APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Everett McKinley Dirksen United States Courthouse Room 2722 - 219 S. Dearborn Street Chicago, Illinois 60604

Office of the Clerk Phone: (312) 435-5850 www.ca7.uscourts.gov

ORDER

Submitted August 7, 2018
Decided August 8, 2018

Before

DIANE P. WOOD, *Chief Judge*
DANIEL A. MANION, *Circuit Judge*
AMY C. BARRETT, *Circuit Judge*

No. 18-8015	IN RE: FCA US LLC, et. al., Petitioners
Originating Case Information:	
District Court No: 3:15-cv-00855-MJR-DGW Southern District of Illinois District Judge Michael J. Reagan	

The following are before the court:

1. **PETITION FOR PERMISSION TO APPEAL FROM ORDER GRANTING CLASS CERTIFICATION**, filed on July 19, 2018, by counsel for Petitioners FCA US, LLC and Harman International Industries, Inc.

2. **PLAINTIFFS-RESPONDENTS' OPPOSITION TO DEFENDANTS-PETITIONERS' RULE 23(f) PETITION FOR INTERLOCUTORY APPEAL OF CLASS CERTIFICATION**, filed on July 30, 2018, by counsel for Respondents.

3. **REPLY IN SUPPORT OF PETITION FOR PERMISSION TO APPEAL FROM ORDER GRANTING CLASS CERTIFICATION**, filed on August 7, 2018, by counsel for Petitioners FCA US, LLC and Harman International Industries, Inc.

IT IS ORDERED that the petition for permission to appeal is **DENIED**.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

June 29, 2018

Before

DIANE P. WOOD, *Chief Judge*

DANIEL A. MANION, *Circuit Judge*

AMY C. BARRETT, *Circuit Judge*

No. 18-8010

IN RE:
FCA US LLC, et al.,

Petitioners.

Appeal from the United States District Court for the Southern District of Illinois.

No. 15-cv-00855

Michael J. Reagan, *Chief Judge*.

O R D E R

On consideration of the petition for rehearing filed in the above-entitled cause, all of the judges on the original panel have voted to deny a rehearing. It is, therefore, **ORDERED** that the aforesaid petition for rehearing is **DENIED**.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Everett McKinley Dirksen United States Courthouse
Room 2722 - 219
S. Dearborn Street
Chicago, Illinois 60604

Office of the Clerk
Phone: (312) 435-5850
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ORDER

May 4, 2018

Before

DIANE P. WOOD, *Chief Judge*
DANIEL A. MANION, *Circuit Judge*
AMY C. BARRETT, *Circuit Judge*

No. 18-8010	IN RE: FCA US LLC, et al., Petitioners
Originating Case Information:	
District Court No: 3:15-cv-00855-MJR-DGW Southern District of Illinois District Judge Michael J. Reagan	

The following are before the court:

1. **PETITION FOR PERMISSION TO APPEAL INTERLOCUTORY ORDER CERTIFIED UNDER 28 U.S.C. § 1292(B)**, filed on April 12, 2018, by counsel for the petitioners.

2. **MOTION FOR LEAVE TO FILE OPPOSITION AND EXHIBITS UNDER SEAL**, filed on April 27, 2018, by attorney Thomas B. Weaver.

3. **PLAINTIFFS' OPPOSITION TO DEFENDANTS' PETITION FOR PERMISSION TO APPEAL INTERLOCUTORY ORDER CERTIFIED UNDER 28 U.S.C § 1292(b)**, filed on April 27, 2018, by attorney Thomas B. Weaver.

4. **MOTION FOR LEAVE TO FILE REPLY IN SUPPORT OF PETITION FOR PERMISSION TO APPEAL INTERLOCUTORY ORDER CERTIFIED UNDER 28 U.S.C. § 1292(b)**, filed on May 3, 2018, by counsel for the petitioners.

5. **MOTION TO STRIKE EXHIBITS TO PLAINTIFFS' OPPOSITION TO PETITION FOR PERMISSION TO APPEAL OR, IN THE ALTERNATIVE, TO SEAL CONFIDENTIAL DOCUMENTS PURSUANT TO SEVENTH CIRCUIT OPERATING PROCEDURE 10(a)**, filed on May 3, 2018, by counsel for the petitioners.

IT IS ORDERED that the petition for leave to file an interlocutory appeal is **DENIED**.

IT IS FURTHER ORDERED that the defendants' request to file a reply is **GRANTED** to the extent that the panel considered the reply.

IT IS FINALLY ORDERED that the defendants' motion to strike is **DENIED**, but the parties' requests to maintain plaintiffs' unredacted response under seal is **GRANTED**. The clerk of this court shall keep the plaintiffs' unredacted opposition and exhibits under seal.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS

BRIAN FLYNN, GEORGE BROWN, KELLY BROWN, and MICHAEL KEITH, *on behalf of themselves and all others similarly situated,* Plaintiffs,	)	
vs.	)	Case No. 15-cv-0855-MJR-DGW
FCA US LLC, *doing business as* Chrysler Group LLC, and HARMAN INTERNATIONAL INDUSTRIES, INC. Defendants.	)	

MEMORANDUM AND ORDER

REAGAN, Chief District Judge:

In 2015, Brian Flynn, Michael Keith, and George and Kelly Brown—all owners or lessees of Chrysler vehicles—brought suit against Chrysler and Harmon International Industries, seeking to sue on their own behalf and on behalf of a number of other

vehicle owners similar to them. Their suit concerns a design flaw in some of Chrysler's 2013-2015 vehicles that received public attention in a 2015 WIRED magazine article. The vehicles in question are equipped with a uConnect system, manufactured by Harmon International, that allows integrated control over the phone, navigation, and entertainment functions throughout the vehicle. Per the plaintiffs, the uConnect system turns the affected vehicles into rolling deathtraps: the uConnect system has design vulnerabilities that allow hackers to take remote control of the vehicle's functions, including the vehicle's steering and brakes, to comical or disastrous effect. The WIRED article contributed to a voluntary recall by Chrysler, depending on how one sees things, and despite the recall the plaintiffs maintain that the affected vehicles still have a number of vulnerabilities that would allow hackers to access the vehicles' critical and non-critical systems. Those ongoing vulnerabilities led the plaintiffs to file a class complaint in this Court, seeking monetary damages and injunctive relief.

Flynn, Keith, and the Browns assert a number of claims linked to the uConnect system and the vehicles the system was installed in, each predicated on their home state's law. Chrysler and Harmon, say the plaintiffs, violated the Magnuson-Moss Act and the implied warranty of merchantability for the affected vehicles under Michigan, Illinois, and Missouri law by putting the vehicles into circulation with the design vulnerabilities; they committed fraud and violated the Michigan, Illinois, and Missouri consumer protection statues when they lied about the vehicles' safety or failed to fully disclose the uConnect vulnerabilities; they were negligent in designing and later fixing the

affected vehicles' vulnerabilities; and they were unjustly enriched by virtue of their tortious or fraudulent conduct or their violations of the vehicles' implied warranties. As damages, the plaintiffs say that they overpaid for their vehicles because the vehicles were initially defective; that the ongoing vulnerabilities have diminished their vehicles' value; that the vulnerabilities have put the plaintiffs at risk of injury or death; and that the vulnerabilities have placed the plaintiffs in an ongoing state of fear or anxiety. Chrysler and Harmon have moved to dismiss all or part of the operative complaint on jurisdictional and pleading grounds, and those motions are now ripe for review.

One note is in order concerning another motion Chrysler filed after Chrysler and Harmon moved to dismiss the operative complaint. The two named Missouri plaintiffs in this case, George and Kelly Brown, bought their Chrysler vehicle pursuant to a discount program, and because that discount program included an arbitration clause covering warranty claims against Chrysler, Chrysler has moved to stay this entire case so that the Browns' claims can be addressed before an arbitrator. Harmon supports the motion. By separate order today, the Court granted a limited stay as to the Browns' claims only, but denied a stay as to the other claims in this suit. Accordingly, this ruling will only address the motions to dismiss directed at Plaintiff Flynn's claims (under Illinois law) and Plaintiff Keith's claims (under Michigan law). Any arguments directed at the Browns' claims will be denied without prejudice in light of the stay; Chrysler and Harmon are free to make those arguments again once the stay is lifted.

Chrysler and Harmon make a number of arguments in favor of full or partial dismissal of the Michigan and Illinois claims in this case, but it makes sense to start with their jurisdictional arguments, for if those succeed all or part of the case must end. The two complain the loudest about standing—they insist that the plaintiffs have not alleged the kinds of injuries recognized as viable by the courts, much less ones that are traceable to either entity's conduct. Their reference to "allegations" and the standard they cite in their motions suggests a facial challenge to standing, and for that kind of challenge the Court accepts as true all of the complaint's allegations and construes those allegations in the plaintiff's favor. ***Silha v. ACT, Inc.*, 807 F.3d 169, 173 (7th Cir. 2015).** To have standing, a litigant must show that he has suffered a concrete and particularized injury that is fairy traceable to the challenged conduct and is likely to be redressed by a favorable court decision. ***Hollingsworth v. Perry*, 133 S. Ct. 2652, 2661 (2013).** The standing doctrine, grounded as it is in the Constitution's case or controversy requirement, serves a number of practical goals: it limits premature judicial interference with legislation, it prevents the courts from being overwhelmed with cases, and it ensures that the primary victims of wrongful conduct will not have their cases litigated in advance by persons who were only trivially harmed. ***Am. Bottom Conservancy v. United States Army Corps of Eng's*, 650 F.3d 652, 656 (7th Cir. 2011).**

Flynn and Keith allege that they have been injured in a variety of ways. The first two injuries—that the uConnect vulnerabilities have exposed them to an increased risk of injury or death if their vehicles were

hacked and that they suffer anxiety and fear because of that possibility—both have some standing problems in light of the Supreme Court's holding in ***Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 & n.5 (2013)**, that a risk of future injury and the fear of that injury doesn't create standing absent a "substantial" risk that the feared injury will come to bear. Taking the plaintiffs' allegations as true, there's not that kind of risk here. There's no allegation in the complaint that the plaintiffs' vehicles were hacked at all or that their vehicles were actually meddled with in a way that could cause real injury. There is the WIRED article and its author, who was subject to a hack that put the author at some controlled risk for journalistic effect, and there were also reports from thirty people who reported possible hacking-related problems during the course of the voluntary recall. But the WIRED scenario was done to a willing subject in a quasi-laboratory setting who suffered no injury whatsoever, and the vast majority of the recall reports concerned theft-related hacks, having nothing to do with any risk of injury or death. Only ***four*** owners in a universe of over a million reported anything close to a safety-related problem—three reported engine stalls and one reported a sudden unintended acceleration that may have been caused by hacking—and there's no allegation that those consumers were actually injured, severely or otherwise. Once more, the uConnect system has been subject to a recall, and even though Flynn and Keith insist that the recall didn't fix all of the vulnerabilities and offer some developed allegations on that front, the recall still reduces the chances even more that a real world hack will occur and that Flynn and Keith will be injured or killed by virtue of a takeover of their vehicles. At the end of the

day, four unverified safety-related reports and one safety-related hack in a quasi-controlled setting concerning a purported defect that's been in existence since 2013 doesn't add up to a "substantial" risk of harm to the plaintiffs here. ***See, e.g., Koronthaly v. L'Oreal USA, Inc.*, 374 F. App'x 257, 259 (3d Cir. 2010) (subjective fear of injury insufficient to create standing when plaintiff had "suffered no adverse health effects" and there was no objective indication of a serious risk of harm); *Simpson v. California Pizza Kitchen, Inc.*, 989 F. Supp. 2d 1015, 1022 (S.D. Cal. 2013) (no standing where there was nothing to suggest that ingestion caused actual harm).**

Consider the chain of events that would need to occur for a serious injury to befall Flynn or Keith. Their automobiles would need to be hacked by a hacker proficient enough to access the vehicles by remote. The hack would need to occur despite the fact that the recall fixed some of the vulnerabilities referenced in the WIRED article. The hacker would need to gain access to the critical systems of the vehicle, and then the hacker would need to hijack those systems in a way that would cause a wreck of the kind of magnitude that could injure or kill. The plaintiffs don't allege that this chain of events has ever happened to anyone, and the chain looks a lot like the kind deemed too attenuated and speculative to create standing in other cases. ***See Clapper*, 133 S. Ct. 1138 at 1148-50; *In re African-Am. Slave Descendants Litig.*, 471 F.3d 754, 760-61 (7th Cir. 2006).** This isn't like a data breach case where cybercriminals who have stolen credit data will likely use that data in the fu-

ture even if they haven't at the start of a suit, ***Remijas v. Neiman Marcus Grp., LLC*, 794 F.3d 688, 694-95 (7th Cir. 2015)**; in this case there is no allegation that a real world hacker has ever hacked the uConnect system to cause injury, nor is there any suggestion that hackers with knowledge of these kinds of vulnerabilities take advantage of them to injure hapless drivers.

So Flynn and Keith lack standing to press injuries based on a risk of injury or death and the fear of that injury. That doesn't mean that they lack standing across the board, though—standing is evaluated on an injury-by-injury basis, ***Davis v. Fed. Elec. Comm'n*, 554 U.S. 724, 734 (2008)**, and Flynn and Keith have two other injuries they wish to press here. Those two injuries are mirror images of each other: they claim that they overpaid for their affected vehicles because the automobiles had defects at the time they were purchased, and they also insist that the defects have caused an appreciable drop in the value of their vehicles on the market. Chrysler and Harmon insist that any overpayment or diminution of value is speculative given that no consumer has actually been severely injured or killed by way of the defect, but safety-related defects aren't the only kinds of defects that could cause a drop in value, and there are enough allegations offered and materials cited by the plaintiffs to suggest a drop, at least at this point in the case. Market forces alone, pressed along by the 2015 WIRED article exposing safety- and access-related vulnerabilities with the uConnect system, could lead to a reduction in the value of the vehicles, as could reports from some 27 odd consumers during the recall suggesting that their automobiles were remotely unlocked and

then robbed by hackers. And overpayment or a drop in value suffices as an injury for standing purposes. ***E.g.*, *In re Aqua Dots Prods. Liab. Litigation*, 654 F.3d 748, 750-51 (7th Cir. 2011); *Cole v. Gen. Motors Corp.*, 484 F.3d 717, 722-23 (5th Cir. 2007); *In re Toyota Motor Corp. Unintended Acceleration Prods. Liab. Litig.*, 754 F. Supp. 2d 1145, 1162 (C.D. Cal. 2010).**

Chrysler and Harmon brush off the overpayment and diminution cases on the grounds that they all involved situations where the harms from defects had materialized for some group of customers, even if they hadn't materialized for the actual plaintiffs in the case. That distinction might matter—it stands to reason that there likely wouldn't be much of a loss in value if the defective product wasn't defective at all—but the distinction doesn't hold up here. ***Aqua Dots***, ***Cole***, and ***Toyota Motor*** all involved products where other customers had problems with the product but the plaintiffs luckily ducked them, and there are allegations of similar problems experienced by other consumers here—Flynn and Keith allege that a journalist driving one of the affected vehicles was hacked in real time and his event narrated for the market to read in a national magazine a little over a year ago, and that the narration fed into a recall that involved at least thirty reports of purported hacking of the affected vehicles. Those events might not back up a substantial risk of death or injury to Keith and Flynn, but they do provide a foundation for a claim that the affected vehicles were overpriced when they were sold or that the affected vehicles lost value once knowledge of the defects reached the market. ***See Toyota Motor Corp.*, 754 F. Supp. 2d at 1162-66 (noting that the risk**

of actual harm from the defect wasn't substantial, but that the "market effect" of the defect was "actual or imminent" and that the non-conclusory allegations of market value loss were sufficient to allege injury in fact).

It's true that a recall occurred for the affected vehicles in this case, and it's also true that a number of courts have cast suspicious glances at claims of overpayment or diminished value when a recall purportedly fixed all of the problems prior to suit. ***E.g.*, *Hadley v. Chrysler Group LLC*, 624 F. App'x 374, 378 (6th Cir. 2015); *In re Toyota Motor Corp. Hybrid Brake Marketing Sales Prac. & Prod. Liab. Litig.*, 915 F. Supp. 2d 1151, 1159 (C.D. Cal. 2013).** The key phrase is "all of the problems"—if a recall didn't remedy three vulnerabilities out of ten or one vulnerability out of twenty, then it's only logical that there might still be a loss in value on the market despite the manufacturer's efforts. ***See Sater v. Chrysler Group LLC*, No. 14-00700, 2014 WL 11412674, at *4 (C.D. Cal. Oct. 7, 2014); *In re Toyota Motor Corp.*, 790 F. Supp. 2d 1152, 1162 (C.D. Cal. 2011).** Keith and Flynn claim that kind of slip here, and their supporting allegations are far from conclusory—they point out that the WIRED article documented a number of vulnerabilities with the uConnect system, they offer clear allegations as to what vulnerabilities the recall didn't fix, and the documents from the recall offer some doubt as to whether everything is fixed. If the plaintiffs can prove that the recall didn't fix all of the defects and that the ongoing vulnerabilities have reduced the market value of their vehicles, the initial overpayment and the subsequent reduced value would qualify as injuries in fact. Whether it's a small

injury or whether the injury isn't legally viable given a doctrine like economic loss are separate questions—all that matters for standing at this phase is that the plaintiffs allege a fair probability of injury. ***E.g.*, *MainStreet Org. of Realtors v. Calumet City, Ill.*, 505 F.3d 742, 744-45 (7th Cir. 2007); *Am. Bottom*, 650 F.3d at 658.** Keith and Flynn have alleged such an injury here in spite of the recall, and that's enough. They've also alleged causation despite the defendants' argument to the contrary: if the defects in the uConnect system still allow hackers to access their vehicles despite the recall, then any lost value would be "fairly traceable" to the uConnect defects, regardless of whether hacking by third parties also contributed. ***Lewert v. P.F. Chang's China Bistro, Inc.*, 819 F.3d 963, 967-68 (7th Cir. 2016).**

Failing a wholesale jurisdictional dismissal on standing grounds, the defendants insist that Flynn and Keith lack standing to bring some of the state law claims raised in this suit. For instance, Flynn is a resident of Illinois, and the defendants argue that he lacks standing to bring claims under Missouri or Michigan law where he has no connection to those states. Likewise, Keith is a resident of Michigan, and the defendants maintain that he lacks standing to invoke the laws of Missouri or Illinois. This argument conflates the standing question with the merits of a claim. Standing exists if a litigant has been injured, the defendants caused that injury, and the injury can be redressed by a judicial decision—nothing more is required. ***Morrison v. YTB Int'l, Inc.*, 649 F.3d 533, 536 (7th Cir. 2011).** The question of what state law is properly invoked by each plaintiff or putative plaintiff is a merits question or possibly a question linked

to the propriety of class certification, and federal courts shouldn't conflate that issue with the standing point. ***E.g.*, *Morrison*, 649 F.3d at 536; *Le v. Kohl's Dep't Stores*, Inc., — F. Supp. 3d —, 2016 WL 498083, at *12-13 (E.D. Wis. Feb. 8, 2016); *Cohan v. Medline Indus., Inc.*, No. 14-cv-1835, 2014 WL 4244314, at *2 (N.D. Ill. Aug. 27, 2014).** Chrysler and Harmon's argument, premised entirely on standing, must be rejected.

With the standing point resolved, Chrysler (but not Harmon) has two more jurisdictional arguments. The first concerns collateral attack: Chrysler says that Flynn and Keith can't take issue with the National Highway Traffic Safety Administration's ruling that there are no more problems with the uConnect system through this more conventional lawsuit, but must challenge that purported ruling through the Administrative Procedure Act. It's a tough pill for the Court to swallow that all plaintiffs are barred wholesale from bringing a typical products liability lawsuit for damages merely because a federal agency has coordinated a recall and made findings as a part of that process, and Chrysler doesn't make that pill any more palatable with a developed argument—it doesn't cite one case where a Court extended the collateral attack doctrine to a case like this. The Court needn't resolve the more difficult question of whether collateral attack applies in these circumstances, though, because the collateral attack point can be disposed of on more mundane grounds. To create a collateral attack problem, Chrysler would need to show that the defect issue was finally determined by the Administration, ***see Peterson v. Johnson*, 714 F.3d 905, 911-12 (6th Cir. 2013); *State Farm Mut. Auto. Ins. Co. v. Indus.***

***Pharmacy Mgmt., LLC*, No. 09-00176, 2009 WL 2448474, at *4-5 (D. Haw. Aug. 11, 2009)**, and the tenor of the Administration's findings don't suggest that kind of finality or confidence. Far from issuing any kind of ultimate determination on the comprehensiveness of Chrysler's voluntary recall, the Administration said, in its recall findings, that it only "appear[ed]" that the defects were addressed, and elsewhere said that it was making no conclusive ruling on whether the defects were cured by way of Chrysler's voluntary recall. Without a more conclusive determination by the Administration as to a defect, there's nothing for the plaintiffs to attack collaterally through this suit.

Chrysler's second jurisdictional argument concerns preemption. According to Chrysler, many of the declaratory requests in the complaint must be dismissed because they are poorly veiled attempts to institute a court-ordered recall and thus are preempted by the Motor Vehicle Safety Act, specifically the parts of the Act that set up procedures for the National Highway Traffic Safety Administration to use as a part of any recall. The touchstone of any preemption analysis is congressional intent, and that intent can be stated explicitly or implied by the federal statute's structure and purpose. ***Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98 (1992).** There's nothing to suggest that the Safety Act explicitly preempts all state claims; to the contrary, the savings clause specifically preserves state law warranty obligations and other rights and remedies provided by state law. ***See* 49 U.S.C. § 30103(d).** That said, implied preemption can still limit a state claim or order despite the

presence of a savings clause. If a part of a federal statute occupies a field so thoroughly that it leaves no room for the States to supplement it, or if state claims or orders serve as an obstacle to the execution of Congress' purpose or frustrates that purpose by interfering with the methods Congress selected to achieve a federal goal, the state efforts are preempted. ***Indiana Bell Telephone Co., Inc. v. Indiana Util. Reg. Com'n*, 359 F.3d 493, 497 (7th Cir. 2004).**

Using state law, as Keith and Flynn are trying to do here, to obtain declaratory-style recall relief would create an implied preemption problem, for court ordered recalls would interfere with the methods set up for recalls by the Safety Act. The Act sets forth a comprehensive scheme for prospective relief from dangerous features in vehicles—it creates a notification procedure if and when the Secretary of Transportation determines that a vehicle contains a defect; it affords the Secretary discretion to determine the type of notification that consumers need; and it provides the Secretary with the authority to determine that a defect or noncompliance is inconsequential to safety, thereby exempting the manufacturer from providing a remedy. ***See* 49 U.S.C. §§ 30118 & 30119.** Allowing the courts to set up their own system for motor vehicle recalls has to conflict with those procedures—any separate system would bypass the Secretary and the discretion entrusted to her, including her discretion to decide against any recall because the defect was inconsequential, and would, at the least, complicate the administrative route set up by the statute by authorizing a parallel proceeding. This kind of "methods" conflict was enough to create a preemption problem for a state claim that would have set up different

methods in the Clean Water Act context in ***International Paper Co. v. Ouellette*, 479 U.S. 481, 492-95 (1987)**, and it was enough to create the same kind of problem for state orders that would have led to different procedures in the Telecommunications Act context in ***Wisconsin Bell v. Bie*, 340 F.3d 441, 444 (7th Cir. 2003)**. The logic follows for the Motor Vehicle Safety Act. ***Lilly v. Ford Motor Co.*, No. 00 C 7372, 2002 WL 84603, at *4-6 (N.D. Ill. Jan. 22, 2002); *In re Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig.*, 153 F. Supp. 2d 935, 944-48 (S.D. Ind. 2001).**

Keith and Flynn's main argument against preemption is that there is no conflict between state recalls and the purpose of the Motor Vehicle Safety Act, for both seek to increase safety. The problem is that a state law can be preempted if it interferes with the actual goal of a federal statute or if it interferes with the methods by which the federal statute set to achieve the federal goal, ***Indiana Bell*, 359 F.3d at 498; *Wisconsin Bell*, 340 F.3d at 445**, and a court-supervised recall would run roughshod over the recall procedures put forth in the Motor Vehicle Safety Act for an agency-coordinated recall, ***In re Bridgestone/Firestone*, 153 F. Supp. 2d at 946-47**. To be sure, a few district courts, led primarily by the Northern District of California's decision in ***Kent v. DaimlerChrysler Corp.*, 200 F. Supp. 2d 1208, 1217-18 (N.D. Cal. 2002)**, rely on Keith and Flynn's logic to find that the Motor Vehicle Safety Act doesn't preempt court-ordered recalls, but given the reasoning in the ***Bridgestone/Firestone*** case and the Seventh Circuit's conclusions in the ***Indiana Bell*** and ***Wisconsin Bell*** cases, the Court doesn't find those

other district court opinions all that persuasive within this circuit.

So Flynn and Keith can't use state law claims to secure a recall. The question remains whether the declaratory requests in their complaint go that far—that is, after all, the only basis advanced by Chrysler for dismissal of those requests. Out of the declaratory requests targeted for dismissal by Chrysler, the plaintiffs want a declaration that the affected vehicles are defective, that the defects are safety-related, that Chrysler and Harmon be financially responsible for notifying the class of the defects, and that Chrysler and Harmon be ordered to remedy the defects in the vehicles or refund the purchase price. Only the last one clearly amounts to a recall order, so only it must be dismissed on preemption grounds at this phase. Chrysler doesn't lay out, in any real detail, how the other three declaratory requests amount to a full-blown judicial recall, so they aren't grist for a preemption-based dismissal for now. The Court can better determine the propriety of the remaining declaratory requests at a later point, with the benefit of more developed argument from one or both of the defendants.[1] That resolves all of the jurisdictional points,

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[1] For similar reasons, the Court won't dismiss the remaining declaratory requests on primary jurisdiction grounds, at least at this point. Chrysler maintains that the National Highway Traffic Safety Administration has primary jurisdiction over most of the declaratory relief requests left in this case and that the Court should defer to it to execute that kind of relief, but Chrysler's argument is perfunctory—it is all of four sentences long. Chrysler doesn't lay out the doctrine, and worse yet it doesn't explain how the remaining declaratory relief requests that it targets for

leaving Chrysler and Harmon's arguments that some or all of Flynn and Keith's complaint should be dismissed for failure to state a claim. Chrysler (but again not Harmon) maintains that all of their claims must go for failure to plead any legally cognizable damages—according to Chrysler, the plaintiffs' operative complaint doesn't offer any facts to back up a loss in value in their vehicles, and thus the damages asserted are entirely conclusory. That's wrong. The operative complaint documents the 2015 WIRED article, explains the recall process, and provides fairly developed allegations as to how the recall didn't go far enough, thereby causing damage to the plaintiffs in the form of overpayment and lost value. That's enough to plead damages under the federal standards at the motion to dismiss stage. ***See Tamoya v. Blagojevich*, 526 F.3d 1074, 1084-85 (7th Cir. 2008) (pleadings are sufficient when the allegations give the defendant "sufficient notice to enable him to begin to investigate and prepare a defense"); *see also Smolinksi v. Oppenheimer*, No. 11-C-7005, 2012 WL 2885175, at *4 (N.D. Ill. July 11, 2012).** It's true that a number of circuits have expressed doubt that some states would recognize the viability of those types of damages in a contract or fraud case, but those rulings haven't resolved the question of whether those damages are bunk in every state, and they have hinted that certain states (like Michigan) might allow for them. ***E.g., In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1016-17 (7th Cir. 2002); *Cole*, 484 F.3d at 725-26.** The

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dismissal are similar enough to a recall as to fall within the "special competence" of the Administration. ***See Bussian v. DaimlerChrysler Corp.*, 411 F. Supp. 2d 614, 629 (M.D.N.C. 2006).**

question for now, then, is whether Illinois or Michigan forecloses claims with the kinds of overpayment damages at issue here, and Chrysler doesn't develop that argument, at least for its wholesale attack on the entirety of the amended complaint. Until Chrysler lays out how those states don't recognize the damages for the claims here or says that it has reviewed Michigan and Illinois law and found nothing on point, the Court isn't in a position to dismiss the Michigan and Illinois claims at this time.

Failing a complete dismissal of the case for want of damages, Chrysler argues that many of the damages asserted in this case must be dismissed as to specific claims or specific plaintiffs. In light of the Court's ruling above that Keith and Flynn only have standing to pursue overpayment and diminished value injuries, most of Chrysler's damages-related dismissal arguments are now moot. This includes the "higher probability of injury or death"- and the "fear and anxiety"-related damages for the Magnuson-Moss Warranty Act claims, the "fear and anxiety"-related damages as to all counts, and the "high probability of injury or death"-related damages as to all counts. The only other damages claim that Chrysler wants dismissed is Plaintiff Keith's claim—according to Chrysler, Keith leased his car, so he couldn't overpay or have any diminished value damages. It's probably true that Keith couldn't have lost value, but it's plausible that Keith was overcharged for his lease because of the ongoing defects in his vehicle, and that overcharge could constitute damages. Because Chrysler hasn't cited any case suggesting that those damages aren't recognized in Michigan or Illinois, the Court isn't prepared to dismiss Keith's entire case at this stage.

Chrysler and Harmon next argue that all of the implied warranty claims must be dismissed for several reasons, chief among them that there was no defect alleged and, even if there was, most states don't allow for a breach of implied warranty claim where the plaintiffs haven't alleged a manifestation of a defect that made the car unfit for transport. As to the first point, the complaint plainly enumerates design vulnerabilities in the uConnect system and the vehicles that the system was installed in, and that's enough to allege a defect at this stage of the case. As to the second point, it's true that some states seem to have limited implied warranty claims to defects which have manifested in a way as to cause real harm to the vehicles, but the critical question here is whether Illinois or Michigan has limited their law in that fashion, and the defendants' arguments on that point are a bit conclusory. Chrysler cites two federal cases and one Missouri case for the proposition, but it doesn't offer any real analysis as to how the circumstances of those cases are similar to this one, nor does it lay out why that law has anything to do with Michigan or Illinois law. Meanwhile, Harmon offers more cases, but its argument is three sentences long and its authority is offered in a string citation— there's no real depth of treatment. The reason for Chrysler and Harmon's brevity seems understandable: the defendants, faced with a twenty page limit on their briefs and a number of arguable points in support of dismissal of the one-hundred-plus page complaint filed by the plaintiffs in this case, have limited some of their arguments to a few sentences. Some of their arguments are so simple and straightforward as to be ably made with little ink, but this one isn't. The point seems to be one of debate among some of the states, ***Bridgestone/Firestone.***,

288 F.3d at 1016-17; *Cole*, 484 F.3d at 725-26, and given that uncertainty, the Court won't dismiss the warranty claims under Michigan or Illinois law for want of viable damages at this phase. Chrysler and Harmon are free to raise more developed arguments on this front at a later point in the proceedings.

Chrysler and Harmon offer two other reasons to dismiss the implied warranty claims, one concerning pre-suit notice and the other concerning privity. The pre-suit notice requirement does away with Keith's implied warranty claim under Michigan law, for Michigan requires pre-suit notice without exception (a point that the plaintiffs don't contest). ***See Johnson Controls, Inc. v. Jay Indus, Inc.*, 459 F.3d 717, 729-30 (6th Cir. 2006).** Flynn's Illinois claim can't be so easily dismissed on notice grounds, though, as Illinois allows for an exception to notice when the defendants already know of the defect as to the entire product line, ***Stella v. LVMH Perfumes & Cosmetics, USA, Inc.*, 564 F. Supp. 2d 833, 837 (N.D. Ill. 2008)**, and there's enough pled in the complaint here about Chrysler and Harmon's knowledge to make a dismissal on notice grounds untenable at this early point. As to privity, it's true that Illinois limits implied warranty claims to the direct seller when the only recovery is for economic losses, but a lack of explicit privity doesn't doom a claim if the seller was an agent of the defendant. ***Rothe v. Maloney Cadillac, Inc.*, 518 N.E.2d 1028, 1029-30 (Ill. 1988).** The plaintiffs make no argument about an agency relationship as to Harmon, so the Illinois warranty claim against Harmon must be dismissed, for only economic damages are viable here. The plaintiffs do allege an agency relationship between Chrysler and the sellers, though,

and there are just enough facts pled about that relationship to make dismissal at this point inappropriate. ***See In re Rust-Oleum Restore Marketing, Sales Practices & Prods. Liab. Litig.*, 155 F. Supp. 3d 772, 807 (N.D. Ill. 2016).** So Flynn's Illinois implied warranty claim can proceed as to Chrysler, but that claim must be dismissed as to Harmon, and Keith's implied warranty claims must be dismissed in full.

With the implied warranty claims settled for now, next up are Keith and Flynn's Magnuson-Moss Act claims, which the defendants say must be dismissed for the same reasons that the Michigan and Illinois implied warranty claims had to be dismissed. The Magnuson-Moss Act allows for a federal suit for breach of an implied warranty arising under state law, so the state and federal implied warranty claims usually rise and fall together. ***E.g.*, *In re Sony PS3 Other OS Litig.*, 551 F. App'x 916, 920 (9th Cir. 2014); *Cooper v. Samsung Elec. Am., Inc.*, 374 F. App'x 250, 254 (3d Cir. 2010).** The defendants want the Magnuson-Moss Act claims dismissed primarily for a lack of privity, and the federal Act incorporates the implied warranty privity requirements of the States—if a state implied warranty claim must be dismissed for want of privity, so too must the Magnuson-Moss Act claim. ***Voelker v. Porsche Cars North America, Inc.*, 353 F.3d 516, 525-26 (7th Cir. 2003).** For the reasons the Court already laid out above, the Illinois Magnuson-Moss Act claim against Harmon must be dismissed for want of anything to suggest privity, but the Illinois Magnuson-Moss Act claim against Chrysler can't be dismissed on privity grounds. The Michigan Magnuson-Moss Act claims

against Harmon and Chrysler can't be dismissed on privity grounds either, as Michigan has abandoned the privity requirement for implied warranty claims. ***Montgomery v. Kraft Foods Global, Inc.*, 822 F.3d 304, 309 (6th Cir. 2016).**

Harmon and Chrysler offer three other reasons to dismiss the Magnuson-Moss Act claims in the entirety, but all of them require little discussion. Like the implied warranty claims, they want the Magnuson-Moss Act claims dismissed for want of an alleged defect, but as the Court already said, the plaintiffs have alleged a defect here. Harmon and Chrysler also want the federal claims dismissed for want of viable warranty damages under Michigan and Illinois law, but their arguments on that front are too undeveloped for the Court to take up now. Finally, they ask that the Magnuson-Moss Act claims be dismissed for lack of pre-suit notice. The rub is that the Magnuson-Moss Act has its own notice provision, and it allows a putative class action to continue to the certification stage without pre-suit notice—after which notice and an opportunity to cure must be provided by the named plaintiffs before the case can proceed further. ***See* 15 U.S.C. § 2310(e); *see also Walsh v. Ford Motor Co.*, 807 F.2d 1000, 1004 (D.C. Cir. 1986); *In re Shop-Vac Mktg. & Sales Prac. Litig.*, 964 F. Supp. 2d 355, 362 (M.D. Pa. 2013).** This is a class case, so a lack of pre-suit notice doesn't lead to dismissal for now.

Flynn and Keith next assert common law fraud claims under Michigan and Illinois law—they claim that Chrysler and Harmon made false statements about the uConnect system and failed to adequately disclose the failures in that system to the plaintiffs

and other consumers. Keith's problem is that his fraudulent misrepresentation and omission claims suffer from a fatal flaw, one linked to the economic loss rule and how that doctrine is applied under Michigan law. As no one disputes, Michigan applies that rule to fraud claims—Michigan precludes recovery for economic losses resulting from the failure of a product to live up to a buyer's expectations, reasoning that those claims are best channeled through the law of contract and warranty and not the law of tort. ***Huron Tool & Eng'g Co. v. Precision Consulting Servs.*, 532 N.W.2d 541, 543-44 (Mich. Ct. App. 1995).** There's an exception to the rule when a plaintiff says that he was fraudulently induced to enter into the purchase contract, but only if the inducement has nothing to do with the quality or character of the goods—if the claim concerns the goods then the fraud claim is again redundant to a warranty claim and, in Michigan at least, caught in the teeth of the economic loss rule. ***E.g.*, *Dinsmore Instrument Co. v. Bombardier, Inc.*, 199 F.3d 318, 320-21 (6th Cir. 1999); *Valleyside Dairy Farms, Inc., v. A.O. Smith Corp.*, 944 F. Supp. 612, 617 (W.D. Mich. 1995).** Keith's fraud claim concerns the uConnect system, so it must be dismissed.[2]

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[2] The plaintiffs argue that the fraudulent inducement exception should apply without limit to fraud claims based on non-commercial, run-of-the-mill transactions, but they cite no case that expressly curbs the doctrine in such a fashion, and the cases the Court has found on its own don't back the plaintiffs up. ***See Murphy v. The Proctor & Gamble Co.*, 695 F. Supp. 2d 600, 602, 603, 607 (E.D. Mich. 2010) (applying the doctrine to a suit by private consumers who purchased razor blades);**

As to common law fraud, that leaves Flynn's misrepresentation and omission claims under Illinois law. Chrysler and Harmon insist that the misrepresentation claim must fail because it wasn't pled with the particularity required by Rule 9, and the two are right to complain. State law fraud claims raised in federal court are subject to the pleading requirements of Federal Rule of Civil Procedure 9. ***Windy City Metal Fabricators & Supply, Inc., v. CIT Tech. Financing Servs., Inc.*, 536 F.3d 663, 668 (7th Cir. 2008)**. To clear that rule for a fraudulent misstatement claim, a plaintiff must lay out, among other points, the particulars of reliance: he must state the misrepresentation that he saw, the date that he saw it, and where he saw it. ***E.g.*, *West Coast Roofing & Waterproofing, Inc. v. Johns Manville, Inc.*, 287 F. App'x 81, 88-89 (11th Cir. 2008); *Evans v. Pearson Enter., Inc.*, 434 F.3d 839, 852-53 (6th Cir. 2006); *Baldwin v. Star Scientific, Inc.*, 78 F. Supp. 3d 724, 738 (N.D. Ill. 2015).** Flynn hasn't satisfied that requirement here. He has only pled reliance on Chrysler and Harmon's purported misstatements in a cursory way, so the Illinois misstatement claim must be dismissed.

Flynn's fraudulent concealment claim presents a closer question, but considering all of the allegations in the amended complaint, the Court is of the view

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***see also Stein v. Fenestra Am., LLC*, No. 09-5038, 2010 WL 816346, at *4-5 (E.D. Pa. Mar. 9, 2010) (applying the doctrine to a suit by private consumers concerning the construction of their home); *Tietsworth v. Harley-Davidson, Inc.*, 677 N.W.2d 233, 244 (Wis. 2004) (Sykes, J.) (applying the doctrine to a suit by private consumers who purchased motorcycles).**

that this claim passes muster under Rule 9. For fraudulent concealment claims, a plaintiff must allege the "who, what, when, where, and how" of the omission, and must also allege that the defendant "intentionally omitted or concealed a material fact that it was under a duty to disclose to the plaintiff." ***Wigod v. Wells Fargo Bank, N.A.*, 673 F.3d 547, 571 (7th Cir. 2012).** The amended complaint clears the more mundane "who, what, when" and so on requirements—it states what information was withheld (the extent of the vulnerabilities in the uConnect system), when the information should have been provided (prior to purchase and during the course of Flynn's ownership), who should have provided it (Chrysler and Harmon), and the where and the how (via a public medium). Chrysler and Harmon fault Flynn for not making out some of his allegations with the precision typically seen in fraudulent misstatement claims, but the slight lack of detail is understandable in concealment claims, where it's far more difficult for a plaintiff to enumerate the time, place, and content of the omitted statement. ***E.g.*, *MacDonald v. Ford Motor Co.*, 37 F. Supp. 3d 1087, 1096 (N.D. Cal. 2014); *Shifrin v. Assoc. Banc Corp.*, No. 12-839, 2013 WL 1192766, at *3 (S.D. Ill. Mar. 22, 2013); *Baggett v. Hewlett-Packard Co.*, 582 F. Supp. 2d 1261, 1267 (C.D. Cal. 2007).** Chrysler and Harmon also insist that the fraudulent concealment claim must be dismissed because Keith hasn't pled that Chrysler and Harmon were under any duty to disclose, but Keith has pled such a duty, and he has backed up that allegation with facts suggesting that Chrysler and Harmon had the kind of superior knowledge about their

products that could create a duty to disclose under Illinois law. ***E.g.*, *Connick v. Suzuki Motor Co., Ltd.*, 675 N.E.2d 584, 594 (Ill. 1996); *Lilly v. Ford Motor Co.*, No. 00-7372, 2002 WL 84603, at *8-9 (N.D. Ill. Jan. 22, 2002)**. This fraud claim isn't grist for dismissal at this point.

Flynn and Keith also claim that Chrysler and Harmon's misstatements and omissions violated the consumer protection acts of Michigan and Illinois. Chrysler and Harmon insist that these statutory fraud claims should be dismissed for the same reasons that the common law fraud claims should be dismissed, but their arguments on the consumer protection front are conclusory. In their opening briefs, the two cite little authority to back up dismissal under Michigan and Illinois' consumer statutes, an especially problematic lapse given that the elements for a common law fraud claim aren't always the same as the elements of a violation of a state consumer protection statute. As one example, Chrysler and Harmon's initial briefs say that the statutory claims should be dismissed for want of reliance, but they cite nothing to demonstrate that reliance is required for the statutory claims, and it looks as if Illinois and maybe even Michigan don't require the same kind of reliance typically needed for common law fraud claims when it comes to claims raised under their consumer statutes. ***Cozzi Iron & Metal, Inc. v. U.S. Office Equip., Inc.*, 250 F.3d 570, 576 (7th Cir. 2001) (Illinois law); *Van Vels v. Premier Athletic Ctr. of Plainfield, Inc.*, 182 F.R.D. 500, 509 (W.D. Mich. 1998) (Michigan law).** Again, while the Court is cognizant of the fact that Chrysler and Harmon have kept many

of their arguments short in an effort to squeeze everything they can into the Court's page limitations, the Court can't dismiss a set of claims unless Chrysler and Harmon make developed arguments justifying dismissal in their opening briefs, and they haven't done that for the consumer protection claims.[3]

Chrysler and Harmon next argue that the Michigan and Illinois negligence claims must be dismissed because Flynn and Keith only seek money damages for injury to their products, and thus can't use a negligence claim to secure a recovery under the economic loss rule. Flynn and Keith concede the premise—they don't refute the application of the rule to a case where a consumer brings a negligence claim for damages to a product alone—and that concession seems right under Michigan and Illinois law, as both states channel those types of claims into the field of contract. ***See Moorman Mfg. Co. v. Nat'l Tank Co.*, 435 N.E.2d 443, 450-51 (Ill. 1982); *Neibarger v. Universal Coop., Inc.*, 486 N.W.2d 612, 619 (Mich. 1992).** Flynn and Keith's only objection is that the rule

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[3] Chrysler (but not Harmon) also moves for dismissal of the Illinois and Michigan consumer protection fraud claims because both statutes foreclose claims when the fraud is based on actions "specifically authorized" by a regulatory body. ***See* 815 ILL. COMP. STAT. 505/10b(1); MICH. COMP. LAWS § 445.904(1)(a)**. Chrysler says that most of the fraud claims in this case are based on purported misrepresentations in the recall materials sent to the vehicle owners and thus are immunized under the statutes, but their argument on that front is three sentences long, and the question is a nuanced one. ***See Bober v. Glaxo Wellcome PLC*, 246 F.3d 934, 940-41 (7th Cir. 2001); *Federal Ins. Co. v. Binney & Smith, Inc.*, 913 N.E.2d 43, 52 (Ill. App. Ct. 2009).** With so little offered, Chrysler hasn't met its burden to show that dismissal is warranted.

doesn't apply to their negligence claims here, as they are also seeking damages for an increased risk of death or injury to them, over and above damages for economic injuries to their vehicles. But as the Court already said, Flynn and Keith lack standing to pursue injuries for any risk of injury or death. That leaves them only with economic damages, meaning that the negligence claims must go.

Chrysler and Harmon's final argument is that the Michigan and Illinois unjust enrichment claims must be dismissed. The two insist that the claims must fail for want of any allegations that Flynn and Keith conferred a benefit on Chrysler or Harmon. There are allegations of a benefit here, though—Flynn bought his vehicle and Keith leased his, and a consumer likely can confer a benefit on a manufacturer by paying for a manufacturer's products through a retailer. ***See Feiner v. Innovation Ventures, LLC*, No. 12-62495, 2013 WL 2386656, at *5 (S.D. Fla. May 30, 2013).** In addition, Chrysler and Harmon say that the unjust enrichment claims must be dismissed because those claims are entirely duplicative of the implied warranty and fraud claims in this suit, but an unjust enrichment claim can be pled in the alternative to fraud or implied contract claims in a case, especially when there are no express contract claims. ***E.g.*, *Disher v. Tamko Building Prods., Inc.*, No. 14-740, 2015 WL 4609980, at *4 (S.D. Ill. July 31, 2015); *Bowlers Alley, Inc. v. Cincinnati Ins. Co.*, 32 F. Supp. 3d 824, 834 (E.D. Mich. 2014).**

That looks to cover all of the arguments raised by the defendants in the text of their motions and in their

many footnotes in favor of dismissal.[4] To sum up, Chrysler and Harmon's jurisdictional motions (Docs. 66 & 71) are **GRANTED IN PART** and **DENIED IN PART**. Flynn and Keith lack standing to pursue damages for a risk of harm or a fear of that risk, so the defendants' motions to dismiss any claims linked to those non-economic damages are **GRANTED**, and those claims are **DISMISSED without prejudice**. Flynn and Keith also cannot seek a court-ordered recall, so Chrysler's motion to dismiss the recall-related request is **GRANTED**, and the recall-related request is **DISMISSED with prejudice**. The other requests in Chrysler and Harmon's jurisdictional motions are **DENIED**. Once more, Chrysler and Harmon's motions to dismiss for failure to state a claim (Docs. 68 & 71) are **GRANTED IN PART** and **DENIED IN PART**. The Michigan implied warranty claim is **DISMISSED with prejudice** as to Chrysler and Harmon for want of pre-suit notice, and the Illinois warranty claim is **DISMISSED without prejudice** as to Harmon for want of any privity allegations. The Magnuson-Moss Act claim predicated on Illinois law against Harmon is **DISMISSED without prejudice**

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[4] Every party in this case, some far more egregiously than others, have taken to the practice of relegating large portions of their briefs to footnotes. The parties are cautioned away from this practice in the future, not only because it's an obvious effort to get around the Court's page limitations, but also because it makes the Court's task of reading the briefs and catching the arguments offered quite difficult. ***See Production & Maintenance Employees' Local 504 v. Roadmaster Corp.*, 954 F.2d 1397, 1407 (7th Cir. 1992).** If the parties need additional pages to make a developed argument or to fully respond to another party's argument, they should simply ask the Court for more room.

for want of privity allegations. The Michigan common law fraud claims are all **DISMISSED with prejudice** on economic loss grounds, and the Illinois common law fraudulent misrepresentation claim is **DISMISSED without prejudice** for failure to plead reliance. The Michigan and Illinois negligence claims are **DISMISSED with prejudice** on economic loss grounds. Chrysler and Harmon's remaining motions to dismiss are **DENIED**.

IT IS SO ORDERED.

DATED: September 23, 2016

/s/ Michael J. Reagan
Chief Judge Michael J. Reagan
United States District Court

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

BRIAN FLYNN, GEORGE BROWN, KELLY BROWN, and MICHAEL KEITH, *on behalf of themselves and all others similarly situated,*	)	
Plaintiffs,	)	
vs.	)	Case No. 15-cv-0855-MJR-DGW
FCA US LLC *doing business as* CHRYSLER GROUP LLC, and HARMAN INTERNATIONAL INDUSTRIES, INC.	)	
Defendants.	)	

MEMORANDUM & ORDER

REAGAN, Chief Judge:

In February 2016, Defendants FCA US LLC and Harman International Industries, Inc. filed motions to dismiss (Docs. 66, 71), arguing that Plaintiffs lack standing to pursue their claims. In two orders (Docs.

115, 236) the undersigned rejected Defendants' arguments and found that Plaintiffs allege sufficient facts to establish Article III standing. During an in-court hearing on Plaintiffs' motion for class certification, counsel for FCA US LLC renewed its standing challenge based on a recent unpublished decision from the Ninth Circuit Court of Appeals in *Cahen v. Toyota Motor Corp*., 2017 WL 6525501 (9th Cir. 2017). Following the hearing, Defendants submitted briefs in support of the renewed challenge (Docs. 344, 345), to which Plaintiffs responded (Doc. 355). The motion for reconsideration is now ripe for ruling.

Having reviewed the ruling in *Cahen* and the briefing by the parties, the Court declines to reverse its prior rulings. The problem for Defendants is that the Ninth Circuit ruling in *Cahen* decision is non-precedential and is not binding authority. The undersigned does not find it to be persuasive authority either, having reviewed the district court's decision in *Cahen* in making the initial determination that Plaintiffs have standing to pursue their claims. For the reasons explained in earlier orders, the Court **FINDS** that Plaintiffs have Article III standing and that they have alleged sufficient facts that, if true, establish that they have suffered an injury-in-fact. Accordingly, the motion for reconsideration (Doc. 344) is **DENIED**.

IT IS SO ORDERED.

DATED: March 9, 2018

s/ Michael J. Reagan
MICHAEL J. REAGAN
Chief Judge
United States District Court

APPENDIX F

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS

BRIAN FLYNN, GEORGE BROWN, KELLY BROWN, and MICHAEL KEITH, *on behalf of themselves and all others similarly situated,*	)	
Plaintiffs,	)	
vs.	)	Case No. 15-cv-0855-MJR-DGW
FCA US LLC *doing business as* CHRYSLER GROUP LLC, and HARMAN INTERNATIONAL INDUSTRIES, INC.	)	
Defendants.	)	

ORDER GRANTING MOTION UNDER 28 U.S.C. § 1292(b) AND MEMORANDUM IN SUPPORT

REAGAN, Chief Judge:

Defendants ask this court to certify for interlocutory appeal its conclusion that Plaintiffs have standing to complain they overpaid for their vehicles that they claim are vulnerable to hacking because their

computer systems, which are connected to the internet and control almost everything in the car including the engine, braking, airbags, door locks, seats, and infotainment systems, lack appropriate security systems. Plaintiffs do not allege their vehicles have been actually hacked nor do they claim they are aware of any hacked vehicle outside of controlled environments.

In 2015, Plaintiffs Brian Flynn, Michael Keith, and George and Kelly Brown filed this putative class action against Defendants FCA US LLC and Harman International Industries, Inc. alleging a number of claims related to a design flaw in the uConnect system, manufactured by Harman and installed in some of FCA's 2013-2015 vehicles. According to Plaintiffs, the uConnect system allows integrated control over phone, navigation, and entertainment functions in certain vehicles, and it is vulnerable to hackers seeking to take remote control of one of the affected vehicles, as reported in a 2015 WIRED magazine article. Although the article contributed to a voluntary recall by Chrysler, Plaintiffs maintain that the affected vehicles still have a number of vulnerabilities that could allow hackers to access critical and non-critical systems in the vehicles.

According to Plaintiffs, due to Defendants misrepresentations about the security of their vehicles, they overpaid for their vehicles at the time of purchase. They also claim that the publicity surrounding the WIRED article has led to a diminution in the value of their vehicles. Plaintiffs do not allege specific instances of hacking outside of a controlled environment, and Defendants argue, among other things, that any risk of future hacking is too speculative to

justify allowing Plaintiffs to pursue their claims for overpayment or diminution in value economic damages.

In February 2016, Defendants FCA US LLC and Harman International Industries, Inc. filed motions to dismiss Plaintiffs' first amended complaint, arguing that Plaintiffs lack standing to pursue their claims because they do not allege the types of injuries recognized as viable by the courts. In September 2016, the undersigned rejected Defendants' arguments as to Plaintiffs Keith and Flynn, finding that Plaintiffs allege sufficient facts in a non-conclusory manner to establish Article III standing. (Doc. 115). For the same reason, the Court rejected Defendants' standing arguments as to the Browns in August 2017. (Doc. 236).

On January 8, 2018, during an in-court hearing on Plaintiffs' motion for class certification, counsel for FCA US LLC renewed its standing challenge based on a recent unpublished decision from the Ninth Circuit Court of Appeals in *Cahen v. Toyota Motor Corp*., 2017 WL 6525501 (9th Cir. 2017). The decision upheld a district court ruling dismissing a complaint for lack of standing in a lawsuit with allegations nearly identical to those made by Plaintiffs in this case. This Court set a briefing schedule for the renewed standing challenge, and, after reviewing the briefs and the *Cahen* order, the motion for reconsideration was denied on March 9, 2018. (Doc. 374).

On March 19, 2018, Defendant Harman International Industries, Inc. timely filed a motion to certify for interlocutory appeal the order denying the motion for reconsideration. (Doc. 378). Plaintiffs filed a mem-

orandum in opposition (Doc. 381) to which Harman replied (Doc. 383). Defendant FCA US LLC responded in support of Harman's motion, though they ask that the Court certify a modified version of the question proposed by Harman. For the reasons delineated below, the Court **GRANTS** Harman's motion to certify order for interlocutory appeal.

Pursuant to 28 U.S.C. § 1292(b), a district judge who is of the opinion that an order "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation," may certify the order for interlocutory appeal. The undersigned cannot recall ever certifying an order for interlocutory appeal, as the statutory test must be carefully, reservedly and judiciously applied. In this instance, however, Defendants make a persuasive argument in favor of certifying a question on the issue of Article III standing.

The Court considers four statutory criteria in determining whether to grant a § 1292(b) petition: "there must be a question of *law*, it must be *controlling*, it must be *contestable*, and its resolution must promise to *speed up* the litigation." ***Ahrenholz v. Bd. of Trustees of Univ. of Illinois*, 219 F.3d 674, 675 (7th Cir. 2000)(emphasis in original)**. Under § 1292(b), "question of law" refers to a "question of the meaning of a statutory or constitutional provision, regulation, or common law doctrine," which is in line with the Article III standing challenge made by Defendants. ***Id.* at 676**. While it may be imprecise to characterize a standing issue as a "pure" question of

law, the issue may be resolved on the pleadings without requiring an appellate court to delve into the record. ***See id.* at 676-77**. Here, to determine whether Plaintiffs have standing, a reviewing court does not need to look beyond the operative complaint, which is a reasonable inquiry during the course of an interlocutory appeal. ***See, e.g., Boim v. Quranic Literacy Inst. and Holy Land Foundation for Relief and Dev.*, 291 F.3d 1000 (7th Cir. 2002)(ruling on the denial of a motion to dismiss and referring to the allegations in the complaint to do so)**.

The question of Article III standing is controlling because if Plaintiffs do not have standing this litigation is likely to be over. ***See In re Text Messaging Antitrust Litig.*, 630 F.3d 622, 624 (7th Cir. 2010)**. Likewise, the question is contestable. The ruling in favor of Plaintiffs in this case was not clear cut, and, faced with similar allegations, district courts have decided differently. In *Cahen*, the plaintiffs alleged that their vehicles were vulnerable to being hacked due to a lack of security in their vehicles' security systems, though the plaintiffs did not identify an incidence of hacking outside of a controlled environment. Their claims were dismissed for lack of standing, and the Ninth Circuit upheld the dismissal in a non-precedential order. ***See Cahen v. Toyota Motor Corp.*, 147 F.Supp.3d 955 (N.D. Cal. 2015) *aff'd by Cahen v. Toyota Motor Corp.*, --- Fed.Appx. ---, 2017 WL 6525501 (9th Cir. 2017); *see also U.S. Hotel and Resort Mgmt., Inc.* 2014 WL 3748639 (D. Minn. July 30, 2014)(dismissing for lack of standing claims as too speculative where plaintiffs alleged a risk of future injury due to publicity sur-**

rounding certain hotel room locks' susceptibility to unauthorized opening). Judges faced with similar standing challenges have found that a future risk of hacking or unauthorized intrusion is too speculative and that allegations of economic loss stemming from a speculative risk of future harm cannot establish standing. While the undersigned came to a different conclusion in this action, that serves to demonstrate that the question of standing is contestable.

In this case, an immediate appeal of the ruling that Plaintiffs have standing to pursue their claims would materially advance the ultimate termination of the litigation. Article III standing is a threshold issue. If Plaintiffs do not have standing, the parties will be saved from continuing protracted, costly litigation, as such a ruling will likely be the end of this action. ***See Ahrenholz*, 219 F.3d at 677**. Accordingly, the undersigned **FINDS** that the question of whether Plaintiffs have standing is a controlling question of

law that is contestable, the resolution of which would speed up this litigation.

CONCLUSION

For the above-stated reasons, the Court **GRANTS** the motion to certify order for interlocutory appeal (Doc. 378) filed by Defendant Harman International Industries, Inc. and **CERTIFIES** the order finding that Plaintiffs have Article III standing (Doc. 374) for immediate interlocutory appeal pursuant to 28 U.S.C. § 1292(b). Defendants may proceed to seek interlocutory appeal, pursuant to Federal Rule of Appellate

Procedure 5, regarding whether Plaintiffs have Article III standing to pursue their claims.

In light of this ruling, the Court **STAYS** this action in its entirety. The May 4, 2018 final pretrial conference and the May 14, 2018 jury trial settings are **VACATED** and will be reset by future order. The joint motion to continue trial (Doc. 382) is **DENIED as MOOT.**

IT IS SO ORDERED.

DATED: April 3, 2018

s/ Michael J. Reagan
MICHAEL J. REAGAN
Chief Judge
United States District Court

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

BRIAN FLYNN, GEORGE BROWN, KELLY BROWN, and MICHAEL KEITH, *on behalf of themselves and all others similarly situated,* Plaintiffs,	)	
vs.	)	Case No. 15-cv-0855-MJR-DGW
FCA US LLC *doing business as* CHRYSLER GROUP LLC, and HARMAN INTERNATIONAL INDUSTRIES, INC. Defendants.	)	

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT AND PLAINTIFFS' MOTION TO CERTIFY CLASS

REAGAN, Chief Judge:

INTRODUCTION

In 2015, Plaintiffs Brian Flynn, Michael Keith, and George and Kelly Brown filed this putative class action against Defendants FCA US LLC ("FCA") and Harman International Industries, Inc. ("Harman") alleging a number of claims related to design flaws in the Uconnect system, which was manufactured by Harman and installed in certain 2013-2015 Chrysler vehicles.[1] According to Plaintiffs, the Uconnect is an infotainment system that allows integrated control over phone, navigation, and entertainment functions in certain vehicles, and its design and installation makes it vulnerable to hackers seeking to take remote control of one of the affected vehicles, as reported in a 2015 WIRED magazine article. Although the article contributed to a voluntary recall by Chrysler, Plaintiffs maintain that the affected vehicles still have a number of unremedied vulnerabilities and design defects that could allow hackers to access critical and non-critical systems in the vehicles.

Before the Court are Defendants' motions for summary judgment and Plaintiffs' motion to certify class. Plaintiffs moved to certify several classes, including nationwide and state-based classes. (Doc. 266). FCA and Harman both responded to the motion (Docs. 318, 321), and Plaintiffs replied to both responses (Docs. 338, 339). The Court held a hearing on the motion on January 11, 2018, after which Defendants renewed a standing challenge made in the early stages of this lit-

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[1] FCA US LLC is an American subsidiary of Fiat Chrysler Automobiles, N.A. that sells vehicles under the Chrysler, Dodge, and Jeep brands at issue in this suit.

igation and sought permission for an interlocutory appeal (Docs. 344, 345, 378). The Seventh Circuit denied the petition for leave to file an interlocutory appeal on May 4, 2018. (Doc. 388). Defendants petitioned for rehearing, and their request was denied on June 29, 2018.

Before briefing was complete on the motion to certify class, Defendants filed seven motions for summary judgment. FCA filed four motions (Docs. 256, 257, 264, and 267) along with briefs in support thereof, and Harman filed three (Docs. 346, 348, and 350).[2] Plaintiffs responded to all seven motions (Docs. 297, 298, 299, 305, 365, 366, 367), and Defendants filed replies to each response (Docs. 288, 289, 290, 291, 375, 376, 377). With the prolific briefing complete, the motions for summary judgment and the motion to certify class are ripe for ruling, and the Court considers each in turn.

BACKGROUND

Plaintiffs bring suit against Harman and FCA on a number of implied warranty and fraud claims alleging that two Uconnect infotainment systems, the 8.4A and 8.4AN, which were manufactured by Harman and incorporated into certain vehicles (the "class vehicles") by FCA, were installed in such a way that the

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[2] The Court has warned the parties in the past about tactics, such as the excessive use of footnotes, that attempt to skirt this Court's page limits. While not expressly forbidden by the rules, Defendants attempt an end-around briefing limits by filing multiple motions for summary judgment. That has not gone unnoticed and will not be looked upon kindly in the future. The Court may well impose a word-count limitation in the future – a first for the undersigned.

systems are unreasonably and unsafely vulnerable to hacking by third-parties. In essence, this case contemplates (1) whether the class vehicles are defective; (2) whether Defendants knew they were defective and, if so, when; and (3) whether they withheld or concealed information about the alleged defects from consumers. All the vehicles purchased or leased by the named plaintiffs were equipped with either a Uconnect 8.4A or 8.4AN.

Brian Flynn is an Illinois consumer who purchased a new 2014 Jeep Grand Cherokee from Federico Chrysler Dodge Jeep RAM in Wood River, Illinois. He seeks to certify a nationwide or, in the alternative, an Illinois-based Magnuson-Moss Warranty Act class on the theory that the cybersecurity defects in the class vehicles run afoul of the implied warranty of merchantability. To that end, he also seeks to certify an Illinois class on a common law implied warranty of merchantability claim.

In addition, Flynn brings common law fraudulent concealment and fraudulent omission claims on behalf of a nationwide or an Illinois class of consumers, alleging that FCA and Harman concealed and suppressed information about the severity of the cybersecurity defects in the class vehicles. In doing so, Flynn contends that FCA and Harman also engaged in deceptive or unfair business practices in connection with the sale of his vehicle in violation of the Illinois Consumer Fraud and Deceptive Business Practices Act (ICFA) when they concealed or omitted material facts about the cybersecurity of the class vehicles and made affirmative statements about the safety of the vehicles. Flynn also pursues an unjust enrichment claim

on behalf of a nationwide or Illinois class against both FCA and Harman.

George and Kelly Brown are Missouri consumers who purchased, through a special pricing program, a 2014 Jeep Cherokee from Dave Sinclair Chrysler Jeep Dodge in Pacific, Missouri. The Browns were subject to arbitration on their warranty claims and opted not to pursue them. Instead, they join Flynn in bringing a fraudulent concealment and fraudulent omission claim and an unjust enrichment claim on behalf of a nationwide class. They also allege that FCA and Harman violated the Missouri Merchandising Practice Act, Missouri's unfair and deceptive practices act, and seek to bring an unjust enrichment claim on behalf of a Missouri class if a nationwide class is not certified.

Michael Keith is a Michigan consumer who leased a 2014 Dodge Ram 1500 and a 2014 Jeep Cherokee from Lakeshore Chrysler in Montague, Michigan. He also leased a 2015 Dodge Challenger from K&M Dodge in Grand Rapids, Michigan. He brings an MMWA implied warranty of merchantability claim on behalf of either a nationwide or a Michigan class against FCA and Harman. He joins Flynn and the Browns in the proposed nationwide class fraudulent concealment and fraudulent omission claim and the nationwide class unjust enrichment claim. Keith also alleges that Harman and FCA violated the Michigan Consumer Protection Act and were unjustly enriched by his leasing of defective vehicles.

Harman and FCA maintain that the class vehicles are safe and not defective. They maintain that the vehicles have never been hacked outside of a controlled environment and that hacking the class vehicles now,

after a 2015 recall campaign, is a remote risk, too remote to support Plaintiffs' claims of any overpayment or diminution in value damages. As Defendants moved for summary judgment on the named plaintiffs' claims before a class was certified, the Court considers their motions before considering Plaintiffs' motion to certify class. ***See Cowen v. Bank United of Texas, FSB*, 70 F.3d 937, 941-42 (7th Cir. 1995)(noting that "[c]lass actions are expensive to defend. One way to try to knock one off at low cost is to seek summary judgment before the suit is certified as a class action.")**.

MOTIONS FOR SUMMARY JUDGMENT

A. Legal Standard

Federal Rule of Civil Procedure 56 governs motions for summary judgment. Summary judgment is appropriate if the movant shows that there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law. ***Archdiocese of Milwaukee v. Doe,* 743 F.3d 1101, 1105 (7th Cir. 2014), *citing* FED. R. CIV. P. 56(a). *Accord Anderson v. Donahoe,* 699 F.3d 989, 994 (7th Cir. 2012).** A genuine issue of material fact remains "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." ***Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986). *Accord Bunn v. Khoury Enterpr., Inc.,* 753 F.3d 676, 681-82 (7th Cir. 2014).**

In assessing a summary judgment motion, the district court views the facts in the light most favorable to, and draws all reasonable inferences in favor of, the nonmoving party. ***Anderson v. Donahoe*, 699 F.3d 989, 994 (7th Cir. 2012); *Delapaz v. Richardson*,**

634 F.3d 895, 899 (7th Cir. 2011). As the Seventh Circuit has explained, as required by Rule 56(a), "we set forth the facts by examining the evidence in the light reasonably most favorable to the non-moving party, giving [him] the benefit of reasonable, favorable inferences and resolving conflicts in the evidence in [his] favor." ***Spaine v. Community Contacts, Inc.*, 756 F.3d 542 (7th Cir. 2014)**.

B. <u>FCA's Motion for Summary Judgment on All Claims (Doc. 256)</u>

FCA's first motion for summary judgment raises two issues: first, that Plaintiffs have no evidence of a defect and, second, that they have no evidence of damages. As to whether Plaintiffs have evidence of a defect in the class vehicles, the Court finds that there is a genuine issue of material fact. Plaintiffs present evidence of cybersecurity weaknesses, including various documents uncovered during discovery and the expert testimony of Marc Rogers. When considered in the light most favorable to Plaintiffs, this is sufficient to demonstrate a genuine dispute between the parties as to whether the class vehicles have defects. Similarly, the parties have a genuine dispute as to whether the alleged defects were remedied by FCA's voluntary recall or whether they require additional measures to protect the vehicles from an unreasonable risk of hacking.

As to evidence of damages, despite FCA's arguments to the contrary, the parties dispute whether the defects alleged by Plaintiffs have been repaired sufficiently. While FCA cites case law from district courts around the country that may suggest that overpayment damages are inappropriate where a defect has

been fixed, here there is a dispute of material fact as to the effectiveness of Chrysler's software-related recall. Plaintiffs provide evidence that the design and installation of the Uconnect devices themselves, rather than the software operating the devices, is defective and that fixing the software may not have fixed the alleged defects. Accordingly, the Court finds that genuine disputes of material fact exist such that summary judgment cannot be granted as to all counts at this time.

C. Motions for Summary Judgment on Magnuson-Moss Warranty Act and Common Law Implied Warranty Claims (Docs. 257, 264, 346, 350)

Both FCA and Harman move for summary judgment on Flynn's and Keith's Magnuson-Moss Warranty Act (MMWA) claims, which they seek to bring against both Defendants on behalf of a nationwide class or, in the alternative, an Illinois and a Michigan class, respectively. The MMWA claims are based on alleged violations of the implied warranty of merchantability. Additionally, Flynn brings an Illinois common law implied warranty of merchantability claim against FCA.

Neither Keith nor Flynn provided Defendants with pre-suit notice or an opportunity to cure prior to filing suit, and Defendants argue that they are entitled to summary judgment due to the lack of pre-suit notice. In ruling on Defendants' motions to dismiss, the Court found that the MMWA does not require pre-suit notice or an opportunity to cure in a putative class action prior to class certification, but FCA and Harman ask the undersigned to reconsider that ruling.

Pursuant to 15 U.S.C. § 2310(e), putative MMWA class actions may proceed to the extent necessary to establish the representative capacity of the named plaintiffs prior to providing a defendant with notice and an opportunity to cure. ***See In re Shop-Vac Mktg. and Sales Practices Litigation*, 964 F.Supp.2d 355, 362 (M.D. Pa. 2013)(MMWA "imposes different requirements on classes of consumers that it does on individuals . . . [and] classes of consumers are prohibited only from proceeding in a class action unless the seller is afforded a reasonable opportunity to cure.")**. The Court persists in its ruling that the MMWA claims may proceed for the limited purpose of establishing the representative capacities of Flynn and Keith despite the lack of pre-suit notice to Defendants. ***Id.; See also Walsh v. Ford Motor Co.*, 807 F.2d 1000, 1004 (D.C. Cir. 1986)(class actions may not proceed, but may be brought, prior to affording a defendant an opportunity to cure).**

Flynn's common law implied warranty claim brought under Illinois law is not saved by the notice provision in the MMWA. The only way his common law claim can survive is if an exception to the notice requirement exists. As the Court already ruled, an exception to the notice requirement exists in Illinois if a defendant already knew of the defect in an entire product line. ***See Stella v. LVMH Perfumes & Cosmetics USA, Inc*., 564 F.Supp.2d 833, 837 (N.D. Ill. 2008)**. Here, Flynn presents evidence that FCA was aware of the allegedly defective and risky installation of the Uconnect system at the time the class vehicles

were sold, so there is sufficient evidence that the exception applies to survive a motion for summary judgment.

Defendants next argue that Flynn and Keith cannot pursue their MMWA claims and that the claims they seek to bring on behalf of a nationwide class must fail because their vehicles are merchantable. MMWA claims rise or fall based on the underlying state law. ***See Walsh v. Ford Motor Co.*, 807 F.2d 1000, 1012 (7th Cir. 1986)**. Under Illinois law, a seller of goods impliedly warrants that the goods sold are "fit for the ordinary purposes for which such goods are used." **810 ILCS 5/2-314**. Similarly, Michigan requires that a product be "fit for its intended, anticipated or reasonably foreseeable use," to be merchantable. **Mich. Comp. Laws § 440.2314**. Both states allow plaintiffs to pursue claims that defective products are not merchantable.

Even though both Plaintiffs continued to drive their vehicles after learning of the hack detailed by WIRED, the Court cannot find as a matter of law that the vehicles were merchantable based on that evidence alone, as Defendants suggest. Plaintiffs provide evidence of cybersecurity defects sufficient to create a genuine issue of material fact as to merchantability and the presence of defects in the vehicles. Despite Defendants' characterization that the defect alleged by Plaintiffs requires that they be hacked before bringing suit, Plaintiffs provide evidence that suggests that the Uconnect integration in their vehicles is flawed such that the defect exists regardless of whether they, personally, have had their vehicles hacked. The crux of their case is that their vehicles had unreasonable cybersecurity defects at the time

they were produced and sold to the public, even when compared to other vehicles and products that include computer systems that are inherently hackable. The defect is in the design and the installation of the devices, according to Plaintiffs' evidence, and there is a genuine issue of material fact as to whether the vehicles were defective at the time they were sold and whether they were, and are, merchantable.

FCA also argues that summary judgment on Flynn's claims must be granted because he purchased from a dealership, rather than directly from FCA. Illinois law requires privity for an implied warranty claim and FCA maintains that there is no evidence of privity here. Privity inquiries into the relationship between a purchaser, a seller, and a manufacturer are fact-intensive. In some circumstances, a manufacturer is in privity with a consumer who purchased through a remote seller, but in others privity cannot be established between a consumer and a manufacturer. ***See Szajna v. General Motors, Corp.*, 503 N.E.2d 760 (Ill. 1986)(examining whether a Magnuson-Moss written warranty permits a nonprivity consumer to sue under an implied warranty theory); *Elward v. Electrolux Home Products, Inc.*, 214 F.Supp.3d 701, 706 (N.D. Ill. 2016); *Azimi v. Ford Motor Co.*, 977 F.Supp. 847, 851 (N.D. Ill. 1996)(acknowledging that a car dealership may be an agent of the manufacturer)**. Based on the evidence presented, there is a genuine question of material fact as to whether privity exists, and summary judgment cannot be granted at this time.

Harman raises additional arguments as to the nationwide MMWA claim in Count One. The Court has

previously dismissed all of the MMWA claims against Harman, but Plaintiffs attempt to bring Harman back into the MMWA action by including them in a proposed nationwide MMWA claim in Count One.[3] Despite the general reference to "Plaintiffs" in Count One, Flynn's MMWA claims against Harman were dismissed with prejudice for want of privity, and Flynn cannot attempt to revive the claim against Harman by alleging a nationwide class.

For all these reasons, the Court **DENIES** FCA's motions for summary judgment (Docs. 257, 264) as to Keith's and Flynn's state-based and nationwide MMWA claims (Counts 1, 4, and 11). FCA's motion for summary judgment on Flynn's common law implied warranty of merchantability claim (Count 5) is **DENIED**. Harman's motion for summary judgment on the claims of Brian Flynn (Doc. 346) is **GRANTED** as to the nationwide class claim (Count 1). Harman's motion for summary judgment (Doc. 350) on the MMWA claims of Michael Keith (Counts 1 and 11) is **DENIED**.

D. Motions for Summary Judgment on Brian Flynn's Common Law Fraud and Illinois Consumer Fraud Act Claims (Docs. 257, 346)

Flynn seeks to bring common law fraudulent concealment and fraudulent omission claims against FCA and Harman on behalf of a nationwide class (Count 2) or, in the alternative, an Illinois class (Count 7). He

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[3] The Browns decided against pursuing their MMWA claim and have been dismissed as plaintiffs as to Count One.

also alleges an Illinois Consumer Fraud and Deceptive Business Practices Act (ICFA) claim on behalf of an Illinois class.

The Court considers counts two and seven together, as the same law applies to both.[4] To succeed on these counts, Flynn must prove that FCA "intentionally omitted or concealed a material fact that it was under a duty to disclose" to him. ***Wigod v. Wells Fargo Bank, N.A.*, 673 F.3d 547, 571 (7th Cir. 2012)**. A duty to disclose arises if "'plaintiff and defendant are in a fiduciary or confidential relationship' or in a 'situation where plaintiff places trust and confidence in defendant, thereby placing defendant in a position of influence and superiority over plaintiff.'" ***Id.* (citing *Connick v. Suzuki Motor Co.*, 675 N.E.2d 584, 593 (1996).** A special trust relationship between a plaintiff and defendant is "extremely similar to that of a fiduciary relationship." ***Id.* (citing *Benson v. Stafford*, 941 N.E.2d 386, 403 (2010))**. The concealment of a material fact must be more than a "mere passive omission of facts during a business transaction" and "must have been done 'with the intention to deceive under circumstances creating an opportunity and duty to speak.'" ***Perlman v. Time,***

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[4] Flynn brings Count Two under a vague reference to federal common law, alleging that no material conflicts exist between the states on such laws. Illinois choice of law rules require that Illinois law applies to Flynn's claims because he lives in Illinois, purchased his vehicle pursuant to a sales contract in Illinois, and was allegedly deceived in Illinois. Illinois law applies to Flynn's claims even as to a proposed nationwide class claim, so counts two and seven rise and fall together. Similarly, his unjust enrichment claims in counts three and eight rise and fall together.

***Inc*., 380 N.E.2d 1040, 1044 (Ill.App. 1st 1978)(citation omitted)**.

The problem for Flynn is that he points to no evidence and makes no developed argument beyond mere conjecture that demonstrates that an automobile manufacturer, or a component manufacturer for an automobile manufacturer, and a consumer who purchases from a dealership are engaged in a fiduciary or special trust relationship or that there was an intent to deceive by FCA or Harman such that a duty to speak arose. In the absence of any evidence or developed argument to support his claim, both Defendants are entitled to summary judgment on Flynn's common law fraudulent concealment and omission claims (Counts 2 and 7).

Turning to Flynn's statutory fraud claims, the Illinois Consumer Fraud Act (ICFA) prohibits the "misrepresentation or the concealment, suppression, or omission of any material fact" in the conduct of any trade or commerce. **815 ILCS 505/2**. The "elements of a claim under ICFA are: (1) a deceptive or unfair act or practice by the defendant; (2) the defendant's intent that the plaintiff rely on the deceptive or unfair practice; and (3) the unfair or deceptive practice occurred during a course of conduct involving trade or commerce." ***Siegel v. Shell Oil Co.*, 612 F.3d 932, 934 (7th Cir. 2010)**. Defendants argue that summary judgment must be granted because the allegedly withheld information was not material to Flynn. As to the omission of information, an "omission is 'material' if the plaintiff would have acted differently had [he] been aware of it, or if it concerned the type of information upon which [he] would be expected to rely in making [his] decision to act." ***DOD Technologies v.***

Mesirow Ins. Services, Inc. **887 N.E.2d 1, 10 (2008)**.

Here, there is a genuine issue of material fact as to whether the information about the Uconnect design and installation that allegedly was withheld would have changed Flynn's decision to purchase his vehicle or whether it was the type of information that he would be expected to rely on in deciding to purchase a vehicle. Defendants gloss over Flynn's evidence that he did not fully understand the cybersecurity risks of the Uconnect device in his car by pointing to testimony that Flynn understands that computers can be hacked and that he purchased a car with a computer. That is insufficient to warrant summary judgment on the basis of materiality.

Defendants next argue that Flynn cannot demonstrate that he relied on the information at issue, but ICFA does not require proving reliance, only that a defendant intended that a consumer would rely on a deceptive or unfair practice. ***See Wigod*****, 673 F.3d at 575 n.13**. Flynn, however, must establish causation, as Defendants point out. His ICFA claim contends that FCA's advertisements touting the safety of the class vehicles were deceptive because FCA knew their design and installation was not, in fact, safe, but Flynn cannot point to a specific communication or advertisement that he saw.

Under ICFA, deceptive advertising cannot be the proximate cause of damages unless the advertisement actually deceives the plaintiff. ***Shannon v. Boise Cascade Corp.*****, 805 N.E.2d 213, 217 (Ill. 2004)**. Additionally, Illinois courts have held that a plaintiff cannot establish proximate cause where he cannot

identify a specific communication between himself and the defendant. ***See De Bouse v. Bayer*, 922 N.E.2d 309, 316 (Ill. 2009)**. Flynn's ICFA theory that alleges that Defendants engaged in deceptive advertising in order to protect profits and to avoid recalls that would damage their brand image is essentially a "market theory of causation" that Illinois courts squarely reject. ***See Community Bank of Trenton v. Schnuck Markets, Inc.* 887 F.3d 803, 823 (7th Cir. 2018)**. Flynn offers no evidence that creates a genuine issue of material fact as to causation. He cannot establish causation and fails to meet the requirements of pursuing an ICFA claim. Accordingly, the Court **GRANTS** Defendants' motions for summary judgment (Docs. 257, 346) on counts two, six, and seven as to Brian Flynn.

E. Motions for Summary Judgment on Brian Flynn's Unjust Enrichment Claims (Docs. 257, 346)

Where unjust enrichment claims are based on the same conduct underlying fraud claims, the claims rise or fall together. ***Cleary v. Philip Morris Inc.*, 656 F.3d 511, 518 (7th Cir. 2011)**. To that end, Flynn incorporates his fraud claim arguments as his argument against summary judgment on his unjust enrichment claims. Accordingly, the Court finds that the fraud claims and unjust enrichment claims rest on the same allegedly improper conduct and that Defendants are entitled to summary judgment against Flynn for the reasons described above. Even if the Court were not granting summary judgment on Flynn's fraud claims, however, Flynn has not produced any

evidence of a benefit conferred on FCA or Harman to create a genuine issue of material fact. For all these reasons, the Court **GRANTS** the motions by Harman and FCA as to Flynn's unjust enrichment claims (Counts 3 and 8).

F. Motions for Summary Judgment on Keith's Michigan Consumer Protection Act Claim (Docs. 264, 350)

Keith alleges that both Harman and FCA violated the Michigan Consumer Protection Act. According to Keith, Defendants both made affirmative misrepresentations and failed to disclose material facts in connection with the sale of the class vehicles. The Michigan Consumer Protection Act (MCPA) prohibits "[u]nfair, unconscionable, or deceptive methods, acts or practices in the conduct of trade or commerce." **Mich. Comp. Laws § 445.903(1)**. Both affirmative misrepresentations, such as those misrepresenting the quality of a product, and failing to reveal material facts in a way that misleads or deceives consumers are considered "unfair, unconscionable, or deceptive" acts under the MCPA. **Mich. Comp. Laws § 445.903(1)(d)&(s)**. To sustain an MCPA claim predicated on affirmative representations, Keith must establish that he relied on FCA's deceptive conduct to his detriment, meaning he must demonstrate the specific statements on which he relied. ***See In re OnStar Contract Litig.*, 278 F.R.D. 352, 378 (E.D. Mich. 2011) and *Williams v. Scottrade*, No. 06-10677, 2006 WL 2077588, at *7 (E.D. Mich. July 25, 2006)**).

Keith identifies no specific statements on which he relied in leasing his vehicles and cannot survive

summary judgment on his MCPA claim to the extent that he pursues an affirmative representation theory. Seemingly, Keith is aware of this shortfall, as his responses to the summary judgment motions appear to ignore that there is an affirmative misrepresentation aspect to his MCPA claim. Accordingly, Defendants are entitled to summary judgment on count twelve to the extent that Keith attempts to premise his MCPA claim on affirmative misrepresentations by Defendants.

As to whether Defendants failed to reveal material facts, the elements Keith must establish are different. The MCPA proscribes "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." **Mich. Comp. Laws § 445.903(1)(s)**. A claim premised on a failure to disclose material facts does not require a consumer to prove reliance or a duty to disclose. Here, there is a genuine issue of material fact as to whether Keith reasonably could have known of the alleged defect in his vehicles and whether that information would have altered his leasing decision. ***See In re Porsche Cars North America, Inc.*, 800 F.Supp.2d 801, 855-56 (S.D. Ohio 2012)**. Keith has presented sufficient evidence to create an issue of fact as to whether Defendants knew of the alleged defects at the time of production and sale of the class vehicles and whether they failed to disclose the defects to consumers. Accordingly, Keith can demonstrate material questions of fact as to the heart of his fraudulent omission MCPA claim, and Defendants' motions for summary judgment on count twelve are denied as to that claim.

G. Motions for Summary Judgment on George and Kelly Brown's Missouri Merchandising Practices Act Claim (Docs. 267, 348)

To succeed on their Missouri Merchandising Practices Act (MMPA) claim, the Browns must establish that they bought merchandise from the defendants for personal, family, or household purposes and that they suffered an ascertainable loss of money or property as a result of an act declared unlawful by Mo. Rev. Stat. 407.020, which defines the term "unlawful practice" broadly as 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 . . . in or from the state of Missouri." **Mo. Rev. Stat. § 407.020.1**. Unlike common law fraud claims, the MMPA does not require showing a duty to disclose on the part of a defendant, but the MMPA does require a plaintiff to show that they suffered a loss caused by a defendant's unlawful conduct. ***See Plubell v. Merck & Co., Inc.*, 289 S.W.3d 707, 714 (Mo. Ct. App. 2009)**.

The Browns present sufficient evidence to survive summary judgment on the questions of causation and materiality. They have experts and witnesses prepared to testify about the design defects in the affected vehicles and to calculate financial loss in the form of overpayment. There is evidence suggesting that FCA knew of the defects at all relevant times and did not disclose them. The Browns testify that had they known that their vehicle was designed with the alleged cybersecurity defects, then they would not have paid as much as they did or perhaps would not have

purchased it at all. Taken together, this amounts to questions of material fact as to whether information concealed by FCA constituted an unlawful practice that caused the Browns to suffer an ascertainable loss.

FCA attempts to add a requirement that the Browns show something beyond the typical bad faith or recklessness showings for omission claims under the MMPA, but the scienter requirement for claims alleging an omission of material fact relates to whether FCA knew, or upon reasonable inquiry would have known, the material facts it allegedly failed to disclose. ***See Johnsen v. Honeywell International, Inc.*, 2016 WL 1242545, *3 (E.D.Mo. 2016)(citing *Hope v. Nissan N. Am., Inc.*, 353 S.W.3d 68, 84 (Mo. Ct. App. 2011))**. The Browns present sufficient evidence to clear this hurdle, so their MMPA claim against FCA survives summary judgment.

The Browns are in a different position as to their fraudulent omission claims against Harman. They offer no evidence that Harman knew, or upon reasonable inquiry would have known, that the installation of the Uconnect device in their vehicle led to cybersecurity defects. Harman's evidence shows that they manufactured the Uconnect device to FCA's specifications but that they had no role in the installation or fitting of the units in FCA's vehicles. The Browns offer no evidence to the contrary. Further there is no evidence or case law before the Court that suggests that Harman is a seller within the meaning of the MMPA. There is no evidence that Harman sold anything to the Browns. They produced components for a vehicle sold by FCA. Absent evidence that the Browns purchased

something from Harman, as required by the plain language of the MMPA, the Browns' MMPA claims fail against Harman. Accordingly, FCA's motion for summary judgment (Doc. 267) is denied and Harman's motion for summary judgment (Doc. 348) is granted as to count nine.

H. Motions for Summary Judgment on Missouri and Michigan Unjust Enrichment Claims (Docs. 264, 267, 348, 350)

Both the Browns and Keith bring unjust enrichment claims under the laws of their home states. In order to sustain a claim for unjust enrichment under Michigan law, a plaintiff must prove (1) that the defendant received a benefit conferred by the plaintiff, and (2) that there was a resulting inequity to the plaintiff. ***Belle Isle Gill Corp. v. City of Detroit*, 666 N.W.2d 271, 280 (Mich. Ct. App. 2003)**. Similarly, Missouri requires a plaintiff to prove (1) that they conferred a benefit on a defendant; (2) that the defendant received the benefit, and (3) that the defendant retained the benefit under circumstances that render that retention inequitable. ***Hertz Corp. v. RAKS Hospitality, Inc.*, 196 S.W.3d 536, 543 (Mo. App. 2006)**. Here, both the Browns and Keith face the same roadblock: they fail to put forth any evidence that a benefit was conferred on either Defendant, relying instead on conclusory statements. As the record is devoid of evidence that could create a genuine issue of material fact, the Court grants Defendants' motions for summary judgment on the Missouri unjust enrichment claim (Count 267, 348) and the Michigan unjust enrichment claim (Count 267, 350).

I. Remaining Nationwide Class Claims

As all Plaintiffs' unjust enrichment claims fail, Defendants' motions for summary judgment on Count Three, the nationwide unjust enrichment claim, are granted, as well. Similarly, the Browns' and Keith's common law fraudulent concealment claims were dismissed with prejudice due to the economic loss doctrine. (*See* Docs. 115, 236), and the Court has granted summary judgment as to Flynn's common law claims. Accordingly, the Court finds that none of the plaintiffs can pursue count two and grants Defendants' motions for summary judgment as to count two.

PLAINTIFFS' MOTION TO CERTIFY CLASS

Having fully considered Defendants' motions for summary judgment, the Court turns to Plaintiffs' motion to certify class. As a preliminary note, the question of class certification is moot as to the claims on which the Court has granted summary judgment because the named plaintiffs in this case are not proper class representatives as to their claims that lack merit. ***Wiesmueller v. Kosobucki*, 513 F.3d 784, 787 (7th Cir. 2008)**. Accordingly, the Court considers whether to certify a class on the following claims:

- **Count One:** Nationwide Magnuson-Moss Warranty Act Class against both FCA and Harman;[5]
- **Count Four:** Illinois Magnuson-Moss Warranty Class against FCA;

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[5] Based on the Court's ruling on summary judgment, Flynn and Keith remain viable proposed class representatives as to FCA and Keith remains as to Harman.

- **Count Five:** Illinois Common Law Implied Warranty of Merchantability Class against FCA;
- **Count Nine:** Missouri Merchandising Practices Act Class against FCA;
- **Count Eleven:** Michigan Magnuson-Moss Warranty Act Class against both FCA and Harman; and
- **Count Twelve:** Michigan Consumer Protection Act Class against both FCA and Harman.

A. Standard Governing Class Certification

District courts should exercise "caution in class certification generally." ***Thorogood v. Sears, Roebuck & Co.*, 547 F.3d 742, 746 (7th Cir. 2008)**. To obtain class certification under Rule 23, a plaintiff must satisfy each requirement of Rule 23(a) – numerosity, commonality, typicality, and adequacy of representation – and one subsection of Rule 23(b). ***See Harper v. Sheriff of Cook County*, 581 F.3d 511, 513 (7th Cir. 2009); *Oshana v. Coca-Cola Co.*, 472 F.3d 506, 513 (7th Cir. 2006)**. Plaintiffs seek certification under Rule 23(b)(3), which requires that they establish that "questions of law or fact common to all class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." **FED. R. CIV. P. 23(b)(3)**. If the requirements of Rule 23(a) and 23(b) are satisfied, the class also must be "identifiable as a class," meaning that the class definitions must be definite enough that a class can be ascertained. ***Oshana*,**

472 F.3d at 513 (citations omitted). Failure to satisfy any of these requirements precludes certification of a class.

The putative class representatives bear the burden of proving each disputed requirement by a preponderance of the evidence. ***Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 811 (7th Cir. 2012)**. The Court does not analyze the merits of a complaint in assessing whether to certify a class, though the "class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action." ***Retired Chi. Police Ass'n v. City of Chicago*, 7 F.3d 584, 596 (7th Cir. 1993). *See also Eisen v. Carlisle v. Jacquelin*, 417 U.S. 156, 178, 94 S. Ct. 2140, 40 L. Ed. 2d 732 (1974) ("In determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met.")**. The Seventh Circuit has instructed that district courts should make "whatever factual and legal inquiries are necessary to ensure that requirements for class certification are satisfied before deciding whether a class should be certified, even if those considerations overlap the merits of the case." ***Am. Honda Motor Co. v. Allen 600 F.3d 813, 815 (7th Cir. 2010)(citing Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 676 (7th Cir. 2001))**. With these principles in mind, the Court considers Plaintiffs' motion to certify class.

B. Rule 23(a) Requirements

a. Rule 23(a)(1): Numerosity

Rule 23(a) requires that a proposed class be "so numerous that joinder of all members is impracticable." **FED. R. CIV. P. 23(a)(1).** The Court may make common sense assumptions when it comes to numerosity. ***See Arreola v. Godinez*, 546 F.3d 788, 797 (7th Cir. 2008)**. Defendants raise no developed challenge as to numerosity, and Plaintiffs have adequately demonstrated that FCA sold over one million vehicles with the Uconnect 8.4A and 8.4AN installed. Accordingly, the Court finds that Plaintiffs satisfy the numerosity requirement.

b. Rule 23(a)(2): Commonality

Rule 23(a)(2) requires that "questions of law or fact common to the class" must exist before a class may be certified. **FED. R. CIV. P. 23(a)(2)**. Courts have generally described this requirement as a low hurdle to surmount, and it is satisfied when a common nucleus of operative facts exist. ***See Flanagan v. Allstate Ins. Co.*, 242 F.R.D. 421 (N.D. Ill. 2007) (citing *Rosario v. Livaditis*, 963 F.2d 1013, 1018 (7th Cir. 1992))**. Class certification will not be defeated solely because there are some factual variations among the grievances of the class members. ***McManus v. Sturm Foods, Inc.*, 292 F.R.D. 606, 618 (S.D. Ill. 2013); *see also Keele v. Wexler*, 149 F.3d 589, 594 (7th Cir. 1998)**. Rather, Plaintiffs must demonstrate that they suffered the same injury and that their claims can be resolved on a class-wide basis.

For purposes of 23(a)(2), even a single common contention, the determination of which resolves an issue that is central to the validity of the claims, is sufficient. ***Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 359 (7th Cir. 2011)**. What matters is the "capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation." ***Id.* at 351 (alteration in original)**. Courts have found that a sufficient common nucleus of operative fact exists where a defendant has engaged in standardized conduct toward members of the class. ***Keele v. Wexler*, 149 F.3d 589, 594 (7th Cir. 1998)(citing cases)**. Plaintiffs clear that low hurdle. Their claims rest on the same basic allegations of actions by FCA and Harman leading up to and following the production of vehicles with the relevant Uconnect devices. The alleged defects and Defendants' alleged course of conduct in failing to disclose them raise common questions as to whether Defendants engaged in the type of standardized conduct contemplated by Rule 23(a)(2). Accordingly, the Court finds that Plaintiffs satisfy Rule 23(a)(2)'s commonality requirement.

c. Rule 23(a)(3): Typicality

A claim is typical if it "arises from the same event or practice or course of conduct that gives rise to the claims of other class members and . . . [the] claims are based on the same legal theory." ***Oshana v. Coca-Cola Co.*, 472 F.3d 506, 514 (7th Cir. 2006)(citing *Rosario v. Livaditis*, 963 F.2d 1013, 1018 (7th Cir. 1992))**. The requirement is closely related to commonality and is meant to ensure that the named plaintiffs' claims have the same essential characteristics as the claims of the class at large. ***Id.*** The starting point for typicality analysis is that "there must be

enough congruence between the named representative's claim and that of the unnamed members of the class to justify allowing the named party to litigate on behalf of the group." ***Spano v. The Boeing Co.*, 633 F.3d 574, 586 (7th Cir. 2011)**. Here, the named Plaintiffs' claims arise from the same practice or course of conduct (Defendants actions related to cybersecurity defects in the Uconnect devices installed in certain Chrysler vehicles) that gives rise to the claims of other potential class members, and their claims are based on the same legal theories as class members' claims. Accordingly, the Court finds that the typicality prong of Rule 23(a)(3) has been met.

d. Rule 23(a)(4): Adequacy

The final requirement of Rule 23(a) is that the representative parties fairly and adequately protect the interests of the class. **FED. R. CIV. P. 23(a)(4)**. This inquiry is meant to uncover "conflicts of interest between the named parties and the class they seek to represent." ***Amchem Prods. v. Windsor*, 521 U.S. 591, 625 (1997)**. Adequacy of representation requires that the class representatives be a part of the class and that they possess the same interests, and suffer the same injuries, as the class members. ***Id.* at 626**. The Court considers whether (1) plaintiffs' counsel is qualified, experienced, and generally able to conduct the proposed litigation, and (2) whether the named plaintiff and the proposed class have antagonistic or conflicting interests. ***See Rawson v. Sources Receivables Management, LLC*, 289 F.R.D. 267, 269 (citing *Rosario*, 963 F.2d at 1018)**. In general, absent some showing to the contrary, adequacy of representation will be presumed. ***Westefer v. Snyder*, 2006 WL 2639972, at *6 (S.D. Ill. 2006)(citing**

***Guarantee Inc. Agency Co. v. Mid-Continental Realty Corp.*, 57 F.R.D. 555, 565-66 (N.D. Ill. 1972)**).

Here, Defendants challenge the adequacy of class counsel, but the undersigned is not convinced by the record that counsel cannot adequately represent the interests of the proposed classes. Counsel has pursued their clients' interests vigorously, has litigated discovery issues thoroughly, and has devoted significant time and resources to this action. While this litigation has had contentious moments and the parties have an obvious distaste for each other's tactics, class counsel has demonstrated that they are competent to fairly and adequately represent the interests of a class without conflict.

Further, despite Defendants' many objections to the adequacy of the named plaintiffs, their arguments do not focus on the relevant inquiry – whether Plaintiffs' interests are antagonistic to those of the class members. Defendants suggest, without developed argument to support the contention, that the interests of a new purchaser are antagonistic to those of a used purchaser because only one person in a chain of ownership can recover overpayment damages. Defendants also argue that class representation is inadequate because Plaintiffs propose including purchasers and lessees in the same class. Plaintiffs' methods for damage calculations can accommodate measuring damages for different types of class members, and courts have certified classes involving claims of both purchasers and lessees of vehicles. ***See Daffin v. Ford Motor Co.*, 458 F.3d 549, 552 (6th Cir. 2006); *Trew v. Volvo Cars of North America LLC*, 2007 WL 2239210 (E.D. Cal. 2007)**. The Court finds that

Plaintiffs carry their burden of establishing adequacy by a preponderance of the evidence. At this time, the named plaintiffs' claims are not in conflict with those that could be brought by class members and their interests and alleged injuries align, though the Court may revisit this issue in the future if necessary.

B. Rule 23(b)(3) Considerations

Plaintiffs' predominance argument in their opening brief is insufficient to satisfy the Court that they have satisfied their burden. Predominance is similar to typicality and commonality but is far more demanding, and Plaintiffs barely scratch the surface of what the Court must consider. They are saved from a ruling that they failed to establish predominance only by the time spent discussing relevant issues during the hearing on the motion to certify class.

As Plaintiffs seek certification under Rule 23(b)(3), they must show (1) that the questions of law or fact common to the members of the proposed class predominated over questions affecting only individual class members; and (2) that a class action is superior to other available methods of resolving the controversy. ***Messner v. Northshore University HealthSystem*, 669 F.3d 802, 811 (7th Cir. 2012)**. The Rule 23(b)(3) "inquiry trains on the legal or factual questions that qualify each class member's case as a genuine controversy," with the purpose being to determine whether a proposed class is "sufficiently cohesive to warrant adjudication by representation." ***Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 623 (1997)**. Rule 23(b)(3) "poses the question whether a single suit would handle the dispute better than multiple suits." ***In re Aqua Dots Prods. Liab. Litig.***

654 F.3d 748, 752 (7th Cir. 2011). The Court considers class members' interest in individually controlling separate actions, the extent of any litigation already begun by class members, the desirability of concentrating the litigation in this form, and likely difficulties in managing a class action. **FED. R. CIV. P. 23(b)(3)(A)-(D)**.

a. Damages

The Court first considers whether "damages are susceptible of measurement across the entire class." ***Suchanek v. Sturm Foods, Inc.*, 764 F.3d 750, 760 (7th Cir. 2014)**. If damages can be estimated, the Court moves on to examine the factors identified in 23(b)(3), which "deal with the interests of individual members of the class in controlling their own litigations and carrying them on as they see fit." ***Id.* (internal quotations and citing references omitted)**.

Damages are susceptible of class-wide measurement if there is a "single or common method that can be used to measure and quantify the damages of each class member. **WILLIAM RUBENSTEIN, NEWBERG ON CLASS ACTIONS § 12:4 (5th Ed. 2013)**. If damages can be measured on a class-wide basis, then questions of individual damage calculations will not overwhelm questions common to the class. ***Comcast Corp. v. Behrend*, 569 U.S. 27, 35-36 (2013)**. Individualized questions regarding damages do not prevent certification under 23(b)(3). ***Messner*, 669 F.3d at 815**.

Here, Plaintiffs offer two methods to measure damages on a class-wide basis. First, they offer that damages could be calculated by expert Myles Kitchen who would estimate a cost of repair for the class vehicles by estimating the cost to retrofit the vehicles with

the needed cybersecurity upgrades. Considering that Plaintiffs' case is focused on whether class members overpaid for their vehicles, the undersigned is unconvinced that this is a method for calculating class-wide damages. Damages must fit a plaintiff's theory of liability and be sufficiently reliable. ***Mullins v. Direct Digital, LLC*, 795 F.3d 654, 671 (7th Cir. 2015)**. Plaintiffs offer little argument in support of how the cost of repair method fits their theory of liability, and that is insufficient to meet their burden.

Plaintiffs offer another method for measuring class-wide damages: a discrete choice analysis that could measure consumer opinions on the economic value of vehicle cybersecurity. This method is an enhanced form of conjoint analysis, a methodology often used to calculate damages in class actions and is sufficiently tied to Plaintiffs' theory of liability. The analysis attempts to measure the value of the class vehicles had consumers been aware of the allegedly withheld information about the lacking cybersecurity. With this method, Plaintiffs have met their burden of showing a proposed class-wide damage calculation that is consistent with their theory of liability.

b. Predominance

Predominance analysis begins with the elements of the underlying causes of action. ***Messner*, 699 F.3d at 815**. The "predominance requirement is meant to test whether proposed classes are sufficiently cohesive to warrant adjudication by representation, but it scarcely demands commonality to all questions." ***Comcast Corp.*, 569 U.S. at 41**. It is generally satisfied "when common questions represent a significant

aspect of [a] case and ... can be resolved for all members of [a] class in a single adjudication." ***Messner*, 699 F.3d at 815 (citing reference omitted, alterations in original)**. The inquiry focuses on whether a common nucleus of operative facts and issues underlies the proposed class claims rather than on whether some individualized questions exist. A question is common if the same evidence answers it for all class members. "Mere *assertion* by class counsel that common issues predominate is not enough." ***Parko v. Shell Oil Co.*, 739 F.3d 1083, 1085 (7th Cir. 2014)(alteration in original)**.

i. Proposed Nationwide Classes

Rule 23(b)(3) warns against certifying a nationwide class on the Magnuson-Moss Warrant Act claim. MMWA claims rely on underlying state law. The Court squarely rejects Plaintiffs' contention that Michigan law should be applied to an entire nationwide class regardless of where class members reside or where they purchased and used their vehicles. To certify a class potentially would require the Court to apply the law to every state, and there are wide variations between various state implied warranty claims, including, but not limited to, states that require privity and states that do not. To do so would be unwieldy and would require highly individualized inquiries.

Plaintiffs propose that, to overcome the differences in underlying state laws the Court could instead certify subclasses of class members living in states that require privity and class members living in states that do not. Even though that broadly covers an aspect of implied warranty claims that varies from state to state, there are more variations between state laws

on the implied warranty of merchantability than just the question of privity. Merchantability, for example, can be defined differently at the state level with different nuances carved out, and the application of the state definition to a consumer's factual situation would determine, in part, whether a claim rises or falls. For this reason, courts commonly refuse to certify nationwide classes based on warranty, fraud, and products-liability suits based on questions of commonality, predominance and superiority, and this Court finds that doing so is necessary here. ***See In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1015 (7th Cir. 2002)**. Accordingly, the Court declines to certify nationwide MMWA class, as proposed by Plaintiffs.[6]

ii. Proposed State Classes

As to the state classes, the Court finds that common questions predominate. For Plaintiffs' implied warranty claims, there appears to be no difference among class members with respect to proving merchantability and the defectiveness of the class vehicles. For the omission-based consumer protection claims, whether Defendants knew the vehicles were defective and engaged in unlawful practices poses a common question that predominates over individual questions that may arise. Further, these common questions are particularly appropriate for class-wide resolution. The proof needed to answer these questions is common to all class members, and it would be

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[6] Similarly, had counts two and three survived summary judgment, Rule 23(b)(3) would bar certification of nationwide classes due to variations in state laws related to fraudulent concealment and fraudulent omission claims and to unjust enrichment claims.

highly costly to litigate the same questions of liability on an individual basis. In *Amchem*, the Supreme Court commented that "[p]redominance is a test readily met in certain cases alleging consumer or securities fraud or violations of the antitrust laws." **521 U.S. at 625**. While individualized remedies and damages may have to be determined based on subclasses or an individual level, that does not preclude certification. ***Butler v. Sears, Roebuck & Co.*, 727 F.3d 796, 801 (7th Cir. 2013)**. Accordingly, the Court finds that Plaintiffs have met their burden as to predominance in the proposed state-wide class claims (Counts 4, 5, 9, 11, and 12).

c. Superiority

Under the superiority requirement of Rule 23(b)(2), a class action must be superior to other available methods for the fair and efficient adjudication of the controversy. "Class certification is usually considered a superior method of adjudicating claims involving standardized conduct, even if there are individual issues that exist among class members (for example, on questions such as damages), so long as those individual issues can be managed through bifurcated hearings." ***Cicilline v. Jewel Food Stores, Inc*., 542 F.Supp.2d 831, 838 (N.D. Ill. 2008); *See Arrreola*, 546 F.3d at 800-01 ("Although the extent of each class member's personal damages might vary, district judges devise solutions to address that problem if there are substantial common issues that outweigh the single variable of damages amount.")**.

Because common issues predominate and the named Plaintiffs are typical and adequate class representatives, as discussed above, the instant case meets this requirement. Despite individualized damage inquiries that may be required if the class prevails, this case will be manageable as a class action. Requiring each class member to bring a separate action would be a waste of time and money. ***See Markham v. White*, 171 F.R.D. 217, 224 (N.D. Ill. 1997)**. The Court finds that the superiority requirement of Rule 23(b)(3) is met.

C. Class Definition

Having determined that the 23(a) and 23(b)(3) factors are satisfied as to counts four, five, nine, ten, and eleven, the final consideration before the Court is the definition of the proposed class. A class definition "must be definite enough that the class can be ascertained." ***Oshana*, 472 F.3d at 513**. On their state claims, Plaintiffs propose that the class be defined as:

> All persons who purchased or leased vehicles in [the state at issue], which were manufactured by FCA and which are equipped with the Uconnect 8.4A or Uconnect 8.4AN systems that were subject to the July 23, 2015 NHTSA Safety Recall campaign number 15V461.

Defendants argue that, as proposed, the class definition is unmanageable because class members would be ever-shifting due to the failure to include time limitations, making the class amorphous. Plaintiffs' response is that the Court should exercise its power to modify the class definition rather than deny certification, and they propose the date of class certification as a cut-off date for class membership. A cut-off date is

necessary to avoid manageability difficulties, as new class members could be created any time a class vehicle is purchased on the resale market. Class definition issues should be solved by refining the class rather than flatly denying certification. ***Messner*, 669 F.3d at 825**. Accordingly, the Court will adjust the class definitions rather than deny certification.

CONCLUSION

Defendants' motions for summary judgment (Docs. 256, 257, 264, 267, 346, 348, 350) are **GRANTED in part** and **DENIED in part**. At the close of the case, the Clerk of Court is **DIRECTED** to enter judgment as follows:

- On Count One, in favor of Harman and against Brian Flynn.
- On Counts Two and Three, in favor Harman and FCA and against Flynn, Keith, and George and Kelly Brown
- On Counts Six, Seven, and Eight, in favor of Harman and FCA and against Flynn;
- On Count Nine, in favor of Harman and against the Browns;
- On Count Ten, in favor of Harman and FCA and against the Browns; and
- On Count Thirteen, in favor of Harman and FCA and against Keith.

Further, for the above-stated reasons, the Court **GRANTS in part** and **DENIES in part** Plaintiffs' motion to certify class (Doc. 266). The motion is denied as to both FCA and Harman on counts one, two, three, six, seven, eight, ten, eleven, and thirteen. The

motion is further denied as to Harman on counts four, five, and nine.

The motion is **GRANTED** as follows:

Counts Four and Five: an Illinois Class against FCA US, LLC defined as:

> All persons who purchased or leased vehicles in Illinois on or before July 5, 2018, that were manufactured by FCA and that are equipped with the Uconnect 8.4A or Uconnect 8.4AN systems that were subject to the July 23, 2015 NHTSA Safety Recall campaign number 15V461.

Count Nine: a Missouri Class against FCA US, LLC defined as:

> All persons who purchased or leased vehicles in Missouri on or before July 5, 2018, that were manufactured by FCA and that are equipped with the Uconnect 8.4A or Uconnect 8.4AN systems that were subject to the July 23, 2015 NHTSA Safety Recall campaign number 15V461.

Count Twelve: a Michigan Class against FCA US, LLC and Harman defined as:

> All persons who purchased or leased vehicles in Michigan on or before July 5, 2018, that were manufactured by FCA and that are equipped with the Uconnect 8.4A or Uconnect 8.4AN systems that were subject to the July 23, 2015 NHTSA Safety Recall campaign number 15V461.

The Court **APPOINTS** Brian Flynn as class representative for the Illinois class, Keith Brown as class representative for the Michigan class, and Kelly and George Brown as class representatives for the Missouri class. The Court also **APPOINTS** the following law firms as class counsel: Armstrong Teasdale LLP; Law Office of Christopher Cueto, LTD; Law Office of Lloyd M. Cueto, P.C.; and Law Office of Stephen R. Wigginton.

In light of an anticipated appeal of this Order, the Court **VACATES** the July 16, 2018 trial date and continues the jury trial in this matter indefinitely.

Should no party file a timely notice of appeal, the parties shall confer regarding class notice and shall file a status report with their joint proposal or competing proposals by August 10, 2018.

IT IS SO ORDERED.

DATED: July 5, 2018

s/ Michael J. Reagan
MICHAEL J. REAGAN
Chief Judge
United States District Court