APPENDIX

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Appendix A

No. 22-1245

United States Court Of Appeals
For The Sixth Circuit

IN RE: FORD MOTOR COMPANY F-150 AND RANGER TRUCK FUEL ECONOMY MARKETING AND SALES PRACTICES LITIGATION.

MARSHALL B. LLOYD; *ET AL.*,

Petitioners,

v.

FORD MOTOR COMPANY,

Respondent.

Appeal from the United States District Court for the Eastern District of Michigan at Detroit.

Nos: 19-md-02901, 19-cv-11319, 19-cv-11639, 19-cv-11728, 19-cv-11728, 19-cv-

11993, 19-cv-12015, 19-cv-12035, 19-cv-12080, 19-cv-12135, 19-cv-12309–12310, 19-cv-12373, 19-cv-12375, 19-cv-12377, 19-cv-12427, 19-cv-12436–12438, 19-cv-12554, 19-cv-12895, 19-cv-13197, and 20-cv-12272—Sean F. Cox, District Judge.

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Argued: March 8, 2023

Decided and Filed: April 21, 2023

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Before: GRIFFIN, BUSH, and MURPHY, Circuit Judges.No. 22-1245 *In re Ford Motor Co. F-150 & Ranger Truck Fuel Econ. Marketing and Sales Practices Litig.*

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COUNSEL

ARGUED: Steve W. Berman, HAGENS BERMAN SOBOL SHAPIRO LLP, Seattle, Washington, for Appellants. Stephanie A. Douglas, BUSH SEYFERTH PLLC, Troy, Michigan, for Appellee. **ON BRIEF:** Steve W. Berman, HAGENS BERMAN

SOBOL SHAPIRO LLP, Seattle, Washington, E. Powell Miller, Sharon S. Almonrode, Emily E. Hughes, THE MILLER LAW FIRM, Rochester, Michigan, Adam J. Levitt, John E. Tangren, DICELLO LEVITT GUTZLER LLC, Chicago, Illinois, for Appellants. Stephanie A. Douglas, BUSH SEYFERTH PLLC, Troy, Michigan, Jill M. Wheaton, Kyle M. Asher, DYKEMA GOSSETT PLLC, Ann Arbor, Michigan, for Appellee.

OPINION

GRIFFIN, Circuit Judge.

Plaintiffs are a group of consumers alleging that defendant Ford Motor Company intentionally submitted false fuel economy testing figures for certain vehicles to the U.S. Environmental Protection Agency (EPA). Plaintiffs claim that this, in turn, led the agency to provide an inaccurate fuel economy estimate to consumers, which induced consumers (including plaintiffs) to buy those vehicles. The district court ruled that federal law preempted plaintiffs' state-law claims. We agree and affirm.

I.

This case centers on allegations that Ford cheated on its fuel economy and emissions testing for certain truck models, including the F-150 and Ranger.

The Energy Policy and Conservation Act (EPCA), 42 U.S.C. § 6201 *et seq*., and its corresponding regulations specifically control such testing, so an initial overview of this testing regime is in order.

Congress enacted the EPCA in 1975 to develop a comprehensive regulatory scheme for fuel economy testing; the stated purposes of the act include "improv[ing] energy efficiency of motor vehicles" and "provid[ing] a means for verification of energy data to assure the reliability of energy data." 42 U.S.C. § 6201(5), (7). This act introduced corporate average fuel economy (CAFE) standards that automobile manufacturers must follow in designing, manufacturing, and marketing their vehicles. *See, e.g.*, 15 U.S.C. §§ 2001–13 (1975). In 1994, Congress updated those standards. *See* Pub. L. 103-272, 108 Stat. 745 (1994); 49 U.S.C. §§ 32901–19. Those standards, applicable today, require automobile manufacturers to follow the EPA's fuel economy standards, *see* § 32902, describe how the EPA and manufacturers calculate average fuel economy, *see* § 32904, dictate how manufacturers report the resulting figures, *see* § 32908, and set requirements for how the EPA ensures compliance with the CAFE standards, *see* § 32911. The EPA has the authority to implement these statutes by regulation. *See, e.g.*, 49 U.S.C. §§ 32902(k)(2); 32908(g)(1).

These statutes and corresponding regulations mandate that manufacturers follow a complex testing methodology set by the EPA. To produce testing data

that the EPA uses in its own fuel economy calculation, manufacturers test the fuel economy of their vehicles with a dynamometer. 40 C.F.R. § 1066.401 *et seq*.; U.S. EPA, *How Vehicles are Tested*.[1] A dynamometer is essentially a "treadmill for vehicles" (as plaintiffs describe), and, as such, it does not naturally simulate other environmental and physical forces acting on a vehicle during normal operation like "aerodynamic drag, tire rolling resistance, driveline losses, and other effects of friction." 40 C.F.R. § 1066.301. The dynamometer thus must be calibrated to recreate those forces through incorporation of "road load" figures, 40 C.F.R.§ 1066.210(a), which is "the force imparted on a vehicle while driving at constant speed over a smooth level surface from sources such as tire rolling resistance, driveline losses, and aerodynamic drag," U.S. EPA, *201504: Determination and Use of Vehicle Road-Load Force and Dynamometer Settings* 2 (Feb. 23, 2015). "The general procedure for determining road-load force is performing coastdown tests and calculating road-load coefficients." 40 C.F.R. § 1066.301(b). "This procedure is described in SAE J1263 and SAE J2263" and "incorporated by reference in § 1066.1010," though the regulations allow "certain

[1] Available at: https://www.fueleconomy.gov/feg/how_tested.shtml (last visited April 19, 2023).

deviations from those procedures for certain applications." *Id.*[2]

Coastdown testing tells manufacturers "how much rolling resistance and drag a vehicle has[,] so that when a vehicle is testing on a dynamometer, the manufacturer knows how much drag and rolling resistance to apply to the vehicle to simulate the road." First Amended Complaint (Complaint), R.78, PageID 2056; *see also* U.S. EPA, *2015-04: Determination and Use of Vehicle Road-Load Force and Dynamometer Settings* 4. "In a coastdown test, a vehicle is brought to a high speed on a flat, straight road," at about eighty mph, "and then set coasting in neutral until it slows to a low speed," at about nine mph. Complaint, R.78, PageID 2151, 2168. The test is performed at least five times, and, each time, devices on the vehicle measure environmental conditions, performance data, speed, and distance traveled. *Id.* A manufacturer records the time it takes for a vehicle to slow as "[t]he test produces data that identifies or maps the drag and other forces acting on the vehicle

[2] "SAE" refers to the Society of Automotive Engineers, a "global association of more than 128,000 engineers and related technical experts in the aerospace, automotive, and commercial-vehicle industries." *About SAE International*, available at https://www.sae.org/about (last visited April 19, 2023). The SAE develops engineering mobility standards, including those referenced here, to further "[t]he design of safety, productivity, dependability, efficiency, and certification." *See SAE Standards*, available at https://www.sae.org/standards (last visited April 19, 2023).

in the real world." *Id.* at 2168–69. The coastdown testing ultimately produces the figures used for dynamometer testing (known as "target coefficients"), thus allowing the dynamometer to simulate the "actual load on the [vehicle's] engine during on-road driving." *Id.* at 2170–71, 2173.

Once a manufacturer determines a vehicle's road-load "target coefficients," 40 C.F.R. § 1066.301(a), it uses those coefficients in its simulated dynamometer testing, *see id.* § 1066.210. The EPA also heavily regulates this testing, *see* 49 U.S.C. § 32904(c), and its regulations again prescribe the exact process (and formulas) a manufacturer must use. *See* 40 C.F.R. § 600.21012(a), (b); U.S. EPA, *Testing at the National Vehicle and Fuel Emissions Laboratory*.[3]

Throughout this entire process, manufacturers must "establish, maintain, and retain" records relating to their testing, 40 C.F.R. § 600.005(a), and allow the EPA to access or inspect testing facilities, *id.* § 600.005(b). Once a manufacturer has finished testing a vehicle, it must submit the results and supporting documentation to the EPA. *Id.* § 600.006; *see also* 49 U.S.C. § 32907(b). The EPA may require the manufacturer to submit the disputed vehicle for testing or to conduct additional testing itself if, "based on the results of an inspection . . . or any other information," the agency "has reason to believe that

[3] Available at: https://www.epa.gov/greenvehicles/testing-national-vehicle-and-fuel-emissions-laboratory (last visited April 19, 2023).

the manufacturer has not followed proper testing procedures," the "testing equipment is faulty or improperly calibrated," or the records provided to the EPA cannot confirm the manufacturer's figures. 40 C.F.R. § 600.008(e)(1).

Once a manufacturer submits data for review, that data "must be judged reasonable and representative" by the EPA. *Id.* § 600.008(c)(1). In reviewing the data, the EPA may accept it, require additional manufacturer testing, or perform its own confirmatory testing. *Id.* § 600.008(c). The EPA confirms about "15-20%" of manufacturer-provided test results through its own testing. U.S. EPA, *How Vehicles are Tested*. If it does perform such testing, it compares its own data with that provided by the manufacturer; if an "unacceptable" discrepancy exists, the EPA may reject "all fuel economy data submitted by the manufacturer until the cause of the discrepancy is determined and the validity of the data is established by the manufacturer." 40 C.F.R. § 600.008(a), (d). If the agency does not perform its own confirmatory testing, a manufacturer "must" instead perform said testing if certain "conditions" exist, including a prior failure of an emissions standard or that the reported fuel economy is "higher than expected based on procedures approved by the" EPA. *Id*. § 600.008(b)(1). The EPA evaluates confirmatory results submitted by the manufacturer for "reasonableness and representativeness." *Id*. § 600.008(c)(3).

Once the EPA is satisfied with the fuel economy figure, it adopts that figure as its own. *See* 49 U.S.C. § 32904(c) (dictating that "[t]he [EPA] Administrator *shall measure* fuel economy for each model and calculate average fuel economy for a manufacturer under testing and calculation procedures prescribed by the Administrator") (emphasis added). The EPCA establishes that the "fuel economy" of a vehicle produced by these procedures is "the average number of miles traveled by an automobile for each gallon of gasoline (or equivalent amount of other fuel) used, *as determined by the [EPA] Administrator* under [49 U.S.C. §] 32904(c)." *Id.* § 32901(a)(11) (emphasis added). And the regulations provide that, so long as the estimates satisfy the EPA's prescribed testing procedures, "[t]he label values that the manufacturer calculates and submits . . . shall constitute the EPA fuel economy estimates." 40 C.F.R. § 600.312-08(a)(3). *See also* Fuel Economy Labeling of Motor Vehicles: Revisions To Improve Calculation of Fuel Economy Estimates, 71 Fed. Reg. 77872, 77872–76 (Dec. 27, 2006) (to be codified at 40 C.F.R. pts. 86 and 600) (describing the estimates as "the EPA fuel economy estimates"). This figure is included by law on the label, colloquially called a "Monroney" sticker, that is attached to each new vehicle sold. 49 U.S.C. § 32908(b)(1)(A); 40 C.F.R. § 600.302-12; *see also* Fuel Economy Labeling of Motor Vehicles, 71 Fed. Reg. at 77916 n.80.

The purpose of the standardized EPA estimate is two-fold. It not only "provide[s] consumers with a

basis on which to compare the fuel economy of different vehicles," but it also "provide[s] consumers with a reasonable estimate of the fuel economy they can expect to achieve." Fuel Economy Labeling of Motor Vehicles, 71 Fed. Reg. at 77873. But the EPA also warns consumers that the estimates are, indeed, estimates. "[F]uel economy varies from driver to driver for a wide variety of reasons, such as different driving styles, climates, traffic patterns, use of accessories, loads, weather, and vehicle maintenance." *Id.* at 77874; *see also* 40 C.F.R. § 600.302-12(b)(4) (providing that the Monroney sticker must include the disclaimer: "Actual results will vary for many reasons, including driving conditions and how you drive and maintain your vehicle.").

The EPA monitors compliance with these requirements. *See* 49 U.S.C. §§ 32910–12. If the EPA suspects that a manufacturer has "fail[ed] to comply with an applicable average fuel economy standard" under § 32902, it "shall conduct a proceeding, with an opportunity for a hearing on the record, to decide whether a violation has been committed." *Id.* § 32911(b). If, at any point during the model year, the EPA determines that the label values have been calculated incorrectly, it may correct those figures or require the manufacturer to do so. 40 C.F.R. § 600.312-08(a)(5). Among the possible violations a manufacturer could commit would be in its "obligation to report truthful and complete information" following testing. 40 C.F.R. § 1066.2(b); *see also* 49 U.S.C. § 32911. The EPA may "void any certificates or

approvals associated with a submission of information," including "for all engine families certified based on emission data collected," if it determines that the manufacturer "intentionally submitted false, incomplete, or misleading information." 40 C.F.R. § 1066.2(c). Civil and criminal penalties may also apply. *Id*. § 1066.2(b) (citing 18 U.S.C. § 1001 and 42 U.S.C. § 7413(c)(2)).

While the EPA regulates the fuel economy estimate provided to consumers on the Monroney sticker, the Federal Trade Commission (FTC) regulates advertising to consumers. Fuel Economy Labeling of Motor Vehicles, 71 Fed. Reg. at 77917. Its "Guide Concerning Fuel Economy Advertising for New Vehicles . . . advises vehicle manufacturers and dealers how to disclose the established fuel economy of a vehicle, as determined by the [EPA's] rules." *Id*. The FTC also discourages manufacturers from advertising other fuel economy figures beyond that determined by the EPA: "Given consumers' exposure to EPA estimated fuel economy values over the last several decades, fuel economy and driving range estimates derived from non–EPA tests can lead to deception if consumers understand such estimates to be fuel economy ratings derived from EPA–required tests." 16 C.F.R. § 259.4(*l*)(1). "Accordingly, advertisers should avoid such claims and disclose the EPA fuel economy or driving range estimates." *Id*.

II.

Pursuant to this testing regime, Ford conducted testing and provided the resulting figures to the EPA for the 2018, 2019, and 2020 F-150 and 2019 and 2020 Ranger trucks. The EPA then published its fuel-economy estimates for those vehicles. The F-150 had an EPA-estimated mpg of 20 city, 26 highway, and 22 combined, while the Ranger had an EPA-estimated 20 city, 25, highway, and 22 combined mpg. Ford used these figures in its advertisements, promoting the 2019 Ranger as the "most fuel-efficient gas-powered midsize pickup in America" and the F-150 as "best in class for fuel economy."

Plaintiffs claim, however, that Ford committed fraud in its testing. In September 2018, several Ford employees questioned the testing process, which led to Ford announcing that it would investigate its testing of the 2019 Ranger and other vehicles. It then disclosed that it was under criminal investigation by the Department of Justice (DOJ) for its emissions and fuel-efficiency testing. Several other agencies opened investigations, including the EPA. After these allegations arose, independent car reviewers performed "real-world mileage" tests and determined that the actual performance of the Ranger and other vehicles was "nowhere close" to the EPA estimates. Complaint, R.78, PageID 2157–58.

Plaintiffs tested the 2018 Ford F-150 and 2019 Ford Ranger to verify the fuel economy of those

vehicles. Their testing (which they contend conformed to the EPA's standards) showed that Ford fraudulently reduced the road-load resistance level used in the dynamometer testing. The road-load figures obtained from the "coastdown [tests] for each vehicle [were] found to have more resistance (which would result in more fuel consumption) than the road-load models reported to the EPA." Complaint, R.78, PageID 2172. They determined that the mpg estimates of the F-150 should be 17.7 city, 22.7 highway, and 20.0 combined, with the Ranger being 18.3, 23.4, and 20.6, respectively. In short, plaintiffs' testing allegedly proves that the EPA estimates for both those truck models are several mpg better than what they should be. This means that both trucks consume much more fuel than previously estimated, costing consumers thousands of dollars in added fuel cost.

Plaintiffs then filed a host of putative class-action suits alleging that Ford cheated during its coastdown testing procedure to ensure that it received a more favorable fuel economy estimate from the EPA. The Judicial Panel on Multidistrict Litigation consolidated those cases in the Eastern District of Michigan. The district court directed plaintiffs to file a consolidated master complaint, and the ensuing complaint, at nearly 1,000 pages long, included claims of breach of contract, negligent misrepresentation, breach of express warranty, fraud, and unjust enrichment under the laws of every state. Plaintiffs requested several forms of relief, including: 1)

certification of the proposed class; 2) "Declaring, adjudging, and decreeing the conduct of the Defendant as alleged herein to be unlawful, unfair, and deceptive"; 3) "Requiring that all Class members be notified about the lower fuel economy ratings and higher emissions at Ford's expense and providing correct fuel economy and emissions ratings"; and 4) awarding plaintiffs restitution and damages. *Id*. at 3014–15.

Ford moved to dismiss the complaint, raising a host of reasons. Pertinent for our purposes, Ford contended that 1) federal law both expressly and impliedly preempted plaintiffs' claims, 2) the EPA had primary jurisdiction over the case, such that the district court should dismiss the case, and 3) plaintiffs' misrepresentation and omission claims failed to state a claim upon which relief can be granted. The district court agreed with Ford on all counts and dismissed plaintiffs' complaint.[4] *In re Ford Motor Co. F-150 & Ranger Truck Fuel Econ. Mktg. & Sales Pracs. Litig.*, No. 2:19-md-02901, 2022 WL 551221 (E.D. Mich., Feb. 23, 2022). Plaintiffs timely appealed.

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[4] While the case progressed, the federal investigations into Ford's alleged fraud did too. By the time Ford moved to dismiss the complaint, the DOJ had closed its investigation and did not intend to take further action. The EPA similarly closed its own investigation shortly before the district court issued its decision. On appeal, plaintiffs have acknowledged that these investigations closed without further agency action.

III.

To survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks omitted). We review de novo a district court's decision to dismiss a case under Rule 12(b)(6), *Taylor v. City of Saginaw*, 922 F.3d 328, 331 (6th Cir. 2019), including whether the district court properly did so on federal preemption grounds, *McDaniel v. Upsher-Smith Labs., Inc.*, 893 F.3d 941, 944 (6th Cir. 2018). In doing so, we must "construe the complaint in the light most favorable to the plaintiff and accept all allegations as true." *Taylor*, 922 F.3d at 331 (citation omitted). The defendant has the burden of showing that a plaintiff has failed to state a plausible claim for relief. *Id.* at 331–32.

IV.

The Supremacy Clause of the U.S. Constitution provides that "the Laws of the United States . . . shall be the supreme Law of the Land . . . , any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. "The phrase 'Laws of the United States' encompasses both federal statutes themselves and federal regulations that are properly adopted in accordance with statutory authorization." *City of New York v. F.C.C.*, 486 U.S. 57, 63 (1988). Thus, "state laws that 'interfere with, or are contrary to the laws of congress,

made in pursuance of the constitution' are invalid." *Wis. Pub. Intervenor v. Mortier*, 501 U.S. 597, 604 (1991) (quoting *Gibbons v. Ogden*, 9 Wheat. 1, 211 (1824)). This inquiry is largely one of congressional intent, i.e., whether the statute demonstrates an "intent to supplant state authority in a particular field." *Id.* at 604–05. In line with the standards governing motions for dismissal, a defendant bears the burden of proof in establishing preemption as grounds for dismissal. *Brown v. Earthboard Sports USA, Inc.*, 481 F.3d 901, 912 (6th Cir. 2007).

Ordinary preemption provides an affirmative defense to support dismissal of a claim (as Ford did here). *Hudak v. Elmcroft of Sagamore Hills*, 58 F.4th 845, 852 (6th Cir. 2023).[5] "State-law claims can be preempted expressly in a federal statute or regulation, or impliedly, where congressional intent to preempt state law is inferred." *McDaniel*, 893 F.3d at 944 (citation omitted). Through an express preemption clause, Congress may make clear "that it

[5] Ordinary preemption is distinguished from the "misleadingly named doctrine" of complete preemption, a "jurisdictional" doctrine under which a court could conclude "that the pre-emptive force of a statute is so extraordinary that it converts an ordinary state common-law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule." *Hogan v. Jacobson*, 823 F.3d 872, 879 (6th Cir. 2016) (quotation marks omitted). This "complete preemption" doctrine is a narrow one that the Supreme Court has applied in only three statutory settings. *See Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 6–11 (2003).

is displacing or prohibiting the enactment of state legislation in a particular area." *Matthews v. Centrus Energy Corp.*, 15 F.4th 714, 720 (6th Cir. 2021). By contrast, implied preemption applies in one of two forms: field or conflict. *Id.* "Field preemption occurs 'where the scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.'" *Id.* (quoting *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98 (1992)). Conflict preemption may instead be present when "Congress has not entirely displaced state regulation over the matter in question." *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984). In that circumstance, state law may be preempted "to the extent it actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law, or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress." *Id.* (internal citations omitted).

A.

We begin and end with implied preemption. Ford asserts that plaintiffs' fraud-on-the-agency claims are impliedly preempted because those claims conflict with the EPA's testing and fraud-policing authority set forth in the EPCA and with the fact that the EPA is responsible for the fuel economy figures. Plaintiffs say otherwise, arguing their claims are based on state-law duties that are identical to those that federal law imposes on auto manufacturers. We

agree with Ford and conclude that plaintiffs' claims inevitably conflict with the EPCA and its regulatory scheme.[6]

In this, as in any preemption inquiry, the Supreme Court instructs that the "purpose of Congress is the ultimate touchstone," as "explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 516 (1992) (citations omitted). We normally "apply a strong presumption against implied preemption in fields that States traditionally regulate" because "preemption can trammel upon state sovereignty." *Torres v. Precision Indus.*, 995 F.3d 485, 491 (6th Cir. 2021) (per curiam) (citation and internal quotation marks omitted); *cf. Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 579 U.S. 115, 125 (2016). Further, the presence of an express preemption provision "does *not* bar the ordinary working of conflict pre-emption principles." *Geier v. Am. Honda Motor Co., Inc.*, 529 U.S. 861, 869 (2000).

Although no court has addressed implied preemption in this specific context, we do not write on a blank slate—a host of caselaw exists addressing similar fraud-on-the-agency claims in the context of implied preemption. *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341 (2001), is the seminal case.

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[6] Given that our conclusion on implied preemption disposes of the case entirely, we need not address the alternative arguments the parties raise, including express preemption. *See Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 348 n.2 (2001).

There, the plaintiffs claimed injuries resulting from bone screws that had been reviewed and approved by the Food and Drug Administration (FDA). *Id.* at 343–46. The Court began its analysis by noting that no presumption against preemption existed in this context: "Policing fraud against federal agencies is hardly 'a field which the States have traditionally occupied,' such as to warrant a presumption against finding federal pre-emption of a state-law cause of action." *Id.* at 347 (internal citation omitted). Instead, "the relationship between a federal agency and the entity it regulates is inherently federal in character because the relationship originates from, is governed by, and terminates according to federal law." *Id.*

Given that lack of presumption, the Court held that "the plaintiffs' state-law fraud-on-the-FDA claims conflict with, and are therefore impliedly pre-empted by, federal law." *Id.* at 348. Its reasoning was straightforward—the federal scheme empowered the FDA to punish and deter fraud, and the agency used that authority to balance several statutory objectives, which state-law fraud-on-the-agency claims would skew. *Id.* For example, the FDA has "a variety of enforcement options that allow it to make a measured response to suspected fraud upon the [agency]." *Id.* at 349. And the FDA had "flexibility" in pursuing its objectives, including "the difficult task of regulating the marketing and distribution of medical devices without intruding upon decisions statutorily committed to the discretion of health care professionals." *Id.* at 349– 50. Thus, state-law fraud-

on-the-agency claims would "inevitably conflict with the FDA's responsibility to police fraud consistently with the Administration's judgment and objectives." *Id*. at 350. "In sum, were plaintiffs to maintain their fraud-on-the-agency claims here, they would not be relying on traditional state tort law" predating the federal law at issue. *Id*. at 353. "On the contrary, the existence of these federal enactments is a critical element in their case;" the claims existed solely because of the FDA's regulatory and disclosure scheme. *Id*. Therefore, "this sort of litigation would exert an extraneous pull on the scheme established by Congress, and it is therefore pre-empted by that scheme." *Id*.

Courts have applied *Buckman* to other regulatory schemes. Consider *Garcia v. Wyeth-Ayerst Laboratories*, 385 F.3d 961 (6th Cir. 2004). There, we held that a Michigan statute immunizing drug manufacturers from product-liability claims was not facially unconstitutional; as part of our analysis, we concluded that a state-law fraud-on-the-FDA tort claim was impliedly preempted under *Buckman*. *Id*. at 965–66. In so doing, we reasoned that "*Buckman* teaches that state tort remedies requiring proof of fraud committed against the FDA are foreclosed since federal law preempts such claims." *Id*. at 966 (citation omitted).

The Ninth Circuit similarly applied *Buckman* to hold that state-law claims of improper disclosures related to the harmful effects of a pesticide were

preempted under the Federal Insecticide, Fungicide, and Rodenticide Act. *Nathan Kimmel, Inc. v. DowElanco*, 275 F.3d 1199, 1205–06 (9th Cir. 2002). That act, like the FDA scheme in *Buckman*, "is a comprehensive regulatory scheme aimed at controlling the use, sale, and labeling of pesticides," and it both required EPA approval of a pesticide's label and prohibits submitting false information. *Id.* at 1204. The Ninth Circuit concluded that *Buckman*'s analysis similarly applied—the scheme empowered the EPA to punish fraud, the balancing of statutory objectives can be skewed by allowing fraud-on-the-agency claims to proceed, and "the existence of the [act's] requirements are similarly a critical element of [the plaintiff's] state-law case." *Id.* at 1204–06.

And in *Farina v. Nokia, Inc.*, the Third Circuit held that state-law claims alleging the fraudulent marketing of cell phones as safe despite their dangerous radio frequencies were preempted by federal law governing the Federal Communications Commission (FCC). 625 F.3d 97, 104 (3d Cir. 2010). "The Supreme Court's preemption case law indicates that regulatory situations in which an agency is required to strike a balance between competing statutory objectives lend themselves to a finding of conflict preemption." *Id.* at 123 (citing *Buckman*, 531 U.S. at 348). The purpose of the FCC's regulations was to balance protecting the public from emissions with enabling companies to supply quality services in a cost-effective way, and the FCC's balancing of these objectives "is a policy question, not a legal one." *Id.* at

124–25 (citation omitted). "A jury determination that cell phones in compliance with the FCC's [radio frequency] guidelines were still unreasonably dangerous would, in essence, permit a jury to second guess the FCC's conclusion" and, given that state-law standards vary, "eradicat[e] the uniformity necessary to regulating the wireless network." *Id.* at 125–26.

Buckman and its progeny apply with equal force here—the regulatory scheme governing the EPA's approval of fuel economy estimates preempts plaintiffs' state-law claims. Both the EPCA and its corresponding regulations set the standards for testing that a manufacturer *must* follow. The regulations dictate how a manufacturer must test on a dynamometer, *see, e.g.*, 40 C.F.R. § 1066.401, *et seq.*, and how to input correct road-load figures to simulate normal drag and friction, *id.* §§ 1066.301, 1066.1010. They set specific standards for testing, *id.* § 1066.301(b), and provide formulas to calculate city and highway fuel mileage, *id.* § 600.21012. Throughout this process, the EPA is empowered to investigate suspected fraud. *See* 49 U.S.C. §§ 32910–12. If it suspects a manufacturer is not following proper testing procedures, the agency may require the manufacturer to submit the vehicle for inspection or to conduct additional testing. 40 C.F.R. § 600.008. When a manufacturer later submits proposed figures, the EPA must review them for reasonableness before adopting those figures; if those figures are not reasonable, the EPA may again require additional testing. *Id.* Manufacturers have an obligation to

submit truthful information, and the EPA may take corrective or punitive action if information is incomplete or false. 40 C.F.R. § 1066.2. The EPA thus "has at its disposal a variety of enforcement options that allow it to make a measured response to suspected fraud upon the Administration." *Buckman*, 531 U.S. at 349. And, ultimately, the fuel economy figure is the EPA's own; it is not adopted or published unilaterally by Ford (or by any other manufacturer). *See* 49 U.S.C. §§ 32904(c), 32901(a)(11).

The EPA uses this regulatory scheme to "achieve a somewhat delicate balance of statutory objectives" in providing fuel economy estimates. *See Buckman*, 531 U.S. at 348. The testing regime—whereby manufacturers test the vehicles and submit the figures before the EPA may confirm those figures in several ways—is "designed to represent a reasonable balance between the need for accurate fuel economy data and the need to contain the cost of testing for both industry and EPA." Fuel Economy Labeling of Motor Vehicles, 71 Fed. Reg. at 77881. The "criteria for use of the mpg-based approach . . . are based on the balance of three factors." *Id.* at 77897. "First, [the EPA] designed them to be sufficiently large so that typical test-to-test variability would not cause a test group to fail the criteria." *Id.* "Second, [the EPA] want[ed] to minimize the potential error in the fuel economy label." *Id.* "Third, [the EPA] want[ed] to avoid requiring additional fuel economy testing that will have little to no impact on the label values." *Id.* This balance is reflected in what the EPA requires for

approval of fuel economy figures: that they be "reasonable and representative." 40 C.F.R. § 600.008(c)(1). The EPA does not require the figures to be strictly accurate; rather, they must be reasonably related to the testing performed and the EPA's expected fuel economy ratings. This demonstrates that the EPA has significant discretion throughout this process.

Plaintiffs' claims inevitably conflict with this regime.[7] First, because the EPA accepted Ford's testing information and published its estimate based on that information, plaintiffs' claims essentially challenge the EPA's figures. *Cf. Farina*, 625 F.3d at 122 ("Whether or not Farina intends to expressly challenge the FCC standards at trial, the inescapable effect of his complaint is to do so."). To evaluate their claims, a jury would have to decide whether Ford's testing figures are correct or fraudulent. This inescapably and impermissibly puts a jury into the EPA's regulatory shoes. *See id.* at 125 ("Allowing juries to impose liability on cell phone companies for claims like Farina's would conflict with the FCC's regulations."). So even though the EPA exercised its

[7] As a threshold matter, *Buckman* made clear that state law has not traditionally regulated fraud against a federal agency; that relationship is "inherently" federal because it owes its very existence to federal law. 531 U.S. at 347–48. Thus, unlike in other circumstances where states *have* traditionally regulated conduct, *cf. Torres*, 995 F.3d at 491, no presumption against preemption exists here (and plaintiffs do not argue to the contrary).

statutory duty and found Ford's testing to be acceptable, a jury would still make its own determination, thus conflicting with the EPA's authority to set its own fuel-economy figures.

Second, allowing juries to second-guess the EPA's fuel economy figures would permit them to rebalance the EPA's objectives. As explained, the EPA's process accounts for several factors, including cost, accuracy of data, and redundancy of testing. *See* Fuel Economy Labeling of Motor Vehicles, 71 Fed. Reg. at 77881, 77897. The EPA does not require manufacturers' fuel economy figures to be stringently accurate, and it warns consumers that estimates may vary. *See* 40 C.F.R. § 600.302-12(b)(4). It is for the EPA, not a jury, to balance its own objectives in determining whether fuel economy data is reasonable: "Allowing juries to perform their own risk-utility analysis and second-guess the [EPA's] conclusion would disrupt the expert balancing underlying the federal scheme." *Farina*, 625 F.3d at 126. Because the EPA's authority must balance certain statutory objectives, it "can be skewed by allowing fraud-on-the-[EPA] claims under state tort law." *Buckman*, 531 U.S. at 348; *see also Geier*, 529 U.S. at 875–81 (holding that federal law preempted state-law claims based on the lack of airbags because the Department of Transportation's regulation depended on a balancing of multiple factors, such as safety, cost, technological development, and consumer preferences).

Third, as the EPA has the authority to approve or reject fuel economy figures, its "federal statutory scheme amply empowers the [agency] to punish and deter fraud." *Buckman*, 531 U.S. at 348. The EPA has several statutory and regulatory ways to police suspected fraud and monitor compliance with its testing procedures. *See, e.g.*, 49 U.S.C. § 32910; 40 C.F.R. § 600.312-08; 40 C.F.R. § 600.008; 40 C.F.R. § 1066.2. Thus, "Congress has afforded the EPA substantial enforcement powers under [the EPCA] that enable the EPA to make a measured response to suspected fraud against it," including conducting hearings, requiring additional testing, and rejecting a manufacturer's data. *Kimmel*, 275 F.3d at 1205–06. Both determining whether a manufacturer has committed fraud against the agency *and* policing said fraud is, consequently, the responsibility of the EPA. Such explicit authority was a foundational reason *Buckman* determined the claims at issue were preempted. *See* 531 U.S. at 350 ("State-law fraud-on-the-FDA claims inevitably conflict with the FDA's responsibility to police fraud consistently with the Administration's judgment and objectives."). In adjudicating a state-law claim, a jury would be empowered to usurp the EPA's fraud-policing powers.

Finally, state-law claims would skew the disclosures that manufacturers need to make to the EPA. Manufacturers like Ford have documentation that they must submit to the EPA, and the EPA has the responsibility to determine whether this documentation is sufficient. *See* 40 C.F.R. §

600.008(e)(1). But if a state-law claim were to proceed, a jury may find this documentation inadequate even if the EPA had previously determined otherwise. Thus, as was noted in *Buckman*, "[a]pplicants would then have an incentive to submit a deluge of information that the Administration neither wants nor needs, resulting in additional burdens on the [EPA's] evaluation" of the manufacturer's fuel economy data. 531 U.S. at 351. This would burden the agency's approval process and obstruct its goal of "provid[ing] consumers with a basis on which to compare the fuel economy of different vehicles." Fuel Economy Labeling of Motor Vehicles, 71 Fed. Reg. at 77873.

In sum, federal law provides how the EPA regulates fuel economy standards and what the EPA must balance in arriving at its own estimates. It similarly gives the EPA significant authority to investigate and deter fraud. State-law tort claims, like plaintiffs', would skew this balance and permit juries to take the EPA's place in determining whether fuel economy estimates are reasonable. Therefore, as with the claims and regulatory scheme in *Buckman*, plaintiffs' claims are preempted as conflicting with federal law. *See* 531 U.S. at 348.

B.

Plaintiffs contend that several Supreme Court cases dictate the opposite conclusion. First, they cite *Wyeth v. Levine*, where the Supreme Court addressed preemption of state-law claims based on a

manufacturer's failure to warn consumers of a drug's possible side effects. 555 U.S. 555, 559–60 (2009). The Court held that the FDA's approval of the drug label did not preempt these claims—under the federal regulatory scheme at issue, the manufacturer bore the responsibility for the label's contents, and the regulations permitted unilateral alteration of the label. *Id.* at 568–73. Therefore, the state-law claims complemented federal law, and the manufacturer "failed to demonstrate that it was impossible for it to comply with both federal and state requirements." *Id.* at 573. Then, they point to *Silkwood v. Kerr-McGee Corp.*, where the Court determined that federal law did not preempt a state damages award arising from an escape of plutonium from a nuclear facility. 464 U.S. at 241, 258. Congress had provided strict safety regulations for such facilities, but it never provided any remedy for a violation of those standards that would preempt a state law. *Id.* at 253–56. Thus, "Congress assumed that state-law remedies, in whatever form they might take, were available to those injured by nuclear incidents." *Id.* at 256. And, finally, they raise *Medtronic v. Lohr*, where the Court held that state-law claims were not preempted by a statute prohibiting requirements that were "different from, or in addition to," federal requirements. 518 U.S. 470, 492–502 (1996). Nothing in the preemption statute at issue denied a state "the right to provide a traditional damages remedy for violations of common-law duties when those duties parallel federal requirements." *Id.* at 495; *see also Bates v. Dow*

Agrosciences LLC, 544 U.S. 431, 447–48 (2005) (concluding that, so long as a state law imposed only a "parallel requirement[]," no express preemption applied—the statute did "not preclude States from imposing different or additional *remedies,* but only different or additional *requirements*"); *Fulgenzi v. PLIVA, Inc.*, 711 F.3d 578, 586–87 (6th Cir. 2013) ("[The plaintiff's] suit is not even *premised* on violation of federal law, but rather on an independent state duty. The alleged breach arises from the same act, but the legal basis is different. This is simply not grounds for preemption."). Plaintiffs claim that these cases illustrate how Ford's state-law duties are identical to the EPCA's and that, given Ford's fraud, Ford can comply with both to rectify their actions. We cannot agree.

First, plaintiffs' fraud-on-the-agency claims here arose out of the EPCA's requirements— i.e., that Ford failed to follow the EPCA by not providing truthful information as required by the EPCA—not solely out of state-law tort principles. "[T]he existence of these federal enactments is a critical element in their case." *Buckman*, 531 U.S. at 353. Both *Buckman* and *Kimmel* distinguished *Medtronic* and similar caselaw on this basis. *See id.* at 352 ("[I]t is clear that the *Medtronic* claims arose from the manufacturer's alleged failure to use reasonable care in the production of the product, not solely from the violation of FDCA requirements."); *Kimmel*, 275 F.3d at 1206 ("[W]e believe that the existence of the FIFRA requirements are similarly a critical element of

Kimmel's state-law case . . . ."). While plaintiffs' claims may be founded in part on state-law fraud principles, they are also *necessarily* premised on violations of federal law, namely a failure to follow the testing procedures set by the EPA. To demonstrate that Ford committed fraud, plaintiffs would need to show that Ford failed to follow the EPA-proscribed testing procedures or its obligation to report truthful information to the EPA. 40 C.F.R. § 1066.2(b). Their claims would not exist without specific standards regulating the dynamometer, "road load," and coastdown testing process. Therefore, plaintiffs' claims could not exist apart from federal law. *See Buckman*, 531 U.S. at 353 ("[A]lthough *Medtronic* can be read to allow certain state-law causes of actions that parallel federal safety requirements, it does not and cannot stand for the proposition that any violation of the FDCA will support a state-law claim.").

Second, unlike in *Silkwood*, Congress has not disclaimed providing any remedy for violating the EPA testing process. To the contrary, the regulatory scheme gives the EPA significant authority to investigate and correct alleged fraud. *See* 49 U.S.C. §§ 32910–12. The EPA may impose any number of civil or criminal penalties, including voiding fuel economy data for all related engine families. 40 C.F.R. § 1066.2(c). These enforcement authorities, combined with the balancing of EPA's interests and the fact that these numbers belong to the EPA, strongly suggest that Congress intended that the EPCA be enforced by

the federal government. *See Buckman*, 531 U.S. at 352.

Third, and crucially, the regulatory scheme governing fuel economy standards *requires* the EPA to approve those figures and publish them as its own. While Ford must provide the requisite testing data to the EPA, it is the EPA's responsibility to determine whether that data is "reasonable"; after doing so, the EPA adopts those figures. *See, e.g.*, 49 U.S.C. § 32901(a)(11); 40 C.F.R. § 600.312-08(a)(3). The EPA must give its own approval, all the while balancing its statutory and regulatory objectives. This renders *Levine* distinguishable, where the manufacturer was responsible for the contents of the drug's label and could alter it unilaterally without agency approval. 555 U.S. at 568–73.

PLIVA, Inc. v. Mensing, which held that federal law preempted the state-law failure-to-warn claims at issue, confirms this distinction. 564 U.S. 604, 609 (2011). The manufacturers in *Mensing*—unlike in *Levine*—did not have the unilateral authority to modify the drug labels: "Before the Manufacturers could satisfy state law, the FDA—a federal agency—had to undertake special effort permitting them to do so." *Id*. at 623. "[W]hen a party cannot satisfy its state duties without the Federal Government's special permission and assistance, which is dependent on the exercise of judgment by a federal agency, that party cannot independently satisfy those state duties for pre-emption purposes." *Id*. at 623–24. The scheme at

issue here is like that in *Mensing*—Ford has no authority to modify or update the fuel economy figures for its vehicles once the EPA has accepted those figures. It *must* go through the EPA, which has already balanced several objectives in reaching its figures. *Levine* did not involve such a balancing of factors—another reason that it is distinguishable. *See, e.g.*, *Farina*, 625 F.3d at 130 ("[*Levine*] was not a balancing case.").

Finally, plaintiffs attempt to rescue their case by arguing that Ford committed fraud on consumers, not just the agency. But that distinction is immaterial for reasons previously noted— any fraud committed by Ford on consumers is a byproduct of alleged fraud committed on the EPA. One does not exist apart from the other. Consequently, plaintiffs' claims for fraud on consumers exist solely because of the EPCA's requirements. *Cf. Buckman*, 531 U.S. at 353. In any event, Ford's advertisements relied solely on the EPA estimates to proclaim that the Ranger was the "most fuel-efficient gas-powered midsize pickup in America" and that the F-150 had a "best-in-class EPA-estimated highway fuel efficiency rating of 30 mpg." Mere reliance on the EPA estimates, without making any further disclosures about a vehicle's supposed real-world fuel economy, is not enough. *See, e.g.*, *Gray v. Toyota Motor Sales, U.S.A., Inc.*, 554 F. App'x 608, 609 (9th Cir. 2014) ("[A]s a matter of law, there is nothing false or misleading about a car manufacturer's advertising that identifies the EPA fuel economy estimates for the car." (citation

omitted)); *In re Ford Fusion and C-MAX Fuel Econ. Litig.*, No. 13-MD-2450 (KMK), 2015 WL 7018369, at *27 (S.D.N.Y. Nov. 12, 2015) ("To the extent that Plaintiffs' claims rest on Defendant's mere use of EPA estimates . . . such claims are [expressly] preempted." (citation and original brackets omitted)). Indeed, complaining about how Ford uses those estimates is "tantamount to permitting Plaintiffs to challenge the EPA estimates themselves," which plaintiffs cannot do. *See In re Ford Fusion and C-MAX Fuel Econ. Litig.*, No 13-MD-2450 (KMK), 2017 WL 3142078, at *10 (S.D.N.Y. July 24, 2017).

C.

In conclusion, we hold that plaintiffs' fraud-on-the-agency claims against Ford are impliedly preempted as conflicting with federal law.[8] The EPCA

[8] We do not pass any opinion on the applicability of this analysis in the event that the EPA itself determines that a manufacturer committed fraud in its fuel-economy testing. *Cf. Buckman*, 531 U.S. at 353–54 (Stevens, J., concurring) (noting that, if the agency had found fraud, "a plaintiff would be able to establish causation without second-guessing the FDA's decisionmaking or overburdening its personnel, thereby alleviating the Government's central concerns regarding fraud-on-the-agency claims"); *Garcia*, 385 F.3d at 966 (explaining that *Buckman* applied to a plaintiff's claim "on the basis of *state court* findings of fraud on the FDA," but that similar concerns would not arise "when the *FDA itself* determines that a fraud has been committed on the agency during the regulatory-approval process"). Such a situation is not before us as the EPA closed its own investigation into Ford's alleged fraud without further action.

provides ample authority for the EPA to regulate testing, deter fraud, and publish its own fuel economy estimates. The EPA must balance several objectives in doing so, and state-law tort claims would skew this balance. "For the reasons stated above, we think this sort of litigation would exert an extraneous pull on the scheme established by Congress, and it is therefore pre-empted by that scheme." *Buckman*, 531 U.S. at 353.

IV.

For the foregoing reasons, we affirm the judgment of the district court.

Appendix B

No. 22-1245

United States Court Of Appeals
For The Sixth Circuit

IN RE: FORD MOTOR COMPANY F-150 AND RANGER TRUCK FUEL ECONOMY MARKETING AND SALES PRACTICES LITIGATION.

MARSHALL B. LLOYD; *ET AL.*,

Petitioners,

v.

FORD MOTOR COMPANY,

Respondent.

Filed June 21, 2023

BEFORE: GRIFFIN, BUSH, and MURPHY, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the

petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court.* No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

* Judges Kethledge and Davis recused themselves from participation in this ruling.

Appendix C

No. 22-1245

United States Court Of Appeals
For The Sixth Circuit

IN RE: FORD MOTOR COMPANY F-150 AND RANGER TRUCK FUEL ECONOMY MARKETING AND SALES PRACTICES LITIGATION.

MARSHALL B. LLOYD; *ET AL.*,

Petitioners,

v.

FORD MOTOR COMPANY,

Respondent.

BEFORE: GRIFFIN, BUSH, and MURPHY, Circuit Judges.

JUDGMENT

Filed April 21, 2023

On Appeal from the United States District Court
for the Eastern District of Michigan at Detroit.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION THEREOF, it is ORDERED that the judgment of the district court is AFFIRMED.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

Appendix D

No. 22-1245

United States Court Of Appeals
For The Sixth Circuit

IN RE: FORD MOTOR COMPANY F-150 AND RANGER TRUCK FUEL ECONOMY MARKETING AND SALES PRACTICES LITIGATION.

MARSHALL B. LLOYD; *ET AL.*,

Petitioners,

v.

FORD MOTOR COMPANY,

Respondent.

TRANSCRIPT

Heard March 8, 2023

[3:2-7] CLERK: Case Number 22-1245, Marshall Lloyd et al. v. Ford Motor Company. Oral argument

not to exceed 15 minutes per side. Mr. Berman, you may proceed for the Appellant.

HON. RICHARD A. GRIFFIN: Good morning.

MR. BERMAN: Good morning, Your Honors. Steve Berman on behalf of the Appellants.

* * * * *

[5:4-13] HON. RICHARD A. GRIFFIN: The fact that it's over with, that the -- your brief says that it's over with regard to criminal prosecution. Do you concede it's over with for -- that the EPA has made a determination that what was submitted complies with their rules and regulations?

MR. BERMAN: I have no idea, Your Honor. There's nothing in the record to suggest or in the EPA's pronouncements as to whether they're still looking at this on a civil basis.

HON. RICHARD A. GRIFFIN: Okay.

* * * * *

[11:5-12:11] HON. JOHN K. BUSH: So, at this point you're only seeking damages.

MR. BERMAN: That's correct. And, Your Honor, most of these cars are new cars. So, this case is a

couple years old. So, the primary class members here, if there were a class, are new car buyers, people who would have gone in and seen --

HON. JOHN K. BUSH: I guess when you say new car buyers, the purchases have already taken place though, right?

MR. BERMAN: That's correct.

HON. JOHN K. BUSH: They were new car buyers at that time the purchase took place.

MR. BERMAN: That's correct.

HON. JOHN K. BUSH: but these are all used cars at this point, correct?

MR. BERMAN: That's correct.

HON. JOHN K. BUSH: Okay. What I'm getting at is, is there really any interference with what the EPA does. Because it seems like to me you're seeking damages which doesn't really interfere with what the EPA does going forward. I mean, there's not any current Monroney sticker that's being affected by the relief you're seeking in this case, is there?

MR. BERMAN: No, there is not.

HON. JOHN K. BUSH: You're just saying this past

testing was done incorrectly, resulting in an incorrect Monroney number.

MR. BERMAN: Right.

HON. JOHN K. BUSH: And you're seeking damages for that.

MR. BERMAN: That's correct.

* * * * *

[26:25-27:8] HON. JOHN K. BUSH: Let me ask you a quick question about the representations that Ford made. Do you agree that the representations were all related to -- when it says best in class and most fuel efficient gas-powered midsize pickup in America they were -- do you understand that Ford was referring to what the tests were under the EPA procedure?

MR. BERMAN: I agree with that, Your Honor.

HON. JOHN K. BUSH: Okay. They're not referring to, like, any other kind of test.

MR. BERMAN: No.

HON. JOHN K. BUSH: Okay.

* * * * *

[27:20-28:8] HON. RICHARD A. GRIFFIN: Thank you. Case will be submitted. You may call the next case.

(Whereupon these proceedings were concluded.)

C E R T I F I C A T I O N

I, Sonya Ledanski Hyde, certified that the foregoing transcript is a true and accurate record of the proceedings.

Sonya Ledanski Hyde

Appendix E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

IN RE: FORD MOTOR CO. F-150 AND RANGER TRUCK FUEL ECONOMY MARKETING AND SALES PRACTICES LITIGATION	Case No. 2:19-md-02901 Sean F. Cox United States District Court Judge

_____/

OPINION & ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

Filed February 23, 2022

The Judicial Panel on Multidistrict Litigation transferred several putative class actions to this Court for coordinated pretrial proceedings. At this juncture, the operative complaint is Plaintiffs' First Amended Consolidated Master Class Action Complaint, wherein Plaintiffs assert a variety of state-law claims under the laws of fifty states, and a related federal claim, against Defendant Ford Motor Company ("Ford"). The First Amended Consolidated

Master Class Action Complaint spans nearly a thousand pages and includes three hundred and eleven counts. The matter is currently before the Court on Ford's Motion to Dismiss it. The parties have extensively briefed the issues and the Court heard oral argument on June 17, 2021.

The central argument presented in Ford's motion is that Plaintiffs' claims are preempted under federal law. As explained below, this Court concludes that Plaintiffs' claims are preempted under federal law, both express preemption and implied conflict preemption. In addition, the Court finds several of Ford's additional or alternative arguments to have merit and rules that: 1) Plaintiffs lack standing to assert claims arising under the laws of the twenty-two states where no named Plaintiff claims to reside or have been injured; 2) Plaintiffs claims are barred under the doctrine of primary jurisdiction; 3) Plaintiffs' misrepresentation-based consumer fraud and consumer protection claims fail for additional reasons; 4) Plaintiffs' representative claims brought under the consumer protection statutes of several states are subject to dismissal based on statutory class-action bars; 5) Plaintiffs' breach of contract claims are subject to dismissal because Plaintiffs do not allege the existence of an enforceable contract with Ford; 6) Plaintiffs' express warranty claims are also barred by federal and state laws; 7) Plaintiffs' Magnuson-Moss Warranty Act claims must also be dismissed for failure to allege sufficient pre-suit

notice; and 8) Plaintiffs' transactions are exempt from the Michigan Consumer Protection Act.

BACKGROUND

The Judicial Panel on Multidistrict Litigation, with the consent of this Court, transferred and assigned various putative class action cases pending in the Eastern District of Michigan and other districts to the undersigned. Thereafter, this Court appointed interim lead counsel for Plaintiffs.

On December 16, 2019, this Court issued a "Joint Case Management Order" that, among other things, ordered Plaintiffs to file a consolidated master amended complaint no later than January 27, 2020, and Ford to respond to it by March 27, 2020.

On January 27, 2020, Plaintiffs filed a "Consolidated Amended Master Class Action Complaint." (ECF No. 64). After Ford filed a Motion to Dismiss to that complaint, however, Plaintiffs advised that they intended to file another amended complaint that would render that Motion to Dismiss moot. The parties agreed that Plaintiffs would file their amended complaint on or before August 21, 2020.

Plaintiffs' First Amended Consolidated Master Class Action Complaint ("FAC")[1], filed on August 21, 2020 (ECF No. 78), which now spans nearly a

[1] In their briefs, Plaintiffs refer to this pleading as the "FACC" and Ford refers to it as the "ACAC." For simplicity, this Court will refer to it as the FAC.

thousand pages and includes three hundred and eleven counts, is the operative complaint.

The FAC includes an "Introduction" section that provides an overview of Plaintiffs' claims. "Car makers know that one of the most important factors for a consumer purchasing a vehicle is fuel economy. With vehicle purchases and leases being among the largest transactions most consumers will carry out in their lifetime, consumers trust the fuel economy rating displayed in a vehicle's window sticker to help them make important financial decisions." (FAC at ¶ 1). In this case, Plaintiffs allege that Ford "cheated on its fuel economy testing on some of its best-selling and most popular trucks. Ford then used its inaccurate fuel economy ratings on the window stickers to sell and lease these trucks to consumers. Over a million Ford truck owners are now driving vehicles that will cost them thousands of dollars more to own or lease than they anticipated. Because of Ford's deception, all purchasers and lessees of these vehicles paid more for these vehicles than they are actually worth." (*Id*. at ¶ 2). Plaintiffs bring this putative class action, asking this Court to certify a class defined as:

> All persons who purchased or leased a Ford vehicle whose published EPA fuel economy ratings, as printed on the vehicles' window sticker, were more than the fuel economy rating produced by a properly conducted applicable federal mileage test. The vehicles in the Class include but are not limited to

> the model year 2019 and 2020 Ford Ranger and the 2018, 2019, and 2020 Ford F-150.

(*Id*. at ¶ 3). "These vehicles are hereinafter referred to as the 'Coastdown Cheating Vehicles' and include the 2019 and 2020 Ford Ranger and the 2018, 2019, and 2020 F-150 series trucks, and likely also include other Ford vehicles." (*Id*. at ¶ 4).

"A Coastdown test is a procedure that determines metrics used to calculate a vehicles's fuel economy values of 'MPG Rating' (miles per gallon). Coastdown testing tells a manufacturer how much rolling resistance and drag a vehicle has so that when a vehicle is testing on a dynamometer, the manufacturer knows how much drag and rolling resistance to apply to the vehicle to simulate the road." (*Id*. at ¶ 5). Plaintiffs allege that "Ford fudged its coastdown testing and used inaccurate drag and resistance figures to boost the vehicles' EPA (Environmental Protection Agency) mileage ratings." (*Id*. at ¶ 6).

"On the window sticker of every Ford F-150 and Ford Ranger are EPA-required indications of fuel economy including city and highway mileage, miles per gallon, and a combined city and highway miles per gallon statement." (*Id*. at ¶ 7). "Ford knows that fuel economy is material to consumers. Testing of the 2018 F-150 using the mandated coastdown procedure reveals that Ford did not follow appropriate coastdown testing procedures." (*Id*. at ¶ 8). "The window sticker or 'Monroney sticker' for a 2018 F-150

V6 indicates mileage of 20 city, 26 highway, and 22 combined. Accurate coastdown testing of a 2018 Ford F-150 V6 reveals the following: The real highway fuel number is 22.7 MGP compared to 26.6 reported by Ford to the EPA. Thus, the highway fuel difference is 15% and the city difference 10%. Assuming the lifetime of a truck is 150,000 miles, at the real city miles per gallon rates, city driving would consume an extra 821 gallons over the lifetime of the truck. The highway extra fuel (extra means real MPG versus Ford's reported MPG) is 968 gallons." (*Id*. at ¶ 9). "These are material differences as manufacturers fight for every 1/10th of a difference in miles per gallon both to attract customers and to earn credits under the applicable environmental emissions regulations." (*Id*. at ¶ 10).

"Ford's motives in overstating vehicle miles per gallon were: (1) to advertise the vehicles as 'Best in Class' for fuel economy or to advertise a fuel economy that would beat the competition and/or be attractive to consumers, (2) to attract customers based on fuel economy ratings, and (3) to earn more credits for Ford under the U.S. CAFÉ environmental regulations since less fuel burned means less emission." (*Id*. at ¶ 11). "Ford has admitted that the 2019 Ranger is just the first model that is being investigated by the government for improper coastdown testing. As explained herein, Plaintiffs' testing of the 2018 F-150 reveals similar coastdown cheating." (*Id*. at ¶ 12). "Ford sold approximately 1 million 2018 and 2019 F-150s. The extra fuel costs, with the same assumptions

above, for all 2018 and 2019 F-150s would be approximately $2.32 billion for city driving, $2.09 billion highway, and $1.9 billion combined." (*Id.* at ¶ 13).

"The 2018, 2019, and 2020 F-150 are virtually identical in engine and body configuration. In fact, on its applications to certify fuel economy ratings and emissions certifications for the 2019 and 2020 F-150, Ford used the same vehicle serial numbers and presented the same emissions test numbers to the EPA as it did for the 2018 F-150 applications. Likewise, the 2020 Ranger is virtually identical in engine and body configuration to the 2019 Ranger and Ford has used the same vehicle serial number and presented the same emissions test numbers to the EPA as it did for the 2019 Ranger application." (*Id.* at ¶ 14).

"Ford deliberately misrepresented or miscalculated certain road testing factors during internal vehicle testing processes in order to report that its vehicles were more fuel efficient than they actually were. In particular, Ford miscalculated something called 'Road Load,' which is the force that is imparted on a vehicle while driving at a constant speed over a smooth, level surface from sources such as tire rolling resistance, driveline losses, and aerodynamic drag. Ford's internal lab tests did not account for these forces, which lead to better – and entirely inaccurate – fuel economy projections." (*Id.* at ¶ 15).

"Despite Ford's own employees questioning its testing practices and the calculations that Ford was utilizing for fuel economy ratings, at least by September 2018, Ford took no action to correct the problems nor to alert customers that their test methods were flawed and that consumers would not get the promised fuel economy." (*Id*. at ¶ 16). "With respect to its 2019 Ford Ranger, Ford promised that its midsize truck 'will deliver with durability, capability and fuel efficiency, while also providing in-city maneuverability and the freedom desired by many midsize pickup truck buyers to go off the grid.' Ford also claimed that its 'All-New Ford Ranger [was] Rated Most Fuel Efficient Gas-Powered Midsize Pickup in America.' 'With EPA-estimated fuel economy ratings of 21 mpg city, 26 mpg highway and 23 mpg combined, 2019 Ford Ranger is the most fuel efficient gas-powered midsize pickup in America.' Ford claimed the 2019 Ranger 'is the no-compromise choice for power, technology, capability, and efficiency whether the path is on road or off.'" (*Id*. at ¶ 17).

"Ford knew that to sell the Ranger, it had to tout it had fuel efficiency, and this promise was material to consumers." (*Id*. at ¶ 18). "There is no question that Ford used the fuel efficiency ratings as a selling tool to entice consumers into purchasing the 2019 Ford Ranger. Indeed, Ford promised that '[t]he adventure-ready 2019 Ford Ranger is the most fuel-efficient gas-powered midsize pickup in America – providing a superior EPA-estimated city fuel economy rating and an unsurpassed EPA-estimated combined

fuel economy rating versus the competition. The all-new Ranger has earned EPA-estimated fuel economy ratings of 21 mpg city, 26 mpg highway, and 23 mpg combined for 4x2 trucks.' Ford claimed that '[t]his is the best-in-class EPA-estimated city fuel economy rating of any gasoline-powered four-wheel-drive midsize pickup and it is an unsurpassed EPA-estimated combined fuel economy rating.'" (*Id.* at ¶ 19),

"Fuel economy was also used as a tool to entice customers to buy the Ford F-150. Ford promised that certain of the 2018 F-150s were 'best in class' for fuel economy, or promised certain city, highway and combined fuel miles per gallon for other F-150 models that were robust enough that Ford believed would make them attractive to consumers." (*Id.* at ¶ 20). "In contrast to Ford's promises, as noted above, scientifically valid testing has revealed that the vehicles (i) are not as fuel efficient as promised; (ii) are not what a reasonable consumer would expect; and (iii) are not what Ford had advertised. Further, the vehicles' promised power, fuel economy and efficiency, and towing capacity are obtained only by altering the testing calculations." (*Id.* at ¶ 21). "Ford's representations are deceptive and false, and Ford sold its 2019 and 2020 Ford Rangers and 2018, 2019, and 2020 F-150 models while omitting information that would be material to a reasonable consumer; namely, that Ford miscalculated factors during internal vehicle testing processes in order to report that its vehicles were more fuel efficient than they actually

were, and discounted common real-world driving conditions." (*Id*. at ¶ 22).

"Plaintiffs bring this action individually and on behalf of all other current and former owners or lessees of the Coastdown Cheating Vehicles. Plaintiffs seek damages, injunctive relief, and equitable relief for Ford's misconduct related to the design, manufacture, marketing, sale, and lease of the Coastdown Cheating Vehicles, as alleged in this Complaint." (*Id*. at ¶ 23).

The FAC includes named Plaintiffs from the following twenty eight states: Alabama, Arizona, California, Florida, Georgia, Hawaii, Illinois, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, New Jersey, New York, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, and Wisconsin. There are no named Plaintiffs who assert claims under the law of the remaining twenty-two states.

The Court includes here some factual allegations in the FAC that are relevant to the challenges in the pending Motion to Dismiss.

Plaintiffs allege that "Ford deliberately miscalculated and misrepresented factors used in vehicle certification testing in order to report that its vehicles used less fuel and emitted less pollution than they actually did. The certification test-related

cheating centers on the 'Coastdown" testing and "Road Load" calculations." (FAC at ¶ 397).

"The Coastdown test results are sent by Ford to the EPA to be used as the basis for mileage information used on window stickers, also called a 'Monroney sticker.'" (FAC at ¶ 404).

"The Monroney sticker is on the window of every new car and included information about the vehicles's price, engine and transmission specifications, other mechanical and performance specs, fuel economy and emissions ratings, safety ratings, and standard and optional features." (*Id*. at ¶ 405). "The Monroney sticker is named for A.S. 'Mike' Monroney, a longtime Oklahoma congressman who wrote the 1958 Automobile Information Disclosures Act, the federal law that requires the Monroney sticker." (*Id*. at ¶ 406).

Included on the Monroney sticker "is a section called 'the EPA sticker.' The Environmental Protection Agency section of the sticker tells how many miles per gallon of gas the vehicle gets on the highway and in the city. The EPA label provides miles-per-gallon equivalent (MPGe) figures for electric and hybrid cars to help consumers compare the fuel economy of these vehicles with gas- and diesel-powered cars. The EPA section hereinafter will detail the vehicles's potential environmental impact with green house gas emissions." (*Id*. at ¶ 407).

"The fuel economy figures are used by car reviewers and used by consumers to rate cars." (*Id*. at ¶ 408).

"Ford has admitted that in September of 2018 several of its own employees were questioning its computer modeling and physical test practices for certification of fuel economy and emissions. Yet, Ford took no action to correct these ongoing misrepresentations or to alert consumers." (FAC at ¶ 410). Plaintiffs allege that, "[p]ressured by a pending governmental criminal investigation, Ford has now stated that it will look into the testing of the 2019 Ranger truck before looking at its other vehicles." (*Id*. at ¶ 411).

Plaintiffs allege that Ford's "March 2019 Securities and Exchange Commission filing revealed that it is under criminal investigation by the United States Department of Justice for its emissions certification practices." (FAC at ¶ 430). They further allege that in "September 2018, several Ford employees expressed concerns about the testing practices at Ford pertaining to emissions and fuel efficiency. In February 2019, Ford admitted it was looking into these concerns about its 'computer-modeling methods and calculations used to measure fuel economy and emissions.'" (*Id*. at ¶ 432).

"Even after Ford employees had come forward about the cheating, Ford's media center touted the 2019 Ranger truck as having amazing performance without compromise," with claims about fuel

efficiency "front and center." (FAC at ¶ 462). "Ford's claim of *most fuel efficient in its class*" is set forth in its "sales brochures for the 2019 Ranger." (*Id.* at ¶ 463) (emphasis added).

Ford's "F-150 is the best-selling vehicle in the United States and has been for decades." (FAC at ¶ 464). "To stimulate F-150 sales and maintain its lead over competitors like the Dodge Ram, Ford announced that the 2018 Ford F-150 would be best in class for fuel economy and/or published inflated MPG estimates." (*Id.* at ¶ 465).

Exhibit 18 to the FAC is a Monroney sticker for a 2018 F-150 2.7 V6. The sticker notes that "This label is affixed pursuant to the Federal Automobile Information Disclosure Act." The sticker lists the "Fuel Economy" as "22 MPG" for combined city/hwy, "20 city," and "26 highway," with "4.5 gallons per 100 miles." (*Id.* at ¶ Ex. 18). The sticker states that "Actual results will vary for many reasons, including driving conditions and how you drive and maintain your vehicle." (*Id.*).

"The 2018 F-150 brochure lists the estimated fuel economy for the various types of 150s," with various "EPA-estimated ratings" for each of the types and stating that "[a]ctual mileage will vary." (Ex. 20 to FAC).

Plaintiffs allege that, as a result of Ford's "unfair, deceptive, and/or fraudulent business practices, Plaintiffs did not receive the fuel efficiency

that was advertised and will incur increased fuel costs over the life of their vehicle. Had Ford told the truth, that it was cheating on its coastdown testing, Plaintiffs would not have bought their vehicle or would have paid substantially less." (FAC at ¶ 471).

The FAC asks this Court to certify a "Nationwide Class" that would consist of "[a]ll persons who purchased or leased a Ford vehicle whose published EPA fuel economy ratings, as printed on the vehicles' window sticker, were more than the fuel economy rating produced by a properly conducted applicable federal mileage test. The vehicles in the Class include but are not limited to the model year 2019 and 2020 Ford Ranger and the 2018, 2019, and 2020 Ford F150." (FAC at ¶ 481).

The FAC also asks the Court to certify fifty subclasses, one for each of the states in the United States (i.e., an "Alabama Subclass," an "Alaska Subclass," etc.).

The FAC contains three-hundred and eleven separate counts, consisting mostly of state-law claims, that are organized by subclasses. That is, the FAC first asserts all of the causes of action brought on behalf of the Alabama subclass under Alabama law, and then does the same for each of the proposed subclasses. It then asserts five counts as a "Nationwide Class."

The FAC's request for relief asks this Court to certify this case as a class action. It also asks the

Court to declare that Ford's conduct is "unlawful, unfair, and deceptive." (FAC at 960). It further asks this Court to require that "all Class members be *notified about the lower fuel economy ratings* and higher emissions at Ford's expense" and *provide* "*correct fuel economy* and emissions *ratings*" to Class members. (*Id*. at 961) (emphasis added). The FAC also seeks an award of compensatory and exemplary damages, "disgorgement of all profits wrongfully received by Ford for the Coastdown Cheating Vehicles," and an award of statutory penalties. (*Id*.).

STANDARD OF DECISION

Ford brings the instant Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6).

Fed. R. Civ. P. 12(b)(1) provides for the dismissal of an action for lack of subject matter jurisdiction. "Article III standing is a question of subject matter jurisdiction properly decided under 12(b)(1)." *American BioCare, Inc. v. Howard & Howard Attorneys, Pllc*, 702 F. App'x 416, 419 (6th Cir. 2017). Because Ford challenges subject matter jurisdiction, Plaintiffs have the burden of proof to show that subject matter jurisdiction exists. *Id*. When ruling on a motion to dismiss for lack of standing under Rule 12(b)(1), the district court must accept all material allegations of the complaint as true. *Courtney v. Smith*, 297 F. App'x 455, 459 (6th Cir. 2002).

"To survive a motion to dismiss" under Fed. R. Civ. P. 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). A claim is facially plausible when a plaintiff pleads factual content that permits a court to reasonably infer that the defendant is liable for the alleged misconduct. *Id.* When assessing the sufficiency of a plaintiff's claim, this Court must accept the complaint's factual allegations as true. *Ziegler v. IBP Hog Mkt., Inc.*, 249 F.3d 509, 512 (6th Cir. 2001). "Mere conclusions," however, "are not entitled to the assumption of truth. While legal conclusions can provide the complaint's framework, they must be supported by factual allegations." *Iqbal,* 556 U.S. at 664, 129 S.Ct. 1937. Thus, a plaintiff must provide "more than labels and conclusions," or a "formulaic recitation of the elements of a cause of action" in order to survive a motion to dismiss. *Twombly*, 550 U.S. at 555, 127 S.Ct. 1955. "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do no suffice." *Iqbal*, 556 U.S. at 678, 129 S.Ct. 1937.

Rule 9(b) of the Federal Rules of Civil Procedure "sets the pleading standard for 'alleging fraud or mistake' and governs state fraudulent concealment claims in diversity cases." *Smith v. General Motors, LLC*, 988 F.3d 873, 883 (6th Cir.

2021). "Rule 9(b) requires parties to 'state with particularity the circumstances constituting fraud or mistake' for fraud claims but permits general allegations about the defendant's knowledge to avoid a 12(b)(6) motion to dismiss. The adequacy of 9(b) pleadings in the face of a motion to dismiss under 12(b)(6) are analyzed under the *Twombly/Iqbal* framework." *Id.* "To satisfy Rule 9(b), 'the plaintiff must allege (1) 'the time, place, and content of the alleged misrepresentation,' (2) 'the fraudulent scheme,' (3) the defendant's fraudulent intent, and (4) the resulting injury.'" *Smith*, *supra* (citations omitted).

ANALYSIS

I. Plaintiffs' Claims Are Preempted By Federal Law.

As its opening and central argument, Ford asserts that all of Plaintiffs' claims in this action are preempted under federal law and must be dismissed. The Court agrees.

"The federal preemption doctrine has grown out the Supremacy Clause of the United States Constitution, which provides in part 'the Laws of the United States which shall be made in Pursuance' of the Constitution 'shall be the supreme Law of the Land.' U.S. Const., art. VI, cl. 2." *State Farm v. Reardon*, 539 F.3d 336, 341 (6th Cir. 2008). "According to the Supreme Court, '[t]he phrase 'Laws of the

United States' encompasses both federal statutes themselves and federal regulations that are properly adopted in accordance with statutory authorization.'" *Id.* (quoting *City of New York, v. FCC*, 486 U.S. 57, 63, 108 S.Ct. 100 L.Ed.2d 664 (1982)). "Federal law may preempt state law either expressly or impliedly." *Id.*

Here, Ford makes arguments regarding both express preemption and implied preemption. Before analyzing those arguments, the Court will discuss the basic federal framework relating to fuel economy estimates.

The testing and disclosure of estimated fuel economy for new vehicles sold in the United States is governed by a comprehensive federal regulatory scheme created by the Environmental Policy and Conservation Act ("EPCA"), and enforced by the Federal Trade Commission ("FTC") and the Environmental Protection Agency ("EPA").

"The EPCA provides that every new vehicle sold in the United States be labeled with a sticker (a 'Monroney Sticker') indicating estimated fuel economy, and that a booklet comparing fuel economies of similar vehicles, prepared by the EPA, be made available by vehicle dealerships." *In re Ford Fusion & C-MAX Fuel Econ. Litig.,* 2015 WL 7018369 (S.D. N.Y. 2015*"(C-Max I"), supra*, at *4 (citing 49 U.S.C. § 32908(b) and *Giles v. Ford Motor Co.*, 24 F.Supp.3d 1039, 1045 (D. Colo. 2014)). "The Monroney Sticker must also include a disclaimer indicating that '[a]ctual results will vary for many

reasons, including driving conditions and how you drive and maintain your vehicle." *Id*. (citing 40 C.F.R. 600.302-12(b)(4) and *Giles, supra*).

"The EPA regulates the calculation of estimated fuel economy." *C-MAX I, supra*. The current regime allows automobile manufacturers like Ford to choose between two methods of calculating fuel economy. 40 C.F.R. § 600.210-12.

"The FTC, by contrast, regulates the advertisement of fuel economy estimates to consumers. As explained in *C-MAX I:*

> Its regulations provide, in relevant part, that "[n]o manufacturer or dealer shall make any express or implied representation in advertising concerning the fuel economy of any new automobile unless . . . the [EPA] is the source of the 'estimated city mpg' and 'estimated highway mpg' and that the numbers are estimates" and marked as such. 16 C.F.R. § 259.2(a); *see also Gilles*, 24 F.Supp.2d at 1046-47 (describing these regulations and noting that, "[s]imply put, when a manufacturer includes miles per gallon numbers in an advertisement, it must, in a clear and conspicuous manner, include the EPA mileage estimates, state that they are estimates, and indicate that the EPA is the source of the estimates."). The FTC regulations further provide that

> "[f]uel economy estimates derived from a non-EPA test may be disclosed provided that," inter alia, the EPA estimates have "substantially more prominence than any other estimate." 16 C.F.R. § 259.2(c). Unlike the EPA regulations, the FTC regulations do not require an "actual results will vary" disclaimer. *Gilles*, 24 F.Supp.3d at 1047. If a manufacturer fails to comply, the FTC may take "corrective action . . . under appropriate statutory provisions." 16 C.F.R. § 1.5.

C-MAX I, supra, at *5.

As Ford's brief notes, "EPA fuel economy estimates are not, and have never been, guarantees of real-world fuel economy performance," explaining:

As the EPA itself has stressed, its fuel economy "ratings are a useful tool for comparing the fuel economies of different vehicles but may not accurately predict the average [miles per gallon] *you* will get. EPA Your Mileage Will Vary, available at https://www.fueleconomy.gov/feg/why_differ.shtml (last visited Oct. 12, 2020) (emphasis in original). Indeed, a vehicle's fuel economy "will vary." *Id.* For this reason, when designing the Monroney label, regulators acknowledged that it must contain a "statement . . . informing the buyer that the values on the label are not guaranteed[.]" 76 Fed. Reg. at 39505.

And as the EPA has long-acknowledged, its required fuel economy estimates are not – and can never be – "perfect" figures that can predict the performance of each vehicle for each driver under all conditions:

> It is important to emphasize that fuel economy varies from driver to driver for a wide variety of reasons, such as different driving styles, climates, traffic patterns, use of accessories, loads, weather, and vehicle maintenance. Even different drivers of the same vehicle will experience different fuel economy as these and other factors vary. Therefore, *it is impossible to design a "perfect" fuel economy test* that will provide accurate, real-world economy estimates for every consumer. With any estimate, there will always be consumers that get better or worse actual fuel economy. The EPA estimates are meant to be a general guideline for consumers, particularly, to compare the relative fuel economy of one vehicle to another.
>
> 71 Fed. Reg. at 77874; *see also* 76 Fed. Reg. at 39505 (emphasizing "tradition" of ensuring consumers know estimates do not reflect real world economy); EPA Your Mileage Will Vary, available at https://www.fueleconomy.gov/feg/why_differ.shtml (last visited Oct. 12, 2020).

(Def.'s Br. at 6-7).

A. Express Preemption

"Express preemption exists where either a federal statute or regulation contains explicit language indicating that a specific type of state law is preempted." *State Farm*, 539 F.3d at 34142.

Chapter 329 of Title 49 of the United States Code ("Transportation") is titled "Automobile Fuel Economy." Section 32919 of Chapter 329 is titled "Preemption," and provides, in its entirety:

> (a) General. – When an average fuel economy standard prescribed under this chapter is in effect, a State or a political subdivision of a State may not adopt or enforce a law or regulation related to fuel economy standards or average fuel economy standards for automobiles covered by an average fuel economy standard under this chapter.
>
> (b) Requirements must be identical. – When a requirement under section 32908 of this title is in effect, a State or a political subdivision of a State may adopt or enforce a law or regulation on disclosure of fuel economy or fuel operating costs for an automobile covered by section 32908 only if

> the law or regulation is identical to that requirement.
>
> (c) State and political subdivision automobiles.– A State or political subdivision of a State may prescribe requirements for fuel economy for automobiles obtained for its own use.

49 U.S.C. § 32919.

Where, as here, the "statute contains an express preemption clause," the Court should "not invoke any presumption against pre-emption but instead focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent." *Puerto Rico v. Franklin California Tax-Free Trust*, 579 U.S. 115, 136 S.Ct. 1938, 1946 (2016) (internal quotations omitted); *see also Dialysis Newco, Inc. v. Community Health Sys. Group Health Plan*, 938 F.3d 246, 258 (8th Cir. 2019).

Ford asserts that Plaintiffs' claims in this action are expressly preempted by 49 U.S.C. § 32919(a) and (b).

Ford argues that the vehicles at issue in this case "are undisputedly covered by 49 U.S.C. § 32908, the general fuel economy labeling provision. And the accompanying preemption provision expresses Congress's intent clearly: no State may obligate a vehicle manufacturer to comply with any

requirement pertaining to the disclosure of a vehicle's fuel economy unless an identical requirement is already imposed by Section 32908." (Def.'s Br. at 15). Ford contends that "[b]ecause Plaintiffs' core theory of this case would impose such forbidden 'non-identical' testing and disclosure requirements, their claims are expressly preempted." (*Id*.). Ford asserts that "the plain wording of Congress's express preemption clause, combined with the overall structure and purpose of the surrounding regulatory scheme, leaves no doubt that Congress intended to preempt all state-law efforts to impose differing fuel economy testing and disclosure obligations on vehicle manufacturers." (Def.'s Br. at 16).

Ford argues that Plaintiffs' claims in this action are expressly preempted under § 32919(b), arguing:

> Plaintiffs claim that Ford "cheated" on fuel economy testing and produced fuel economy estimates for the subject vehicles that are *per se* deceptive. *See, e.g.*, [FAC] ¶ 2. They bring this action seeking a judicial decree requiring Ford to, inter alia, "correct" those estimates. *Id*. at Prayer for Relief. As their chosen means to achieve that result, Plaintiffs invoke various state laws that would impose widely differing obligations than those contained in 49 U.S.C. § 32908. Thus, under the plain language of Section 32919(b)'s express preemption clause,

> Plaintiff's state law claims must be dismissed.

(Def.'s Br. at 16-17).

Ford also argues that while § 32919(b) "preempts the use of state law to impose different labeling standards than those in Section 32908, Section 32919(a) sweeps much more broadly and also compels the dismissal of this litigation in its entirety," arguing:

> Specifically, that provision bars any "law or regulation related to fuel economy standards for automobiles covered by an average fuel economy standard[.]" 49 U.S.C. §32919(a). "The words 'related to,' as used in this context, 'express a broad presumptive purpose.'" *Wellons v. Northwest Airlines, Inc.*, 165 F.3d 493, 495 (6th Cir. 1999) (quoting *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992)). That broad preemptive construction applies in the context of many federal statutory regimes, including the EPCA. *See, e.g, Metro Taxicab Bd. of Trade v. City of New York*, 615 F.3d 152, 156-57 (2d Cir. 2010) (holding that the "related to" language in § 32919(a) should be interpreted consistent with other statutory preemption provisions containing that phrase and citing case law noting its "expansive" nature).

Federal law defines the term "average fuel economy standard" as "a performance standard specifying a minimum level of average fuel economy applicable to a manufacturer in a year." 49 U.S.C. § 32901(a)(6). Courts have used this phrase interchangeably with the term "fuel economy standard," which is not separately defined. *See, e.g., In re Ctr. for Auto Safety,* 793 F.2d 1346, 1348 (D.C. Cir. 1986). Given the rules of broad interpretation, "[r]elated to fuel economy standards' means having "a connection with, or reference to" those standards, *Morales,* 504 U.S. at 383-84, when viewed in light of the objectives of the statutory scheme. *Egelhoff v. Egelhoff ex. rel. Breiner*, 532 U.S. 141, 147 (2001).

Here, the procedures designed by the EPA to test fuel economy – in accordance with the EPA's mandate under 49 U.S.C. § 32904 – are undoubtedly "related to fuel economy standards or average fuel economy standards." Indeed, these testing procedures, and the resulting fuel-economy figures, are used to determine whether vehicle manufacturers meet the fuel economy and emissions standards by the federal government. *See* 40 C.F.R. 600.210-12, 600.210-08(a) (2008). Plaintiffs repeatedly acknowledge these governing standards in the [FAC]. *See, e.g.*, [FAC] ¶¶

436 (noting that "the FTP-75 (Federal Test Procedure) cycle [] has been created by the EPA and is used for emission certification and fuel economy testing of passenger vehicles in the United States"), 439 ("The standardized technique for performing a coastdown is prescribed in the Code of Federal Regulations"), 442 (alluding to "[t]he processes required by the Code of Federal Regulations").

Nevertheless, Plaintiffs go beyond those requirements by implausibly claiming that Ford had a duty to disclose the "true fuel economy" for the subject vehicles, as if such a figure actually exists. And by advancing claims that are untethered from the standards and procedures that the EPA has prescribed for estimating and disclosing fuel economy, Plaintiffs introduce an inherent conflict with the words and intentions of Congress. (*See, e.g.*, [FAC] ¶¶ 31, 25 & others). This should not be permitted. Indeed, under the Supremacy Clause of the U.S. Constitution, where conflict exists between a state claim and an express preemption of federal law, the federal law must be held supreme. See U.S. Const. art. VI, CL. 2; *Maryland v Louisiana*, 451 U.S. 725, 746 (1981) ("It is basic to this constitutional command that all conflicting state provisions be without effect.").

> Plaintiffs' claims are undoubtedly preempted.

(Def.'s Br. at 16-18).

In support of its position that Plaintiffs' claims in this case are expressly preempted by federal law, Ford directs this Court to cases such as *C-MAX I* and *Paduano v. Am. Honda Motor Co., Inc.*, 169 Cal. App. 4th 1453, 1468 (Cal. App. 2009).

The C-Max Fuel Economy Litigation case against Ford was an MDL that was assigned to a district court judge in the Southern District of New York. *C-Max I, supra.* Like this case, the plaintiffs asserted state-law statutory claims under various consumer protection acts and common law claims such as fraud, negligent misrepresentation, breach of contract, unjust enrichment and breach of warranty claims. After the plaintiffs file\d a consolidated amended class action complaint, Ford filed a motion to dismiss in which it made a number of challenges – including that the claims are expressly preempted by federal law. Ford made the same express preemption arguments it makes here.

In an opinion and order issued in 2015, the district court ruled that the plaintiffs' claims were "partially preempted." *Id.* at *25. In doing so, the district court stated that the plaintiffs' "claims appear to rest on two separate strands of alleged wrongdoing:" 1) allegations that challenged Ford's "guarantees of a real-world fuel economy that go

beyond including EPA estimates in advertisements," (i.e., allegations that Ford's advertisements emphasized that the MPG estimates were something their vehicles would "actually deliver"); and 2) allegations that "appear to challenge the mere use of EPA fuel estimates, in ways that the EPA contemplated using them, as opposed to 'actual' fuel economy." *Id.*

The district court concluded that claims based upon allegations concerning advertisements that functioned to "guarantee specific, real-world performance," are not preempted by federal law. *Id*. at *26. On the other hand, it concluded that to the extent plaintiffs' claims were based on Ford's mere use of EPA estimates, such claims are preempted. It explained that "[t]he use of EPA estimates themselves clearly falls within the scope of the relevant FTC regulations, and any state law indicating otherwise would constitute 'a law or regulation on disclosures of fuel economy or fuel operating costs' that is not identical to those contained in, or contemplated by, the EPCA." *Id*. at *27. It further explained that:

> Likewise, as Defendant contends, any obligation to include "actual" fuel economy based on independent testing of each Vehicle goes beyond what automobile manufacturers are required to do under the EPCA. Accordingly, to the extent that Plaintiffs' claims are premised on the idea that the advertisements (or Monroney

> Stickers) included EPA estimates, rather than some other "actual" fuel economy calculation, or to the extent that Plaintiffs' claims are based on the contention that Defendant failed to independently test and disclose the fuel economy of the C-Max in order to determine its "actual" performance, (CAC ¶¶ 97, 100-01), the Court finds that those claims are preempted by the EPCA and FTC, because they seek to impose a regime above and beyond that required by those regulations.

Id. at *27. Thus, the district court ruled that "[t]o the extent that Plaintiffs made claims based on the mere use of EPA fuel economy estimates in advertisements or on Monroney Stickers, those claims are dismissed because they are preempted by federal law." *Id*. at *40.

Paduano is an earlier case that was cited in *C-MAX I* and has been followed in other similar cases. In *Paduano*, the plaintiff asserted state-law claims against an automobile manufacturer because he was displeased with the fuel efficiency of the vehicle he had purchased. *Paduano v. Am. Honda Motor Co., Inc.*, 169 Cal. App. 4th 1453 (Cal. App. 2009). The defendant sought to dismiss the claims on several grounds, including express preemption by federal law, and the trial court granted the motion. The appellate court concluded that the plaintiff raised claims that are not preempted by federal law and reversed the

trial court's judgment as to his state-law causes of action for deceptive advertising.

In addressing the preemption issue, the appellate court concluded that § 32919(a) had no application to the claims. *Id*. at 1475-76. It then addressed express preemption under § 32919(b) and concluded that the particular claims asserted by Paduano were not preempted, explaining:

> Contrary to Honda's characterization of Paduano's UCL and CLRA claims, Paduano is not claiming that disclosing the EPA mileage estimates is, by itself, deceptive. Rather, Paduano maintains that Honda has *voluntarily made additional assertions, beyond the disclosure of the mileage estimates, that are untrue or misleading*, and that federal law does not require, or even address, these additional assertions. Paduano's claims are based on statements Honda made in its advertising brochure to the effect that one may drive a Civic Hybrid in the same manner as one would a conventional car, and need not do anything "special," in order to achieve the beneficial fuel economy of the EPA estimates. It is not, as Honda maintains, the disclosure of the EPA estimates that Paduano claims is deceptive per se. *What Paduano is challenging is Honda's added commentary in which it alludes to those estimates in a*

> *manner that may give consumers the misimpression that they will be able to achieve mileage close to the EPA estimates while driving a Honda hybrid in the same manner as they would a conventional vehicle*. Paduano does not seek to require Honda to provide "additional alleged facts" regarding the Civic Hybrid's fuel economy, as Honda suggests, but rather, seeks to prevent Honda from making misleading claims about how easy it is to achieve better fuel economy. Contrary to Honda's assertions, *if Paduano were to prevail on his claims, Honda would not have to do anything differently with regard to its disclosures of the EPA mileage estimates.*

Id. at 1477 (emphasis added).

Kim v. General Motors, LLC is another case wherein the plaintiff asserted various state-law claims against an automobile manufacturer, asserting they were misled about the vehicle's fuel economy. *Kim v. General Motors, LLC*, 99 F.Supp.3d 1096 (C.D. Calf. 2015). The defendant moved to dismiss, arguing that the claims "are expressly preempted by 49 U.S.C. § 32919 because, if allowed to go forward, they would amount to 'inconsistent state regulation of fuel economy or the disclosure of fuel economy.'" *Id*. at 1102. The district court rejected the defendant's argument that the claims asserted against it were preempted by federal law. In doing so, it first agreed

with *Paduano* that § 32919(a) had no application to the claims. It then went on to consider whether the claims were preempted under § 32919(b) and concluded they were not, relying on *Paduano*:

> Here, as in *Paduano*, Plaintiff does not challenge the disclosure of the EPA estimate itself, nor does it focus on representations made on the Monroney label. (FAC ¶ 26; Opp. at 4.) As in *Paduano*, Plaintiff cites to *additional statements, made in advertisements* rather than on a Monroney label, that Plaintiff alleges could lead a reasonable consumer to believe that the vehicle is *capable of achieving these EPA estimates under real world conditions*. In other words, Plaintiff challenges GM's *use of the EPA estimates in a way that may give consumers the mistaken impression that they are able to achieve real-world mileage and tank range derived from those figures.*

Kim, 99 F.Supp.3d at 1104 (emphasis added).

In response to Ford's express preemption arguments, Plaintiffs make arguments against preemption under both subsections.

In arguing that their claims are not expressly preempted under § 32919(a), Plaintiffs note that Ford's own cited authorities, *C-MAX I* and *Paduano,* found no express preemption under subsection (a)

because "§ 32919(a) pertains to fleet fuel efficiency standards, not the mileage of individual models." (Pls.' Br. at 18). Both of those cases so ruled (*see C-MAX-I, supra*, at *25 and *Paduano*, *supra,* at 1476), as did the district court in *Kim* (*see Kim*, 99 F. Supp.3d at 110203). This Court rejects Ford's express preemption argument based upon § 32919(a) under that line of authority.

But that still leaves Ford's express preemption argument under § 32919(b). As to that, Plaintiffs argue that "Ford premises its argument on a series of cases in which plaintiffs did not challenge the underlying Monroney Sticker information but alleged that non-Sticker misrepresentations were actionable under state law – as opposed to Plaintiffs here, who allege both sorts of misrepresentations." (Pls.' Br. at 20). In other words, Plaintiffs characterize the cases cited by Ford as: 1) not having addressed the issue of whether a "false-sticker claim" was preempted; and 2) having found that claims based on "non-sticker misrepresentations" (ie, assertions other than stating EPA mileage estimates) were actionable under state law.

Plaintiffs mischaracterize those decisions as not having rejected the issue of whether federal law preempts state-law claims based on a manufacturer's use of EPA estimates in advertisements or Monroney Stickers, rather than the vehicle's "actual" or "true" fuel economy calculation. The district court in *C-MAX I* rejected that very argument:

> Likewise, as Defendant contends, any obligation to include "actual" fuel economy based on independent testing of each Vehicle goes beyond what automobile manufacturers are required to do under the EPCA. Accordingly, to the extent that Plaintiffs' claims are premised on the idea that the advertisements (or Monroney Stickers) included EPA estimates, rather than some other "actual" fuel economy calculation, or to the extent that Plaintiffs' claims are based on the contention that Defendant failed to independently test and disclose the fuel economy of the C-Max in order to determine its "actual" performance, (CAC ¶¶ 97, 100-01), the Court finds that those claims are preempted by the EPCA and FTC, because they seek to impose a regime above and beyond that required by those regulations.

C-MAX I, supra, at *27.

And recall that in rejecting the express preemption argument in *Paduano*, the court explained that "if Paduano were to prevail on his claims, Honda would not have to do anything differently with regard to its disclosures of the EPA mileage estimates." *Paduano, supra*, at 1477. Here, the same is not true. The FAC asks this Court to certify a "Nationwide Class" that would consist of "[a]ll persons who purchased or leased a Ford vehicle

whose published EPA fuel economy ratings, as printed on the vehicles' window sticker, were more than the fuel economy rating produced by a properly conducted applicable federal mileage test." (FAC at ¶ 481). If Plaintiffs were to prevail on their claims in this case, the very relief Plaintiffs seek includes that this Court require that all Class members be notified about the "correct fuel economy" of the vehicles. (FAC at ¶ 961).

This Court concludes that Plaintiffs' "false-sticker" claims are expressly preempted by federal law.

There is case law that does reflect, however, that claims that are based upon certain representations, that go beyond including EPA estimates in advertisements, are not preempted. For example, in *C-MAX I*, the court concluded that the "Plaintiffs' allegation that Ford did not only rely on the EPA estimate, but also guaranteed real-world fuel economy based upon it, is an allegation that goes 'beyond' that estimate. The Court therefore concur[red] with holdings of other courts that considered similar allegations, namely that advertisements functioned to guarantee specific, real-world performance, and conclude[d] that such claims are not preempted." *C-MAX I, supra*, at *26.

In responding to Ford's motion, Plaintiffs contend their state-law claims in this case are not expressly preempted because they are based upon alleged misstatements made by Ford that go beyond

the *EPA* estimates in advertising or Monroney Stickers. The problem for Plaintiffs is that, unlike the plaintiffs in *C-MAX I*, *Paduano*, and *Kim,* they do not allege that Ford made any statements that went beyond EPA estimates to state (or even suggest) that such real-world fuel economy could be achieved by their vehicles.

Instead, Plaintiffs direct the Court to alleged "other" kinds of representations that they contend are "extrinsic" to fuel economy estimates and, therefore, are not preempted. Plaintiffs allege that Ford claimed in an advertisement "that '[w]ith EPA-estimated fuel economy ratings of 21 mpg city, 26 mpg highway and 23 mph combined, the 2019 Ford Ranger is the *most fuel efficient* gas-powered midsize pickup in America" and that another vehicle was "*best in class*" for fuel economy with stated EPA fuel economy estimates. (Pls.' Br. at 27) (emphasis added).

Plaintiffs have not directed the Court to any case wherein a court has ruled that claims based upon those kind of allegations are not expressly preempted by federal law.

Moreover, under the reasoning in the above cases, Ford persuasively argues that it used the EPA fuel estimates of its vehicles in the very way the EPA contemplated they would be used – to compare the estimated fuel economy of different vehicles.

This Court therefore concludes that all of Plaintiffs' claims in this action, that are based upon

Ford's alleged use of the EPA mileage estimates in the Monroney stickers and in its challenged advertisements, are preempted under federal law and shall be dismissed on that basis.

Given this ruling, the Court need not address Ford's alternative or additional challenges raised in the pending motion. Because the Court finds a number of those challenges also have merit, however, it shall address them.

B. Implied Conflict Preemption

Ford contends that, in addition to being expressly preempted, Plaintiffs claims also fail due to implied conflict preemption.

"Implied preemption has been subdivided into 'field preemption' and 'conflict preemption." *State Farm*, 539 F.3d at 342. Here, Ford asserts that conflict preemption exists.

Conflict preemption "occurs 'when compliance with both state and federal law is impossible, or when the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *United States v. Locke*, 529 U.S. 89, 109, 120 S.Ct. 1135, 146 L.Ed.2d 69 (2000) (citations omitted); *see also Chrysler Group LLC v. Fox Hills Motor Sales, Inc.*, 776 F.3d 411, 424 (6th Cir. 2015) ("Conflict preemption occurs when a state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of

Congress.'"). "In other words, '[i]f the purpose of the act cannot otherwise be accomplished – if its operation within its chosen field . . . must be frustrated and its provisions be refused their natural effect – the state law must yield to the regulation of Congress.'" *Id.* (quoting *Savage v. Jones*, 225 U.S. 501, 533, 32 S.Ct. 715, 56 L.Ed. 1192 (1912)).

In support of this argument that Plaintiffs' claims in this action are also barred by conflict preemption Ford asserts:

> The federal government, through the EPA, and at direction of Congress, promulgated a comprehensive set of statutes and regulations to further the federal objective of providing consumers with uniform and comparable fuel economy information. *See, e.g.*, 49 U.S.C. § 32904 (vesting EPA with responsibility to establish test methods and calculation procedures for determining fuel economy estimates); 49 U.S.C. § 32908(b)(1) (requiring automobile manufacturers to display EPA fuel economy estimates on each new automobile offered for retail sale in the United States); 49 U.S.C. § 32908(c)(3) (mandating that the EPA prepare an annual Fuel Economy Guide); 40 C.F.R. § 533.6 (setting forth measurement and calculation procedures for light trucks); 40 C.F.R. §§ 600.40508 and 600.407-08 (requiring dealers to make available a printed copy of

> the annual Fuel Economy Guide). In furtherance of this pervasive federal scheme, the FTC has adopted the aforementioned directives that require manufacturers to generate EPA fuel economy estimates and to use them in any advertising referring to fuel-economy performance. The FTC's definitive advertising requirements, and the EPA's explicit testing/labeling requirements, together evidence a comprehensive federal scheme to provide consumers with consistent and comparable fuel economy information.

(Def.'s Br. at 21-22). Ford persuasively argues that "Plaintiffs' position in this litigation, if sustained, would wholly frustrate this federal scheme" and explains:

> Each of the 45 named Plaintiffs complain that Ford acted unlawfully by failing to disclose the "true fuel economy" for the subject vehicles. (*See, e.g.*, ACAC ¶ 31 (stating that a Plaintiff would not have purchased, or would have paid less for the subject vehicles, "[h]ad Ford disclosed the [vehicle's] true fuel economy[.]").) Even if "true" fuel economy existed for any vehicle – it does not, as fuel performance is highly dependent on operating conditions, driving habits, etc. – this is not what federal law

> requires. As explained in detail above, manufacturers are instructed to provide fuel economy estimates generated according to EPA-mandated testing procedures, which prescribe the actual fuel type and driving cycle to be administered during the test, and to explain that a consumer's actual mileage "will vary." Plaintiffs' claims are impliedly preempted because they would require Ford not only to make disclosures that are different from what federal law requires, but also to construct and disclose supposed "true" fuel economy, which is impossible and would surely mislead consumers.

(Def.'s Br. at 22).

In response, Plaintiffs assert that it is not clear "which theory of implied preemption Ford relies upon – field or conflict preemption" and so they address both. Ford's brief is clear, however, that it asserts that *conflict preemption* applies. (*See, e.g.*, Def.'s Statement of Issues Presented No. 1, arguing "conflict preemption" applies, Def.'s Br. at 20 with heading stating that "conflict preemption also bars Plaintiffs' claims.").

As to conflict preemption, Plaintiffs argue that "Ford incorrectly argues that disclosure of the vehicles' true fuel economy would require Ford 'to make disclosures that are different from what federal law requires' and to construct and disclose a supposed

'true' fuel economy, which is impossible and would surely mislead consumers.'" (Pls.' Br. at 33). Plaintiffs argue that their "claims are that because of Ford's false advertising, Ford had a duty under state law to disclose the **true fuel economy** *in addition to* the Monroney Sticker." (*Id.* at 33-34) (italics in original, bolding added for emphasis). Plaintiffs argue that claim does not create a conflict, because it is not impossible to comply with both the regulation and the obligation that Plaintiffs identify. (*Id.* at 34). Plaintiffs rely on *C-MAX I*, where the district court found no conflict preemption,[2] and then direct the Court to various cases dealing with emissions that are not analogous to this fuel economy case.

The federal government, through the EPA, and at direction of Congress, has established a comprehensive set of statutes and regulations to

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[2] *See C-MAX-I, supra*, at *28. This Court does not agree with this ruling, wherein the district court concluded that "a manufacturer could disclose an alternative fuel economy estimate yet still ensure that EPA estimates are the most prominent." Moreover, Plaintiffs are not suggesting that Ford should provide an alternative "estimate." Plaintiffs assert that Ford should have to disclose the "true fuel economy" of its vehicles. If Ford were required to provide "true fuel economy" figures for their vehicles, that would directly conflict with the federally-mandated language on the Monroney Stickers that "[a]ctual results will vary for many reasons, including driving conditions and how you drive and maintain your vehicle," which is the whole reason why the federal government requires that "estimates" of the fuel economy of new vehicles be provided to consumers.

further the federal objective of providing consumers with uniform and comparable fuel economy information. This Court agrees with Ford that Plaintiffs' state-law claims in this case – that they admit would require Ford to construct and disclose to consumers an additional, supposed "true fuel economy" for their vehicles – stand as an obstacle to the accomplishment and execution of that federal regime.

II. Plaintiffs Lack Standing To Assert Claims Arising Under The Laws Of The States Where No Named Plaintiff Claims To Reside Or Have Been Injured.

Ford's Motion to Dismiss includes alternative or additional arguments pertaining to standing. Among other things, Ford asserts that Plaintiffs lack Article III standing to assert claims arising under the laws of the twenty two states where no named Plaintiff claims to reside or have been injured. (Def.'s Br. at 28). In response, Plaintiffs assert that this challenge is premature and should be addressed later, at the class certification stage.

This Court has addressed this very same challenge in other putative class actions. *See In re Refrigerant Compressors Antitrust Litig.*, 2012 WL 2917465 at *4 (E.D. Mich. 2012); *Flores v. FCA US LLC,* 2021 WL 1122216 at *24-25 (E.D. Mich. 2021). Other district courts in this district have as well. *See,*

eg., In re Packaged Ice Antitrust Litig., 779 F. Supp 2d 642, 657 (E.D. Mich. 2011, Judge Borman). This Court shall follow that same approach here and rules that Plaintiffs lack standing to assert claims arising under the laws of the twenty two states where no named Plaintiff claims to reside or have been injured.

Accordingly, the following counts are also subject to dismissal on this basis: Counts 712 (asserted under Alaska law), Counts 19-24 (asserted under Arkansas law), Counts 33-38 (asserted under Colorado law), Counts 39-44 (asserted under Connecticut law), Counts 45-50 (asserted under Delaware law), Counts 70-75 (asserted under Idaho law), Counts 82-87 (asserted under Indiana law), Counts 88-93 (asserted under Iowa law), Counts 94-99 (asserted under Kansas law), Counts 100-105 (asserted under Kentucky law), Counts 112-117 (asserted under Maine law), Counts 143-148 (asserted under Mississippi law), Counts 155-160 (asserted under Montana law), Counts 167-172 (asserted under Nevada law), Counts 173-178 (asserted under New Hampshire Law), Counts 185-190 (asserted under New Mexico law), Counts 198-203 (asserted under North Carolina law), Counts 204-209 (asserted under North Dakota law), Counts 234-239 (asserted under Rhode Island law), Counts 271-276 (asserted under Vermont law), Counts 289-294 (asserted under West Virginia law), and Counts 301-306 (asserted under Wyoming law).

III. Plaintiff's Claims Are Also Barred By The Doctrine Of Primary Jurisdiction.

Ford contends that even if this Court were to find that some claims in the FAC are viable, "it should nevertheless decline to exercise jurisdiction over this case under the doctrine of primary jurisdiction." (Def.'s Br. at 34).

"The doctrine of primary jurisdiction 'arises when a claim is properly cognizable in court but contains some issue within the special competence of an administrative agency.'" *United States v. Any and All Radio Station Trans. Equip.*, 204 F.3d 658, 664 (6th Cir. 2000) (quoting *United States v. Haun*, 124 F.3d 745, 749 (6th Cir. 1997) (citing *Reiter v. Cooper*, 507 U.S. 258, 268, 113 S.Ct. 1213, 122 L.Ed.2d 604 (1993)).

"Unfortunately, '[n]o fixed formula exists for applying the doctrine.'" *Id.* (citing *United States v. Western Pacific R. Co.*, 352 U.S. 59, 64, 77 S.Ct. 161, 1 L.Ed.2d 126 (1956)). Rather, a district court "must apply the doctrine of primary jurisdiction on a case-by-case basis," deferring to an administrative agency when the reasons for the existence of the doctrine are present. *Alltel Tennessee, Inc. v. Tennessee Pub. Serv. Comm'n*, 913 F.2d 305, 309 (6th Cir. 1990). "Those reasons, broadly speaking, are the desire for uniformity in adjudication and the belief that the decisionmaker with the most expertise and broadest perspective regarding a statutory or regulatory scheme will be most likely to resolve the issue

correctly." *Any and All Radio Station Trans. Equip., supra*, at 664.

Here, Ford argues that the "EPA has primary jurisdiction regarding the accuracy of EPA-mandated fuel-economy estimates because their calculation is obviously within the EPA's special expertise and the Agency has a need to promote the uniformity of its administrative policy in this important area. These concerns are highlighted by the comprehensive and complex nature of the federal regulatory scheme promulgated by the EPA." (Def.'s Br. a 34-35). In support of this argument, at pages 35 to 36 of its brief, Ford details the regulatory scheme at issue. It also discusses the regulatory authority to enforce the regulations and notes that "the federal government is currently exercising its authority to investigate Ford's fuel-economy testing of the Subject Vehicles. (*See* ACAC, at Ex. 2)." (Def.'s Br. at 36).

Ford argues that, despite the complexity of the EPA's regulatory scheme, and an ongoing governmental investigation, "Plaintiffs continue to ask this Court – not the EPA – to determine whether the fuel-economy estimates displayed on select Ford-brand vehicles are accurate." (Def.'s Br. at 36). Ford contends it would be improper to supplant the special expertise of the EPA in this manner and direct the Court to both *C-Max I* and *Giles*.

In *C-Max I*, Ford argued that the district court should decline to exercise jurisdiction over the plaintiffs' claims under the doctrine of primary

jurisdiction. *C-Max I, supra*, at *29. The district court accepted that argument in part and rejected it in part. As to the plaintiffs' claims that were based upon advertisements that went beyond using the EPA mileage estimates being misleading, the district court concluded those claims were not barred by the doctrine. *Id*. at 2930 (Concluding this court "properly may determine whether Defendant's alleged guarantees of real-world fuel economy were misleading to consumers without treading on the calculation methods devised by the EPA, or their disclosure as mandated by the EPA."). But the district court found that the other claims were barred by the doctrine:

> On the other hand, passing judgment on whether there is a way to calculate fuel economy for the C-Max, and whether that should be disclosed, directly implicates the methods devised by the EPA, and the disclosure requirements devised by the FTC. Accordingly, those claims are barred here by the primary jurisdiction doctrine, as they fall within the competence, and mandate, of the EPA and FTC. *Id*. at *30. Here, Plaintiffs do not assert claims about guarantees of real-world fuel economy performance. To the contrary, the only claims they raise in this case are the claims that the district court found were barred in *C-Max I* – claims challenging the accuracy of

> Ford's EPA fuel economy estimates and Ford's disclosure of them.

The district court in *Giles* also considered whether it should decline to exercise jurisdiction over claims under the doctrine of primary jurisdiction. *Giles,* 24 F.Supp.3d 1039 at 1049-50. The district court rejected Ford's primary jurisdiction argument because the claims in that case were not based upon the accuracy of the EPA estimates:

> The problem with Ford's argument is that this case does not involve claims based on matters within an agency's special competence. In support of this argument, Ford points out that the "EPA has primary jurisdiction regarding the accuracy of EPA mileage estimates." [ECF No. 16 at 25.] This is undoubtedly true, and those estimates surely depend on technical information not within the conventional experience of this Court. However, as noted above, *this case is not about the accuracy of the EPA estimates*. Rather, Mr. Giles is challenging specific advertisements which failed to disclose that they were based on the EPA estimates and, in his opinion, misled him and other purchasers of the Ford Escape. These claims are closer to the garden variety fraud cases that are very

> much within the conventional experience of the courts. This Court therefore declines Ford's invitation to refer the case to the EPA.

Giles, supra, at *1050 (emphasis added). Unlike the *Giles* case, this case *is about* the accuracy of the EPA estimates.

This Court agrees with Ford that the claims in this action are barred by the doctrine of primary jurisdiction.

IV. Plaintiffs' Misrepresentation-Based Consumer Fraud And Consumer Protection Claims Fail For Additional Reasons.

In addition to preemption, Ford's motion also challenges Plaintiffs' consumer fraud and consumer protection claims and focus on their misrepresentation-based claims. Plaintiffs misrepresentation-based claims can be divided into two categories: 1) claims based on materials that simply disclose EPA-mandated fuel-economy estimates; and 2) claims based upon representations other than EPA estimates.

A. Claims Based On Materials Merely Containing EPA-Mandated Fuel-Economy

Estimates Fail To State A Claim.

Numerous courts have found that a plaintiff fails to state a consumer protection act claim where the claim is based upon materials that merely contain EPA-mandated fuel-economy estimates. *See, e.g.*, *In re Ford Fusion & C-MAX Fuel Econ. Litig.*, 2015 WL 7018369 * 32 ("[T]he Court is persuaded that any [consumer protection] claims based on the mere inclusion of EPA estimated fuel economy and associated disclaimers do not state a claim upon which relief can be granted. The case law makes clear . . . that the mere use of EPA estimates, as opposed to any other supposed estimates of 'actual' fuel-economy, are not actionable."); *Paduano v. Am. Honda Motor Co.*, 88 Cal.Rptr.3d at 105 ("As a matter of law, there is nothing false or misleading about Honda's advertising with regard to its statements that identify the EPA fuel economy estimates for the two Civic Hybrid models."); *Gray v. Toyota Motor Sales, USA*, 2012 WL 313703 at *6 (D. Cal. 2012) ("[T]he claims must fail as they rely solely on advertisements that merely repeat the approved EPA mileage estimates, without any additional representations as to, for example, a consumer's ability to achieve those figures under normal driving conditions"), *aff'd, Gray v. Totoya Motor Sales, USA, Inc.*, 554 F. App'x 608, 609 (9th Cir. 2014) ("[N]o misrepresentation occurs when a manufacturer merely advertises EPA estimates."); *Kim v. General Motors, LLC,* 99 F.Supp.3d 1096, 1108 (C.D. Calf. 2015) (District court agreeing with other

authorities "which held that [consumer protection] claims that 'rely solely on advertisements that merely repeat the approved EPA mileage estimates, without any additional representations as to, for example, *a consumer's ability to achieve those figures under normal driving conditions*,' must fail.") (emphasis in original).

Plaintiffs do not appear to dispute that the authority Ford relies on, "stands for the narrow proposition 'that the mere use of EPA estimates, as opposed to any other supposed estimates of 'actual' fuel-economy, are not actionable.'" (Pls.' Br. at 68).

This Court concurs with that line of authority and rules that, to the extent that any of the consumer protection act claims are based upon materials that merely contain EPA-mandated fuel-economy estimates, those claims fail to state a claim.

B. Plaintiffs' Claims Based On Misrepresentations Other Than EPA Estimates Also Fail To State A Claim.

Plaintiffs argue, however, that "even Ford's authority recognizes 'additional' representations that go beyond EPA estimates are sufficient to establish claims." (Pls.' Br. at 68). Plaintiff contends their statutory claims should not be dismissed because they "have alleged reliance on misrepresentations other than EPA estimates." (Pls.' Br. at 69) (emphasis added). The only such alleged "other"

misrepresentations that Plaintiffs direct the Court to are Ford "falsely claiming" that the "Class Vehicles were 'most fuel efficient' and 'best in class' for fuel economy – in other words better than the competition to induce sales – in places like Ford's website, dealer brochures and sales pamphlets, television and radio commercials, and/or on the Vehicle's window Stickers. (See ¶¶ 11, 17-22, 414-415, 456, 462-470)." (*Id.*).

For example, in paragraph 17, Plaintiffs allege that, "[w]ith respect to its 2019 Ford Ranger, Ford promised that its midsize truck 'will deliver with durability, capability, and fuel efficiency" and "also claimed that its All-New Ford Ranger [was] Rated Most Fuel Efficient Gas-Powered Midsize Pickup in America." "With EPA-estimated fuel economy ratings of 21 mpg city, 26 mpg highway and 23 mpg combined, 2019 Ford Ranger is the most fuel efficient gas-powered midsize pickup in America." (FAC at ¶ 19).

In paragraph 19, Plaintiffs allege that "Ford promised that '[t]he adventure-ready 2019 Ford Ranger is the most fuel-efficient gas-powered midsize pickup in America – providing a superior EPA-estimated city fuel economy rating and an unsurpassed EPA-estimated combined fuel economy rating versus the competition. The all-new Ranger has earned EPA-estimated fuel economy ratings of 21 mpg city, 26 mpg highway and 23 mpg combined for 4x2 trucks.' Ford claimed that '[t]his is the best-in-class EPA-estimated city fuel economy rating of any gasoline-powered four-wheel-drive midsize pickup

and it is an unsurpassed EPA-estimated combined fuel economy rating.'" (FAC at ¶ 19).

Unlike the representations found to be sufficient to be actionable in the above cases, Plaintiffs have not alleged that Ford made any representations that the vehicles at issue would actually achieve the EPA-estimated figures under real-world conditions.

Rather, Plaintiffs take issue with alleged statements wherein Ford stated that its vehicles were "best-in-class" or "most fuel efficient" – comparative statements about ratings.

In its reply brief, Ford makes two points. First, it asserts that the "additional" alleged statements about "most fuel efficient" is non-actionable "puffery," and direct the Court to *Raymo v. FCA US LLC*, 475 F. Supp.3d 680, 706 (E.D. Mich. 2020). In that case, Judge Berg ruled alleged statements, such as "leading fuel economy" are "general and nonquantifiable" and are therefore "nonactioanble puffery."

Second, Ford asserts that the additional statements Plaintiffs rely on are "generalized statements about comparing the EPA-estimated fuel-economy figures among vehicles" that are not actionable. (Def.'s Reply Br. at 24). Ford directs the Court to "*C-Max II*," wherein the court ruled that statements that "C-Max [ ] bests in MPG" and "most fuel-efficient midsize hybrid in America" are not actionable. In this regard, Ford asserts that "[c]omparisons are, after all, the *purpose* of the EPA

estimates. EPA Your Mileage Will vary, available at https://www.fueleconomy.gov/feg/why_differ.shtml (last visited Feb. 2, 2021) (estimates 'are a useful tool for comparing the fuel economies of different vehicles.'). Yet that is all Plaintiffs allege." (*Id.*) (emphasis in original).

In *C-MAX II,* the district court rejected the argument that the comparative statements at issue in that case were mere puffery, because the statements are "capable of verification." *Id.* at *10. It agreed, however, that the comparative statements were not actionable, explaining:

> Nowhere in these commercials does Ford promise that the C-MAX will achieve better gas mileage than the Prius V or that the Fusion's fuel economy "doubles the fuel economy of the average vehicle" under real-world conditions. Instead, the commercials rely on the EPA-estimated fuel economy of the Vehicles in making these comparisons . . .

In re Ford Fusion and C-Max Fuel Econ. Litig., 2017 WL 3142078 at * 10 (S.D. 2017).

This Court concludes that Plaintiffs have not sufficiently alleged a misrepresentation-based consumer protection claim against Ford.

V. The Consumer Protection Claims Under The Law Of Several State's Laws Fail DueTo Statutory Class-Action Bars.

In addition to preemption, Ford asserts that several of Plaintiffs' state consumer protection act claims fail as a result of statutory class-action bars. (Def.'s Br. at 39). Ford notes that the "Alabama, Arkansas, Georgia, Louisiana, Mississippi, Montana, Ohio, South Carolina, Tennessee and Virginia consumer protection statutes preclude class actions or otherwise provide a private right of action exclusively for individuals acting in their own capacities. *See, e.g.*, Ala. Code § 8-19-10(f); Ark. Code Ann. 4-88-113(f)(1)(B); Ga. Code Ann. § 10-1-399(a); La. Stat. Ann. § 51:1409(A); Miss. Code Ann. § 75-24-15(4); Mont. Code Ann. § 30-14-133(1); Ohio Rev. Code Ann. § 1345.09(A); S.C. Code Ann. § 39-5-140(a); Tenn. Code Ann. § 47-18-109(a)(1); Va. Code § 59.1-204." (*Id.*). Ford claims that, as federal courts in this district have decided, this "means that Plaintiffs' claims under these statutes, seeking class-wide recovery, are inappropriate and subject to dismissal." (*Id.*).

In response, Plaintiffs do not dispute that the consumer protection act statutes of the above-referenced states contain provisions that bar class actions. They contend, however, that Fed. R. Civ. P. 23 displaces such state statutory provisions in a diversity case like this one.

There is a split of authority on this issue. Several district courts within the Sixth Circuit –

including this Court – have rejected Plaintiffs' argument and enforced the statutory bars. *See, e.g., Matanky v. Gen. Motors LLC*, 370 F. Supp.3d 772, 987-99 (E.D. Mich. 2019); *In re Packaged Ice Antitrust Litig.*, 779 F. Supp.2d at 663 n.4; *McKinney v. Bayer Corp.*, 744 F. Supp.2d 733, 749 (N.D. Ohio 2010); *Flores v. FCA US LLC, supra*, at *23-24. This Court concludes that Plaintiffs' representative claims brought under the consumer protection statutes of the following states are subject to dismissal on this basis: Alabama (Count 1), Georgia (Count 57), Louisiana (Count 106), Ohio (210), South Carolina (Count 240), Tennessee (Count 253), and Virginia (Count 277).[3]

VI. Plaintiffs' Breach Of Contract Claims Are Also Subject To Dismissal Because Plaintiffs Do Not Allege The Existence Of An Enforceable Contract With Ford.

Ford asserts that Plaintiffs breach of contract claims against it should also be dismissed because Plaintiffs do not allege the existence of an enforceable contract with Ford. (Def.'s Br. at 43). In support of this challenge, Ford notes that Plaintiffs allege that "[e]ach and every sale or lease of a [ ] vehicle constitutes a contract between Ford and the purchasers or lessee." (*See, eg.*, FAC at ¶ 518). Ford

[3] The representative consumer protection act claims brought under the laws of Arkansas, Mississippi, and Montana are also subject to dismissal on this same basis, but as explained above, are being dismissed for lack of standing.

notes that "[a]t no point, however, do Plaintiffs plead facts plausibly showing that Ford is a party to any such contract, much less specify the offers that Ford allegedly made, what consideration supposedly passed between them, or what contractual provision was supposedly breached." (Def.'s Br. at 43). Ford further states "there is no allegation that Ford offered to sell, or sold, a vehicle directly to any individual Plaintiff, as each individual lead Plaintiff alleges that they purchased or leased their vehicle from an 'authorized Ford dealership.' *See, e.g.*, [FAC] ¶ 29." (*Id.*). Ford therefore argues that Plaintiffs' contract claims fail "upon review of the hornbook elements of contract law. They fail to allege facts showing that Ford made an offer to them, that they accepted that offer, that they paid any consideration to Ford, and that Ford failed to honor a binding promise made to them." (*Id.* at 43-44). Ford asserts that the "mere conclusory allegations that the purchase or a lease of a vehicle 'constitutes a contract' with Ford is insufficient" and argues that all of Plaintiffs' breach of contract claims should be dismissed. (*Id.*).

Plaintiffs barely respond to this challenge. (*See* Pls.' Br. at 72-73). They address this challenge in a single paragraph wherein they state that "Plaintiffs alleged that they bought or leased a Ford vehicle from an authorized Ford dealership" and claim they need not allege a direct relationship with Ford to sufficiently plead their breach of contract claims against Ford." (*Id.*). Plaintiffs do not attempt to explain how their allegations in the FAC are sufficient

to state a breach of contract claim under any of the applicable states' laws.

Plaintiffs have not identified a contract between Plaintiffs and Ford in their allegations in the FAC and have not identified the term(s) of the alleged contract that were allegedly breached by Ford. As such, Plaintiffs have failed to plead a plausible breach of contract claim against Ford. *See, e.g.*, *Northhampton Restaurant Group, Inc. v. FirstMerit Bank, N.A.*, 492 F. App'x 518, 522 (6th Cir. 2012) (It is a basic tenant of contract that a party can only advance a claim of breach of written contract by identifying and presenting the actual terms of the contract allegedly breached); *Alchaibani v. Litton Loan Servicing, LP*, 528 F. App'x 462, 465 (6th Cir. 2013) (mere vague legal conclusions fall short of *Twombly's* plausibility standard).

VII. Plaintiffs' Express Warranty Claims Are Also Barred By Federal And State Laws.

In addition to preemption, Ford contends that Plaintiffs have failed to state any valid warranty-based claims in the FAC. Plaintiffs allege that Ford made two different warranties: 1) the EPA fuel economy estimates on the Monroney label; and 2) the New Vehicle Limited Warranty ("NVLW"). Ford contends that both claims fail. The Court agrees.

A. The EPA Fuel Economy Estimates Do Not Establish A

Warranty Under Federal Or State Law.

First, Ford persuasively argues that, as a matter of law, the EPA fuel economy estimates do not establish a warranty under federal or state law:

> The same federal statute that requires Ford to generate and disclose EPA fuel economy estimates explicitly bars any claim that such estimates constitute a warranty under state or federal law. *See* 49 U.S.C. § 32908(d) ("[a] disclosure about fuel economy or estimated annual fuel costs under this section ***does not establish a warranty*** under the law of the United States or a State."). That statute bars ***all*** such warranty claims, regardless of whether they are directed to the EPA estimate on the window sticker itself, or to other advertising statements that reiterate the EPA estimated fuel economy. *See, e.g., Paduano*, 169 Cal.App. 4tth at 1453, 1467 ("Thus, to the extent that Honda identified the EPA fuel economy estimates in its own advertising, Honda's provision of those estimates does not constitute an independent warranty that [plaintiff's] vehicle would achieve the EPA fuel economy estimates or a similar level of fuel economy."). Plaintiffs base their express warranty claim directly on the Monroney

> labels on Ford's vehicles, which federal law makes clear do not establish warranty. (*See, e.g.*, ACAC¶ 524 ("Ford expressly warranted in advertisements, ***including in the stickers affixed to the windows of its vehicles, that its vehicles provided a favorable fuel economy of specific MPGs***, depending on the vehicle."). Based on this straightforward application of § 32908(d), Plaintiffs' breach of express warranty claim should be dismissed with prejudice.

(Def.'s Br. at 47-48) (emphasis in original).

In response to this argument, Plaintiffs rely on *C-MAX I,* wherein the district court found that § 32908(d) did not bar claims based upon guarantees in advertising that went beyond a mere disclosure of EPA estimates. (Pls.' Br. at 47-48). Again, however, this case does not involve claims based on such guarantees of real-world performance. Rather, Plaintiffs assert express warranty claims based upon the EPA estimates themselves. These claims are barred by 49 U.S.C. § 32908(d) that provides that a "disclosure about fuel economy or estimated annual fuel costs under this section does not establish a warranty under a law of the United States or a State."

B. Any Express Warranty Claims Based Upon The NVLW Also Fail

Because The Alleged Design Defects Are Not Covered.

Ford also asserts that, to the extent Plaintiffs' express warranty claim is based upon the New Vehicle Limited Warranty ("NVLW"), that covers defects in factory supplied material or workmanship, the claims fail because they have not pleaded any facts showing that the alleged defect falls within the scope of the warranty coverage. (Def.'s Br. at 48). Ford asserts that, in fact, Plaintiffs characterize the "issue as one of design. *See* ACAC ¶¶2164, 2238 (' . . . Ford failed to inform [the Mississippi and Missouri Plaintiffs] that the [subject vehicles] were ***defectively designed***, and failed to fix the defectively ***designed*** [vehicles] free of charge.'" (*Id*. at 49) (emphasis added).

In response, Plaintiffs direct the Court to a non-binding district court case that rejected distinctions between design and materials/workmanship defects at the motion-to-dismiss phase.

This Court, however, has already taken a position on this issue, in *Flores,* wherein it followed *Matanky v. Gen. Motors, LLC*, 370 F.Supp.3d 772 (E.D. Mich. 2019) and ruled that the plaintiffs pleaded a design defect that was not covered under the express warranty provided. *Flores v. FCA US LLC*, 2021 WL 1122216 at * 7-8 (E.D. Mich. 2021). The Court concludes that this is an additional ground for dismissal of the express warranty claims in this case.

VIII. Plaintiffs' MMWA Claims Must Also Be Dismissed For Failure To Allege Sufficient Pre-Suit Notice.

Count 307 of Plaintiffs' FAC asserts claims under the federal Magnuson-Moss Warranty Act ("MMWA).

Ford contends that Plaintiffs cannot sustain an MMWA claim. Among other things, Ford asserts that Plaintiffs have failed to allege sufficient pre-suit notice. Ford argues that even if Plaintiffs "had stated a viable warranty claim, their MMWA claim should still be dismissed because they failed to meet the Act's pre-suit notice requirements." (Def.'s Br. at 52).

Class actions brought under the MMWA are subject to specific notice requirements. 15 U.S.C. § 2310(e); *Bhatt v. Mercedes-Benz USA, LLC*, 2018 WL 5094932 at *4 (C.D. Cal. 2018); *Kuns v. Ford Motor Co.*, 543 F. App'x 572, 576 (6th Cir. 2013). First, the MMWA "requires each named plaintiffs to give the warrantor a reasonable opportunity to cure any failure to comply with the express or implied terms of the warranty." *Bhatt, supra,* (citing 15 U.S.C. § 2310(e)); *Kuns, supra* (noting the "requirement that a warrantor have an opportunity to cure is codified at section 2310(e), which states that 'no action . . . may be brought under subsection (d) of this section for failure to comply with any obligation under any written or implied warranty . . . unless the person obligated under the warranty . . . is afforded a reasonable opportunity to cure such failure to

comply.'"). Second, "[a]fter this reasonable opportunity is afforded, each plaintiff must, then, notify the warrantor that the plaintiff is going to initiate a suit on behalf of a class." *Bhatt, supra;* 15 U.S.C. § 2310(e).

Failure to comply with these notice requirements compels dismissal. *See, e.g.*, *Bearden v. Honeywell Intern., Inc.*, 720 F.Supp.2d 932, 936 (M.D. Tenn. 2010) (Noting mandatory language of notice language in MMWA and dismissing claims for failure to allege that required notice was provided); *Stearns v. Select Comfort Retail Corp.*, 2009 WL 4723366 at *10 (N.D. Cal. 2009) (dismissing MMWA claims in putative class action for failure to allege that named plaintiffs provided required notice under the MMWA); *Nadler v. Nature's Way Pods., LLC*, 2014 WL 12601567 at *3 (C.D. Cal. 2014) (same).

Here, Ford claims that Plaintiffs failed to comply with the MMWA's notice requirements because each named Plaintiff does not allege to have given the required pre-suit notice. It also contends that the second requirement is not met as Plaintiffs have not alleged that they notified Ford of their intent to initiate a suit on behalf of a class.

Plaintiffs respond to this two-part challenge in the following paragraph of their brief, wherein they argue:

> Plaintiffs allege that (1) Ford was provided an opportunity to cure and multiple written notices of the intent to sue (¶3974); (2) Ford knew of the defect at the time of the sale, thus waiving an opportunity to cure (¶3971); and (3) that it would be futile to afford Ford an opportunity to cure its breach (*see, e.g.*, ¶ 528). These allegations sufficiently plead a viable MMWA claim. *See Persad*, 2018 WL 3428690, at *6 (holding that plaintiffs' complaint properly alleged futility and denied motion to dismiss based on lack of pre-suit notice).

(Pls.' Br. at 56).

As the *Stearns* court noted, the language requiring notice in the MMWA is mandatory. And in *Kuns*, the plaintiff made the same futility argument that Plaintiffs make here and the Sixth Circuit did not find it persuasive. *Kuns*, 543 F. App'x at 576 (Noting the plaintiff's argument that any request to cure the defect would have been futile, and rejecting it because the plaintiff "does not cite – and we cannot locate – any case law indicating that this statutory requirement can be waived if a plaintiff subjectively determines that demand would be futile and does not so much as request the seller to cover the necessary repair.").

Thus, Plaintiffs' failure to allege that they provided adequate pre-suit notice under the statute is

an additional basis for dismissal of Plaintiffs' MMWA count.

IX. Plaintiffs' Transactions Are Exempt From The Michigan Consumer Protection Act.

In addition to preemption, Ford argues that Plaintiffs' claims under the Michigan Consumer Protection Act (Count 130) also fail because their motor vehicle sales and lease transactions are exempt from the Act. In support of this argument, Ford asserts:

> The MCPA does not apply to transactions that are specifically authorized and fully regulated by state and federal law. *See* Mich. Comp. Laws § 445.904(a); accord *Zaher v. Argent Mortg. Co., LLC*, No. 14-111848, 2017 WL 193550, at *5 (E.D. Mich. Jan. 18, 2017). This exemption is construed broadly and looks to the general transaction. *See Divis v. General Motors, LLC*, No. 18-13025, 2019 WL 4735405, at *9 (E.D. Mich. Sept. 27, 2019) (citing *Liss v. Lewiston-Richards, Inc.,* 478 Mich. 203, 210 (2007)). Indeed, the Michigan Court of Appeals confirmed that 'the manufacture, sale, and lease of automobiles, and the provision of express and implied warranties concerning those automobiles and their components are all conduct that is 'specifically authorized' under federal and

> state law." *Cyr v. Ford Motor Co.,* 2019 WL 7206100, a *2-3 (Mich. Ct. App. Dec. 26, 2019).

(Def.'s Br. at 60-61).

In response, Plaintiffs direct the Court to single district court decision wherein the court declined to make a ruling on this issue at the motion-to-dismiss phase, and choosing to revisit the issue on summary judgment.

This Court very recently addressed this same issue in *Gant*, concluding that the exemption applies to motor vehicle sales. *Gant v. Ford Motor Co.*, 2021 WL 364250 at *7-8 (E.D. Mich. Feb. 3, 2021). Plaintiffs' claims under the Michigan Consumer Protection Act (Count 130 of the FAC) are subject to dismissal on this same basis.

CONCLUSION & ORDER

Accordingly, the Court ORDERS that Defendant Ford's Motion to Dismiss is GRANTED because the Court concludes that Plaintiffs' claims are preempted under federal law, and because the claims

are subject to dismissal for the additional reasons discussed above.

IT IS SO ORDERED.

s/ Sean F. Cox
Sean F. Cox
United States District Judge

Appendix F

EPA Coastdown Testing and Road Load Measurement Regulations

40 C.F.R. § 1066.210

(a) General requirements. A chassis dynamometer typically uses electrically generated load forces combined with its rotational inertia to recreate the mechanical inertia and frictional forces that a vehicle exerts on road surfaces (known as "road load"). Load forces are calculated using vehicle-specific coefficients and response characteristics. The load forces are applied to the vehicle tires by rolls connected to motor/absorbers. The dynamometer uses a load cell to measure the forces the dynamometer rolls apply to the vehicle's tires.

(b) Accuracy and precision. The dynamometer's output values for road load must be NIST–traceable. We may determine traceability to a specific national or international standards organization to be sufficient to demonstrate NIST–traceability. The force-measurement system must be capable of indicating force readings as follows:

(1) For dynamometer testing of vehicles at or below 20,000 pounds GVWR, the dynamometer force-measurement system must be capable of indicating force readings during a test to a resolution of ±0.05%

of the maximum load-cell force simulated by the dynamometer or ±9.8 N (±2.2 lbf), whichever is greater.

(2) For dynamometer testing of vehicles above 20,000 pounds GVWR, the force-measurement system must be capable of indicating force readings during a test to a resolution of ±0.05% of the maximum load-cell force simulated by the dynamometer or ±39.2 N (±8.8 lbf), whichever is greater.

(c) Test cycles. The dynamometer must be capable of fully simulating vehicle performance over applicable test cycles for the vehicles being tested as referenced in the corresponding standard-setting part, including operation at the combination of inertial and road-load forces corresponding to maximum road-load conditions and maximum simulated inertia at the highest acceleration rate experienced during testing.

(d) Component requirements. The following specifications apply:

(1) The nominal roll diameter must be 120 cm or greater. The dynamometer must have an independent drive roll for each drive axle as tested under § 1066.410(g), except that two drive axles may share a single drive roll. Use good engineering judgment to ensure that the dynamometer roll diameter is large enough to provide sufficient tire-roll

contact area to avoid tire overheating and power losses from tire-roll slippage.

(2) Measure and record force and speed at 10 Hz or faster. You may convert measured values to 1–Hz, 2–Hz, or 5–Hz values before your calculations, using good engineering judgment.

(3) The load applied by the dynamometer simulates forces acting on the vehicle during normal driving according to the following equation:

Where:

FR = total road-load force to be applied at the surface of the roll. The total force is the sum of the individual tractive forces applied at each roll surface.

i = a counter to indicate a point in time over the driving schedule. For a dynamometer operating at 10–Hz intervals over a 600–second driving schedule, the maximum value of i should be 6,000.

A = a vehicle-specific constant value representing the vehicle's frictional load in lbf or newtons. See subpart D of this part.

Gi = instantaneous road grade, in percent. If your duty cycle is not subject to road grade, set this value to 0.

B = a vehicle-specific coefficient representing load from drag and rolling resistance, which are a function of vehicle speed, in lbf/(mi/hr) or N·s/m. See subpart D of this part.

v = instantaneous linear speed at the roll surfaces as measured by the dynamometer, in mi/hr or m/s. Let $v_{i-1} = 0$ for $i = 0$.

C = a vehicle-specific coefficient representing aerodynamic effects, which are a function of vehicle speed squared, in lbf/(mi/hr)2 or N·s2/m2. See subpart D of this part.

Me = the vehicle's effective mass in lbm or kg, including the effect of rotating axles as specified in § 1066.310(b)(7).

t = elapsed time in the driving schedule as measured by the dynamometer, in seconds. Let $t_{i-1} = 0$ for $i = 0$.

M = the measured vehicle mass, in lbm or kg.

ag = acceleration of Earth's gravity = 9.80665 m/s2.

(4) We recommend that a dynamometer capable of testing vehicles at or below 20,000 pounds GVWR be designed to apply an actual road-load force within ±1% or ±9.8 N (±2.2 lbf) of the reference value, whichever is greater. Note that slightly higher errors

may be expected during highly transient operation for vehicles above 8,500 pounds GVWR.

(e) Dynamometer manufacturer instructions. This part specifies that you follow the dynamometer manufacturer's recommended procedures for things such as calibrations and general operation. If you perform testing with a dynamometer that you manufactured or if you otherwise do not have these recommended procedures, use good engineering judgment to establish the additional procedures and specifications we specify in this part, unless we specify otherwise. Keep records to describe these recommended procedures and how they are consistent with good engineering judgment, including any quantified error estimates.

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40 C.F.R. § 1066.301

Vehicle testing on a chassis dynamometer involves simulating the road-load force, which is the sum of forces acting on a vehicle from aerodynamic drag, tire rolling resistance, driveline losses, and other effects of friction. Determine dynamometer settings to simulate road-load force in two stages. First, perform a road-load force specification by characterizing on-road operation. Second, perform a road-load derivation to determine the appropriate dynamometer load settings

to simulate the road-load force specification from the on-road test.

(a) The procedures described in this subpart are used to determine the road-load target coefficients (A, B, and C) for the simulated road-load equation in § 1066.210(d)(3).

(b) The general procedure for determining road-load force is performing coastdown tests and calculating road-load coefficients. This procedure is described in SAE J1263 and SAE J2263 (incorporated by reference in § 1066.1010). Continued testing based on the 2008 version of SAE J2263 is optional, except that it is no longer available for testing starting with model year 2026. This subpart specifies certain deviations from those procedures for certain applications.

(c) Use good engineering judgment for all aspects of road-load determination. For example, minimize the effects of grade by performing coastdown testing on reasonably level surfaces and determining coefficients based on average values from vehicle operation in opposite directions over the course.

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40 C.F.R. § 1066.305

(a) For motor vehicles at or below 14,000 pounds GVWR, develop representative road-load coefficients

to characterize each vehicle covered by a certificate of conformity. Calculate road-load coefficients by performing coastdown tests using the provisions of SAE J1263 and SAE J2263 (incorporated by reference in § 1066.1010). This protocol establishes a procedure for determination of vehicle road load force for speeds between 115 and 15 km/hr (71.5 and 9.3 mi/hr); the final result is a model of road-load force (as a function of speed) during operation on a dry, level road under reference conditions of 20 °C, 98.21 kPa, no wind, no precipitation, and the transmission in neutral. You may use other methods that are equivalent to SAE J2263, such as equivalent test procedures or analytical modeling, to characterize road load using good engineering judgment. Determine dynamometer settings to simulate the road-load profile represented by these road-load target coefficients as described in § 1066.315. Supply representative road-load forces for each vehicle at speeds above 15 km/hr (9.3 mi/hr), and up to 115 km/hr (71.5 mi/hr), or the highest speed from the range of applicable duty cycles.

(b) For cold temperature testing described in subpart H of this part, determine road-load target coefficients using one of the following methods:

(1) You may perform coastdown tests or use other methods to characterize road load as described in paragraph (a) of this section based on vehicle operation at a nominal ambient temperature of -7 °C (20 °F).

(2) You may multiply each of the road-load target coefficients determined using the procedures described in paragraph (a) of this section by 1.1 to approximate a 10 percent decrease in coastdown time for the test vehicle.

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40 C.F.R. § 1066.315

Determine dynamometer road-load settings for chassis testing by following SAE J2264 (incorporated by reference in § 1066.1010).

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40 C.F.R. § 1066.401

(a) Use the procedures detailed in this subpart to measure vehicle emissions over a specified drive schedule. Different procedures may apply for criteria pollutants and greenhouse gas emissions as described in the standard-setting part. This subpart describes how to—

(1) Determine road-load power, test weight, and inertia class.

(2) Prepare the vehicle, equipment, and measurement instruments for an emission test.

(3) Perform pre-test procedures to verify proper operation of certain equipment and analyzers and to prepare them for testing.

(4) Record pre-test data.

(5) Sample emissions.

(6) Record post-test data.

(7) Perform post-test procedures to verify proper operation of certain equipment and analyzers.

(8) Weigh PM samples.

(b) The overall test generally consists of prescribed sequences of fueling, parking, and driving at specified test conditions. An exhaust emission test generally consists of measuring emissions and other parameters while a vehicle follows the drive schedules specified in the standard-setting part. There are two general types of test cycles:

(1) Transient cycles. Transient test cycles are typically specified in the standard-setting part as a second-by-second sequence of vehicle speed commands. Operate a vehicle over a transient cycle such that the speed follows the target values. Proportionally sample emissions and other parameters and calculate emission rates as specified in subpart G of this part to calculate emissions. The

standard-setting part may specify three types of transient testing based on the approach to starting the measurement, as follows:

(i) A cold-start transient cycle where you start to measure emissions just before starting an engine that has not been warmed up.

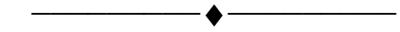
(ii) A hot-start transient cycle where you start to measure emissions just before starting a warmed-up engine.

(iii) A hot-running transient cycle where you start to measure emissions after an engine is started, warmed up, and running.

(2) Cruise cycles. Cruise test cycles are typically specified in the standard-setting part as a discrete operating point that has a single speed command.

(i) Start a cruise cycle as a hot-running test, where you start to measure emissions after the engine is started and warmed up and the vehicle is running at the target test speed.

(ii) Sample emissions and other parameters for the cruise cycle in the same manner as a transient cycle, with the exception that the reference speed value is constant. Record instantaneous and mean speed values over the cycle.



40 C.F.R. § 1066.1010

Certain material is incorporated by reference into this part with the approval of the Director of the Federal Register under 5 U.S.C. 552(a) and 1 CFR part 51. To enforce any edition other than that specified in this section, EPA must publish a document in the Federal Register and the material must be available to the public. All approved incorporation by reference (IBR) material is available for inspection at EPA and at the National Archives and Records Administration (NARA). Contact EPA at: U.S. EPA, Air and Radiation Docket Center, WJC West Building, Room 3334, 1301 Constitution Ave. NW, Washington, DC 20004; www.epa.gov/dockets; (202) 202–1744. For information on inspecting this material at NARA, visit www.archives.gov/federal-register/cfr/ibr-locations.html or email fr.inspection@nara.gov. The material may be obtained from the following sources:

(a) National Institute of Standards and Technology (NIST), 100 Bureau Drive, Stop 1070, Gaithersburg, MD 20899–1070; (301) 975–6478; www.nist.gov.

(1) NIST Special Publication 811, 2008 Edition, Guide for the Use of the International System of Units (SI), Physics Laboratory, March 2008; IBR approved for §§ 1066.20(a); 1066.1005.

(2) [Reserved]

(b) SAE International, 400 Commonwealth Dr., Warrendale, PA 15096–0001; (877) 606–7323 (U.S. and Canada) or (724) 776–4970 (outside the U.S. and Canada); www.sae.org.

(1) SAE J1263 MAR2010, Road Load Measurement and Dynamometer Simulation Using Coastdown Techniques, Revised March 2010, ("SAE J1263"); IBR approved for §§ 1066.301(b); 1066.305(a); 1066.310(b).

(2) SAE J1634 JUL2017, Battery Electric Vehicle Energy Consumption and Range Test Procedure, Revised July 2017, ("SAE J1634"); IBR approved for § 1066.501(a).

(3) SAE J1711 JUN2010, Recommended Practice for Measuring the Exhaust Emissions and Fuel Economy of Hybrid–Electric Vehicles, Including Plug–In Hybrid Vehicles, Revised June 2010, ("SAE J1711"); IBR approved for §§ 1066.501(a); 1066.1001.

(4) SAE J2263 DEC2008, Road Load Measurement Using Onboard Anemometry and Coastdown Techniques, Revised December 2008; IBR approved for §§ 1066.301(b); 1066.305; 1066.310(b).

(5) SAE J2263 MAY2020, (R) Road Load Measurement Using Onboard Anemometry and Coastdown Techniques, Revised May 2020, ("SAE J2263"); IBR approved for §§ 1066.301(b); 1066.305; 1066.310(b).

(6) SAE J2264 JAN2014, Chassis Dynamometer Simulation of Road Load Using Coastdown Techniques, Revised January 2014, ("SAE J2264"); IBR approved for § 1066.315.

(7) SAE J2711 MAY2020, (R) Recommended Practice for Measuring Fuel Economy and Emissions of Hybrid–Electric and Conventional Heavy–Duty Vehicles, Revised May 2020, ("SAE J2711"); IBR approved for §§ 1066.501(a); 1066.1001.

(8) SAE J2951 JAN2014, Drive Quality Evaluation for Chassis Dynamometer Testing, Revised January 2014, ("SAE J2951"); IBR approved for § 1066.425(j).

Appendix G

State Consumer Protection Statutes

ARIZONA CONSUMER FRAUD ACT
(ARIZONA REV. STAT.§ 44-1522)

A. The act, use or employment by any person of any deception, deceptive or unfair act or practice, fraud, false pretense, false promise, misrepresentation, or concealment, suppression or omission of any material fact with intent that others rely on such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise whether or not any person has in fact been misled, deceived or damaged thereby, is declared to be an unlawful practice.

CALIFORNIA UNFAIR COMPETITION LAW
(CAL. BUS. & PROF. CODE § 17200)

As used in this chapter, unfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by Chapter 1 (commencing with Section 17500) of Part 3 of Division 7 of the Business and Professions Code.

CALIFORNIA'S CONSUMERS LEGAL REMEDIES ACT (CAL. BUS. & PROF. CODE § 1770)

(a) The unfair methods of competition and unfair or deceptive acts or practices listed in this subdivision undertaken by any person in a transaction intended to result or that results in the sale or lease of goods or services to any consumer are unlawful: . . .

(2) Misrepresenting the source, sponsorship, approval, or certification of goods or services. . . .

(5) Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have . . . .

(7) Representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another. . . .

(9) Advertising goods or services with intent not to sell them as advertised. . . .

(16) Representing that the subject of a transaction has been supplied in accordance with a previous representation when it has not. . . .

CALIFORNIA FALSE ADVERTISING LAW
(CAL. BUS. & PROF. CODE § 17500)

It is unlawful for any person, firm, corporation or association, or any employee thereof with intent directly or indirectly to dispose of real or personal property or to perform services, professional or otherwise, or anything of any nature whatsoever or to induce the public to enter into any obligation relating thereto, to make or disseminate or cause to be made or disseminated before the public in this state, or to make or disseminate or cause to be made or disseminated from this state before the public in any state, in any newspaper or other publication, or any advertising device, or by public outcry or proclamation, or in any other manner or means whatever, including over the Internet, any statement, concerning that real or personal property or those services, professional or otherwise, or concerning any circumstance or matter of fact connected with the proposed performance or disposition thereof, which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading, or for any person, firm, or corporation to so make or disseminate or cause to be so made or disseminated any such statement as part of a plan or scheme with the intent not to sell that personal property or those services, professional or otherwise, so advertised at the price stated therein, or as so advertised. Any violation of the provisions of this section is a misdemeanor punishable by

imprisonment in the county jail not exceeding six months, or by a fine not exceeding two thousand five hundred dollars ($2,500), or by both that imprisonment and fine.

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FLORIDA UNFAIR AND DECEPTIVE TRADE PRACTICES ACT (FLA. STAT. § 501.204)

(1) Unfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.

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GEORGIA FAIR BUSINESS PRACTICES ACT (GA. CODE § 10-1-393)

a) Unfair or deceptive acts or practices in the conduct of consumer transactions and consumer acts or practices in trade or commerce are declared unlawful.

(b) By way of illustration only and without limiting the scope of subsection (a) of this Code section, the following practices are declared unlawful: . . .

(7) Representing that goods or services are of a particular standard, quality, or grade or that goods are of a particular style or model, if they are of another . . . .

(9) Advertising goods or services with intent not to sell them as advertised . . . .

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HAWAII ACT § 480-2(A)
(HAW. REV. STAT. § 480-2)

(a) Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are unlawful.

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ILLINOIS CONSUMER FRAUD AND DECEPTIVE BUSINESS PRACTICES ACT (815 ILCS 505/2)

§ 2. Unfair methods of competition and unfair or deceptive acts or practices, including but not limited to the use or employment of any deception, fraud, false pretense, false promise, misrepresentation or the concealment, suppression or omission of any material fact, with intent that others rely upon the concealment, suppression or omission of such material fact, or the use or employment of any practice described in Section 2 of the "Uniform Deceptive Trade Practices Act", approved August 5, 1965, in the conduct of any trade or commerce are hereby declared unlawful whether any person has in fact been misled, deceived or damaged thereby. In construing this section consideration shall be given to the interpretations of the Federal Trade Commission and

the federal courts relating to Section 5(a) of the Federal Trade Commission Act.

MARYLAND CONSUMER PROTECTION ACT
(MD. CODE COM. LAW § 13-101)

Unfair, abusive, or deceptive trade practices include any: . . . .

(3) Failure to state a material fact if the failure deceives or tends to deceive . . . .

(9) Deception, fraud, false pretense, false premise, misrepresentation, or knowing concealment, suppression, or omission of any material fact with the intent that a consumer rely on the same in connection with:

(i) The promotion or sale of any consumer goods, consumer realty, or consumer service . . . .

MASSACHUSETTS GENERAL LAW CHAPTER 93(A) (MASS. GEN. LAWS CH. 93A, § 2)

(a) Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.

MICHIGAN CONSUMER PROTECTION ACT (MICH. COMP. LAWS § 445.903)

Sec. 3. (1) Unfair, unconscionable, or deceptive methods, acts, or practices in the conduct of trade or commerce are unlawful and are defined as follows: . . . .

(s) Failing to reveal a material fact, the omission of which tends to mislead or deceive the consumer, and which fact could not reasonably be known by the consumer. . . .

(bb) Making a representation of fact or statement of fact material to the transaction such that a person reasonably believes the represented or suggested state of affairs to be other than it actually is. . . .

(cc) Failing to reveal facts that are material to the transaction in light of representations of fact made in a positive manner. . . .

MINNESOTA PREVENTION OF CONSUMER FRAUD ACT (MINN. STAT. § 325F.69)

The act, use, or employment by any person of any fraud, unfair or unconscionable practice, false pretense, false promise, misrepresentation, misleading statement or deceptive practice, with the intent that others rely thereon in connection with the sale of any merchandise, whether or not any person has in fact been misled, deceived, or damaged thereby, is enjoinable as provided in section 325F.70.

MINNESOTA DECEPTIVE TRADE PRACTICES ACT (MINN. STAT. § 325D.44)

Subdivision 1. Acts constituting. A person engages in a deceptive trade practice when, in the course of business, vocation, or occupation, the person: . . . .

(2) causes likelihood of confusion or of misunderstanding as to the source, sponsorship, approval, or certification of goods or services . . . .

(5) represents that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have or that a person

has a sponsorship, approval, status, affiliation, or connection that the person does not have . . . .

(7) represents that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another . . . .

(9) advertises goods or services with intent not to sell them as advertised . . . .

(13) engages in (i) unfair methods of competition, or (ii) unfair or unconscionable acts or practices . . . .

(14) engages in any other conduct which similarly creates a likelihood of confusion or of misunderstanding . . . .

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MISSOURI MERCHANDISING PRACTICES ACT
(MO. REV. STAT. § 407.020)

1. The act, use or employment by any person of any deception, fraud, false pretense, false promise, misrepresentation, unfair practice or the concealment, suppression, or omission of any material fact in connection with the sale or advertisement of any merchandise in trade or commerce or the solicitation of any funds for any charitable purpose, as defined in section 407.453, in or from the state of Missouri, is declared to be an unlawful practice. . . .

NEBRASKA CONSUMER PROTECTION ACT
(NEB. REV. STAT. § 59-1602)

Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce shall be unlawful.

NEW JERSEY CONSUMER FRAUD ACT
(N.J. STAT. § 56:8-2)

The act, use or employment by any person of any commercial practice that is unconscionable or abusive, deception, fraud, false pretense, false promise, misrepresentation, or the knowing, concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise or real estate, or with the subsequent performance of such person as aforesaid, whether or not any person has in fact been misled, deceived or damaged thereby, is declared to be an unlawful practice; provided, however, that nothing herein contained shall apply to the owner or publisher of newspapers, magazines, publications or printed matter wherein such advertisement appears, or to the owner or operator of a radio or television station which disseminates such

advertisement when the owner, publisher, or operator has no knowledge of the intent, design or purpose of the advertiser.

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NEW YORK GENERAL BUSINESS LAW
(N.Y. GEN. BUS. LAW § 349)

(a) Deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are hereby declared unlawful.

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NEW YORK GENERAL BUSINESS LAW
(N.Y. GEN. BUS. LAW § 350)

False advertising in the conduct of any business, trade or commerce or in the furnishing of any service in this state is hereby declared unlawful.

———♦———

NEW YORK GENERAL BUSINESS LAW
(N.Y. GEN. BUS. LAW § 350-a)

1. The term "false advertising" means advertising, including labeling, of a commodity, or of the kind, character, terms or conditions of any employment opportunity if such advertising is misleading in a material respect. In determining whether any

advertising is misleading, there shall be taken into account (among other things) not only representations made by statement, word, design, device, sound or any combination thereof, but also the extent to which the advertising fails to reveal facts material in the light of such representations with respect to the commodity or employment to which the advertising relates under the conditions prescribed in said advertisement, or under such conditions as are customary or usual. . . .

———————♦———————

OKLAHOMA CONSUMER PROTECTION ACT
(OKLA. STAT. TIT. 15, § 752)

As used in the Oklahoma Consumer Protection Act: . . .

13. "Deceptive trade practice" means a misrepresentation, omission or other practice that has deceived or could reasonably be expected to deceive or mislead a person to the detriment of that person. Such a practice may occur before, during or after a consumer transaction is entered into and may be written or oral;

14. "Unfair trade practice" means any practice which offends established public policy or if the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers . . . .

———————♦———————

OKLAHOMA CONSUMER PROTECTION ACT
(OKLA. STAT. TIT. 15, § 753)

A person engages in a practice which is declared to be unlawful under the Oklahoma Consumer Protection Act when, in the course of the person's business, the person: . . . .

2. Makes a false or misleading representation, knowingly or with reason to know, as to the source, sponsorship, approval, or certification of the subject of a consumer transaction . . . .

5. Makes a false representation, knowingly or with reason to know, as to the characteristics, ingredients, uses, benefits, alterations, or quantities of the subject of a consumer transaction or a false representation as to the sponsorship, approval, status, affiliation or connection of a person therewith . . . .

7. Represents, knowingly or with reason to know, that the subject of a consumer transaction is of a particular standard, style or model, if it is of another . . . .

8. Advertises, knowingly or with reason to know, the subject of a consumer transaction with intent not to sell it as advertised . . . .

OREGON UNLAWFUL TRADE PRACTICES ACT
(OR. REV. STAT. § 646.608)

(1) A person engages in an unlawful practice if in the course of the person's business, vocation or occupation the person does any of the following: . . . .

(b) Causes likelihood of confusion or of misunderstanding as to the source, sponsorship, approval, or certification of real estate, goods or services. . . .

(e) Represents that real estate, goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, quantities or qualities that the real estate, goods or services do not have or that a person has a sponsorship, approval, status, qualification, affiliation, or connection that the person does not have. . . .

(g) Represents that real estate, goods or services are of a particular standard, quality, or grade, or that real estate or goods are of a particular style or model, if the real estate, goods or services are of another. . . .

(i) Advertises real estate, goods or services with intent not to provide the real estate, goods or services as advertised . . . .

(u) Engages in any other unfair or deceptive conduct in trade or commerce. . . .

PENNSYLVANIA UNFAIR TRADE PRACTICES
AND CONSUMER PROTECTION LAW
(73 PA. CONS. STAT. §§ 201-2, 201-3)

(4) "Unfair methods of competition" and "unfair or deceptive acts or practices" mean any one or more of the following: . . .

(ii) Causing likelihood of confusion or of misunderstanding as to the source, sponsorship, approval or certification of goods or services . . . .

(v) Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation or connection that he does not have . . . .

(vii) Representing that goods or services are of a particular standard, quality or grade, or that goods are of a particular style or model, if they are of another . . . .

(ix) Advertising goods or services with intent not to sell them as advertised . . . .

SOUTH CAROLINA REGULATION OF MANUFACTURERS, DISTRIBUTORS, AND DEALERS ACT (S.C. CODE §§ 56-15-30, 56-15-40)

(a) Unfair methods of competition and unfair or deceptive acts or practices as defined in Section 56-15-40 are hereby declared to be unlawful. . . .

(B) It shall be deemed a violation of Section 56-15-30(a) for any manufacturer . . . to engage in any action which is arbitrary, in bad faith, or unconscionable and which causes damage to any of the parties or to the public. . . .

(D) It shall be deemed a violation of Section 56-15-30(a) for a manufacturer . . .

(4) to resort to or use any false or misleading advertisement in connection with his business as such manufacturer . . . .

SOUTH DAKOTA DECEPTIVE TRADE PRACTICES AND CONSUMER PROTECTION LAW (S.D. CODIFIED LAWS § 37-24-6)

It is a deceptive act or practice for any person to:

(1) Knowingly act, use, or employ any deceptive act or practice, fraud, false pretense, false promises, or misrepresentation or to conceal, suppress, or omit any material fact in connection with the sale or advertisement of any merchandise, regardless of whether any person has in fact been misled, deceived, or damaged thereby . . . .

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TEXAS DECEPTIVE TRADE PRACTICES AND CONSUMER PROTECTION ACT
(TEX. BUS. & COM. CODE § 17.46)

(a) False, misleading, or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful . . . .

(b) Except as provided in Subsection (d) of this section, the term "false, misleading, or deceptive acts or practices" includes, but is not limited to, the following acts . . . .

(2) causing confusion or misunderstanding as to the source, sponsorship, approval, or certification of goods or services . . . .

(5) representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have or that a person has a sponsorship, approval, status,

affiliation, or connection which the person does not . . . .

(7) representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another . . . .

(9) advertising goods or services with intent not to sell them as advertised . . . .

———————♦———————

UTAH CONSUMER SALE PRACTICES ACT
(UTAH CODE § 13-11-4)

(1) A deceptive act or practice by a supplier in connection with a consumer transaction violates this chapter whether it occurs before, during, or after the transaction.

(2) Without limiting the scope of Subsection (1), a supplier commits a deceptive act or practice if the supplier knowingly or intentionally:

(a) indicates that the subject of a consumer transaction has sponsorship, approval, performance characteristics, accessories, uses, or benefits, if it has not;

(b) indicates that the subject of a consumer transaction is of a particular standard, quality, grade, style, or model, if it is not . . . .

———————♦———————

WASHINGTON CONSUMER PROTECTION ACT (WASH. REV. CODE § 19.86.020)

Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.

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WISCONSIN DECEPTIVE TRADE PRACTICES ACT (WIS. STAT. § 110.18)

No person, firm, corporation or association, or agent or employee thereof, with intent to sell, distribute, increase the consumption of or in any wise dispose of any real estate, merchandise, securities, employment, service, or anything offered by such person, firm, corporation or association, or agent or employee thereof, directly or indirectly, to the public for sale, hire, use or other distribution, or with intent to induce the public in any manner to enter into any contract or obligation relating to the purchase, sale, hire, use or lease of any real estate, merchandise, securities, employment or service, shall make, publish, disseminate, circulate, or place before the public, or cause, directly or indirectly, to be made, published,

disseminated, circulated, or placed before the public, in this state, in a newspaper, magazine or other publication, or in the form of a book, notice, handbill, poster, bill, circular, pamphlet, letter, sign, placard, card, label, or over any radio or television station, or in any other way similar or dissimilar to the foregoing, an advertisement, announcement, statement or representation of any kind to the public relating to such purchase, sale, hire, use or lease of such real estate, merchandise, securities, service or employment or to the terms or conditions thereof, which advertisement, announcement, statement or representation contains any assertion, representation or statement of fact which is untrue, deceptive or misleading

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Appendix H

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

Case No.: 1:16-cv-12541-TLL-PTM

JASON COUNTS, *et al.*, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

GENERAL MOTORS LLC, ROBERT BOSCH GMBH, and ROBERT BOSCH, LLC,

Defendants.

Hon. Thomas L. Ludington
United States District Judge

Hon. Patricia T. Morris
United States Magistrate Judge

Filed July 12, 2023

OPINION AND ORDER DISMISSING CASE WITH PREJUDICE UNDER IMPLIED PREEMPTION AND DENYING PENDING MOTION AS MOOT

In this emissions-regulations case, the parties have spent years litigating the allegations that General Motors and Robert Bosch LLC misled consumers into purchasing a GM-manufactured car by installing devices that defeated the emissions testing approved by the Environmental Protection Agency. But then the Sixth Circuit Court of Appeals recently dismissed a substantially similar claim as preempted by the Energy Policy and Conservation Act, 42 U.S.C. § 6201 *et seq*. The parties were directed to submit supplemental briefing regarding whether this case should be dismissed under that new precedent.

As explained hereafter, the case will be dismissed with prejudice because Plaintiffs' state-claims are impliedly preempted by the Clean Air Act, 42 U.S.C. § 7401 *et seq*.

I.

Plaintiffs are a group of consumers who purchased a 2014 or 2015 Chevrolet Cruze diesel (the "diesel Cruze") and seek to represent a putative class

of "[a]ll persons who purchased or leased a [diesel Cruze]." ECF No. 1 at PageID.62. Plaintiffs' alleged injury is their overpayment for a diesel Cruze caused by Defendants General Motors and Bosch duping them into buying a diesel Cruze with a "defeat device" that made the emissions comply with the regulations of the Environmental Protection Agency (EPA) and California Air Resources Board ("CARB"). *See id.* at PageID.64–65, 68, 74–75. Their theory of liability follows:

> [R]eports and vehicle testing now indicate that General Motor's (GM) so called "Clean Diesel" vehicle, the Chevrolet Cruze (Cruze), emits far more pollution on the road than in lab tests and that these vehicles exceed federal and state emission standards. Real world testing has recently revealed that these vehicles emit dangerous oxides of nitrogen (NO_x) at levels ***many times higher than (i) their gasoline counterparts, (ii) what a reasonable consumer would expect from a "Clean Diesel," and (iii) United States Environmental Protection Agency maximum emissions standards.***

Id. at PageID.12–13.

In June 2022, Defendants' motions for summary judgment were denied, *Counts v. Gen. Motors, LLC*, 606 F. Supp. 3d 678 (E.D. Mich. 2022), and the parties' *Daubert* motions were resolved, *Counts v. Gen. Motors, LLC*, 606 F. Supp. 3d 547 (E.D.

Mich. 2022). In August 2022, Plaintiffs filed a Motion to Certify a Class, which Defendants oppose, ECF Nos. 446, 462.

On April 21, 2023, the Sixth Circuit dismissed seemingly identical claims as impliedly preempted by the Energy Policy and Conservation Act (EPCA), 42 U.S.C. § 6201 *et seq.*, and its corresponding regulations for emissions testing, *In re Ford Motor Co. F-150 & Ranger Truck Fuel Econ. Mktg. & Sales Pracs. Litig.*, 65 F.4th 851, 862–64 (6th Cir. 2023); *see also* ECF No. 483 (notifying this Court of the dismissal). And the petition for an *en banc* rehearing was denied by "the full court." *Ford*, No. 22-1245, 2023 WL 4115991, at *1 (6th Cir. June 21, 2023).

The effect of that case, if any, has been briefed by the parties regarding this case. Plaintiffs assert their state-law claims are not preempted, ECF No. 489 (sealed), while Defendants contend that implied preemption warrants dismissal of Plaintiffs' state-law claims, ECF Nos. 491; 492.

II.

A.

The Supremacy Clause of the United States Constitution provides that "the Laws of the United States … shall be the supreme Law of the Land," despite "any Thing in the Constitution or Laws of any State to the Contrary." U.S. CONST. art. VI, cl. 2. "The phrase 'Laws of the United States' encompasses both federal statutes themselves and federal

regulations that are properly adopted in accordance with statutory authorization." *City of New York v. FCC*, 486 U.S. 57, 63, (1988) (per curiam). Thus, "state laws that 'interfere with, or are contrary to the laws of congress, made in pursuance of the constitution' are invalid." *Wis. Pub. Intervenor v. Mortier*, 501 U.S. 597, 604 (1991) (quoting *Gibbons v. Ogden*, 22 U.S. 1 (1824)). This inquiry is largely one of congressional intent, i.e., whether the statute demonstrates an "intent to supplant state authority in a particular field." *Id.* at 604-05. In line with the standards governing motions for dismissal, a defendant bears the burden of proof in establishing preemption as grounds for dismissal. *Brown v. Earthboard Sports USA, Inc.*, 481 F.3d 901, 912 (6th Cir. 2007).

Ordinary preemption[1] provides an affirmative defense to support dismissal of a claim (as Ford did here). *Hudak v. Elmcroft of Sagamore Hills*, 58 F.4th 845, 852 (6th Cir. 2023). "State-law claims can be preempted expressly in a federal statute or

[1] Ordinary preemption is distinguished from the "misleadingly named doctrine" of complete preemption, a "jurisdictional" doctrine under which a court could conclude "that the pre-emptive force of a statute is so extraordinary that it converts an ordinary state common-law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule." *Hogan v. Jacobson*, 823 F.3d 872, 879 (6th Cir. 2016) (quotation marks omitted). This "complete preemption" doctrine is a narrow one that the Supreme Court has applied in only three statutory settings. *See Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 6–11 (2003).

regulation, or impliedly, where congressional intent to preempt state law is inferred." *McDaniel v. Upsher–Smith Lab'ys, Inc.*, 893 F.3d 941, 944 (6th Cir. 2018) (citation omitted). Through an express preemption clause, Congress may make clear "that it is displacing or prohibiting the enactment of state legislation in a particular area." *Matthews v. Centrus Energy Corp.*, 15 F.4th 714, 720 (6th Cir. 2021).

By contrast, implied preemption applies in one of two forms: field or conflict. *Id.* "Field preemption occurs 'where the scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.'" *Id.* (quoting *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98 (1992)). Conflict preemption may instead be present when "Congress has not entirely displaced state regulation over the matter in question." *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984). In that circumstance, state law may be preempted "to the extent it actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law, or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress." *Id.* (internal citations omitted).

B.

Applying these principles three months ago, the Sixth Circuit dismissed a putative class action that a group of consumers brought against an automobile manufacturer. *In re Ford Motor Co. F-150*

& Ranger Truck Fuel Econ. Mktg. & Sales Pracs. Litig., 65 F.4th 851 (6th Cir. 2023), *en banc reh'g denied per curiam*, No. 22-1245, 2023 WL 4115991 (6th Cir. June 21, 2023). The consumers asserted state-law "fraud-on-the-agency" claims arising from manufacturer's alleged fraud on the EPA via submission of false fuel-economy-testing figures for certain truck models, which the Sixth Circuit held were impliedly preempted for conflicting with the EPCA, 42 U.S.C. § 6201 *et seq.*, and its regulatory scheme.

The crux of the Sixth Circuit's holding of "first impression" is summarized as follows:

> (1) "First, because the EPA accepted Ford's testing information and published its estimate based on that information, plaintiffs' claims essentially challenge the EPA's figures." *Ford*, 65 F.4th at 863 (quoting *Farina v. Nokia Inc.*, 625 F.3d 97, 122 (3d Cir. 2010)).
>
> (2) "Second, allowing juries to second-guess the EPA's fuel economy figures would permit them to rebalance the EPA's objectives." *Id.*
>
> (3) "Third, as the EPA has the authority to approve or reject fuel economy figures, its 'federal statutory scheme amply empowers the [agency] to punish and deter fraud.'" *Id.* (alteration in original) (quoting *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 348 (2001)).

(4) "Finally, state-law claims would skew the disclosures that manufacturers need to make to the EPA." *Id.*

In sum, the "state-law fraud-on-the-agency claims would 'inevitably conflict with the [EPA]'s responsibility to police fraud consistently with the Administration's judgment and objectives," *id.* at 861 (quoting *Buckman*, 531 U.S. at 350). All these holdings apply the same with respect to the state-law claims at issue in this case, explained more extensively below.

III.

A.

When reviewing preemption, Congress's intentions are the lynchpin. *Ford*, 65 F.4th at 860 (quoting *Cipollone v. Liggett Grp.*, 505 U.S. 504, 516 (1992)).

The EPCA and the Clean Air Act (CAA) both grant the EPA wide-ranging authority to manage and to supervise motor-vehicle performance. The EPCA, enacted in 1975, aimed to establish a thorough regulation plan for fuel-economy testing, emphasizing the improvement of motor-vehicle energy efficiency and assuring reliable energy data. *Id.* at 854 (quoting 42 U.S.C. § 6201(5), (7)). Similarly, the CAA's goal is to safeguard and to improve the nation's air quality with a detailed regulation plan, which ultimately benefits public health, welfare, and productive capacity. 42 U.S.C. § 7401(b)(1). In sum, the CAA

directs the EPA to set standards for air-pollutant emissions from new motor vehicles or their engines. *Id.* § 7521(a)(1).

Under both these regulatory frameworks, the responsibility of rigorous testing falls on vehicle manufacturers. *Ford*, 65 F.4th at 854–55; 42 U.S.C. § 7525(a)–(d), (h). And the EPA requires such manufacturers to use "a chassis dynamometer" to conduct testing cycles for both fuel economy under the EPCA and emissions under the CAA. *Ford*, 65 F.4th at 854–55; *see also* 40 C.F.R. § 86.115-78. Also, Congress clarified that fuel-economy tests should coincide with emission tests when possible, 49 U.S.C. § 32904, showcasing that regulating vehicle fuel economy (EPCA) and emissions (CAA) are complementary and manageable by the same testing procedures.

Both laws have provisions for "in-use testing" requiring manufacturers to conduct and to report emissions tests for vehicles already in use. *See* 42 U.S.C. § 7541; 40 C.F.R. § 86.1847-01. And if the EPA suspects the presence of a "defeat device," then it can test or demand additional testing on any vehicle at a specified location, using its defined driving cycles and test conditions. 40 C.F.R. § 86.1809-01(b); *cf. Ford*, 65 F.4th at 865.

In both frameworks, manufacturers must submit data specified by the EPA for review. *See* 40 C.F.R. §§ 86.1843-01, 86.1844-01; *Ford*, 65 F.4th at 856. Under the CAA, manufacturers must also deliver

a meticulous account of the vehicle's auxiliary emission control devices ("AECDs"), enabling the EPA to investigate if any "defeat device" lurks beneath the deck. 40 C.F.R. § 86.0042 (providing the EPA's definition of "defeat device"); *see also id.* § 86.1844-01(d)(11) (requiring manufacturers to describe any AECDs).

When it comes to data evaluation under both regimes, the EPA holds the reins. Manufacturers must convince the EPA that their vehicle design does not unnecessarily reduce the effectiveness of emissions control under normal operation and use. 40 C.F.R. § 86.1809-01(d)(1), (2)(ii). If the initial round of fuel-economy testing shows unsatisfactory results, then manufacturers must conduct more tests. *Ford*, 65 F.4th at 865.

Under both the EPCA and the CAA, the EPA is tasked with making an affirmative statement about the vehicle's performance based on its review of manufacturers' data. This results in either a fuel-economy estimate under the EPCA, 49 U.S.C. § 32904(c), or a Certificate of Conformity (COC) based on emissions testing under the CAA, 42 U.S.C. § 7525(a)(1). If a vehicle complies with the regulations, then the EPA issues a COC: the EPA's positive verdict on the vehicle's emission performance. *See, e.g.*, ECF No. 12-2 at PageID.529 (issuing COC for the 2014 diesel Cruze).

The EPA also holds substantial power to investigate and to penalize manufacturers that stray

off either course. As with the EPCA, *see Ford*, 65 F.4th at 857 (including statutory and regulatory citations), under the CAA the EPA may impose fines, *see, e.g.*, 42 U.S.C. §§ 7524(b), 7524(c), call back vehicles, *id.* § 7541(c)(1), and even revoke a vehicle's COC, 40 C.F.R. §§ 86.1850-01(d), 86.1851-10(d)(1).

And both legislative frameworks provide a lighthouse for consumers, guiding them with publicly disclosed test results. *See* Data on Cars used for Testing Fuel Economy, EPA (last updated June 14, 2023), https://www.epa.gov/compliance-and-fuel-economy-data/data-cars-usedtestingfuel-economy (releasing results of fuel-economy testing publicly); 42 U.S.C. § 7525(e) (requiring the EPA to do the same under the CAA). Even more telling in the CAA context, the EPA requires manufacturers to put specific language inside the engine compartment stating that the vehicle complies with the EPA's applicable emissions standards. 40 C.F.R. § 86.1807-01(a), (c)(ii). This transparency allows prospective buyers to make informed decisions and manufacturers to communicate clear compliance to their customers, ensuring consistent and comparable emissions information. *See Ford*, 65 F.4th at 857.

In sum, Congress's intent demonstrates that the CAA impliedly preempts state-law fraud-on-the-agency claims that rely on emissions figures that were provided by vehicle manufacturers and approved by the EPA.

B.

The *Ford* court concluded that the state-law claims were impliedly preempted by the EPCA because they were intertwined with alleged violations of the EPCA. *Ford*, 65 F.4th at 866. Those findings apply equally to the CAA implied preemption at issue here.

Like the claims in *Ford*, Plaintiffs' claims here are inextricably intertwined with alleged violations of the CAA. As explained earlier, Plaintiffs' state-law claims arise from alleged misconduct by GM and Bosch involving violations of the CAA vis-a-vis EPA regulations for defeat devices, testing procedures, and emissions output. *See* discussion *supra* Section III.B. Without the CAA and its regulations, Plaintiffs would have no basis for their claims. In this way, Plaintiffs' claims exist "solely because of" a federal statute and are thus impliedly preempted by it. *Ford*, 65 F.4th at 866; *see also Loreto v. Procter & Gamble Co.*, 515 F. App'x 576, 579 (6th Cir. 2013). That is, "any fraud committed by [GM] on consumers is a byproduct of alleged fraud committed on the EPA" such that challenging it "is 'tantamount to permitting Plaintiffs to challenge the EPA estimates themselves,' which plaintiffs cannot do." *Ford*, 65 F.4th at 866 (quoting *In re Ford Fusion and C-MAX Fuel Econ. Litig.*, No. 7:13-MD-02450, 2017 WL 3142078, at *10 (S.D.N.Y. July 24, 2017)).

Because Plaintiffs' "state-law fraud-on-the-agency claims would 'inevitably conflict with the

[EPA]'s responsibility to police fraud consistently with the Administration's judgment and objectives,'" the claims are impliedly preempted by the CAA. *See Ford*, 65 F.4th at 861 (quoting *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 350 (2001)).

C.

To draw a tighter analogy, Plaintiffs' claims in this case are impliedly preempted by the CAA in the same way that the claims in *Ford* were impliedly preempted by the EPCA. Plaintiffs' state-law claims alleging GM manipulated its emissions output and testing results for the diesel Cruze meet the CAA head on, in much the same way as state-law fraud claims related to fuel economy were knocked down in the *Ford* case. ECF No. 484 at PageID.42452. The intersection of these claims with the CAA is no coincidence—it is a direct reflection of the conflict these claims sparked in the EPCA landscape of *Ford*.

1.

Ford provided clear insight: when the EPA green-lights a manufacturer's test data, any legal challenges against the data are essentially proxy battles on the EPA's test data. *Ford*, 65 F.4th at 862–63. The same principle applies here. That is, to cement their state-law fraud claims here, Plaintiffs must demonstrate that GM "failed to follow the EPA-pr[e]scribed testing procedures or its obligation to report truthful information to the EPA." *Id.* at 865.

Despite the EPA's diligence, approving GM's emissions tests and AECD reports, a jury would still have to make an independent judgment, potentially sparking a flame on the EPA's mandate by determining whether GM's test results were deceptive—as Plaintiffs and their experts claim—or truthful, as per the EPA's assessment. *Id.* at 863. Plaintiffs claim that GM and Bosch deceived the EPA to secure EPA-issued COCs, resulting in diesel Cruzes that emit more emissions than federal standards in certain conditions. ECF No. 390 at PageID.32003 ("GM and Bosch employed three strategies that successfully deceived regulators and consumers."); *id.* at PageID.32004 ("Smithers shows in detail the multiple fraudulent statements made to regulators and repeated failure to disclose the effect of AECDs on emissions."); *id.* at PageID.32019 ("GM and Bosch designed and tested at least three defeat devices, installed them into the subject vehicles, and lied to regulators about them."); *accord* ECF No. 1 at PageID.12–13 ("Real world testing has recently revealed that these vehicles emit dangerous oxides of nitrogen (NO_x) at levels many times higher than … ***United States Environmental Protection Agency maximum emissions standards***."). But Plaintiffs have not identified an emissions benchmark, standard, or metric— except the EPA's standards—that a reasonable consumer would be aware of, care about, or expect. *See Counts v. Gen. Motors, LLC*, 606 F. Supp. 3d 678, 702 (E.D. Mich. 2022) ("Plaintiffs now only argue that Defendants defrauded them by

installing and concealing defeat devices that misrepresent the diesel Cruze's emissions [to the EPA]."). That is, Plaintiffs' allegations about "defeat devices" concealing excess emissions from the EPA hinge solely on the violation of EPA regulations, as confirmed by Plaintiffs' emissions expert, Juston Smithers. *See Counts v. Gen. Motors, LLC*, 606 F. Supp. 3d 547, 564–67 (E.D. Mich. 2022) ("Smithers contends that GM should have identified its online dosing to regulators as an EI-AECD."); ECF No. 339-4 at PageID.19703 (testifying that "[d]efeat device has a specific definition in the CFR"); *accord* ECF No. 345-2 at PageID.22507–10. Indeed, Plaintiffs repeatedly testified that their only concern for emissions output was regulatory compliance. *E.g.*, ECF Nos. 346-24 at PageID.24032; 346-26 at PageID.24088; 346-27 at PageID.24159; 346-28 at PageID.24218; 346-30 at PageID.24296; 34631 at PageID.24356.

Hence, Plaintiffs' claims, being thoroughly entwined with federal emissions standards and the EPA, are impliedly preempted by the CAA. *Ford*, 65 F.4th at 863 ("[P]laintiffs' claims essentially challenge the EPA's figures." (quoting *Farina v. Nokia Inc.*, 625 F.3d 97, 122 (3d Cir. 2010))).

The presence of the Federal Trade Commission (FTC) in *Ford*'s fuel-economy marketing saga does not change the analysis in this case. Since Plaintiffs' affirmative-misrepresentation claims have been dismissed from this case, *Counts v. Gen. Motors, LLC*, 237 F. Supp. 3d 572, 597–99 (E.D. Mich. 2017),

neither the FTC nor the EPCA are at issue. Rather, the core of this material-omissions case is Plaintiffs' belief that GM should have disclosed certain "defeat devices" and NO_x emissions to the EPA under the CAA, based on definitions and expectations all arising from EPA regulations. *See* discussion *supra* Section III.B.

In sum, "because the EPA accepted [GM]'s testing information and published its estimate based on that information, plaintiffs' claims essentially challenge the EPA's figures." *Ford*, 65 F.4th at 683 (citing *Farina v. Nokia Inc.*, 625 F.3d 97, 122 (3d Cir. 2010))).

2.

Allowing juries to question the EPA's figures could lead to them overstepping their bounds and meddling with the EPA's balanced objectives, including cost, data accuracy, and test-redundancy considerations. *Id.* at 863. After manufacturers conduct EPA-prescribed testing and submit their required data, it is for the EPA—no one else—to evaluate the results based on various important factors and objectives. *Id.* at 854, 856.

The same principle applies to GM's diesel Cruzes, which are put through a stringent testing process before their results are submitted to the EPA for review. *See* 40 C.F.R. § 1066 *et seq.*; *see also* 42 U.S.C. § 7525(a)(1); 40 C.F.R. § 86.1844-01(d)(11) (requiring manufacturers to disclose the function and

justification of any AECDs that reduce the effectiveness of emissions system under certain conditions); 40 C.F.R. § 86.1844-01(g)(3) (same for "[d]etailed technical descriptions of emission-related components and AECDs); 40 C.F.R. § 86.1844-01(g)(4) (same for "[d]etailed calibration specifications for all emission-related components and AECDs"); 40 C.F.R. § 86.1844-01(g)(5) (same for "[a]ny information necessary to demonstrate that no defeat devices are present on any vehicles covered by a certificate"). The EPA is well-equipped to assess these test results and disclosures holistically, while striking a balanced decision about regulatory compliance. *See* 42 U.S.C. § 7521(a)(1), (b)(2)(A) (permitting the EPA to revoke COCs).

Allowing plaintiffs and juries to override these judgments could give rise to a shadow regulatory system—one led by lawyers and experts, rather than by Congress and the EPA. *Ford*, 65 F.4th at 863 ("Second, allowing juries to second-guess the EPA's fuel economy figures would permit them to rebalance the EPA's objectives.").

3.

Plaintiffs' claims would overstep the EPA's powers to penalize and to prevent fraud. The EPA holds significant authority to enforce the EPCA and to deter fraudulent activities. *Id.* at 857. This power is intended to be wielded by the federal government, not by civil litigants before juries who could end up contradicting and usurping the EPA's role. *Id.* at 865

(citing *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 352 (2001)). The EPA is vested with the powers to investigate violations, to issue civil penalties, to request voluntary recalls, and even to revoke COCs. *Id.* at 865; *see also* discussion *supra* Section III.A.

And the EPA has flexed its powers against other manufacturers. *E.g.*, Garret Ellison, *Michigan Companies Fined $10M for Selling Diesel "Defeat Devices,"* MLive (Sept. 15, 2022), https://www.mlive.com/public-interest/2022/09/michigan-companies-fined-10m-for-sellingdiesel-defeat-devices.html [https://perma.cc/K88N-C8TL] ("The EPA says it resolved 40 diesel tampering cases in 2021."); Press Release, U.S. Dep't of Just., Volkswagen AG Agrees to Plead Guilty and Pay $4.3 Billion in Criminal and Civil Penalties; Six Volkswagen Executives and Employees are Indicted in Connection with Conspiracy to Cheat U.S. Emissions Tests (Jan. 11, 2017), https://www.justice.gov/opa/pr/volkswagen-ag-agrees-plead-guilty-and-pay-43-billioncriminal-and-civil-penalties-six [https://perma.cc/48YH-37UE] (extracting a $1.45 billion settlement payment from Volkswagen in 2017 for its violations of the CAA).

These enforcement powers and execution of them reveals a comprehensive regulatory framework under the EPA's vigilant watch, leaning toward implied preemption under the CAA. *See Ford*, 65 F.4th at 863 ("Third, as the EPA has the authority to

approve or reject fuel economy figures, its 'federal statutory scheme amply empowers the [EPA] to punish and deter fraud.'" (quoting *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 348 (2001))).

4.

Plaintiffs' claims would distort the EPA-required disclosures. Under the CAA, manufacturers must adhere to EPA regulations to obtain a COC by providing details about their emissions tests and any AECDs they use. *See, e.g.*, 40 C.F.R. §§ 86.1843-01, 86.1844-01.

Here, Plaintiffs are effectively challenging the adequacy of GM's disclosures to the EPA, *e.g.*, ECF No. 390 at PageID.32019 ("Defendants designed the defeat devices to evade detection on regulatory cycles."), echoing the fraud-on-the-agency claims seen in *Ford*, 65 F.4th at 865. If allowed to proceed, then these claims would compel manufacturers to over-document their submissions, despite the EPA's satisfaction, resulting in an unnecessary burden on manufacturers and the EPA's evaluation process. *See Buckman*, 531 U.S. at 351 ("Applicants would then have an incentive to submit a deluge of information that the Administration neither wants nor needs, resulting in additional burdens on the FDA's evaluation of an application."); *Ford*, 65 F.4th at 864 ("[I]f a state-law claim were to proceed, a jury may find this documentation inadequate even if the EPA had previously determined otherwise.").

By challenging these submissions, Plaintiffs are implying that the EPA either accepted false or insufficient data or made an incorrect judgment—both claims being preempted by federal law. *See Ford*, 65 F.4th at 863 ("Finally, state-law claims would skew the disclosures that manufacturers need to make to the EPA.").

D.

Plaintiffs advance three counterarguments that deserve attention. Their first argument is that, like a train, the *Ford* case should be confined to its tracks because it concerned fuel-economy figures, while this case concerns emissions-output statistics. ECF No. 489 at PageID.42714–22. But Plaintiffs have not explained why this difference should matter. Indeed, the holding of *Ford* seems to control the facts of this case with much greater force than the facts of *Ford*. In *Ford*, the debate revolved around fuel-economy information that was calculated from the emissions figures approved by the EPA. *Ford*, 65 F.4th at 854–57 ("This case centers on allegations that Ford cheated on its fuel economy *and emissions testing* … ." (emphasis added)). However, in this case, Plaintiffs are not just complaining about a product of the emissions data; they are directly challenging the emissions data that the EPA calculated itself. ECF No. 489 at PageID.42719–20 ("Under the Clean Air Act, the EPA only performs emissions testing to verify that the vehicles meet certain minimum standards to be approved for sale and use." (citing 42 U.S.C.

§ 7525(a)(1))). In other words, Plaintiffs' challenge here is one degree closer to the core issue than the challenge in *Ford*. This fact only strengthens the controlling force that *Ford* has here.

Plaintiffs also argue that *Ford* is not useful here, as it was decided based on implied conflict preemption, and this Court has already held that the claims here are not subject to express preemption or implied field preemption. ECF No. 489 at PageID.42722–24. But this argument is self-defeating because this Court never considered implied conflict preemption. *See Counts v. Gen. Motors, LLC*, 237 F. Supp. 3d 572, 588-92 (E.D. Mich. 2017). Nor the nature and purpose of the federal regulatory scheme, its intended effect on state laws and regulations, or the potential for state-law claims to interfere with federal objectives—all which were key factors in *Ford*. Regardless, lack of express or field preemption does not nix consideration of conflict preemption.

Lastly, Plaintiffs say their claims do not hinge on any EPA findings, unlike those in *Ford*; they are based on the existence of defeat devices and public misrepresentations about them. ECF No. 489 at PageID.42724–31. But both are true here, as explained earlier. *See* discussion *supra* Section III.B, III.C.1. The alleged devices would defeat the EPA's emissions-output testing, which the EPA has the power "to punish and deter." *Ford*, 65 F.4th at 863. Thus, Plaintiffs' challenges to the figures that the

EPA approved renders their claims impliedly preempted by the CAA.

E.

In sum, the state-law claims that Plaintiffs have advanced here are preempted by the Clean Air Act. In all respects, they mirror the state-law claims that were preempted in *In re Ford Motor Co. F-150 & Ranger Truck Fuel Econ. Mktg. & Sales Pracs. Litig.*, 65 F.4th 851 (6th Cir. 2023), *en banc reh'g denied per curiam*, No. 22-1245, 2023 WL 4115991 (6th Cir. June 21, 2023). Both sets of claims (1) challenge the sufficiency of the manufacturer's testing and disclosures to the EPA, (2) would place juries in the EPA's regulatory shoes, (3) would disrupt the EPA's enforcement powers and could skew the EPA's required disclosures, and (4) could lead to disruptive practical consequences. For these reasons, this Court holds that Plaintiffs' state-law claims here are preempted by the Clean Air Act in the same way as the state-law fraud claims were preempted by the Energy Policy and Conservation Act in *Ford*.

IV.

Accordingly, it is **ORDERED** that Plaintiffs' Amended Complaint, ECF No. 94, is **DISMISSED WITH PREJUDICE**.

Further, it is **ORDERED** that Plaintiffs' Motion to Certify Class, ECF No. 446, is **DENIED AS MOOT**.

This is a final order and closes the above-captioned case.

Dated: July 12, 2023

s/Thomas L. Ludington
THOMAS L. LUDINGTON
United States District Judge

Appendix I

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

Case No.: 1:17-cv-11661-TLL-PTM

IN RE DURAMAX DIESEL LITIGATION

Hon. Thomas L. Ludington
United States District Judge

Hon. Patricia T. Morris
United States Magistrate Judge

Filed July 12, 2023

OPINION AND ORDER GRANTING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT, DISMISSING CASE WITH PREJUDICE UNDER IMPLIED PREEMPTION, AND DENYING REMAINING MOTIONS AS MOOT

In this emissions-regulations case, the parties have spent years litigating the allegations that General Motors and Robert Bosch LLC misled consumers into purchasing GM-manufactured trucks by installing devices that defeat the emissions testing approved by the Environmental Protection Agency. But then the Sixth Circuit Court of Appeals recently dismissed a substantially similar claim as preempted by the Energy Policy and Conservation Act, 42 U.S.C. § 6201 *et seq*. The parties were directed to submit supplemental briefing regarding whether this case should be dismissed under that new precedent.

As explained hereafter, the case will be dismissed with prejudice because Plaintiffs' state-law claims are impliedly preempted by the Clean Air Act, 42 U.S.C. § 7401 *et seq*., and Plaintiffs lack statutory standing for their RICO claim because they are indirect purchasers.

I.

Plaintiffs are a group of consumers who purchased or leased a model year 2011–2016 Chevrolet Silverado 2500HD or 3500HD, or a GMC Sierra 2500HD or 3500HD (the "Duramax Trucks") and who seek to represent a putative class of "[a]ll persons who purchased or leased a [Duramax Truck]." ECF No. 18 at PageID.1015.[1] Plaintiffs' alleged injury

[1] This case consolidates 30 cases. *Herman v. Gen. Motors LLC*, No. 1:17-CV-11661 (E.D. Mich. filed May 25, 2017); *Mizell v. Gen. Motors LLC*, No. 2:17-CV-11984 (E.D. Mich. filed June

21, 2017); *Anderton v. Gen. Motors LLC*, No. 1:19-CV-11306 (E.D. Mich. filed May 6, 2019); *Harvell v. Gen. Motors LLC*, No. 1:19-CV-11307 (E.D. Mich. filed May 6, 2019); *Arkels v. Gen. Motors LLC*, No. 1:19-CV-11308 (E.D. Mich. filed May 6, 2019); *Hackett v. Gen. Motors LLC*, No. 1:19-CV-11313 (E.D. Mich. filed May 6, 2019); *Barger v. Gen. Motors LLC*, No. 1:19-CV-11320 (E.D. Mich. filed May 6, 2019); *Andersen v. Gen. Motors LLC*, No. 1:19-CV-11331 (E.D. Mich. filed May 7, 2019); *Patton v. Gen. Motors LLC*, No. 1:19-CV-11332 (E.D. Mich. filed May 7, 2019); *Ahearn v. Gen. Motors LLC*, No. 1:19-CV-11337 (E.D. Mich. filed May 7, 2019); *Lanctot v. Gen. Motors LLC*, No. 1:19-CV-11339 (E.D. Mich. filed May 7, 2019); *Beavers v. Gen. Motors LLC*, No. 1:19-CV-11341 (E.D. Mich. filed May 7, 2019); *Bradford v. Gen. Motors LLC*, No. 1:19-CV-11344 (E.D. Mich. filed May 7, 2019); *Quaid v. Gen. Motors LLC*, No. 1:19-CV-11348 (E.D. Mich. filed May 7, 2019); *Anderson v. Gen. Motors LLC*, No. 1:19-CV-11349 (E.D. Mich. filed May 7, 2019); *Bloom v. Gen. Motors LLC*, No. 1:19-CV-11351 (E.D. Mich. filed May 8, 2019); *Jaramillo v. Gen. Motors LLC*, No. 1:19-CV-11354 (E.D. Mich. filed May 8, 2019); *Fetters v. Gen. Motors LLC*, No. 1:19-CV-11357 (E.D. Mich. filed May 8, 2019); *Oliver v. Gen. Motors LLC*, No. 1:19-CV-11365 (E.D. Mich. filed May 8, 2019); *Aten v. Gen. Motors LLC*, No. 1:19-CV-11366 (E.D. Mich. filed May 8, 2019); *Garza v. Gen. Motors LLC*, No. 1:19-CV-11368 (E.D. Mich. filed May 8, 2019); *Scott v. Gen. Motors LLC*, No. 1:19-CV-11370 (E.D. Mich. filed May 8, 2019); *Bago v. Gen. Motors LLC*, No. 1:19-CV-11372 (E.D. Mich. filed May 9, 2019); *Gravatt v. Gen. Motors LLC*, No. 1:19-CV-11374 (E.D. Mich. filed May 9, 2019); *Abney v. Gen. Motors LLC*, No. 1:19-CV-11376 (E.D. Mich. filed May 9, 2019); *Sloan v. Gen. Motors LLC*, No. 1:19-CV-11379 (E.D. Mich. filed May 9, 2019); *Richardson v. Gen. Motors LLC*, No. 1:19-CV-11381 (E.D. Mich. filed May 9, 2019); *Balch v. Gen. Motors LLC*, No. 1:19-CV-11394 (E.D. Mich. filed May 10, 2019); *Pantel v. Gen. Motors LLC*, No. 1:19-CV-13219 (E.D. Mich. filed Nov. 1, 2019); *Bulaon v. Gen. Motors LLC*, No. 1:19-CV-13220 (E.D. Mich. filed Nov. 1, 2019).

is their overpayment for a Duramax Truck caused by Defendants General Motors and Bosch duping them into buying a Duramax Truck with "at least three different 'defeat devices'" that made the emissions comply with the regulations of the Environmental Protection Agency (EPA) and California Air Resources Board ("CARB"). *Id.* at PageID.893–94, 982, 1017. Their theory of liability follows:

> [T]he Silverado and Sierra 2500 and 3500 models emit levels of NO_x many times higher than (i) their gasoline counterparts, (ii) what a reasonable consumer would expect, (iii) what GM had advertised, (iv) the [EPA]'s maximum standards, and (v) the levels set for the vehicles to obtain a certificate of compliance that allows them to be sold in the United States.

Id. at PageID.892.

In August 2022, Plaintiffs filed a *Daubert* motion to exclude two of Defendants' experts, ECF Nos. 367; 368 (sealed), and a motion for class certification, ECF Nos. 364; 366 (sealed). Meanwhile, Defendants filed a *Daubert* motion to exclude three of Plaintiffs' experts, ECF No. 370; 371 (sealed), and separate motions for summary judgment, ECF Nos. 363; 365 (sealed); 373.

On April 21, 2023, the Sixth Circuit dismissed seemingly identical claims as impliedly preempted by the Energy Policy and Conservation Act (EPCA), 42 U.S.C. § 6201 *et seq.*, and its corresponding

regulations for emissions testing, *In re Ford Motor Co. F-150 & Ranger Truck Fuel Econ. Mktg. & Sales Pracs. Litig.*, 65 F.4th 851, 862–64 (6th Cir. 2023); *see also* ECF No. 431 (notifying this Court of the dismissal). And the petition for an *en banc* rehearing was denied by "the full court." *Ford*, No. 22-1245, 2023 WL 4115991, at *1 (6th Cir. June 21, 2023).

The effect of that case, if any, has been briefed by the parties regarding this case. Plaintiffs assert their state-law claims are not preempted, ECF Nos. 438; 439; 441, while Defendants contend that implied preemption warrants dismissal of Plaintiffs' state-law claims, ECF Nos. 442; 443.

II.

A.

The Supremacy Clause of the United States Constitution provides that "the Laws of the United States … shall be the supreme Law of the Land," despite "any Thing in the Constitution or Laws of any State to the Contrary." U.S. CONST. art. VI, cl. 2. "The phrase 'Laws of the United States' encompasses both federal statutes themselves and federal regulations that are properly adopted in accordance with statutory authorization." *City of New York v. FCC*, 486 U.S. 57, 63, (1988) (per curiam). Thus, "state laws that 'interfere with, or are contrary to the laws of congress, made in pursuance of the constitution' are invalid." *Wis. Pub. Intervenor v. Mortier*, 501 U.S. 597, 604 (1991) (quoting *Gibbons v. Ogden*, 22 U.S. 1

(1824)). This inquiry is largely one of congressional intent, i.e., whether the statute demonstrates an "intent to supplant state authority in a particular field." *Id.* at 604-05. In line with the standards governing motions for dismissal, a defendant bears the burden of proof in establishing preemption as grounds for dismissal. *Brown v. Earthboard Sports USA, Inc.*, 481 F.3d 901, 912 (6th Cir. 2007).

Ordinary preemption[2] provides an affirmative defense to support dismissal of a claim (as Ford did here). *Hudak v. Elmcroft of Sagamore Hills*, 58 F.4th 845, 852 (6th Cir. 2023). "State-law claims can be preempted expressly in a federal statute or regulation, or impliedly, where congressional intent to preempt state law is inferred." *McDaniel v. Upsher–Smith Lab'ys, Inc.*, 893 F.3d 941, 944 (6th Cir. 2018) (citation omitted). Through an express preemption clause, Congress may make clear "that it is displacing or prohibiting the enactment of state legislation in a

[2] Ordinary preemption is distinguished from the "misleadingly named doctrine" of complete preemption, a "jurisdictional" doctrine under which a court could conclude "that the pre-emptive force of a statute is so extraordinary that it converts an ordinary state common-law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule." *Hogan v. Jacobson*, 823 F.3d 872, 879 (6th Cir. 2016) (quotation marks omitted). This "complete preemption" doctrine is a narrow one that the Supreme Court has applied in only three statutory settings. *See Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 6–11 (2003).

particular area." *Matthews v. Centrus Energy Corp.*, 15 F.4th 714, 720 (6th Cir. 2021).

By contrast, implied preemption applies in one of two forms: field or conflict. *Id.* "Field preemption occurs 'where the scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.'" *Id.* (quoting *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98 (1992)). Conflict preemption may instead be present when "Congress has not entirely displaced state regulation over the matter in question." *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984). In that circumstance, state law may be preempted "to the extent it actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law, or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress." *Id.* (internal citations omitted).

B.

Applying these principles three months ago, the Sixth Circuit dismissed a putative class action that a group of consumers brought against an automobile manufacturer. *In re Ford Motor Co. F-150 & Ranger Truck Fuel Econ. Mktg. & Sales Pracs. Litig.*, 65 F.4th 851 (6th Cir. 2023), *en banc reh'g denied per curiam*, No. 22-1245, 2023 WL 4115991 (6th Cir. June 21, 2023). The consumers asserted state-law "fraud-on-the-agency" claims arising from manufacturer's alleged fraud on the EPA via

submission of false fuel-economy-testing figures for certain truck models, which the Sixth Circuit held were impliedly preempted for conflicting with the EPCA, 42 U.S.C. § 6201 *et seq.*, and its regulatory scheme.

The crux of the Sixth Circuit's holding of "first impression" is summarized as follows:

> (1) "First, because the EPA accepted Ford's testing information and published its estimate based on that information, plaintiffs' claims essentially challenge the EPA's figures." *Ford*, 65 F.4th at 863 (quoting *Farina v. Nokia Inc.*, 625 F.3d 97, 122 (3d Cir. 2010)).
>
> (2) "Second, allowing juries to second-guess the EPA's fuel economy figures would permit them to rebalance the EPA's objectives." *Id.*
>
> (3) "Third, as the EPA has the authority to approve or reject fuel economy figures, its 'federal statutory scheme amply empowers the [agency] to punish and deter fraud.'" *Id.* (alteration in original) (quoting *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 348 (2001)).
>
> (4) "Finally, state-law claims would skew the disclosures that manufacturers need to make to the EPA." *Id.*

In sum, the "state-law fraud-on-the-agency claims would 'inevitably conflict with the [EPA]'s responsibility to police fraud consistently with the Administration's judgment and objectives," *id.* at 861

(quoting *Buckman*, 531 U.S. at 350). All these holdings apply the same with respect to the state-law claims at issue in this case, explained more extensively below.

III.

A.

When reviewing preemption, Congress's intentions are the lynchpin. *Ford*, 65 F.4th at 860 (quoting *Cipollone v. Liggett Grp.*, 505 U.S. 504, 516 (1992)).

The EPCA and the Clean Air Act (CAA) both provide the EPA with wide-ranging authority to manage and to supervise motor-vehicle performance. The EPCA, enacted in 1975, aimed to establish a thorough regulation plan for fuel-economy testing, emphasizing the improvement of motor-vehicle energy efficiency and assuring reliable energy data. *Id.* at 854 (quoting 42 U.S.C. § 6201(5), (7)). Similarly, the CAA's goal is to safeguard and to improve the nation's air quality with a detailed regulation plan, which ultimately benefits public health, welfare, and productive capacity. 42 U.S.C. § 7401(b)(1). In sum, the CAA directs the EPA to set standards for air-pollutant emissions from new motor vehicles or their engines. *Id.* § 7521(a)(1).

Under both these regulatory frameworks, the responsibility of rigorous testing falls on vehicle manufacturers. *Ford*, 65 F.4th at 854–55; 42 U.S.C. § 7525(a)–(d), (h). And the EPA requires such

manufacturers to use "a chassis dynamometer" to conduct testing cycles for both fuel economy under the EPCA and emissions under the CAA. *Ford*, 65 F.4th at 854–55; *see also* 40 C.F.R. § 86.115-78. Also, Congress clarified that fuel-economy tests should coincide with emission tests when possible, 49 U.S.C. § 32904, showcasing that regulating vehicle fuel economy (EPCA) and emissions (CAA) are complementary and manageable by the same testing procedures.

Both laws have provisions for "in-use testing" requiring manufacturers to conduct and to report emissions tests for vehicles already in use. *See* 42 U.S.C. § 7541; 40 C.F.R. § 86.1847-01.

And if the EPA suspects the presence of a "defeat device," then it can test or demand additional testing on any vehicle at a specified location, using its defined driving cycles and test conditions. 40 C.F.R. § 86.1809-01(b); *cf. Ford*, 65 F.4th at 865.

In both frameworks, manufacturers must submit data specified by the EPA for review. *See* 40 C.F.R. §§ 86.1843-01, 86.1844-01; *Ford*, 65 F.4th at 856. Under the CAA, manufacturers must also deliver a meticulous account of the vehicle's auxiliary emission control devices ("AECDs"), enabling the EPA to investigate if any "defeat device" lurks beneath the deck. 40 C.F.R. § 86.0042 (providing the EPA's definition of "defeat device"); *see also id.* § 86.1844-01(d)(11) (requiring manufacturers to describe any AECDs).

When it comes to data evaluation under both regimes, the EPA holds the reins. Manufacturers must convince the EPA that their vehicle design does not unnecessarily reduce the effectiveness of emissions control under normal operation and use. 40 C.F.R. § 86.1809-01(d)(1), (2)(ii). If the initial round of fuel-economy testing shows unsatisfactory results, then manufacturers must conduct more tests. *Ford*, 65 F.4th at 865.

Under both the EPCA and the CAA, the EPA is tasked with making an affirmative statement about the vehicle's performance based on its review of manufacturers' data. This results in either a fuel-economy estimate under the EPCA, 49 U.S.C. § 32904(c), or a Certificate of Conformity (COC) based on emissions testing under the CAA, 42 U.S.C. § 7525(a)(1). If a vehicle complies with the regulations, then the EPA issues a COC: the EPA's positive verdict on the vehicle's emission performance. *See, e.g.*, ECF No. 365-7 at PageID.21755 (issuing COC for the 2011 Duramax Trucks).

The EPA also holds substantial power to investigate and to penalize manufacturers that stray off either course. As with the EPCA, *see Ford*, 65 F.4th at 857 (including statutory and regulatory citations), under the CAA the EPA may impose fines, *see, e.g.*, 42 U.S.C. §§ 7524(b), 7524(c), call back vehicles, *id.* § 7541(c)(1), and even revoke a vehicle's COC, 40 C.F.R. §§ 86.1850-01(d), 86.1851-10(d)(1).

And both legislative frameworks provide a lighthouse for consumers, guiding them with publicly disclosed test results. *See* Data on Cars used for Testing Fuel Economy, EPA (last updated June 14, 2023), https://www.epa.gov/compliance-and-fuel-economy-data/data-cars-usedtestingfuel-economy (releasing results of fuel-economy testing publicly); 42 U.S.C. § 7525(e) (requiring the EPA to do the same under the CAA). Even more telling in the CAA context, the EPA requires manufacturers to put specific language inside the engine compartment stating that the vehicle complies with the EPA's applicable emissions standards. 40 C.F.R. § 86.1807-01(a), (c)(ii). This transparency allows prospective buyers to make informed decisions and manufacturers to communicate clear compliance to their customers, ensuring consistent and comparable emissions information. *See Ford*, 65 F.4th at 857.

In sum, Congress's intent demonstrates that the CAA impliedly preempts state-law fraud-on-the-agency claims that rely on emissions figures that were provided by vehicle manufacturers and approved by the EPA.

B.

The *Ford* court concluded that the state-law claims were impliedly preempted by the EPCA because they were intertwined with alleged violations of the EPCA. *Ford*, 65 F.4th at 866. Those findings apply equally to the CAA implied preemption at issue here.

Like the claims in *Ford*, Plaintiffs' claims here are inextricably intertwined with alleged violations of the CAA. As explained earlier, Plaintiffs' state-law claims arise from alleged misconduct by GM and Bosch involving violations of the CAA vis-a-vis EPA regulations for defeat devices, testing procedures, and emissions output. *See* discussion *supra* Section III.B.

Without the CAA and its regulations, Plaintiffs would have no basis for their claims. In this way, Plaintiffs' claims exist "solely because of" a federal statute and are thus impliedly preempted by it. *Ford*, 65 F.4th at 866; *see also Loreto v. Procter & Gamble Co.*, 515 F. App'x 576, 579 (6th Cir. 2013). That is, "any fraud committed by [GM] on consumers is a byproduct of alleged fraud committed on the EPA" such that challenging it "is 'tantamount to permitting Plaintiffs to challenge the EPA estimates themselves,' which plaintiffs cannot do." *Ford*, 65 F.4th at 866 (quoting *In re Ford Fusion and C-MAX Fuel Econ. Litig.*, No. 7:13-MD-02450, 2017 WL 3142078, at *10 (S.D.N.Y. July 24, 2017)).

Because Plaintiffs' "state-law fraud-on-the-agency claims would 'inevitably conflict with the [EPA]'s responsibility to police fraud consistently with the Administration's judgment and objectives,'" the claims are impliedly preempted by the CAA. *See Ford*, 65 F.4th at 861 (quoting *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 350 (2001)).

C.

To draw a tighter analogy, Plaintiffs' claims in this case are impliedly preempted by the CAA in the same way that the claims in *Ford* were impliedly preempted by the EPCA. Plaintiffs' state-law claims alleging GM manipulated its emissions output and testing results for the Duramax Trucks meet the CAA head on, in much the same way as state-law fraud claims related to fuel economy were knocked down in the *Ford* case. ECF No. 433 at PageID.48079. The intersection of these claims with the CAA is no coincidence—it is a direct reflection of the conflict these claims sparked in the EPCA landscape of *Ford*.

1.

Ford provided clear insight: when the EPA green-lights a manufacturer's test data, any legal challenges against the data are essentially proxy battles on the EPA's test data. *Ford*, 65 F.4th at 862–63. The same principle applies here. That is, to cement their state-law fraud claims here, Plaintiffs must demonstrate that GM "failed to follow the EPA-pr[e]scribed testing procedures or its obligation to report truthful information to the EPA." *Id.* at 865.

Despite the EPA's diligence, approving GM's emissions tests and AECD reports, a jury would still have to make an independent judgment, potentially sparking a flame on the EPA's mandate by determining whether GM's test results were deceptive—as Plaintiffs and their experts claim—or

truthful, as per the EPA's assessment. *Id.* at 863. Plaintiffs ARGUE that GM and Bosch deceived the EPA to secure EPA-issued COCs, resulting in Duramax Trucks that emit more emissions than federal standards in certain conditions. *E.g.*, ECF No. 389 at PageID.36137 ("GM and Bosch employed the online dosing strategy to deceive regulators and consumers."); *id.* at PageID.36155–56 (asserting GM "effectively shield[ed] the [online dosing] function from regulatory scrutiny, and, therefore, from the public as well")); *accord id.* at PageID.36137 (arguing GM's defeat devices "deceived the regulators"); *id.* at PageID.36139 ("GM and Bosch designed and tested the online dosing defeat device, installed it in the Duramax trucks, and lied to regulators about the parameters and effects of online dosing on the trucks' emissions in real-world driving."); *id.* at PageID.36151 ("[T]he Duramax trucks contain a 'defeat device' intended to evade regulatory scrutiny and enable the vehicles to pass regulatory test cycles."). But Plaintiffs have not identified an emissions benchmark, standard, or metric—except the EPA's standards—that a reasonable consumer would be aware of, care about, or expect. *See In re Duramax Diesel Litig.*, 298 F. Supp. 3d 1037, 1049 (E.D. Mich. 2018) ("They allege that GM and Bosch conspired to conceal the defeat devices in the Duramax engine from the EPA and allege that, because of the defeat devices, the vehicles in question do not comply with emission pollution standards, despite being certified as conforming to those

requirements."). That is, Plaintiffs' allegations about "defeat devices" concealing excess emissions from the EPA hinge solely on the violation of EPA regulations, as confirmed by Plaintiffs' emissions expert, Juston Smithers. *See* ECF No. 371-5 at PageID.29125 (testifying that his expert "conclusion in this case is that the subject vehicles contain a defeat device … . as defined in the federal regulations"). Indeed, Plaintiffs repeatedly testified that their only concern for emissions output was regulatory compliance. *E.g.*, ECF Nos. 363-24 at PageID.18871; 363-26 at PageID.18882; 363-32 at PageID.18932; 363-33 at PageID.18942; 363- 34 at PageID.18949.

Hence, Plaintiffs' claims, being thoroughly entwined with federal emissions standards and the EPA, are impliedly preempted by the CAA. *Ford*, 65 F.4th at 863 ("[P]laintiffs' claims essentially challenge the EPA's figures." (quoting *Farina v. Nokia Inc.*, 625 F.3d 97, 122 (3d Cir. 2010))).

The presence of the Federal Trade Commission (FTC) in *Ford*'s fuel-economy marketing saga does not change the analysis in this case. Since Plaintiffs' affirmative-misrepresentation claims have been dismissed from this case, *In re Duramax Diesel Litig.*, 298 F. Supp. 3d 1037, 1057 (E.D. Mich. 2018), neither the FTC nor the EPCA are at issue. Rather, the core of this material-omissions case is Plaintiffs' belief that GM should have disclosed certain "defeat devices" and NO_x emissions to the EPA under the CAA, based on

definitions and expectations all arising from EPA regulations. *See* discussion *supra* Section III.B.

In sum, "because the EPA accepted [GM]'s testing information and published its estimate based on that information, plaintiffs' claims essentially challenge the EPA's figures." *Ford*, 65 F.4th at 683 (citing *Farina v. Nokia Inc.*, 625 F.3d 97, 122 (3d Cir. 2010))).

2.

Allowing juries to question the EPA's figures could lead to them overstepping their bounds and meddling with the EPA's balanced objectives, including cost, data accuracy, and test-redundancy considerations. *Id.* at 863. After manufacturers conduct EPA-prescribed testing and submit their required data, it is for the EPA—no one else—to evaluate the results based on various important factors and objectives. *Id.* at 854, 856.

The same principle applies to GM's Duramax Trucks, which are put through a stringent testing process before their results are submitted to the EPA for review. *See* 40 C.F.R. § 1066 *et seq.*; *see also* 42 U.S.C. § 7525(a)(1); 40 C.F.R. § 86.1844-01(d)(11) (requiring manufacturers to disclose the function and justification of any AECDs that reduce the effectiveness of emissions system under certain conditions); 40 C.F.R. § 86.1844-01(g)(3) (same for "[d]etailed technical descriptions of emission-related components and AECDs); 40 C.F.R. § 86.1844-01(g)(4)

(same for "[d]etailed calibration specifications for all emission-related components and AECDs"); 40 C.F.R. § 86.1844-01(g)(5) (same for "[a]ny information necessary to demonstrate that no defeat devices are present on any vehicles covered by a certificate"). The EPA is well-equipped to assess these test results and disclosures holistically, while striking a balanced decision about regulatory compliance. *See* 42 U.S.C. § 7521(a)(1), (b)(2)(A) (permitting the EPA to revoke COCs).

Allowing plaintiffs and juries to override these judgments could give rise to a shadow regulatory system—one led by lawyers and experts, rather than by Congress and the EPA. *Ford*, 65 F.4th at 863 ("Second, allowing juries to second-guess the EPA's fuel economy figures would permit them to rebalance the EPA's objectives.").

3.

Plaintiffs' claims would overstep the EPA's powers to penalize and to prevent fraud. The EPA holds significant authority to enforce the EPCA and to deter fraudulent activities. *Id.* at 857. This power is intended to be wielded by the federal government, not by civil litigants before juries who could end up contradicting and usurping the EPA's role. *Id.* at 865 (citing *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 352 (2001)). The EPA is vested with the powers to investigate violations, to issue civil penalties, to request voluntary recalls, and even to

revoke COCs. *Id.* at 865; *see also* discussion *supra* Section III.A.

And the EPA has flexed its powers against other manufacturers. *E.g.*, Garret Ellison, *Michigan Companies Fined $10M for Selling Diesel "Defeat Devices,"* MLive (Sept. 15, 2022), https://www.mlive.com/public-interest/2022/09/michigan-companies-fined-10m-for-sellingdiesel-defeat-devices.html [https://perma.cc/K88N-C8TL] ("The EPA says it resolved 40 diesel tampering cases in 2021."); Press Release, U.S. Dep't of Just., Volkswagen AG Agrees to Plead Guilty and Pay $4.3 Billion in Criminal and Civil Penalties; Six Volkswagen Executives and Employees are Indicted in Connection with Conspiracy to Cheat U.S. Emissions Tests (Jan. 11, 2017), https://www.justice.gov/opa/pr/volkswagen-ag-agrees-plead-guilty-and-pay-43-billioncriminal-and-civil-penalties-six [https://perma.cc/48YH-37UE] (extracting a $1.45 billion settlement payment from Volkswagen in 2017 for its violations of the CAA).

These enforcement powers and execution of them reveals a comprehensive regulatory framework under the EPA's vigilant watch, leaning toward implied preemption under the CAA. *See Ford*, 65 F.4th at 863 ("Third, as the EPA has the authority to approve or reject fuel economy figures, its 'federal statutory scheme amply empowers the [EPA] to punish and deter fraud.'" (quoting *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 348 (2001))).

4.

Plaintiffs' claims would distort the EPA-required disclosures. Under the CAA, manufacturers must adhere to EPA regulations to obtain a COC by providing details about their emissions tests and any AECDs they use. *See, e.g.*, 40 C.F.R. §§ 86.1843-01, 86.1844-01.

Here, Plaintiffs are effectively challenging the adequacy of GM's disclosures to the EPA, *e.g.*, ECF No. 389 at PageID.36139 ("Defendants intentionally designed the Duramax engines to extensively use online dosing outside the conditions of governmental testing."), echoing the fraud-on-the-agency claims seen in *Ford*, 65 F.4th at 865. If allowed to proceed, then these claims would compel manufacturers to over-document their submissions, despite the EPA's satisfaction, resulting in an unnecessary burden on manufacturers and the EPA's evaluation process. *See Buckman*, 531 U.S. at 351 ("Applicants would then have an incentive to submit a deluge of information that the Administration neither wants nor needs, resulting in additional burdens on the FDA's evaluation of an application."); *Ford*, 65 F.4th at 864 ("[I]f a state-law claim were to proceed, a jury may find this documentation inadequate even if the EPA had previously determined otherwise.").

By challenging these submissions, Plaintiffs are implying that the EPA either accepted false or insufficient data or made an incorrect judgment—both claims being preempted by federal law. *See Ford*,

65 F.4th at 863 ("Finally, state-law claims would skew the disclosures that manufacturers need to make to the EPA.").

D.

Plaintiffs advance three counterarguments that deserve attention. Their first argument is that, like a train, the *Ford* case should be confined to its tracks because it concerned fuel-economy figures, while this case concerns emissions-output statistics. ECF No. 439 at PageID.48295–303. But Plaintiffs have not explained why this difference should matter. Indeed, the holding of *Ford* seems to control the facts of this case with much greater force than the facts of *Ford*. In *Ford*, the debate revolved around fuel-economy information that was calculated from the emissions figures approved by the EPA. *Ford*, 65 F.4th at 854–57 ("This case centers on allegations that Ford cheated on its fuel economy *and emissions testing* … ." (emphasis added)). However, in this case, Plaintiffs are not just complaining about a product of the emissions data; they are directly challenging the emissions data that the EPA calculated itself. ECF No. 439 at PageID.48300 ("Under the Clean Air Act, the EPA only performs emissions testing to verify that the vehicles meet certain minimum standards to be approved for sale and use." (citing 42 U.S.C. § 7525(a)(1))). In other words, Plaintiffs' challenge here is one degree closer to the core issue than the challenge in *Ford*. This fact only strengthens the controlling force that *Ford* has here.

Plaintiffs also argue that *Ford* is not useful here, as it was decided based on implied conflict preemption, and this Court has already held that the claims here are not subject to express preemption or implied field preemption. ECF No. 439 at PageID.48303–05. But this argument is self-defeating because this Court never considered implied conflict preemption. *See In re Duramax Diesel Litig.*, 298 F. Supp. 3d 1037, 1063-64 (E.D. Mich. 2018). Nor the nature and purpose of the federal regulatory scheme, its intended effect on state laws and regulations, or the potential for state-law claims to interfere with federal objectives—all which were key factors in *Ford*. Regardless, lack of express or field preemption does not nix consideration of conflict preemption.

Lastly, Plaintiffs say their claims do not hinge on any EPA findings, unlike those in *Ford*; they are based on the existence of defeat devices and public misrepresentations about them. ECF No. 439 at PageID.48305–12. But both are true here, as explained earlier. *See* discussion *supra* Section III.B, III.C.1. The alleged devices would defeat the EPA's emissions-output testing, which the EPA has the power "to punish and deter." *Ford*, 65 F.4th at 863. Thus, Plaintiffs' challenges to the figures that the EPA approved renders their claims impliedly preempted by the CAA.

E.

In sum, the state-law claims that Plaintiffs have advanced here are preempted by the Clean Air Act. In all respects, they mirror the state-law claims that were preempted in *In re Ford Motor Co. F-150 & Ranger Truck Fuel Econ. Mktg. & Sales Pracs. Litig.*, 65 F.4th 851 (6th Cir. 2023), *en banc reh'g denied per curiam*, No. 22-1245, 2023 WL 4115991 (6th Cir. June 21, 2023). Both sets of claims (1) challenge the sufficiency of the manufacturer's testing and disclosures to the EPA, (2) would place juries in the EPA's regulatory shoes, (3) would disrupt the EPA's enforcement powers and could skew the EPA's required disclosures, and (4) could lead to disruptive practical consequences. For these reasons, this Court holds that Plaintiffs' state-law claims here are preempted by the Clean Air Act in the same way as the state-law fraud claims were preempted by the Energy Policy and Conservation Act in *Ford*.

IV.

That disposition leaves Plaintiffs' RICO claim to be resolved. The law of the land here is clear: Under the indirect-purchaser rule, if manufacturer A sells to retailer B, and retailer B sells to consumer C, then C cannot sue A. *See Ill. Brick Co. v. Illinois*, 431 U.S. 720, 729 (1977); *see also Trollinger v. Tyson Foods, Inc.*, 370 F.3d 602, 616 (6th Cir. 2004) ("[I]ndirect purchasers lack standing under RICO and the antitrust laws to sue for overcharges passed on to

them by middlemen."). The rule is that simple and has no exceptions.

Here, it is clear as day that neither GM nor Bosch ever charged Plaintiffs a dime. Indeed, Bosch sold software to GM, which manufactured and then sold the Duramax Trucks to dealerships, which sold them to Plaintiffs or other people who sold them to Plaintiffs. *E.g.*, ECF No. 363-11 at PageID.18783 ("I purchased them from a dealer."); *see also* ECF Nos. 158 at PageID.5989–9315; 307 at PageID.17188–301; 308 at PageID.17448–552. Thus, Plaintiffs are trying to recover "passthrough" overcharges. *See Apple Inc. v. Pepper*, 139 S. Ct. 1514, 1524–25 (2019). So they lack statutory standing for their RICO claim, which must therefore be dismissed. *Counts v. Gen. Motors, LLC*, 606 F. Supp. 3d 678, 703 (E.D. Mich. 2022) ("[T]he indirect-purchaser rule … forecloses Plaintiffs' RICO claim."); *see also Hu v. BMW of N. Am., LLC*, No. 2:18-CV-04363, 2021 WL 346974, at *3 (D.N.J. Feb. 2, 2021) (dismissing RICO claim under the "bright-line" indirect-purchaser rule).

V.

Accordingly, it is **ORDERED** that Defendants' Motions for Summary Judgment, ECF No. 363; 365; 373, are **GRANTED**.

Further, it is **ORDERED** that Plaintiffs' Complaints, ECF Nos. 1; 18; 158; 203; 204; 307; 308, are **DISMISSED WITH PREJUDICE**.

Further, it is **ORDERED** that Plaintiffs' Motions to Certify Class, ECF No. 364; 366, are **DENIED AS MOOT**.

Further, it is **ORDERED** that Plaintiffs' Motions to Exclude Expert Testimony, ECF No. 367; 368, are **DENIED AS MOOT**.

Further, it is **ORDERED** that Defendants' Motions to Exclude Expert Testimony, ECF No. 370; 371, are **DENIED AS MOOT**.

This is a final order and closes the above-captioned case.

Dated: July 12, 2023

s/Thomas L. Ludington
THOMAS L. LUDINGTON
United States District Judge