No. 11-57006

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IN RE TOYOTA MOTOR CORP. UNINTENDED ACCELERATION MARKETING, SALES PRACTICES, AND PRODUCTS LIABILITY LITIGATION

TOYOTA MOTOR CORPORATION AND TOYOTA MOTOR SALES, U.S.A. INC.,
Defendants-Petitioners,

v.

CERTAIN ECONOMIC LOSS PLAINTIFFS,
Plaintiffs-Respondents.

On Petition for Permission to Appeal an Order of the United States District Court for the Central District of California
Case No. 8:10ML2151 JVS(FMOx)

BRIEF OF INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, disclosure is hereby made by *amicus curiae* International Association of Defense Counsel of the following corporate interests:

a. Parent companies of the corporation/association:
None.

b. Any publicly held company that owns ten percent (10%) or more of the corporation/association:
None.

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INTEREST OF AMICUS CURIAE[1]

Amicus curiae International Association of Defense Counsel (IADC) is an association of corporate and insurance attorneys from the United States and around the globe whose practice is concentrated on the defense of civil lawsuits. The IADC is dedicated to the just and efficient administration of civil justice and continual improvement of the civil justice system.

The IADC supports a justice system in which plaintiffs are fairly compensated for genuine injuries, responsible defendants are held liable for appropriate damages, and non-responsible defendants are exonerated without unreasonable cost. The IADC has a particular interest in the fair and efficient administration of class actions like this, which are increasingly global in reach, as well as in ensuring that actions are brought in the appropriate forum and decided by courts with proper jurisdiction.

[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part and no person or entity, other than *amicus curiae* and its counsel, made a monetary contribution to its preparation or submission.

I. INTRODUCTION

Plaintiffs in this case seek damages for an alleged defect known as sudden unintended acceleration ("SUA") in Toyota vehicles. However, most lead Plaintiffs either do not claim they have even experienced SUA, or do not allege any accident or physical injury caused by SUA.

Plaintiffs do not assert product liability claims. Instead, Plaintiffs cast their case as a "benefit of the bargain" action and invoke California's Consumer Legal Remedies Act ("CLRA"), Unfair Competition Law ("UCL"), and False Advertising Law ("FAL"), as well as various other warranty-related claims. Each Plaintiff contends that he or she relied on Toyota's representations that advertised Toyota vehicles as "safe" and "reliable." Each Plaintiff asserts that he or she either would not have acquired the vehicle in question had Toyota disclosed the SUA defect in its advertising, or would have purchased or leased the vehicle but at a lower price than what he or she paid.

Such generic allegations, were they allowed to state a claim, would open the proverbial floodgates to litigation, as every product recall could be the basis for a new class action, whether or not any consumers were injured. Accordingly, such "benefit of the bargain" theories are simply not cognizable unless there is a specific "bargain" that was breached – *e.g.*, failure to deliver a product with certain

contractually-promised specifications. Because no Plaintiff alleged any such representation or promise by Toyota that they relied upon, the district court should have dismissed Plaintiffs' CLRA, UCL and FAL claims.

II. STATEMENT OF FACTS

The IADC adopts the statement of facts set forth by Petitioner in its Opening Brief.

III. SUMMARY OF ARGUMENT

Toyota contends that Article III standing is lacking here. We do not repeat those arguments. Rather, we urge that dismissal of many of these Plaintiffs' claims is required under F.R.C.P. 12(b)(6) because of even more basic flaws in the Plaintiffs' pleading.[2]

So-called "benefit of the bargain" class action cases have proliferated in recent years, expanding the pool of potential plaintiffs and the scope of class actions in the process. Under this "benefit of the bargain" approach, plaintiffs argue that it is not necessary for a product defect to manifest for them to assert a claim. Courts have repeatedly concluded that such a theory is cognizable only if

[2] This Court has jurisdiction to consider "any issue fairly included within" the district court order certified for appeal under 28 U.S.C. § 1292(b). *See Lee v. Am. Nat'l Ins. Co.*, 260 F.3d 997, 1000 (9th Cir. 2001) (citing *Yamaha Motor Corp. USA v. Calhoun*, 516 U.S. 199, 205 (1996)). That order also concluded that Plaintiffs satisfied statutory standing requirements under UCL, FAL, and CLRA. (*See* Op. at 27-33, 35.)

there is an actual "bargain," i.e., where a manufacturer promised to deliver something specific and did not. *No* case cited by Plaintiffs has held that a manufacturer's generic advertising theme of "safe and reliable," without any specific representations related to the alleged defect, can provide a "benefit of the bargain" cause of action when that defect is later "discovered."

In addition to Article III standing, another way to resolve such cases is to apply the Supreme Court's guidance on a F.R.C.P. 12(b)(6) motion to dismiss, as set forth by *Iqbal* and *Twombly*. The district court did not do so, and erroneously accepted Plaintiffs' conclusory and speculative allegations at face-value. The court's ruling improperly allows Plaintiffs to proceed with their "benefit of the bargain" theory even though no Plaintiff can recall any specific representation of Toyota – only a "theme" of Toyota advertising emphasizing "safety" and "reliability" – that they supposedly relied upon in acquiring a Toyota vehicle. Given such deficiencies, Plaintiffs have not stated a claim or established standing under CLRA, UCL and FAL, and the district court should be reversed.

IV. ARGUMENT

A. The District Court Erred In Its Application Of F.R.C.P. 12(b), As Plaintiffs Fail To Allege Facts Necessary To Support Their Claims

1. The Correct Standard On A Motion To Dismiss Does Not Require A Court To Accept Conclusory Statements Or Speculative Allegations As True

The district court repeatedly stated in its Opinion that it was assuming the truth of Plaintiffs' allegations, as it "must at the pleading stage." (Op. at 17.) However, Plaintiffs' material allegations were conclusory and/or speculative, and many "allegations" were actually ultimate legal conclusions that the court need not have accepted at face value. These are just the type of allegations that Rule 12 proceedings are designed to reject. The result of the district court's erroneous and wholesale adoption of Plaintiffs' "facts" means that any plaintiff purchasing any product subject to even a voluntary recall can sue under California law and force a defendant to endure discovery at least through a motion for summary judgment. This error can and should be corrected by applying the correct standards under F.R.C.P. 12(b)(1) or (6).

To resist a motion to dismiss, F.R.C.P. 8 "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). "A pleading that offers 'labels and conclusions' or 'a formulaic recitation

of the elements of a cause of action will not do.'" *Id.* (quoting *Twombly*, 550 U.S. at 555). "Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Id.* (quoting *Twombly*, 550 U.S. at 557).

Accordingly, even though a plaintiff's allegations are "accepted as true" on a motion to dismiss, for the complaint to survive it "must contain sufficient factual matter . . . to 'state a claim to relief that is plausible on its face.'" *Id.* (quoting *Twombly*, 550 U.S. at 570). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556). "The plausibility standard . . . asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* "Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* at 1950. "But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—'that the pleader is entitled to relief.'" *Id.* (citing F.R.C.P. 8(a)(2)). *See also id.* at 1949 ("Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of 'entitlement to relief.'") (citing *Twombly*, 550 U.S. at 557).

Likewise, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Id.* "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* As *Twombly* articulated, a court is "not bound to accept as true a legal conclusion couched as a factual allegation." 550 U.S. at 555. "Rule 8 . . . does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions." *Iqbal*, 129 S.Ct. at 1950.

F.R.C.P. 12(b)(1), which applies to Toyota's Article III standing arguments, likewise requires a court to do more than simply accept a plaintiff's conclusory allegations on their face. When a defendant brings a factual challenge to subject matter jurisdiction, a court "need not presume the truthfulness of the plaintiffs' allegations." *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000) (citing Moore's Federal Practice, Par. 12.30[4], at 12-38 (3d ed. 1999)). Moreover, "a court may look beyond the complaint to matters of public record without having to convert the motion into one for summary judgment." *Id.* (citations omitted).

Accordingly, whether F.R.C.P. 12(b)(1) or (b)(6) is applied, the Federal Rules require a court ruling on a motion to dismiss to do more than simply accept the truth of conclusory or speculative allegations in a complaint.

2. No Plaintiff Alleges Any Specific Representation By Toyota Or Reliance Thereon

Plaintiffs have not brought any product liability claims in this action, but instead assert various "benefit of the bargain" theories. The district court allowed allegations related to these theories to withstand a motion to dismiss. However, while the district court invoked F.R.C.P. 12(b)(1) and (6), it failed to apply the correct standards and simply assumed that all of Plaintiffs' allegations – even those amounting to legal conclusions – were true. The court also erred by giving credit to conclusory statements that lacked sufficient factual allegations supporting the statement. *See Iqbal*, 129 S.Ct. at 1950 (F.R.C.P. 8 "does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions.").

Possibly the most glaring deficiency in Plaintiffs' allegations is that none of them identify any specific assurance or representation from Toyota upon which they relied regarding the safety of Toyota vehicles, the performance of the vehicles, or the non-defective status of such vehicles.

For example, Plaintiff Brown does not allege that she ever experienced SUA in her Toyota vehicle, or that she incurred any physical injury or damages from SUA. (SAMCC ¶ 40.) However, the court concluded that allegations that Brown was "exposed to advertisements that emphasized safety" that "motivated her to purchase her vehicle" were adequate to allege economic loss when she "concludes

that she personally would not have purchased her vehicle or paid as much for it had she known the truth about the defects" related to SUA. (Op. at 15-16.)

The suggestion that, had Toyota acted "properly," Plaintiff Brown (a) would have known about SUA through Toyota's own general advertising, and (b) either would not have bought the vehicle, or would have but would have insisted on paying a lower price than she did, is nothing more than pure speculation and/or a "naked assertion" devoid of "further factual enhancement." *See Iqbal*, 129 S. Ct. at 1949. This problem permeates all of the named Plaintiffs' allegations.

Plaintiff Brown, like many other Plaintiffs, admits that "she does not recall the specifics of the many Toyota advertisements she saw before she purchased her Camry." (SAMCC ¶ 40.) Plaintiff Benjamin, who also does not allege he experienced SUA, likewise "does not recall the specifics of the many Toyota advertisements he saw before he purchased his Sienna," but only recalls a "theme" of "safety and reliability." (*Id.* ¶ 37.) No Plaintiffs allege that they heard – much less relied on – any specific representation of Toyota related to safety, reliability, or even a standard of performance in deciding whether to purchase their vehicles.

Plaintiffs' other attempts to plead reliance are similarly deficient. For example, Plaintiff Tucker, who also does not state that she experienced SUA in her vehicle, alleges: "When she purchased her Camry, she was not aware that Toyota

vehicles could accelerate suddenly and dangerously out of the driver's control and lacked a fail-safe mechanism to overcome this. Ms. Tucker *cannot speculate as to what she would have done had she been in possession of this information*, but she would have based her decision on her analysis of the risk, her ability to pay, and alternatives in the market." (*Id.* ¶ 65 (emphasis added).) Plaintiff Tucker cannot cross the threshold into plausibility with such allegations. Instead, she admits that she does not know whether disclosure about SUA would have made any difference in her decision to purchase a Camry.

Other Plaintiffs, although perhaps not as blatantly speculative as Plaintiff Tucker, nonetheless fail to plead reliability in a manner than meets the requirements of *Iqbal* and *Twombly*. All lead Plaintiffs inconsistently allege that they would not have bought or leased their vehicles if Toyota had disclosed information about SUA in its general advertising, but also that they might have bought or leased the vehicles but just would have paid a lower price. (SMACC ¶¶ 34-69.) Such allegations reflect the sought-after conclusion, but do not contain specific facts giving rise to an inference beyond the "mere possibility" of liability. *Iqbal,* 129 S. Ct. at 1950. They do not "contain sufficient factual matter . . . to 'state a claim to relief that is plausible on its face.'" *Id*. at 1949.

Moreover, at least 15 named Plaintiffs do not even allege that their vehicles have ever experienced SUA. These Plaintiffs have stated no plausible basis for alleging that their vehicles are not "safe" and "reliable," as previously advertised by Toyota. Their contentions to the contrary amount to nothing more than conclusory allegations that *Iqbal* and *Twombly* render insufficient as a matter of law.

Plaintiffs have argued, and apparently the district court agreed, that *Kwikset Corporation v. Superior Court of Orange County*, 51 Cal. 4th 310 (Cal. 2011), allows Plaintiffs to assert California UCL and FAL claims simply by alleging that they relied on Toyota's generic advertising theme of "safety and reliability" in purchasing vehicles that, they contend, have a defect that undermines the "safety and reliability" message. However, *Kwikset* does not allow a plaintiff to maintain UCL and FAL claims on such allegations.

Kwikset featured a very specific representation – a "Made in U.S.A." label – and the plaintiff consumers specifically alleged that they would not have bought the product but for that representation. 51 Cal. 4th 310, 330. The court in *Kwikset* was faced with whether such allegations were sufficient in light of Proposition 64, which limited the reach of private litigation related to unfair competition to one "who has suffered injury in fact and has lost money or property as a result of such

unfair competition." *Id.* at 321-22. The court observed that labels, particularly "Made in U.S.A." labels, matter to some consumers, and that the California legislature has outlawed deceptive and fraudulent "Made in America" representations. *Id.* at 329. The fact that the plaintiffs alleged that they would not have bought the product if they knew about the misrepresentation was sufficient to allege both economic injury and causation. *Id.* at 330. *See also Hill v. Roll Internat. Corp.*, 195 Cal. App. 4th 1295, 1307 (Cal. App. 1st Dist. 2011) (applying *Kwikset* to reject claim that green drop on water bottle represented that the subject bottled water was environmentally superior to other waters and endorsed by an environmental organization, and holding that although defendants had used the "green drop" in marketing to invoke some sort of association with the environment, it did not constitute the type of specific representation by a manufacturer that could reasonably "mislead" a consumer).

It is clear that Plaintiffs' allegations here do not meet the *Kwikset* test. Plaintiffs do not point to any particular representation of Toyota that they relied on, and can recall only general "themes of safety." They do not allege that Toyota represented that its vehicles were and would always be free of defects. With no specific representation, Plaintiffs cannot allege that they relied on Toyota's general advertising "themes." In addition, the plaintiffs in *Kwikset* alleged that they would

not have bought the products if they had been properly represented in their labeling; but in this case, all Plaintiffs equivocate on the issue through their alternative allegations of no-purchase and "would have paid less."[3]

Plaintiffs' allegations, when stripped of conclusory and non-plausible assertions, amount to no more than a "formulaic recitation" intended to attempt to meet the basic requirements needed to assert injury and causation for unfair competition or false advertising. *See Iqbal*, 129 S. Ct. at 1949. Thus, under *Iqbal* and *Twombly*, Plaintiffs' allegations are insufficient to state a claim.

3. Plaintiffs' Allegations Related To "Lost Value" Also Are Conclusory And/Or Speculative

Some Plaintiffs also allege that their Toyota vehicles "lost" money or value, apparently in an alternative attempt to satisfy the requirement of an "economic injury." Notably, a CLRA claim requires proof of damages in order to maintain standing. *See Kwikset Corp.*, 51 Cal. 4th at 336. These allegations likewise should not have survived a motion to dismiss.

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[3] Plaintiffs may cite to *In re Tobacco II Cases*, 46 Cal. 4th 298 (Cal. 2009), for the proposition that California courts allow general recitations of reliance on advertising to assert an injury for purposes of a UCL claim. However, California has not adopted *Iqbal* and *Twombly*, and a federal court ruling on a UCL claim necessarily must apply federal standards. Moreover, *Tobacco II* assumed exposure to an "extensive and long-term advertising campaign," 46 Cal. 4th at 328, which has not been pled here.

The district court cites to the example of Plaintiff Benjamin, who alleged that he "began investigating a trade of his 2007 Sienna for a 2011 Sienna just before the recalls were made public." (SAMCC ¶ 37.) He alleges that "[h]e has seen his trade-in value drop $2,000 since the recalls according to KELLEY BLUE BOOK, NADA GUIDE, and Edmunds.com." (*Id.*) But he does not allege that he even attempted to sell or trade his 2007 Sienna, or that he personally was injured by the alleged drop in value.

Accordingly, under the district court's reasoning, Plaintiff Benjamin is allowed to proceed in the case as a lead Plaintiff even though (1) he does not allege that he has experienced or been physically injured by a manifested defect, (2) he cannot recall any specific representation by Toyota that he allegedly relied on in purchasing his vehicle, and (3) he has not alleged any out-of-pocket loss relating to his vehicle. Plaintiff Benjamin's allegations, were they to survive a motion to dismiss, would allow any consumer owning a recalled product to bring a civil complaint for damages even if the plaintiff had experienced no actual physical or economic injury at all.[4]

[4] Moreover, Plaintiff Benjamin does not allege whether the supposed depreciation is based on an unrepaired recalled vehicle – after all, as Plaintiffs allege, the January 2010 recall offered a replacement pedal (SMACC ¶ 293) – or whether the alleged drop in value would be the same once the pedal was replaced.

In another example, Plaintiff Tucker alleges that when she sold her Toyota Camry, she "received less for her vehicle than she would have had her Camry not had a SUA defect." (*Id.* ¶ 65.) She does not allege anything about her negotiations or price research when she sold her Camry. She does not allege anything that even establishes how she knows that she "received less" due to SUA.[5] Given that vehicles nearly always depreciate simply through time and use, a fact susceptible to the "common sense" the Supreme Court implores courts to use on a motion to dismiss, *see Iqbal*, 129 S. Ct. at 1950, Plaintiff Tucker's allegation is pure speculation and conclusory.

In summary, these allegations do not establish economic injury either and are wholly inadequate to survive a motion to dismiss brought under either F.R.C.P. 12(b)(1) or (6).

B. The District Court's Decision, If Allowed To Stand, Will Open The Doors For Widespread Litigation And Discourage Corporate Actions That Promote Safety

Aside from the legal failures outlined above, the policy problem with Plaintiffs' attempt at expanding *Kwikset* is that it would provide standing and a

[5] Plaintiffs' complaint includes general allegations that the value of Toyota vehicles declined at a rate surpassing Toyota's competitors. However, Plaintiff Tucker does not allege anything suggesting that she understood this to be the effect on her market price, or that she experienced a selling price similar to that alleged generically by Plaintiffs.

cause of action to the purchasers of any recalled product, forcing manufacturers to endure discovery through summary judgment, driving up litigation costs, and discouraging corporations from issuing voluntary recalls or post-purchase warnings about their products.

It is common for automobile manufacturers in the United States to emphasize the "safety and reliability" of their vehicles in advertising and marketing materials. Consumers who are actually interested in what makes a vehicle "safe and reliable" will research key indicators that are meaningful to them. For example, the United States National Highway Traffic Safety Administration ("NHTSA") publicizes five-star crash rating information that evaluates vehicles on crash and rollover impacts. Private services such as Consumer Reports assess the reliability of vehicles. A manufacturer's generic "theme" of "safety and reliability" does not constitute any affirmative representation about any specific aspect of the product's performance, and reflects the reality that many consumers seek information from a variety of sources before purchasing a vehicle.

However, the district court's order translates generic statements about "safety and reliability" into a promise for a defect-free vehicle. In a single decision, the court creates a new standard of liability on manufacturers: nothing less than perfection will do. It does not matter if a plaintiff has not experienced the

defect. It does not matter if the product is still functioning as intended. It does not matter if the consumer does not allege any out-of-pocket losses. The mere fact that the manufacturer had some sort of "safety and reliability" theme in its advertising means that any alleged defect – which impliedly undermines reliability, if not safety – now opens the door to the courtroom.

The implications for such a rule of law are staggering. The NHTSA on-line database shows that there were 605 vehicle-related safety defect or non-compliance notices issued in 2011.[6] According to the Consumer Product Safety Commission, it also completed 405 product recalls in 2011.[7] Given this data, hundreds of new class action lawsuits would be ushered in each year under the district court's ruling.

One alternative, of course, to reduce the number of lawsuits is for manufacturers to simply stop conducting voluntary recalls. Yet encouraging manufacturers to NOT recall products whenever there is a potential defect could create additional risks for the American consumer.

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[6] "Safety Defect/Non-Compliance Notices" monthly report, available at http://www-odi.nhtsa.dot.gov/acms/cs/jaxrs/download/doc/UCM364119/RCLMTY-122011-1234.PDF, last viewed February 20, 2012.

[7] "2011 Performance & Accountability Report," at 7, available at http://www.cpsc.gov/cpscpub/pubs/reports/2011par.pdf, last viewed February 20, 2012.

The better approach is to reverse the court below. Not only does the district court's decision lead to a bad policy outcome, the rationale behind it is not supported by other cases that have weighed in on so-called "benefit of the bargain" theories. These cases show that where a product does not manifest the alleged defect – *i.e.*, it performs as expected – and where there is no contractual promise that is alleged to be broken, there is no "benefit of the bargain" injury because the plaintiff who does not experience a defect has still received what he or she bargained for.

A leading case for this proposition is *Rivera v. Wyeth-Ayerst Laboratories*, 283 F.3d 315 (5th Cir. 2002). In *Rivera*, the Fifth Circuit held that plaintiffs who had consumed an allegedly defective drug that nonetheless worked as intended without adverse physical effect could not establish economic injury. 283 F.3d at 320. The court concluded that plaintiffs "received the benefit of the bargain" because "the plaintiffs had not alleged that the products had been ineffective as to them." *Id.*

In *Rivera*, the Fifth Circuit distinguished its prior case of *Coghlan v. Wellcraft Marine Corp.*, 240 F.3d 449 (5th Cir. 2001), in which plaintiffs had contracted to buy an all-fiberglass boat but instead received a less valuable, wood-fiberglass hybrid. The *Coghlan* plaintiffs were allowed to maintain a breach of

contract, requesting damages equal to the difference in value between the promised all-fiberglass boat and the received wood-fiberglass boat. The crux was that the Coghlans had "assert[ed] they were promised one thing but were given a different, less valuable thing." *Rivera*, 283 F.3d at 320 (quoting *Coghlan*, 240 F.3d at 455 n.4).

Unlike the *Coghlan* plaintiffs – and unlike the *Kwikset* plaintiffs – Plaintiffs here have not "asserted they were promised one thing," because the alleged "safety/reliability" advertising theme of Toyota did not promise anything specific. Instead, all lead Plaintiffs find themselves in similar straits as those in *Rivera* for which they have not alleged any contractual "promise" upon which they could have relied. Thus, Plaintiffs cannot allege that they have not received the benefit of their bargain.

This Court's ruling in *Birdsong v. Apple, Inc.*, 590 F.3d 955 (9th Cir. 2009), a case complaining about the potential for iPods to cause hearing loss, provides a similar analysis. In *Birdsong*, the plaintiffs did "not allege the iPods failed to do anything they were designed to do," nor did they allege that they "have suffered or are substantially certain to suffer inevitable hearing loss or other injury from iPod use." *Id.* at 959. This Court affirmed that plaintiffs did not state a claim for breach of implied warranty.

That was not the end of the analysis, however. The *Birdsong* plaintiffs also had brought a UAL claim under California law, on the theory that the iPods all had a defect that caused the iPods to be worth less than what plaintiffs had paid for them. But this Court concluded that the alleged reduction in value was based on the hypothetical risk of hearing loss, which was not manifest in these plaintiffs. *Id.* at 961. Plaintiffs' "benefit of the bargain theory" likewise could not provide standing, because they did "not allege[] that they were deprived of an agreed-upon benefit in purchasing their iPods." *Id.* Specifically, "[t]he plaintiffs do not allege that Apple made any representations that iPod users could safely listen to music at high volumes for extended periods of time." *Id.* In other words, the plaintiffs' alleged injury in fact was "premised on the loss of a 'safety' benefit that was not part of the bargain to begin with." *Id.* (citing *Animal Legal Defense Fund v. Mendes*, 160 Cal. App. 4th 136, 146-47, 72 Cal. Rptr. 3d 553 (Cal. Ct. App. 2008)). Again, the fact that there were no allegations of any *specific* representation that constituted a "promise" as to the product's performance prevented plaintiffs from stating a claim or achieving standing.

Similarly, the Eight Circuit Court of Appeals in *Briehl v. GMC*, 172 F.3d 623 (8th Cir. 1999), affirmed the dismissal of a class action alleging that an automaker's anti-lock braking system was defectively designed. The court

reiterated the well-established rule that "purchasers of an allegedly defective product have no legally recognizable claim where the alleged defect has not manifested itself in the product they own," rejecting claims where plaintiffs "have not alleged that their ABS brakes have malfunctioned or failed." *Id.* at 628. Where plaintiffs attempted to plead as damages the diminished resale value of their vehicles, the court found their allegations were simply too conclusory and speculative. *Id.* at 629. For example, none alleged that they had actually sold their vehicles at a reduced value. *Id.* The court concluded that plaintiffs had failed to state a claim. *Id.*

Cases that Plaintiffs rely on to argue that their allegations sufficiently support standing or a cause of action are all distinguishable. For example in *In re Zurn Pex Plumbing Prods. Liab. Litig.*, 644 F.3d 604, 617 (8th Cir. 2011), the court allowed class certification of plaintiffs who had not yet suffered leaks in their plumbing due to an alleged defect known as stress corrosion cracking. But, unlike the case at bar, *Zurn Pex* did not concern any "unfair competition" or "false advertising" claims, and thus there was no analysis of whether plaintiffs had adequately pled misrepresentation and reliance.

Moreover, the opinion in *Zurn Pex* was rendered in a class certification context – not an initial motion to dismiss – where expert testimony already had

been offered to establish that the alleged defect was manifest, even if it had not yet caused physical damage. *Id.* The plaintiffs also had alleged that due to the defect, the plumbing was "doomed to leak." *Id.* at 609. In contrast, here, Plaintiffs have not plausibly alleged that SUA is "doomed" to manifest itself in their vehicles. Indeed, some Plaintiffs have had their Toyota vehicles for years without any alleged SUA incident. (*See, e.g.*, SAMCC ¶¶ 45, 51, 65.)

Plaintiffs also misplace reliance on *Cole v. General Motors Corp.*, 484 F.3d 717 (5th Cir. 2007). *Cole* did not concern any "unfair competition" or "false advertising" claims, but instead was limited to contract-based theories. Thus, again, the *Cole* plaintiffs did not need to allege any facts pertaining to misrepresentations or reliance. Because of the purely contract-based posture of the claims, and because plaintiffs alleged that the manufacturer unreasonably delayed in responding to the defect, the court in *Cole* concluded that economic injury could be asserted. 484 F.3d at 722-723.

Wolin v. Jaguar Land Rover North America, LLC, 617 F.3d 1168 (9th Cir. 2010), also does not dictate the result sought by Plaintiffs. *Wolin* was about class certification, and does not address standing at all. *Wolin* concluded that manifestation of a defect was not necessary for class certification by citing to *Blackie v. Barrack*, 524 F.2d 891 (9th Cir. 1975). But *Blackie* was about securities

violations and class certification, not about product defects. *Blackie* only stands for the proposition that a class certification decision should not be based on any assumptions about the ultimate merits of the case. 524 F.2d at 901. Accordingly, *Wolin* did not actually address any of the questions now before this Court.[8]

In summary, Plaintiffs' cases do not enlighten the issues raised here. To the extent cases such as *Kwikset* might have some bearing, they show that Plaintiffs must allege particular, concrete representations that are specifically relied upon by consumers in order to have standing and state a claim under CLRA, FAL and UCL.

V. CONCLUSION

Plaintiffs' allegations do not satisfy the pleading standards required to withstand an F.R.C.P. 12(b) motion to dismiss. None of these Plaintiffs allege anything suggesting that he or she actually relied on any specific item of safety

[8] Plaintiffs likely will attempt to rely on *Degelmann v. Advanced Med. Optics Inc.*, 659 F.3d 835 (9th Cir. 2011). As Toyota has already explained (see OBOM at 22-23), *Degelmann* does not support Plaintiffs' position on Article III standing. Nor does *Degelmann* assist Plaintiffs in stating a claim under F.R.C.P. 12(b)(6), because it does not address that issue at all. Plaintiffs must satisfy both Article III standing and statutory standing to withstand a motion to dismiss. *See Salmon Spawning & Recovery Alliance v. Gutierrez*, 545 F.3d 1220, 1225 (9th Cir. 2008) ("If a plaintiff has shown sufficient injury to satisfy Article III, but has not been granted statutory standing, the suit must be dismissed under Federal Rule of Civil Procedure 12(b)(6), because the plaintiff cannot state a claim upon which relief can be granted.").

information provided by Toyota prior to his or her purchase, and they fail to allege they would have even paid attention to any of the information specific to SUA. Their allegations defy plausibility by inconsistently alleging that they would not have bought their vehicles if Toyota had disclosed information about SUA in its general advertising, but then also alleging that they might have bought the vehicles but just would have paid a lower price. Yet none of the Plaintiffs include any factual allegations pertaining to what they paid for their vehicles, or how that price was negotiated.

Such a deficient pleading cannot form the basis of a class action, because the allegations do not satisfy Rule 12. Such a holding is consistent with cases showing that plaintiffs cannot assert economic injury based simply on the alleged presence of a defect, and appropriately narrows the universe of potential class actions that may be generated from product recalls. Accordingly, this Court should reverse the ruling by the district court on the issues of standing and stating a claim under CLRA, FAL and UCL.

Dated February 29, 2012.

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CERTIFICATE OF COMPLIANCE

Certificate of Compliance Pursuant to 9th Circuit Rules 28-4,29-2(c)(2) and (3), 32-2 or 32-4 for Case Number No. 11-80187.

I certify that this brief complies with the length limits set forth at Fed. R. App. P. 32, and contains 5,390 words. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

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CERTIFICATE OF SERVICE

I hereby certify that on February 29, 2012, I electronically filed the foregoing brief of Amicus Curiae International Association of Defense Counsel with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing brief by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

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