; TARENNE HERRON; JENNIFER HESTER; DEBBIE HETTERLY; AMANDA HILL; RONALD HILL; CHRIS HILLAND; SHIRLEY B. HINES; VERON HINES; TIMOTHY HINSON; HEATHER HOBACK; BRITTANY HOBAN; DOMINGA HOBBS; MARY HODGES; CHRISTOPHER HOEHN; JERRY HOLLEY; KEISHA HOLLOWAY; BRENDA HOLMES; JAMES HOLMES, III; TIMOTHY HOLROYD; CHAD HOLSTON; CHARLES HOOFNAGLE; CANDI HOOVER; CHARLIE HOPKINS; MARCIA HORSTMAN; RICHARD HOSKINS; CODY HOWARD; JESSICA HOWARD; AUDREY HUBAND; MAX HUBAND; JOHN HUBBARD; SUZANNE HUBBARD; DAVID HUBER; TEDDY HUDDLESTON; AMY HUDSON; HUBERT HUGHES; DENNY HUNCHES; LINNIE HUPE; SHERRY HUTCHINS; DEBORAH G. JACKSON; MITCHELL JACKSON; STANLEY JACKSON, SR.; TRACY JACKSON; JASON JAFFEUX; BRUCE JAMES; SALLY JAMES; SANDY JAMES; WALTER JEFFRIES, SR.; RANDALL JNBAPTISTE; AUSTIN JOHNSON; AUSTIN JOHNSON; EBORAH L. JOHNSON; DAVID W. JOHNSON; BILLY JONES; CHARLIE JONES; CHRISTINA JONES; JOHN K. JONES; PEYTON P. JONES; WILBUR JONES; PHILIP R. JUDSON; KENNETH JUNGERSON; NANCY JUNGERSON; JENIFER JUSTICE; DAVID KADAS; TINA KADAS; GREGORY KASHIN; SRINIVAS KATEPALLI; WILLIAM L. KEE; VICTOR G. KEHLER; SEAN KELLER; TERESA KELLER; CHRISTOPHER KELLY; NONA KELLY;

VERONICA KELLY; PATRICK KEOUGH; MEE RAN KIM; CARLTON KINARD; DORIS E. KING; KARL KING; JOHN KIRBY; VERNON KIRBY; DIANA KITE; EDWARD KIZER; PATSY KIZER; JOHN KNIGHT; ANN KORKOLIS; FRED KRAUER, JR.; JEAN KUESTER; KATHRYN KUYKENDOLL; DANIEL KWITCHEN; CHIN KWON; DENNIS LAMB; JEANETTE LAMB; KAREN LAMB; JAMES LAMBERT; STEPHANIE LAMM; KATHY LAMPERT; ANDREW W. LANDER; CODY LAUGHINGHOUSE; DAVID LEATHERMAN; BLAIRE S. LEE; KENNETH LEE; JENNIFER LEEMAN; RONALD LEEMAN; JERRY LERMAN; CALVIN LEWIS; HAYES LEWIS; REGINA A. LEWIS; ROY W. LEWIS; KAREN LILLEY; STEPHEN LILLEY; LYLE LINDBERG; ASHLEY LIPPOLIS-AVILES; BILLY LLEWELLYN; WILLIAM LOHMANN, JR.; ROBIN LOVETT; DAVID W. LOVING; KEN LU; MICHELE J. LUIS; MELINDA LUMPKIN; DIRK LYNCH; GINGER LYNCH; PATRICIA LYONS; WILLIAM LYONS; DINNE MACDONALD; DWAYNE MADDOX; SORAYA MAINS; MELISSA MALONE; THOMAS MALONE; REGINA MANNING; TERRANCE MANNING; KIRAN MANTRALA; ANDREA MARCHESE; STANLEY MARCUS; STEVE MARKOVITS; KENNETH MARTIN; RACHEL MARTIN; REYNALDO MARTINEZ; RALPH MARTINI; CLETIOUS T. MASHBURN; LAUREN MATSKO; SHAWNA MATTOCKS; LEO MAYNES; PENNY MCCENEY; STELLA MCCLAIN; WILLIAM MCCLELLAN; ROBERT MCCLELLAND; SUSAN MCCLELLAND; SUSAN MCFADDEN; RICHARD MCGRUDER; VICTORIA MCGRUDER; DONALD MCINTIRE; ANNE MCKENNA; RACHEL

MCKENZIE; KENNETH MCKINNEY; TERESA MCLAWHORN; DAVID MEADOWS; RITA MEDLEY; TOMMY MEDLEY; ROBERT MEEKER; MICHAEL MEISTER; KAREN MELLER; CARMEN C. MERCADO; ROBERT E. MICKLE; EDMEE MIGUEZ-GERSTLE; MICHAEL E. MILLER; LISA MILLFORD; MICHAEL MINTZ; MARY MITCHELL; MICHELLE MONROE; CHRIS MOONEY; GARY MOORE; KAREN MOORE; MELODY MORRIS; SUZANNE MOWBRAY; RAYMOND MUELLER; PATRICK MULHERN; DAVID MULLIGAN; LAURENCE MULLIGAN; MARY MULLIGAN; BILLIE MUTTER; MELISSA MUTTER; KEVIN NEWSOME; REVERDY NICHOLSON; SUSAN NOON; SARAH NOVAK; RACHEL NOVERSA; TODD NUNNALLY; JONATHAN O'BRIEN; DARLENE O'DONNELL; JAMES O'DONNELL; PAUL O'KEEFE; TIMOTHY O'MARA; CAROLYN O'NEILL; PAUL J. O'ROURKE; MALCOLM O'SULLIVAN; BRIAN OSBORNE; SARAH OSINSKI; JESSICA OUTER; HERBERT C. OVERSTREET; CANDACE OWENS; CHRISTOPHER PALAZIO; LYNETTE PALMER-FORD; ASHLEY D. PANNELL; MATTHEW PARK; TERRI PARKER; MICAH PARMAN; BHAGVATI PATEL; MUKESH PATEL; PRADIP PATEL; SHREYA PATIL; JOHN PATTIE; JAMES PEARSALL, JR.; DONNA PEARSON; OREST PELECH; CHRIS PENA; ROY M. PENNINGTON, III; THOMAS PEPE; MARK PERRY; KAREN PETERS; JOHN PETERSON; MARK PETERSON; REBECCA PETRELLA; SUSAN PETRIE; ROBERT PETRUSKA; CLAUDE PETTYJOHN; CARL PIERCE; JANET PIETROVITO; DEBRA PINES; LINDSEY POLI; ANGELA POLINKO; CARLTON

POLLARD; DAVID POORE, III; ANTON POPOV; LINDA M. PRATT; JASON PRICE; ROBERT PUAKEA; SARA PULLEN; SARHAN QURAISHI; JAMES RADCLIFFE; MELISSA RADCLIFFE; SCOTT RAMSEY; JACQUELINE RANDOLPH; MICHAEL RANGER; NANCY RANSOME; SHELLIE RENZ; SHERI RESSE; MATTHEW D. REVELLE; STEPHEN RIBBLE; ANITA RICE; LARRY RICE; RICHARD RICHARDSON; CARI RICHARDSON; MICHAEL RICHEY; SARAH RICHEY; MARVIN RIDDICK; DANNY RIDDLE; JENNIFER RIGGER; WAYNE RILEY; TAMRIA RISHER; DANIEL ROBERTS; MARY ROBERTS; SUSAN ROBERTS; GAYE ROBERTSON; SKYLER ROBEY; ANNIE ROBINSON; ANTONIO ROBINSON; KEVIN ROBINSON; PAMELA ROBINSON; ROCKY ROCKBURN; COLETTE ROOTS; DARYL ROOTS; GREGG ROSENBERG; ERIC ROTHMAN; BRIAN ROWE; VIRGINIA A. ROWEN; JULIET ROWLAND; PAUL ROY; RONALD RUCKER; DAVID RUFFNER, JR.; JILL RUFFNER; KRISTYN RUZICKA; JENNIFER RYAN; STEPHEN RYAN; JOSEPH SALAZAR; RACIN SAM; GEORGE SANCHEZ; BONNIE SANDAHL; GARY SARKOZI; JEFF SAUNDERS; JEANNETTE SCHAAR; AILEEN L. SCHMIDT; EDWARD SCHNITTGER; LINDA RUTH SCOTT; GWEN SEAL; AMY SEAY; ANTHONY SELB; DELMAR N. SELDEN; LYNN SETTLE; RICHARD SEYMANN; SHARON SGAVICCHIO; SHA'NESHA SHARPE; ROBERT L. SHELLHOUSE; GARY SHELOR; STEPHANIE SHELOR; BRENDA SHIFFLETT; NINA SIBERT; DAVID SILVERNALE; JESSICA SIMONS; MARY SINGHAS; RANDALL SINGHAS; DONALD

SKINNER; RICHARD E. SMITH; SUZANNE SMITH; CYNTHIA L. SNYDER; MANDY SNYDER; HOWARD SNYKER; WESLEY SONGER; JOHN SORESE; RAYMOND M. SOUZA; SHELLIE S. SPADARO; TONY L. SPARKS; LINDA SPRADLIN; SUSAN STANDRIDGE; NANETTE STANLEY; JONATHAN STARKS; EUGENIA STARNES; GARY STECK; REBECCA STECK; ANDREW STEELEY; CAROLYN RENEE STEVENS; SARA STEVENS; SASHA STITT; TIM STOESSEL; CHEVON D. STOKES; EDWARD STOKES; NATHAN STONE; YOLANDA SULLIVAN; DENNIS SUMLIN; JOHNNIE SUMLIN; JOHN SUTOR; WANDA SUTPHIN; STELLA TANG; ANDREW TAYLOR; ANN TAYLOR; KIMBERLY TAYLOR; FREDDY TELLERIA; MATTHEW TENGS; JOHN THACKER; CANDACE TILLAGE; CHRISTOPHER TOKAR; SUSIE TORTOLANI; MARY TRAINOR; ADELINE TROTTER; PEGGY TSACLAS; JAMES TURNER; ROBERT TURNER; RUFUS TUNSTALL; LUCILLE TYLER; TRAVIS TYSINGER; JOHN TYSON; CYNTHIA UTLEY; CARRIE VAN HOOK; DENISE VANGELOS; MILCA VARGAS; ROBERT VARNER; MARY VAUGHAN; ROBENA D. VAUGHAN; KELLY VERHAM; KIMBERLY VEST; CAROL VIERGUTZ; MARY ANN VILLIES; WALLACE VINGELIS; MARVIN WADE; SANDRA WADE; SCOTT WAGGONER; TERESA WAGGONER; MAGI WAGNER; JANE WALLACE; STACY WALLER; SHERYL WALTERS; GARY WALTON; KIMBERLY WARD; CATHERINE WATERS; BERNARD WATTS; MICHAEL WEBB; SCOTT WEBB; MELISSA WEBSTER; SHARON WELLS; STEPHANY WHIPPLE; SARAH WHITLOCK; ROBERT T. WIENER; CHRISTOPHER WILCHER;

DAVID WILD; CHRISTINA WILLIAMS; GEORGE WILLIAMS; GINER WILLIAMS; DAGNY WILLS; GARY WILLS; DR. SARAH WILMER; LESLIE WILSON; ROBIN WILSON; THOMAS WINSTON; CHARLES WISER; SARA WOLLMACHER; MIKE WOO; WAYNE H. WOOD; WAYNE WOODHAMS; STACEY T. WOODS; ARTHUR WRIGHT; THOMAS WRIGHT; DAVID WYCKOFF; GINO YANNOTTI; JAMIE YOUNG; JONG YUN; ATEF ZAYD; ANGELA R. ZIMMERMAN; RINGO YUNG,

Plaintiffs - Appellants,

v.

ALEXANDRIA HYUNDAI, LLC; BROWN'S LEESBURG HYUNDAI, LLC; BROWN'S MANASSAS HYUNDAI, LLC; CHECKERED FLAG IMPORTS, INCORPORATED; CHECKERED FLAG STORE #6, LLC; CRAFT AUTOMOTIVE, INCORPORATED; DUNCAN IMPORTS, INCORPORATED; FAIRFAX HYUNDAI, INCORPORATED; FIRST TEAM, INCORPORATED; GATEWAY HYUNDAI, INCORPORATED; HALL AUTOMOTIVE GROUP, INCORPORATED; HALL HYUNDAI NEWPORT NEWS, LLC; HALL HYUNDAI, LLC; HYUNDAI MOTOR AMERICA, INCORPORATED; MILLER AUTO SALES, INCORPORATED; CAVALIER HYUNDAI, INCORPORATED; HARRISONBURG AUTO MALL, LLC; JAMES CITY COUNTY ASSOCIATES, INCORPORATED; MALLOY HYUNDAI; POHANKA AUTO CENTER, INCORPORATED; PRICE HYUNDAI CORPORATION; PRIORITY GREENBRIER AUTOMOTIVE, INCORPORATED; PRIORITY IMPORTS NEWPORT NEWS, INCORPORATED;

ROBERT WOODALL CHEVROLET, INCORPORATED; TYSINGER MOTOR COMPANY, INCORPORATED; WBM, INCORPORATED, d/b/a West Broad Hyundai; WRIGHT WAY AUTOMOTIVE, INCORPORATED,

Defendants - Appellees.

No. 17-1611

LINDA RUTH SCOTT, individually and on behalf of all other Virginia owners similarly situated; DANIELLE KAY GILLELAND; JOSEPH BOWE; MICHAEL DESOUTO,

Plaintiffs - Appellants,

and

JOHN WILLIAM GENTRY, individually and on behalf of all other Virginia owners similarly situated,

Plaintiff,

v.

HYUNDAI MOTOR AMERICA, INCORPORATED,

Defendant - Appellee.

Appeals from the United States District Court for the Western District of Virginia, at Charlottesville. Norman K. Moon, Senior District Judge. (3:13-cv-00030-NKM-RSB; 3:14-cv-00002-NKM-RSB; 3:14-cv-00005-NKM-RSB)

Argued: May 9, 2018 Decided: July 13, 2018

Before THACKER and HARRIS, Circuit Judges, and SHEDD, Senior Circuit Judge.

Dismissed in part, affirmed in part by published opinion. Judge Thacker wrote the opinion, in which Judge Harris and Senior Judge Shedd joined.

ARGUED: James B. Feinman, JAMES B. FEINMAN & ASSOCIATES, Lynchburg, Virginia, for Appellants. Shon Morgan, QUINN EMANUEL URQUHART & SULLIVAN LLP, Los Angeles, California, for Appellees. **ON BRIEF:** Jakarra J. Jones, Richmond, Virginia, James F. Neale, MCGUIREWOODS LLP, Charlottesville, Virginia; David Cooper, QUINN EMANUEL URQUHART & SULLIVAN LLP, New York, New York, for Appellees.

THACKER, Circuit Judge:

This appeal arises from the dismissal of three consumer actions based on Virginia state law claims. The actions focus on a series of misrepresentations made by Hyundai Motor America ("Hyundai") regarding the Environmental Protection Agency ("EPA") estimated fuel economy for the 2011, 2012, and 2013 models of the Hyundai Elantra. A Judicial Panel on Multidistrict Litigation ("JPML") consolidated dozens of similar consumer suits in the United States District Court for the Central District of California (the "MDL court"). But the JPML remanded to the United States District Court for the Western District of Virginia the three actions at issue in this appeal: *Gentry v. Hyundai Motor Am., Inc.*, No. 3:13-cv-00030; *Adbul-Mumit v. Hyundai*

Motor Am., Inc., No. 3:14-cv-00005; and *Abdurahman v. Alexandria Hyundai, LLC*, No. 3:14-cv-00002.

The Western District of Virginia dismissed with prejudice the claims in all three actions, save one claim in the *Gentry* action, for failure to satisfy federal pleading standards. Because one claim remains pending before the district court, we dismiss the *Gentry* appeal for lack of jurisdiction. We affirm the district court's dismissal of the *Adbul-Mumit* and *Abdurahman* actions and its denial of the plaintiffs' post-dismissal request for leave to amend their complaints in those actions.

I.

A.

In 2011 and 2012, a series of Hyundai advertisements claimed that 2011–2013 models of the Hyundai Elantra delivered an EPA fuel economy rating of 40 miles per gallon. But according to the United States Department of Justice and the California Air Resources Board, Hyundai used improper testing parameters to calculate greenhouse gas emissions. *See United States v. Hyundai Motor Co.*, 77 F. Supp. 3d 197, 198–99 (D.D.C. 2015). Hyundai used those parameters to compute an inaccurate fuel economy estimate. On November 2, 2012, after discussions with the EPA, Hyundai issued a press release adjusting the fuel economy rating "by one or two mpg" for "most vehicle[s]." J.A. 398.[1] Hyundai ultimately agreed to pay the largest

[1] Citations to the "J.A." refer to the Joint Appendix filed by the parties in this appeal.

civil penalty in the history of the Clean Air Act: $93,656,600 to the United States and $6,343,400 to the California Air Resources Board. *See Hyundai and Kia Clean Air Act Settlement*, EPA, https://www.epa.gov/enforcement/hyundai-and-kia-clean-air-act-settlement (June 19, 2018) (saved as ECF opinion attachment). Hyundai also forfeited greenhouse gas emissions credits valued "in excess of $200 million." *Id.*

B.

Numerous consumer lawsuits followed. On February 6, 2013, the JPML consolidated more than 50 suits in the Central District of California. Shortly after consolidation, plaintiffs in several consumer suits claimed to have reached a settlement with Hyundai for a single nationwide class. The proposed class consisted of "[a]ny individual who owned or leased a Class Vehicle on or before November 2, 2012." J.A. 1061. The proposed settlement permitted class members to either take a lump sum payment or participate in a reimbursement program offered by Hyundai.

In late 2013 and early 2014, consumers in Virginia filed the three actions at issue in this appeal, alleging state law consumer protection claims. Each asserts the same three Virginia state law causes of action: (1) a Lemon Law claim;[2] (2) a Virginia Consumer Protection Act claim; and (3) a false advertising claim. *Gentry* involves a class

[2] Pursuant to Virginia's Lemon Law, "[a]ny consumer who suffers loss by reason of" a motor vehicle manufacturer's failure to "conform the motor vehicle to any applicable warranty" may bring a civil action. Va. Code §§ 59.1-207.13–14.

action complaint with five named plaintiffs filed in the District Court for the Western District of Virginia on August 13, 2013. The named plaintiffs purport to represent a class of similarly situated consumers who purchased Elantras in Virginia. *Abdurahman* and *Adbul-Mumit* are mass tort actions filed in Virginia state court on December 18, 2013, and January 10, 2014, respectively. These two actions were removed to the Western District of Virginia in early 2014. Hyundai moved to dismiss the complaints in all three actions.

In June 2014, before the district court ruled on the motions to dismiss, the JPML transferred *Gentry*, *Adbul-Mumit*, and *Abdurahman* to the MDL court in the Central District of California so as to participate in the ongoing settlement efforts. And, in 2015, the MDL court certified a class for settlement purposes and approved the settlement that permitted class members to either take a lump sum payment or participate in a reimbursement program offered by Hyundai. The JPML later entered remand orders on September 9, 2015, with respect to *Gentry*, *Adbul-Mumit*, and *Abdurahman*, remanding to the Western District of Virginia all plaintiffs who either (1) opted out of the settlement or (2) were not members of the certified class (*i.e.*, individuals who purchased Elantras after November 2, 2012).

C.

Upon remand to the Western District of Virginia, the parties filed status reports with the district court. In its status report, Hyundai asserted, "[T]he current complaints are outdated and will only promote confusion going forward" because the

complaints "include a mix of pre- and post November 2, 2012 consumers, as well as many settlement class members who did not opt out of the settlement." Hyundai Status Report at 6, *Gentry v. Hyundai Motor Am.*, No. 3:13-cv-00030 (W.D. Va. Aug. 14, 2013; filed Jan. 8, 2016) ECF No. 82.[3] Thereafter, on June 21, 2016, the district court allowed the plaintiffs in each action 21 days to amend their respective complaints, observing that "the complaints now may be stale and in need of updating." Order to Confer at 2, *Gentry*, ECF No. 86 (filed June 21, 2016). Of note, the district court warned that, if the plaintiffs declined to amend, "the original complaints will be deemed operative" and Hyundai may "renew[] their original motions to dismiss." *Id.* at 3. The 21 day deadline passed without amendment.

Nonetheless, the district court granted plaintiffs an additional 20 days to amend. The district court noted that Hyundai had "sought [clarification] from Plaintiffs for almost two years" and that the "cases ha[d] lingered in a state of inactivity for too long." Order Granting Extension at 2, *Gentry*, ECF No. 89 (filed July 22, 2016). The district court again warned that it did "not intend to further extend this deadline" and that the "prior complaints [will] become operative" if the plaintiffs failed to amend. *Id.* at 3. Once again, the plaintiffs failed to amend.

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[3] The district court did not consolidate the three actions. However, all citations to court filings in this opinion appeared in the proceedings before the Western District of Virginia. *Gentry v. Hyundai Motor Am.*, No. 3:13-cv-00030, No. 3:14-cv-00002, No. 3:13-cv-00005, 2017 WL 354251 (W.D. Va. 2017).

On August 22, 2016, Hyundai moved to dismiss all pending claims in *Gentry*, *Adbul-Mumit*, and *Abdurahman*. On January 23, 2017, the district court granted the motion in part, dismissing all claims with the exception of one claim in the *Gentry* action. In doing so, the district court observed that the complaints did not satisfy the Federal Rule of Civil Procedure 8(a)(2) pleading standard, as explained in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). Specifically, the district court held that the complaints "fail[ed] to identify the factual basis for claims by any plaintiff or identify the plaintiffs themselves in the body of the pleading." J.A. 1471 (internal quotation marks omitted). The district court also articulated several Virginia state law grounds for dismissal. *See id.* at 1473 ("Aside from insufficient pleading, there are additional legal bases to dismiss the . . . claims.").

The plaintiffs filed a motion to reconsider and sought leave to amend their dismissed complaints. At no point throughout the entirety of the litigation, however, did the plaintiffs provide the district court with proposed amended complaints. The district court denied the motion to reconsider, and the plaintiffs in each action filed a timely notice of appeal. We consolidated the appeals.

II.

Appellate Jurisdiction

At the outset, we must determine the extent of our jurisdiction. In consolidated appeals, "each constituent case must be analyzed individually . . . to

ascertain jurisdiction." *Hall v. Hall*, 138 S. Ct. 1118, 1128 (2018); *see Tri-State Hotels, Inc. v. F.D.I.C.*, 79 F.3d 707, 711 (8th Cir. 1996) ("[W]hen . . . the consolidation is an arrangement for joint proceedings and convenience, then each suit retains its individual nature, and appeal in one suit is not precluded solely because the other suit is still pending before the district court." (internal quotation marks and citation omitted)); *Americana Healthcare Corp. v. Schweiker*, 688 F.3d 1072, 1083 (7th Cir. 1982) (determining appellate jurisdiction of each action consolidated on appeal). This court possesses jurisdiction over appeals "from all final decisions of the district courts of the United States." 28 U.S.C. § 1291. A final decision "is one that ends the litigation . . . and leaves nothing for the court to do but execute judgment." *Calderon v. GEICO Gen. Ins. Co.*, 754 F.3d 201, 204 (4th Cir. 2014) (quoting *Ray Haluch Gravel Co. v. Cent. Pension Fund of Int'l Union of Operating Eng'rs & Participating Emp'rs*, 571 U.S. 177, 183 (2014)).

We possess jurisdiction over the *Adbul-Mumit* and *Abdurahman* appeals because the district court dismissed those actions in their entirety. *See* J.A. 1477 ("[T]he motions to dismiss those cases will be granted."). But with respect to the *Gentry* appeal, one claim remains pending before the district court. Counsel for *Gentry* concedes that the district court did not enter a final order in that action. Oral Argument at 12:50, *Adbul-Mumit v. Alexandria Hyundai, LLC*, No. 17-1582 (4th Cir. May 9, 2018) http://www.ca4.uscourts.gov/oral-argument/listen-to-oral-arguments. Mr. Gentry nonetheless urges us to exercise jurisdiction over his appeal to "correct" a jurisdictional mistake of the district court. *Id.* He

alleges that the district court dismissed claims that were never remanded to the Western District of Virginia by the MDL court. The record belies this allegation. The district court correctly noted, "Mr. Gentry is the only remaining . . . plaintiff" in the *Gentry* action because "the other four named class representatives were not remanded by the MDL." J.A. 1451. Accordingly, we dismiss the *Gentry* appeal for lack of appellate jurisdiction.

III.

Twombly and *Iqbal*

We turn to the remaining *Adbul-Mumit* and *Abdurahman* appeals.[4] The district court dismissed those actions for failure to satisfy the federal pleading standards pursuant to *Bell Atl. Corp. v. Twombly*, 550 U.S. 554 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). Yet Appellants make no reference to *Twombly* or *Iqbal* in either their opening or reply briefs. Instead, Appellants rely upon their challenges to the district court's alternate grounds for dismissal, which rest on Virginia state law. We must therefore determine whether Appellants abandoned a challenge to the district court's dismissal of the complaints pursuant to *Twombly* and *Iqbal*.

This court makes "no habit of venturing beyond the confines of the case on appeal to address arguments the parties have deemed unworthy of orderly mention." *United States v. Holness*, 706 F.3d 579, 591–92 (4th Cir. 2013). We apply abandonment

[4] We refer to the plaintiffs in those actions as "Appellants."

and waiver principles to "provide a substantial measure of fairness and certainty to the litigants who appear before us." *Id*. at 592. Accordingly, "contentions not raised in the argument section of the opening brief are abandoned." *United States v. Al-Hamdi*, 356 F.3d 564, 571 n.8 (4th Cir. 2004). Whether to decide pertinent, unraised arguments is a matter vested to our discretion. *See Rice v. Rivera*, 617 F.3d 802, 808 n.4 (4th Cir. 2010); *A Helping Hand, LLC v. Baltimore Cty.*, 515 F.3d 356, 369 (4th Cir. 2008).

On this record, we decline to invent an argument in support of Appellants' complaints. The district court could not have been more clear that Appellants' failure to satisfy federal pleading standards constituted an independent basis for dismissal. Indeed, the order contained a separate subheading dedicated to the issue: "*Abdurahman* and *Adbul-Mumit* -- Analysis of Motions to Dismiss. I. Failure to Properly Plead Claims." J.A. 1471.[5] The district court framed all other grounds for dismissal as alternative holdings. *Id.* at 1473 ("*Aside from insufficient pleading*, there are additional legal bases to dismiss." (emphasis supplied)).

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[5] The district court's core concern at dismissal was that "the individual plaintiffs are simply named in the caption [of the complaint] and not mentioned again by name" and that all defendants are "lump[ed]" together with general allegations. J.A. 1471, 1472. The district court held, quite clearly, that this rendered their complaints deficient under *Twombly* and *Iqbal*. *See id*. at 1472 ("While each and every unique fact is not required, federal pleading standards nevertheless control in federal court, and the Complaints here fail those standards." (internal quotation marks and citation omitted)).

Upon denying Appellants' motion to reconsider, the district court *again* reiterated the insufficiency of the pleading:

> Most obviously, the Court provided 'independent basis for dismissal' by concluding 'the *Abdurahman* and *Adbul-Mumit* Complaints failed to satisfy federal pleading standards': The Complaints do not make a single, specific allegation about even one of hundreds of named plaintiffs, much less about any of the seven, remaining . . . plaintiffs. Other arguments . . . are simply recapitulations of their previously-rejected arguments that are improper on reconsideration.

Mem. Op. Denying Mot. to Reconsider at 6, *Gentry v. Hyundai Motor Am.*, No. 3:13-cv-00030 (W.D. Va. Aug. 14, 2013; filed Apr. 6, 2017) ECF No. 119.

Despite these clear holdings, Appellants make no citation to *Twombly*, *Iqbal*, or even Rule 8 of the Federal Rules of Civil Procedure (establishing the federal pleading standard) in their 55 page opening brief. And the Virginia state law arguments that Appellants raise are irrelevant to the concern that Appellants' complaints failed to satisfy pleading standards in federal court.[6]

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[6] Appellants filed their complaints in Virginia state court, and the actions were later removed to federal court. Responsible pleading practice compels counsel to carefully consider whether his or her complaint satisfies federal pleading standards upon removal. *See* 14B Charles Alan Wright et al., Federal Practice and Procedure § 3738 (4th ed.) ("[I]t has been settled by numerous cases that the removed case will be governed by the Federal Rules of Civil Procedure and all other provisions of federal law relating to procedural matters.").

Thus, we hold that Appellants have waived their challenge to the district court's conclusion that the complaints failed to satisfy federal pleading standards. Because this constituted an independent basis for the order below, we affirm the district court's dismissal of the *Abdurahman* and *Adbul-Mumit* actions.

IV.

Denial of Leave to Amend

Appellants also argue that the district court improperly denied their post judgment motions for leave to amend their complaints. We review a district court's denial of a post-judgment motion for leave to amend for abuse of discretion. *See Laber v. Harvey*, 438 F.3d 404, 427–28 (4th Cir. 2006).

A.

Appellants contend that the district court abused its discretion because Appellants did not have the benefit of a "definitive ruling" before their complaints were dismissed with prejudice. Oral Argument at 6:55–9:05, *Adbul-Mumit v. Alexandria Hyundai, LLC*, No. 17-1582 (4th Cir. May 9, 2018) http://www.ca4.uscourts.gov/oral-argument/listen-to-oral-arguments. According to Appellants, only a district court's "definitive ruling" on the pleadings is sufficient to place a plaintiff on notice of any deficiencies in the complaint and the possibility that the action might be later dismissed with finality. In other words, Appellants see "no need to amend until there's a reason to amend." *Id.* at 7:30.

Appellants' position has some degree of support in the Second and Seventh Circuits. *See Lorely Fin. (Jersey) No. 3 Ltd. v. Wells Fargo Sec., LLC*, 797 F.3d 160, 190 (2d Cir. 2015) ("Without the benefit of a [definitive] ruling [on the pleadings], many a plaintiff will not see the necessity of amendment."); *Runnion ex rel. Runnion v. Girl Scouts of Greater Chi. and Nw. Ind.*, 786 F.3d 510, 523 n.3 (7th Cir. 2015) ("A district court does not have the discretion to remove the liberal amendment standard by . . . requiring plaintiffs to propose amendments before the court rules on a Rule 12(b)(6) motion on pain of forfeiture of the right to amend."). Even so, those circuits still allow the district court to dismiss with prejudice, without first issuing a definitive ruling, in some circumstances. *See Lorely Fin.*, 797 F.3d at 190 ("Our opinion today . . . leaves unaltered the grounds on which denial of leave to amend has been long held proper."); *Runnion*, 786 F.3d at 519–20 ("*Unless it is certain from the face of the complaint that any amendment would be futile or otherwise unwarranted*, the district court should grant leave to amend after granting a motion to dismiss." (emphasis supplied)).

Other circuits do not categorically require a district court to issue a definitive ruling before dismissal with prejudice. *See Rollins v. Wackenhut Serv., Inc.*, 703 F.3d 122, 131 (D.C. Cir. 2012) (affirming district court's dismissal with prejudice of a complaint without a prior definitive ruling); *Pet Quarters, Inc. v. Depository Trust & Clearing Corp.*, 559 F.3d 772, 782 (8th Cir. 2009) (affirming dismissal with prejudice on futility grounds without prior opportunity to amend); *Curley v. Perry*, 246 F.3d 1278, 1284 (10th Cir. 2001) (affirming sua

sponte dismissal with prejudice of meritless complaint).

Categorically requiring a district court to *first* provide a "definitive ruling" before dismissal with prejudice impedes a district court's inherent power to manage its docket. *See Dietz v. Bouldin*, 136 S. Ct. 1885, 1892 (2016) ("[D]istrict courts have the inherent authority to manage their dockets and courtrooms with a view toward the efficient and expedient resolution of cases."). Likewise, such a requirement would be at odds with our general rule that the nature of dismissal is a matter for the discretion of the district court. *See Carter v. Norfolk Cmty. Hosp. Ass'n, Inc.*, 761 F.2d 970, 974 (4th Cir. 1985) ("[D]ismissal under Rule 12(b)(6) is . . . with prejudice unless it specifically orders dismissal without prejudice. *That determination is within the district court's discretion.*" (emphasis supplied)). Moreover, adopting the type of bright line rule Appellants urge would place an unyielding impetus on the district court to resolve pleading deficiencies, regardless of previous opportunities to amend or other extenuating circumstances. That is not the role of the court. The district court does not serve as a legal advisor to the parties, nor is a dispositive motion a "dry run" for the nonmovant to "wait and see" what the district court will decide before requesting leave to amend.

Instead, we leave the nature of dismissal to the sound discretion of the district court. *See Carter*, 761 F.2d at 974.

B.

Plaintiffs whose actions are dismissed are free to subsequently move for leave to amend pursuant to Federal Rule of Civil Procedure 15(b) even if the dismissal is with prejudice. *See Laber*, 438 F.3d at 427–28. Appellants here did just that. *See* Mem. Supp. Mot. to Reconsider at 14, *Gentry v. Hyundai Motor Am.*, No. 3:13-cv-00030 (W.D. Va. Aug. 14, 2013; filed Feb. 8, 2017) ECF No. 112. We turn to that issue now.

We review a district court's denial of leave to amend for abuse of discretion. *Laber*, 438 F.3d at 427–28. "A court should evaluate a postjudgment motion to amend the complaint 'under the same legal standard as a similar motion filed before judgment was entered.'" *Katyle v. Penn Nat. Gaming, Inc.*, 637 F.3d 462, 471 (4th Cir. 2011) (quoting *Laber*, 438 F.3d at 427). Motions for leave to amend should generally be granted in light of "this Circuit's policy to liberally allow amendment." *Galustian v. Peter*, 591 F.3d 724, 729 (4th Cir. 2010). However, a district court may deny leave to amend "when the amendment would be prejudicial to the opposing party, there has been bad faith on the part of the moving party, or the amendment would be futile." *Johnson v. Oroweat Foods Co.*, 785 F.2d 503, 509 (4th Cir. 1986).

Prejudice to the opposing party "will often be determined by the nature of the amendment and its timing." *Laber*, 438 F.3d at 427. Generally, "[t]he further the case progressed before judgment was entered, the more likely it is that [subsequent] amendment will prejudice the defendant." *Id.* We look to the "particular circumstances" presented,

including previous opportunities to amend and the reason for the amendment. *Scott v. Family Dollar Stores, Inc.*, 733 F.3d 105, 118–19 (4th Cir. 2013) (granting leave on a plaintiff's first request for leave where the "proposed amended complaint merely elaborates on an allegation in the original complaint"); *see also Laber*, 438 F.3d at 427–28 (considering both the timing of the amendment and the "alternative theory" for relief it advanced).

Reviewing the record here, we discern no abuse of discretion. The circumstances of the litigation below compel our conclusion that the nature and timing of the amendment would prejudice Hyundai.[7] Throughout the litigation below, Hyundai repeatedly challenged the sufficiency of Appellants' complaints -- specifically on the ground that the complaints failed to plead facts pertinent to individual plaintiffs and defendants. These pleading deficiencies were the subject of status reports, meetings, and eventually a motion to dismiss. *See* Hyundai Status Report at 6,

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[7] Moreover, the misleading and inconsistent assertions made on behalf of Appellants here also indicate bad faith. During oral argument, Appellants' counsel contended that he "asked seven times for leave to amend," but later conceded that these requests occurred "during" the period the district court had already granted leave to amend. Oral Argument at 6:20, 10:30, *Adbul-Mumit v. Alexandria Hyundai, LLC*, No. 17-1582 (4th Cir. May 9, 2018) http://www.ca4.uscourts.gov/oral-argument/listen-to-oral-arguments. This is nonsensical. Further, these requests were only mentioned, in passing, in emails to the district court. Counsel never brought forward proposed amendments for the district court's consideration.

Counsel also represents that although he repeatedly "attempted" to seek leave, he "didn't think there was jurisdiction to amend" the complaints. Oral Argument at 34:30. Surely both cannot be true. Again -- nonsensical.

Gentry, ECF No. 82 (filed Jan. 8, 2016) ("Until the plaintiffs and their claims are identified, the parties do not have a meaningful reference point [to proceed]."); Resp. to Appellants' Letter at 2, *Gentry*, ECF No. 88 (filed July 13, 2016) ("[Hyundai has] been requesting this same information since August, 2014 . . . . The information is necessary to determine who is actually a plaintiff in the remanded matters."); Meet and Confer Report at 4–5, *Gentry*, ECF No. 90 (filed Aug. 22, 2016) ("It is in everyone's best interest to know who and how many plaintiffs are involved in this case . . . . [Hyundai] should not have to devote more resources trying to figure out who is suing them."); Mem. Supp. Mot. to Dismiss at 5, *Gentry*, ECF No. 91 (filed Aug. 22, 2016) ("Without identification and verification of those individuals actually alleging an injury, plaintiffs' claims should be dismissed."). Given that the MDL court remanded only some of the named plaintiffs' cases because these plaintiffs did not fall within the MDL class, Hyundai's demands were not unreasonable. Further, because the MDL court remanded the claims of only certain plaintiffs to the Western District of Virginia, the barebones complaints rendered impossible the district court's efforts to determine the extent of its jurisdiction.[8]

All of this time and energy, largely focused on the deficiency of the complaints, spanned the entirety of the 2016 calendar year. In June 2016 -- in the heat of this litigation concerning the sufficiency

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[8] Appellants allege that Hyundai is also in possession of information that would help inform the district court of the extent of its jurisdiction. Appellants' Br. at 41. This misses the point. The plaintiff is the master of the complaint and it is not incumbent on defendants to cure its deficiencies.

of the complaints -- the district court *twice* granted Appellants leave to amend and explained "that the complaints may now be stale and in need of updating." Order to Confer at 2, *Gentry*, ECF No. 86 (filed June 21, 2016). Specifically, the district court stated,

> [Amendment] might be further warranted because the [*Adbul-Mumit* and *Abdurahman* actions] contain dozens, if not hundreds, of named plaintiffs and defendants. Indeed, parts or all of these cases may be duplicative of *Gentry*. Furthermore, Defendants previously filed motions to dismiss the complaints in all three cases, but those motions were not resolved on the merits . . . . Given the proceedings in the MDL, the voluminous nature of the complaints, their possible duplication, and the fact Defendants never had their motions to dismiss adjudicated on the merits, the Court is attuned to the possibility that the complaints may now be stale and in need of updating.

Id. (internal citations omitted). After Appellants failed to meet the district court's original 21 day deadline, the court granted Appellants an additional 20 days. But once again, Appellants failed to amend.

And still, even after status reports, opportunities to amend, dispositive motions, dismissal with prejudice, and a post-judgment motion for leave to amend, Appellants have not once provided the district court with a proposed amendment purporting to cure the deficiencies. *See* Oral Argument at 6:40–6:55, *Adbul-Mumit v. Alexandria*

Hyundai, LLC, No. 17-1582 (4th Cir. May 9, 2018), http://www.ca4.uscourts.gov/oral-argument/listen-to-oral-arguments.

Faced with such resolute adherence to deficient complaints, the district court's decision to dismiss with prejudice was well within its discretion under the facts of this case.

V.

For the foregoing reasons, we dismiss the appeal in the *Gentry* action and affirm the district court's dismissal of the *Adbul-Mumit* and *Abdurahman* actions.

DISMISSED IN PART,
AFFIRMED IN PART

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

CASE NO. 3:13–cv–00030
OPINION, JUDGE NORMAN K. MOON

JOHN WILLIAM GENTRY, *ET AL.*,
Plaintiffs,
v.
HYUNDAI MOTOR AMERICA, INC.,
Defendant.

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CASE NO. 3:14–cv–00002
OPINION, JUDGE NORMAN K. MOON

ALIM ABDURAHMAN, *ET AL.*,
Plaintiffs,
v.
HYUNDAI MOTOR AMERICA, INC., *ET AL.*,
Defendants.

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CASE NO. 3:14–cv–00005
OPINION, JUDGE NORMAN K. MOON

JIHAD ABDUL-MUMIT, *ET AL.*,
Plaintiffs,
v.
HYUNDAI MOTOR AMERICA, INC., *ET AL.*,
Defendants.

These three cases are before the Court on motions to dismiss. Each involves allegations that Hyundai Motor America, Inc. ("HMA") misstated or misrepresented the gas mileage obtained by Hyundai Elantras. *Gentry* is a class action against a single defendant, HMA. *Abdurahman* is a mass action of over 700 plaintiffs against 29 defendants: HMA and various Virginia dealerships. *Abdul-Mumit*—also a mass action with substantively identical allegations to *Abdurahman*—has over 500 named plaintiffs suing 27 defendants. The cases previously were stayed, transferred to MDL 2424, and then partially remanded by the MDL back to this Court in September 2015. Each case contains a claim under the Virginia Motor Vehicle Warranty Enforcement Act ("Lemon Law"), Va. Code §§ 59.1-207.9 *et seq*.; the Virginia Consumer Protection Act of 1977 ("VCPA"), Va. Code §§ 59.1-196 *et seq*.; and for false or misleading advertising, Va. Code §§ 18.2-216 & 59.1-68.3.

An important date in these cases is November 2, 2012, when HMA announced its "recalculation" of fuel economy estimates for certain vehicles ("Announcement"). At the MDL, a class settlement was reached for pre-November 2nd purchasers and is now on appeal before the Ninth Circuit. Thus, the MDL remanded these cases for proceedings on two sets of claims: (1) any **pre-**November 2nd purchasers who opted out of the settlement, and; (2) **post-**November 2nd purchasers of 2011-13 Hyundai Elantras sold in Virginia. (*Gentry*, dkt. 91).

The parties have presented numerous jurisdictional and merits arguments. After briefing and oral argument, the Court concludes that aspects of the Lemon Law claim in *Gentry* based on the on-

board mileage calculator may proceed. But the aspect of the Lemon Law claim based on fuel economy, as well as Mr. Gentry's VCPA and false advertising claims, will be dismissed because those counts do not state a claim. As for *Abdul-Mumit* and *Abdurahman*, the Court finds that it has jurisdiction based on the Class Action Fairness Act ("CAFA"). In addition to sharing some shortcomings with the *Gentry* complaint, the complaints in *Abdul-Mumit* and *Abdurahman* are devoid of facts pertaining to any of the hundreds of named plaintiffs or to any Defendant other than HMA. Therefore, those complaints will be dismissed.

PROCEDURAL BACKGROUND

I. *Gentry* Filed and Stayed.

Gentry was filed in this Court in August 2013. The complaint was amended that October, but Defendant HMA moved both to dismiss the complaint and to stay the case. The case was stayed in November 2013 pending a decision from the MDL.

II. *Abdurahman* Filed and Removed, so *Abdul-Mumit* Is Filed (and Removed).

After Gentry was stayed, the Plaintiffs' attorney, Mr. Feinman, filed a mass action, *Abdurahman*, in state court in December 2013. Defendants removed the case to this Court on January 2014, citing the Class Action Fairness Act ("CAFA") as the basis for removal.

The next day, Mr. Feinman filed *Abdul-Mumit* in the Roanoke Circuit Court, a complaint which was

substantively identical to *Abdurahman*, except that the caption of named plaintiffs and defendants differed somewhat. Predictably, Defendants removed *Abdul-Mumit* in February 2014, although this time—in addition to CAFA jurisdiction—they also relied on traditional diversity jurisdiction (arguing that that defendant dealerships in Virginia were fraudulently joined or were nominal defendants) and federal question jurisdiction (arguing that the attempt to evade the Court's stay in *Gentry* implicated the Court's authority to control its own proceedings).

III. MDL Transfers, then Remands, the Cases

With motions to dismiss pending in all three cases, the MDL on June 9, 2014 ordered the transfer of all three cases to the Central District of California.

After extensive proceedings, the MDL returned the cases on September 15, 2015 to this Court, identifying the two classes noted above: pre-November 2nd opt-outs and post-November 2nd purchasers. From late 2015 to mid-2016, the parties—at the Court's repeated urging—attempted with only modest success to resolve various case management issues: *e.g.*, deadlines; identification of proper plaintiffs and possible duplication of cases; and whether discovery, repleading, or both should occur.

In June and July 2016, the Court ordered Plaintiffs to amend their complaints to reflect developments in the case, or else have their prior complaints deemed operative. (*See Gentry*, dkts. 86,

89). They chose the latter, and Defendants filed renewed motions to dismiss in all three cases.

ALLEGATIONS IN *GENTRY*

Gentry was filed as a class action with five named plaintiffs. Defendant HMA asserts—and Plaintiff does not contest—that the four other named class representatives were not remanded by the MDL because those plaintiffs fell within the settlement and did not opt out. Thus, Mr. Gentry is the only remaining named plaintiff in *Gentry*.

The Complaint brings claims for violations of Virginia's "Lemon Law," the VCPA, and deceptive advertising law. (Dkt. 27 [hereinafter "Complaint"] ¶ 4). The case involves allegedly deceptive practices surrounding HMA's 2011–2013 Elantra vehicle. In November 2010, HMA's CEO introduced the "All New 40 MPG Hyundai Elantra." (Complaint ¶ 5). Ad campaigns represented that the Elantra would obtain 40 miles per gallon ("MPG") on the highway. (*Id.*). Allegedly, 16,000 Virginians bought the 2011–2013 edition. (*Id.*). Mr. Gentry was one of them. He commutes several miles to work, and in early 2013 began researching a new vehicle. (*Id.* ¶ 7). He recalled ads for the 2011–2012 Elantra touting its 40 MPG highway and later saw others about the 2013 Elantra claiming 38 MPG. (*Id.*). He thus purchased a 2013 Elantra on February 18, 2013 from a dealer in Staunton, Virginia. (*Id.* ¶ 8). He asserts that his "warranty book" stated his car would receive "up to" 40 MPG. (*Id.* ¶ 7).

Post-purchase, Mr. Gentry kept track of his car's MPG. Rather than obtaining 38 MPG, his Elantra received only 30 to 33 MPG. (Complaint ¶ 9).

Plaintiff returned to the local HMA dealership, where employees relayed that his car should get 38 MPG on the highway. (*Id.* ¶¶ 9–10). Indeed, the dealership's owner drove the vehicle himself and calculated that Gentry's car was receiving 32 MPG, and that the on-board mileage calculator was overstating the actual gas mileage. (*Id.* ¶ 10). Further testing by the dealership employees and HMA representatives occurred.

On June 18, 2013, HMA employees performed tests in Staunton, Virginia. (Complaint ¶ 11). Their tests yielded 62 MPG and 42 MPG calculations, while the on-board mileage calculator yielded 37–40 MPG and 38–44 MPG, respectively. (*Id.*). In subsequent conversations with Mr. Gentry, the dealership's owner expressed doubt about the accuracy of these calculations, which contradicted his experiences, as well as Mr. Gentry's, when driving the car. (*Id.* ¶ 12). The dealership owner claimed the HMA employees insisted that: the Elantra obtained the proper gas mileage; Mr. Gentry's calculations were caused by his driving style; and the car received the proper gas mileage. (*Id.*).

Facing a nonresponsive HMA, Gentry sought legal representation. During his search, he discovered "for the first time" details of a separate class action where HMA admitted in November 2012 that it has submitted false and incorrect mileage calculations to the EPA for its 2011–2013 Elantras. (Complaint ¶ 13). Plaintiff alleges additional facts regarding two of his claims.

Lemon Law. Plaintiff alleges that HMA published on its website in April 2012 statements that 39% of Elantras obtain 40 MPG. (Complaint ¶

21). HMA cannot fix its 2011–2013 Elantras to make them produce 40 MPG. (*Id*. ¶ 24). Further, HMA represented that Elantra's on-board mileage calculators would give "accurate" MPG assessments but in fact do not. (*Id*. ¶ 25). Mr. Gentry alleges "on information and belief" that HMA knew its MPG tests for the Elantra model, as well as its on-board mileage calculator, were inaccurate. (*Id*.).

VCPA. Plaintiff asserts several statements or actions by HMA constituted violations of the VCPA: (A) HMA's statement that Elantras would receive 40 MPG; (B) HMA's refusal to sell an Elantra to Mr. Gentry that conformed to the 40 MPG representation; (C) HMA's representation that the on-board calculator was accurate; (D) statements from a HMA website that 2013 Elantras could obtain 38 MPG had deceptively obscure and difficult-to-read disclaimers; (E) HMA employees' statements about the gas mileage Mr. Gentry's Elantra actually received when they tested it. (*See* Complaint ¶ 31).

GENTRY—ANALYSIS OF MOTION TO DISMISS

I. Additional Facts Presented by HMA.

HMA submitted several exhibits to its motion to dismiss. HMA uses the first class of exhibits to advance its legal arguments about preemption. The second batch of documents is used in support of HMA's argument that the EPA has primary jurisdiction over this case. Even if the Court were to consider these documents, the arguments they support do not succeed or fail by reference to the exhibits.

For Exhibits A through E, HMA urges judicial notice of statements made by the government on its websites. *See Johnson v. Clarke*, No. 7:12CV00410, 2012 WL 4503195, at *2 n.1 (W.D. Va. Sept. 28, 2012) (compiling cases). These exhibits contain statements made on the EPA's website about fuel economy, HMA's Elantra, and the relevant regulatory regime. HMA observes that federal law mandates fuel economy labels and authorizes the EPA to issue effecting regulations. *See* 48 U.S.C. § 32908(b); 40 C.F.R. §§ 600.302-12(a)-(f), (h). One regulation mandates that these labels state: "actual results will vary for many reasons." 40 C.F.R. § 600.302-12(b)(4). According to the EPA, the purpose of the fuel estimates is to "help consumers compare the fuel economy of different vehicles when shopping for new cars." (Dkt. 91-3 at ECF 2).

On November 2, 2012—before Gentry purchased his car—EPA and HMA announced that, as a result of a federal investigation, HMA would lower fuel estimates on most 2012 and 2013 models by an average of 1-2 MPG; the change for Elantras was 2 MPG. (Dkt. 91-5 at ECF 2; dkt. 91-6 at ECF 2). The Announcement advised that HMA would be submitting a plan to re-label all cars on dealership lots with corrected mileage estimates. (Ex. D).

From this, HMA states that Gentry saw a corrected label *before* he purchased his vehicle. And from that purported fact, HMA asserts that the Court may take judicial notice of a reproduced sticker in its brief because it is integral to the complaint. Based on the existence of the sticker—so HMA's argument goes—Gentry's claims fail because he had notice of the accurate MPG estimate for his Elantra.

However, this line of argument assumes that HMA actually re-labeled the car Mr. Gentry bought before he bought it. Indeed, HMA admits the sticker is a "replica" of what Mr. Gentry "would have seen at the time of purchase." (Dkt. 91-1 at 7). At the motion to dismiss stage, the Court cannot use the additional facts HMA has submitted to make further factual inferences that (1) HMA properly relabeled the car Gentry bought, and (2) Gentry saw the corrected mileage sticker before purchasing his vehicle. *See Zak v. Chelsea Therapeutics Int'l, Ltd.*, 780 F.3d 597, 607 (4th Cir. 2015).

HMA also relies upon a consent decree between it, other parties, and the EPA entered on January 9, 2015 in a Washington, D.C. court. (Ex. I, J). Specifically, HMA must submit a "Corrective Measures Completion Report" by April 2018 and annual reports for monitoring by the EPA. (Ex. J., ¶ 19; *Id*. App'x A, ¶ 10). The import of these documents is discussed, *infra*, where the Court finds that the primary jurisdiction doctrine does not apply, and thus the EPA's consent decree is no impediment to deciding these cases.

II. Standing

To bring a federal case, a "plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547, 194 L. Ed. 2d 635 (2016). HMA argues that Gentry lacks standing because he did not suffer injury in fact and, even if he did, such injury was not

fairly traceable to HMA. The Court concludes that Mr. Gentry has standing.

Under the injury-in-fact inquiry, an alleged injury must affect the plaintiff in a personal and individual way. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 n.1 (1992). HMA argues that Mr. Gentry cannot base his claims on pre-Announcement fuel estimates because those estimates were not in effect when he purchased his car in February 2013. It says that representations about models he did not purchase are irrelevant, and Mr. Gentry never claims to have seen (before his purchase) the advertisements he cites about the 2013 Elantra. (Dkt. 91-1 at 11). But the Announcement does not affect Gentry's claim, which is that he bought a 2013 Elantra falsely represented to achieve 38 MPG highway mileage. (Complaint ¶ 7). The fact that HMA or the EPA made a generic announcement about an incorrect 40 MPG estimate for some vehicles does not negate Plaintiff's assertion that his vehicle still did not achieve the corrected mileage. HMA's arguments simply go to the merits of whether Mr. Gentry states a plausible claim for relief. *See infra* Part III.

As for the "causal connection" prong, HMA claims that the November 2, 2012 Announcement and the window (or "Monroney") sticker sever any connection between the injury he suffered and the conduct complained of. But HMA's claim about the sticker fails, as it implies the Court may assume (against Gentry) the corrected sticker was placed on Gentry's vehicle and seen by him. At the motion-to-dismiss stage, the Court must make factual inferences from the complaint (or judicially-noticed materials) in favor of Gentry, not against him. *See*

Zak, 780 F.3d at 607 ("when a court considers relevant facts from the public record at the pleading stage, the court must construe such facts in the light most favorable to the plaintiffs"). Without this inferential crutch, HMA's argument fails and Mr. Gentry has standing.

III. Preemption and Other Difficulties

HMA next claims that Gentry's state law claims are preempted by Section 32919(b), which states that when a requirement under § 32908 is in effect, "a State may adopt or enforce a law or regulation on disclosure of fuel economy . . . only if the law or regulation is identical to that requirement." Section 32908(b) and the EPA's effectuating regulations specifically describe the content of the window-sticker fuel economy estimates. Moreover, the Federal Trade Commission has declared that car advertisements must include the relevant EPA mileage estimates. *See* 16 C.F.R. 259.2; *see also Guide Concerning Fuel Economy Advertising of New Automobiles*, 60 Fed. Reg. 56230-01, 1995 WL 652912 (Nov. 8, 1995). Courts have thus found that—to the extent a plaintiff's claims are based on ads or window-stickers using EPA estimates and not defendants' statements about "actual" fuel economy calculations—such claims are preempted. *See In re Ford Fusion & C-Max Fuel Econ. Litig.*, No. 13-MD-2450 KMK, 2015 WL 7018369, at *27 (S.D.N.Y. Nov. 12, 2015) (compiling cases). In other words, to avoid preemption, statements made in advertisements must go beyond the mere (and mandatory) disclosure of EPA fuel economy estimates. *See id*. at 26.

HMA argues that "construing" its (proclaimed) use of EPA fuel economy estimates in advertisements as anything more than that—for instance, as a warranty, promise, or statement of actual mileage (as in portions of Count I)—would impose obligations not identical to the federal regulatory regime. (Dkt. 91-1 at 13). This argument has some force, although it does not reach Gentry's allegations about the on-board mileage calculator. (*See* Complaint ¶ 25). Yet the argument also overlooks the antecedent question: What was the nature of HMA's statements?

Gentry attempts to frame the relevant statements not as mere disclosures of EPA estimates but as affirmations of fact which would not conflict with federal law (and thus not be the subject of preemption). *See, e.g., Yung Kim v. Gen. Motors, LLC*, 99 F. Supp. 3d 1096, 1103–04 (C.D. Cal. 2015); *see also* dkt. 92 (Response Br.) at ECF 8. The parties' positions were brought into sharp relief at oral argument, where HMA claimed that the MPG statements were EPA estimates but Gentry argued they were warranties of fact. (*See* dkt. 105 [hereinafter "Tr."] at 20, 25, 28, 31).

As an initial observation, it is hard to ascertain what statements Gentry's causes of action involve. He bought a 2013 Elantra Coupe. (Complaint ¶ 8). Prior to purchase, it is alleged he "had previously seen advertisements touting the '40 MPG' Hyundai Elantra vehicles and found numerous advertisements asserting that the 2013 Hyundai Elantra obtained highway mileage of '38 MPG.'" (*Id*. ¶ 7). Further details of these ads are not provided, but Gentry attached to his complaint a DVD containing "representative sample[s] of the Hyundai

Elantra advertisements, all believed to have been disseminated in Virginia." (*Id.*). It was "[b]ased on the[se] Hyundai advertisements and many same or similar affirmations of facts made by salesmen" that Mr. Gentry bought his Elantra. (*Id.* ¶ 8; *see id.* ¶ 23). The Court must therefore turn to the ads on the DVD, which provide the only substantive basis on which to evaluate what representations ostensibly were made to Gentry.

Notably, it is never alleged that Mr. Gentry himself viewed or relied upon these ads. Assuming he did, the DVD contains twelve videos, none of which aid his cause. The third, fourth, and twelfth ones are HMA Super Bowl ads narrated by actor Jeff Bridges; these ads disclose on-screen that the 40 MPG figures are "EPA Estimates." Moreover, they are for 2011 Elantras. Thus, these "representative samples" cannot support Gentry's claims because they are both preempted and irrelevant to the model he purchased.

The second video, "Save the Asterisks," is an HMA-produced online video which touts that all Elantras receive 40 MPG without reference to EPA estimates. But that video involves the 2011 Elantra and thus cannot form the basis of Gentry's claims. *See* Jeremy Korzeniewski, *Video: Hyundai launches Save the Asterisks campaign for 40-mpg Elantra*, AUTOBLOG, http://www.autoblog.com/2010/12/02/video-hyundai-launches-save-the-asterisks-campaign-for-40-mpg-e/ (Dec. 2, 2010). The same is true for the first video, which depicts the unveiling of the 2011 Elantra at a Los Angeles car show.

The remaining videos (5 through 11) fail as well. All are made by local dealerships, which are not defendants in the *Gentry* case, and Plaintiffs' counsel

conceded at oral argument that HMA would not be liable for warranties made by dealerships. (Tr. at 30). The fifth video also is unhelpful because it pertains to a 2011 Elantra.

In sum, while the complaint generically asserts that HMA made various, unspecified statements about the 40 MPG Elantra, the only factual allegations before the Court involve statements that (1) properly disclose that they are EPA estimates, and thus are preempted, or (2) are from non-defendant dealerships, (3) are about an Elantra model other than the one Gentry bought, or (4) some combination thereof. While only this first category of statements are preempted, the others categories provide reasons why Gentry fails to state claims against HMA based on his vehicle's gas mileage.

IV. Primary Jurisdiction with EPA over Fuel Estimates

Next, HMA urges primary jurisdiction, a doctrine where "a claim pending before a court 'requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body,' [so] judicial proceedings are stayed 'pending referral of such issues to the administrative body for its views.'" *Advamtel, LLC v. AT & T Corp.*, 105 F. Supp. 2d 507, 511 (E.D. Va. 2000) (quoting *United States v. Western Pac. R.R. Co.*, 352 U.S. 59, 63–64 (1956)). The primary jurisdiction doctrine does not apply to this case.

HMA contends that EPA fuel economy estimates for Hyundai vehicles are the subject of ongoing regulatory activity. (Dkt. 91-1 at 14). Specifically,

HMA is subject to the consent decree with EPA requiring it to take corrective measures for its EPA fuel economy. (Ex. J (dkt. 91-11) ¶ 19, App'x A). HMA asserts without explanation that "orders by this Court have the potential to interfere and possibly conflict with the agency's oversight."

Primary jurisdiction presents little problem here. Adjudication of the issues in this case—essentially, compensation for unfair and deceptive advertising—would not interfere with the EPA's efforts to ensure that HMA and other defendants take remedial measures to avoid future miscalculations of EPA fuel estimates; nor has the EPA appeared in or suggested this litigation would intrude upon its regulatory prerogatives. *See Envtl. Tech. Council v. Sierra Club*, 98 F.3d 774, 789 & nn. 23–24 (4th Cir. 1996) (despite name, primary jurisdiction doctrine is a discretionary decision by district court; noting that EPA had not sought to intervene or participate as *amicus* when party asserted primary jurisdiction).

V. Lemon Law Claim: Fuel Mileage and On-Board Mileage Calculator

HMA attacks Mr. Gentry's Lemon Law claim that is rooted in both fuel mileage and the Elantra's on-board mileage calculator. The Lemon Law applies to defects "which significantly impairs the use, market value, or safety of the motor vehicle to the consumer . . . ." Va. Code § 59.1-207.13(A). HMA says that Gentry has not sufficiently alleged that the purportedly erroneous MPG statements and on-board mileage calculator impaired his car's use, value, or safety.

Whether a nonconformity significantly impairs a car's use, market value, or safety is an affirmative defense. Va. Code § 59.1-207.13(G)(1). It is not enough on a Rule 12(b)(6) motion that the complaint fails to allege the car's value, use, or safety was affected; rather, the complaint must put forth facts affirmatively showing that the value, use, or safety was not affected. *See Goodman v. Praxair, Inc.*, 494 F.3d 458, 464 (4th Cir. 2007) (*en banc*) (A "motion to dismiss filed under Federal Rule of Procedure 12(b)(6) . . . generally cannot reach the merits of an affirmative defense [except] in the relatively rare circumstances where facts sufficient to rule on an affirmative defense are alleged in the complaint . . . .); *see also id.* at 466. "An affirmative defense permits 12(b)(6) dismissal if the face of the complaint includes all necessary facts for the defense to prevail." *Leichling v. Honeywell Int'l, Inc.*, 842 F.3d 848, 850–51 (4th Cir. 2016). That is not the situation here.

Nevertheless, for the reasons stated in the Court's preemption analysis, *see supra* Part III, the Lemon Law claim will be dismissed to the extent it is based on fuel mileage. It may proceed regarding the on-board mileage calculator claim.

VI. VCPA Claim

A. Reliance and the On-Board Mileage Calculator

Without the fuel mileage aspects of Gentry's claims, *see supra* Part III, the remaining portion of the VCPA claim rests on the alleged inaccuracy of his Elantra's on-board mileage calculator.

(Complaint ¶¶ 25, 28). "Virginia courts have consistently held that reliance is required to establish a VCPA claim." *Fravel v. Ford Motor Co.*, 973 F. Supp. 2d 651, 658 (W.D. Va. 2013); *see Hamilton v. Boddie-Noell Enterprises, Inc.*, 88 F. Supp. 3d 588, 591 (W.D. Va. 2015); *Brown v. Transurban USA, Inc.*, 144 F. Supp. 3d 809, 846 (E.D. Va. 2015); *Cooper v. GGGR Investments, LLC*, 334 B.R. 179, 189 (E.D. Va. 2005).

Mr. Gentry failed to plead reliance based on any representation made to him before he purchased his vehicle or in relation to the on-board mileage calculator. (*See* dkt. 91-1 (Def's Br.) at 18–19). The Complaint only makes a generic reference to representations made in an owner's manual that the calculator was accurate. Of course, one has an owner's manual only *after* purchasing a vehicle, and Gentry makes no allegation that he read the manual before buying his Elantra. (*See* Complaint ¶ 25). Further, HMA points out that cases cited by Gentry for the proposition that reliance need not be pled are not VCPA cases. (Dkt. 93 at 11–12).[1] For these reasons, the VCPA claim cannot be premised on the allegedly inaccurate on-board mileage calculator.[2]

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[1] Specifically, *Daughtrey v. Ashe*, 243 Va. 73 (Va. 1992), was an express warranty case under the Uniform Commercial Code. The *Daughtrey* Court explicitly did not pass on the contours of reliance, because the statute contained no such requirement. *Id*. at 77–79. Likewise, *Martin v. American Medical Systems, Inc.*, involved a warranty claim which—unlike a VCPA claim—made it "unnecessary that the buyer actually rely upon" a statement. 116 F.3d 102, 105 (4th Cir. 1997).

[2] Mr. Gentry also relies on the on-board mileage calculator as part of his false advertising claim. This fails for similar reasons. He "has neither alleged that he viewed, nor that

B. Pleading with Particularity

Gentry's VCPA claim explicitly accuses HMA of fraudulent conduct. (*E.g.*, Complaint ¶¶ 31(A), (E)). Several recent cases hold that VCPA claims, which sound in fraud, must satisfy the heightened pleading standards in Rule 9(b). *See Wynn's Extended Care, Inc. v. Bradley*, 619 F. App'x 216, 220 (4th Cir. 2015); *Vuyyuru v. Wells Fargo Bank, N.A.*, No. 3:15CV598-HEH, 2016 WL 356087, at *4 (E.D. Va. Jan. 28, 2016); *Brown v. Transurban USA, Inc.*, 144 F. Supp. 3d 809, 845 (E.D. Va. 2015); *Maines v. Guillot*, No. 5:16CV00009, 2016 WL 3556258, at *3 (W.D. Va. June 16, 2016). Although creating a miasma of impropriety, the complaint here alleges very view details about what Mr. Gentry actually encountered and relied upon before buying his vehicle; rather, the complaint contains broad, generic references to unspecified advertisements that HMA allegedly made and Gentry was vaguely aware of at some undisclosed time. (Complaint ¶¶ 7–8).[3] Because

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[HMA] ran, any advertisements for the on-board mileage calculator." (Dkt. 91-1 at 20). Without any allegations of what advertisements Mr. Gentry saw, relied upon, or "induce[d]" him "to enter into" an agreement for an Elantra, Va. Code. § 18.2-216, he cannot establish any "loss as the result of" alleged false advertising. Va. Code § 59.1-68.3.

[3] To the extent Mr. Gentry does provide details about statements or representations made by HMA, they are unconnected to his purchase. For instance, the Complaint (¶ 21) alleges that, on April 18, 2012, HMA posted a statement on its website that 39% of vehicles sold achieved 40 MPG highway, and suggested that Elantras would obtain that mileage. But nowhere is it alleged that *Mr. Gentry* viewed this statement, that the statement applied to the Elantra edition he purchased,

Gentry must—but has not—plead "the time, place, and contents of the false representations, as well as the identity of the person making the misrepresentation and what he obtained thereby," *Wynn's*, 619 F. App'x at 220; *see Brown*, 144 F. Supp. 3d at 845, the VCPA fails in its entirety.

VII. Class Allegations

HMA seeks dismissal of the putative class because the Complaint contains no allegations that suggest Mr. Gentry (or for that matter, the other named plaintiffs that are part of the MDL settlement of the pre-November 2nd class) can satisfy the requirements in Fed. R. Civ. P. 23(a) and 23(b). *See EQT Prod. Co. v. Adair*, 764 F.3d 347, 358 (4th Cir. 2014) (explaining test at certification stage). The Court will dismiss the class allegations without prejudice as to Mr. Gentry's Lemon Law claim based on the on-board mileage calculator, but with prejudice as to all other aspects.

Mr. Gentry points out that assessment of a class is usually reserved for the certification phase after discovery. It is true that courts generally prefer to wait until after discovery to make a definitive class certification ruling. *See*, *e.g.*, *Govan v. Whiting-Turner Contracting Co.*, 146 F. Supp. 3d 763, 769 (D.S.C. 2015); *Scott v. Clarke*, No. 3:12-CV-00036,

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or that he relied on this statement when purchasing his Elantra.

Similarly, the Complaint and DVD attachment attribute a website screenshot about the 2013 Elantra's fuel economy to HMA. (Complaint ¶ 31(D)). But again there is no allegation that Mr. Gentry saw this website page, relied on it, or was mislead by it.

2012 WL 6151967, at *9 (W.D. Va. Dec. 11, 2012). But courts can still reject consideration of class treatment if the face of the complaint does not contain facts from which a colorable class might exist. *See*, *e.g.*, *Waters v. Electrolux Home Prod., Inc.*, No. 5:13CV151, 2016 WL 3926431, at *4 (N.D.W. Va. July 18, 2016); *Cornette v. Jenny Garton Ins. Agency, Inc.*, No. 2:10-CV-60, 2010 WL 2196533, at *2 (N.D.W. Va. May 27, 2010). So it is here. The sole allegations about the class are:

> The facts surrounding the purchase of a 2011-2013 Elantra by the five named class representative are typical of what happened to over 16,000 Virginians. This lawsuit can be amended to include 50, 500, 5,000, or 15,000 victims of [HMA's] misconduct, all of whose stories will be similar to what these five representatives experienced and continue and experience.

(Complaint ¶ 18). This is simply a superficial allusion to the legal prerequisites of a class in Rule 23(a)—commonality, typicality, adequacy, and numerosity—unadorned by any supporting factual allegations.

Moreover, the diversity of the class representatives undercuts the allegations: Four of the original five representatives are no longer involved in this case because they were part of the pre-November 2, 2012 settlement reached in the MDL. This is in contrast to Mr. Gentry who, by virtue of his purchase date, would fall within a putative post-November 2nd class. This pre- versus post-November 2nd dichotomy is problematic yet

inherent in the class definitions corresponding to each claim: *i.e.*, "all persons who purchased or leased a 2011-2013 Hyundai Elantra in Virginia." (Complaint ¶¶ 20, 29, 34). The fact that so many would-be class members (and all but one of the original named representatives) are already covered by the nationwide class settlement in the MDL further undermines the viability of the class. There is little reason to think that Mr. Gentry's post-November 2nd claims are typical of pre-November 2nd buyers, or even typical of other *post*-November 2nd purchasers: As HMA observes, the reasons to purchase a particular vehicle vary greatly from one person to another, and performance issues at the heart of this case, like gas mileage, will depend on many idiosyncratic factors such as geography, driving habits, and highway versus city driving.

In sum, these concerns cut to the commonality of the class, as well as Mr. Gentry's typicality. There are also adequacy issues, since all claims (except a portion of Mr. Gentry's Lemon Law count) fail on the merits. Accordingly, the Court will dismiss the class allegations with prejudice as to the Lemon Law claim based on fuel economy, the VCPA claim, and the false advertising claim. The class allegations are dismissed without prejudice as to Mr. Gentry's Lemon Law claim based on the on-board mileage calculator, which survives on the merits.

ALLEGATIONS IN *ABDURAHMAN* AND *ABDUL-MUMIT*

These cases involve claims by hundreds of plaintiffs against HMA and dozens of its dealerships in Virginia. Because the facts and legal theories in

both cases are substantially the same (indeed, the allegations are virtually identical to *Gentry*), record citations are to the *Abdul-Mumit* Complaint unless otherwise noted. The cases assert the same three claims under Virginia law as in *Gentry*: Lemon Law; VCPA, and; deceptive advertising. (Dkt. 1-3 [hereinafter "Complaint"] ¶ 2). As in *Gentry*, the plaintiffs are alleged purchasers of 2011–2013 Hyundai Elantras.

In November 2010, HMA's CEO introduced the "All New 40 MPG Hyundai Elantra." (Complaint ¶ 5). Ad campaigns represented that the Elantra would obtain 40 miles per gallon ("MPG") on the highway. (*Id.*). HMA also represented through owners' manuals that the Elantra's on-board mileage calculator was accurate, but it allegedly does not accurately calculate or display the correct MPG obtained. (*Id.* ¶ 6). Plaintiffs allege "on information and belief" that HMA never performed standard industry tests to assess Elantra's MPG. (*Id.*).[4]

Plaintiffs allege that HMA published on its website in April 2012 statements that 39% of Elantras obtain 40 MPG. (Complaint ¶ 8). According to the complaints, HMA cannot fix its 2011–2013 Elantras to make them produce 40 MPG. (*Id.* ¶ 11).

Plaintiffs assert that several statements or actions by Defendants constituted violations of the VCPA: (A) Defendants' statements that Elantras would receive 40 MPG; (B) Defendants' refusal to sell an Elantra to Plaintiffs that conformed to the 40 MPG representation; (C) Defendants' representations that the on-board calculator was

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[4] This allegation contradicts the related one in *Gentry*, where Plaintiff's counsel wrote that HMA had conducted the tests but made false representations about the on-board calculator.

accurate; (D) statements from an HMA website that 2013 Elantras could obtain 38 MPG had deceptively obscure and difficult-to-read disclaimers. (*See* Complaint ¶ 16). The Complaints alleged that "plaintiffs specifically relied upon [HMA's and the dealerships] advertisements as truthful and accurate." (*Id.* ¶ 17). It is alleged that HMA "programmed and installed the on-board calculator to show that the vehicle is getting higher mileage than actually obtained." (*Id.*).

JURISDICTIONAL ISSUES

Earlier in this litigation, the Court ordered the parties to brief the question of subject matter jurisdiction (dkt. 61), specifically as it relates to the Class Action Fairness Act ("CAFA"), which provides for jurisdiction over mass actions under certain circumstances: *i.e.*, typically when there is minimal diversity of citizenship between the parties, an aggregate amount-in-controversy over $5,000,000, and there are 100 or more plaintiffs. *See* 28 U.S.C. §§ 1332(d)(2), (d)(10)–(11)(B). Under § 1332(d)(11)(B)(i), jurisdiction exists over these mass actions "except that jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the [$75,000] jurisdictional amount" in controversy requirement. The parties have briefed the import of the "except clause" and Plaintiffs have filed a motion to remand.

I. The Except Clause Is a Jurisdictional Carveout, not a Threshold for Removal

The except clause could be interpreted either as a threshold to removal (*i.e.*, every plaintiff must

meet the amount-in-controversy requirement *before* a case can be removed), or as a subsequent jurisdictional limit (*i.e.*, any plaintiff whose claims fell below $75,000.01 must be severed and remanded *after* removal). The weight of authority indicates that the second interpretation is the better one. *See Robertson v. Exxon Mobil Corp.*, 814 F.3d 236, 240 n.2 (5th Cir. 2015); *Lowery v. Alabama Power Co.*, 483 F.3d 1184, 1203–07 (11th Cir. 2007); *Anwar v. Fairfield Greenwich Ltd.*, 676 F. Supp. 2d 285, 292 (S.D.N.Y. 2009); *Haley v. AMS Servicing, LLC*, No. CIV. 13-5645 FSH JBC, 2014 WL 2602044, at *4 (D.N.J. June 11, 2014); *see also Mississippi ex rel. Hood v. AU Optronics Corp.*, 134 S. Ct. 736, 740 (2014). As Defendants put it, "the 'except' clause permits individual plaintiffs to contest jurisdiction and seek to have their individual cases remanded . . . ." (*Abdurahman*, dkt. 113 at 1). Thus, the Court has CAFA jurisdiction generally over the removed cases as long as at least one plaintiff meets the individual amount-in-controversy requirement; but if challenged, a particular plaintiff must also meet the individual amount-in-controversy requirement to remain in federal court.

II. Plaintiffs Satisfy the Individual Amount-in-Controversy Requirement.

Both *Abdurahman* and *Abdul-Mumit* involve at least one plaintiff that satisfies the individual amount-in-controversy requirement, thus making removal of the cases proper as a general matter. In *Abdurahman*, Jeffrey Barber and Rufus Tunstall purchased two Elantras each, for a total value of $46,304 for each plaintiff. (*Abdurahman*, dkt. 1

(Notice of Removal) ¶ 12). Plaintiffs request damages in the form of the full purchase price of their vehicle, plus treble damages (*Abdurahman*, dkt. 1-2 at ECF 8–29 ¶¶ 8, 13, 17–18, 20, Prayer for Relief), which are allowed by statute. *See* Va. Code § 59.1-204(A). Consequently, treble damages may be included in the amount-in-controversy calculation. *See Dell Webb Communities, Inc. v. Carlson*, 817 F.3d 867, 871 (4th Cir. 2016); *Wall v. Fruehauf Trailer Servs., Inc.*, 123 F. App'x 572, 577 (4th Cir. 2005). This takes the value of Barber and Tunstall's respective claims well over $75,000.

As for the remaining plaintiffs in *Abdurahman* and those in *Abdul-Mumit*, all were alleged to purchase defective Elantras roughly valued at $23,000. (*E.g.*, *Abdul-Mumit*, dkt. 1 (Notice of Removal) ¶ 15; dkt. 1-3 (Complaint) ¶ 3). Statutory trebling takes this value to $69,000 for each plaintiff. Plaintiffs also requested attorneys' fees (at $350/hour), expert witness fees, and costs. (*Abdul-Mumit*, dkt. 1-3 ¶¶ 8, 13, 17–18, 20, Prayer for Relief; *Abdurahman*, dkt. 1-2 ¶¶ 8, 13, 17–18, 20, Prayer for Relief). These kinds of damages may be included in the amount-in-controversy calculation if they are permitted by statute, which they are here. *See Missouri State Life Ins. Co. v. Jones*, 290 U.S. 199, 202–03 (1933); *Dell Webb Communities, Inc. v. Carlson*, 817 F.3d 867, 871 (4th Cir. 2016); *Francis v. Allstate Ins. Co.*, 709 F.3d 362, 368 (4th Cir. 2013); *CPFilms, Inc. v. Best Window Tinting, Inc.*, 466 F. Supp. 2d 711, 713 (W.D. Va. 2006) (compiling cases); Va. Code § 59.1-207.14. The "complexity of the[se] case[s] is sufficient to establish" that, when accounting for these additional categories of recoverable damages, the amount in controversy for

each plaintiff exceeds $75,000.00. *See Francis v. Allstate Ins. Co.*, 709 F.3d 362, 369 (4th Cir. 2013).[5]

III. CAFA's Local Controversy and Home State Exceptions Do Not Apply

CAFA contains provisions whereby the Court is required to decline jurisdiction over cases with certain features of a local dispute. *See* 28 U.S.C. § 1332(d)(4). These carve-outs are known as the "local controversy," *id.* § 1332(d)(4)(A), and "home state" exceptions. *Id.* § 1332(d)(4)(B). Plaintiffs contend in their motion to remand that these provisions warrant remand, but they are not applicable here.[6]

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[5] Even if CAFA jurisdiction were lacking, Defendants argue that traditional diversity and supplemental jurisdiction over each plaintiff exists because the dealership defendants were fraudulently joined. Once their Virginia citizenship is disregarded, so the argument goes, complete diversity exists. The Court does not decide this issue because it finds CAFA jurisdiction exists, but fraudulent joinder is discussed *supra* as to other aspects of CAFA.

[6] Many Circuits hold that these exceptions are not purely jurisdictional and thus a motion to remand must be made in a reasonable time. *See*, *e.g.*, *Watson v. City of Allen, Tx.*, 821 F.3d 634, 639–40 (5th Cir. 2016); *Visendi v. Bank of Am., N.A.*, 733 F.3d 863, 869–70 & n.3 (9th Cir. 2013) (compiling cases); *Gold v. N.Y. Life Ins. Co.*, 730 F.3d 137, 142–43 (2d Cir. 2013); *Dutcher v. Matheson*, No. 14-4085, 2016 WL 6471724, at *4 (10th Cir. Nov. 2, 2016); *Mason v. Lockwood, Andrews & Newnam, P.C.*, No. 16-2313, 2016 WL 6777325, at *7 (6th Cir. Nov. 16, 2016). To the extent these cases reflect the law in this Circuit, the motions to remand are untimely. Plaintiffs waited over a year after the cases were returned to this Court by the MDL before moving to remand them to state court. (*Abdul-Mumit*, dkts 46, 73).

To qualify for remand under the "local controversy exception," there must have been "no other class action . . . filed [in the three years before removal of the instant case] asserting the *same or similar* factual allegations against *any* of the defendants on behalf of the *same or other* persons." 28 U.S.C. § 1332(d)(4)(A)(ii) (emphasis added). As shown both above and below, the factual allegations in *Gentry*, *Abdurahman*, and *Abdul-Mumit* are overwhelmingly similar. In many instances they are exactly the same; they appear to have been copied directly from *Gentry* into *Abdurahman* and *Abdul-Mumit* only days after the Court transferred *Gentry* to the MDL. All three cases present identical claims necessitating proof of similar facts, and the complaints are lodged against HMA (*i.e.*, the central defendant in each case, and the only defendant against whom there are substantive allegations). As a result, the local controversy exception does not apply and the Court retains jurisdiction. *See Dutcher v. Matheson*, 840 F.3d 1183, 1191 (10th Cir. 2016) (finding local controversy exception to jurisdiction inapplicable where "complaint not only raises similar factual allegations, but also asserts the same basis of wrongdoing"; "We are struck by the similarity of the factual allegations between the two complaints, which allege, in nearly identical language, the same acts of wrongdoing by the same defendant.").[7]

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[7] To apply, subsection (A) also requires that at least one defendant "*whose alleged conduct* forms a *significant* basis for the claims" be a citizen of Virginia. 28 U.S.C. § 1332(d)(4)(A)(i)(II)(bb), (cc) (emphasis added). This provision also is not satisfied. As discussed elsewhere, *Abdurahman* and *Abdul-Mumit* contain no substantive allegations against the

As an alternative basis for remand, Plaintiffs cite the home state exception in subsection (B), which requires declining jurisdiction when, *inter alia*, "the primary defendants" are citizens of Virginia. 28 U.S.C. § 1332(d)(4)(B). Again, this subsection fails. First, HMA—as the overwhelming focus of the complaints, manufacturer of the allegedly defective cars, and holder of the greatest potential liability to the greatest number of plaintiffs—is the primary defendant, not the in-state dealership defendants (against whom there are no specific factual allegations). *See Watson v. City of Allen, Tx.*, 821 F.3d 634, 641 (5th Cir. 2016) ("The phrase 'primary defendants' indicates a chief defendant or chief class of defendants"); *Vodenichar v. Halcon Energy Properties, Inc.*, 733 F.3d 497, 505–06 (3d Cir. 2013) (setting forth factors in "primary defendant" analysis). Second, the absence of any factual allegations relating to the dealership defendants is so conspicuous in these cases that fraudulent joinder applies, and thus their citizenship can be disregarded. *See Weidman v. Exxon Mobil Corp.*, 776 F.3d 214, 218–19 (4th Cir. 2015) (holding that when "there is no factual detail at all to support

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dealership defendants, which are the purported Virginia citizens. Furthermore, Defendants argue (*Abdurahman*, dkt. 68 ¶¶ 6–19; *Abdul-Mumit*, dkt. 1 ¶¶ 26–38), the procedural history of this case suggests, and writings from Plaintiffs' counsel show (*Abdurahman*, dkt. 68-1; *Abdul-Mumit*, dkt. 1-5) that the subsequent mass actions filed in state court named the in-state dealership defendants to evade the stay in *Gentry*, prevent removal, and avoid potential transfer of the suits to the MDL. Fraudulent joinder would therefore apply to disregard the dealership's citizenship. *See Weidman v. Exxon Mobil Corp.*, 776 F.3d 214, 218–19 (4th Cir. 2015).

any claims against" non-diverse defendants, and plaintiff "has not in any way alleged" their involvement or that "their actions were connected" to plaintiff, then fraudulent joinder applies).[8]

IV. Removal Was Procedurally Proper.

Briefly in their written submissions (dkt. 72 at 8 ¶11; dkt. 74 at ECF 3) and at oral argument (Tr. at 3–5, 15–16), Plaintiffs suggested that Defendants improperly removed the case because they should have first conducted discovery in state court to ascertain the amount-in-controversy. This is not the law.

"When the plaintiff's complaint does not state the amount in controversy, the defendant's notice of removal may do so." *Dart Cherokee Basin Operating Co., LLC v. Owens*, 135 S. Ct. 547, 551 (2014) (citing 28 U.S.C. § 1446(c)(2)(A)); *see Strawn v. AT & T Mobility LLC*, 530 F.3d 293, 298 (4th Cir. 2008); *Ellenburg v. Spartan Motors Chassis, Inc.*, 519 F.3d 192, 200 (4th Cir. 2008). Although the Complaints seek particular categories of damages—*e.g.*, purchase price of Plaintiffs' vehicles, treble damages, attorneys' fees—they do not request a sum certain. (*See generally Abdurahman*, dkt.1-2 at ECF 8–29; *Abdul-Mumit*, dkt. 1-3). Accordingly, Defendants put forth allegations in their notices of removal

[8] For similar reasons, the Court will not decline to exercise jurisdiction based on 28 U.S.C. §1332(d)(3): the primary defendants are not citizens of Virginia, the actions were brought originally in state court to avoid federal jurisdiction, and same or similar claims were asserted in a class action within a preceding 3-year period. *See id*. § 1332(d)(3)(C), (E)-(F).

(dovetailed with supporting affidavits[9] and the allegations in the Complaints) that satisfy the requisite amount in controversy, as the Court has discussed above. *See supra* Parts I–II. The requirements of § 1446 have therefore been satisfied.[10]

ABDURAHMAN AND *ABDUL-MUMIT*— ANALYSIS OF MOTIONS TO DISMISS

I. Failure to Properly Plead Claims

HMA (and the dealerships) first point out that, as mass actions where individual plaintiffs proceed against individual defendants, the Complaints do not satisfy the pleading standards of *Twombly* and *Iqbal*. They observe that the complaints fail "to identify the factual basis for claims by **any** plaintiff" or identify the plaintiffs themselves in the body of the pleading. (Dkt. 104-1 at 2 (emphasis in original)). Rather, the individual plaintiffs are simply named in the caption and not mentioned again by name in the

[9] The evidentiary submissions, though prudent, were not even required from Defendants unless and until the Court or Plaintiffs questioned the amount-in-controversy allegations from the notices of removal. *See Dart Cherokee*, 135 S. Ct. at 551, 553–54.

[10] Plaintiffs rely on 28 U.S.C. §§ 1446(b)(3) and (c)(3)(A). According to them, those subsections do not permit removal until after Defendants received in state court a filing establishing the grounds removal, which—in their view—must be accomplished exclusively through discovery in state court. (*See* Tr. at 4–5, 16). Even if Plaintiffs' substantive understanding of this rule was correct (a point the Court doubts), those statutes only apply when "the case stated by the initial pleading is not removable," which was not the situation here. *See Dart Cherokee*, 135 S. Ct. at 551.

complaint; the only general factual allegation about them is: "plaintiffs are individual buyers" of 2011–2013 Elantras in Virginia. (*Abdul-Mumit*, Complaint ¶ 3).

This problem also exists as to the dealership defendants. As Defendants observe, "there is not a single substantive allegation anywhere in either Complaint about any dealer." (Dkt. 104-1 at 3). The complaints instead lump the dealers in with generic statements made about HMA. As this Court has observed before, "[i]n the Fourth Circuit and elsewhere, courts have interpreted *Twombly* and *Iqbal* to mean that generic or general allegations about the conduct of 'defendants,' without more, fail to state a claim." *See Marcantonio v. Dudzinski*, 155 F. Supp. 3d 619, 626–27 (W.D. Va. 2015) (compiling cases).

Plaintiffs' response on this score states that these lawsuits were filed pursuant to Virginia's class action/consolidation/coordination statute, Va. Code § 8.01-267.1, for "efficiency," and "it would abate the savings the statute was intended to provide if each and every particular fact unique to each Plaintiff is required." (*Abdurahman*, dkt. 105 at ECF 11). While "each and every" unique fact is not required, federal pleading standards nevertheless control in federal court, *see generally Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), and the Complaints here fail those standards. (*See Abdurahman*, dkt. 107 at 6).

II. Standing

Defendants argue that Plaintiffs lack standing, which is a jurisdictional issue that must be decided. They observe that the Complaints allege that

"**someone** sustained an injury, but that will not suffice" because they must allege that they sustained a redressable injury at the hands of HMA. (*Abdurahman*, dkt. 104-1 at 5) (emphasis in original). While the Complaints are deficient, the shortcoming goes to the merits rather than to standing. It is alleged that Plaintiffs purchased the model of car that otherwise is at the heart of this litigation; it is not, for instance, as if they bought a Ford (or no car at all) and thus fell completely outside the bounds of this case. Rather, the failing here is that there are insufficient facts alleged to show that Plaintiffs have stated a claim based on their purchases. Thus, the better understanding of the circumstances here is that Plaintiffs failed to satisfy the pleading standards of Rule 8, not that they lack constitutional standing.

III. Incorporation of *Gentry* Arguments on Preemption and Primary Jurisdiction

Defendants incorporate by reference their aforementioned arguments in *Gentry* about preemption and primary jurisdiction. The Court incorporates its rulings on those issues in *Gentry* here to the extent they provide an alternative basis for dismissal.

IV. Lemon Law Claim

Aside from insufficient pleading, there are additional legal bases to dismiss the Lemon Law claims in *Aburahman* and *Abdul-Mumit*.

A. Failure to Provide Notice or Make Attempts to Remedy

Virginia's Lemon Law requires that "the consumer . . . prior to availing himself of the provisions of" that law, "notify the manufacturer of the need for the correction or repair of the nonconformity." Va. Code § 59.1-207.13(E). Notification under the statute requires that (1) "a written complaint of the defect or defects has been mailed to it or (2) it has responded to the consumer in writing regarding a complaint, or (3) a factory representative has either inspected the vehicle or met with the consumer or an authorized dealer regarding the nonconformity." Va. Code § 59.1-207.11.

Here, the Complaints contain no allegations particular to any plaintiff, much less that any of them notified HMA or the dealerships. It "is clear that in order to avail herself of the extraordinary relief provided in the Lemon Law, [a plaintiff is] required to report the defects and the need for correction by notification to the manufacturer of the nonconformity." *Smith v. Gen. Motors Corp.*, 1994 WL 1031403, at *4, 35 Va. Cir. 112 (Va. Cir. Ct. 1994).

Faced with this shortcoming, Plaintiffs respond that Subsection (D) obliges the manufacturer to disclosure that written notice of nonconformity is required, but that Defendants failed to so prove. The fact that Defendants did not "alleg[e] and establish[]" (*Abdul-Mumit*, dkt. 60 at ECF 6) that they complied with Subsection (D) is immaterial, because at the pleading stage an evidentiary showing *by Defendants* is not required. More

centrally, Subsection (D) requires the manufacturer to inform customers only that "written notification of the nonconformity to the manufacturer is required before the consumer may be eligible *for a refund or replacement of the vehicle* under this chapter." Va. Code § 59.1-207.13(D) (emphasis added). In other words, Subsection (D) (or failure to abide by it) does not relieve a consumer of his exhaustion/notification prerequisite in Subsection (E). Moreover, Plaintiffs' conclusory argument that notice would have been in vain fails: No law is cited for the proposition that a bare, self-serving allegation in a complaint can overcome a statutory requirement. The Lemon Law claim should thus be dismissed.

Likewise, a would-be plaintiff must make "a reasonable number of attempts" to have a manufacturer remedy the nonconformity. Va. Code § 59.1-207.13(A). The Complaints do not include any allegations about whether any plaintiff made reasonable attempts as defined in and required by the statute. *Id.* § 59.1-207.13(B).

B. Dealerships as Improper Defendants

Under § 59.1-207.13(A), only the "manufacturer shall" be liable for nonconformities, not the dealerships. *See Maggard v. A&L RV Sales*, No. 2:08CV00013, 2008 WL 2677873, at *1 (W.D. Va. July 3, 2008) (Jones, J.); Va. Code § 59.1-207.11. In response, plaintiffs agree that "Lemon Law claims are not pled against the dealerships." (Dkt. 105 at ECF 9).

V. VCPA Claim: Failure to Satisfy Rule 9(b) and Lack of Reliance

Again, Defendants correctly argue that the VCPA claims are subject to Rule 9(b)'s heightened pleading standard for fraud. The failure here is even more apparent than in *Gentry* because these Complaints involve hundreds of purchasers and do not explain any details surrounding any of their purchasers (*e.g.*, where and when they bought the vehicles, who made certain representations to them, what those representations were, *etc*.). Plaintiffs' response brief contains merely bald assertions of particularity that are in turn built upon the conclusory allegations in the Complaints. (Dkt. 105 at 10). The Complaints also fail to include meaningful, non-conclusory allegations of reliance, a necessary element for a VCPA claim. *See supra* analysis in *Gentry*.

VI. Other Arguments

Defendants also make other arguments about EPA mileage estimates, the false advertising claim, and the duplicativeness of *Abdurahman* and *Abdul-Mumit*. In light of the Court's other rulings and decision to dismiss those Complaints in their entirety, the arguments are not addressed.

NATURE OF DISMISSAL

Finally, the Court must decide whether to dismiss the faulty claims in *Gentry* and the cases in *Abdurahman* and *Abdul-Mumit* with or without prejudice. After considering the circumstances of the

cases and the applicable law, the Court will order dismissals with prejudice, except as to the class allegations regarding Mr. Gentry's Lemon Law claim based on the on-board mileage calculator, which are dismissed without prejudice.

The Court previously suggested that the Complaints in these cases should be amended, yet it has been accommodating in allowing the respective Plaintiffs to decide the matter for themselves. For instance, in a June 21, 2016 case management order entered in all three cases, the Court observed:

> Given the proceedings in the MDL, the voluminous nature of the complaints, their possible duplication, and the fact that Defendants never had their motions to dismiss adjudicated on the merits, the Court is attuned to the possibility that the complaints now may be stale and in need of updating.

(*Gentry*, dkt. 86 at 2). Nevertheless, because "a plaintiff is the master of his complaint," the Court gave Plaintiffs the option of filing amended complaints within 21 days or allowing their prior filings to remain operative. (*Id.* at 2–3).

This deadline passed without amendment, signalling that Plaintiffs wished to proceed with their original filings. But Plaintiffs subsequently filed a letter motion seeking a *nunc pro tunc* extension, writing that "more time, and more conferences among counsel, are necessary to determine what amendments, if any, are necessary." (*Abdurahman*, dkt. 87 at 2). The Court granted what amounted to a 20-day extension of the original

deadline, but it also indicated that the three cases had "lingered" for "too long" since remand from the MDL and that further extensions of the deadline were unlikely. (Dkt. 89 at 2–3). For a second time, the deadline expired without amended complaints, thus making the previous filings operative.

From this, the Court concludes that Plaintiffs have nothing more to add to their Complaints. Well over two years of litigation transpired between the time the Complaints were filed and the Court's invitations to amend, but Plaintiffs—as was their right—twice declined to do so, even though the evolved circumstances of the cases might have warranted it. Moreover, many of the reasons for dismissal rest on purely legal grounds. *See Cozzarelli v. Inspire Pharm. Inc.*, 549 F.3d 618, 630 (4th Cir. 2008). And at no time during adjudication of the motions to dismiss did Plaintiffs suggest that they might seek leave to amend or had other facts to put before the Court. *See id.* To the contrary, they remained steadfast that the Complaints "state causes of action and adequately put Hyundai on notice of the claims against it and there is absolutely no surprise." (*Aburdahman*, dkt. 105 at ECF 13–14; *Gentry*, dkt. 92 at ECF 17). Defendants, on the other hand, specifically requested dismissal with prejudice in their moving briefs. (*Abdurahman*, dkt. 104-1 at 15; *Gentry*, dkt. 91-1 at at 21–22).

"The determination whether to dismiss with or without prejudice under Rule 12(b)(6) is within the discretion of the district court." *Weigel v. Maryland*, 950 F. Supp. 2d 811, 825 (D. Md. 2013) (citing, *inter alia*, *Carter v. Norfolk Cmty. Hosp. Ass'n, Inc.*, 761 F.2d 970, 974 (4th Cir. 1985)). Where there has been no opportunity to amend the complaint, dismissal

should generally be without prejudice. *See Cosner v. Dodt*, 526 F. App'x 252, 253 (4th Cir. 2013); *Adams v. Sw. Virginia Reg'l Jail Auth.*, 524 F. App'x 899, 900 (4th Cir. 2013). Because Plaintiffs have been offered (but forgone) opportunities to amend and have not suggested the existence of additional facts, and because the dismissals rest in large part on legal deficiencies, they will be with prejudice.

SUMMARY

For the foregoing reasons, the motions to remand *Abdurahman* and *Abdul-Mumit* will be denied, and the motions to dismiss those cases will be granted. The motion to dismiss in *Gentry* will be granted in part and denied in part. All claims in *Gentry* will be dismissed except for Mr. Gentry's Lemon Law claim based on the on-board mileage calculator.

The Clerk is requested to send a copy of this opinion to counsel. An appropriate order will issue.

Entered this 23rd day of January, 2017.

/S/
NORMAN K. MOON
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

CASE NO. 3:13–cv–00030
ORDER, JUDGE NORMAN K. MOON

JOHN WILLIAM GENTRY, *ET AL.*,
Plaintiffs,
v.
HYUNDAI MOTOR AMERICA, INC.,
Defendant.

****

CASE NO. 3:14–cv–00002
ORDER, JUDGE NORMAN K. MOON

ALIM ABDURAHMAN, *ET AL.*,
Plaintiffs,
v.
HYUNDAI MOTOR AMERICA, INC., *ET AL.*,
Defendants.

****

CASE NO. 3:14–cv–00005
ORDER, JUDGE NORMAN K. MOON

JIHAD ABDUL-MUMIT, *ET AL.*,
Plaintiffs,
v.
HYUNDAI MOTOR AMERICA, INC., *ET AL.*,
Defendants.

In accordance with the accompanying opinions applicable to the respective cases captioned above, it is **ORDERED** as follows:

In *Gentry*, the motion to dismiss is **GRANTED in part** and **DENIED in part**. Counts 2 and 3 and the corresponding class allegations are **DISMISSED** with prejudice. Count 1 is **DISMISSED** with prejudice to the extent it relies on allegations regarding fuel economy, but remains pending as to allegations regarding an on-board mileage calculator. The class allegations corresponding to Count 1 are **DISMISSED**, with prejudice as to a fuel economy class but without prejudice as to an on-board mileage calculator class.

In *Abdurahman* and *Abdul-Mumit*, the motions to remand are **DENIED**. The motions to dismiss those cases are **GRANTED**. Accordingly, those cases are **DISMISSED** with prejudice. The Clerk is requested to strike *Abdurahman* and *Abdul-Mumit* from the active docket of the Court.

The Clerk is hereby directed to send a certified copy of this Order to all counsel of record.
Entered this 23rd day of January, 2017.

/S/
NORMAN K. MOON
UNITED STATES DISTRICT JUDGE

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IN RE HYUNDAI AND KIA FUEL ECONOMY LITIGATION, KEHLIE R. ESPINOSA; NICOLE MARIE HUNTER; JEREMY WILTON; KAYLENE P. BRADY; GUNTHER KRAUTH; ERIC GRAEWINGHOLT; REECE PHILIP THOMSON; ALEX MATURANI; NILUFAR REZAI; JACK ROTTNER; LYDIA KIEVIT; REBECCA SANDERS; BOBBY BRANDON ARMSTRONG; SERGIO TORRES; RICHARD WOODRUFF; MARSHALL LAWRENCE GORDON; JOEL A. LIPMAN; JAMES GUDGALIS; MARY P. HOESSLER; STEPHEN M. HAYES; BRIAN REEVES; SAM HAMMOND; MARK LEGGETT; EDWIN NAYTHONS; MICHAEL WASHBURN; IRA D. DUNST; BRIAN WEBER; KAMNEEL MAHARAJ; KIM IOCOVOZZI; HERBERT J. YOUNG; LINDA HASPER; LESLIE BAYARD; TRICIA FELLERS; ORLANDO ELLIOTT; JAMES BONSIGNORE; MARGARET SETSER; GUILLERMO QUIROZ; DOUGLAS KURASH; ANDRES CARULLO; LAURA S. SUTTA; GEORGIA L. THOMAS;	No. 15-56014 D.C. No. 2:13-ml-02424-GW-FFM

ERIC J. OLSON; JENNIFER MYERS; TOM WOODWARD; JEROLD TERHOST; CAMERON JOHN CESTARO; DONALD BROWN; MARIA FIGUEROA; CONSTANCE MARTYN; THOMAS GANIM; DANIEL BALDESCHI; LILLIAN E. LEVOFF; GIUSEPPINA ROBERTO; ROBERT TRADER; SEAN GOLDSBERRY; CYNTHIA NAVARRO; OWEN CHAPMAN; MICHAEL BREIN; TRAVIS BRISSEY; RONALD BURKARD; ADAM CLOUTIER; STEVEN CRAIG; JOHN J. DIXSON; ERIN L. FANTHORPE; ERIC HADESH; MICHAEL P. KEETH; JOHN KIRK MACDONALD; MICHAEL MANDAHL; NICHOLAS MCDANIEL; MARY J. MORAN-SPICUZZA; GARY PINCAS; BRANDON POTTER; THOMAS PURDY; ROCCO RENGHINI; MICHELLE SINGLTEON; KEN SMILEY; GREGORY M. SONSTEIN; ROMAN STARNO; GAYLE A. STEPHENSON; ANDRES VILLICANA; RICHARD WILLIAMS; BRADFORD L. HIRSCH; ASHLEY CEPHAS; DAVID E. HILL; CHAD MCKINNEY; MORDECHAI SCHIFFER; LISA SANDS; DONALD KENDIG; KEVIN GOBEL; ERIC LARSON; LIN MCKINNEY; RYAN CROSS; PHILLIP HOFFMAN; DEBRA SIMMONS; ABELARDO MORALES; PETER BLUMER; CAROLYN HAMMOND;

MELISSA LEGGETT; KELLY MOFFETT; EVAN GROGAN; CARLOS MEDINA; ALBERTO DOMINGUEZ; CATHERINE BERNARD; MICHAEL BREIEN; LAURA GILL; THOMAS SCHILLE; JUDITH STANTON; RANDY RICKERT; BRYAN ZIRKEL; JAMES KUNDRAT; ROBERT SMITH; MARIA KOTOVA; JOSIPA CASEY; LUAN SNYDER; BEN BAKER; BRIAN NGUYEN; HATTIE WILLIAMS; BILL HOLVEY; LOURDES VARGAS; KENDALL SNYDER; NOMER MEDINA; SAMERIA GOFF; URSULA PYLAND; MARCELL CHAPMAN; KAYE KURASH; HOLLY AMROMIN; JOHN CHAPMAN; MARY D'ANGELO; GEORGE RUDY; AYMAN MOUSA; SHELLY HENDERSON; JEFFREY HATHAWAY; DENNIS J. MURPHY; DOUGLAS A. PATTERSON; JOHN GENTRY; LINDA RUTH SCOTT; DANIELLE KAY GILLELAND; JOSEPH BOWE; MICHAEL DESOUTO,
Plaintiffs-Appellees,

GREG DIRENZO,
Petitioner-Appellee,

HYUNDAI MOTOR AMERICA; KIA MOTORS AMERICA; KIA MOTORS CORPORATION; GROSSINGER AUTOPLEX, INC., FKA Grossinger

Hyundai; JOHN KRAFCIK; HYUNDAI MOTOR COMPANY; SARAH KUNDRAT,
Defendants-Appellees,

v.

CAITLIN AHEARN; ANDREW YORK,
Objectors-Appellants.

IN RE HYUNDAI AND KIA FUEL ECONOMY LITIGATION,

In Re,

KEHLIE R. ESPINOSA; NICOLE MARIE HUNTER; JEREMY WILTON; KAYLENE P. BRADY; GUNTHER KRAUTH; ERIC GRAEWINGHOLT; REECE PHILIP THOMSON; ALEX MATURANI; NILUFAR REZAI; JACK ROTTNER; LYDIA KIEVIT; REBECCA SANDERS; BOBBY BRANDON ARMSTRONG; SERGIO TORRES; RICHARD WOODRUFF; MARSHALL LAWRENCE GORDON; JOEL A. LIPMAN; JAMES GUDGALIS; MARY P. HOESSLER; STEPHEN M. HAYES; BRIAN REEVES; SAM HAMMOND; MARK LEGGETT; EDWIN NAYTHONS; MICHAEL WASHBURN; IRA D.

No. 15-56025

D.C. No. 2:13-ml-02424-GW-FFM

DUNST; BRIAN WEBER; KAMNEEL MAHARAJ; KIM IOCOVOZZI; HERBERT J. YOUNG; LINDA HASPER; LESLIE BAYARD; TRICIA FELLERS; ORLANDO ELLIOTT; JAMES BONSIGNORE; MARGARET SETSER; GUILLERMO QUIROZ; DOUGLAS KURASH; ANDRES CARULLO; LAURA S. SUTTA; GEORGIA L. THOMAS; ERIC J. OLSON; JENNIFER MYERS; TOM WOODWARD; JEROLD TERHOST; CAMERON JOHN CESTARO; DONALD BROWN; MARIA FIGUEROA; CONSTANCE MARTYN; THOMAS GANIM; DANIEL BALDESCHI; LILLIAN E. LEVOFF; GIUSEPPINA ROBERTO; ROBERT TRADER; SEAN GOLDSBERRY; CYNTHIA NAVARRO; OWEN CHAPMAN; MICHAEL BREIN; TRAVIS BRISSEY; RONALD BURKARD; ADAM CLOUTIER; STEVEN CRAIG; JOHN J. DIXSON; ERIN L. FANTHORPE; ERIC HADESH; MICHAEL P. KEETH; JOHN KIRK MACDONALD; MICHAEL MANDAHL; NICHOLAS MCDANIEL; MARY J. MORAN-SPICUZZA; GARY PINCAS; BRANDON POTTER; THOMAS PURDY; ROCCO RENGHINI; MICHELLE SINGLTEON; KEN SMILEY; GREGORY M. SONSTEIN; ROMAN STARNO; GAYLE A. STEPHENSON; ANDRES VILLICANA; RICHARD WILLIAMS;

BRADFORD L. HIRSCH; ASHLEY CEPHAS; DAVID E. HILL; CHAD MCKINNEY; MORDECHAI SCHIFFER; LISA SANDS; DONALD KENDIG; KEVIN GOBEL; ERIC LARSON; LIN MCKINNEY; RYAN CROSS; PHILLIP HOFFMAN; DEBRA SIMMONS; ABELARDO MORALES; PETER BLUMER; CAROLYN HAMMOND; MELISSA LEGGETT; KELLY MOFFETT; EVAN GROGAN; CARLOS MEDINA; ALBERTO DOMINGUEZ; CATHERINE BERNARD; MICHAEL BREIEN; LAURA GILL; THOMAS SCHILLE; JUDITH STANTON; RANDY RICKERT; BRYAN ZIRKEL; JAMES KUNDRAT; ROBERT SMITH; MARIA KOTOVA; JOSIPA CASEY; LUAN SNYDER; BEN BAKER; BRIAN NGUYEN; HATTIE WILLIAMS; BILL HOLVEY; LOURDES VARGAS; KENDALL SNYDER; NOMER MEDINA; SAMERIA GOFF; URSULA PYLAND; MARCELL CHAPMAN; KAYE KURASH; HOLLY AMROMIN; JOHN CHAPMAN; MARY D'ANGELO; GEORGE RUDY; AYMAN MOUSA; SHELLY HENDERSON; JEFFREY HATHAWAY; DENNIS J. MURPHY; DOUGLAS A. PATTERSON; JOHN GENTRY; LINDA RUTH SCOTT; DANIELLE KAY GILLELAND; JOSEPH BOWE; MICHAEL DESOUTO,

Plaintiffs-Appellees,

GREG DIRENZO,
Petitioner-Appellee,

HYUNDAI MOTOR AMERICA; KIA MOTORS AMERICA; KIA MOTORS CORPORATION; GROSSINGER AUTOPLEX, INC., FKA Grossinger Hyundai; JOHN KRAFCIK; HYUNDAI MOTOR COMPANY; SARAH KUNDRAT,
Defendants-Appellees,

v.

ANTONIO SBERNA,
Objector-Appellant,

IN RE HYUNDAI AND KIA FUEL ECONOMY LITIGATION

KEHLIE R. ESPINOSA; NICOLE MARIE HUNTER; JEREMY WILTON; KAYLENE P. BRADY; GUNTHER KRAUTH; ERIC GRAEWINGHOLT; REECE PHILIP THOMSON; ALEX MATURANI; NILUFAR REZAI; JACK ROTTNER; LYDIA KIEVIT; REBECCA SANDERS; BOBBY BRANDON ARMSTRONG; SERGIO TORRES;

No. 15-56059

D.C. No. 2:13-ml-02424-GW-FFM

RICHARD WOODRUFF; MARSHALL LAWRENCE GORDON; JOEL A. LIPMAN; JAMES GUDGALIS; MARY P. HOESSLER; STEPHEN M. HAYES; BRIAN REEVES; SAM HAMMOND; MARK LEGGETT; EDWIN NAYTHONS; MICHAEL WASHBURN; IRA D. DUNST; BRIAN WEBER; KAMNEEL MAHARAJ; KIM IOCOVOZZI; HERBERT J. YOUNG; LINDA HASPER; LESLIE BAYARD; TRICIA FELLERS; ORLANDO ELLIOTT; JAMES BONSIGNORE; MARGARET SETSER; GUILLERMO QUIROZ; DOUGLAS KURASH; ANDRES CARULLO; LAURA S. SUTTA; GEORGIA L. THOMAS; ERIC J. OLSON; JENNIFER MYERS; TOM WOODWARD; JEROLD TERHOST; CAMERON JOHN CESTARO; DONALD BROWN; MARIA FIGUEROA; CONSTANCE MARTYN; THOMAS GANIM; DANIEL BALDESCHI; LILLIAN E. LEVOFF; GIUSEPPINA ROBERTO; ROBERT TRADER; SEAN GOLDSBERRY; CYNTHIA NAVARRO; OWEN CHAPMAN; MICHAEL BREIN; TRAVIS BRISSEY; RONALD BURKARD; ADAM CLOUTIER; STEVEN CRAIG; JOHN J. DIXSON; ERIN L. FANTHORPE; ERIC HADESH; MICHAEL P. KEETH; JOHN KIRK MACDONALD; MICHAEL MANDAHL; NICHOLAS MCDANIEL; MARY J.

MORAN-SPICUZZA; GARY PINCAS; BRANDON POTTER; THOMAS PURDY; ROCCO RENGHINI; MICHELLE SINGLTEON; KEN SMILEY; GREGORY M. SONSTEIN; ROMAN STARNO; GAYLE A. STEPHENSON; ANDRES VILLICANA; RICHARD WILLIAMS; BRADFORD L. HIRSCH; ASHLEY CEPHAS; DAVID E. HILL; CHAD MCKINNEY; MORDECHAI SCHIFFER; LISA SANDS; DONALD KENDIG; KEVIN GOBEL; ERIC LARSON; LIN MCKINNEY; RYAN CROSS; PHILLIP HOFFMAN; DEBRA SIMMONS; ABELARDO MORALES; PETER BLUMER; CAROLYN HAMMOND; MELISSA LEGGETT; KELLY MOFFETT; EVAN GROGAN; CARLOS MEDINA; ALBERTO DOMINGUEZ; CATHERINE BERNARD; MICHAEL BREIEN; LAURA GILL; THOMAS SCHILLE; JUDITH STANTON; RANDY RICKERT; BRYAN ZIRKEL; JAMES KUNDRAT; ROBERT SMITH; MARIA KOTOVA; JOSIPA CASEY; LUAN SNYDER; BEN BAKER; BRIAN NGUYEN; HATTIE WILLIAMS; BILL HOLVEY; LOURDES VARGAS; KENDALL SNYDER; NOMER MEDINA; SAMERIA GOFF; URSULA PYLAND; MARCELL CHAPMAN; KAYE KURASH; HOLLY AMROMIN; JOHN CHAPMAN; MARY D'ANGELO;

GEORGE RUDY; AYMAN MOUSA; SHELLY HENDERSON; JEFFREY HATHAWAY; DENNIS J. MURPHY; DOUGLAS A. PATTERSON; JOHN GENTRY; LINDA RUTH SCOTT; DANIELLE KAY GILLELAND; JOSEPH BOWE; MICHAEL DESOUTO,
Plaintiffs-Appellees,

GREG DIRENZO,
Petitioner-Appellee,

HYUNDAI MOTOR AMERICA; KIA MOTORS AMERICA; KIA MOTORS CORPORATION; GROSSINGER AUTOPLEX, INC., FKA Grossinger Hyundai; JOHN KRAFCIK; HYUNDAI MOTOR COMPANY; SARAH KUNDRAT,
Defendants-Appellees,

v.

PERI FETSCH,
Objector-Appellant.

IN RE HYUNDAI AND KIA FUEL ECONOMY LITIGATION

KEHLIE R. ESPINOSA; NICOLE MARIE HUNTER; JEREMY WILTON;

No. 15-56061

D.C. No. 2:13-ml-02424-GW-FFM

KAYLENE P. BRADY; GUNTHER KRAUTH; ERIC GRAEWINGHOLT; REECE PHILIP THOMSON; ALEX MATURANI; NILUFAR REZAI; JACK ROTTNER; LYDIA KIEVIT; REBECCA SANDERS; BOBBY BRANDON ARMSTRONG; SERGIO TORRES; RICHARD WOODRUFF; MARSHALL LAWRENCE GORDON; JOEL A. LIPMAN; JAMES GUDGALIS; MARY P. HOESSLER; STEPHEN M. HAYES; BRIAN REEVES; SAM HAMMOND; MARK LEGGETT; EDWIN NAYTHONS; MICHAEL WASHBURN; IRA D. DUNST; BRIAN WEBER; KAMNEEL MAHARAJ; KIM IOCOVOZZI; HERBERT J. YOUNG; LINDA HASPER; LESLIE BAYARD; TRICIA FELLERS; ORLANDO ELLIOTT; JAMES BONSIGNORE; MARGARET SETSER; GUILLERMO QUIROZ; DOUGLAS KURASH; ANDRES CARULLO; LAURA S. SUTTA; GEORGIA L. THOMAS; ERIC J. OLSON; JENNIFER MYERS; TOM WOODWARD; JEROLD TERHOST; CAMERON JOHN CESTARO; DONALD BROWN; MARIA FIGUEROA; CONSTANCE MARTYN; THOMAS GANIM; DANIEL BALDESCHI; LILLIAN E. LEVOFF; GIUSEPPINA ROBERTO; ROBERT TRADER; SEAN GOLDSBERRY; CYNTHIA NAVARRO; OWEN CHAPMAN; MICHAEL BREIN;

TRAVIS BRISSEY; RONALD BURKARD; ADAM CLOUTIER; STEVEN CRAIG; JOHN J. DIXSON; ERIN L. FANTHORPE; ERIC HADESH; MICHAEL P. KEETH; JOHN KIRK MACDONALD; MICHAEL MANDAHL; NICHOLAS MCDANIEL; MARY J. MORAN-SPICUZZA; GARY PINCAS; BRANDON POTTER; THOMAS PURDY; ROCCO RENGHINI; MICHELLE SINGLTEON; KEN SMILEY; GREGORY M. SONSTEIN; ROMAN STARNO; GAYLE A. STEPHENSON; ANDRES VILLICANA; RICHARD WILLIAMS; BRADFORD L. HIRSCH; ASHLEY CEPHAS; DAVID E. HILL; CHAD MCKINNEY; MORDECHAI SCHIFFER; LISA SANDS; DONALD KENDIG; KEVIN GOBEL; ERIC LARSON; LIN MCKINNEY; RYAN CROSS; PHILLIP HOFFMAN; DEBRA SIMMONS; ABELARDO MORALES; PETER BLUMER; CAROLYN HAMMOND; MELISSA LEGGETT; KELLY MOFFETT; EVAN GROGAN; CARLOS MEDINA; ALBERTO DOMINGUEZ; CATHERINE BERNARD; MICHAEL BREIEN; LAURA GILL; THOMAS SCHILLE; JUDITH STANTON; RANDY RICKERT; BRYAN ZIRKEL; JAMES KUNDRAT; ROBERT SMITH; MARIA KOTOVA; JOSIPA CASEY; LUAN SNYDER; BEN BAKER; BRIAN

NGUYEN; HATTIE WILLIAMS; BILL HOLVEY; LOURDES VARGAS; KENDALL SNYDER; NOMER MEDINA; SAMERIA GOFF; URSULA PYLAND; MARCELL CHAPMAN; KAYE KURASH; HOLLY AMROMIN; JOHN CHAPMAN; MARY D'ANGELO; GEORGE RUDY; AYMAN MOUSA; SHELLY HENDERSON; JEFFREY HATHAWAY; DENNIS J. MURPHY; DOUGLAS A. PATTERSON; JOHN GENTRY; LINDA RUTH SCOTT; DANIELLE KAY GILLELAND; JOSEPH BOWE; MICHAEL DESOUTO,
Plaintiffs-Appellees,

GREG DIRENZO,
Petitioner-Appellee,

HYUNDAI MOTOR AMERICA; KIA MOTORS AMERICA; KIA MOTORS CORPORATION; GROSSINGER AUTOPLEX, INC., FKA Grossinger Hyundai; JOHN KRAFCIK; HYUNDAI MOTOR COMPANY; SARAH KUNDRAT,
Defendants-Appellees,

v.

DANA ROLAND,
Objector-Appellant.

IN RE HYUNDAI AND KIA FUEL ECONOMY LITIGATION,	No. 15-56064
KEHLIE R. ESPINOSA; NICOLE MARIE HUNTER; JEREMY WILTON; KAYLENE P. BRADY; GUNTHER KRAUTH; ERIC GRAEWINGHOLT; REECE PHILIP THOMSON; ALEX MATURANI; NILUFAR REZAI; JACK ROTTNER; LYDIA KIEVIT; REBECCA SANDERS; BOBBY BRANDON ARMSTRONG; SERGIO TORRES; RICHARD WOODRUFF; MARSHALL LAWRENCE GORDON; JOEL A. LIPMAN; JAMES GUDGALIS; MARY P. HOESSLER; STEPHEN M. HAYES; BRIAN REEVES; SAM HAMMOND; MARK LEGGETT; EDWIN NAYTHONS; MICHAEL WASHBURN; IRA D. DUNST; BRIAN WEBER; KAMNEEL MAHARAJ; KIM IOCOVOZZI; HERBERT J. YOUNG; LINDA HASPER; LESLIE BAYARD; TRICIA FELLERS; ORLANDO ELLIOTT; JAMES BONSIGNORE; MARGARET SETSER; GUILLERMO QUIROZ; DOUGLAS KURASH; ANDRES CARULLO; LAURA S. SUTTA; GEORGIA L. THOMAS; ERIC J. OLSON; JENNIFER MYERS; TOM WOODWARD; JEROLD TERHOST; CAMERON JOHN CESTARO; DONALD BROWN; MARIA FIGUEROA;	D.C. No. 2:13-ml-02424-GW-FFM

CONSTANCE MARTYN; THOMAS GANIM; DANIEL BALDESCHI; LILLIAN E. LEVOFF; GIUSEPPINA ROBERTO; ROBERT TRADER; SEAN GOLDSBERRY; CYNTHIA NAVARRO; OWEN CHAPMAN; MICHAEL BREIN; TRAVIS BRISSEY; RONALD BURKARD; ADAM CLOUTIER; STEVEN CRAIG; JOHN J. DIXSON; ERIN L. FANTHORPE; ERIC HADESH; MICHAEL P. KEETH; JOHN KIRK MACDONALD; MICHAEL MANDAHL; NICHOLAS MCDANIEL; MARY J. MORAN-SPICUZZA; GARY PINCAS; BRANDON POTTER; THOMAS PURDY; ROCCO RENGHINI; MICHELLE SINGLTEON; KEN SMILEY; GREGORY M. SONSTEIN; ROMAN STARNO; GAYLE A. STEPHENSON; ANDRES VILLICANA; RICHARD WILLIAMS; BRADFORD L. HIRSCH; ASHLEY CEPHAS; DAVID E. HILL; CHAD MCKINNEY; MORDECHAI SCHIFFER; LISA SANDS; DONALD KENDIG; KEVIN GOBEL; ERIC LARSON; LIN MCKINNEY; RYAN CROSS; PHILLIP HOFFMAN; DEBRA SIMMONS; ABELARDO MORALES; PETER BLUMER; CAROLYN HAMMOND; MELISSA LEGGETT; KELLY MOFFETT; EVAN GROGAN; CARLOS MEDINA; ALBERTO DOMINGUEZ; CATHERINE BERNARD; MICHAEL

BREIEN; LAURA GILL; THOMAS SCHILLE; JUDITH STANTON; RANDY RICKERT; BRYAN ZIRKEL; JAMES KUNDRAT; ROBERT SMITH; MARIA KOTOVA; JOSIPA CASEY; LUAN SNYDER; BEN BAKER; BRIAN NGUYEN; HATTIE WILLIAMS; BILL HOLVEY; LOURDES VARGAS; KENDALL SNYDER; NOMER MEDINA; SAMERIA GOFF; URSULA PYLAND; MARCELL CHAPMAN; KAYE KURASH; HOLLY AMROMIN; JOHN CHAPMAN; MARY D'ANGELO; GEORGE RUDY; AYMAN MOUSA; SHELLY HENDERSON; JEFFREY HATHAWAY; DENNIS J. MURPHY; DOUGLAS A. PATTERSON; JOHN GENTRY; DANIELLE KAY GILLELAND; JOSEPH BOWE; MICHAEL DESOUTO,

Plaintiffs-Appellees,

GREG DIRENZO,

Petitioner-Appellee,

HYUNDAI MOTOR AMERICA; KIA MOTORS AMERICA; KIA MOTORS CORPORATION; GROSSINGER AUTOPLEX, INC., FKA Grossinger Hyundai; JOHN KRAFCIK; HYUNDAI MOTOR COMPANY; SARAH KUNDRAT,

Defendants-Appellees.

v.

LINDA RUTH SCOTT,
Objector-Appellant.

IN RE HYUNDAI AND KIA FUEL ECONOMY LITIGATION

JOHN GENTRY; LINDA RUTH SCOTT; DANIELLE KAY GILLELAND; JOSEPH BOWE; MICHAEL DESOUTO,
Plaintiffs,

and

JAMES BEN FEINMAN,
Appellant,

v.

HYUNDAI MOTOR AMERICA; KIA MOTORS AMERICA; KIA MOTORS CORPORATION; GROSSINGER AUTOPLEX, INC., FKA GROSSINGER HYUNDAI; JOHN KRAFCIK; HYUNDAI MOTOR COMPANY; SARAH KUNDRAT,
Defendants-Appellees.

No. 15-56067

D.C. No. 2:13-ml-02424-GW-FFM

OPINION

Appeal from the United States District Court
for the Central District of California
George H. Wu, District Judge, Presiding

Argued and Submitted February 10, 2017
Pasadena, California

Filed January 23, 2018

Before: Andrew J. Kleinfeld, Sandra S. Ikuta,
and Jacqueline H. Nguyen, Circuit Judges.

Opinion by Judge Ikuta;
Dissent by Judge Nguyen

SUMMARY*

Class Action

The panel vacated the district court's order granting class certification in a nationwide class action settlement arising out of misstatements by defendants Hyundai Motor America, Inc. and its affiliate, Kia Motors, Inc., regarding the fuel efficiency of their vehicles; and remanded for further proceedings.

The district court had jurisdiction under the Class Action Fairness Act ("CAFA"). In June 2015, the district court gave its final approval of the class settlement. Objectors brought five consolidated appeals raising challenges to class certification, approval of the settlement as fair and adequate, and approval of attorneys' fees as reasonable in proportion to the benefit conferred on the class.

The panel held that the district court abused its discretion in concluding that common questions predominated, and in certifying the settlement class under Fed. R. Civ. P. 23(b)(3). The panel noted that Rule 23(b)(3)'s predominance inquiry was far more demanding than Rule 23(a)'s commonality requirement. The panel further noted that where plaintiffs bring a nationwide class action under CAFA and invoke Rule 23(b)(3), a court must consider the impact of potentially varying state laws. Finally, in determining whether predominance was defeated by variations in state law, the

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

panel proceeded through several steps as outlined in *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 590 (9th Cir. 2012).

The panel held that in failing to apply California choice of law rules, the district court committed a legal error. The panel further held that the district court's reasoning - that the settlement context relieved it of its obligation to undertake a choice of law analysis and to ensure that a class met all of the prerequisites of Rule 23 – was wrong as a matter of law.

The panel held that the district court erred in failing to define the relevant class "in such a way as to include only members who were exposed to advertising that is alleged to be materially misleading," *Mazza*, 688 F.3d at 596, because the record did not support the presumption that used car owners were exposed to and relied on misleading advertising.

Because the district court could determine, after a rigorous Rule 23 analysis, that it would certify a settlement class and approve a settlement, the panel briefly clarified some principles of attorneys' fee approval for the district court on remand.

Judge Nguyen dissented because she believed that the district court committed no error, and she would affirm. Judge Nguyen wrote that in decertifying the class, the majority relied on arguments never raised by the objectors, contravened precedent, and disregarded reasonable factual findings made by the district court after years of extensive litigation. Judge Nguyen further wrote that contrary to Ninth Circuit case law and that of other circuits, the majority shifted the burden of proving whether foreign law governed from the foreign law proponent – here, the objectors – to the district court or class counsel, thereby creating a circuit split and

violating the doctrine of *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938). Also, Judge Nguyen wrote that in excluding used car owners from the class, the majority misapplied the rule that consumer claims merely required proof that the public – not any individual – was likely to be deceived. Finally, Judge Nguyen wrote that the majority based its clarification of the district court's attorneys' fees award on a flawed reading of the record and a disregard of deferential review.

COUNSEL

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Angeles, California; for Appellees Hyundai Motor America and Hyundai Motor Co.

Robert B. Carey and John M. DeStefano, Hagens Berman Sobol Shapiro LLP, Phoenix, Arizona, for Appellees Kaylene P. Brady and Nicole Marie Hunter.

OPINION

IKUTA, Circuit Judge:

This appeal involves a nationwide class action settlement arising out of misstatements by defendants Hyundai Motor America, Inc. (Hyundai) and its affiliate, Kia Motors America, Inc. (Kia)[1] regarding the fuel efficiency of their vehicles. The district court had jurisdiction under the Class Action Fairness Act (CAFA), 28 U.S.C. § 1332(d), because the matter in controversy exceeded $5,000,000, the putative class comprised at least 100 plaintiffs, and at least one plaintiff class member was a citizen of a state different from that of at least one defendant. We have jurisdiction pursuant to 28 U.S.C. § 1291. We hold that the district court abused its discretion in concluding that common questions predominate and certifying this settlement class under Rule 23(b)(3) of the Federal Rules of Civil Procedure, and we remand to the district court for further proceedings consistent with this opinion. Because the district court may still certify a class on remand, we briefly clarify some principles of attorneys' fees awards in the class action context for the district court on remand.

I

"The class action is an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Wal-Mart Stores, Inc. v. Dukes*,

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[1] Defendants-Appellees also include Hyundai and Kia affiliates Kia Motors Corporation; Grossinger Autoplex, Inc., FKA Grossinger Hyundai; John Krafcik; Hyundai Motor Company; and Sarah Kundrat. We refer to all Hyundai entities as "Hyundai" and all Kia entities as "Kia."

564 U.S. 338, 348 (2011) (internal quotation marks omitted). "To come within the exception, a party seeking to maintain a class action must affirmatively demonstrate his compliance with Rule 23." *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013) (internal quotation marks omitted). "Before certifying a class, the trial court must conduct a rigorous analysis to determine whether the party seeking certification has met the prerequisites of Rule 23." *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1186 (9th Cir. 2001) (internal quotation marks omitted). A district court's certification "must be supported by sufficient findings to be afforded the traditional deference given to such a determination." *Molski v. Gleich*, 318 F.3d 937, 946–47 (9th Cir. 2003) (internal quotation marks omitted). "When a district court, as here, certifies for class action settlement only, the moment of certification requires heightened attention[.]" *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 848–49 (1999) (internal quotation marks and citation omitted).

We review the district court's decision to certify a class for an abuse of discretion. *Parra v. Bashas', Inc.*, 536 F.3d 975, 977 (9th Cir. 2008). A district court abuses its discretion when it makes an error of law or when its "application of the correct legal standard was (1) illogical, (2) implausible, or (3) without support in inferences that may be drawn from the facts in the record." *United States v. Hinkson*, 585 F.3d 1247, 1262 (9th Cir. 2009) (en banc) (internal quotations omitted). "We reverse if the district court's certification is premised on legal error." *Molski*, 318 F.3d at 947.

Rule 23 "does not set forth a mere pleading standard." *Comcast*, 569 U.S. at 33. The plaintiff seeking class certification bears the burden of demonstrating that all the requirements of Rule 23 have been met. *See Zinser*, 253 F.3d

at 1188. This requirement means that the plaintiff must first demonstrate through evidentiary proof that the class meets the prerequisites of Rule 23(a), which provides that class certification is proper only if: "(1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a); *see also Comcast*, 569 U.S. at 33. The Rule 23(a) prerequisites "effectively limit the class claims to those fairly encompassed by the named plaintiff's claims." *Dukes*, 564 U.S. at 349 (internal quotation marks omitted). To meet the commonality requirement of Rule 23(a)(2), the plaintiffs' claims "must depend upon a common contention" that is "of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.* at 350.

After carrying its burden of satisfying Rule 23(a)'s prerequisites, the plaintiff must establish that the class meets the prerequisites of at least one of the three types of class actions set forth in Rule 23(b). Fed. R. Civ. P. 23(b); *Comcast*, 569 U.S. at 33. Here, the district court certified the class under Rule 23(b)(3), which provides that a class action may be maintained only if "the court finds that the 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," and which lists

a number of matters "pertinent to these findings." Fed. R. Civ. P. 23(b)(3).[2]

The Rule 23(b)(3) predominance inquiry is "far more demanding" than Rule 23(a)'s commonality requirement. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 624 (1997). The "presence of commonality alone is not sufficient to fulfill Rule 23(b)(3)." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1022 (9th Cir. 1998). Rather, a court has a "duty to take a close look at whether common questions predominate over individual ones," and ensure that individual questions do not

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[2] Rule 23(b) provides, in relevant part:

> A class action may be maintained if Rule 23(a) is satisfied and if: . . .
>
> (3) the court finds that the 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. The matters pertinent to these findings include:
>
> > (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.

"overwhelm questions common to the class." *Comcast*, 569 U.S. at 34 (internal quotation marks omitted). In short, "[t]he main concern of the predominance inquiry under Rule 23(b)(3) is the balance between individual and common issues." *Wang v. Chinese Daily News, Inc.*, 737 F.3d 538, 545–46 (9th Cir. 2013) (internal quotation marks omitted).

Where plaintiffs bring a nationwide class action under CAFA and invoke Rule 23(b)(3), a court must consider the impact of potentially varying state laws, because "[i]n a multi-state class action, variations in state law may swamp any common issues and defeat predominance." *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 741 (5th Cir. 1996). "Variations in state law do not necessarily preclude a 23(b)(3) action." *Hanlon*, 150 F.3d at 1022. For instance, even when some class members "possess slightly differing remedies based on state statute or common law," there may still be "sufficient common issues to warrant a class action." *Id.* at 1022–23; *see also Sullivan v. DB Investments, Inc.*, 667 F.3d 273, 301–02 (3d Cir. 2011) (discussing the "pragmatic response to certifications of common claims arising under varying state laws," and citing a case that affirmed "the district court's decision to subsume the relatively minor differences in state law within a single class" as illustrative) (citing *In re Prudential Ins. Co. of Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 315 (3d Cir. 1998)); *In re Mex. Money Transfer Litig.*, 267 F.3d 743, 747 (7th Cir. 2001) (noting that even though "state laws may differ in ways that could prevent class treatment if they supplied the principal theories of recovery," class representatives in that case met the predominance requirement in part by limiting "their theories to federal law plus aspects of state law that are uniform"). On the other hand, where "the consumer-protection laws of the affected States vary in material ways,

no common legal issues favor a class-action approach to resolving [a] dispute." *Pilgrim v. Universal Health Card, LLC*, 660 F.3d 943, 947 (6th Cir. 2011).

In determining whether predominance is defeated by variations in state law, we proceed through several steps. *See Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 590 (9th Cir. 2012). First, the class action proponent must establish that the forum state's substantive law may be constitutionally applied to the claims of a nationwide class. *Id.* at 589–90.[3] If the forum state's law meets this requirement, the district court must use the forum state's choice of law rules to determine whether the forum state's law or the law of multiple states apply to the claims. *Id.* at 590. "[I]f the forum state's choice-of-law rules require the application of only one state's laws to the entire class, then the representation of multiple states within the class does not pose a barrier to class certification." *Johnson v. Nextel Commc'ns Inc.*, 780 F.3d 128, 141 (2d Cir. 2015). But if class claims "will require adjudication under the laws of multiple states," *Wash. Mut. Bank, FA v. Superior Court*, 24 Cal. 4th 906, 922 (2001), then the court must determine whether common questions will predominate over individual issues and whether litigation of a nationwide class may be managed fairly and efficiently. *Id.* As with any other requirement of Rule 23, plaintiffs seeking class certification bear the burden of demonstrating through evidentiary proof

[3] The Supreme Court has explained that in order to apply the forum state's law to out-of-state defendants, the state must have a "significant contact or significant aggregation of contacts" to the claims asserted by each member of the plaintiff class. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 822 (1985). There is no dispute that California has significant contacts with the defendants in this case.

that the laws of the affected states do not vary in material ways that preclude a finding that common legal issues predominate. *See Castano*, 84 F.3d at 741 (indicating that class action proponents must show that variations in state laws will not affect predominance; "[a] court cannot accept such an assertion on faith.") (quoting *Walsh v. Ford Motor Co.,* 807 F.2d 1000, 1016 (D.C. Cir. 1986) (Ruth Bader Ginsburg, J.)).

We undertook this predominance inquiry in *Mazza v. American Honda Motor Co*., which is closely analogous to our case. *Mazza* considered a car manufacturer's challenge to a district court's decision to certify a nationwide class of consumers claiming that Honda had misrepresented material information regarding Acura RLs. Honda contended that the district court erred in certifying this class under Rule 23(b)(3), because "California's consumer protection statutes may not be applied to a nationwide class with members in 44 jurisdictions," *Mazza*, 666 F.3d at 589, and therefore plaintiffs had not demonstrated "that the questions of law or fact common to class members predominate over any questions affecting only individual members." Fed. R. Civ. Pro. 23(b)(3).

Mazza addressed this argument by undertaking the following analysis. The plaintiffs first established that defendants had adequate contacts to the forum state, and therefore the court should apply California's choice of law rules. 666 F.3d at 590.[4] Under these rules, the foreign law

[4] Under California choice of law rules, there are "two different analyses for selecting which law should be applied in an action": one considering a contractual choice-of-law provision, and the other requiring an application of the governmental interest test. *See Wash. Mut. Bank*,

proponent had the burden of showing that the law of multiple states, rather than California law, applied to class claims. *Id.* *Mazza* therefore walked through the three parts of California's governmental interest test. First, we determined that Honda showed there were material differences between the plaintiffs' California misrepresentation claims and the laws of other states. *Id.* at 591. Second, we determined that each of the 44 different states where the car sales took place "has a strong interest in applying its own consumer protection laws to those transactions." *Id.* at 592. Turning to the third step of the test, we determined that "if California law were applied to the entire class, foreign states would be impaired in their ability to calibrate liability to foster commerce." *Id.* at 593. Therefore, we held that "each class member's consumer protection claim should be governed by the consumer protection laws of the jurisdiction in which the transaction took place." *Id.* at 594.

Our conclusion that the plaintiffs' class claims "will require adjudication under the laws of multiple states," *Wash. Mut. Bank*, 24 Cal. 4th at 922, led to the next question: whether this conclusion defeated predominance. Although *Mazza* did not expressly address the predominance question,

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24 Cal. 4th at 914–15. The governmental interest test has three steps. "Under the first step of the governmental interest approach, the foreign law proponent must identify the applicable rule of law in each potentially concerned state and must show it materially differs from the law of California." *Id.* at 920. If "the trial court finds the laws are materially different, it must proceed to the second step and determine what interest, if any, each state has in having its own law applied to the case." *Id.* If "each state has an interest in having its own law applied, thus reflecting an actual conflict" the court "must select the law of the state whose interests would be more impaired if its law were not applied." *Id.*; *see also Mazza,* 666 F.3d at 589–90.

its vacatur of the district court's class certification order established that plaintiffs had failed to show that common questions would predominate over individual issues.[5]

Because the Rule 23(b)(3) predominance inquiry focuses on "questions that preexist any settlement," namely, "the legal or factual questions that qualify each class member's case as a genuine controversy," *Amchem*, 521 U.S. at 623, a district court may not relax its "rigorous" predominance inquiry when it considers certification of a settlement class, *Zinser*, 253 F.3d at 1186. To be sure, when "[c]onfronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems, for the proposal is that there be no trial." *Amchem*, 521 U.S. at 620 (citation omitted). But "other specifications of the Rule—those designed to protect absentees by blocking unwarranted or overbroad class definitions—demand undiluted, even heightened, attention in the settlement context." *Id.* "Heightened" attention is necessary in part because a court asked to certify a settlement class "will lack the opportunity, present when a case is litigated, to adjust the class, informed by the proceedings as they unfold." *Id.* Indeed, in *Amchem* itself, the court determined that both factual differences among class members and differences in the state laws

[5] California takes the same approach in applying a choice-of-law analysis to class claims. Under California law, if the court concludes "that class claims will require adjudication under the laws of multiple states," then "the court must determine "whether common questions will predominate over individual issues and whether litigation of a nationwide class may be managed fairly and efficiently." *Wash. Mut. Bank*, 24 Cal. 4th at 922. In California, "the class action proponent bears the burden of establishing the propriety of class certification." *Id.*

applicable to class members' claims defeated predominance for a single nationwide settlement class. *Id.* at 624.

A court may not justify its decision to certify a settlement class on the ground that the proposed settlement is fair to all putative class members.[6] Indeed, federal courts "lack authority to substitute for Rule 23's certification criteria a standard never adopted—that if a settlement is fair, then certification is proper." *Id.* at 622; *see also Ortiz*, 527 U.S. at 849 (holding that "a fairness hearing under Rule 23(e) is no substitute for rigorous adherence to those provisions of the Rule designed to protect absentees[.]") (internal quotation marks omitted)). This prohibition makes sense: "[i]f a common interest in a fair compromise could satisfy the predominance requirement of Rule 23(b)(3), that vital prescription would be stripped of any meaning in the settlement context," and the safeguards provided by the Rule, which "serve to inhibit appraisals of the chancellor's foot kind—class certifications dependent upon the court's gestalt judgment or overarching impression of the settlement's fairness," would be eviscerated. *Amchem*, 521 U.S. at 621, 623.

II

We now turn to the facts of this case. Under the Clean Air Act, all new vehicles sold in the United States must be covered by an Environmental Protection Agency (EPA) certificate of conformity demonstrating compliance with fuel

[6] A court must make such a fairness finding under Rule 23(e) of the Federal Rules of Civil Procedure, which prohibits a court from approving a settlement unless it concludes that "it is fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2).

efficiency and greenhouse gas emission standards. *See* 42 U.S.C. § 7522(a)(1). To obtain such a certificate, a vehicle manufacturer must submit an application to the EPA with information about the fuel efficiency for each model year. *Id.* § 7525(a)(1). In November 2011, a consumer advocacy group sent a letter to the EPA regarding complaints that Hyundai and Kia had overstated the fuel efficiency of a number of their vehicles and asked the EPA to audit the manufacturers. In response, the EPA initiated an investigation into Hyundai's and Kia's fuel efficiency test procedures. About a year later, in November 2012, the EPA investigation confirmed that Hyundai and Kia used improper test procedures to develop the fuel efficiency information submitted for certain 2011, 2012, and 2013 models.[7] These improper procedures resulted in overstated fuel efficiency estimates.

At the same time as the EPA announced its findings, Hyundai and Kia announced that they would lower their fuel efficiency estimates for approximately 900,000 Hyundai and Kia vehicles from model years 2011, 2012, and 2013. At the same time, Hyundai and Kia announced the institution of a voluntary Lifetime Reimbursement Program (LRP) to compensate affected vehicle owners and lessees for the additional fuel costs they had incurred and would incur in the future as a result of the overstated fuel efficiency estimates. Under the LRP, anyone who owned or leased an affected

[7] According to the EPA, the improper procedures included selecting results from test runs that were aided by a tailwind, selecting only favorable results from test runs rather than averaging a broader set of results, restricting testing times to periods when the temperature allowed vehicles to coast farther and faster, and preparing vehicle tires to improve the test results.

Hyundai or Kia vehicle on or before November 2, 2012 was entitled to periodic reimbursements based on the number of miles driven, the difference between the original and revised fuel efficiency estimate, and the average fuel price in the area where the car was driven, plus an extra 15 percent to account for the inconvenience caused by the overstated fuel efficiency estimates. In order to receive these benefits, class members could enroll in the LRP and then periodically visit a Hyundai or Kia dealership to verify their odometer readings. Car owners could register for the LRP until December 31, 2013, although the program would continue for those who registered for as long as they owned or leased their vehicles.[8]

After the EPA commenced its investigation, but before announcing its results, a number of plaintiffs filed suit against Hyundai and Kia. In January 2012, plaintiffs filed a putative nationwide class action in state court in Los Angeles County. *See Espinosa v. Hyundai Motor Am.*, No. BC 476445 (Cal. Super. Ct. filed Jan. 6, 2012). The complaint raised claims under California's consumer protection laws and common law, alleging that Hyundai had falsely advertised that its 2011 and 2012 Elantra and Sonata vehicles got 40 miles per gallon (MPG) on the highway, when in fact these vehicles got far lower MPG.[9] The plaintiffs sought damages, rescission,

[8] In October 2014, Hyundai and Kia entered into a $100 million consent decree with the United States and the California Air Resources Board to settle claims arising from the EPA investigation.

[9] Specifically, the *Espinosa* plaintiffs asserted claims for violations of California Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200–17209; violations of California False Advertising Law, *id.* §§ 17500–17509; violations of California Consumer Legal Remedies Act, *id.* §§ 1750–1784; fraud; negligent misrepresentation; and deceit, *id.* § 1710.

restitution, and injunctive relief in the form of corrective advertising on behalf of a putative nationwide class of owners of specified vehicles who purchased or leased their vehicles in the United States.

After Hyundai removed the *Espinosa* action to federal court, *see* No. 2:12-cv-800 (C.D. Cal. filed Jan. 30, 2012), the plaintiffs moved for certification of a nationwide class. In its opposition to class certification, Hyundai argued, among other things, that differences in state consumer protection laws precluded the application of California law to consumers who are not Californians and defeated predominance. Hyundai supported this argument with a thirty-four page "Appendix of Variations in State Laws," which detailed the numerous differences in the burden of proof, liability, damages, statutes of limitations, and attorneys' fees awards under different state consumer protection laws and common law fraud actions. Hyundai also argued that there were individual questions regarding whether each class member was exposed to or relied on Hyundai's advertising, and that these questions prevented class certification.[10]

[10] During the period from January 2012, when the *Espinosa* plaintiffs filed their complaint, until November 2012, the date the EPA announced the result of its investigation and Honda announced its LRP program, the *Espinosa* plaintiffs focused their efforts on certifying a class. The plaintiffs otherwise limited their actions to filing two amended complaints (one to join additional class representatives) and responding to Hyundai's motion to dismiss, which was denied by the district court on April 24, 2012. (Hyundai's prior motion to dismiss had been vacated when Espinosa filed its amended complaint.) *Hunter v. Hyundai Motor America*, No. 8:12-CV-01909 (C.D. Cal. filed Nov. 2, 2012), and *Brady v. Hyundai Motor America*, No. 8:12-cv-1930 (C.D. Cal. filed Nov. 6, 2012) were not filed until after the LRP program was announced.

In November 2012, the district court issued a tentative ruling on the motion for class certification in *Espinosa*. Plaintiffs sought to certify two classes, an Elantra class (including purchasers and lessees of 2011–12 model year Elantras) and a Sonata class (including all purchasers and lessees of 2011–2012 model year Sonatas). The court stated it would likely find that the plaintiffs demonstrated both the Rule 23(a) commonality and Rule 23(b)(3) predominance requirements were met as to statutory, but not common law claims. With respect to the question whether plaintiffs could show individualized reliance on advertising, the court stated that it would likely find that class-wide reliance on the challenged advertising could be presumed due to the "extensive sweep" of Hyundai's marketing efforts.[11]

Turning to the question whether plaintiffs could certify a nationwide class, despite the fact that their complaint invoked only California law, the district court held it was required to perform a choice of law analysis. The court stated that California had sufficient contacts to support the extraterritorial application of California law to all claims, but "just as in *Mazza*, the three-part choice of law test . . . comes out in Defendant's favor." In reaching this conclusion, the court relied on three factors. First, Hyundai's submission of its appendix of variations in state law "unquestionably demonstrates that there are material differences as between

[11] Although the court indicated that the marketing efforts related to "the fuel efficiency of the Elantra and Sonata vehicles," the campaign identified by the court was limited to the 2011 Elantra. Specifically, the court noted that Hyundai had purchased advertising for the 2011 Elantra during the NFL playoffs, the Super Bowl, and the Academy Awards, placed Elantra ads on Amazon, Facebook, Yahoo, and other internet sites, used print advertising, and placed billboard ads for the 2011 Elantra in Times Square in New York and on certain California freeways.

the various states' laws that would 'make a difference in this litigation.'" (quoting *Mazza*, 666 F.3d at 590–91, specifically considering the scienter requirements and remedies). Second, the court ruled that as in *Mazza*, each of the states "has an interest in balancing the range of products and prices offered to consumers with the legal protections afforded to them." *Mazza*, 666 F.3d at 592. Third, the court determined that "the interests of the other states would be more impaired were California law imposed upon their citizens than California would be impaired were this action limited to a class of only California consumers." In sum, the court found "that certification of a nationwide class where California law is applied to out-of state consumers is foreclosed by the Ninth Circuit's decision in *Mazza*, a case virtually on all fours with the instant matter."

Because California law could not be applied to out-of-state class members, the court thought it was obvious that the class could not be certified: "were the laws of the other various states applied to out-of-state purchasers, class certification would be precluded because common questions of law and fact would no longer predominate." The court held that it would consider certifying a class of California consumers, defined to include only those California consumers who actually viewed one of the challenged advertisements or marketing materials. On November 29, 2012, the Court held a hearing on the class certification motion pending in *Espinosa*, but did not make a final ruling, instead requesting supplemental briefing.

Immediately following Hyundai's November 2, 2012 announcement of the LRP, and before the *Espinosa* court could make a final ruling on class certification, plaintiffs across the country filed a flurry of putative class actions

alleging that Hyundai and Kia misrepresented the fuel efficiency of their vehicles through advertising and Monroney Stickers.[12] Among other actions, plaintiffs filed *Hunter v. Hyundai Motor America*, No. 8:12-CV-01909 (C.D. Cal. filed Nov. 2, 2012), and *Brady v. Hyundai Motor America*, No. 8:12-cv-1930 (C.D. Cal. filed Nov. 6, 2012), in the Central District of California. Both actions claimed violations of California consumer protection laws and common law on behalf of putative nationwide classes of all persons who owned or leased a Hyundai or Kia vehicle that had been identified in the EPA investigation.[13] In December 2012, the district court requested further supplemental briefing on the class certification motion in light of Hyundai's November 2, 2012 announcement.

Plaintiffs in one putative nationwide class action, *see Krauth v. Hyundai Motor Am.*, No. 8:12-cv-01935 (C.D. Cal. filed Nov. 6, 2012), initiated proceedings before the Multidistrict Litigation (MDL) judicial panel pursuant to 28 U.S.C. § 1407, requesting that twelve putative class

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[12] A Monroney Sticker is named after Senator A.S. Mike Monroney, sponsor of the Automobile Information Disclosure Act of 1958, 15 U.S.C. §§ 1231–1233. The Act requires a car manufacturer to affix a label displaying information about the car's fuel efficiency to the window of every new vehicle sold in the United States. *See* 15 U.S.C. §§ 1232–1233; *see also* 49 U.S.C. § 32908; 49 C.F.R. § 575.401 (2012). Monroney stickers are not required for sales of used cars. *See* 15 U.S.C. §§ 1232–1233.

[13] Specifically, the *Hunter* and *Brady* plaintiffs asserted claims under California Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200–17209; California False Advertising Law, *id.* §§ 17500–17509; California Consumer Legal Remedies Act, *id.* §§ 1750–1784; for fraud; for negligent misrepresentation; for unjust enrichment; and for breach of express warranty, Cal. Com. Code § 2313.

actions against Hyundai and Kia (including *Espinosa*, *Hunter*, and *Brady*) relating to the marketing and advertising of the fuel efficiency estimates of Hyundai and Kia vehicles be transferred to a single district for coordinated pretrial proceedings. On February 6, 2013, the MDL judicial panel transferred those actions as MDL No. 2424 to the court that was already presiding over the *Espinosa* action. The MDL judicial panel noted that any other related actions were potential tag-along actions.[14] In total, 56 actions were ultimately transferred to the MDL.

One week after the MDL judicial panel issued its transfer order, and approximately three months after the announcement of the EPA investigation and LRP, the district court held a status conference in the *Espinosa* matter. At that status conference, the *Espinosa* plaintiffs informed the district court that they (along with the plaintiffs in *Hunter* and *Brady*) had reached a settlement with Hyundai for a single nationwide class. Shortly thereafter, the parties informed the court that Kia had agreed to the same settlement terms as Hyundai.

The proposed settlement agreement had the following terms. The parties agreed that the district court should certify a nationwide class of all persons who were current and former owners and lessees of specified Hyundai and Kia vehicles on

[14] *See* Rule 1.1(h), Rules of Procedure of the United States Judicial Panel on Multidistrict Litigation ("'Tag-along action' refers to a civil action pending in a district court which involves common questions of fact with either (1) actions on a pending motion to transfer to create an MDL or (2) actions previously transferred to an existing MDL, and which the Panel would consider transferring under Section 1407.").

or before November 2, 2012.[15] Hyundai and Kia would offer class members several alternative methods of compensation. First, class members could opt to receive the cash equivalent of the pre-existing LRP program. Specifically, class members could choose to receive a single lump sum payment rather than the periodic payments offered through the preexisting LRP. The lump sum payment for current owners was calculated based on an average 4.75-year term of ownership, 15,000 miles driven each year, and gas prices between $3.00 and $3.70.[16] The predicted average total lump sum payment was $353 for class members owning or leasing Hyundais and $667 for class members owning or leasing Kias. A class member who had begun participating in the LRP before the settlement but elected to switch to the lump sum payment option would receive a smaller lump sum, reduced by any amount the class member had already received through the LRP. The class members would receive their lump sum payment in the form of a debit card that would expire one year after it was issued; any unused amount would revert to Hyundai or Kia unless the class member timely deposited the residual amount in a bank account.

Two other compensation options offered consumers a credit that was nominally larger than the lump sum value of the existing LRP program, but which could be used only for purchasing more services or products from Hyundai or Kia. First, class members could choose to receive a Hyundai or Kia dealer service credit worth 150 percent of the value of the lump sum payment. The credit expired after two years.

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[15] The settlement agreement covered 41 different Hyundai models and 35 different Kia models from 2011 to 2013.

[16] For lessees, the lump sum payment was based on a 2.75-year term.

Alternatively, class members could choose to receive a new car rebate certificate worth 200 percent of the lump sum payment, which could be used toward the purchase of a new Hyundai or Kia vehicle. The certificate would expire after three years.

Finally, class members who were already participating in the preexisting LRP could choose to forego any of the settlement options and simply remain in the preexisting LRP. The deadline for enrolling in the LRP was extended to July 6, 2015, giving class members who had not enrolled in the LRP by the original December 31, 2013 deadline an additional 18 months to do so. Class members who were current owners or lessees of certain Hyundai vehicles who elected to remain in the LRP could receive an additional $100 for current original owners and $50 for current lessees and fleet owners.[17]

Used car owners were included in the proposed settlement class, but received only half the amounts available to new car owners. The settling parties justified this settlement amount on the ground that used car owners' "reliance on the Monroney numbers is less clear and potentially individualized" because Monroney stickers are not required for sales of used cars. *See* 15 U.S.C. §§ 1232–1233.

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[17] In January 2014, the settling parties filed an addendum to the proposed settlement that extended the additional $100 offer to former owners of these Hyundai models. In May 2014, the settling parties filed a second addendum to the settlement agreement allowing class members to submit claims through the settlement website and requiring defendants to follow certain procedures for distributing class members' payments.

The proposed settlement provided a process for class members to opt out of the settlement by mailing a request for exclusion. However, upon the district court's final approval of the settlement agreement, the district court would dismiss "all other lawsuits centralized in the MDL in which the named plaintiffs in such lawsuit(s) did not timely exclude themselves from the settlement."

In addition to paying the requisite amounts for class members, Hyundai and Kia agreed to pay class counsel reasonable attorneys' fees. The amount of attorneys' fees would be negotiated and awarded separately from the relief provided to class members.

Following the February 2013 announcement of this proposed settlement, the court ordered discovery in April 2013 to confirm the facts on which the settlement was based and to allow plaintiffs to evaluate the terms of the settlement. Hyundai and Kia produced several hundred thousand pages of documents and allowed plaintiffs to interview 11 employees.

While this confirmatory discovery was ongoing, a different group of plaintiffs filed another action against Hyundai in the Western District of Virginia. *See Gentry v. Hyundai Motor Am.*, No. 3:13-cv-0030 (W.D. Va. filed Oct. 14, 2013). The *Gentry* plaintiffs asserted claims under Virginia consumer protection, false advertising, and vehicle warranty laws on behalf of a putative class of all persons who had purchased a model year 2011, 2012, or 2013 Hyundai

Elantra in Virginia.[18] Claiming that Hyundai's false advertising was willful, the complaint demanded the greater of treble damages or $1000 for each class member under the Virginia Consumer Protection Act. *See* Va. Code Ann. §59.1-204(A). On November 6, 2013, the MDL judicial panel identified the *Gentry* action as a tag-along action, and transferred it to the Central District of California as part of MDL No. 2424.

In December 2013, after approximately eight months of confirmatory discovery, the *Hunter*, *Brady*, and *Espinosa* plaintiffs moved for class certification and preliminary approval of the nationwide class settlement. According to these plaintiffs, confirmatory discovery had failed to reveal any evidence that Hyundai and Kia had engaged in deceptive conduct, knowing concealment, or other bad acts. In their motion for certification of a settlement class, the settling parties contended that common questions of fact or law predominated under Rule 23(b)(3) with respect to California causes of action.

The *Gentry* plaintiffs opposed class certification and sought remand of their action to the Western District of Virginia. In their memorandum opposing class certification filed May 2014, the *Gentry* plaintiffs argued that California choice of law rules did not allow certification of the class. The memorandum discussed elements of both the governmental interest test and the contractual choice-of-law provision. First, with respect to their contractual claim, the

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[18] The *Gentry* plaintiffs alleged violations of the Virginia Motor Vehicle Warranty Enforcement Act, Va. Code Ann. §§ 59.1-207.9 to 207.16:1, the Virginia Consumer Protection Act, *id.* § 59.1-200(14), and Virginia's false advertising statute, *id.* § 18.2-216.

plaintiffs stated that the Virginia plaintiffs had purchased their vehicles by means of a contract with a Virginia choice of law provision and under California law, "an otherwise enforceable choice-of-law agreement may not be disregarded merely because it may hinder the prosecution of a multistate or nationwide class action or result in the exclusion of nonresident consumers from a California-based class action." *Wash. Mut. Bank*, 24 Cal. 4th at 918. Second, under the elements of California's governmental interest test, the *Gentry* plaintiffs noted that "[n]umerous courts have recognized that conflicts exist among State substantive laws" applicable to analogous consumer fraud claims, and argued that there were "material and significant conflicts in the law of Virginia as compared to the law and remedy sought to be applied by *Espinosa*, *Hunter*, and *Brady*."[19] Moreover, the memorandum contended, not only were the Virginia causes of action "materially different from those asserted by the Settling Plaintiffs," but Virginia also had a strong interest in having its law apply. Accordingly, even without the contractual choice-of-law provisions, the *Gentry* plaintiffs argued, California law would require courts to apply Virginia

[19] The *Gentry* plaintiffs argued that the Virginia Consumer Protection Act provides for a minimum of $500 in statutory damages for individuals who suffer damage as a result of a violation of the act, *see* Va. Code Ann. § 59.1-204(A), while California's Consumer Legal Remedies Act sets no statutory minimum damages for individuals who suffer violations of the act, *see* Cal. Civ. Code § 1780(a). This statutory minimum of $500 is superior to the average maximum lump sum benefit of $353 that Hyundai class members are entitled to under the settlement. In addition, under the Virginia Consumer Protection Act, the trier of fact can award treble damages within its discretion if it finds that the violation was "willful," *see* Va. Code Ann. § 59.1-204; *Holmes v. LG Marion Corp.*, 258 Va. 473, 478 (1999), whereas, under California's Legal Remedies Act, the trier of fact can only award punitive damages if it finds "clear and convincing evidence" of "oppression, fraud, or malice," Cal. Civ. Code. § 3294(a).

law.[20] Three sets of plaintiffs, including the *Gentry* plaintiffs, also filed objections to the terms of the settlement.[21]

In June 2014, the district court circulated a tentative ruling granting the plaintiffs' motion for certification of the settlement class. The court acknowledged that it "would need to engage in an extensive choice of law analysis" if the case were going to trial. Nevertheless, the court thought such an analysis was not warranted in the settlement context, because notwithstanding the *Gentry* plaintiffs' objections to class certification "on the grounds that Virginia law provides a materially different remedy to Virginia consumers" for certain claims, state law variations were less of a concern and could be addressed as part of the final fairness hearing under Rule 23(e). Accordingly, the district court declined to apply California's choice of law rules to determine whether

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[20] The dissent contends that we should disregard the *Gentry* plaintiffs' argument regarding California choice of law rules because they alternatively argue on appeal that the failure to include a Virginia subclass would violate their due process rights. *See* Dissent at 66–67, n.3. This claim is based on the *Gentry* plaintiffs' interpretation of a Virginia Supreme Court case as holding that the commencement of a class action in California that does not include a Virginia cause of action will not toll the statute of limitations in Virginia, and thus they would be time-barred from bringing their Virginia-specific claims. Recognizing this interpretation is in dispute, the *Gentry* plaintiffs alternatively urged us to certify this question to the Virginia Supreme Court. Because the *Gentry* plaintiffs raised their choice-of-law argument to the district court, we do not place any significance on the fact that they later also raised an alternative argument.

[21] In addition to the *Gentry* plaintiffs, the objectors included the named plaintiffs in two other actions transferred to the district court as part of MDL No. 2424, *Krauth* and *Wilson v. Kia Motors America, Inc.*, No. 13-cv-1069 (D.N.J. filed Jan. 24, 2013). These plaintiffs are not objectors in this appeal.

California law was applicable to the class, or to make any choice of law ruling, and instead held that even if "substantial differences in state law are brought to light at the final fairness hearing, those issues do not prevent the Court from certifying the class for settlement purposes." The court adhered to this position in its subsequent rulings.

In August 2014, the court granted class certification without ever addressing variations in state law.[22] At the same time, the district court granted preliminary approval of the proposed settlement, finding it sufficiently fair, reasonable, and adequate to merit disseminating notice of the settlement to the class. The court noted the settling parties' agreement that an aggregate amount of $210 million represented the total lump sum compensation that would be available to class members.

In December 2014, counsel for the *Espinosa*, *Hunter*, and *Brady* plaintiffs, as well as counsel for plaintiffs in other actions that had been transferred to the district court, filed applications for attorneys' fees. Through a series of hearings beginning in March 2015, the district court approved $2,700,000 in attorneys' fees to class co-counsel who represented the plaintiffs in the *Hunter* and *Brady* cases, $2,850,000 in attorneys' fees to class co-counsel who represented the plaintiffs in the *Espinosa* case, and collectively over $3 million to counsel for other plaintiffs. In calculating attorneys' fees, the district court began with the

[22] The class was defined as: "[a]ll current and former owners and lessees of a Class Vehicle (i) who were the owner or lessee, on or before November 2, 2012, of such Class Vehicle that was registered in the District of Columbia or one of the fifty (50) states of the United States," with several small exceptions.

lodestar method (multiplying the number of hours the prevailing party reasonably expended on the litigation by a reasonable hourly rate). The court then determined that the *Hunter* and *Brady* counsel were entitled to a lodestar enhancement in light of the complexity and volume of work and the amount of the settlement, and multiplied the lodestar amount by a 1.22 multiplier. The district court also determined that the *Espinosa* counsel was entitled to a lodestar enhancement due to the risk of filing a lawsuit before the November 2, 2012 EPA announcement, and multiplied the lodestar amount by a 1.5521 multiplier. In total, the district court awarded approximately $9 million in attorneys' fees and costs.

In March 2015, the *Hunter*, *Brady*, and *Espinosa* plaintiffs, along with Hyundai and Kia, jointly moved for final approval of class settlement. In support of this motion, Hyundai and Kia submitted declarations reporting on response rates of class members. The reports established that approximately 21 percent of class members had filed claims for some $44,000,000 in total value. Of the class members filing claims, more than two-thirds began participating in the LRP before the settlement. Therefore, the portion of the class filing new claims accounted for only a small fraction of the $44 million in total value.

In June 2015, the district court gave its final approval of the class settlement. The court reaffirmed its prior conclusion that the certification of the class for settlement was proper under Rule 23(b)(3) and that the settlement was fair, relying in part on its August 2014 finding that the settlement would provide an estimated $210 million to the class. In rejecting objections that the proposed attorneys' fees awards were excessive and not in proportion to the benefit conferred on the

class, the district court noted that the attorneys' fees did not impact class recovery because they were awarded separately, and so the issue of collusion did not arise. Further, the court stated that the fees were in most cases less than the amount requested by counsel. Finally, the court dismissed all lawsuits in MDL No. 2424 except for those in which the named plaintiffs had timely excluded themselves from the settlement.

III

Objectors now bring five consolidated appeals raising challenges to class certification, approval of the settlement as fair and adequate, and approval of attorneys' fees as reasonable in proportion to the benefit conferred on the class.

A

We first address objectors' arguments that the district court abused its discretion by failing to conduct a choice of law analysis or rigorously analyze potential differences in state consumer protection laws before certifying a single nationwide settlement class under Rule 23(b)(3). As explained in *Mazza*, the district court was required to apply California's choice of law rules to determine whether California law could apply to all plaintiffs in the nationwide class, or whether the court had to apply the law of each state, and if so, whether variations in state law defeated predominance. 666 F.3d at 588–89. Under California's choice of law rules, this required the district court to apply the California governmental interest test. *Id.* at 590. There is no dispute that the district court did not do so. The parties acknowledge that the district court did not conduct a choice of law analysis, and did not apply California law or the law

of any particular state in deciding to certify the class for settlement.

In failing to apply California choice of law rules, the district court committed a legal error. "A federal court sitting in diversity must look to the forum state's choice of law rules to determine the controlling substantive law." *Id.* (quoting *Zinser*, 253 F.3d at 1187). The district court made a further error by failing to acknowledge, as it had in its tentative ruling, that Hyundai and the *Gentry* plaintiffs submitted evidence that the laws in various states were materially different than those in California, and that these variations prevented the court from applying only California law. Finally, the court erred by failing to make a final ruling as to whether the material variations in state law defeated predominance under Rule 23(b)(3). Because "variations in state law may swamp any common issues and defeat predominance," *Castano*, 84 F.3d at 741, a court must analyze whether "the consumer-protection laws of the affected States vary in material ways," *Pilgrim*, 660 F.3d at 947, even if the court ultimately determines that "the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues," *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1045 (2016) (citation omitted).

The district court's reasoning that the settlement context relieved it of its obligation to undertake a choice of law analysis and to ensure that a class meets all of the prerequisites of Rule 23, is wrong as a matter of law. While the district court was correct that it need not consider litigation management issues in determining whether to certify a class, the Rule 23(b)(3) predominance inquiry focuses on whether common questions outweigh individual

questions, an issue that preexists any settlement. *Amchem*, 521 U.S. at 623. Therefore, factors such as whether the named plaintiffs were in favor of the settlement or whether other class members had an opportunity to opt out are irrelevant to the determination whether a class can be certified.

If anything, this case highlights the reasons underlying *Amchem*'s warning that district courts must give "undiluted, even heightened, attention in the settlement context," *Amchem*, 521 U.S. at 620, to scrutinize proposed settlement classes.[23] Because the district court made clear that it would be unlikely to certify the same class for litigation purposes, the class representatives were well aware that they would be unlikely to succeed in any efforts to certify a nationwide litigation class. Thus, by "permitting class designation despite the impossibility of litigation, both class counsel and court [were] disarmed." *Id.* at 621. Hyundai and Kia knew that there was little risk that they would face a nationwide litigation class action if they did not reach a settlement agreement. Accordingly, "[c]lass counsel confined to settlement negotiations could not use the threat of litigation to press for a better offer, and the court [faced] a bargain proffered for its approval without benefit of adversarial investigation." *Id.* (citation omitted).

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[23] The dissent argues that we fail to apply the correct standard of review. *See* Dissent at 75. In making this argument, the dissent echoes the dissenting justices in *Amchem*, which likewise argued that the majority had erred in failing to give sufficient deference to the district court. *Amchem*, 521 U.S. at 630 (Breyer, J., concurring in part and dissenting in part). But we are bound by the *Amchem* majority, which indicates that a district court makes a legal error, and thus abuses its discretion, when it fails to scrutinize a settlement class to the same extent as a litigation class. *Id.* at 620.

Finally, the district court erred in holding that it could avoid considering the potential applicability of the laws of multiple states on the ground that the proposed settlement was fair. "[A] fairness hearing under Rule 23(e) is no substitute for rigorous adherence to those provisions of the Rule designed to protect absentees[.]" *Ortiz*, 527 U.S. at 849.

Because the district court erred in certifying a settlement class, we must vacate the class certification. This does not mean that the court is foreclosed from certifying a class (or subclasses) on remand. We make no ruling on this issue, and merely note that *Mazza* determined that no such class was possible in a closely analogous case.

B

Even if the district court had restricted the class to California consumers (as the court indicated it would do in its tentative ruling in *Espinosa*), we would still have to consider the objectors' argument that the district court abused its discretion in certifying a settlement class under Rule 23(b)(3) that includes used car owners without analyzing whether these class members were exposed to, and therefore could have relied on Hyundai's and Kia's misleading statements. According to the objectors, individual questions of reliance preclude the inclusion of used car owners in this class.

In *Mazza*, we provided guidance on how a district court should determine whether a court can presume that class members relied on misleading advertising. On the one hand, we explained, "[a]n inference of classwide reliance cannot be made where there is no evidence that the allegedly false representations were uniformly made to all members of the proposed class." *Mazza*, 666 F.3d at 595 (quoting

Davis–Miller v. Automobile Club of Southern California, 201 Cal. App. 4th 106, 125 (2011)). Rather, the class proponent must establish that the scope of the advertising makes it reasonable to assume that all class members were exposed to the allegedly misleading advertisements. *Id.* On the other hand, we noted the California Supreme Court's exception to this general rule in *In re Tobacco II Cases*. *Tobacco II* presumed that class members had relied on a pervasive advertising campaign for cigarettes, extending over 40 years by 11 different defendants, which "misled the smoking public of the health risks and addictive nature of smoking and targeted the putative class uniformly in an alleged class-wide effort to seduce and induce people to smoke." 46 Cal. 4th 298, 309, 327–28 (2009) (*Tobacco II*). Distinguishing *Tobacco II*, *Mazza* explained that "in the context of a decades-long tobacco advertising campaign where there was little doubt that almost every class member had been exposed to defendants' misleading statements," class members did not need to demonstrate individualized reliance. 666 F.3d at 596. Harmonizing these rules, *Mazza* concluded that "[i]n the absence of the kind of massive advertising campaign at issue in *Tobacco II*, the relevant class must be defined in such a way as to include only members who were exposed to advertising that is alleged to be materially misleading." *Id.*[24]

[24] California courts have likewise read *Tobacco II* narrowly, and have rejected the argument that class-wide reliance can be presumed "whenever there is a showing that a misrepresentation was material." *Tucker v. Pacific Bell Mobile Services*, 208 Cal. App. 4th 201, 226–27 (2012) (citing *Tobacco II*, 46 Cal. 4th at 327). As indicated in *Mazza*, reliance can be presumed only when there is the sort of massive decades-long advertising campaign at issue in *Tobacco II*. 666 F 3d. at 596. Regardless whether the Hyundai and Kia advertising campaign here was more extensive than the campaign in *Mazza*, *see* Dissent at 78, it does not come close to the level of cigarette advertising from the 1960s to the 2000s.

We held that the defendant's scope of advertising in *Mazza* did not rise to that level, and therefore an individualized case had to be made for each member showing reliance. *Id.* For this reason, we held that common questions of fact did not predominate where the class included members who were not exposed to the false advertising or who purchased products after learning of the misrepresentations, and therefore it was an error to certify the class. *Id.*

The district court addressed the question whether class members could have relied on Hyundai's and Kia's misleading statements in its June 14, 2014 ruling, and concluded that it could presume that all class members relied on the misleading statements because "misrepresentations were uniformly made to all consumers by virtue of Monroney stickers and nationwide advertising." In reaching this conclusion, the district court failed to reference any evidence in the record regarding the extent of the advertising campaign for the 41 different Hyundai models and 35 different Kia models from 2011 to 2013; nor did it provide any reasoning regarding how this advertising reached the level of the cigarette advertising campaign (extending over 40 years by 11 defendants) discussed in *Tobacco II*.[25] Furthermore, the

[25] The district court's statement in its November 2012 ruling that class-wide reliance on the challenged advertising could be presumed due to the "extensive sweep" of Hyundai's marketing efforts focused solely on the 2011 Elantra model; the Sonata model is merely mentioned in an aside. The court did not address either the 35 other Hyundai models or any Kia models. This is not surprising, given that the district court relied on a declaration that focused almost exclusively on the 2011 Elantras, with only limited mention made of the 2011 Sonata models or any 2012 models. Moreover, because the advertising was limited in time (under a year) and scope, it does not come close to the pervasive campaign (extending over 40 years by 11 separate companies) described in

district court's ruling is based on a factual error, because there is no requirement that Monroney stickers be provided to purchasers of used cars, and there is no evidence in the record that used car owners were uniformly exposed to such stickers. In fact, the settlement itself relied on this difference in exposure to misleading information in awarding used car owners only half the amounts awarded to new car owners. *See supra*, at p. 42. Nor can we conclude that this error was harmless because exposure to the defendant's advertising can be presumed. The settling parties have not identified any evidence in the record of this sort of massive advertising campaign that could give rise to such a presumption with respect to used car owners.

The settling parties argue that even if there are individualized questions regarding exposure to the nationwide advertising, these questions do not predominate in the settlement context, where there is no manageability concern. This argument is contrary to *Amchem*, where the Court held that factual differences among class members, such as the ways that class members were exposed to asbestos and the length of those exposures, translated into significant legal differences, thereby defeating predominance for a settlement class. 521 U.S. at 624. Similarly here, factual differences regarding used car owners' exposure to the misleading statements translate into significant legal differences regarding the viability of these class members' claims.

In sum, because the record does not support the presumption that used car owners were exposed to and relied on misleading advertising, the district court had an obligation to define the relevant class "in such a way as to include only

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Tobacco II.

members who were exposed to advertising that is alleged to be materially misleading." *Mazza*, 666 F.3d at 596. The district court erred by failing to do so here.

C

Because a court's obligations under Rule 23 are heightened in the settlement-class context, *Amchem*, 521 U.S. at 620, a district court's obligation to conduct a "rigorous analysis" to ensure that the prerequisites of Rule 23 have been met, *Comcast*, 569 U.S. at 33, is heightened as well. Here, the district court failed to conduct a rigorous inquiry into whether the proposed class could meet the Rule 23 prerequisites on the mistaken assumption that the standard for certification was lessened in the settlement context. Because our precedent raises grave concerns about the viability of a nationwide class in this context, *see Mazza*, 666 F.3d at 596–97, this certification decision cannot stand.

IV

Because the district court may yet determine, after a rigorous Rule 23 analysis, that it may certify a settlement class and approve a settlement, we briefly clarify some principles of attorneys' fee approval for the district court on remand. *See, e.g.*, *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 820–22 (3d Cir. 1995). When awarding attorneys' fees in a class action, the district court has "an independent obligation to ensure that the award, like the settlement itself, is reasonable, even if the parties have already agreed to an amount." *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 941 (9th Cir. 2011). Therefore, we have "encouraged courts to guard against an unreasonable result by cross-checking their

calculations against a second method." *Id.* at 944. "In this circuit, there are two primary methods to calculate attorneys fees: the lodestar method and the percentage-of-recovery method." *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 949 (9th Cir. 2015). "Under the percentage-of-recovery method, the attorneys' fees equal some percentage of the common settlement fund; in this circuit, the benchmark percentage is 25%." *Id.* (citing *Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d at 942); *see also Hanlon*, 150 F.3d at 1029. If the district court employs the lodestar method, but calculates an award that "overcompensates the attorneys according to the 25% benchmark standard, then a second look to evaluate the reasonableness of the hours worked and rates claimed is appropriate." *In re Coordinated Pretrial Proceedings in Petroleum Prod. Antitrust Litig.*, 109 F.3d 602, 607 (9th Cir. 1997). When a district court fails to conduct a "comparison between the settlement's attorneys' fees award and the benefit to the class or degree of success in the litigation" or a "comparison between the lodestar amount and a reasonable percentage award," we may remand the case to the district court for further consideration. *Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d at 943; *see also In re HP Inkjet Printer Litig.*, 716 F.3d 1173, 1190 (9th Cir. 2013). Indeed, in the absence of an adequate explanation of whether the award is proportionate to the benefit obtained for the class, "we have no choice but to remand the case to the district court to permit it to make the necessary calculations and provide the necessary explanations." *McCown v. City of Fontana*, 565 F.3d 1097, 1102 (9th Cir. 2009).

Here, the district court used the lodestar method to calculate attorneys' fees, awarding approximately $9 million in attorneys' fees and costs. However, the court failed to calculate the value of the settlement in order to ensure that the

attorneys' fees were not excessive in proportion to the settlement value. Although the court mentioned that the settling parties had earlier estimated the value of the proposed settlement at $210 million, it did not make a finding regarding the actual value of the settlement based on claims made, and the claims data in the record indicates that the amount of settlement funds claimed by class members was far lower.[26] Moreover, the court failed to address objectors' reasonable questions about the value of the settlement, for example, whether the value for class members who began participating in the LRP before the settlement, and who elected to remain in the LRP or who switched from the LRP to the lump sum option, could be attributed to the attorneys' efforts in this litigation.[27] Because the district court could not compare the fees award to the settlement value without considering these questions and determining the actual

[26] Although the settling parties filed expert reports, the district court did not discuss or address them in any way. An examination of the reports, would have likely led the district court to probe some of expert's questionable assumptions, such as the assumption that car owners who entered the LRP program before the settlement would own their cars for a shorter period of time than car owners who entered the LRP program after the settlement, and the assumption that all of the class members who entered the LRP program after the settlement would not have done so of their own accord regardless of the settlement.

[27] The dissent contends that "we have rejected objectors' arguments that a federal investigation merits a reduction in class counsel's fees," citing *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1048 n.3 (9th Cir. 2002). *See* Dissent at 80. This is incorrect. *Vizcaino* concluded that the federal investigation was irrelevant to the pivotal issue in the suit, and therefore concluded that it did not merit a reduction in fees. By contrast, the EPA investigation here established that Hyundai and Kia had misstated fuel efficiency estimates for certain models, which was the pivotal issue in this class action, and which directly led Hyundai and Kia to implement the LRP program.

settlement value, it failed "to assure itself—and us—that the amount awarded was not unreasonably excessive in light of the results achieved." *Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d at 943.

A district court must also provide adequate justification for the use of a multiplier, which is appropriate in only "rare" or "exceptional" cases. *See Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 554 (2010). Here, the district court's reasoning for enhancing the lodestar amount by a multiplier for class counsel, namely that the *Hunter* and *Brady* multiplier was warranted by the "complexity and volume of work that counsel engaged in," and that the *Espinosa* multiplier was warranted by the risk that *Espinosa* counsel assumed by filing a lawsuit before the announcement of the LRP, is insufficient to explain why an enhancement is warranted, particularly given objectors' concerns that the settlement confers only modest benefits to the class, *see Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d at 942 (holding that district courts should "award only that amount of fees that is reasonable in relation to the results obtained," even where counting all hours reasonably spent would produce a larger fees award) (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 440 (1983)).[28]

[28] We also disagree with the district court's conclusion that "the issue of collusion is not present in the attorney[s'] fees context" because "the attorney[s'] fees were awarded separately from the class recovery and did not impact class recovery." The district court's responsibility to conduct an independent inquiry into the reasonableness of attorneys' fees is of equal, if not greater, importance when attorneys' fees are awarded separately from the class award. *See Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d at 943. Indeed, we have identified this exact arrangement as one of the "subtle signs" of collusion in the settlement context. *See id.* at 947. Similar to the "clear sailing agreement" examined in *Bluetooth Headset Prods. Liab. Litig.*, the parties reached an agreement on the

On remand, if the district court properly approves class certification and a settlement, the district court must determine what value was created by the settlement and take a closer look at the reasonableness of the attorneys' fees in light of the results achieved.[29]

V

We conclude that the district court abused its discretion in certifying a nationwide settlement class without conducting a rigorous predominance analysis under Rule 23(b)(3) to determine whether variations in state consumer protection laws, or individual factual questions regarding exposure to the misleading statements, precluded certification.[30] We vacate class certification and remand to the district court for

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amount of attorneys' fees to be paid in the *Hunter* and *Brady* actions, and the defendants did not contest the fees before the district court.

[29] In light of our decision that the district court abused its discretion in certifying a settlement class under Rule 23(b)(3) without conducting a choice of law analysis and considering differences in state consumer protection laws, we do not reach the objection raised by James Feinman, counsel for the *Gentry* plaintiffs, that the district court abused its discretion in not awarding him attorneys' fees.

[30] Objectors raised a number of additional arguments, including claims that: the district court abused its discretion in certifying the settlement class because named plaintiffs did not adequately represent the interests of the class, as required under Rule 23(a)(4); the district court's failure to conduct a choice of law analysis violated absent class members' due process rights; the district court's failure to certify a Virginia subclass violated class members' due process rights; and the settlement was not fair and adequate under Rule 23(e). Because we conclude that the district court abused its discretion in certifying the class under Rule 23(b)(3), we do not consider these arguments. *See Wang*, 737 F.3d at 546.

further proceedings consistent with this opinion. Each party will bear its own costs on appeal.

VACATED AND REMANDED.

NGUYEN, Circuit Judge, dissenting:

"Economic reality dictates" that this consumer lawsuit "proceed as a class action or not at all." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 161 (1974). By championing the cause of a handful of objectors and their attorneys (who were denied fees below) to decertify the class, the majority deprives thousands of consumers of any chance to recover what is, conservatively speaking, a more than $159 million settlement.[1] In doing so, the majority relies on arguments never raised by the objectors, contravenes precedent, and disregards reasonable factual findings made by the district court after years of extensive litigation.

The majority also deals a major blow to multistate class actions. Contrary to our case law and that of our sister circuits, the majority shifts the burden of proving whether foreign law governs class claims from the foreign law proponent—here, the objectors—to the district court or class counsel. This newly invented standard significantly burdens

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[1] The majority attempts to soften its decision by noting that its vacatur of the class certification "does not mean that the court is foreclosed from certifying a class (or subclasses) on remand." Opinion at 52. But this sentiment is undercut by the majority's acknowledged "grave concerns about the viability of a nationwide class in this [case's] context." Opinion at 56.

our overloaded district courts, creates a circuit split, and runs afoul of the doctrine established long ago in *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938). Next, in excluding used car owners from the class, the majority misapplies the rule that consumer claims merely require proof that the *public*—not any individual—is likely to be deceived. Lastly, the majority bases its clarification of the district court's attorneys' fees award on a flawed reading of the record and a disregard of our usual deferential review.

I. Rule 23's predominance inquiry was readily met

Both we and our sister circuits have long held that a nationwide class action cannot be decertified simply because there are "differences between state consumer protection laws." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1022–23 (9th Cir. 1998); *In re Mex. Money Transfer Litig.*, 267 F.3d 743, 747 (7th Cir. 2001) ("[N]ationwide classes are certified routinely even though every state has its own [laws.]"). Far from imposing geographic limitations, the predominance inquiry under Rule 23(b)(3) simply tests whether questions common to the class "are more prevalent or important" than individual ones, *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1045 (2016) (citation omitted), a standard which is "readily met" in consumer class actions, *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 625 (1997). "Predominance is not, however, a matter of nose-counting. Rather, more important questions apt to drive the resolution of the litigation are given more weight in the predominance analysis over individualized questions which are of considerably less significance to the claims of the class." *Torres v. Mercer Canyons Inc.*, 835 F.3d 1125, 1134 (9th Cir. 2016) (citation omitted). Therefore, even if just one common question predominates, "the action may be considered proper under

Rule 23(b)(3) even though other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members." *Tyson*, 136 S. Ct. at 1045 (citation omitted).

Here, the district court concluded that the following undisputed common questions predominated over individualized issues: "[w]hether the fuel economy statements were in fact accurate" and "whether defendants knew that their fuel economy statements were false or misleading." The district court also found that the class claims were subject to common proof because the fuel economy statements were "uniformly" made by Defendants via "Monroney stickers and nationwide advertising." These types of common issues, which turn on a common course of conduct by the defendant, establish predominance in nationwide class actions. *Hanlon*, 150 F.3d at 1022–23 (affirming certification of a nationwide settlement class of car owners because common questions as to defendant's knowledge and existence of the problem predominated over state law variations); *Edwards v. First Am. Corp.*, 798 F.3d 1172, 1182–83 (9th Cir. 2015) (reversing denial of a nationwide consumer class certification because the defendants' "common scheme, if true, presents a significant aspect of [defendants'] transactions"). Neither the objectors nor the majority adhere to these precedents.

II. Neither the district court nor class counsel had a duty to raise arguments on objectors' behalf, nor can a class action be decertified for failure to do so

The majority's first misstep in the predominance analysis is a subtle, but dispositive, departure from our nationwide class action jurisprudence. In violation of controlling choice-

of-law rules, the majority places the burden on the district court or class counsel to extensively canvass every state's laws and determine that none other than California's apply. Opinion at 28, 52. This is wrong for three reasons. First, because the objectors here bore the burden and failed to meet it, the class claims are controlled by California law. Second, the majority's reassignment of the burden cannot be justified under Rule 23, which is silent on choice-of-law issues and requires class counsel to prove predominance, but not a negative. Nor can the majority rely on the combination of Rule 23 and CAFA diversity jurisdiction to flip the burden. Doing so violates the *Erie* doctrine, which requires a California federal court sitting in diversity jurisdiction to apply California's choice-of-law rules, even where a federal rule is involved. Third, the majority's heavy reliance on *Amchem* is misplaced because that case did not address choice-of-law issues and involved conflicts between potential claimants that are not present here.

A. The objectors failed to meet their choice-of-law burden

As the majority acknowledges, California's choice-of-law rules control the outcome of this case. Opinion at 29, 50. Under these rules, California law applies "unless a party litigant timely invokes the law of a foreign state," in which case it is "the foreign law proponent" who must "shoulder the burden of demonstrating that foreign law, rather than California law, should apply to class claims." *Wash. Mut. Bank, FA v. Superior Court*, 15 P.3d 1071, 1080–81 (Cal. 2001) (citation omitted); *Pokorny v. Quixtar, Inc.*, 601 F.3d 987, 995 (9th Cir. 2010). The "foreign law proponent" here, of course, is the objectors.

To meet their burden, the objectors must satisfy the three-step governmental interest test. *Wash. Mut.*, 15 P.3d at 1080–81; *Pokorny*, 601 F.3d at 994–95. Under that test, the objectors must prove that: (1) the law of the foreign state "materially differs from the law of California," *Wash. Mut.*, 15 P.3d at 1080–81, meaning that the law differs "with regard to the particular issue in question"; (2) a "true conflict exists," meaning that each state has an interest in the application of its own law to "the circumstances of the particular case"; and (3) the foreign state's interest would be "more impaired" than California's interest if California law were applied. *Kearney v. Salomon Smith Barney, Inc.*, 137 P.3d 914, 922 (Cal. 2006); *Pokorny*, 601 F.3d at 994–95. If the objectors fail to meet their burden at any step in the analysis, the district court "may properly find California law applicable without proceeding" to the rest of the analysis. *Pokorny*, 601 F.3d at 995 (quoting *Wash. Mut.*, 15 P.3d at 1081).[2]

The majority faults the district court for not sua sponte surveying all 50 states' laws to prove that none other than California's should apply. But, to the extent anyone was obliged to analyze the laws of other states, that burden fell squarely on the objectors—and they failed to meet it. No objector even mentioned, much less conducted, the correct

[2] The objectors' burden is not the "modest" burden applicable when an out-of-state defendant invokes its due process right to be free from arbitrarily applied state law. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818 (1985). We cannot conflate the due process rights of out-of-state defendants with those of objectors given that the "burdens placed by a State upon an absent class-action plaintiff are not of the same order or magnitude as those it places upon an absent defendant." *Id.* at 808. While the objectors have a due process right to opt out of the settlement, they have no due process right to dictate which state's law applies to the class. *See id.* at 814 (rejecting objectors' due process challenge to settlement).

choice-of-law analysis. Nor did any objector explain how, under the facts of this case, they satisfied the governmental interest test's three elements. "Where, as here, parties do not address choice-of-law issues, California courts presumptively apply California law." *Johnson v. Lucent Techs. Inc.*, 653 F.3d 1000, 1008 (9th Cir. 2011). Given the objectors' failure to prove that the law of a state other than California applied, the district court acted well within its discretion in certifying the class.

The majority acknowledges, as it must, that the objectors carry the burden. Opinion at 30. But it does not acknowledge that the objectors entirely failed to do so here. Instead, the majority implies that a few sentences in the objectors' opposition to class certification constitute a developed choice of law analysis. Opinion at 44–46. But in that opposition, the *Gentry* objectors clearly argue that California *contractual* choice of law provisions should govern, citing explicitly to three contracts entered into by their named class representatives. "California has two different analyses for selecting which law should be applied in an action": the contractual choice-of-law provisions analysis from *Nedlloyd Lines B.V. v. Super. Ct.*, 834 P.2d 1148 (Cal. 1992), and, "[a]lternatively," the governmental interests test. *Wash. Mut.*, 15 P.3d at 1077. Apart from a passing reference to *Washington Mutual*, the objectors never even addressed the governmental interests test before the district court. They certainly did not meet their burden of showing that foreign law should apply.[3]

[3] Indeed, the lead plaintiff in the *Gentry* tag-along action (the only *Gentry* objector to appeal) sought to hold hostage any class recovery under the settlement unless she and her attorney were certified to represent a Virginia subclass that, by her own concession, would recover *nothing*

Our precedent recognizes that when, as here, the foreign law proponent fails to meet its burden, neither the district court nor class counsel is obligated to address choice-of-law issues, nor will a class action be decertified for lack of such analysis. In *Harmsen v. Smith*, for example, we rejected the argument that California law could not be applied to a class which included non-Californians, even though the district court conducted no choice-of-law analysis. 693 F.2d 932, 946–47 (9th Cir. 1982). There, the foreign law proponent challenged the ability of non-California class members to recover under California fraud and tort claims that, like the claims here, arose from the defendants' misrepresentations. *Id.* at 946, 935–37. The district court rejected the argument on a procedural ground, which we did not embrace on appeal. *Id.* at 946. However, we did not fault the district court for failing to raise and then refute arguments favoring another state's law. Instead, we placed the onus where it belonged: on the foreign law proponent who "failed to show, as required by California law, that the law of other states relating to the [class] claims is significantly different from California's and, more importantly, that the interests of other states would be impaired by application of California law to these non-resident plaintiffs." *Id.* at 947; *accord Pokorny*, 601 F.3d at 994–96 (affirming application of California law because the foreign law proponent failed to meet its burden under California's governmental interest test).

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because her claim was "time-barred" under Virginia law. Given that concession, any textual differences between the two states' statutes are not "material" because they do not "make a difference in this litigation": they do not result in a greater recovery under Virginia rather than California law. *Mazza v. Am. Honda Motor Co., Inc.*, 666 F.3d 581, 590 (9th Cir. 2012).

This case is even more straightforward than *Harmsen*, as the objectors here did not advance *any* argument under the governmental interest test, and therefore we must "apply California law." *Johnson*, 653 F.3d at 1008. The objectors' silence is a far cry from *Mazza*—the only case from this circuit to which the majority analogizes. There, the foreign law proponent (the defendant) "exhaustively detailed the ways in which California law differs from the laws of the 43 other jurisdictions" and showed how applying the facts to those disparate state laws made "a difference in this litigation." *Mazza v. Am. Honda Motor Co., Inc.*, 666 F.3d 581, 590–91 (9th Cir. 2012). Unlike class counsel here, the plaintiffs in *Mazza* did "not contest these differences[.]" *Id.* at 591 n.3. Weighing these arguments and concessions, a divided panel concluded it was error to find that the defendant had "not met its burden" to show that foreign law applied "[u]nder the facts and circumstances of this case." *Id.* at 591, 594. In light of that unique record, *Mazza* stands as a rare exception to the general rule that "[p]redominance is a test readily met" in consumer class actions. *Amchem*, 521 U.S. at 625.

We have never held, in *Mazza* or any other case, that a class cannot be certified unless a district court sua sponte raises and refutes arguments on the objectors' behalf in support of foreign law. Rather, we have made clear that, if the "*parties* do not address choice-of-law issues, California courts presumptively apply California law." *Johnson*, 653 F.3d at 1008 (emphasis added). After all, the court, as an impartial arbiter, need not do a party's "work for it, either by manufacturing its legal arguments, or by combing the record on its behalf for factual support." *See W. Radio Servs. Co. v. Qwest Corp.*, 678 F.3d 970, 979 (9th Cir. 2012). Nor is any duty triggered if a district court becomes aware that multiple

states' laws may apply; as *Mazza* confirmed, the mere "fact that two or more states are involved does not itself indicate that there is a conflict of law." 666 F.3d at 590 (quoting *Wash. Mut.*, 15 P.3d at 1080). The district court therefore had no duty to dig up briefing from two years earlier in the *Espinosa* action and refashion those arguments for the objectors' benefit.

B. Under the *Erie* doctrine, CAFA and Rule 23 cannot reassign the foreign law proponent's burden because it is substantive state law

The majority's reassignment of the burden under California's choice-of-law rules also violates the *Erie* doctrine. A federal court sitting in diversity jurisdiction must "apply the substantive law of the state in which it sits, including choice-of-law rules"—even where a federal rule or statute is involved. *Harmsen*, 693 F.2d at 946–47; *Manalis Fin. Co. v. United States*, 611 F.2d 1270, 1272 (9th Cir. 1980) ("[W]hen application of a federal statute depends on an issue of state law, a federal court should defer to the ruling of the highest court of the state on that issue.").

Because California's choice-of-law rules are substantive state law for which the California Supreme Court is the final arbiter, the majority is not free to disregard them. *Harmsen*, 693 F.2d at 946–47; *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941). The California Supreme Court has unequivocally held that California law governs *unless* a foreign law proponent meets its burden to prove otherwise under the governmental interest test, *Wash. Mut.*, 15 P.3d at 1080–82, as we have repeatedly recognized. *See, e.g., Pokorny*, 601 F.3d at 995. Moreover, the California Supreme Court has made clear that the foreign law proponent bears the

burden even "when a nationwide class action is at issue," rejecting the idea that the "*proponent* of class certification [should] affirmatively demonstrate[] that California law is more properly applied." *Wash. Mut.*, 15 P.3d at 1081. Yet that is exactly what the majority demands here.

By flouting the applicable choice-of-law rules, the majority denies relief that the class would have obtained in state court.[4] In doing so, the majority's ruling creates exactly the "variations between state and federal" outcomes that the *Erie* doctrine is designed to combat. *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 430 (1996); *Beeman v. Anthem Prescription Mgmt., LLC*, 689 F.3d 1002, 1005 (9th Cir. 2012) (en banc) (critiquing panel's misapplication of state law for violating *Erie* by creating "inconsistent" results in state and federal courts). The Supreme Court has stressed the need to prevent inconsistent state and federal outcomes as the basis for its holding that federal courts must apply state choice-of-law rules. *Klaxon*, 313 U.S. at 496. As the Court explained, failure to follow these rules would allow "the accident of diversity of citizenship [to] disturb equal administration of justice in . . . state and federal courts sitting side by side," which would "do violence to the principle of uniformity within a state upon which the [*Erie*] decision is based." *Id.*

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[4] *See, e.g., Rutledge v. Hewlett-Packard Co.*, 190 Cal. Rptr. 3d 411, 431–32 (Cal. Ct. App. 2015) (reversing denial of nationwide consumer class certification where lower "court improperly placed the burden" on class counsel because "the burden was on [the foreign law proponent] to demonstrate that the interests of other state's laws were greater than California's interests").

Nor can the majority rely on the general principle that a district court should "protect" the class by conducting a "heightened" or "rigorous" analysis of whether class counsel has satisfied certain Rule 23 prerequisites. Opinion at 32, 51, 56–57. Rule 23 says nothing about how choice-of-law issues should be resolved, nor does it require class counsel or the district court to make choice-of-law arguments on the objectors' behalf. We should avoid importing into the class certification process "an additional hurdle" found nowhere in the Rule. *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1126 (9th Cir. 2017).

Moreover, the majority's position puts us at odds with the reasoned decisions of other circuits. The prevailing view amongst our sister circuits is that "variations in the rights and remedies available to injured class members under the various laws of the fifty states [do] not defeat commonality and predominance." *Sullivan v. DB Investments, Inc.*, 667 F.3d 273, 301 (3d Cir. 2011) (en banc) (alteration in original) (quoting *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 529 (3d Cir. 2004)). These circuits reject the notion that Rule 23 places the burden on anyone other than the objector to prove which law applies. *See Mex. Money*, 267 F.3d at 747 ("Why [class counsel] should have an obligation to find some way to defeat class treatment is a mystery."). As Judge Easterbrook has explained:

> It is best to bypass marginal theories if their presence would spoil the use of an aggregation device that on the whole is favorable to holders of small claims. Instead of requiring the plaintiffs to conduct what may be a snipe hunt, district judges should do what the court did here: Invite objectors to

> identify an available state-law theory that the representatives should have raised, and that if presented would have either increased the recovery or demonstrated the inappropriateness of class treatment.

Id. This burden allocation makes sense because Rule 23 does not come into play until *after* a foreign law proponent has proven that the class claims are governed by multiple states' laws. The majority's contrary holding sends a district court on exactly the "snipe hunt" that the Seventh Circuit warns against.

The problem created by the majority can easily be avoided simply by adhering to our own precedent, which is on all fours. In *Hanlon v. Chrysler Corp.*, we affirmed certification under Rule 23(b)(3) of a nationwide settlement class of car owners alleging violations of state consumer laws. 150 F.3d at 1017, 1022. There, as here, multiple class actions were filed and then consolidated in California following a federal agency's investigation, with the defendant announcing a remedial plan and entering into a settlement only after the class moved for certification. *Id.* at 1018. Like the *Gentry* objector in our appeal, an objector in *Hanlon* filed a late class action in another state and sought to litigate it in contravention of the district court's orders. *Id.* at 1019. We held that common questions as to the defendant's knowledge and the existence of the problem (the same questions at issue here) predominated, notwithstanding "variations in state law." *Id.* at 1020, 1022–23. In rejecting the objectors' argument that "the idiosyncratic differences between state consumer protection laws" defeated predominance, we reasoned that the claims revolved around a "common nucleus of facts" and applied the longstanding rule that "differing remedies" do not

preclude class certification. *Id.* at 1022–23. That same reasoning applies with even greater force here, where the class claims turn on the Defendants' common course of conduct (its fuel economy statements) and no objector established that the law of any other states applied.

C. The settlement raises no concerns about collusion

The majority implies that the settlement here raises the same concerns about collusion between class and defense counsel that animated *Amchem*. Opinion at 51. But this case is nothing like *Amchem*, which was the most "sprawling" class the Court had ever seen. 521 U.S. at 624. There, asbestos manufacturers agreed to settle with class counsel for several pending products liability cases only upon receiving a global release for as-yet-unfiled lawsuits by future claimants, who class counsel did not represent. *Id.* at 601. Unlike class counsel here, who litigated for years, the settling parties in *Amchem* never intended to litigate the future claimants' lawsuits. *Id.* at 601. Instead, within a single day, they filed a complaint, an answer, a proposed settlement, and a motion to certify a class of current and future claimants under various state products liability laws—none of which are implicated here. *Id.* at 601–03. The class encompassed individuals "exposed to different asbestos-containing products, for different amounts of time, in different ways, and over different periods," rendering some class members sick while others suffered "no physical injury." *Id.* at 624. But while the class definition was expansive, the remedies were anemic. The settlement allowed the defendants to unilaterally set the compensation for claims, capped the number of claims payable per year regardless of how many were filed, and bound the class in perpetuity despite allowing the defendants to withdraw after ten years. *Id.* at 604–05.

Unsurprisingly, the Court found the class untenable on multiple grounds, including inadequate representation, because of class members' conflicting interests. *Id.* at 627–28. Whereas current claimants, who suffered from lung cancer and other asbestos-related illnesses, wanted to maximize the current payout, future claimants, who were healthy at the time, had a strong interest in preserving funds should they become sick. *Id.* at 624. The Court also highlighted unexplained disparities between class members' recovery, with some class members receiving no compensation at all and others receiving hundreds of thousands less than the average recovery for that claim. *Id.* at 604, 610 n.14. It was in this collusive context that *Amchem* chided the district court for not devoting "undiluted, even heightened, attention" to Rule 23 criteria "designed to protect" absent class members and their right to proper notice and adequate representation. *Id.* at 620 (citing Rule 23(c) and (d)). Moreover, the Court expressly distinguished the case before it, where "individual stakes are high and disparities among class members great," from consumer class actions, where the predominance requirement is "readily met." *Id.* at 625.

The consumer class certified here raises none of the concerns identified in *Amchem*. As *Hanlon* explained in distinguishing *Amchem*, the "heart" of the problem there was the class members' conflicting interests: current claimants, who were sick, wanted to maximize the immediate payout, whereas healthy claimants had a strong interest in preserving funds in case they became ill in the future. *Hanlon*, 150 F.3d at 1020–21. Here, like in *Hanlon*, there are no such conflicts because all class members suffer from "the same problem"—cars with a fuel economy that is worse than advertised—for which they are all compensated, without any

of the onerous terms that *Amchem* found objectionable. *See id.* at 1021.

Nor does *Amchem* support decertification on the ground urged by the majority, namely, that the district court should have sua sponte catalogued the laws of all 50 state law to identify any variations and competing state interests. *Amchem* did not address, much less conduct, a choice-of-law analysis. The fundamental problem in *Amchem* was the factual differences between class members that created a conflict between potential claimants. *Id.* at 1020–21. And that conflict would have existed even if all the state laws at issue were identical.

Finally, faulting the district court at every turn, the majority fails to adhere to our deferential standard of review. When reviewing an order granting class certification, "we accord the district court noticeably more deference than when we review a denial." *Torres*, 835 F.3d at 1132 (quoting *Abdullah v. U.S. Sec. Assocs., Inc.*, 731 F.3d 952, 956 (9th Cir. 2013)). Our review of a class action settlement is "very limited" and we will "reverse only upon a strong showing that the district court's decision was a clear abuse of discretion." *Linney v. Cellular Alaska P'ship*, 151 F.3d 1234, 1238 (9th Cir. 1998) (internal quotation marks omitted) (quoting *Class Plaintiffs v. Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992)). "This is especially true in light of the strong judicial policy that favors settlements, particularly where complex class action litigation is concerned." *Id.* (quoting *Class Plaintiffs*, 955 F.2d at 1276); *see also Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 963–64 (9th Cir. 2009). The majority's failure to apply a deferential standard of review is reflected in the opinion's unusual reliance on a *tentative* order in the *Espinosa* class action, which the district court never adopted.

See Opinion at 37–39, 52. But it is only the district court's final rulings—issued after it had the benefit of additional briefing, hearings, and over eight more months of discovery—which we are reviewing here.

III. Used car owners need not offer individualized proof under the reasonable consumer test, which asks only if the public is likely to be deceived

In excluding used car owners from the class, the majority again focuses on an argument not raised by the objectors and belied by the record. The reliance element of California consumer protection laws "does not require individualized proof" that each plaintiff was exposed to a specific misrepresentation. *Pulaski & Middleman, LLC v. Google, Inc.*, 802 F.3d 979, 986 (9th Cir. 2015) (internal quotation mark omitted) (quoting *In re Tobacco II Cases*, 207 P.3d 20, 35 (Cal. 2009)). Rather, under the "reasonable consumer test," reliance is presumed if "members of the public are likely to be deceived" by the defendant's misrepresentation. *Rubio v. Capital One Bank*, 613 F.3d 1195, 1204 (9th Cir. 2010) (quoting *Williams v. Gerber Prods. Co.*, 552 F.3d 934, 938 (9th Cir. 2008); *Tobacco II*, 207 P.3d at 29. In fact, the California Supreme Court has expressly rejected the view that a claim requires proof that purchasers "heard and had relied on specific misrepresentations." *Tobacco II*, 207 P.3d at 40.

Applying this standard, we routinely affirm class certification without demanding proof of every class member's exposure to the same misrepresentation. In *Gutierrez v. Wells Fargo Bank, NA*, for example, we upheld class certification because common issues predominated as to whether the public was likely to be deceived (and thus reliance could be presumed) by a bank's "misleading

marketing materials." 704 F.3d 712, 728–79 (9th Cir. 2012). The district court identified four exhibits that contained the bank's misleading marketing of its overdraft fees: a website, a 2001 and 2005 brochure, and a new account jacket from 2004 that was "customarily provided" at the opening of a new account. *Id.* at 729. On appeal, we did not limit the class to only those new account holders who read the jacket; instead, we upheld certification of a class that included all account holders who had incurred overdraft fees from 2004 to 2008. *Id.* at 718, 728–29. As we explained, the class was not overbroad because the "pervasive nature" of the marketing materials established reliance, as similar statements appeared in other advertising, which was enough to show reliance under California law. *Id.* at 729; *accord Blackie v. Barrack*, 524 F.2d 891, 902 (9th Cir.1975) (where there are "similar misrepresentations, . . . the class is united by a common interest in determining whether a defendant's course of conduct is in its broad outlines actionable, which is not defeated by slight differences in class members' positions").

Similarly, the district court here did not limit the class to those who saw the Monroney stickers on new cars because the fuel economy statements were also "uniformly" made in "nationwide advertising." The advertising campaign here was even more pervasive than in *Gutierrez*, with more than $100 million spent on a large number of print magazines, billboards, and TV commercials during the NFL playoffs, the Super Bowl, and the Academy Awards. The objectors do not refute any of this evidence, which in any event requires us to defer to the district court's factual finding even if another view "is equally or more" plausible. *Cooper v. Harris*, 137 S. Ct. 1455, 1465 (2017).

The omissions in the advertising campaign here bear no resemblance to the "smaller-scale" advertisements of "quite disparate information" in *Mazza*, to which the majority (but not the objectors) analogizes. 666 F.3d at 586, 595–96. We have distinguished *Mazza* to uphold class certification where, as here, the class suffers from an "informational injury," meaning "a common policy of non-disclosure" by the defendant. *Torres*, 835 F.3d at 1135. As we have explained, the outcome in *Mazza* was due to the defendant having "subjected only a small segment of an expansive class of car buyers to misleading material as part of a 'very limited' advertising campaign." *Id.* at 1137 (quoting *Mazza*, 666 F.3d at 595). But where there exists "a common failure to disclose information, and not merely a disparate series of affirmative statements," predominance is easily established. *Id.* at 1137–38; *accord In re First All. Mortg. Co.*, 471 F.3d 977, 985, 990–91 (9th Cir. 2006) (affirming consumer class certification under California law based on defendants' omissions and misrepresentations communicated through various loan officers).

Rather than apply clear error review, the majority faults the settling parties for purportedly "not identify[ing] any evidence in the record of [a] massive advertising campaign." Opinion at 55. But the settling parties directed us to such evidence, including the TV and print advertising discussed above. And, contrary to the majority's assertion, the advertisements' misleading fuel statements were not limited to only Elantra vehicles. Importantly, the settling parties might well have identified more evidence had the objectors actually made the argument that the majority advances here. The objectors' failure to do so waived the issue. *See W. Radio*, 678 F.3d at 979.

Finally, the majority mistakenly equates the uniform advertising campaign here with the asbestos exposure in *Amchem,* Opinion at 55, which involved different substantive state law. Unlike the products liability claims in *Amchem*, the consumer claims here do not turn on individualized proof of exposure. *See Rubio*, 613 F.3d at 1204. Moreover, predominance is not defeated simply because there may be "important matters . . . peculiar to some individual class members." *Tyson*, 136 S. Ct. at 1045; *Local Joint Exec. Bd. of Culinary/Bartender Tr. Fund v. Las Vegas Sands, Inc.*, 244 F.3d 1152, 1163 (9th Cir. 2001) (reversing denial of class certification despite "some variation" in claims and "some potential difficulty in proof").

IV. The attorneys' fees award was not an abuse of discretion

The district court correctly calculated the attorney's fee award using the lodestar method and then cross-checked that figure against the settlement's estimated value to make the factual finding that the "total amount of attorney's fees awarded in this case is far lower than . . . 25% of the settlement figure." The majority does not dispute this methodology, but criticizes the award based on its own miscalculation of the settlement's value and the mistaken belief that the court failed to address the objectors' questions. Opinion at 57–59. These are curious grounds for disapproval, as the objectors do not rely on them, instead confirming at oral argument that that their "only disagreement is with the *multiplier* that was applied to a portion of the fees." Oral Argument at 17:01– 17:25. In fact, the concerns that the objectors raised were addressed by the district court in several hearings and rounds of supplemental briefing.

The majority states that the court failed to answer the objectors' questions about whether the Lifetime Reimbursement Program ("LRP") portion of the settlement "could be attributed to the attorneys' efforts in this litigation," implying that the LRP was instead the result of the EPA investigation. Opinion at 58. But these questions were not raised by the objectors and, in any event, are answered by the district court's finding that the investigation only played a "part" in Defendants' announcement of the LRP on November 2, 2012. The LRP announcement came only after almost a year of dispositive motions, discovery, depositions, and expert reports, and just three weeks before a class certification hearing. It is therefore more than reasonable to infer, as the district court did, that this litigation pressured Defendants to announce the LRP.

Certainly, the claims here were bolstered by the EPA's finding that Defendants' fuel economy representations were inflated. Yet other important elements of the class claims remained unresolved. Where, as here, other "pivotal issue[s]" remain, we have rejected objectors' arguments that a federal investigation merits a reduction in class counsel's fees. *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1048 n.3 (9th Cir. 2002). And we have never before conjured arguments not advanced by objectors to discredit class counsel's role in diligently litigating a case to settlement simply because, along the way, an agency's findings *confirmed* the claims' viability. To the contrary, we have upheld certification of nationwide class actions even when they were filed *after* a federal agency's investigation established liability. *See Hanlon*, 150 F.3d at 1018.

Moreover, the record supports the district court's finding that attorneys' fees were "far lower" than 25% of the

settlement value even if we count only the portion of the settlement that is indisputably attributable to class counsel's efforts: LRP claims filed after December 31, 2013 (the original LRP enrollment deadline that the settlement extended). As reflected in several expert[5] and other reports, the net present value of LRP claims filed after that date totaled more than $65 million by March 26, 2015, which was still several months away from the July 6, 2015, claim deadline.[6] An attorneys' fees award of $8.9 million is less than 14% of this $65 million portion of the settlement.

The majority wrongly suggests that all class claims were worth less than "$44,000,000 in total value." Opinion at 48. The reports from which it plucks that number make clear that the $44 million reflected only *lump sum* payments for roughly 100,000 "completed claims" as of March 2015. That number does not include the $65 million in LRP claims filed after December 2013, nor the almost 42,000 "pending claims" that had not yet been paid, nor any other claims to be submitted in the more than three months before the July 6, 2015, claim deadline. Not only that, the majority's concerns about how to account for class members who switched from the LRP to a lump sum payment were addressed in expert reports that

[5] These expert reports were filed in appeal No. 15-56014 on March 10, 2016.

[6] That $65 million figure is the sum of the net present value of LRP claims filed from January through December 2014 with Hyundai ($13,698,496) and Kai ($12,535,120), plus net present value of LRP claims filed after that date with Hyundai ($21,862,156) and Kia ($17,655,276).

calculated the "incremental value" of the lump sum payments. These reports were never challenged below.[7]

The majority also suggests that "this exact arrangement" has been found to be "one of the 'subtle signs' of collusion." Opinion at 59–60 n.28 (quoting *In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935, 943, 947 (9th Cir. 2011)). This case could not be more different than *Bluetooth*, in which the settlement paid the class "zero dollars" and contained a "clear sailing" provision in which "defendants agreed not to object" to an award of attorneys' fees totaling eight times the cy pres award, and a "kicker" clause whereby "all fees not awarded would revert to defendants." 654 F.3d at 938, 947. The district court there made no findings under *either* the lodestar or the percentage method and instead awarded what "defendants agreed to pay." *Id.* 943. Here, the settlement has no clear sailing or kicker clauses, Defendants successfully litigated a reduction in fees, the court made findings, and the class received tens of millions of dollars. Moreover, the settlement here "was negotiated over multiple mediation sessions with a respected and experienced mediator," class counsel were "experienced," and class

[7] These reports reflect a total settlement value of, conservatively speaking, more than $159 million as of March 2015—three months before the July 6, 2015, claim deadline. That $159 million reflects the sum of the $65 million in LRP claims filed after December 31, 2013, another $50 million in LRP claims filed before that date, and $44 million in lump sum payments. Given that the settlement totaled $159 million well before the claim deadline, the district court was correct that the claims process was on track to reach an estimated $210 million. Where, as here, a settlement involves "a complicated formula from which valuable considerations of several kinds are provided to the class members," it is no abuse of discretion to use a settlement's "estimated value" when calculating fees. *Wing v. Asarco Inc.*, 114 F.3d 986, 990 (9th Cir. 1997).

members had plenty of opportunities to raise their concerns at seven hearings over seventeen months. The majority has "floated out the specter" of collusion, "but brought forth no facts to give that eidolon more substance." *Negrete v. Allianz Life Ins. Co. of N. Am.*, 523 F.3d 1091, 1099 (9th Cir. 2008).

Given that the objectors' sole quibble is with the multiplier used by the district court, and reviewing factual findings for clear error, affirmance should be an easy call. The district court's findings about the "complexity" of the work and the "risk" class counsel assumed by litigating this case are exactly the kind of findings that justify an upward lodestar adjustment. *Hanlon*, 150 F.3d at 1029. Based on similar findings, we have affirmed fee awards totaling a far greater percentage of the class recovery than the fees here. *See, e.g., Vizcaino*, 290 F.3d at 1047–48 (no abuse of discretion to award fees constituting 28% of the class's recovery given the "risk" assumed in litigating); *In re Pac. Enters. Sec. Litig.*, 47 F.3d 373, 379 (9th Cir. 1995) (no abuse of discretion where the "$4 million award (thirty-three percent [of the class's recovery]) for attorneys' fees is justified because of the complexity of the issues and the risks"). The majority's disregard of our usual deferential review is deeply troubling.

* * *

In decertifying this class of hundreds of thousands of car owners who were deceived, the majority effectively ensures that "no one will recover anything." *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 463 (9th Cir. 2000), *as amended* (June 19, 2000). "Settlement at least allows damages for some members of the class where damages might otherwise

be unobtainable for any member of the class." *Id.* Because the district court committed no error, I would affirm.

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 15-56014 D.C. No. 2:13-ml-02424-GW-FFM
Central District of California, Los Angeles

In re: HYUNDAI AND KIA FUEL ECONOMY LITIGATION,

KEHLIE R. ESPINOSA; NICOLE MARIE HUNTER; JEREMY WILTON; KAYLENE P. BRADY; GUNTHER KRAUTH; ERIC GRAEWINGHOLT; REECE PHILIP THOMSON; ALEX MATURANI; NILUFAR REZAI; JACK ROTTNER; LYDIA KIEVIT; REBECCA SANDERS; BOBBY BRANDON ARMSTRONG; SERGIO TORRES; RICHARD WOODRUFF; MARSHALL LAWRENCE GORDON; JOEL A. LIPMAN; JAMES GUDGALIS; MARY P. HOESSLER; STEPHEN M. HAYES; BRIAN REEVES; SAM HAMMOND; MARK LEGGETT; EDWIN NAYTHONS; MICHAEL WASHBURN; IRA D. DUNST; BRIAN WEBER; KAMNEEL MAHARAJ; KIM IOCOVOZZI; HERBERT J. YOUNG; LINDA HASPER; LESLIE BAYARD; TRICIA FELLERS; ORLANDO ELLIOTT; JAMES BONSIGNORE; MARGARET SETSER; GUILLERMO QUIROZ; DOUGLAS KURASH; ANDRES CARULLO; LAURA S. SUTTA; GEORGIA L. THOMAS; ERIC J. OLSON; JENNIFER MYERS; TOM WOODWARD; JEROLD TERHOST; CAMERON JOHN CESTARO; DONALD BROWN; MARIA FIGUEROA; CONSTANCE MARTYN; THOMAS GANIM; DANIEL BALDESCHI; LILLIAN

E. LEVOFF; GIUSEPPINA ROBERTO; ROBERT TRADER; SEAN GOLDSBERRY; CYNTHIA NAVARRO; OWEN CHAPMAN; MICHAEL BREIN; TRAVIS BRISSEY; RONALD BURKARD; ADAM CLOUTIER; STEVEN CRAIG; JOHN J. DIXSON; ERIN L. FANTHORPE; ERIC HADESH; MICHAEL P. KEETH; JOHN KIRK MACDONALD; MICHAEL MANDAHL; NICHOLAS MCDANIEL; MARY J. MORAN-SPICUZZA; GARY PINCAS; BRANDON POTTER; THOMAS PURDY; ROCCO RENGHINI; MICHELLE SINGLTEON; KEN SMILEY; GREGORY M SONSTEIN; ROMAN STARNO; GAYLE A. STEPHENSON; ANDRES VILLICANA; RICHARD WILLIAMS; BRADFORD L. HIRSCH; ASHLEY CEPHAS; DAVID E. HILL; CHAD MCKINNEY; MORDECHAI SCHIFFER; LISA SANDS; DONALD KENDIG; KEVIN GOBEL; ERIC LARSON; LIN MCKINNEY; RYAN CROSS; PHILLIP HOFFMAN; DEBRA SIMMONS; ABELARDO MORALES; PETER BLUMER; CAROLYN HAMMOND; MELISSA LEGGETT; KELLY MOFFETT; EVAN GROGAN; CARLOS MEDINA; ALBERTO DOMINGUEZ; CATHERINE BERNARD; MICHAEL BREIEN; LAURA GILL; THOMAS SCHILLE; JUDITH STANTON; RANDY RICKERT; BRYAN ZIRKEL; JAMES KUNDRAT; ROBERT SMITH; MARIA KOTOVA; JOSIPA CASEY; LUAN SNYDER; BEN BAKER; BRIAN NGUYEN; HATTIE WILLIAMS; BILL HOLVEY; LOURDES VARGAS; KENDALL SNYDER; NOMER MEDINA; SAMERIA GOFF; URSULA PYLAND; MARCELL CHAPMAN; KAYE KURASH; HOLLY AMROMIN; JOHN CHAPMAN; MARY D'ANGELO; GEORGE RUDY; AYMAN MOUSA; SHELLY HENDERSON; JEFFREY HATHAWAY; DENNIS J.

MURPHY; DOUGLAS A. PATTERSON; JOHN GENTRY; LINDA RUTH SCOTT; DANIELLE KAY GILLELAND; JOSEPH BOWE; MICHAEL DESOUTO, Plaintiffs-Appellees,

GREG DIRENZO, Petitioner-Appellee,

HYUNDAI MOTOR AMERICA; KIA MOTORS AMERICA; KIA MOTORS CORPORATION; GROSSINGER AUTOPLEX, INC., FKA Grossinger Hyundai; JOHN KRAFCIK; HYUNDAI MOTOR COMPANY; SARAH KUNDRAT, Defendants-Appellees,

v.

CAITLIN AHEARN; ANDREW YORK, Objectors-Appellants.

No. 15-56025 D.C. No. 2:13-ml-02424-GW-FFM

In re: HYUNDAI AND KIA FUEL ECONOMY LITIGATION,

KEHLIE R. ESPINOSA; NICOLE MARIE HUNTER; JEREMY WILTON; KAYLENE P. BRADY; GUNTHER KRAUTH; ERIC GRAEWINGHOLT; REECE PHILIP THOMSON; ALEX MATURANI; NILUFAR REZAI; JACK ROTTNER; LYDIA KIEVIT; REBECCA SANDERS; BOBBY BRANDON ARMSTRONG; SERGIO TORRES; RICHARD WOODRUFF; MARSHALL LAWRENCE GORDON; JOEL A. LIPMAN; JAMES GUDGALIS; MARY P. HOESSLER; STEPHEN M.

HAYES; BRIAN REEVES; SAM HAMMOND; MARK LEGGETT; EDWIN NAYTHONS; MICHAEL WASHBURN; IRA D. DUNST; BRIAN WEBER; KAMNEEL MAHARAJ; KIM IOCOVOZZI; HERBERT J. YOUNG; LINDA HASPER; LESLIE BAYARD; TRICIA FELLERS; ORLANDO ELLIOTT; JAMES BONSIGNORE; MARGARET SETSER; GUILLERMO QUIROZ; DOUGLAS KURASH; ANDRES CARULLO; LAURA S. SUTTA; GEORGIA L. THOMAS; ERIC J. OLSON; JENNIFER MYERS; TOM WOODWARD; JEROLD TERHOST; CAMERON JOHN CESTARO; DONALD BROWN; MARIA FIGUEROA; CONSTANCE MARTYN; THOMAS GANIM; DANIEL BALDESCHI; LILLIAN E. LEVOFF; GIUSEPPINA ROBERTO; ROBERT TRADER; SEAN GOLDSBERRY; CYNTHIA NAVARRO; OWEN CHAPMAN; MICHAEL BREIN; TRAVIS BRISSEY; RONALD BURKARD; ADAM CLOUTIER; STEVEN CRAIG; JOHN J. DIXSON; ERIN L. FANTHORPE; ERIC HADESH; MICHAEL P. KEETH; JOHN KIRK MACDONALD; MICHAEL MANDAHL; NICHOLAS MCDANIEL; MARY J. MORAN-SPICUZZA; GARY PINCAS; BRANDON POTTER; THOMAS PURDY; ROCCO RENGHINI; MICHELLE SINGLTEON; KEN SMILEY; GREGORY M SONSTEIN; ROMAN STARNO; GAYLE A. STEPHENSON; ANDRES VILLICANA; RICHARD WILLIAMS; BRADFORD L. HIRSCH; ASHLEY CEPHAS; DAVID E. HILL; CHAD MCKINNEY; MORDECHAI SCHIFFER; LISA SANDS; DONALD KENDIG; KEVIN GOBEL; ERIC LARSON; LIN MCKINNEY; RYAN CROSS; PHILLIP HOFFMAN; DEBRA SIMMONS; ABELARDO MORALES; PETER BLUMER; CAROLYN HAMMOND; MELISSA LEGGETT;

KELLY MOFFETT; EVAN GROGAN; CARLOS MEDINA; ALBERTO DOMINGUEZ; CATHERINE BERNARD; MICHAEL BREIEN; LAURA GILL; THOMAS SCHILLE; JUDITH STANTON; RANDY RICKERT; BRYAN ZIRKEL; JAMES KUNDRAT; ROBERT SMITH; MARIA KOTOVA; JOSIPA CASEY; LUAN SNYDER; BEN BAKER; BRIAN NGUYEN; HATTIE WILLIAMS; BILL HOLVEY; LOURDES VARGAS; KENDALL SNYDER; NOMER MEDINA; SAMERIA GOFF; URSULA PYLAND; MARCELL CHAPMAN; KAYE KURASH; HOLLY AMROMIN; JOHN CHAPMAN; MARY D'ANGELO; GEORGE RUDY; AYMAN MOUSA; SHELLY HENDERSON; JEFFREY HATHAWAY; DENNIS J. MURPHY; DOUGLAS A. PATTERSON; JOHN GENTRY; LINDA RUTH SCOTT; DANIELLE KAY GILLELAND; JOSEPH BOWE; MICHAEL DESOUTO, Plaintiffs-Appellees,

GREG DIRENZO, Petitioner-Appellee,

HYUNDAI MOTOR AMERICA; KIA MOTORS AMERICA; KIA MOTORS CORPORATION; GROSSINGER AUTOPLEX, INC., FKA Grossinger Hyundai; JOHN KRAFCIK; HYUNDAI MOTOR COMPANY; SARAH KUNDRAT, Defendants-Appellees,

v.

ANTONIO SBERNA, Objector-Appellant,

No. 15-56059 D.C. No. 2:13-ml-02424-GW-FFM

In re: HYUNDAI AND KIA FUEL ECONOMY LITIGATION

KEHLIE R. ESPINOSA; NICOLE MARIE HUNTER; JEREMY WILTON; KAYLENE P. BRADY; GUNTHER KRAUTH; ERIC GRAEWINGHOLT; REECE PHILIP THOMSON; ALEX MATURANI; NILUFAR REZAI; JACK ROTTNER; LYDIA KIEVIT; REBECCA SANDERS; BOBBY BRANDON ARMSTRONG; SERGIO TORRES; RICHARD WOODRUFF; MARSHALL LAWRENCE GORDON; JOEL A. LIPMAN; JAMES GUDGALIS; MARY P. HOESSLER; STEPHEN M. HAYES; BRIAN REEVES; SAM HAMMOND; MARK LEGGETT; EDWIN NAYTHONS; MICHAEL WASHBURN; IRA D. DUNST; BRIAN WEBER; KAMNEEL MAHARAJ; KIM IOCOVOZZI; HERBERT J. YOUNG; LINDA HASPER; LESLIE BAYARD; TRICIA FELLERS; ORLANDO ELLIOTT; JAMES BONSIGNORE; MARGARET SETSER; GUILLERMO QUIROZ; DOUGLAS KURASH; ANDRES CARULLO; LAURA S. SUTTA; GEORGIA L. THOMAS; ERIC J. OLSON; JENNIFER MYERS; TOM WOODWARD; JEROLD TERHOST; CAMERON JOHN CESTARO; DONALD BROWN; MARIA FIGUEROA; CONSTANCE MARTYN; THOMAS GANIM; DANIEL BALDESCHI; LILLIAN E. LEVOFF; GIUSEPPINA ROBERTO; ROBERT TRADER; SEAN GOLDSBERRY; CYNTHIA NAVARRO; OWEN CHAPMAN; MICHAEL BREIN; TRAVIS BRISSEY; RONALD BURKARD; ADAM CLOUTIER; STEVEN CRAIG; JOHN J. DIXSON; ERIN L. FANTHORPE; ERIC HADESH; MICHAEL

P. KEETH; JOHN KIRK MACDONALD; MICHAEL MANDAHL; NICHOLAS MCDANIEL; MARY J. MORAN-SPICUZZA; GARY PINCAS; BRANDON POTTER; THOMAS PURDY; ROCCO RENGHINI; MICHELLE SINGLTEON; KEN SMILEY; GREGORY M SONSTEIN; ROMAN STARNO; GAYLE A. STEPHENSON; ANDRES VILLICANA; RICHARD WILLIAMS; BRADFORD L. HIRSCH; ASHLEY CEPHAS; DAVID E. HILL; CHAD MCKINNEY; MORDECHAI SCHIFFER; LISA SANDS; DONALD KENDIG; KEVIN GOBEL; ERIC LARSON; LIN MCKINNEY; RYAN CROSS; PHILLIP HOFFMAN; DEBRA SIMMONS; ABELARDO MORALES; PETER BLUMER; CAROLYN HAMMOND; MELISSA LEGGETT; KELLY MOFFETT; EVAN GROGAN; CARLOS MEDINA; ALBERTO DOMINGUEZ; CATHERINE BERNARD; MICHAEL BREIEN; LAURA GILL; THOMAS SCHILLE; JUDITH STANTON; RANDY RICKERT; BRYAN ZIRKEL; JAMES KUNDRAT; ROBERT SMITH; MARIA KOTOVA; JOSIPA CASEY; LUAN SNYDER; BEN BAKER; BRIAN NGUYEN; HATTIE WILLIAMS; BILL HOLVEY; LOURDES VARGAS; KENDALL SNYDER; NOMER MEDINA; SAMERIA GOFF; URSULA PYLAND; MARCELL CHAPMAN; KAYE KURASH; HOLLY AMROMIN; JOHN CHAPMAN; MARY D'ANGELO; GEORGE RUDY; AYMAN MOUSA; SHELLY HENDERSON; JEFFREY HATHAWAY; DENNIS J. MURPHY; DOUGLAS A. PATTERSON; JOHN GENTRY; LINDA RUTH SCOTT; DANIELLE KAY GILLELAND; JOSEPH BOWE; MICHAEL DESOUTO, Plaintiffs-Appellees,

GREG DIRENZO, Petitioner-Appellee,

HYUNDAI MOTOR AMERICA; KIA MOTORS AMERICA; KIA MOTORS CORPORATION; GROSSINGER AUTOPLEX, INC., FKA Grossinger Hyundai; JOHN KRAFCIK; HYUNDAI MOTOR COMPANY; SARAH KUNDRAT, Defendants-Appellees,

v.

PERI FETSCH, Objector-Appellant.

No. 15-56061 D.C. No. 2:13-ml-02424-GW-FFM

In re: HYUNDAI AND KIA FUEL ECONOMY LITIGATION

KEHLIE R. ESPINOSA; NICOLE MARIE HUNTER; JEREMY WILTON; KAYLENE P. BRADY; GUNTHER KRAUTH; ERIC GRAEWINGHOLT; REECE PHILIP THOMSON; ALEX MATURANI; NILUFAR REZAI; JACK ROTTNER; LYDIA KIEVIT; REBECCA SANDERS; BOBBY BRANDON ARMSTRONG; SERGIO TORRES; RICHARD WOODRUFF; MARSHALL LAWRENCE GORDON; JOEL A. LIPMAN; JAMES GUDGALIS; MARY P. HOESSLER; STEPHEN M. HAYES; BRIAN REEVES; SAM HAMMOND; MARK LEGGETT; EDWIN NAYTHONS; MICHAEL WASHBURN; IRA D. DUNST; BRIAN WEBER; KAMNEEL MAHARAJ; KIM IOCOVOZZI; HERBERT J. YOUNG; LINDA HASPER; LESLIE BAYARD; TRICIA FELLERS; ORLANDO ELLIOTT; JAMES BONSIGNORE; MARGARET SETSER;

GUILLERMO QUIROZ; DOUGLAS KURASH; ANDRES CARULLO; LAURA S. SUTTA; GEORGIA L. THOMAS; ERIC J. OLSON; JENNIFER MYERS; TOM WOODWARD; JEROLD TERHOST; CAMERON JOHN CESTARO; DONALD BROWN; MARIA FIGUEROA; CONSTANCE MARTYN; THOMAS GANIM; DANIEL BALDESCHI; LILLIAN E. LEVOFF; GIUSEPPINA ROBERTO; ROBERT TRADER; SEAN GOLDSBERRY; CYNTHIA NAVARRO; OWEN CHAPMAN; MICHAEL BREIN; TRAVIS BRISSEY; RONALD BURKARD; ADAM CLOUTIER; STEVEN CRAIG; JOHN J. DIXSON; ERIN L. FANTHORPE; ERIC HADESH; MICHAEL P. KEETH; JOHN KIRK MACDONALD; MICHAEL MANDAHL; NICHOLAS MCDANIEL; MARY J. MORAN-SPICUZZA; GARY PINCAS; BRANDON POTTER; THOMAS PURDY; ROCCO RENGHINI; MICHELLE SINGLTEON; KEN SMILEY; GREGORY M SONSTEIN; ROMAN STARNO; GAYLE A. STEPHENSON; ANDRES VILLICANA; RICHARD WILLIAMS; BRADFORD L. HIRSCH; ASHLEY CEPHAS; DAVID E. HILL; CHAD MCKINNEY; MORDECHAI SCHIFFER; LISA SANDS; DONALD KENDIG; KEVIN GOBEL; ERIC LARSON; LIN MCKINNEY; RYAN CROSS; PHILLIP HOFFMAN; DEBRA SIMMONS; ABELARDO MORALES; PETER BLUMER; CAROLYN HAMMOND; MELISSA LEGGETT; KELLY MOFFETT; EVAN GROGAN; CARLOS MEDINA; ALBERTO DOMINGUEZ; CATHERINE BERNARD; MICHAEL BREIEN; LAURA GILL; THOMAS SCHILLE; JUDITH STANTON; RANDY RICKERT; BRYAN ZIRKEL; JAMES KUNDRAT; ROBERT SMITH; MARIA KOTOVA; JOSIPA CASEY; LUAN SNYDER; BEN BAKER; BRIAN

NGUYEN; HATTIE WILLIAMS; BILL HOLVEY; LOURDES VARGAS; KENDALL SNYDER; NOMER MEDINA; SAMERIA GOFF; URSULA PYLAND; MARCELL CHAPMAN; KAYE KURASH; HOLLY AMROMIN; JOHN CHAPMAN; MARY D'ANGELO; GEORGE RUDY; AYMAN MOUSA; SHELLY HENDERSON; JEFFREY HATHAWAY; DENNIS J. MURPHY; DOUGLAS A. PATTERSON; JOHN GENTRY; LINDA RUTH SCOTT; DANIELLE KAY GILLELAND; JOSEPH BOWE; MICHAEL DESOUTO, Plaintiffs-Appellees,

GREG DIRENZO, Petitioner-Appellee,

HYUNDAI MOTOR AMERICA; KIA MOTORS AMERICA; KIA MOTORS CORPORATION; GROSSINGER AUTOPLEX, INC., FKA Grossinger Hyundai; JOHN KRAFCIK; HYUNDAI MOTOR COMPANY; SARAH KUNDRAT, Defendants-Appellees,

v.

DANA ROLAND, Objector-Appellant.

No. 15-56064 D.C. No. 2:13-ml-02424-GW-FFM

In re: HYUNDAI AND KIA FUEL ECONOMY LITIGATION

KEHLIE R. ESPINOSA; NICOLE MARIE HUNTER; JEREMY WILTON; KAYLENE P. BRADY; GUNTHER KRAUTH; ERIC GRAEWINGHOLT; REECE PHILIP THOMSON;

ALEX MATURANI; NILUFAR REZAI; JACK ROTTNER; LYDIA KIEVIT; REBECCA SANDERS; BOBBY BRANDON ARMSTRONG; SERGIO TORRES; RICHARD WOODRUFF; MARSHALL LAWRENCE GORDON; JOEL A. LIPMAN; JAMES GUDGALIS; MARY P. HOESSLER; STEPHEN M. HAYES; BRIAN REEVES; SAM HAMMOND; MARK LEGGETT; EDWIN NAYTHONS; MICHAEL WASHBURN; IRA D. DUNST; BRIAN WEBER; KAMNEEL MAHARAJ; KIM IOCOVOZZI; HERBERT J. YOUNG; LINDA HASPER; LESLIE BAYARD; TRICIA FELLERS; ORLANDO ELLIOTT; JAMES BONSIGNORE; MARGARET SETSER; GUILLERMO QUIROZ; DOUGLAS KURASH; ANDRES CARULLO; LAURA S. SUTTA; GEORGIA L. THOMAS; ERIC J. OLSON; JENNIFER MYERS; TOM WOODWARD; JEROLD TERHOST; CAMERON JOHN CESTARO; DONALD BROWN; MARIA FIGUEROA; CONSTANCE MARTYN; THOMAS GANIM; DANIEL BALDESCHI; LILLIAN E. LEVOFF; GIUSEPPINA ROBERTO; ROBERT TRADER; SEAN GOLDSBERRY; CYNTHIA NAVARRO; OWEN CHAPMAN; MICHAEL BREIN; TRAVIS BRISSEY; RONALD BURKARD; ADAM CLOUTIER; STEVEN CRAIG; JOHN J. DIXSON; ERIN L. FANTHORPE; ERIC HADESH; MICHAEL P. KEETH; JOHN KIRK MACDONALD; MICHAEL MANDAHL; NICHOLAS MCDANIEL; MARY J. MORAN-SPICUZZA; GARY PINCAS; BRANDON POTTER; THOMAS PURDY; ROCCO RENGHINI; MICHELLE SINGLTEON; KEN SMILEY; GREGORY M SONSTEIN; ROMAN STARNO; GAYLE A. STEPHENSON; ANDRES VILLICANA; RICHARD WILLIAMS; BRADFORD L. HIRSCH; ASHLEY CEPHAS; DAVID E. HILL; CHAD

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GREG DIRENZO, Petitioner-Appellee,
HYUNDAI MOTOR AMERICA; KIA MOTORS AMERICA; KIA MOTORS CORPORATION; GROSSINGER AUTOPLEX, INC., FKA Grossinger Hyundai; JOHN KRAFCIK; HYUNDAI MOTOR COMPANY; SARAH KUNDRAT, Defendants-Appellees.

v.

LINDA RUTH SCOTT, Objector-Appellant.

No. 15-56067 D.C. No. 2:13-ml-02424-GW-FFM

In re: HYUNDAI AND KIA FUEL ECONOMY LITIGATION

JOHN GENTRY; LINDA RUTH SCOTT; DANIELLE KAY GILLELAND; JOSEPH BOWE; MICHAEL DESOUTO, Plaintiffs, and JAMES BEN FEINMAN, Appellant,

v.

HYUNDAI MOTOR AMERICA; KIA MOTORS AMERICA; KIA MOTORS CORPORATION; GROSSINGER AUTOPLEX, INC., FKA Grossinger Hyundai; JOHN KRAFCIK; HYUNDAI MOTOR COMPANY; SARAH KUNDRAT, Defendants-Appellees.

ORDER

THOMAS, Chief Judge:

Upon the vote of a majority of nonrecused active judges, it is ordered that these cases be reheard en banc pursuant to Federal Rule of Appellate Procedure 35(a) and Circuit Rule 35-3. The three-judge panel disposition in these cases shall not be cited as precedent by or to any court of the Ninth Circuit.

Judges Wardlaw and Callahan did not participate in the deliberations or vote in these cases.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

CASE NO. 3:13–cv–00030
OPINION, JUDGE NORMAN K. MOON

JOHN WILLIAM GENTRY, *ET AL.*,
Plaintiffs,
v.
HYUNDAI MOTOR AMERICA, INC.,
Defendant.

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CASE NO. 3:14–cv–00002
OPINION, JUDGE NORMAN K. MOON

ALIM ABDURAHMAN, *ET AL.*,
Plaintiffs,
v.
HYUNDAI MOTOR AMERICA, INC., *ET AL.*,
Defendants.

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CASE NO. 3:14–cv–00005
OPINION, JUDGE NORMAN K. MOON

JIHAD ABDUL-MUMIT, *ET AL.*,
Plaintiffs,
v.
HYUNDAI MOTOR AMERICA, INC., *ET AL.*,
Defendants.

Plaintiffs in each of these three cases move for reconsideration under Rule 59(e) of the Court's January 23, 2017 opinion (January Opinion) dismissing the *Abdurahman* and *Abdul-Mumit* cases in whole and the *Gentry* case in part. (*See* dkt. 111 & 112 in *Gentry*[1]). The facts and procedural history of this case are lengthy, well-known to the parties, and discussed
thoroughly in the January Opinion, so they will not be repeated here.

Plaintiffs' motions often either reargue points already exhaustively briefed prior to the January Opinion, or raise new arguments that should have been presented earlier. Plaintiffs' arguments that do not fall within those categories are without merit. For those reasons, the motions for reconsideration will be denied.

Plaintiffs' motions are styled as motions to alter or amend a judgment under Federal Rule of Civil Procedure 59(e). That Rule is inapplicable to *Gentry*, because the Court did not enter judgment in that case within the meaning of Rule 54. Rather, the Court granted in part and denied in part Defendant HMA's motion to dismiss. As such, the ruling in *Gentry* is an interlocutory one under Rule 54(b), "and the decision to revisit such an order is committed to the Court's discretion as part of its inherent authority." *Wootten v. Virginia*, 168 F. Supp. 3d 890, 893 (W.D. Va. 2016) (compiling cases). Courts have "distilled the grounds for a Rule 54(b) motion for reconsideration to (1) an intervening change in the law, (2) new evidence that was not previously available, or (3) correction of a clear error of law or to

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[1] All docket citations in this opinion are to the *Gentry* docket unless otherwise noted.

prevent manifest injustice." *Id*. Reconsideration motions are "disfavored" and "should be granted sparingly." *Id*. As this Court recently summarized, a motion for reconsideration:

> is not meant to re-litigate issues already decided, provide a party the chance to craft new or improved legal positions, highlight previously-available facts, or otherwise award a proverbial "second bite at the apple" to a dissatisfied litigant. It is inappropriate where it merely reiterates previous arguments. It is not an occasion to present a better and more compelling argument that the party could have presented in the original briefs, or to introduce evidence that could have been addressed or presented previously. Aggrieved parties may not put a finer point on their old arguments and dicker about matters decided adversely to them. In sum, a party who fails to present his strongest case in the first instance generally has no right to raise new theories or arguments in a motion to reconsider.

Id. (internal citations and quotations omitted). As discussed below, the motion in *Gentry* does not pass muster under these standards. Turning to *Abdurahman* and *Abdul-Mumit*, the January Opinion and accompanying order dismissed those cases, making a Rule 59(e) motion the proper vehicle for review. The standard of review, however, is virtually the same as articulated above regarding Rule 54(b) motions for reconsideration. *See Mayfield v. Nat'l Ass'n for Stock Car Auto Racing, Inc.*, 674

F.3d 369, 378 (4th Cir. 2012); *Pac. Ins. Co. v. Am. Nat. Fire Ins. Co.*, 148 F.3d 396, 403 (4th Cir. 1998).

I. The Court Properly Ruled on Those Issues over Which It Had Jurisdiction.

Mr. Gentry's first argument is that that Court exceeded the scope of the MDL's remand and dismissed claims over which it lacks jurisdiction. (*See* dkt. 112 (Pls' Br.) at 4). The contention fails.

As Defendant HMA observes, "the Court never purported to reach the claims of nonremanded plaintiffs and expressly cited in its Opinion the scope of the Judicial Panel on Multidistrict Litigation's remand." (Dkt. 113 (Defs' Br.) at 2). The Court made quite clear what classes of claims were before it, and that Mr. Gentry "is the only remaining named plaintiff in *Gentry*." (January Opinion at 2, 3, 4).

The fact of the matter is that there are no pre-November 2 claims left before the Court in *Gentry*. That is not a function of the January Opinion, but of the Complaint itself and the identity of the named plaintiffs. Mr. Gentry falls within the putative post-November 2 class because he bought his car in 2013. (*Gentry* Complaint ¶ 8). So the January Opinion addressed whether he stated claims for himself and as a putative representative of the putative post-November 2 class.

The four other named plaintiffs—Scott, Gilleland, Bowe, and DeSouto—are all members of the pre-November 2, 2012 class. (*Gentry* Complaint ¶¶ 14–17). But as the Court made clear, those four plaintiffs are satisfied with the MDL settlement and have not opted out of it. (January

Opinion at 4). Their claims, then, are not before the Court.

The upshot is that there are *no* pre-November 2 claims plaintiffs before the Court. The only named plaintiffs in this lawsuit who—given their purchase dates—could represent a class of pre-November 2 opt-outs are not doing so; thus, there are simply no pre-November 2 disputes to adjudicate. *See Shelton v. Pargo, Inc.*, 582 F.2d 1298, 1305 (4th Cir. 1978) (observing that named plaintiffs in putative class action "are the representative parties, without whose presence as plaintiffs the case could not proceed as a class action"); *Feamster v. Compucom Sys., Inc.*, No. 7:15-CV-00564, 2016 WL 722190, at *5 (W.D. Va. Feb. 19, 2016) ("If all three named plaintiffs are barred from bringing a collective action, the case simply may not proceed in that form.").[2] Put more succinctly, it is as if the Complaint in *Gentry* does not contain any pre-November 2 claims. That is not because this Court dismissed them, but rather because claims of a putative pre-November 2 opt-out class cannot be adjudicated without a class representative, which is lacking.

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[2] *See also Potter v. Norwest Mortg., Inc.*, 329 F.3d 608, 611 (8th Cir. 2003) ("a federal court should normally dismiss an action as moot when the named plaintiff settles its individual claim, and the district court has not certified a class"); *Clark v. State Farm Mut. Auto. Ins. Co.*, 590 F.3d 1134, 1138 n.3 (10th Cir. 2009) (compiling cases); *West v. Health Net of the Ne.*, 217 F.R.D. 163, 176 (D.N.J. 2003) (mootness of named plaintiff's claims before class certification results in dismissal of "the entire action, including its class claims, because there is no plaintiff (either named or unnamed) who can assert a justiciable claim against any defendant").

II. The Court Correctly Applied the Standard of Review.

Next, Mr. Gentry argues the Court clearly erred by failing to credit the facts alleged in the Complaint. (Pls' Br. at 5–6). The argument fails for the reasons summarized by Defendant HMA. (*See* Defs' Br. at 4–5).

First, contrary to Mr. Gentry's contention, it was proper for the Court to consider the attachments to the Complaint in deciding the motion to dismiss. *See Sec'y of State For Defence v. Trimble Navigation Ltd.*, 484 F.3d 700, 705 (4th Cir. 2007).[3]

Second, resort to these materials was necessary because the Complaint made insufficient, vague, generic statements about Defendant HMA's advertising campaign. *See* January Opinion at 10 (noting difficulty of ascertaining "what statements Gentry's causes of action involve"), 11, 14 (allegations about owner's manual were unhelpful given lack of allegations Mr. Gentry had read it before his purchase), 15 n.3 (no allegations that Mr. Gentry saw, relied upon, or was misled by Defendant's website). In considering a motion to dismiss a putative class action claim, courts do not give deference to "generalized allegations concerning unnamed plaintiffs or putative class members," and instead look "whether the named plaintiffs alleged

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[3] Indeed, Mr. Gentry urged the Court to rely upon the attachments (including those dealing with pre-November 2 claims) to bolster his post-November 2 claims, arguing that "when Hyundai leaves the false advertising up in a place where it expects and knows people will see it, it is responsible for the mayhem it causes." (*See* dkt. 92 at 6).

sufficient facts" regarding themselves. *McCants v. NCAA*, 201 F. Supp. 3d 732, 740 (M.D.N.C. 2016); *see Marcantonio v. Dudzinski*, 155 F. Supp. 3d 619, 626 (W.D. Va. 2015) ("generic or general allegations" about defendants' conduct is insufficient).

Third, crediting the attachments over the vague allegations in the Complaint was proper, because "in the event of conflict between the bare allegations of the complaint and any exhibited attached [thereto], the exhibit prevails." *S. Walk at Broadlands Homeowner's Ass'n, Inc. v. OpenBand at Broadlands, LLC*, 713 F.3d 175, 182 (4th Cir. 2013) (quoting *Fayetteville Inv'rs v. Commercial Builders, Inc.*, 936 F.2d 1462, 1465 (4th Cir. 1991)); *see also* Fed. R. Civ. P. 9(f).

III. Mr. Gentry's Lemon Law Claim Based on Fuel Mileage.

Mr. Gentry asserts the Court dismissed part of his Lemon Law claim for failure to give the statutorily-required notice. (Pls' Br. at 7). Defendant HMA correctly observes that this contention "mischaracteriz[es]" the January Opinion, which unambiguously stated its analysis rested on other grounds. (Defs' Br. at 5; *see* January Opinion at 13).

IV. The Claims in *Abdurahman* and *Abdul-Mumit* Are Deficient.

Plaintiffs in the *Abdurahman* and *Abdul-Mumit* mass actions mount additional arguments against the Court's dismissal of their claims. (*See* Pls' Br. at 7–13). These positions lack merit and are sufficiently

rebutted by the reasons and authorities provided by Defendans. (*See* Defs' Br. at 6–8).

Most obviously, the Court provided "independent bases for dismissal" by concluding "the *Abdurahman* and *Abdul-Mumit* Complaints failed to satisfy federal pleading standards": The Complaints do not make a single, specific allegation about even one of the hundreds of named plaintiffs, much less about any of the seven, remaining opt-out plaintiffs. (Defs' Br. at 6–7 (citing January Opinion at 24–25)). Other arguments—*e.g.*, Plaintiffs' position that the Lemon Law does not require notice when it would be "vain" to do so—are simply recapitulations of their previously-rejected arguments that are improper on reconsideration.

V. Leave to Amend Was Correctly Denied.

Plaintiffs in all three cases complain that dismissal should not be with prejudice and without leave to amend. (Pls' Br. at 13–14). They advance the remarkable and muddled position (for which they cite no authority) that—despite remand to this Court by the MDL—"[t]here was no jurisdiction here to amend" the Complaint, ostensibly because "a whole Complaint cannot be partially amended." (*Id*. at 13). Given that reconsideration is an extraordinary remedy and that the onus is on Plaintiffs to show (by citing applicable law and facts) a clear error or manifest injustice, the Court rejects Plaintiffs' position; it is insufficiently raised and thus waived, and—alternatively—fails to satisfy the motion for reconsideration standard.

Finally, Plaintiffs offer a single paragraph (again with no legal authorities) in support of their view

that dismissal with prejudice was error. (Pls' Br. at 14 ¶ 17). The January Opinion thoroughly detailed why dismissal with prejudice was proper. (January Opinion at 28–30; *see* Defs' Br. at 9–12 (explaining reasons that "plaintiffs had notice of the deficiencies in their complaints" and "plaintiffs fail to show they could cure the defects in their complaints")). Plaintiffs have not carried their burden of showing that reconsideration is warranted.

SUMMARY

For the foregoing reasons, Plaintiffs' motions for reconsideration will be denied. An accompanying order will issue. The Clerk is requested to send a copy of this opinion and the order to counsel.

Entered this 6th day of April, 2017.

/S/
NORMAN K. MOON
UNITED STATES DISTRICT JUDGE

28 U.S.C.A. §1407
Multidistrict litigation

(a) When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this section upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions. Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated: *Provided, however*, That the panel may separate any claim, cross-claim, counter-claim, or third-party claim and remand any of such claims before the remainder of the action is remanded.

(b) Such coordinated or consolidated pretrial proceedings shall be conducted by a judge or judges to whom such actions are assigned by the judicial panel on multidistrict litigation. For this purpose, upon request of the panel, a circuit judge or a district judge may be designated and assigned temporarily for service in the transferee district by the Chief Justice of the United States or the chief judge of the circuit, as may be required, in accordance with the provisions of chapter 13 of this title. With the consent of the transferee district court, such actions may be assigned by the panel to a judge or judges of such district. The judge or judges to whom such actions are assigned, the members of the judicial panel on multidistrict litigation, and other circuit

and district judges designated when needed by the panel may exercise the powers of a district judge in any district for the purpose of conducting pretrial depositions in such coordinated or consolidated pretrial proceedings.

(c) Proceedings for the transfer of an action under this section may be initiated by—

(i) the judicial panel on multidistrict litigation upon its own initiative, or

(ii) motion filed with the panel by a party in any action in which transfer for coordinated or consolidated pretrial proceedings under this section may be appropriate. A copy of such motion shall be filed in the district court in which the moving party's action is pending.

The panel shall give notice to the parties in all actions in which transfers for coordinated or consolidated pretrial proceedings are contemplated, and such notice shall specify the time and place of any hearing to determine whether such transfer shall be made. Orders of the panel to set a hearing and other orders of the panel issued prior to the order either directing or denying transfer shall be filed in the office of the clerk of the district court in which a transfer hearing is to be or has been held. The panel's order of transfer shall be based upon a record of such hearing at which material evidence may be offered by any party to an action pending in any district that would be affected by the proceedings under this section, and shall be supported by findings of fact and conclusions of law based upon such record. Orders of transfer and such other orders as the panel may make thereafter shall be filed in the office of the clerk of the district court

of the transferee district and shall be effective when thus filed. The clerk of the transferee district court shall forthwith transmit a certified copy of the panel's order to transfer to the clerk of the district court from which the action is being transferred. An order denying transfer shall be filed in each district wherein there is a case pending in which the motion for transfer has been made.

(d) The judicial panel on multidistrict litigation shall consist of seven circuit and district judges designated from time to time by the Chief Justice of the United States, no two of whom shall be from the same circuit. The concurrence of four members shall be necessary to any action by the panel.

(e) No proceedings for review of any order of the panel may be permitted except by extraordinary writ pursuant to the provisions of title 28, section 1651, United States Code. Petitions for an extraordinary writ to review an order of the panel to set a transfer hearing and other orders of the panel issued prior to the order either directing or denying transfer shall be filed only in the court of appeals having jurisdiction over the district in which a hearing is to be or has been held. Petitions for an extraordinary writ to review an order to transfer or orders subsequent to transfer shall be filed only in the court of appeals having jurisdiction over the transferee district. There shall be no appeal or review of an order of the panel denying a motion to transfer for consolidated or coordinated proceedings.

(f) The panel may prescribe rules for the conduct of its business not inconsistent with Acts of Congress and the Federal Rules of Civil Procedure.

(g) Nothing in this section shall apply to any action in which the United States is a complainant

arising under the antitrust laws. "Antitrust laws" as used herein include those acts referred to in the Act of October 15, 1914, as amended (38 Stat. 730; 15 U.S.C. 12), and also include the Act of June 19, 1936 (49 Stat. 1526; 15 U.S.C. 13, 13a, and 13b) and the Act of September 26, 1914, as added March 21, 1938 (52 Stat. 116, 117; 15 U.S.C. 56); but shall not include section 4A of the Act of October 15, 1914, as added July 7, 1955 (69 Stat. 282; 15 U.S.C. 15a).

(h) Notwithstanding the provisions of section 1404 or subsection (f) of this section, the judicial panel on multidistrict litigation may consolidate and transfer with or without the consent of the parties, for both pretrial purposes and for trial, any action brought under section 4C of the Clayton Act.

VA Code Ann. § 8.01-267.1
Standards governing consolidation, etc., and transfer.

On motion of any party, a circuit court may enter an order joining, coordinating, consolidating or transferring civil actions as provided in this chapter upon finding that:

1. Separate civil actions brought by six or more plaintiffs involve common questions of law or fact and arise out of the same transaction, occurrence or series of transactions or occurrences;

2. The common questions of law or fact predominate and are significant to the actions; and

3. The order (i) will promote the ends of justice and the just and efficient conduct and disposition of the actions, and (ii) is consistent with each party's right to due process of law, and (iii) does not prejudice each individual party's right to a fair and impartial resolution of each action.

Factors to be considered by the court include, but are not limited to, (i) the nature of the common questions of law or fact; (ii) the convenience of the parties, witnesses and counsel; (iii) the relative stages of the actions and the work of counsel; (iv) the efficient utilization of judicial facilities and personnel; (v) the calendar of the courts; (vi) the likelihood and disadvantages of duplicative and inconsistent rulings, orders or judgments; (vii) the likelihood of prompt settlement of the actions without the entry of the order; and (viii) as to joint trials by jury, the likelihood of prejudice or confusion.

The court may organize and manage the combined litigation and enter further orders consistent with the right of each party to a fair trial

as may be appropriate to avoid unnecessary costs, duplicative litigation or delay and to assure fair and efficient conduct and resolution of the litigation, including but not limited to orders which organize the parties into groups with like interest; appoint counsel to have lead responsibility for certain matters; allocate costs and fees to separate issues into common questions that require treatment on a consolidated basis and individual cases that do not; and to stay discovery on the issues that are not consolidated.

VA Code Ann. § 8.01-267.2
When actions pending in same court

For purposes of this chapter, actions shall be considered pending in the same circuit court when they have been (i) filed in that court, regardless of whether the defendant has been served with process, or (ii) properly transferred to that court.

VA Code Ann. § 8.01-267.3
Consolidation and other combined proceedings

On motion of any party, a circuit court in which separate civil actions are pending which were brought by six or more plaintiffs may enter an order coordinating, consolidating or joining any or all of the proceedings in the actions upon making the findings required by § 8.01-267.1. The order may provide for any or all of the following:

1. Coordinated or consolidated pretrial proceedings;

2. A joint hearing or, if requested by any party, trial by jury with respect to any or all common questions at issue in the actions; or

3. Consolidation of the actions.

VA Code Ann. § 8.01-267.4
Transfer

A. Whenever there are pending in different circuit courts of the Commonwealth civil actions brought by six or more plaintiffs which involve common issues of law or fact and arise out of the same transaction, occurrence or the same series of transactions or occurrences, any party may apply to a panel of circuit court judges designated by the Supreme Court for an order of transfer. Upon such application and upon making the findings required by § 8.01-267.1, the panel may order some or all of the actions transferred to a circuit court in which one or more of the actions are pending for purposes of coordinated or consolidated pretrial proceedings. The circuit court to which actions are transferred may enter further orders as provided in § 8.01-267.3. Any subsequent application for further transfer shall be made to the circuit court to which the actions were transferred. Upon completion of pretrial proceedings and any joint hearings or trials, the circuit court may remand the actions to the circuit courts in which they were originally filed or may retain them for final disposition.

B. Any party who files an application for transfer shall at the same time give notice of such application to all parties and to the clerk of each circuit court in which an action that is the subject of the application is pending. Upon receipt of the notice, a circuit court

shall not enter any further orders under § 8.01-267.3 until after the panel has entered an order granting or denying an application for transfer pursuant to subsection A.

VA Code ANN. § 8.01-267.5
Joinder and severance

Six or more parties may be joined initially as plaintiffs in a single action if their claims involve common issues of fact and arise out of the same transaction or occurrence or the same series of transactions or occurrences. On motion of a defendant, the actions so joined shall be severed unless the court finds that the claims of the plaintiffs were ones which, if they had been filed separately, would have met the standards of § 8.01-267.1 and would have been consolidated under § 8.01-267.3. If the court orders severance, the claims may proceed separately upon payment of any appropriate filing fees due in the separate circuit courts within sixty days of entry of the order. The date of the original filing shall be the date of filing for each of the severed actions for purposes of applying the statutes of limitations.

VA Code Ann. § 8.01-267.6
Separate trials; special interrogatories

In any combined action under this chapter, the court, on motion of any party, may order separate or bifurcated trials of any one or more claims, cross-claims, counterclaims, third-party claims, or separate issues, always preserving the right of trial by jury.

Additionally, the court may submit special interrogatories to the jury to resolve specific issues of fact.

VA Code Ann. § 8.01-267.7
Later-filed actions

Later-filed actions may be joined with ongoing litigation in accordance with the procedures of § 8.01-267.3 or § 8.01-267.4 and the standards of § 8.01-267.1. Parties in later-filed actions joined with on-going multiple claimant litigation may, in the discretion of the court, be bound to prior proceedings but only to the extent permitted by law and only to the extent that the court finds that the interests of such parties were adequately and fairly represented. Consistent with the language of this section and the standards of § 8.01-267.1, the parties may utilize all prior discovery taken by any party in on-going multiple party litigation as if the parties in the later-filed actions had been parties at the time the discovery was taken. On motion of any party or by the person from whom discovery is sought, the court may limit or prohibit discovery by parties in later-filed actions if the court finds that the matters on which the discovery is sought have been covered adequately by prior discovery.

VA Code Ann. § 8.01-267.8
Interlocutory appeal

A. The Supreme Court or the Court of Appeals, in its discretion, may permit an appeal to be taken from an order of a circuit court although the order is not a final order where the circuit court has ordered

a consolidated trial of claims joined or consolidated pursuant to this chapter.

B. The Supreme Court or the Court of Appeals, in its discretion, may permit an appeal to be taken from any other order of a circuit court in an action combined pursuant to this chapter although the order is not a final order provided the written order of the circuit court states that the order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation.

C. Application for an appeal pursuant to this section shall be made within ten days after the entry of the order and shall not stay proceedings in the circuit court unless the circuit court or the appellate court shall so order.

VA Code Ann. § 8.01-267.9
Effect on other law

The procedures set out in this chapter are in addition to procedures otherwise available by statute, rule or common law and do not limit in any way the availability of such procedures, but shall not apply to any action against a manufacturer or supplier of asbestos or product for industrial use that contains asbestos to which the provisions of § 8.01-374.1 may apply.

FRCP Title III, Rule 15
Amended and Supplemental Pleadings

(a) Amendments Before Trial.

(1) *Amending as a Matter of Course.* A party may amend its pleading once as a matter of course within:

(A) 21 days after serving it, or

(B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier.

(2) *Other Amendments.* In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires.

(3) *Time to Respond.* Unless the court orders otherwise, any required response to an amended pleading must be made within the time remaining to respond to the original pleading or within 14 days after service of the amended pleading, whichever is later.

(b) Amendments During and After Trial.

(1) *Based on an Objection at Trial.* If, at trial, a party objects that evidence is not within the issues raised in the pleadings, the court may permit the pleadings to be amended. The court should freely permit an amendment when doing so will aid in presenting the merits and the objecting party fails to satisfy the court that the evidence would prejudice that party's action or defense on the merits. The court may

grant a continuance to enable the objecting party to meet the evidence.

(2) *For Issues Tried by Consent.* When an issue not raised by the pleadings is tried by the parties' express or implied consent, it must be treated in all respects as if raised in the pleadings. A party may move—at any time, even after judgment—to amend the pleadings to conform them to the evidence and to raise an unpleaded issue. But failure to amend does not affect the result of the trial of that issue.

(c) Relation Back of Amendments.

(1) *When an Amendment Relates Back.* An amendment to a pleading relates back to the date of the original pleading when:

(A) the law that provides the applicable statute of limitations allows relation back;

(B) the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading; or

(C) the amendment changes the party or the naming of the party against whom a claim is asserted, if Rule 15(c)(1)(B) is satisfied and if, within the period provided by Rule 4(m) for serving the summons and complaint, the party to be brought in by amendment:

(i) received such notice of the action that it will not be prejudiced in defending on the merits; and

(ii) knew or should have known that the action would have been brought against it,

but for a mistake concerning the proper party's identity.

(2) *Notice to the United States.* When the United States or a United States officer or agency is added as a defendant by amendment, the notice requirements of Rule 15(c)(1)(C)(i) and (ii) are satisfied if, during the stated period, process was delivered or mailed to the United States attorney or the United States attorney's designee, to the Attorney General of the United States, or to the officer or agency.

(d) Supplemental Pleadings.

On motion and reasonable notice, the court may, on just terms, permit a party to serve a supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented. The court may permit supplementation even though the original pleading is defective in stating a claim or defense. The court may order that the opposing party plead to the supplemental pleading within a specified time.