

1 NOT FOR PUBLICATION

2  
3 **UNITED STATES DISTRICT COURT**  
4 **DISTRICT OF NEW JERSEY**

5 \_\_\_\_\_  
6 ) Hon. Esther Salas  
7 IN RE FORD MOTOR CO. E-350 ) Civil Action No. 03-4558  
8 VAN PRODUCTS LIABILITY ) MDL No. 1687  
9 LITIGATION (NO. II) )  
10 \_\_\_\_\_) **OPINION**

11  
12 **SALAS, District Judge:**

13  
14 This matter comes before the Court on the renewed class certification motion (Doc. No.  
15 375) filed by Plaintiffs, various owners of Ford’s E-350 vans. Also before the Court is Ford’s  
16 motion to amend (Doc. No. 393) its Answer to include an affirmative defense asserting that any  
17 implied warranties were limited by the terms of the express warranties issued with its vehicles.  
18 The Court has considered the parties’ submissions and decided the matter without oral argument  
19 pursuant to Federal Rule of Civil Procedure 78. For the following reasons, the Court will grant  
20 Ford’s motion to amend and deny class certification.

21  
22 ***Background***  
23

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

31 proposed class have actually suffered a rollover; indeed, the proposed class specifically excluded  
32 those who claim damages for personal injury as a result of purchasing or leasing a Ford E-350  
33 van. (Compl. ¶ 63). Plaintiffs claim economic harm because the alleged defect purportedly  
34 makes the E-350 vans unsuitable and unfit for transporting 15 passengers. The Complaint  
35 purported to bring claims on behalf of Plaintiffs and a putative nationwide class that includes:  
36 “all persons and entities who purchased or otherwise lawfully acquired E350 ‘15-passenger’ vans  
37 (a/k/a E350 Super Club Wagons, Econoline ‘15-passenger’ vans, or E350 Super Duty Extended  
38 Length passenger vans) manufactured by Defendant Ford Motor Company . . . model years 1991-  
39 2005, and who reside in the fifty states and/or the District of Columbia.” (Compl. ¶ 1).

40 The Complaint initially asserted claims on behalf of various named Plaintiffs from five  
41 states: Alabama, Arkansas, California, Illinois, and New Jersey. Ford moved to dismiss the  
42 entire Complaint. In an Opinion and Order dated September 2, 2008 (amended September 3,  
43 2008), the Hon. Harold A. Ackerman, Senior District Judge, granted in part and denied in part  
44 Ford’s motion. *In re Ford Motor Co. E-350 Van Prods. Liab. Litig. (No. II)*, No. 03-4558, MDL  
45 No. 1687, 2008 WL 4126264, at \*29 (D.N.J. Sept. 2, 2008) (“MTD Opinion”). Judge Ackerman  
46 applied the law of the Plaintiffs’ home states to their respective claims, except where no material  
47 difference existed between the various states’ laws, and he dismissed the following claims: 1) the  
48 Alabama, Arkansas, and Illinois Plaintiffs’ express warranty claims; 2) the Alabama, Arkansas,  
49 and Illinois Plaintiffs’ implied warranty claims; 3) the Alabama and Arkansas Plaintiffs’  
50 respective state consumer fraud statutory claims; and 4) one of the three state consumer fraud  
51 statutory claims advanced by the California Plaintiff. *Id.* at \*3, 29-30. After Judge Ackerman  
52 resolved Ford’s motion to dismiss, the parties in November 2008 agreed to the joinder of newly

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

72

73

74  
75  
76

77

78

79

80

81

82

83

84

85

86

87

88

89

90

91

92

93

94

95

96

97

98

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

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

***Plaintiffs' Proposed Classes***

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

99 All persons or entities residing in the States of Georgia, Michigan, New  
100 Jersey, New York and Pennsylvania, who purchased or otherwise  
101 acquired and currently own a Ford E-350 van, new or used, model years  
102 1991-2005, and assert BREACH OF IMPLIED WARRANTY claims  
103 under their respective state laws and all persons or entities residing in the  
104 State of Georgia who purchased the subject vehicles and assert a  
105 BREACH OF EXPRESS WARRANTY claim.  
106

107 All persons or entities residing in the States of Florida, New York and  
108 Texas, who purchased or otherwise acquired and currently own a Ford E-  
109 350 van, new or used, model years 1991-2005, and assert VIOLATION  
110 OF CONSUMER PROTECTION ACTS in their respective states.  
111

112 All persons or entities residing in the States of California, Georgia and  
113 Pennsylvania, who purchased or otherwise acquired and currently own a  
114 Ford E-350 van, new or used, model years 1991-2005 and assert  
115 UNJUST ENRICHMENT under their respective state laws.  
116

117 (Pls.’ Br. at 11). In response to Ford’s opposition argument, Plaintiffs have limited their  
118 proposed unjust enrichment class to “purchasers of *new* Ford E-350 vans *prior* to April 2004.”

119 (Pls.’ Reply Br. at 35 & n.22) (emphasis added). As an alternative to these three classes,  
120 Plaintiffs seek certification of eight, state-based classes (“state classes”) consisting of:  
121

122 All persons or entities residing in the State of [state] who purchased or  
123 otherwise acquired and currently own a Ford E-350 van, new or used,  
124 model years 1991-2005.  
125

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

133 proposed classes.

134 The main thrust of Plaintiffs' certification argument is that Chief Judge Brown's  
135 summary judgment rulings have pared down the initial proposed classes into manageable groups,  
136 and that the new proposed classes satisfy the predominance requirement of Federal Rule  
137 23(b)(3). For the remaining implied warranty claims, which derive from each state's version of  
138 UCC § 2-314, Plaintiffs contend that they can present common proof of a design defect, the  
139 existence of an implied warranty, causation, and a common injury measured by the difference in  
140 value between the product as warranted and the product as received per UCC § 2-714. Although  
141 Plaintiffs suggested measuring their common injury by the cost of retrofit in their initial motion  
142 for class certification (*see* Doc. No. 254 at 47 n.15), Plaintiffs now set forth a uniform retrofit  
143 cost of \$2,100 as their common proof of injury. With regard to the remaining consumer fraud  
144 claims, Plaintiffs assert that they can present common proof of Ford's alleged misrepresentations,  
145 deception, ascertainable loss, and causation. Conversely, Plaintiffs argue that they do not need to  
146 make individual showings of reliance in order to establish their consumer fraud claims. Finally,  
147 with regard to the remaining unjust enrichment claims, Plaintiffs state that they can present  
148 common proof of unjust benefit to Ford, stemming from the fact that Ford did not disclose the E-  
149 350 van's defect (inability to carry fifteen passengers).

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

155 its statute of limitations defenses will require additional individual inquiries to determine  
156 whether specific class members' claims are time-barred. The prevalence of individualized  
157 inquiries, Ford argues, defeats the predominance requirement of Federal Rule 23(b)(3).  
158

159 *Motion to Amend*  
160

161 During the briefing of the renewed class certification motion, Plaintiffs objected to Ford's  
162 argument predicated on the factual contention that the express warranty issued with every new E-  
163 350 van limited the duration of any implied warranty. Plaintiffs argued that this line of implied  
164 warranty defense was foreclosed, because Ford failed to raise it as an affirmative defense in its  
165 Answer to the Complaint, or in any of the summary judgment motions. (Pls.' Reply Br. at 13).  
166 In response, Ford moved to amend its Answer to include this affirmative defense, which  
167 Plaintiffs oppose on the ground of waiver.

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

170 All of the vehicles in the purported classes were sold to their initial  
171 purchaser with an express warranty provided by Ford that validly limited  
172 the duration of the implied warranty of merchantability to the period of  
173 the express warranty, i.e., 3 years or 36,000 miles, whichever comes first.  
174 Accordingly, the claims of Plaintiffs or some members of the purported  
175 classes are barred because they never suffered a legally cognizable injury,  
176 damages, and/or loss within 3 years or 36,000 miles of the initial  
177 purchase of the vehicle.  
178

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

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

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

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

205 court may deny leave to amend a complaint if a plaintiff's delay in seeking amendment is undue,  
206 motivated by bad faith, or prejudicial to the opposing party," but delay alone is an insufficient  
207 ground for denying leave to amend. *Cureton v. Nat'l Collegiate Athletic Ass'n*, 252 F.3d 267,  
208 272-73 (3d Cir. 2001). The Court will allow Ford's proposed amendment, because Plaintiffs'  
209 assertion of undue delay and prejudice is overstated, and Plaintiffs' attack on the merits of the  
210 warranty disclaimers is premature.

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

216 Any express limitation or negation of Ford's implied warranties that the  
217 E350 vans were fit to accommodate and safely transport 15 passengers,  
218 when such was not the case, would be unreasonable and unconscionable  
219 and, accordingly, is unenforceable pursuant to UCC § 2-316.  
220

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

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

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

---

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

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

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

256

257

### ***Class Certification***

258

259

Federal Rule of Civil Procedure 23 governs class certification. The party seeking class  
260 certification must satisfy both the conjunctive requirements of subpart (a) and one of  
261 the requirements of subpart (b). Fed. R. Civ. P. 23; *In re Schering Plough Corp. ERISA Litig.*,  
262 589 F.3d 585, 596 (3d Cir. 2009). The Supreme Court succinctly described the Rule  
263 23(a) requirements applicable to all class actions in *Amchem Products, Inc. v. Windsor*: “(1)  
264 numerosity (a ‘class [so large] that joinder of all members is impracticable’); (2) commonality

265 ('questions of law or fact common to the class'); (3) typicality (named parties' claims or defenses  
266 'are typical . . . of the class'); and (4) adequacy of representation (representatives 'will fairly and  
267 adequately protect the interests of the class')." 521 U.S. 591, 613 (1997). Under subpart (b),  
268 Plaintiffs primarily seek certification pursuant to subpart (b)(3), which requires a finding that  
269 "questions of law or fact common to class members predominate over any questions affecting  
270 only individual members, and that a class action is superior to other available methods for fairly  
271 and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). Alternatively, Plaintiffs  
272 seek certification pursuant to subpart (b)(2), which is appropriate when "the party opposing the  
273 class has acted or refused to act on grounds that apply generally to the class, so that final  
274 injunctive relief or corresponding declaratory relief is appropriate respecting the class as a  
275 whole." Fed. R. Civ. P. 23(b)(2).

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

287 *Inc.*, 457 F.3d 291, 297 (3d Cir. 2006)). “A class certification decision requires a thorough  
288 examination of the factual and legal allegations.” *Id.* (quoting *Newton v. Merrill Lynch, Pierce,*  
289 *Fenner & Smith, Inc.*, 259 F.3d 154, 166 (3d Cir. 2001)). In this regard, “the requirements set  
290 out in Rule 23 are not mere pleading rules”; “[t]he court may delve beyond the pleadings to  
291 determine whether the requirements for class certification are satisfied.” *Id.* at 316 (internal  
292 quotation marks and citations omitted). The class certification decision “calls for findings by the  
293 court, not merely a ‘threshold showing’ by a party, that each requirement of Rule 23 is met,” and  
294 “the court must resolve all factual or legal disputes relevant to class certification, even if they  
295 overlap with the merits—including disputes touching on elements of the cause of action.” *Id.* at  
296 307; *see also Hohider v. United Parcel Serv., Inc.*, 574 F.3d 169, 197 (3d Cir. 2009) (explaining  
297 that “rigorous analysis” under *Hydrogen Peroxide* requires the district court to “determine what  
298 elements plaintiffs would have to prove under [their] theory to reach a finding of liability and  
299 relief, and then assess whether this proof can be made within the parameters of Rule 23”).  
300 “Factual determinations necessary to make Rule 23 findings must be made by a preponderance of  
301 the evidence.” *Hydrogen Peroxide*, 552 F.3d at 320.<sup>2</sup>

---

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

302 Plaintiffs challenge the *Hydrogen Peroxide* standard on two fronts. Plaintiffs first argue  
303 that “*Hydrogen Peroxide* left intact . . . the rule in the Third Circuit that Rule 23 should receive a  
304 liberal construction.” (Pls.’ Br. at 12). Next, Plaintiffs contend that Ford’s reading of *Hydrogen*  
305 *Peroxide* is contrary to the Supreme Court’s recognition that class certification analysis does not  
306 involve an inquiry into whether individual plaintiffs will prevail on the merits (Pls.’ Reply Br.  
307 at 6 (citing *Eisen v. Carlisle & Jacqueline*, 417 U.S. 156, 177-78 (1974)). Both contentions lack  
308 merit, because the Third Circuit rejected both of Plaintiffs’ contentions in *Hydrogen Peroxide*,  
309 552 F.3d at 316-17 & n.18, 321-22; *see also Merlo v. Federal Express Corp.*, No. 07-4311, 2010  
310 WL 2326577, at \*3-4 (D.N.J. May 7, 2010) (assessing and rejecting similar arguments under  
311 *Hydrogen Peroxide*).

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

---

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

321 ‘doubt’ as to whether a Rule 23 requirement is met—no matter the area of substantive law.” *Id.*;  
322 *see also In re Schering Plough Corp. ERISA Litig.*, 589 F.3d at 600 n.14. Plaintiffs cite the 2009  
323 case *In re Constar Int’l Inc. Sec. Litig.*, 585 F.3d 774 (3d Cir. 2009) to suggest that *Hydrogen*  
324 *Peroxide* “left intact” the prior “liberal construction” rule (Pls.’ Br. at 12), but Plaintiffs  
325 misrepresent what *Constar* held. Far from an endorsement of the “liberal construction” rule  
326 expressly repudiated by *Hydrogen Peroxide*, *Constar* considered whether the special master’s  
327 and district court’s passing references to the “liberal construction” rule in their decisions that  
328 predated *Hydrogen Peroxide* rendered the class certification analysis invalid after the Court of  
329 Appeals decided *Hydrogen Peroxide*. The *Constar* court found the error harmless, because the  
330 district court did not actually apply the “liberal construction” rule and the substance of the district  
331 court’s analysis complied with the standard pronounced in *Hydrogen Peroxide*. 585 F.3d at 781-  
332 82 (explaining that references to the “liberal construction” rule “were not conclusions, but rather  
333 a preface to further analysis”).

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

343 as it is ‘necessary’ to determine whether a class certification requirement is met.”). Previously,  
344 our Circuit explained in *Newton* that the circumstances of *Eisen* support a narrow reading of its  
345 holding, because the preliminary merits inquiry encountered by the *Eisen* Court involved a  
346 district court’s decision to shift costs (notification of class members) to the defendant that was  
347 based on that court’s determination that the plaintiff was likely to succeed on the merits of his  
348 claim. *Newton*, 259 F.3d at 166. Accordingly, our Circuit has determined that “*Eisen* is best  
349 understood to preclude only a merits inquiry that is not necessary to determine a Rule 23  
350 requirement.” *Hydrogen Peroxide*, 552 F.3d at 317 (citing *Newton*, 259 F.3d at 166-69). The  
351 *Hydrogen Peroxide* court bolstered this portion of its ruling by noting that the Courts of Appeals  
352 for the First, Second, Fourth, Fifth, and Seventh Circuits have similarly construed *Eisen* not to  
353 preclude consideration of the merits to the extent necessary to make Rule 23 findings. 552 F.3d  
354 at 317 n.17 (citing *In re New Motor Vehicles Canadian Exp. Antitrust Litig.*, 522 F.3d 6, 24 (1st  
355 Cir. 2008); *In re Initial Pub. Offering Sec. Litig.*, 471 F.3d 24, 41 (2d Cir. 2006); *Gariety v.*  
356 *Grant Thornton, LLP*, 368 F.3d 356, 366 (4th Cir. 2004); *Oscar Private Equity Invs. v.*  
357 *Allegiance Telecom, Inc.*, 487 F.3d 261, 268 (5th Cir. 2007); *Szabo v. Bridgeport Machs., Inc.*,  
358 249 F.3d 672, 677 (7th Cir. 2001)). Recently, the Third Circuit echoed its *Hydrogen Peroxide*  
359 decision. *See Sullivan v. DB Invs., Inc.*, 2011 U.S. App. LEXIS 25185, at \*68 (3d Cir. Dec. 20,  
360 2011) (“[A] district court may inquire into the merits of the claims presented in order to  
361 determine whether the requirements of Rule 23 are met, but not in order to determine whether the  
362 individual elements of each claim are satisfied.”).

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

365 Ct. 2541 (2011) is consistent with the *Hydrogen Peroxide* rule. See *Behrend*, 655 F.3d at 190 n.6  
366 (“The Supreme Court confirmed [the Third Circuit’s] interpretation of the Rule 23 inquiry in  
367 *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 180 L. Ed. 2d 374 (2011).”). *Wal-Mart* begins  
368 with a reminder that “[t]he class action is ‘an exception to the usual rule that litigation is  
369 conducted by and on behalf of the individual named parties only.’” *Id.* at 2550 (quoting *Califano*  
370 *v. Yamasaki*, 442 U.S. 682, 700-701 (1979)). *Wal-Mart* further recognized that “rigorous  
371 analysis” under Rule 23 “[f]requently . . . will entail some overlap with the merits of the  
372 plaintiff’s underlying claim. That cannot be helped.” *Id.* at 2551. The *Wal-Mart* Court also  
373 addressed the limited scope of *Eisen*’s prohibition on merits inquiries, explaining that the  
374 preliminary merits inquiry conducted by the trial judge in that case had no bearing on the class  
375 certification analysis. *Id.* at 2552 n.6. “To the extent the [*Eisen*] statement goes beyond the  
376 permissibility of a merits inquiry for any other pretrial purpose,” the *Wal-Mart* Court stated, “it is  
377 the purest dictum and is contradicted by our other cases.” *Id.*; see also *Sullivan*, 2011 U.S. App.  
378 LEXIS 25185, at \*49 (“[T]he focus is on whether the defendant’s conduct was common as to all  
379 of the class members, not on whether each plaintiff has a ‘colorable’ claim.”) (quoting *Wal-Mart*,  
380 131 S. Ct. at 2551).

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

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

389 With the above considerations in mind, the Court turns to Ford's challenges to Plaintiffs'  
390 proposed classes. Ford addresses its objections to Plaintiffs' showings under subparts (b)(2) and  
391 (b)(3). First, Ford objects that Plaintiffs' proposed classes fail to exclude named class members  
392 whose claims were previously dismissed on the merits by Chief Judge Brown's summary  
393 judgment opinions. Second, Ford contests Plaintiffs' proposed classes for each jurisdiction on a  
394 claim-by-claim basis, arguing that individualized fact issues defeat predominance under Rule  
395 23(b)(3) with regard to each proposed class. Third, Ford argues that Plaintiffs cannot avail  
396 themselves of Rule 23(b)(2), because Plaintiffs primarily seek monetary relief, and because the  
397 same individual issues that defeat predominance under Rule 23(b)(3) preclude certification under  
398 Rule 23(b)(2). The Court considers each argument in turn.

399 I. CLASS DEFINITIONS & PREVIOUSLY DISMISSED CLAIMS

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

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

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

413 Turning to the Texas consumer fraud claim under the Texas Deceptive Trade  
414 Practices-Consumer Protection Act (DTPA), Tex. Bus. & Com. Code § 2.313 *et seq.*, Chief  
415 Judge Brown granted summary judgment in favor of Ford on Texas Plaintiff St. Luke's claim  
416 that Ford's description of the E-350 van as a "15-passenger van" misrepresented the van's ability  
417 to safely carry 15 passengers. July 9 Opinion, 2010 WL 2813788, at \*54. Chief Judge Brown  
418 left intact, however, St. Luke's omission-based theory of a DTPA violation under § 17.46(b)(24).  
419 *Id.* at \*55. Plaintiffs' proposed classes do not distinguish between class members having a  
420 misrepresentation-based consumer fraud claim and an omission-based consumer fraud claim.  
421 Yet, the July 9 Opinion differentiated between the underlying factual predicates for these claims,  
422 and why omission was the only viable theory under the DTPA. With regard to Plaintiffs' claim  
423 that Ford implicitly represented that the E-350 van could safely carry 15 passengers by  
424 describing, or "packaging" the E-350 van as a "15-passenger" van, Chief Judge Brown concluded  
425 that this representation was too vague under Texas law to be actionable under DTPA  
426 §§ 17.46(b)(5), (b)(7), and (b)(9). *Id.* at \*54 ("An imprecise or vague representation amounts to  
427 mere opinion or puffing. Here, under the particular undisputed facts of this case, Ford's  
428 description of the E-350 van as a 15-passenger van did not include any representation of safety,  
429 and does not rise to the level required for a violation of [DTPA] § 17.46(b)(5).") (citation  
430 omitted). Not only did this ruling eliminate the only named Texas Plaintiff's DTPA

431 misrepresentation claim, but it categorically rejected the contention that any Texas Plaintiff could  
432 bring such a claim. Conversely, as Plaintiffs’ recognize in their reply brief (Pls.’ Reply Br. at 27  
433 n.18, 29) (citing Compl. ¶ 31), the surviving omission claim under DTPA § 17.46(b)(24) was  
434 predicated on allegations that Ford failed to disclose to consumers that, due to stability issues, the  
435 E-350 van should only be driven by “trained experienced drivers.” *See* July 9 Opinion, 2010 WL  
436 2813788, at \*55. Plaintiffs recognize that they cannot proceed with a DTPA misrepresentation  
437 claim in light of the July 9 Opinion. (*See* Pls.’ Reply Br. at 27-29). Thus, to the extent that  
438 Plaintiffs seek certification of a DTPA claim on behalf of Texas class members, the Court will  
439 assess Rule 23(b)(3) predominance for Plaintiffs’ proposed class through the lens of the  
440 § 17.46(b)(24) omission claim permitted by the July 9 Opinion.<sup>3</sup>

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

---

<sup>3</sup>As noted in this Court’s extensive discussion of “rigorous analysis” under Rule 23, the Court limits its merits analysis to whether Plaintiffs can satisfy the requirements of Rule 23 for the relevant claim, and does not presently consider whether Plaintiffs have meritorious claims.

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

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

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

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

466 The predominance requirement of subpart (b)(3) “tests whether proposed classes are  
467 sufficiently cohesive to warrant adjudication by representation,” and is a “far more  
468 demanding” requirement than the commonality requirement of subpart (a). *Hydrogen Peroxide*,  
469 552 F.3d at 311 (quoting *Amchem*, 521 U.S. at 623-24). Predominance “requir[es] more than a  
470 common claim,” and “[i]ssues common to the class must predominate over individual issues[.]”  
471 *Id.* (citation omitted). “Because the nature of the evidence that will suffice to resolve a question  
472 determines whether the question is common or individual, a district court must formulate some

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

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

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

492

---

<sup>4</sup>The Court notes that Plaintiffs sorted their arguments by claim and not by jurisdiction. The Court has endeavored to match Plaintiffs’ opposition arguments to Ford’s jurisdiction-specific objections.

493           A. *New York*

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

500                     1. *Consumer Fraud, N.Y. Gen. Bus. Law § 349*<sup>5</sup>

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

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

---

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

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

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

534 transportation.” (Pls.’ Reply Br. at 27). Plaintiffs further argue that deception is measured by an  
535 objective standard, because New York law does not require a showing of reliance. Citing Florida  
536 case law, Plaintiffs state that “causation may be established with proof that Ford’s conduct ‘was  
537 likely to deceive a consumer acting reasonably in the same circumstances.’” (Pls.’ Br. at 36;  
538 Pls.’ Reply Br. at 26) (citations omitted). Finally, Plaintiffs contend that they have presented  
539 common evidence of injury in the form of an inherent design defect that manifests on every  
540 vehicle—an inability to “safely carry 15 passengers.” (Pls.’ Br. at 36; *see also* Pls.’ Reply Br. at  
541 33). Plaintiffs point to two decisions of the New York Court of Appeals that they claim enable  
542 them to present common proof of deception and causation under GBL § 349. First, Plaintiffs  
543 argue that *Oswego Fund v. Marine Midland Bank* set an objective “reasonable consumer”  
544 standard for determining whether or not an alleged representation was deceptive. *See* 647 N.E.2d  
545 741 (N.Y. 1995). Second, Plaintiffs invoke *Stutman v. Chemical Bank* for the proposition that  
546 they can show common proof of causation simply by showing that the alleged misrepresentations  
547 were “material.” *See* 731 N.E.2d 608 (N.Y. 2000). With regard to injury, Plaintiffs cite  
548 *Ackerman v. Coca-Cola Co.*, No. 09-0395, 2010 WL 2925955 (E.D.N.Y. July 21, 2010) and *In*  
549 *re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litigation*, 55 F.3d 768  
550 (3d Cir. 1995), for the proposition that they can claim a common, benefit-of-the-bargain, or  
551 diminution in value, injury.

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

556 *a. Misrepresentation*

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

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

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

---

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

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

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

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

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

---

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

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

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

635 *b. Deception & Causation*

636 The parties agree that, while New York's consumer fraud law does not require a showing  
637 of reliance, it does require a showing of deception and causation. *See, e.g., Oswego*, 647 N.E.2d  
638 at 745 (“[W]hile the statute does not require proof of justifiable reliance, a plaintiff seeking  
639 compensatory damages must show that the defendant engaged in a material deceptive act or  
640 practice that caused actual, although not necessarily pecuniary, harm.”). Plaintiffs argue that  
641 they can show common proof of deception and causation, because *Oswego* adopted an objective  
642 “reasonable consumer” standard for determining consumer deception under GBL § 349. Yet, the  
643 issue of deception is less clear than Plaintiffs would have this Court believe. True, the *Oswego*  
644 court stated that it was adopting “an objective definition of deceptive acts and practices,” *id.* at  
645 745, but in applying that standard, the court considered “whether a reasonable consumer *in*  
646 *plaintiffs' circumstances* might have been misled,” *id.* (emphasis added) (finding record  
647 inconclusive). Elsewhere, the court reasoned that “the [defendant] Bank’s liability under the  
648 statute will depend, in part, on whether plaintiffs possessed or could reasonably have obtained  
649 the relevant information they now claim the Bank failed to provide.” *Id.* These statements  
650 suggest that, while a reasonable consumer standard applies, some consideration of the plaintiff’s

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

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

672 (Pentecostal Temple). *See* July 9 Opinion, 2010 WL 2813788, at \*19-20, 45, 68-69.<sup>9</sup> It cannot  
673 be denied that these Plaintiffs’ injuries were caused by any representation or omission by Ford,  
674 and, accordingly, these Plaintiffs’ claims have been dismissed. For remaining Plaintiffs and  
675 putative class members, the presiding court would need to conduct individualized inquiries to  
676 determine if their claims similarly lacked causation, and Plaintiffs offer no common proof to  
677 overcome this hurdle. *See, e.g., In re Currency Conversion Fee Antitrust Litig.*, 230 F.R.D. 303,  
678 310-11 (S.D.N.Y. 2004) (denying certification of class of consumers claiming that credit card  
679 provider misrepresented and/or failed to disclose its policy for charging currency conversion fees  
680 on international transactions, because each plaintiff had to show causation, and “[s]uch a  
681 showing entails individual inquiries, including an examination of each cardholder’s  
682 understanding [of the credit terms]”); *Newman*, 238 F.R.D. at 75 (same, noting numerous issues  
683 of causation, including whether each class member saw the alleged misrepresentations, was  
684 influenced by the same, and the availability of alternative information).

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

---

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

689 released a study concerning the rollover propensity of 15-passenger vans (including the E-350  
690 van) in April 2001, that Ford issued a safety advisory in September 2002 instructing consumers  
691 to use trained drivers for the E-350 van, and that CBS aired a news segment about the dangers of  
692 the E-350 van in an episode of “Sixty Minutes II” in September 2002. (Compl. ¶¶ 28, 31, 38,  
693 61(e)). Considering that Plaintiffs’ primary theory of damages at the class certification stage is a  
694 common benefit-of-the-bargain injury, it stands to reason that the consumers who saw these  
695 reports and understood the E-350 van to have significant handling problems will have a difficult  
696 time proving causation, and in doing so, they would not rely on common proof. This observation  
697 is not mere speculation; the record reflects that a number of Plaintiffs reported seeing different  
698 news releases at different times. *See, e.g.*, July 9 Opinion, 2010 WL 2813788, at \*5 (First  
699 United), 34 (Allen Temple). Moreover, Plaintiffs’ concede in their reply brief that the various  
700 government reports and news articles about the E-350 van “may have disclosed (on a classwide  
701 basis no less) ‘rollover issues associated with [Extended Passenger Vans.]’” (Pls.’ Reply Br. at  
702 31).<sup>10</sup> Plaintiffs’ proposed class makes no effort to exclude persons having knowledge of the  
703 van’s handling problems at the time of purchase. Given the vastly different experiences of  
704 named Plaintiffs, it would take individualized causation inquiries to determine which putative  
705 class members saw such news reports prior to their purchase of an E-350 and understood the van

---

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

706 to have handling problems.

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

728  
729  
730  
731  
732  
733  
734  
735  
736  
737  
738  
739  
740  
741  
742  
743  
744  
745  
746  
747  
748  
749

*c. Injury*

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

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

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

---

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

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

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

783 First, this Court is not persuaded by Plaintiff’s argument that this case fundamentally  
784 differs from a risk-of-failure case. The summary judgment record revealed that some Plaintiffs  
785 did not experience any handling problems and/or continued to fill their vans to capacity  
786 whenever suitable to their transportation needs. *See* July 9 Opinion, 2010 WL 2813788, at \*4  
787 (Greater All Nation: some handling problems, fills van to capacity of 12, based on seat size), 46  
788 (Mestre: some handling problems with one van, filled both vans to capacity during ownership),  
789 51 (St. Luke’s: no handling problems, voluntarily limited capacity to 12), 56 (St. James: no  
790 handling problems, voluntarily limited capacity to 12), 62 (Conant Avenue: some minor handling

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

---

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

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

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

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

828  
829 *Id.* at 16-17. In reaching its decision, *Frank* cited with approval a number of appellate decisions  
830 that rejected consumer claims for inherent automobile part defects where the consumer did not  
831 claim manifestation of the defect. *Id.* at 15 (citing *Carlson v. Gen. Motors Corp.*, 883 F.2d 287  
832 (4th Cir. 1989) (claims of inherently defective diesel engines); *Briehl v. Gen. Motors Corp.*, 172  
833 F.3d 623 (8th Cir. 1999) (claims of inherently defective anti-lock brake systems)). Chief Judge  
834 Brown properly recognized that *Frank* stopped short of requiring manifestation of the defect; yet,

835 in the absence of such manifestation, *Frank* still required the plaintiff to present evidence of an  
836 actual injury, in the form of out-of-pocket repair costs or sale at a loss. July 9 Opinion, 2010 WL  
837 2813788, at \*71 (distinguishing *Frank* from Arkansas case law). Here, some Plaintiffs did not  
838 report detectable handling difficulties<sup>13</sup> or repair costs, and it appears that no Plaintiffs claim to  
839 have sold an E-350 van at a loss as a result of the van’s handling reputation. *Cf. id.* at \*57  
840 (applying *Briebl*, 172 F.3d at 626-29, and granting summary judgment against St. James’s claims  
841 because “St. James has not sold its vehicles, has no specific plan to do so, and has not identified  
842 any reduced resale value”). The speculative nature of the asserted “common injury” is revealed  
843 by the fact that Plaintiffs do not offer any evidence of how the E-350’s handling compares to its  
844 contemporary competitors or industry standards for extended passenger vans. Indeed, Plaintiffs’  
845 summary judgment brief stated that it would “rely on expert testimony to determine *if*, and how  
846 much, prices of the new and used vans reflected their publicized problems.” (Doc. No. 247 at  
847 37) (emphasis added). Under these circumstances, the Court fails to see how Plaintiffs can assert  
848 a common, actual injury under *Frank*, without resorting to the sort of speculation that *Frank* was  
849 concerned about. Ultimately, this Court does not decide the merits of Plaintiffs’ proofs of injury.

---

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

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

855 Second, the Court notes that Chief Judge Brown bolstered his *Frank* analysis with the  
856 benefit-of-the-bargain analysis provided by a decision from the Southern District of New York  
857 that rejected unjust enrichment claims where the product had not malfunctioned. July 9 Opinion,  
858 2010 WL 2813788, at \*72 (quoting *In re Canon Cameras*, 237 F.R.D. 357, 359-60 (S.D.N.Y.  
859 2006)). The *Canon Cameras* court reasoned that “[a] plaintiff who purchases a digital camera  
860 that never malfunctions over its ordinary period of use cannot be said to have received less than  
861 what he bargained for when he made the purchase.” 237 F.R.D. at 360. Chief Judge Brown  
862 likened this reasoning to the actual injury requirement of *Frank*, and concluded that New York  
863 Plaintiff Barrett could not show he was deprived of the benefit-of-the-bargain, because he had  
864 not shown that his van malfunctioned, or that he had suffered actual injury. July 9 Opinion, 2010  
865 WL 2813788, at \*72.<sup>14</sup> Plaintiffs’ primary damages theory is a benefit-of-the-bargain theory,  
866 predicated on UCC § 2-714, but Plaintiffs do not address this adverse ruling, and Plaintiffs do  
867 not suggest that GBL § 349 has a lower benefit-of-the-bargain threshold than an unjust  
868 enrichment claim. Further, Plaintiffs offer no explanation for how class members like

---

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

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

876 Third, this Court notes that Plaintiffs’ proposed classes do not reflect the fact that the  
877 bubble market on E-350 vans ended, by their own account, in April 2004. *See* July 9 Opinion,  
878 2010 WL 2813788, at \*44 (“[A]ll Plaintiffs admitted in their Responses and Objections to Ford’s  
879 Second Set of Written Interrogatories that ‘[t]he artificial demand for the E-350 15 passenger  
880 vans, as referred to in the Complaint, is believed to have eroded fully by April, 2004, when the  
881 [National Highway Traffic Safety Administration] reissued a safety warning concerning  
882 15-passenger vans.’”). Further, as previously noted, Plaintiffs’ proposed classes do not take into  
883 account the numerous public reports about the E-350’s handling problems that they concede were  
884 issued between 2000 and 2004. (*See* Compl. ¶¶ 25-47, 61(e)) (identifying numerous public  
885 reports and broadcasts that were released between 2000 and 2004). Plaintiffs have modified their  
886 proposed unjust enrichment class to exclude vans purchased after April 2004, consistent with  
887 their position on the van’s bubble market, but Plaintiffs have not modified their other classes in  
888 the same way, and Plaintiffs’ proposed classes still do not account for the consumers who viewed  
889 the news releases prior to purchase. To the extent that Plaintiffs assert that class members who  
890 purchased their vans after the first of these public reports (circa 2000) have a common benefit-of-

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

899 *Ackerman*, 2010 WL 2925955, and *General Motors Corp. Pick-Up Truck Fuel Tank*, 55  
900 F.3d 768, cited by Plaintiffs, do not compel a different conclusion. With regard to *Ackerman*,  
901 that court held on a motion to dismiss that "[i]njury is adequately alleged under GBL §§ 349 or  
902 350 by a claim that a plaintiff paid a premium for a product based on defendants' inaccurate  
903 representations." 2010 WL 2925955, at \*23. The plaintiffs in *Ackerman* alleged that they paid a  
904 premium for a beverage marketed "as a fortified beverage, a dietary supplement in liquid form."  
905 *Id.* Here, Plaintiffs state they have common proof of an inherent design defect that prevented the  
906 E-350 van from being the 15-passenger van they were promised. But as noted above, different  
907 Plaintiffs were exposed to different representations, if at all, regarding the van's capabilities, and  
908 not all Plaintiffs experienced the alleged handling problems in their use of the van. Further,  
909 Plaintiffs concede that post-April 2004 purchasers did not pay a premium on the van. *Ackerman*

---

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

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

917         As for *In re General Motors*, that court suggested that "[t]he cost of a retrofit . . . may  
918 constitute an alternative measure of the damages arising from [a] breach of warranty." 55 F.3d at  
919 816. At first blush, this case appears to provide strong support for Plaintiffs' argument in this  
920 case, because that case involved similar consumer claims of an inherent vehicle design defect  
921 (certain GM trucks contained dangerously defective fuel tanks) that affected the resale value of  
922 those trucks. However, the court's decision arose in the context of assessing the adequacy of a  
923 class settlement. Thus, *In re General Motors* did not address whether the cost of a retrofit  
924 constituted sufficient injury under a particular state's law (New York GBL § 349 or otherwise) to  
925 state a claim, and, in fact, the court recognized that other jurisdictions have rejected warranty  
926 claims asserting diminution in value for damages. *See id.* This Court therefore does not read *In*  
927 *re General Motors*' discussion of using the cost of a retrofit as an alternative measure of damages  
928 to displace New York's substantive requirement of actual injury. Indeed, a Maryland decision  
929 cited favorably by Plaintiffs, *Lloyd v. General Motors Corp.*, recognized that New York law  
930 differed from more lenient jurisdictions by requiring an actual injury showing. 916 A.2d 257,  
931 292-93 (Md. 2007) (citing *Frank* and *Weaver v. Chrysler Corp.*, 172 F.R.D. 96 (S.D.N.Y. 1997))

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

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

#### 940 *2. Implied Warranty*

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

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

954 concerning whether the implied warranty existed at the time of purchase, in the case of used E-  
955 350 vans, or expired prior to the point when a given class member suffered an actual injury.  
956 (Ford Resp. Br. at 28-29). Next, Ford submits that Plaintiffs do not have classwide proof of a  
957 design defect, which Ford claims must be determined by reference to a risk-utility balancing test.  
958 (*Id.* at 30). Third, Ford contends that Chief Judge Brown’s *Frank* rulings demonstrate that  
959 Plaintiffs do not have common proof of actual injury, for the same reason that Plaintiffs did not  
960 have common proof of actual injury under GBL § 349. (*Id.* at 32-33). Finally, Ford argues that  
961 Plaintiffs do not have common proof of causation. (*Id.* at 35-36).

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

---

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

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

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

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

---

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

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

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

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

---

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

995 a plaintiff must “prove cause in fact and proximate causation on the part of a specific defendant”)  
996 (quoting 1 White and Summers, Uniform Commercial Code § 9-1, at 436 [3d ed.]); *Complaint of*  
997 *Am. Export Lines, Inc.*, 620 F. Supp. 490, 518 (S.D.N.Y. 1985). The varied experiences of  
998 named Plaintiffs reveal that some had actual knowledge of the van’s handling problems, if not  
999 the exact design defect that caused those handling characteristics. For instance, Florida Plaintiff  
1000 Blandon, prior to purchasing her used 2000 E-350 van in 2006, had lost control while driving  
1001 another E-350 van and had participated in numerous discussions with co-workers regarding the  
1002 van’s handling characteristics and relative safety. July 9 Opinion, 2010 WL 2813788, at \*49-50  
1003 (granting summary judgment against Blandon’s claims, because of Blandon’s actual knowledge  
1004 of the alleged defect). Similarly, New York Plaintiff Barrett told his E-350 salesman that a friend  
1005 of his had experienced a rollover, and that the van should not be driven by inexperienced drivers.  
1006 *Id.* at \*69. Class members with similar knowledge of the handling problems—whether from  
1007 personal experience or from viewing the numerous public reports identified in Plaintiffs’  
1008 Complaint—would not be able to prove causation under New York law and, more importantly  
1009 for purposes of this class certification decision, would not share common proof of causation.  
1010 The proof would consist of their unique, individual consumer experiences.

1011 This Court finds instructive the Second Circuit’s decision in *Sobiech v. International*  
1012 *Staple & Machine Co.*, which held, under New York law, that the plaintiff could not maintain  
1013 action for breach of implied warranty because he knew of a product’s (vegetable packaging  
1014 machine) defects from personally using the product on a trial basis prior to purchase. 867 F.2d  
1015 778, 782-83 (2d Cir. 1989). In doing so, the *Sobiech* court relied on N.Y. U.C.C. § 2-316(3)(b),  
1016 which states that there are no implied warranties “with regard to defects which an examination

1017 ought in the circumstances to have [been] revealed” when the buyer has an opportunity to inspect  
1018 the goods prior to purchase. *See also* N.Y. U.C.C. §§ 2-314 Cmt. 13 (“In an action based on  
1019 breach of warranty, it is of course necessary to show not only the existence of the warranty but  
1020 the fact that the warranty was broken and that the breach of the warranty was the proximate cause  
1021 of the loss sustained.”); 2-316 Cmt. 8 (“Of course if the buyer discovers the defect and uses the  
1022 goods anyway, or if he unreasonably fails to examine the goods before he uses them, resulting  
1023 injuries may be found to result from his own action rather than proximately from a breach of  
1024 warranty. . . . The particular buyer’s skill and the normal method of examining goods in the  
1025 circumstances determine what defects are excluded by the examination. A failure to notice  
1026 defects which are obvious cannot excuse the buyer.”). These principles apply with equal force  
1027 here, where some Plaintiffs knew of the handling issues from personal experience (Barrett,  
1028 Blandon), and others no doubt knew of the handling issues from the numerous public reports,  
1029 articles, and broadcast announcements about the E-350 van’s rollover propensity that Plaintiffs  
1030 identified in the Complaint. (*See* Compl. ¶¶ 25-47) (identifying numerous public reports and  
1031 broadcasts that were released between 2000 and 2004). Plaintiffs argue that Ford has not made a  
1032 showing that any class members had “actual knowledge” of the defect prior to purchase (Pls.’  
1033 Reply Br. at 20 n.13), but Plaintiffs’ assessment is wholly contradicted by the summary judgment  
1034 record.<sup>19</sup>

---

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

1035 In light of this record, the Court concludes that it is likely that a fair number of the  
 1036 putative class members had actual knowledge of the E-350's handling difficulties at the time of  
 1037 purchase, whether from personal experience or from public announcements. These class  
 1038 members would not be able to show causation to support their implied warranty claims.<sup>20</sup>  
 1039 Sorting out those who knew of the defect from personal use from those who learned from public  
 1040 reports, as well as from those having no knowledge, will require numerous individual inquiries.  
 1041 Because of the individual variations in proof for both actual injury and causation, the Court will

---

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

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

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

1042 deny certification of the New York implied warranty claim.

1043 *B. Texas*

1044 The sole remaining Texas claim is St. Luke's omission claim under DTPA  
1045 § 17.46(b)(24). *See* July 9 Opinion, 2010 WL 2813788, at \*55. Ford objects that Plaintiffs  
1046 cannot prove their Texas consumer fraud claims with common proof, because there is no  
1047 classwide evidence of the elements of the DTPA claim: (1) a uniform omission; (2) deception;  
1048 (3) actual injury; and (4) causation. The parties generally rely on the same consumer fraud  
1049 arguments that this Court addressed in the New York section, *supra* Part II.A.1. The Court  
1050 agrees with Ford that common issues of law and fact do not predominate.

1051 Texas Plaintiffs' omission claim is predicated on allegations that Ford failed to disclose  
1052 to consumers that, due to stability issues, the E-350 van should only be driven by trained  
1053 experienced drivers. (*See* Compl. ¶ 31; Pls.' Reply Br. at 27 n.18, 29). As detailed above, the  
1054 undisputed record in this case reveals that the safety instructions in E-350 owner's manuals  
1055 changed throughout the proposed class period. For instance, whereas the owner's guides for  
1056 model-year 2000-2002 E-350 vans included general notices about the vehicle's handling  
1057 capabilities and urged "[e]xtra precautions, such as slower speeds and increased stopping  
1058 distance, . . . when driving a heavily loaded vehicle," the owner's guides for model-year 2003-  
1059 2005 E-350 vans added a "Vehicle Stability and Handling" section, which stated that "[t]he risk  
1060 of a rollover crash increases as the number of people and load in the vehicle increase," and  
1061 advised that "[t]he van should be operated by an experienced driver." (*See* Doc. No. 292, Smith  
1062 Decl. Ex. 12). Naturally, then, Plaintiffs cannot assert a uniform alleged omission, because  
1063 differing amounts of information were disclosed at different times.

1064           The Court is less sanguine about Ford’s deception argument, which primarily relies on  
1065 case law from other jurisdictions. (*See* Ford’s Br. at 42-43). As noted in the discussion of New  
1066 York law, it is unclear whether New York applies a purely objective or quasi-subjective standard  
1067 for determining deception. In the absence of clear guidance from Texas cases or statutes, the  
1068 Court will not weigh this factor against Plaintiffs.

1069           The Court is also hesitant to accept Ford’s argument that Texas Plaintiffs cannot show  
1070 actual injury with common proof under the Texas Supreme Court’s ruling in *DaimlerChrysler*  
1071 *Corp. v. Inman*, 252 S.W.3d 299 (Tex. 2008). St. Luke’s and, presumably, Texas class members  
1072 seek damages based on diminution in value of the van. St. Luke’s also asserts loss of use. Chief  
1073 Judge Brown distinguished the deficient pleadings in *Inman* from St. Luke’s pleadings in this  
1074 case, explaining “[a]s the Supreme Court of Texas noted, the *Inman* plaintiffs did *not* contend  
1075 that the allegedly defective ‘buckles made their vehicles worth less than they paid for them.’”  
1076 July 9 Opinion, 2010 WL 2813788, at \*52 (quoting *Inman*, 252 S.W.3d at 302). Here, all  
1077 Plaintiffs, including St. Luke’s and putative class members, assert that the defective design of the  
1078 E-350 van made their vehicles worth less than they paid for them. (*See, e.g.,* Pls.’ Br. at 35-36)  
1079 (stating that Plaintiffs paid for more than they received, in an amount of \$2,100). Ford asks for  
1080 this Court to recognize that the Texas Supreme Court has adopted an actual injury requirement  
1081 similar to the one articulated in *Frank* (New York). Yet, Chief Judge Brown’s ruling did not  
1082 make this connection, and Ford does not identify Texas authority to support this point. Under  
1083 these circumstances, the Court will presume that Texas Plaintiffs can present common proof of  
1084 an injury, sufficient to have standing under *Inman*.

1085           However, the Court agrees with Ford that Plaintiffs cannot present classwide proof of

1086 reliance or causation. As Chief Judge Brown recognized in the July 9 Opinion, “[r]eliance is an  
1087 essential element of a DTPA claim . . . .” 2010 WL 2813788, at \*53 (citing Tex. Bus. & Com.  
1088 Code § 17.50(a)(1)(B); *Morgan Bldgs. & Spas, Inc. v. Humane Soc’y of S.E. Texas*, 249 S.W.3d  
1089 480, 490 (Tex. App. 2008)). Applied to St. Luke’s claim, “to satisfy the reliance element for an  
1090 omission, a plaintiff must show that defendant had intent to induce a transaction through failure  
1091 to disclose, and that plaintiff would not have entered into the transaction if the information had  
1092 been disclosed.” July 9 Opinion, 2010 WL 2813788, at \*55. Ford correctly points out that Texas  
1093 courts have acknowledged that claims requiring a showing of reliance—including the  
1094 DTPA—involve many individualized inquiries that usually cannot be resolved through class  
1095 litigation. Texas courts have reached this conclusion in the aftermath of the Texas Supreme  
1096 Court’s decertification decision in *Henry Schein, Inc. v. Stromboe*, which recognized that class  
1097 members “are held to the same standards of proof of reliance—and for that matter all the other  
1098 elements of their claims—that they would be required to meet if each sued individually.” 102  
1099 S.W.3d 675, 693 (Tex. 2002) (decertifying a class of contract, warranty, and DTPA claims for,  
1100 *inter alia*, failure to present classwide proof of reliance). In other words, *Schein* held that “[t]he  
1101 burden on plaintiffs to prove reliance in order to recover on any of these theories is in no way  
1102 altered by the assertion of claims on behalf of a class.” *Id.* After *Schein*, multiple appellate  
1103 courts in Texas rejected class certification of consumer fraud claims, explaining that “[p]roof of  
1104 reliance or lack of reliance necessarily requires an *individualized* determination because, under  
1105 all the same facts and circumstances, one person may have relied on the misrepresentation in  
1106 reaching a decision while another did not rely on it in reaching the same decision.” *Texas South*  
1107 *Rentals, Inc. v. Gomez*, 267 S.W.3d 228, 237 (Tex. App. 2008) (quoting *Fid. & Guar. Life Ins.*

1108 *Co. v. Pina*, 165 S.W.3d 416, 423 (Tex. App. 2005); *Grant Thornton, L.L.P. v. Suntrust Bank*,  
1109 133 S.W.3d 342, 355 (Tex. App. 2004)). As of 2008, no Texas appellate court since *Schein* had  
1110 found evidence of classwide reliance. *Gomez*, 267 S.W.3d at 237 (noting that the courts of  
1111 appeals had “questioned whether given the individualized nature of reliance, any class action  
1112 could ever be certifiable under *Schein*”). Ford concedes, however, that the Texas Supreme Court  
1113 did find classwide proof of reliance last year in *Southwestern Bell Telephone Company v.*  
1114 *Marketing On Hold Inc.*, 308 S.W.3d 909 (Tex. 2010). *Southwestern Bell* recognized that  
1115 “Texas courts have been reluctant to certify a class when proof of reliance is required as an  
1116 element of a claim” since *Schein*, and restated that class certification is improper “[w]hen  
1117 evidence existed that individual class members’ experiences reasonably could have varied . . . .”  
1118 *Sw. Bell*, 308 S.W.3d at 921-22. Nevertheless, the *Southwestern Bell* court concluded that the  
1119 phone service consumers before it had common proof of reliance, because the consumers had no  
1120 choice but to rely on the phone company’s representations by paying the allegedly improper  
1121 municipal fees on their phone bills. *Id.* at 922. The court reasoned that the phone company  
1122 would have discontinued phone service if a consumer objected to the fee. *Id.* at 922-23.

1123 In their reply, Plaintiffs make no attempt to place their proposed class within the limited  
1124 contours of *Schein* and *Southwestern Bell*, nor do Plaintiffs assert that they have common  
1125 evidence of reliance. Rather, Plaintiffs contend that Chief Judge Brown’s July 9 Opinion held  
1126 that “there is no ‘reliance’ requirement under the relevant . . . Texas consumer protection laws.”  
1127 (Pls.’ Reply Br. at 26). Plaintiffs’ argument in this regard is disingenuous, because it flatly  
1128 contradicts both Texas law and Chief Judge Brown’s decision. As noted above, reliance is an  
1129 essential element of a DTPA claim. July 9 Opinion, 2010 WL 2813788, at \*53 (citing Tex. Bus.

1130 & Com. Code § 17.50(a)(1)(B); *Morgan Bldgs.*, 249 S.W.3d at 490). Further, Chief Judge  
1131 Brown explained how Plaintiffs could satisfy the reliance requirement for their omission claim:  
1132 “to satisfy the reliance element for an omission, a plaintiff must show that defendant had intent to  
1133 induce a transaction through failure to disclose, *and* that plaintiff would not have entered into the  
1134 transaction if the information had been disclosed.” July 9 Opinion, 2010 WL 2813788, at \*55  
1135 (emphasis added). In other words, Plaintiffs must have common proof that class members would  
1136 not have purchased the E-350 van if Ford had fully disclosed the E-350 van’s handling problems  
1137 to consumers. Not only do Plaintiffs not attempt to make this showing, but Ford correctly notes  
1138 that the record indicates that some named Plaintiffs would have bought their E-350 vans despite  
1139 the handling problems. (*See, e.g.*, Barrett 56.1 Statement, Doc. No. 206, Ex. 2, ¶¶ 22-29)  
1140 (explaining that he would have bought the E-350 van despite the handling issues); (Blandon 56.1  
1141 Statement, Doc. No. 190, Ex. 2, ¶¶ 3-6) (explaining that she purchased an E-350 van, despite  
1142 knowing of its handling problems). No doubt, unidentified members of the proposed Texas class  
1143 would have similar variations that would be material to whether or not they could state a DTPA  
1144 claim. Plaintiffs have no answer for how these individual variations can be resolved without  
1145 individual inquiries.

1146 Plaintiffs have not shown common proof of omission or reliance, and, therefore, common  
1147 issues of fact and law do not predominate over individual issues. Consequently, the Court will  
1148 deny certification of Plaintiffs’ proposed Texas class.

1149 *C. Pennsylvania*

1150 The only remaining Pennsylvania claims are the implied warranty claims of Bethel,  
1151 Hickman Temple, and Mt. Airy, as well Bethel’s unjust enrichment claim on its 2001 van. *See*

1152 July 9 Opinion, 2010 WL 2813788, at \*44; February 16 Opinion, 2011 WL 601279, at \*6. Ford  
1153 objects to Plaintiffs' proposed Pennsylvania classes on the grounds that Plaintiffs cannot prove  
1154 their implied warranty and unjust enrichment claims with common proof. The Court agrees on  
1155 both counts.

1156 *1. Implied Warranty*

1157 Ford advances essentially the same objections to the proposed Pennsylvania implied  
1158 warranty class that it presented in opposition to the proposed New York implied warranty class,  
1159 and Plaintiffs offer essentially the same responses. Accordingly, one would presuppose that the  
1160 same class certification analysis the Court conducted with regard to the New York implied  
1161 warranty class would be applicable to the other jurisdictions' implied warranty classes.

1162 However, as Chief Judge Brown recognized in the omnibus July 9 Opinion, 2010 WL 2813788,  
1163 at \*41-42, Pennsylvania courts have not yet adopted actual injury requirements akin to *Frank*.  
1164 The question remains whether Plaintiffs' implied warranty classes survive in jurisdictions  
1165 with less stringent injury requirements than New York. This Court concludes that the  
1166 Pennsylvania implied warranty class still suffers from individual issues of causation that render  
1167 class treatment impracticable.

1168 Like other states, Pennsylvania imposes an implied warranty of merchantability on all  
1169 contracts for the sale of goods if the seller is a merchant. 13 Pa. Cons. Stat. § 2314(a). The UCC  
1170 as codified in Pennsylvania states that, in order to be merchantable, the goods must "pass  
1171 without objection in the trade under the contract description" and be "fit for the ordinary  
1172 purposes for which such goods are used." *Id.* § 2314(b). The Pennsylvania Supreme Court has  
1173 held that "[t]he concept of merchantability does not require that the goods be the best quality or

1174 the best obtainable but it does require that they have an inherent soundness which makes them  
1175 suitable for the purpose for which they are designed, that they be free from significant defects,  
1176 that they perform in the way that goods of that kind should perform, and that they be of  
1177 reasonable quality within expected variations and for the ordinary purpose for which they are  
1178 used.” *Gall v. Allegheny Cty., Health Dep’t*, 555 A.2d 786, 789-90 (Pa. 1989) (internal citations  
1179 omitted). Like other jurisdictions, Pennsylvania’s UCC requires a showing of causation that can  
1180 be overcome by knowledge of the defect at the time of purchase. “When the buyer before  
1181 entering into the contract has examined the goods or the sample or model as fully as he desired or  
1182 has refused to examine the goods there is no implied warranty with regard to defects which an  
1183 examination ought in the circumstances to have revealed to him.” 13 Pa. Cons. Stat.  
1184 § 2316(c)(2); *see also id.* Cmt. 8 (“The particular buyer’s skill and the normal method of  
1185 examining goods in the circumstances determine what defects are excluded by the examination.  
1186 A failure to notice defects which are obvious cannot excuse the buyer.”); *id.* § 2314 Cmt. 13  
1187 (“Action by the buyer following an examination of the goods which ought to have indicated the  
1188 defect complained of can be shown as matter bearing on whether the breach itself was the cause  
1189 of the injury.”); *Nufeds, Inc. v. Westmin Corp.*, No. 04-1071, 2006 WL 1000021, at \*18 (M.D.  
1190 Pa. Apr. 17, 2006). Consequently, this Court’s causation reasoning with regard to the New York  
1191 implied warranty class applies equally to the Pennsylvania implied warranty class. Resolution of  
1192 these claims will require individualized inquiries into each consumer experience, so as to identify  
1193 and exclude those consumers who purchased E-350 vans with actual knowledge of its handling  
1194 problems, whether from personal use or from a variety of reports that were published between  
1195 2000 and 2004.

1196 *2. Unjust Enrichment*

1197 To assert a claim of unjust enrichment under Pennsylvania law, a plaintiff must show  
1198 that: “(1) benefits conferred on defendant by plaintiff; (2) appreciation of such benefits by  
1199 defendant; and (3) acceptance and retention of such benefits under such circumstances that it  
1200 would be inequitable for defendant to retain the benefit without payment of value.” *Williams*  
1201 *Twp. Bd. of Supervisors v. Williams Twp. Emergency Co.*, 986 A.2d 914, 923-24 (Pa. Commw.  
1202 Ct. 2009) (citations omitted). Pennsylvania law views unjust enrichment as an equitable remedy  
1203 based on the law of restitution. *See, e.g., Mitchell v. Moore*, 729 A.2d 1200, 1203-04  
1204 (Pa. Super. Ct. 1999); *Powers v. Lycoming Engines*, 328 F. App’x 121, 125 (3d Cir. 2009)  
1205 (collecting Pennsylvania cases).

1206 Ford argues that Plaintiffs do not have common proof of a benefit conferred upon Ford,  
1207 that the benefit exceeded the value of the vehicle, or that retention of the benefit by Ford would  
1208 be unjust. Plaintiffs respond by limiting their proposed unjust enrichment class “to consumer  
1209 purchases of new vehicles during the time period prior to April 2004,” so as to limit the class to  
1210 consumers who conveyed a benefit upon Ford, and argue that they have common proof of Ford’s  
1211 misconduct, in the form of evidence that Ford disregarded and failed to disclose to consumers an  
1212 engineering recommendation that Ford should redesign their 15-passenger vans to improve van  
1213 stability and handling. (Pls.’ Reply Br. at 37).

1214 While it appears that the modifications to Plaintiffs’ proposed unjust enrichment classes  
1215 address the first objection raised by Ford (common benefit), the Court agrees with Ford that  
1216 Plaintiffs cannot satisfy the remaining elements of their unjust enrichment claims with common  
1217 proof.

1218 As this Court has explained with regard to other proposed classes, the summary judgment  
1219 record in this case established that different named Plaintiffs had different consumer experiences  
1220 vis-a-vis their E-350 van. Some were not exposed to any representations about the van's  
1221 capacity or relative safety, some experienced no discernable handling problems with their vans,  
1222 some continue to fill their van to capacity, and some incurred no injury whatsoever. At the same  
1223 time, the E-350 owners' manuals issued by Ford progressively alerted consumers to the van's  
1224 unique handling characteristics and the need to drive with caution. This Court finds illustrative  
1225 Chief Judge Brown's rulings with regard to the unjust enrichment claims of Illinois Plaintiff  
1226 Pentecostal Temple, New York Plaintiff Barrett, and Florida Plaintiff Blandon.

1227 Addressing the former, Chief Judge Brown granted summary judgment against  
1228 Pentecostal Temple's unjust enrichment claim, reasoning as follows:

1229 It is undisputed, based on Pastor Edwards's deposition testimony, that no  
1230 one at Pentecostal Temple received any representations from Ford, saw  
1231 any Ford marketing materials, or even observed that the E-350 purported  
1232 to be a 15-passenger van. Pentecostal Temple sold its first E-350 van for  
1233 reasons unrelated to the handling issues giving rise to this litigation, and  
1234 it purchased the 1998 van based on the desire for "something that would  
1235 take more than four or five members at a time" and that would have ease  
1236 of access for seniors and young people. (Edwards Dep. at 56:16-17;  
1237 57:1-19). While other Plaintiffs in this action might have acquired their  
1238 E-350 vans based on Ford's representations or labeling of the vehicles  
1239 as 15-passenger vans, the undisputed record shows that Pentecostal  
1240 Temple did not.

1241  
1242 July 9 Opinion, 2010 WL 2813788, at \*25. Chief Judge Brown explained that Pentecostal  
1243 Temple's "unjust enrichment claim fails for the same substantive flaw that dooms its [consumer  
1244 fraud act] claim: it cannot show deception or other wrongful conduct directed at Pentecostal  
1245 Temple." *Id.* at \*24. Similarly, Chief Judge Brown granted summary judgment against New

1246 York Plaintiff Barrett's unjust enrichment claim, because the undisputed record revealed that  
1247 Barrett: (i) knew of the handling defects prior to purchase and told his salesman of the same  
1248 (simultaneously negotiating a lower price that Barrett deemed fair); (ii) did not experience  
1249 handling problems and continued to fill his van to capacity; (iii) still would have bought the van  
1250 if he had all the knowledge that he had at the time of his deposition; and (iv) had no intention of  
1251 selling the van. *Id.* at \*71-72 (citing the benefit-of-the-bargain principles of *Canon Cameras* and  
1252 the actual injury requirement of *Frank*). As this Court observed, *supra*, it cannot be denied that  
1253 such a class member has been deprived of the benefit of his or her bargain. Chief Judge Brown  
1254 further granted summary judgment against Florida Plaintiff Blandon's unjust enrichment claim  
1255 because she purchased her van in 2008 from a private individual after the point in time (April  
1256 2004) that Plaintiffs concede that the bubble market for E-350 vans had ended. *Id.* at \*50.  
1257 Beyond the April 2004 end-point conceded by Plaintiffs, it is undisputed that a number of public  
1258 reports concerning the E-350's handling problems were published and/or broadcast between  
1259 2000 and 2004. Such reports would necessarily factor into consideration of the equities for the  
1260 unjust enrichment claims of those consumers that viewed the reports.

1261 Where individual consumers bargained with varying degrees of knowledge regarding the  
1262 alleged defect, were exposed to varying representations, if at all, about the van's capacity and  
1263 relative safety, and filled their vans at varying capacities with varying handling problems, if any,  
1264 Plaintiffs cannot overcome these individual consumer experiences with the claim that they have  
1265 common proof that Ford failed to disclose information about the vehicle's handling. The  
1266 presiding court would need to conduct separate inquiries into the equities of each class member's  
1267 consumer experience to resolve these claims. *See, e.g., Vega v. T-Mobile USA, Inc.*, 564 F.3d

1268 1256, 1274 (11th Cir. 2009) (explaining that unjust enrichment claims require the reviewing  
1269 court to “examine the particular circumstances of an individual case and assure itself that,  
1270 without a remedy, inequity would result or persist,” and therefore “courts . . . have found unjust  
1271 enrichment claims inappropriate for class action treatment”). Common issues of law and fact  
1272 thus do not predominate over individualized inquiries, and this Court will deny class certification  
1273 of the Pennsylvania unjust enrichment classes.

1274 *D. Florida*

1275 The only remaining Florida claims are the Florida Deceptive and Unfair Trade Practices  
1276 Act (FDUPTA) claims of Diaz and Mestre. *See* July 9 Opinion, 2010 WL 2813788, at \*51. Ford  
1277 argues that Plaintiffs ignore the “central” issue of consumer knowledge, which led to the  
1278 dismissal of Florida Plaintiff Blandon’s FDUPTA claim. Ford also argues that the proposed  
1279 Florida class fails for the same reasons that the New York and Texas consumer fraud claims fail,  
1280 because the law of the three jurisdictions are relatively similar. (Ford Resp. Br. at 61). Plaintiffs  
1281 respond with the essentially the same arguments that they advanced in support of their New York  
1282 and Texas consumer fraud claims, and emphasize that they do not need to show reliance under  
1283 Florida law. (Pls.’ Reply Br. at 25-35). Although the Court agrees with Plaintiffs that the  
1284 prevailing Florida authority holds that Plaintiffs do not need to show reliance, the Court agrees  
1285 with Ford that individualized issues of deception and causation predominate and defeat  
1286 Plaintiffs’ motion for class certification.

1287 “[U]nder FDUTPA, a litigant must demonstrate three elements: (1) a deceptive act or  
1288 unfair practice; (2) causation; and (3) actual damages.” *Pop’s Pancakes, Inc. v. NuCO2, Inc.*,  
1289 251 F.R.D. 677, 685 (S.D. Fla. 2008) (citing *Rollins, Inc. v. Butland*, 951 So.2d 860, 869 (Fla. 2d

1290 Dist. Ct. App. 2006)). Plaintiffs cite *Fitzpatrick v. General Mills*, 263 F.R.D. 687, 695 (S.D. Fla.  
1291 2010) and *Davis v. Powertel, Inc.*, 776 So. 2d 971, 974 (Fla. 1st Dist. Ct. App. 2000), two cases  
1292 that approved certification of FDUTPA classes, for the proposition that FDUTPA does not  
1293 require a showing of reliance. The Eleventh Circuit has since vacated the class definition  
1294 certified in *Fitzpatrick*, but in doing so approved of the district court's predominance analysis,  
1295 which relied on *Davis*. *Fitzpatrick v. Gen. Mills, Inc.*, 635 F.3d 1279, 1282-83 (11th Cir. 2011).  
1296 However, the appellate court's decision in *Davis* has since been criticized by multiple appellate  
1297 decisions and a federal district court for its failure to account for FDUTPA's causation  
1298 requirement. *Pop's Pancakes*, 251 F.R.D. at 687; *Black Diamond Props., Inc. v. Haines*, 940  
1299 So. 2d 1176, 1179 n.1 (Fla. 5th Dist. Ct. App. 2006); *Philip Morris USA, Inc. v. Hines*, 883  
1300 So.2d 292, 294 (Fla. 4th Dist. Ct. App. 2003). *Pop's Pancakes* further cited *Egwuatu v. South*  
1301 *Lubes, Inc.*, 976 So. 2d 50, 53 (Fla. 1st Dist. Ct. App. 2008), as evidence that the appellate court  
1302 that issued *Davis* had limited its holding. *Pop's Pancakes*, 251 F.R.D. at 687. The Eleventh  
1303 Circuit in *Fitzgerald* did not address these developments in Florida law,<sup>21</sup> and it appears that the  
1304 FDUTPA issue of causation was not raised on appeal.

1305 This Court finds persuasive the deception and causation analysis in *Pop's Pancakes* and  
1306 *Black Diamond*. Both courts denied class certification of the plaintiffs' respective FDUTPA  
1307 claims, because resolution of the claims would require individualized deceptive act and causation  
1308 inquiries. In *Pop's Pancakes*, for instance, the plaintiffs, lessees of beverage equipment, alleged  
1309 that the defendant lessor had included an illicit administrative fee in its property tax invoices.

---

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

1310 The court ruled that the proposed FDUTPA class “fail[ed] to account for those customers who  
1311 fall within the class description, who either were told, prior to receiving the property tax invoice,  
1312 that the invoice included an administrative fee, or, those customers who read the back of the  
1313 invoice and understood, based upon that reading, that the ‘property tax’ fee on the front of the  
1314 invoice included an administrative fee.” 251 F.R.D. at 685. Although the plaintiffs in that case  
1315 characterized the invoice as a uniform misrepresentation, the court disagreed, stating “Plaintiffs  
1316 fail to acknowledge that whether the invoice was deceptive depends, in part, on the knowledge  
1317 and/or understanding of each NUCO customer.” *Id.* at 686. Meanwhile, in *Black Diamond*,  
1318 plaintiffs, homeowners in a residential golf community and members of the golf course, alleged  
1319 that the community developer misrepresented the ownership interest attendant to their golf  
1320 memberships. 940 So. 2d at 1178. The district court of appeals rejected the homeowners’  
1321 FDUPTA class, explaining that the class claims:

1322           alleg[ed] that oral and written misrepresentations took place in 500  
1323           separate oral contract transactions spanning many years and involving  
1324           numerous sales personnel. To prove these allegations, it will be  
1325           necessary that each plaintiff testify. Additionally, it will be necessary for  
1326           each plaintiff to offer proof that he or she was damaged as a result of the  
1327           purported misrepresentations. Finally, given the varied circumstances  
1328           and span of time over which the transactions occurred, defenses  
1329           applicable to some plaintiffs will not be applicable to others.

1330  
1331 *Id.* at 1178-79.

1332           Chief Judge Brown found this reasoning persuasive; he cited *Pop’s Pancakes* with  
1333 approval in granting summary judgment against Florida Plaintiff Blandon’s FDUTPA claim.  
1334 July 9 Opinion, 2010 WL 2813788, at \*49 (reasoning under FDUTPA, per *Pop’s Pancakes*, “a  
1335 defendant’s deceptive practice must cause a plaintiff’s injury, and if a plaintiff knew of the safety

1336 issues that Ford’s allegedly deceptive sales practices attempted to conceal, her injuries could not  
1337 have been caused by those practices”). Plaintiffs have not sought reconsideration of this ruling,  
1338 and it is now law of the case. This Court agrees that the deception and causation analysis of  
1339 *Pop’s Pancakes* and *Black Diamond* controls for the circumstances presented in this case. In  
1340 light of the varied consumer experiences of Plaintiffs in this case—in terms of exposure to  
1341 representations of capacity and safety, pre-existing knowledge of the alleged defect from  
1342 personal use and/or public reports, and manifestation of handling problems at different  
1343 occupancy levels, *see generally* discussion of New York GBL § 349 class, *supra* Part  
1344 II.A.1—resolution of Plaintiffs’ FDUTPA claims will require individualized deception and  
1345 causation inquiries. Accordingly, common issues do not predominate, and this Court will deny  
1346 certification of the Florida class.

1347 *E. Michigan & New Jersey*

1348 The only remaining Michigan and New Jersey claims are for breach of the implied  
1349 warranty of merchantability. July 9 Opinion, 2010 WL 2813788, at \*33, 67; February 16  
1350 Opinion, 2011 WL 601279, at \*10. Ford and Plaintiffs present essentially the same class  
1351 certification arguments as to these proposed classes as they did with regard to the proposed New  
1352 York and Pennsylvania implied warranty classes. Plaintiffs further rely on *In re Mercedes-Benz*  
1353 *Tele Aid Contract Litigation*, 257 F.R.D. 46 (D.N.J. 2009), which certified a class of vehicle  
1354 owners who brought consumer fraud and unjust enrichment claims against the manufacturer for  
1355 failing to tell them that the Tele Aid emergency response systems they purchased with their  
1356 vehicles and paid for with subscription fees would become obsolete.

1357 This Court detects no material differences between Michigan’s and New Jersey’s implied

1358 warranty law and Pennsylvania’s implied warranty law that would compel a different conclusion,  
1359 and therefore the Court discusses them together. Like Pennsylvania, Michigan and New Jersey  
1360 require a showing of causation that can be overcome by proof that the consumer had actual  
1361 knowledge of the defect at the time of purchase. *See, e.g.*, Mich. Comp. Laws §§ 440.2314  
1362 Cmt.13, 440.2316(3)(b) & Cmt. 8; *Jodway v. Kennametal, Inc.*, 525 N.W.2d 883, 890 (Mich. Ct.  
1363 App. 1994) (“A purchaser who has extensive knowledge of a product’s inherently dangerous  
1364 propensities should not be allowed to claim that an implied warranty of merchantability exists as  
1365 a guaranty against such characteristics.”); N.J. Stat. Ann. §§ 12A:2-314 Cmt. 13, 12A:2-  
1366 316(3)(b) & Cmt. 8; *Henry Heide, Inc. v. WRH Prods. Co.*, 766 F.2d 105, 110 (3d Cir. 1985)  
1367 (applying New Jersey law and stating that “if a buyer undertakes a reasonable examination of the  
1368 goods, he is precluded from asserting a claim for breach of implied warranty against anyone who  
1369 was responsible for a defect that the buyer ought, in the circumstances, to have noticed”).  
1370 Accordingly, the Court’s causation analysis of the New York and Pennsylvania implied warranty  
1371 classes applies equally here. *See* Parts II.A.2 and II.C.1, *supra*. In light of the summary  
1372 judgment record, individual issues of causation predominate, and this Court will deny  
1373 certification of these classes.

1374 *In re Mercedes-Benz*, cited by Plaintiffs, does not suggest otherwise, because the  
1375 plaintiffs in that case voluntarily dismissed their implied warranty claims prior to class  
1376 certification. 257 F.R.D. at 50 n.5. Nor is that case persuasive, because, unlike the present case,  
1377 the consumer fraud and unjust enrichment allegations in that case were not undercut by differing  
1378 accounts of misrepresentation, record evidence that some consumers knew of the alleged defect  
1379 at the time of purchase (both from personal knowledge and from public reports), and there was

1380 no doubt that the defect—the obsolescence of the analog network utilized by the vehicles’  
1381 emergency response systems—manifested in all class vehicles. *See id.* at 73 (“Each member of  
1382 the proposed class demonstrated his or her intention to utilize the system by continuing to  
1383 subscribe until being informed that analog service would be discontinued at the end of 2007, and  
1384 some Plaintiffs went so far as to purchase a digital upgrade in order to assure that they could  
1385 continue to use Tele Aid. Thus, each class member got something less than he or she was  
1386 promised: a vehicle that was meant to last up to 20 years, but contained a Tele Aid system that  
1387 would become useless at the end of 2007.”).

1388 *F. California*

1389 The only remaining California claim is First United’s unjust enrichment claim. July 9  
1390 Opinion, 2010 WL 2813788, at \*19; February 16 Opinion, 2011 WL 601279, at \*6-8. Ford and  
1391 Plaintiffs generally present the same class certification arguments as to the proposed California  
1392 class as they did with regard to the proposed Pennsylvania class. This Court detects no  
1393 distinguishing features of California’s law of unjust enrichment that would compel a different  
1394 conclusion. *See, e.g., Ghirardo v. Antonioli*, 924 P.2d 996, 1003 (Cal. 1996) (“Under the law of  
1395 restitution, an individual may be required to make restitution if he is unjustly enriched at the  
1396 expense of another. A person is enriched if he receives a benefit at another’s expense. The term  
1397 ‘benefit’ ‘denotes any form of advantage.’ Thus, a benefit is conferred not only when one adds to  
1398 the property of another, but also when one saves the other from expense or loss.”) (citing  
1399 Restatement of Restitution § 1); February 16 Opinion, 2011 WL 601279, at \*5 (recognizing  
1400 similarities between law of unjust enrichment in Pennsylvania and California). Accordingly, the  
1401 Court will deny certification of Plaintiffs’ proposed California unjust enrichment class for the

1402 same reasons that the Court rejected Plaintiffs' proposed Pennsylvania unjust enrichment class.  
1403 *See* Part II.C.2, *supra*.<sup>22</sup>  
1404 *G. Georgia*  
1405 Georgia Plaintiff Allen Temple seeks certification of its remaining express warranty,  
1406 implied warranty, and unjust enrichment claims. *See* July 9 Opinion, 2010 WL 2813788, at \*38.  
1407 Allen Temple is the only Plaintiff that still has an active express warranty claim after the  
1408 summary judgment rulings. The parties present essentially the same arguments in support of the  
1409 implied warranty and unjust enrichment claims. In addition, the parties dispute whether  
1410 purchasers of used vans can be included in a warranty class under Georgia law.<sup>23</sup> With regard to  
1411 the express warranty class, Ford argues that Chief Judge Brown's summary judgment rulings as

---

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

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

1412 to other named Plaintiffs reveal that different consumers were exposed to different  
1413 representations about the E-350's seating capacity and relative safety. Consequently, Ford  
1414 reasons that the presiding court would have to undertake individualized inquiries of putative  
1415 class members' respective consumer experiences to see if any affirmative representations by Ford  
1416 became the "basis of the bargain." (Ford Resp. Br. at 65). Plaintiffs do not appear to address  
1417 Ford's express warranty argument in their reply brief, but in their class certification brief  
1418 Plaintiffs generally argued that "[w]hether Ford's marketing of the E-350 as a 15-passenger  
1419 vehicle, its '15 Passenger' name, and 15 installed [sic] seats, constitutes a description and  
1420 warranty of safe 15-passenger travel turns wholly on how Ford sold the vans, not on any  
1421 particulars in respect of consumers." (Pls.' Br. at 43). The Court agrees with Ford on all counts.

1422 This Court detects no material differences between Georgia's implied warranty law and  
1423 Pennsylvania's implied warranty law that would compel a different conclusion. Like  
1424 Pennsylvania, Georgia's implied warranty law requires a showing of causation that can be  
1425 overcome by proof that the consumer had actual knowledge of the defect at the time of purchase.  
1426 *See, e.g.,* Ga. Code Ann. §§ 11-2-314 Cmt. 13, 11-2-316(3)(b) & Cmt. 8; *W.M. Hobbs, Ltd. v.*  
1427 *Accusystems of Ga., Inc.*, 339 S.E.2d 646, 647 (Ga. Ct. App. 1986) (rejecting implied warranty  
1428 claim where consumer had the opportunity to use the copier machine on a trial basis prior to  
1429 purchase). Accordingly, the Court's causation analysis of the New York and Pennsylvania  
1430 implied warranty classes applies equally here. *See* Parts II.A.2 and II.C.1, *supra*. Likewise, the  
1431 Court discerns no material difference between Georgia's law of unjust enrichment and that of  
1432 Pennsylvania. *See, e.g., Tuvim v. United Jewish Cmty., Inc.*, 680 S.E. 2d 827, 829-30 (Ga.  
1433 2009) ("Unjust enrichment applies when as a matter of fact there is no legal contract, but when

1434 the party sought to be charged has been conferred a benefit by the party contending an unjust  
1435 enrichment which the benefitted party equitably ought to return or compensate for.”) (citation  
1436 omitted). Accordingly, the Court will deny certification of Plaintiffs’ proposed Georgia unjust  
1437 enrichment class for the same reasons that the Court rejected Plaintiffs’ proposed Pennsylvania  
1438 unjust enrichment class. *See* Part II.C.2, *supra*.

1439 With regard to the proposed express warranty class, the Court agrees with Ford that  
1440 common issues do not predominate. Like other jurisdictions, Georgia law recognizes express  
1441 warranties in the following circumstances:

1442 (a) Any affirmation of fact or promise made by the seller to the buyer  
1443 which relates to the goods and becomes part of the basis of the bargain  
1444 creates an express warranty that the goods shall conform to the  
1445 affirmation or promise.

1446  
1447 (b) Any description of the goods which is made part of the basis of the  
1448 bargain creates an express warranty that the goods shall conform to the  
1449 description.

1450  
1451 Ga. Code Ann. § 11-2-313(1). “It is not necessary to the creation of an express warranty that the  
1452 seller use formal words such as ‘warrant’ or ‘guarantee’ or that he have a specific intention to  
1453 make a warranty, but an affirmation merely of the value of the goods or a statement purporting to  
1454 be merely the seller’s opinion or commendation of the goods does not create a warranty.”

1455 *Id.* § 11-2-313(2).

1456 The decisive test, in determining whether language used is a mere  
1457 expression of opinion or a warranty, is whether it purported to state a fact  
1458 upon which it may fairly be presumed the seller expected the buyer to  
1459 rely, and upon which a buyer would ordinarily rely. If the language used  
1460 is of that character, the fact of reliance on the part of the buyer and the  
1461 presumption of intent on the part of the seller which the law would raise  
1462 in such a case would operate to create a warranty.

1463

1464 *Smith v. Frazer*, 86 S.E. 225, 226 (Ga. 1915) (quoting 30 Am. & Eng. Enc. Law at 142). Chief  
1465 Judge Brown’s omnibus July 9 Opinion rejected other Plaintiffs’ contention that Ford’s “core  
1466 description” of the E-350 as a “15-passenger” van created an express warranty of safety under the  
1467 respective jurisdictions’ UCC provisions. *E.g.*, July 9 Opinion, 2010 WL 2813788, at \*9  
1468 (California Plaintiffs), 31 (New Jersey Plaintiffs), 41 (Pennsylvania Plaintiffs), 73 (Bishop  
1469 Anderson), 79 (Massachusetts Plaintiff).<sup>24</sup> Plaintiffs have not sought reconsideration of these  
1470 rulings, and Plaintiffs do not suggest that Georgia law would require a different conclusion. The  
1471 summary judgment record in this case further revealed that different consumers were exposed to  
1472 different representations, if at all, at the time of purchase. *See* Part II.A.1.a (“Misrepresentation”)  
1473 & n.7, *supra*. Individual inquiries will be necessary to determine whether Ford representatives  
1474 made affirmative representations about the E-350’s relative safety as a 15-passenger van to  
1475 specific consumers. Consumers who were not exposed to such representations cannot assert that  
1476 such representations were a basis for their bargains. *See, e.g., Am. Coach Lines of Orlando, Inc.*  
1477 *v. N. Am. Bus Indus., Inc.*, No. 09-999, 2011 WL 653524, at \*18 (M.D. Fla. Feb. 14, 2011)  
1478 (applying Florida and Georgia law, and concluding that statements made after delivery of the  
1479 product could not have been the basis of the bargain). Plaintiffs have not shown that they can  
1480 establish their express warranty claim with common proof. Therefore, the Court concludes that  
1481 common issues of fact do not predominate, and the Court will deny certification of Georgia

---

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

1482 Plaintiff's express warranty class.

1483 In addition to these reasons, the Court agrees with Ford that Plaintiffs' proposed warranty  
1484 class fails to account for Georgia's treatment of purchasers of used goods. Plaintiffs cite *Georgia*  
1485 *Timberlands, Inc. v. S. Airways, Co.*, 188 S.E.2d 108 (Ga. Ct. App. 1972) for the proposition that  
1486 an implied warranty of merchantability inheres when the used goods are sold by merchants who  
1487 deal in the subject goods. (Pls.' Reply Br. at 21). Yet, Plaintiffs fail to explain how this rule  
1488 would apply to consumers that bought used E-350 vans from third-parties, such as private  
1489 individuals or independent car dealerships. The Court is aware of no Georgia authority that  
1490 would permit express or implied warranty claims to lie against the manufacturer where the  
1491 consumer purchased used goods (even a vehicle) from an unrelated third party. *See Gen. Motors*  
1492 *Corp. v. Halco Instruments, Inc.*, 185 S.E. 2d 619, 622 (Ga. Ct. App. 1971) (collecting cases for  
1493 the proposition that there is no implied warranty of merchantability against the manufacturer  
1494 "[w]hen goods are sold by an original purchaser to a third party as used or second-hand goods");  
1495 *Stewart v. Gainesville Glass Co.*, 212 S.E. 2d 377, 377 (Ga. 1975) (stating that, with few  
1496 exceptions, express warranty claims require privity); *Jones v. Cranman's Sporting Goods*,  
1497 237 S.E. 2d 402, 405 (Ga. Ct. App. 1977) (recognizing that privity exists "(W)here an  
1498 automobile manufacturer, through its authorized dealer issues to a purchaser of one of its  
1499 automobiles from such dealer"); *see also Cole v. Gen. Motors Corp.*, 484 F.3d 717, 730 (5th Cir.  
1500 2007) (citing Georgia as a jurisdiction that does not allow implied warranty claims for used  
1501 goods against a remote manufacturer). Plaintiffs' proposed warranty class does not exclude  
1502 consumers who purchased their used vans from third parties, and thus are over-inclusive.

1503

1504 *H. Statute of Limitations Defenses*

1505 In addition to the jurisdiction- and claim-specific objections discussed above, Ford  
1506 contends that the individual issues surrounding its statute-of-limitations affirmative defenses, as  
1507 well as any tolling doctrine advanced by Plaintiffs to counter these defenses, weighs against a  
1508 finding of predominance. Although the above predominance determinations stand on their own,  
1509 the Court agrees that the individualized inquiries attendant to Ford's statute-of-limitations  
1510 defenses as to each jurisdiction-based sub-class support the denial of class certification.<sup>25</sup>

1511 Before the Court can assess the effect of Ford's statute-of-limitations defenses on the  
1512 predominance inquiry as to each jurisdiction-based sub-class, the Court must determine whether  
1513 such inquiry is even relevant to the predominance inquiry. The Third Circuit in *Barnes v.*  
1514 *American Tobacco Co.* squarely held that affirmative defenses, including statute-of-limitations  
1515 defenses, are properly considered in determining predominance and cohesion for purposes of  
1516 class certification under subsections (b)(2) and (b)(3). 161 F.3d 127, 147-49 (3d Cir. 1998)  
1517 (affirming denial of class certification for putative class of smokers). Indeed, the *Barnes* court  
1518 cited the individual issues arising under those defenses as part of its reasoning for denying class

---

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

1519 certification. *Id.* at 143 (“We believe that addiction, causation, the defenses of comparative and  
1520 contributory negligence, the need for medical monitoring and the statute of limitations present  
1521 too many individual issues to permit certification.”), 146-47 (discussing individual issues related  
1522 to comparative and/or contributory negligence), 149 (citing individual issues attendant to the  
1523 statute of limitations defense as grounds for denying class certification). However, four years  
1524 later in *In re Linerboard Antitrust Litigation*, the court affirmed certification of an antitrust class  
1525 against manufacturers of linerboard, despite the manufacturers’ contention that their statute of  
1526 limitations defenses and consumers’ fraudulent concealment tolling theories presented individual  
1527 issues that defeated predominance. 305 F.3d 145, 160-64 (3d Cir. 2002). In doing so, the  
1528 *Linerboard* court cited with approval case law and a treatise that suggested that such individual  
1529 issues did not defeat class certification, but could be dealt with at a subsequent damages stage.  
1530 *Id.* at 163. Quoting the treatise, the *Linerboard* court explained:

1531 Challenges based on the statute of limitations, fraudulent concealment,  
1532 releases, causation, or reliance have usually been rejected and will not bar  
1533 predominance satisfaction because those issues go to the right of a class  
1534 member to recover, in contrast to underlying common issues of the  
1535 defendant’s liability.

1536  
1537 *Id.* (quoting Newberg & Conti, *Newberg on Class Actions* § 4.26 (3d ed.)). Speaking to the  
1538 federal antitrust claims before it, the *Linerboard* court recognized that individual issues  
1539 pertaining to fraudulent concealment would arise, but reasoned that “common issues of  
1540 concealment predominate here because ‘the inquiry necessarily focuses on defendants’ conduct,  
1541 that is, what defendants did rather than what plaintiffs did.’” *Id.* (citation omitted). The court  
1542 further reasoned:

1543 Key questions will not revolve around whether [the consumers] knew that

1544 the prices paid were higher than they should have been or whether [they]  
1545 knew of the alleged conspiracy among Appellants. Instead, the critical  
1546 inquiry will be whether “defendants successfully concealed the existence  
1547 of the alleged conspiracy, which proof will be common among the class  
1548 members in each class.”

1549  
1550 *Id.* (citation omitted).

1551 While at first blush *Linerboard* appears inconsistent with *Barnes*, Plaintiffs acknowledge  
1552 (Pls.’ Reply Br. at 23) that *Linerboard* endorsed the First Circuit’s reasoning in *Waste Mgmt.*

1553 *Holdings, Inc. v. Mowbray*, 208 F.3d 288, 296 (1st Cir. 2000):

1554 Although a necessity for individualized statute-of-limitations  
1555 determinations invariably weighs against class certification under Rule  
1556 23(b)(3), we reject any per se rule that treats the presence of such issues  
1557 as an automatic disqualifier. In other words, the mere fact that such  
1558 concerns may arise and may affect different class members differently  
1559 does not compel a finding that individual issues predominate over  
1560 common ones. As long as a sufficient constellation of common issues  
1561 binds class members together, variations in the sources and application  
1562 of statutes of limitations will not automatically foreclose class  
1563 certification under Rule 23(b)(3). Predominance under Rule 23(b)(3)  
1564 cannot be reduced to a mechanical, single-issue test.

1565  
1566 *Linerboard*, 305 F.3d at 162-63 (internal citations from *Waste Management Holdings* omitted).

1567 Thus, *Linerboard* cannot be read to prohibit *consideration of the individualized issues* arising  
1568 from statute-of-limitations defenses for purposes of determining predominance under Rule  
1569 23(b)(3). This reading of *Linerboard* is consistent with *Barnes*, which recognized that “the  
1570 existence of affirmative defenses as to some class members may not by itself [be] enough  
1571 warrant the denial of certification.” *Barnes*, 161 F.3d at 147 n.25.<sup>26</sup> Thus, this Court finds that  
1572 Ford’s statute-of-limitations defenses and Plaintiffs’ equitable tolling rejoinders are relevant to

---

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

1573 this Court's consideration of predominance with respect to jurisdiction-based sub-classes.  
1574 Ford's statute-of-limitations defenses and any applicable discovery rule and/or other  
1575 equitable tolling doctrine would require inquiries into the individual circumstances of each  
1576 Plaintiff. As noted above, Chief Judge Brown's summary judgment decisions revealed that  
1577 named Plaintiffs had widely divergent experiences *vis-a-vis* their E-350 vans; some purchased  
1578 their vans with knowledge of the van's unique handling problems (Barrett,<sup>27</sup> Blandon), some saw  
1579 news releases or government reports about the rollover problems (Bishop Anderson, Charles St.  
1580 AME, Conant Avenue), some experienced handling issues while driving (Charles St. AME,  
1581 Conant Avenue), others removed seats or limited the van to less than 15 passengers (Bishop  
1582 Anderson, St. Luke's), and some did not appear to have experienced any handling problems  
1583 whatsoever (Barrett, St. James, St. Luke's). *See* July 9 Opinion, 2010 WL 2813788, at \*45, 51,  
1584 57, 62, 68-69, 76. At the same time, the summary judgment opinions revealed that different  
1585 consumers learned of the E-350 van's handling problems, if at all, in differing degrees, from  
1586 different sources, and at different times. These individual experiences would be relevant to a  
1587 determination of accrual in a jurisdiction with the discovery rule, and thus the presiding court  
1588 would have to conduct countless individualized inquiries. Moreover, for jurisdictions that follow  
1589 New York's equitable tolling requirement of a subsequent affirmative act, Plaintiffs cannot  
1590 invoke *Linerboard's* common proof of fraudulent concealment finding, because each Plaintiff  
1591 would have to show that Ford committed some act, other than the underlying misrepresentation

---

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

1592 of the van's handling abilities, to conceal the original tort. *Ross*, 868 N.E.2d at 198. Contrary to  
1593 Plaintiffs' suggestion, these nuanced, fact-specific inquiries will require careful examination, and  
1594 thus cannot be supplemented with concise questionnaire forms. Such inquiries are not amenable  
1595 to class litigation.

1596 The Court further notes that Plaintiffs' proposed classes appear to include a large number  
1597 of consumers whose claims would be time-barred under the relevant statute of limitations. Ford  
1598 argues that the statute of limitations will bar the vast majority of proposed New York,  
1599 Pennsylvania, and Georgia warranty-claim class members, because the named Plaintiffs from  
1600 these jurisdictions did not join this MDL until November 2008 (*see* Consent Order of November  
1601 5, 2008, Doc. No. 150), and these jurisdictions do not allow cross-jurisdictional tolling. (*See*,  
1602 *e.g.*, Ford's Resp. Br. at 38). Ford reasons that, courtesy of the four-year limitations period and  
1603 the UCC's strict accrual rule for warranty claims (tender of delivery), *see, e.g.*, Ga. Code Ann.  
1604 § 11-2-725, putative class members for these claims must have purchased and received their  
1605 qualifying E-350 vans no later than November 2004. Ford further reasons that some of these  
1606 classes would be deprived of their class representatives, because certain named Plaintiffs  
1607 purchased their E-350 vans before this date. These arguments fail to account for the class tolling  
1608 doctrine recognized by the Supreme Court in *American Pipe & Construction Co. v. Utah*, 414  
1609 U.S. 538 (1974) and *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983). This tolling  
1610 doctrine recognizes that "the commencement of a class action suspends the applicable statute of  
1611 limitations as to all asserted members of the class who would have been parties had the suit been  
1612 permitted to continue as a class action," and that the action "remains tolled for all members of the  
1613 putative class until class certification is denied." *Crown, Cork & Seal*, 462 U.S. at 353-54.

1614 Because the original action in this MDL, filed in August 2003, sought a nationwide class (*see*  
1615 Doc. No. 1 ¶ 7), it would appear that this doctrine tolled the limitations periods for other named  
1616 Plaintiffs who were putative class members under the original class. Neither party addressed this  
1617 class tolling doctrine, and this Court has no occasion to make tolling determinations at the  
1618 present time. Yet, Ford's argument does carry some weight. Presuming that the limitations  
1619 periods were tolled for the subsequent actions that joined this MDL, the cut-off line for the  
1620 warranty classes, courtesy of the first-filed action (New Jersey), would be August 1999. In other  
1621 words, class members would have needed to have taken delivery of their E-350 vans no later than  
1622 August 1999 in order to have a timely warranty claim. Such a cut-off line would shrink the  
1623 warranty classes by approximately 1/3 of the proposed model years (2000-2005 would be  
1624 excluded),<sup>28</sup> unless individual consumers of earlier models presented grounds for equitable  
1625 tolling.

1626 This Court has no occasion to rule on the merits of Ford's statute of limitations defenses  
1627 and Plaintiffs' respective equitable tolling counter-defenses with the present motion. However,  
1628 the Court agrees that Plaintiffs' proposed warranty classes for these jurisdictions fail to account  
1629 for the relatively straightforward effect of the respective UCC statute of limitations on the  
1630 warranty claims. This Court is left to conclude that either a large portion of these proposed  
1631 classes will not have viable warranty claims, or alternatively, that many putative class members  
1632 will require individualized inquiries into issues of equitable tolling.

---

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

1633 *I. Summary*

1634 The Court's decision to deny class certification should not be read to suggest that  
1635 Plaintiffs' remaining claims lack merit, or as tacit approval for Ford's design and marketing of  
1636 the E-350 van. Indeed, this Court is aware that a number of fatal automobile accidents have been  
1637 linked to occurrences of rollovers in this van, and that these accidents are the subject of other  
1638 litigation. Rather, this Court's ruling reflects the unique and highly individualistic experiences of  
1639 consumers, many of whom were not actually deceived and many of whom have suffered no  
1640 actual injury as a result of Ford's conduct. This Court's conclusions do not address the merits of  
1641 Plaintiffs' consumer fraud, warranty, and unjust enrichment claims, but draws upon the summary  
1642 judgment record to assess the nature of the evidence—common or idiosyncratic—that Plaintiffs  
1643 state they will present to support their class claims.

1644 While a narrowly tailored class limited to particular misrepresentations, excluding  
1645 persons with knowledge at the time of purchase, cognizant of the respective statute of limitations,  
1646 and brought in a jurisdiction that did not require actual injury may have been a better candidate  
1647 for class certification, Plaintiffs have not proposed such a class. As it stands, the massive claim-  
1648 and jurisdiction-specific classes proposed by Plaintiffs are rife with issues that will require  
1649 individualized determinations. Common issues of fact and law do not predominate over  
1650 individualized inquiries, as required by Rule 23(b)(3), and thus Plaintiffs' proposed classes do  
1651 not withstand "rigorous analysis" under *Hydrogen Peroxide*. Consequently, the Court will deny  
1652 Plaintiffs' renewed motion for class certification under Rule 23(b)(3) in its entirety.

1653 III. CERTIFICATION UNDER RULE 23(b)(2)

1654 Lastly, the Court addresses Plaintiffs' alternative theory for class certification under

1655 Federal Rule 23(b)(2). As noted above, certification pursuant to subpart (b)(2) is appropriate  
1656 when “the party opposing the class has acted or refused to act on grounds that apply generally to  
1657 the class, so that final injunctive relief or corresponding declaratory relief is appropriate  
1658 respecting the class as a whole.” Fed. R. Civ. P. 23(b)(2). The Supreme Court recently  
1659 explained in *Wal-Mart v. Dukes*<sup>29</sup> that “[t]he key to the (b)(2) class is ‘the indivisible nature of  
1660 the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be  
1661 enjoined or declared unlawful only as to all of the class members or as to none of them.’” 131 S.  
1662 Ct. 2541, 2557 (2011). Conversely, subsection (b)(2) “does not authorize class certification  
1663 when each individual class member would be entitled to a different injunction or declaratory  
1664 judgment against the defendant,” or “an individualized award of monetary damages.” *Id.* Class  
1665 certification is inappropriate where “the monetary relief is not incidental to the injunctive or  
1666 declaratory relief.” *Id.*; *cf. Barnes*, 161 F.3d at 142 (“Subsection (b)(2) class actions are ‘limited  
1667 to those class actions seeking primarily injunctive or corresponding declaratory relief.’”) (citation  
1668 omitted); *In re Mercedes-Benz Antitrust Litig.*, 213 F.R.D. 180, 186 (D.N.J. 2003) (“[C]ourts  
1669 have certified 23(b)(2) classes despite a claim for money damages where the damages were  
1670 incidental or ancillary to a primary claim for an injunction.”).

1671 In addition to a primary focus on injunctive or declaratory relief, the Third Circuit has  
1672 recognized that class claims under Rule 23(b)(2) must be cohesive. *See, e.g., Gates v. Rohm &*

---

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

1673 *Haas Co.*, 655 F.3d 255, 263-64 (3d Cir. 2011); *Barnes*, 161 F.3d at 143; *Geraghty v. U.S.*  
1674 *Parole Comm’n*, 719 F.2d 1199, 1205-06 (3d Cir. 1983). Although, unlike subsection (b)(3),  
1675 (b)(2) does not impose distinct predominance and superiority requirements, our Circuit has  
1676 reasoned that “a (b)(2) class may require more cohesiveness than a (b)(3) class. . . . because in a  
1677 (b)(2) action, unnamed members are bound by the action without the opportunity to opt out.”  
1678 *Barnes*, 161 F.3d at 142-43; *see also Gates*, 655 F.3d at 265 (“The ‘disparate factual  
1679 circumstances of class members’ may prevent a class from being cohesive and, therefore, make  
1680 the class unable to be certified under Rule 23(b)(2).”) (citing *Carter v. Butz*, 479 F.2d 1084,  
1681 1089 (3d Cir. 1973)). Accordingly, our Circuit has held that district courts have the discretion to  
1682 deny certification under (b)(2) when a given case presents “disparate factual circumstances,” or a  
1683 prevalence of individualized issues. *Barnes*, 161 F.3d at 143 (citation omitted).

1684 In their opening brief, Plaintiffs argue that certification under this Rule is proper because  
1685 “the core of the relief sought by Plaintiffs in this case is equitable in nature.” (Pls.’ Br. at 61).  
1686 Toward this end, Plaintiffs cite a paragraph from the Complaint’s Prayer for Relief that seeks  
1687 an order:

1688 [r]equiring Ford to correct the design defect so the E-350 vans cease to  
1689 be a safety hazard, enjoining Ford from distributing the vehicles without  
1690 their being so corrected, and requiring Ford to warn all potential  
1691 purchasers of the unsafe nature of the E-350 through its own dealers and  
1692 through used car dealers and by such means as the Court determines to be  
1693 effective and appropriate.

1694  
1695 (Complaint, Prayer for Relief ¶ B). From this equitable “core,” Plaintiffs contend that “the Court  
1696 may award Class members a uniform stipend of \$2,100.00 each”—the cost of retrofitting the E-  
1697 350 vans with dual rear wheels—as incidental damages. (Pls.’ Br. at 62).

1698 Ford objects that Plaintiffs do not seek primarily injunctive or declaratory relief, and that  
1699 the individual issues that defeated predominance demonstrate that Plaintiffs' claims are not  
1700 sufficiently cohesive to warrant (b)(2) certification. Plaintiffs offer no further argument in  
1701 support of certification under Rule 23(b)(2) in reply.

1702 The Court notes at the onset that the Supreme Court's recent decision in *Wal-Mart* casts a  
1703 cloud over the continued application of the Third Circuit's cohesion requirement for (b)(2)  
1704 certification. The *Wal-Mart* Court explained that the (b)(3) "procedural protections" of  
1705 predominance, superiority, mandatory notice, and the right to opt out did not appear in (b)(2)  
1706 because they "[are] unnecessary to a (b)(2) class." 131 S. Ct. at 2558. According to the Court,  
1707 "[w]hen a class seeks an indivisible injunction benefitting all its members at once, there is no  
1708 reason to undertake a case-specific inquiry into whether class issues predominate or whether  
1709 class action is a superior method of adjudicating the dispute. Predominance and superiority are  
1710 self-evident." *Id.*; *cf. id.* at 2566 (Ginsburg, J., joined by Breyer, Sotomayor, and Kagan, JJ.,  
1711 concurring in part and dissenting in part) (suggesting that "[i]ndividual [factual] differences  
1712 should not bar a . . . Rule 23(b)(2) class, so long as the Rule 23(a) threshold is met"). At the  
1713 same time, the *Wal-Mart* Court expressed doubt regarding whether a class seeking monetary  
1714 damages could *ever* be certified under Rule 23(b)(2), but declined to answer this question. *See*  
1715 *id.* at 2557. While this logic suggests that predominance and superiority are unnecessary  
1716 considerations for *proper* (b)(2) classes, it is unclear whether a predominance-derived  
1717 consideration of cohesion may be relevant in determining whether a proposed class presents a  
1718 proper (b)(2) class. To the extent that cohesion remains a relevant consideration post-*Wal-Mart*,  
1719 this Court agrees with Ford that the myriad individual issues of fact and law identified in this

1720 Court’s (b)(3) predominance analysis *supra*—*i.e.*, exposure to differing representations,  
1721 deception, causation, and Ford’s statutes of limitations affirmative defenses—reveal that  
1722 Plaintiffs’ proposed classes are not sufficiently cohesive to permit (b)(2) class certification. *See*,  
1723 *e.g.*, *Gates*, 655 F.3d at 265, 269 (denying (b)(2) certification of vinyl chloride exposure case,  
1724 where individualized issues of “members’ . . . characteristics and medical histories” made  
1725 certification inappropriate); *Barnes*, 161 F.3d at 143 (denying (b)(2) certification of tobacco case,  
1726 where individualized issues of addiction, causation, and affirmative defenses (comparative  
1727 negligence, statute of limitations) made certification inappropriate). However, to the extent that  
1728 *Wal-Mart* abrogates the existing Circuit rule regarding cohesion, this Court concludes that (b)(2)  
1729 certification is nevertheless inappropriate, simply because the monetary damages sought by  
1730 Plaintiffs are not incidental to a claim for injunctive relief.

1731 Here, the “‘core’ equitable relief” sought by Plaintiff is an order: (1) requiring Ford to  
1732 correct the design defect for existing consumers; (2) enjoining Ford from distributing vehicles  
1733 with the defect; and (3) requiring Ford to warn all potential purchasers of the unsafe nature of the  
1734 E-350 van through its own dealers and through used car dealers and other means determined by  
1735 the Court. (*See* Pls.’ Br. at 61 & n.27; Complaint, Prayer for Relief ¶ B). Of this proposed  
1736 equitable relief, only the first remedy compensates the injuries of putative class members, who,  
1737 according to Plaintiffs’ proposed classes, have already purchased or acquired a model-year 1991-  
1738 2005 E-350 van.<sup>30</sup> Furthermore, Plaintiffs make no attempt to explain how their claims regarding

---

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

1739 model-year 1991-2005 E-350 vans could justify the broad, perpetual injunctions sought in the  
1740 Complaint, which would appear to extend to subsequent model years for which no defect has  
1741 been alleged. Thus, the Court is left to consider Plaintiffs’ proposed affirmative injunction  
1742 requiring Ford to correct the design defect. At the same time that Plaintiffs classify this relief as  
1743 “equitable” in nature, Plaintiffs concede that “there must be a source of money to pay for the  
1744 repair or retrofit of the vans” if class members “wish” to have their vehicles repaired. (*Id.* at 59).  
1745 Elsewhere, Plaintiffs suggest that the Court can simply “award Class members a uniform stipend  
1746 of \$2,100.00 each.” (*Id.* at 62). These statements reveal that Plaintiffs primarily seek monetary  
1747 damages,<sup>31</sup> and even suggests that some class members may choose to receive the costs of repairs  
1748 instead of the actual repairs. As Ford correctly notes, Plaintiffs cannot simultaneously seek an  
1749 affirmative injunction requiring the repairs to be made *and* the monetary costs of those repairs.  
1750 (Ford’s Resp. Br. at 69). Plaintiffs present nothing in their reply brief to bolster their (b)(2)  
1751 claim.

1752 The Supreme Court in *Wal-Mart* emphasized that subpart (b)(2) applies to injunctions  
1753 and declaratory judgments, not “‘equitable’ remedies generally.” 131 S. Ct. at 2560. The Court  
1754 further expressed its dissatisfaction with the class-Respondents’ argument that (b)(2) certification  
1755 was appropriate, simply because their claims for injunctive and declaratory relief predominated

---

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

1756 over their claims for monetary relief (backpay). The Court responded to this argument as  
1757 follows:

1758 [t]he mere “predominance” of a proper (b)(2) injunctive claim does  
1759 nothing to justify elimination of Rule 23(b)(3)’s procedural protections:  
1760 It neither establishes the superiority of class adjudication over individual  
1761 adjudication nor cures the notice and opt-out problems. We fail to see  
1762 why the Rule should be read to nullify these protections whenever a  
1763 plaintiff class, at its option, combines its monetary claims with a  
1764 request—even a “predominating request”—for an injunction.  
1765

1766 *Id.* at 2559. Despite Plaintiffs’ argument that “the core of the relief sought by Plaintiffs in this  
1767 case is equitable in nature” (Pls.’ Br. at 61), the record and Plaintiffs’ arguments reveal that  
1768 Plaintiffs do not seek predominantly injunctive or declaratory relief, and that the monetary  
1769 damages they seek are anything but incidental. In light of the guidance provided by *Wal-Mart*,  
1770 this Court concludes that it would be inappropriate to permit Plaintiffs to sidestep the (b)(3)  
1771 requirements under the guise of a (b)(2) class.<sup>32</sup>  
1772  
1773  
1774  
1775  
1776  
1777  
1778  
1779  
1780  
1781  
1782  
1783  
1784

---

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

1785  
1786  
1787  
  
1788  
  
1789  
  
1790  
1791  
1792  
1793  
1794  
1795

***Conclusion***

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

Dated: February 6, 2012

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