UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Miami Division

MDL No. 2599
Master File No. 15-02599-MD-MORENO
Economic Loss No. 14-24009-CV-MORENO

IN RE:

TAKATA AIRBAG PRODUCTS LIABILITY LITIGATION

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BUTLER AUTO RECYCLING, INC., *et. al.*, *individually and on behalf of all others similarly situated*,

Plaintiffs,

v.

HONDA MOTOR CO., LTD., *et. al.*,[1]

Defendants.

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This multidistrict litigation consolidates allegations of economic loss and personal injury related to airbags manufactured by former-defendants Takata Corporation and TK Holdings (collectively, "Takata") and equipped in vehicles distributed by Defendant vehicle manufacturers.[2]

[1] Audi Aktiengesellschaft, Audi of America, LLC, BMW of North America, LLC, BMW Manufacturing Co., LLC, FCA US LLC, Ford Motor Company, General Motors Company, General Motors Holdings LLC, General Motors LLC, Honda Motor Co., Ltd., American Honda Motor Co., Inc., Honda R&D Co., Ltd, American Honda Motor Co., Inc., Mazda Motor Corporation, Mazda Motor of America, Inc., Mercedes-Benz USA, LLC, Daimler AG, Nissan Motor Co., Ltd., Nissan North America, Inc., Fuji Heavy Industries, Ltd. *n/k/a* Subaru of America, Inc., Toyota Motor Corporation, Toyota Motor Sales, U.S.A., Inc., Toyota Motor Engineering & Manufacturing North America, Inc., Volkswagen Aktiengesellschaft, Volkswagen Group of America.

[2] BMW of North America, LLC and BMW Manufacturing Co., LLC are collectively referred to

The allegations are that Defendants' vehicles were equipped with Takata airbags containing the chemical ammonium nitrate, which creates a small explosion to inflate the airbags during a crash. Plaintiffs, who are automotive part recycler companies that purchased vehicles manufactured by the Automotive Defendants that were equipped with Takata airbags containing the propellant ammonium nitrate, contend that when exposed to high heat and humidity, the explosion is much more forceful and can cause significant injuries and even death.

THIS CAUSE comes before the Court upon the Automotive Defendants' Motion to Dismiss Automotive Recycler Plaintiffs' First Amended Complaint **(D.E. 2976)**,[3] as well as the supplemental Motions to Dismiss filed by Mercedes-Benz **(D.E. 2984)**, Volkswagen **(D.E. 2985)**, and FCA US LLC **(D.E. 2987)**. New GM separately moves to dismiss for lack of personal jurisdiction all non-Florida Plaintiffs in footnote 5 of its Motion to Dismiss the consolidated consumer complaint **(D.E. 2981)**. Ford also separately moved to dismiss the *Sinclair* complaint **(D.E. 2887)**, but that motion was denied as moot in light of the settlement of consumer claims. Ford later requested that the Court defer resolution of Ford's motion to dismiss as to the Recyclers

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as "BMW." FCA US LLC is referred to as "FCA." Ford Motor Company is referred to as "Ford." General Motors Company, General Motors Holdings LLC, and General Motors LLC are collectively referred to as "General Motors." Defendants Honda Motor Co., Ltd., American Honda Motor Co., Inc., and Honda R&D Co., Ltd, American Honda Motor Co., Inc. are collectively referred to as "Honda." Mazda Motor Corporation and Mazda Motor of America, Inc. are collectively referred to as "Mazda." Mercedes-Benz USA, LLC and Daimler AG are collectively referred to as "Mercedes-Benz." Nissan Motor Co., Ltd. and Nissan North America, Inc. are collectively referred to as "Nissan." Fuji Heavy Industries, Ltd. n/k/a Subaru of America, Inc. is referred to as "Subaru." Toyota Motor Corporation, Toyota Motor Sales, U.S.A., Inc., and Toyota Motor Engineering & Manufacturing North America, Inc. are collectively referred to as "Toyota." Volkswagen Aktiengesellschaft and Volkswagen Group of America are collectively referred to, along with Audi Aktiengesellschaft and Audi of America, LLC ("Audi"), as "Volkswagen."

[3] Ford adopts the Automotive Defendants' Motion to Dismiss. (*See* D.E. 3006.)

until the completion of briefing and argument on any motions to dismiss filed by the other Automotive Defendants, and the Court agreed to do so. Ford's Motion to Dismiss argues that the non-Florida Plaintiffs' claims should be dismissed for lack of personal jurisdiction. Together, the Motions seek to dismiss all claims asserted by the Automotive Recycler Plaintiffs in two separate complaints: *Sinclair, et. al. v. Ford Motor Company* ("*Sinclair*") **(D.E. 2670)** and *Butler Auto Recycling, Inc., et. al. v. Honda Motor Co., Ltd., et. al.* ("*Butler*") **(D.E. 2781)**.[4]

THE COURT has thoroughly reviewed the *Butler* and *Sinclair* Complaints, the Automotive Defendants' Motions to Dismiss, the Plaintiffs' Responses in Opposition, the Defendants' Replies, and both parties' supplemental briefing pursuant to the Court's requests. The Court also heard oral argument from the parties on certain issues raised in the moving papers. For the reasons discussed below, the Court **GRANTS IN PART AND DENIES IN PART** the Automotive Defendants' Motions to Dismiss.

BACKGROUND

The Plaintiffs are automotive part recycler companies that purchased vehicles manufactured by the Automotive Defendants that were equipped with Takata airbags containing the propellant ammonium nitrate. Like the Consumer Plaintiffs, the Recycler Plaintiffs allege ammonium nitrate is an innately volatile and unstable propellant that imposes an unreasonable risk of serious foreseeable harm or death upon drivers of the Automotive Defendants' vehicles. The

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[4] Previously, the Automotive-Recycler Plaintiffs' claims against Ford were severed from the Consumer Plaintiffs' claims in the Fourth Amended Complaint (D.E. 2670), and then consolidated for pretrial purposes with the Automotive-Recycler Plaintiffs' claims against the remaining Defendants, *see* D.E. 2969. The claims remaining against Ford from the *Sinclair* Complaint are: Counts 1–2 (RICO); Counts 35–39 (various state consumer protection statutes); Count 40 (Lanham Act); and Count 41 (Fraudulent Concealment and Fraudulent Misrepresentation).

crux of the Recycler Plaintiffs' legal claims is that the Automotive Defendants knew or should have known of these defects prior to installing the Takata airbags in their vehicles, and that the Automotive Defendants concealed from, or failed to notify, the Recycler Plaintiffs and the general public of the full and complete nature of the defect, despite being aware of problems arising during the design and testing process, and through various rupture incidents and recalls. As a result, the Recycler Plaintiffs allege they overpaid for vehicles manufactured by the Automotive Defendants, and they are now unable to sell both the airbags and the vehicles in light of the defects.

The Recyclers filed their First Amended Consolidated Class complaint against Automotive Defendants in 2018 (the *Butler* complaint) **(D.E. 2781)**. The *Butler* Complaint, which largely mirrors the *Sinclair* Complaint, levels the following 27 claims against the remaining Automotive Defendants: violations of the RICO Act (Counts 1–20); violations of the Lanham Act (Count 21); common-law fraudulent concealment and fraudulent misrepresentation (Count 22); and violations of the consumer protection statutes in Florida, Georgia, North Carolina, Tennessee, and Texas (Counts 23–27).

The *Sinclair* Complaint asserts the following 9 claims against Ford: violations of the Racketeer Influenced and Corrupt Organizations ("RICO") Act (Counts 1–2); violations of consumer protection statutes in Florida, Georgia, North Carolina, Tennessee, and Texas (Counts 35–39); violations of the Lanham Act (Count 40); and common-law fraudulent concealment and fraudulent misrepresentation (Count 41).

While those complaints and concomitant motions to dismiss were pending, this Court entered several orders pertaining to the Consumer Track complaints against FCA, the Mercedes defendants, the VW defendants, the Audi defendants, and New GM. Those orders dismissed all RICO claims against those defendants, dismissed some state law statutory fraud claims, sustained

most common law fraud claims, and dismissed all direct file actions for lack of personal jurisdiction over the above Defendants in the Southern District of Florida. The Court also entirely dismissed Audi AG, Daimler AG, and Volkswagen AG due to a lack of personal jurisdiction in the Southern District of Florida.

The Court will now begin by addressing the personal jurisdiction challenges, and then proceed to addressing the substantive claims.

ANALYSIS

I. Personal Jurisdiction

The personal jurisdiction issues here are complicated. Both transferor and directly-filed plaintiffs are at issue, as are post-transfer amended complaints which add both new claims and new defendants. There are also potential waivers of personal jurisdiction defenses. It is useful to begin with a brief history of the litigation.

A. Direct File Complaints vs. Transferor Complaints

In 2015 and 2016, various Automotive Recyclers filed complaints in district courts around the country including N.D. Fla., W.D. Va., W.D. Mo., M.D. Ga., W.D. Tex., E.D. Tenn., and S.D. Fla. The Defendants, at that time, included Honda, BMW, Mazda, Nissan, Subaru, Toyota, and Ford entities ("Legacy Defendants"). Those complaints were then transferred to this Court via the Joint Panel on Multidistrict Litigation.[5]

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[5]Those complaints include: *Butler Auto Recycling v. Takata Corp.* (N.D. Fla. Mar. 25, 2016) (transferred to MDL on 4/12/2016), *Cunningham Bros. Auto Parts, LLC v. Takata Corp.* (W.D. Va. Mar. 29, 2016) (transferred to MDL on 4/12/2016), *Midway Auto Parts LLC v. Takata Corp.* (W.D. Mo.) (transferred to MDL on 3/10/2016), *Road-Tested Parts, Inc. v. Ford Motor Co.* (M.D. Ga. Feb. 22, 2018) (transferred to MDL on 3/7/2018), *Synder's Ltd. V. Takata Corp.* (W.D. Tex. Oct. 8, 2015) (transferred to MDL on 10/23/2015), *Triple D. Corp. v. Takata Corp.* (E.D. Tenn.

On March 14, 2018, however, Plaintiffs filed new complaints on the MDL docket—the *Puhalla*, *Boyd*, and *Whitaker* complaints—as well as new complaints on behalf of six of the seven transferor Plaintiffs. The March 14, 2018 "new complaints" or "amendments" (the parties dispute the terminology) added the "New Defendants"—i.e., FCA, New GM, Mercedes (both domestic and foreign entities), and Volkswagen (both domestic and foreign entities). They also added Racketeer Influenced and Corrupt Organization Act claims, which, if adequately pleaded, would give nationwide jurisdiction.

Then, on April 26, 2018, the Court ordered the Recycler Plaintiffs to "combin[e] all claims brought by all automotive recycler plaintiffs against all defendants *except* Ford Motor Company," and amend the Direct-File Complaints to exclude claims brought by Recycler Plaintiffs. **(D.E. 2651.)** In accordance with the Court's instructions, the Recycler Plaintiffs filed the Automotive Recyclers' First Amended Consolidated Class Action Complaint on the MDL docket on May 18, 2018. That day, the Plaintiffs also filed a complaint on behalf of Automotive Recycler Young's Auto Center and Salvage.[6] There is no question that Young's complaint was directly filed in the MDL, and thus the Defendants must be subject to personal jurisdiction in the state of Florida, as this Court has previously ruled. *In Re Takata Prod. Liab. Litig.*, 396 F. Supp. 3d 1101, 1168-69 (S.D. Fla. 2019).

Mar. 21, 2016) (transferred to MDL 4/1/2016), *Automotive Dismantlers and Recyclers Assoc. v. Am. Honda. Motor Co.* (S.D. Fla. Feb. 2, 2015) (transferred to MDL on 3/9/2015). The direct file complaint is by plaintiff Young's Auto Center and Salvage, LP.

[6] This complaint was only brought against the Legacy Defendants.

Now, Defendants argue that all Defendants who were added after the complaints were transferred to the Southern District of Florida, i.e. the New Defendants, are also "direct-file" Defendants because they were added once the complaints had already been transferred to the MDL Court. Defendants correctly point out that the Court has previously ruled direct-file defendants must be subject to personal jurisdiction in this District, and they argue the Court must dismiss those New Defendants because they are directly filed and are not subject to personal jurisdiction here. Plaintiffs respond that the New Defendants should be assessed according to the jurisdictional reach of the transferor courts, which is they argue is standard MDL practice.

Thus, the Court must decide how it will categorize these "New Defendants." There are two options. First, as **added by amendment** to the transferor complaints, and thus personal jurisdiction is evaluated under the rules of the transferor court. Or second, as defendants added by **new complaints that were directly filed** in the MDL, and thus personal jurisdiction is evaluated under the rules of this Court. This Court's prior orders are instructive here.

In a May 2019 Order on the Consumer track[7], the Court held that the "directly-filed" complaint was the legally operative one, but also held that, within the directly-filed consolidated complaint, the Transferor Plaintiffs and the Direct-File Plaintiffs **retain their separate legal identities**. Accordingly, the Court held that it was appropriate to sever the actions when pre-trial proceedings end and transfer the transferor actions back to the Court from which they came. *In Re Takata Prod. Liab. Litig.*, 379 F. Supp. 3d. 1333, 1343 (S.D. Fla. 2019). Clearly, the Court has previously maintained a legal distinction between directly filed and transferred actions even when

[7] There, Plaintiffs added new *plaintiffs* and new *claims* once in the MDL. Here new *defendants* were added.

in the same complaint.

The Plaintiffs, however, cite several other multidistrict litigations and the Multidistrict Litigation Manual to support the argument that best practice is to allow Plaintiffs to add new claims and defendants through amendment to complaints that have already been transferred to the MDL. Otherwise, the case would be transferred back and forth each time new defendants are added—this creates unnecessary delay and extra burden on the JPML when almost 40% of the federal courts' civil caseload is already MDL cases. This point about efficiency is well taken—but not entirely appropriate here. In the case cited by Plaintiffs, other courts deemed complaints to have retained their transferor identity when they were *amended* once already in the MDL. The New Defendants here were not added by *amendment*. On March 14, 2018, the Plaintiffs filed **NEW** complaints containing the New Defendants—specifically, the *Puhalla*, *Whitaker*, and *Boyd* complaints. Then, almost two months later, the Court ordered the Plaintiffs to separate Recyclers from Consumers, which resulted in the Recycler's First Amended Consolidated Class Action Complaint against both new and old Defendants. So, although all defendants still end up together in the First Amended Consolidated Class Complaint, Plaintiffs did not amend the old transferor complaints—they filed new complaints which were later consolidated with the transferor complaints.

The Court must be consistent with its prior orders, and thus it now holds that the New Defendants were directly filed. This holding is also consistent with Supreme Court precedent. As this Court noted in its previous order, the Supreme Court has recognized that "[c]ases consolidated for MDL pretrial proceedings ordinarily retain their *separate identities*." *Gelboim v. Bank of Am. Corp.*, 574 U.S. 405, 406 (2015) (emphasis added). Thus, when pre-trial proceedings conclude, the Court will need to sever each legally distinct action and remand it to the appropriate district.

The New Defendants have no such transferor Court available to them because the complaint in which they were first introduced to this Court was filed in the MDL. An MDL Court only has its own jurisdictional powers and those of any transferor court. Following a transfer, the transferee judge has all the jurisdiction and powers over pretrial proceedings in the actions transferred to him that the transferor judge would have had in the absence of transfer. *In re FMC Corp. Patent Litigation,* 422 F. Supp. 1163, 1165 (J.P.M.D.L.1976) (citations omitted). No transferor Court exists for the New Defendants, so they must be subject to the jurisdiction of this Court. As previously held, those Defendants are not. *In re Takata Airbag Prod. Liab. Litig.*, 396 F. Supp. 3d 1101, 1168–69 (S.D. Fla. 2019) (dismissing the New Defendants because their only jurisdictionally sufficient claims, the RICO claims, have been dismissed). Because the jurisdictional allegations here are materially identical to those in the consumer complaints and because the Court will dismiss RICO claims against the New Defendants later in this order, all claims against **Audi of America, LLC, Mercedes-Benz USA, LLC, and Volkswagen Group of America, LLC** are **dismissed** for lack of personal jurisdiction in the Southern District of Florida. The Court also **dismisses** all claims against **Daimler AG, Audi AG, and Volkswagen AG** for lack of personal jurisdiction.[8]

Finally, the Court dismisses all claims against FCA and New GM for lack of personal jurisdiction because neither the *Boyd* complaint against FCA, the *Whitaker* complaint against New GM, nor the seven transferor complaints were filed in districts where those companies are subject

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[8] The Plaintiffs do not that these Defendants are not subject to personal jurisdiction in Florida. *See also In re Takata Airbag Prod. Liab. Litig.*, 396 F. Supp. 3d 1101 (S.D. Fla. 2019) (holding that these Defendants are not subject to specific personal jurisdiction in Florida).

to general personal jurisdiction.[9] Nor are these Defendants subject to specific personal jurisdiction in Florida. *In re Takata Airbag Prod. Liab. Litig.*, 396 F. Supp. 3d 1101, 1142 (S.D. Fla. 2019).

Notably, both non-Florida and Florida Plaintiffs' claims against New GM are dismissed. The Court realizes that New GM, in its relevant motions, only moved to dismiss the non-Florida Plaintiffs for lack of personal jurisdiction. Previously, on the Consumer track, the Court dismissed Florida Plaintiffs' claims against New GM where GM did not move for dismissal of Florida Plaintiffs. It now does so again here because New GM is not subject to personal jurisdiction in Florida.[10] This is true whether the claims belong to Floridians or non-Floridians. *In re Takata Airbag Prod. Liab. Litig.*, 396 F. Supp. 3d 1101, 1142-43. (S.D. Fla. 2019).

The Court is aware of its option to allow Plaintiffs to amend their complaint. However, after many years and much expense, it does not appear that Plaintiffs can make a case of specific jurisdiction in Florida so the opportunity to amend would be futile.

B . Waiver

The Legacy Defendants also make a personal jurisdiction argument. They argue that direct-filed claims must be dismissed if Legacy Defendants are not subject to personal jurisdiction in Florida.[11] Of those Defendants, only Ford separately moved to dismiss for lack of personal

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[9] FCA and New GM are subject to general jurisdiction in Michigan. The Consumer Plaintiffs filed transferor complaints in the Eastern District of Michigan, but the Recycler Plaintiffs did not.

[10] Readers of this Court's (numerous) *Takata* opinions will recognize that the Court relies upon the Eleventh Circuit's opinion in *Courboin v. Scott*, 596 F. App'x 729 (11th Cir. 2014) to support the fact that the Court can *sua sponte* dismiss claims against non-moving Defendants when they are similarly situated to moving Defendants. Some Legacy Defendants later rely on this same case to persuade the Court to overlook a complete waiver of personal jurisdiction defenses. The Court does not find *Courboin* applicable in that context and explains why *infra.*

[11] The only direct-file Plaintiff that makes claims against the Legacy Defendants is Young's Auto

jurisdiction. But Ford also makes clear that it has no opposition to the Court exercising jurisdiction over the Recycler Plaintiffs' claims that were transferred into the MDL from other districts. It writes, "Plaintiffs correctly note that those Automotive-Recycler Plaintiffs' claims were transferred into the MDL from various transferor courts. . . . Ford *withdraws* its motion to dismiss for lack of personal jurisdiction as to those Automotive-Recycler Plaintiffs' claims. Thus, Ford's motion to dismiss for lack of personal jurisdiction is directed to the non-Florida *Consumer* Plaintiffs and Automotive-Recycler Plaintiff Young's Auto Center and Salvage, LP." D.E. 2911 at n.1 (emphasis added). Young's Auto Center is a North Carolina-based Plaintiff. Thus, this Southern District of Florida Court must have specific personal jurisdiction over Ford with respect to a North Carolinian's claims. This Court has already held that it would exercise pendent personal jurisdiction over claims by non-Florida Plaintiffs against Ford. D.E. 1417 at n.3.

Ford counters that this Court's pendent personal jurisdiction holding was pre-*Bristol-Myers Squibb*, a 2017 Supreme Court decision that held in order for a state court to exercise personal jurisdiction over non-resident defendant, there must be a link between the forum and the specific plaintiff's claim. *Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco Cty.*, 137 S. Ct. 1773 (2017). It would not suffice that *some* plaintiffs' claims were linked to the forum, even if all plaintiffs had the same cause of action; each plaintiff needed to have their own link. *Id.* Now, Ford argues, this Court cannot exercise jurisdiction over Young's claims in conjunction with claims over which Ford has already admitted this Court has jurisdiction over because Young's is a North Carolina entity whose claims have no link to this forum.

Center and Salvage LP.

But this argument ignores this Court's prior holdings on the applicability of *Brisol-Myers Squibb* to federal court, putative class actions, and multi-district litigations. Other automotive defendants made this identical argument, and the Court rejected it then.

> Mercedes and Volkswagen argue *Bristol-Myers* precludes the Court from exercising pendent personal jurisdiction over the non-Florida putative class members' claims. (D.E. 2988 at 45 n.19.) But this argument flies in the face of several rulings that *Bristol-Myers* does not *per se* preclude federal courts from exercising pendent personal jurisdiction over claims advanced by nonresident plaintiffs. *See, e.g.*, *Sloan v. General Motors LLC*, 287 F. Supp. 3d 840, 862 (N.D. Cal. 2018) (exercising pendent personal jurisdiction over claims advanced by nonresident plaintiffs in light of the "absence of interstate sovereignty concerns present in *Bristol-Myers*"); *In re Packaged Seafood Prod. Antitrust Litig.*, 338 F. Supp. 3d 1118, 1172–73 (S.D. Cal. 2018) (rejecting argument that pendent personal jurisdiction doctrine did not survive *Bristol-Myers*); *Allen v. ConAgra Foods, Inc.*, 2018 WL 6460451, at *4 (N.D. Cal. Dec. 10, 2018) (exercising pendent personal jurisdiction over claims brought by nonresident plaintiffs and noting *Bristol-Myers* did not apply because "the Supreme Court could not have intended to severely narrow the forum choices available to *class* action plaintiffs when it decided a case involving a *mass* action") (emphasis in original).

In re Takata Airbag Prod. Liab. Litig., 396 F. Supp. 3d 1101, 1136 (S.D. Fla. 2019). Indeed, the *Bristol-Myers* Court made it abundantly clear that "our decision concerns the due process limits on the exercise of specific jurisdiction by a State, we leave open the question whether the Fifth Amendment imposes the same restrictions on the exercise of personal jurisdiction by a federal court." *Bristol-Myers*, at 1781, 83-84. Thus, *Bristol-Myers* does not limit this MDL Court's ability to exercise supplemental jurisdiction over non-Florida Plaintiffs' claims against Ford—the Court declines to dismiss Young's Auto Parts complaint against Ford, even though it was directly filed.

The rest of the Defendants made Rule 12(b) motions without including objections to personal jurisdiction. "[T]he requirement of personal jurisdiction represents first of all an individual right, it can, like other such rights, be waived." *Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703 (1982). By the plain text of Rule 12(h)(1)(B)(i), a Defendant waives some Rule 12(b) defenses (including personal jurisdiction) when it does not

raise them in a Rule 12 motion. That is exactly what the Legacy Defendants did here in their motion to dismiss at D.E. 2976. *Palmer v. Braun*, 376 F.3d 1254, 1259 (11th Cir. 2004) ("It is well-settled that lack of personal jurisdiction is a waivable defect, and that a defendant waives any objection to the district court's jurisdiction over his person by not objecting to it in a responsive pleading or a Fed. R. Civ. P. 12 motion."); *Posner v. Essex Ins. Co.*, 178 F.3d 1209, 1214 n.4 (11th Cir. 1999) ("Essex did not move for dismissal on the grounds that the Florida courts lacked personal jurisdiction over it. By omitting this defense from its motion, Essex waived any challenge it could have asserted to the court's exercise of personal jurisdiction over it.").

Defendants cite *Courboin v. Scott*, 596 F. App'x 729 (11th Cir. 2014), an unpublished Eleventh Circuit opinion for the proposition that "[a] district court may on its own motion dismiss an action as to defendants who have not moved to dismiss where such defendants are in a position similar to that of moving defendants or where claims against such defendants are integrally related." *Courboin*, 596 F. App'x at 735. As Defendants note, this Court previously cited *Courboin* when it *sua sponte* dismissed Florida Consumer Plaintiffs' claims against New GM for lack of personal jurisdiction, even though New GM had only moved to dismiss the non-Florida Consumer Plaintiffs' claims on that basis.[12] *In re Takata Airbag Prod. Liab. Litig.*, 396 F. Supp. 3d 1101, 1143 n.11 (S.D. Fla. 2019).

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[12] The Court is dismissing all claims against New GM and not dismissing all claims against Ford, even though both parties only made partial motions to dismiss for lack of personal jurisdiction, because of the unique features of this long, sprawling litigation. The Court was able to exercise jurisdiction over Young's claims against Ford because that jurisdiction was supplemental to the jurisdiction the Court was *already* exercising over Ford pursuant to Ford's acceptance of this Court's jurisdiction over the transferor Recycler Plaintiffs' claims against it. On the other hand, all Recycler Plaintiffs' complaints against New GM were *directly filed*, which gave this Court no opportunity to exercise jurisdiction in the first place. To exercise jurisdiction over the Florida Plaintiffs' claims against New GM would raise the question—supplemental to what?

However, there is vast difference between dismissing additional claims against the same Defendant after the Defendant rightly challenged the Court's power over said Defendant and dismissing *all* claims against a Defendant that did not timely challenge the Court's power at all. In *Courboin*, the Eleventh Circuit specifically based its holding that a district court may, on its own, dismiss an action as to defendants who have not moved to dismiss where such defendants are in a position similar to that of moving defendants on the promise that the district court will do so "fairly"—usually by providing an opportunity for the other party to respond. *Courboin v. Scott*, 596 F. App'x 729, 735 (11th Cir. 2014). In the Court's earlier order citing *Courboin*, Plaintiffs had the opportunity to respond to the argument that New GM was subject to the Court's jurisdiction because New GM moved to dismiss for lack of personal jurisdiction with respect to *all* but the Florida Plaintiffs' claims. Here, Plaintiffs had no such opportunity. It is also worth noting that in *Courboin*, Defendants there had yet to respond *at all* when the Court made its *sua sponte* dismissal. By contrast, these parties have engaged in three years of litigation.[13]

Lastly, in a precedential, albeit older than *Courboin*, opinion, the Eleventh Circuit considered whether a court even has the power to, on its own initiative, dismiss an action based on a waived personal jurisdiction defense. It concluded that a court does not have that power because waiver "confer[s] personal jurisdiction on the Court by consent." *Pardazi v. Cullman Med. Ctr.*, 896 F.2d 1313, 1317 (11th Cir. 1990). Thus, the Court finds that the Legacy Defendants waived their personal jurisdiction defense against the direct-filed claims and that Young's claims may

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[13] Additionally, it is not for the Court to speculate as to why these Defendants chose not to challenge personal jurisdiction at all at the appropriate stage of the litigation. For example, some Defendants may choose to intentionally waive their personal jurisdiction objections to reap the benefits of the global peace that comes with a settlement during an MDL.

proceed to the extent that they state a claim for relief.

To recap, all claims against Audi AG, Daimler AG, Volkswagen AG, Audi of America LLC, Mercedes-Benz USA LLC, Volkswagen Group of America LLC, FCA US LLC, and New GM.

II. Racketeer Influenced and Corrupt Organizations Act (RICO) – Counts 3, 5, 7, 9, 11, 13, 15, 17, and 19 – Violation of 18 U.S.C. § 1962(c)

Recycler Plaintiffs bring RICO claims, both § 1962(c) and (d), against all automaker defendants. The Court will discuss the § 1962(c) claims first, then § 1962(d), but will reserve discussion of the claims against Honda until after each of those sections.

To state a plausible Section 1962(c) claim, Plaintiffs must allege that Defendants: (1) engaged in conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity. *Williams v. Mohawk Indus., Inc.*, 465 F.3d 1277, 1282 (11th Cir. 2006), *abrogated on other grounds by Ray v. Spirit Airlines, Inc.*, 836 F.3d 1340, 1349 (11th Cir. 2016). Racketeering activity is defined as any act indictable under any of the statutory provisions listed in 18 U.S.C. Section 1961(1), which includes mail and wire fraud in violation of 18 U.S.C. Sections 1341 and 1343. *See Kemp v. Am. Tel. & Tel. Co.*, 393 F.3d 1354, 1359 (11th Cir. 2004). A "pattern of racketeering activity" requires the commission of at least two such acts within a ten-year period. *See* 18 U.S.C. § 1961(5); *Rajput v. City Trading, LLC*, 476 F. App'x 177, 180 (11th Cir. 2012).

Plaintiffs' pattern of racketeering claims are predicated on mail and wire fraud, and thus "must comply not only with the plausibility criteria articulated in *Twombly* and *Iqbal*, but also with Fed. R. Civ. P. 9(b)'s heightened pleading standard, which requires that '[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake.'" *Amer. Dental Ass'n v. Cigna Corp.*, 605 F.3d 1283, 1291 (11th Cir. 2010) (quoting *Ambrosia Coal*

& Constr. Co. v. Pages Morales, 482 F.3d 1309, 1316 n.10 (11th Cir. 2007)). "Given the routine use of mail and wire communications in business operations ...[,] 'RICO claims premised on mail or wire fraud must be particularly scrutinized because of the relative ease with which a plaintiff may mold a RICO pattern from allegations that, upon closer scrutiny, do not support it.'" *Crawford v. Franklin Credit Mgmt. Corp.*, 758 F.3d 473, 489 (2d Cir. 2014) (quoting *Efron v. Embassy Suites (Puerto Rico), Inc.*, 223 F.3d 12, 20 (1st Cir. 2000)).

To comply with Rule 9(b), Plaintiffs must allege: "(1) the precise statements, documents, or misrepresentations made; (2) the time, place, and person responsible for the statement; (3) the content and manner in which these statements misled the Plaintiffs; and (4) what the defendants gained by the alleged fraud." *Brooks v. Blue Cross & Blue Shield of Fla., Inc.*, 116 F.3d 1364, 1380–81 (11th Cir. 1997) (*per curiam*) (citation omitted). In addition, the plaintiff must allege particular facts with respect to each defendant's participation in the fraud. *Id.* at 1381. In other words, a plaintiff is required to set forth specific allegations as to each defendant that will fulfill the "who, what, when, where, and how" pertaining to the underlying fraud. *Garfield v. NDC Health Corp.*, 466 F.3d 1255, 1262 (11th Cir. 2006) (citation omitted). At bottom, the purpose of the particularity rule is to alert defendants to their precise misconduct and protect them against baseless charges of fraudulent behavior. *See Durham v. Bus. Mgmt. Assocs.*, 847 F.2d 1505, 1511 (11th Cir. 1988) (citing *Seville Indus. Mach. Corp. v. Southmost Mach. Corp.*, 742 F.2d 786, 791 (3d Cir. 1984)).

In June 2019, this Court dismissed substantive RICO claims as well as RICO conspiracy claims brought by Consumer Plaintiffs against defendants FCA, Mercedes, Volkswagen, Audi, and General Motors. *In re Takata Airbag Prod. Liab. Litig.*, 396 F. Supp. 3d 1101 (2019). Those claims were dismissed for insufficiently alleging a pattern of racketeering activity based on mail

and wire fraud. The Court held that the consumer plaintiffs' allegations of mail and wire fraud did not comply with Rule 9(b). "Plaintiffs fail to plead with sufficient particularity that any of the Defendants engaged in a pattern of racketeering activity premised on mail and wire fraud. Far from 'precise,' Plaintiffs' allegations describe in *general* terms the contents of the Defendants' internal communications, and the Defendants' communications with Takata, government authorities, and the public." *In re Takata Airbag Prod. Liab. Litig.*, 396 F. Supp. 3d 1101, 1159 (S.D. Fla. 2019). Although, as here, the Plaintiffs sufficiently alleged Defendants' knowledge of issues with Takata airbags, the allegations "provide[d] no basis in fact upon which the Court could conclude that any specific act of any specific Defendant[ ] is indictable for mail or wire fraud," *Id.* (citing *Brooks v. Blue Cross & Blue Shield of Fla., Inc.*, 116 F.3d 1364, 1381 (11th Cir. 1997)). The Court then ordered supplemental briefing as to why the Recycler Plaintiffs' RICO allegations, which are materially similar to the Consumer Plaintiffs', should not meet the same fate.

The Recycler Plaintiffs' allegations against almost every automaker defendant (except for Honda) are similar to each other automaker defendant. The Recycler Plaintiffs allege that the automakers knew in some form that Takata's airbags had issues, communicated internally, with Takata, and with regulators about those issues, but failed to disclose their concerns to the public. The Plaintiffs then assert, numerous times, that these communications and failures to disclose were made "in order to conceal the scope and nature of the [defect]." In the previous RICO order, the Court already discounted this style of pleading as "conclusory" and "susceptible to numerous explanations." *Id.* at 1160. Indeed, the RICO allegations that the Court has already dismissed were even more specific than the ones at issue here. With the exception of the allegations against Honda, Mercedes, and GM, Plaintiffs do not specifically identify a single one of Defendants' employees nor do they identify exactly what the communications said (beyond their general subject matter).

Of course, the allegations against Mercedes and GM, which are more specific than those remaining claims, have already been dismissed. *Compare* D.E. 3915-1 ¶¶ 568-589 (GM) *with* D.E. 3915-1 ¶¶ 602-623 (Nissan).

In their supplemental briefing, Recycler Plaintiffs merely restate a summary version of their RICO allegations. They do not attempt to distinguish the RICO allegations against BMW, Ford, Mazda, Nissan, Subaru, and Toyota from those the Court has already dismissed. Nor can they. In the BMW allegations, for instance, Plaintiffs give no details as to *who* at BMW made the communications, nor *what* those communications said in detail. All of the allegations boil down to 1) Defendants had knowledge of occasional inflator defects and 2) Defendants submitted regulatory filings and made representations regarding safety to the public. Of course Plaintiffs allege that these filings and representations were misleading, but Plaintiffs do not plead the contents nor the source of these representations, thereby making it difficult for the Court to determine whether the representations were actually false and doubly difficult for the Court to determine whether the representations were part of a larger scheme. This Court "cannot infer a scheme-driven deception from a complaint that provides no details of fraud or conspiracy." *Am. Dental Ass'n v. Cigna Corp.*, 605 F.3d 1283, 1293 (11th Cir. 2010). As this Court as previously held,

> Plaintiffs' allegations fail to explain how the "deviations from" or "failure to meet" the USCAR specifications had any connection with vehicle safety or nationwide recalls based on the inflator defect, let alone how those alleged deviations or failures constitute mail or wire fraud. And Plaintiffs' allegations about purchases and shipments of inflators seem to assume these communications are fraud based, but they do not allege additional details explaining how these otherwise routine business communications constitute fraud.

In re Takata Airbag Prod. Liab. Litig., 396 F. Supp. 3d 1101, 1159–60 (S.D. Fla. 2019). The

Recycler Plaintiffs' allegations suffer from the same deficiencies. The business communications described by Plaintiffs, even if perhaps overly motivated by profit with too little regard for safety, are not described with sufficient particularity nor do they plausibly show that Defendants devised a scheme to defraud. The § 1962(c) claims against **BMW, Ford, Mazda, Nissan, Subaru, and Toyota** are therefore **dismissed**.

III. Racketeer Influenced and Corrupt Organizations Act (RICO) – Counts 4, 6, 8, 10, 12, 14, 16, 18, 20 – Violation of 18 U.S.C. § 1962(d)

The § 1962(d) against these Defendants suffer from the same defects. While it is possible to make out a violation of § 1962(d) without a § 1962(c) violation, as this Court has previously held, there must be *additional* allegations. "[W]where a plaintiff fails to state a RICO claim and the conspiracy count does not contain additional allegations, [then] the conspiracy claim necessarily fails." *In re Takata Airbag Prod. Liab. Litig.*, 396 F. Supp. 3d 1101, 1164 (S.D. Fla. 2019) (citing *Rogers v. Nacchio*, 241 F. App'x 602, 609 (11th Cir. 2007)).

"The essence of a RICO conspiracy claim is that each defendant has *agreed* to participate in the conduct of an enterprise's illegal activities." *Solomon v. Blue Cross & Blue Shield Ass'n*, 574 F. Supp. 2d 1288, 1291 (S.D. Fla. 2008) (citing 18 U.S.C. § 1962(d)) (emphasis in original). This Court has previously held that "proof of the agreement is at the heart of a conspiracy claim." *Id.* (quoting *In re Managed Care Litig.*, 430 F. Supp. 2d 1336, 1345 (S.D. Fla. 2006)). Plaintiffs can establish a RICO conspiracy claim by showing a Defendant: (1) agreed to the overall objective of the conspiracy; or (2) agreed to commit two predicate acts. *Am. Dental Ass'n*, 605 F.3d at 1293 (quoting *Republic of Panama*, 119 F.3d at 950). A RICO agreement need not be established by direct evidence; it may be inferred from the conduct of the participants. *Id.*

The allegations against the remaining Defendants, at best, allege knowledge that Takata airbags installed in their vehicles could be defective. And the they allege that Takata knew this too. For example, "Takata was aware of faulty welding and rust in the inflators produced at its plant in Monclova, Mexico, which Takata engineers believed could cause the inflators to fail" and "Mazda . . . could have predicted [this]." D.E. 3915-1 ¶¶ 695(a)-(c). But what the allegations against Mazda (and the other Defendants) do not allege is that the parties jointly discussed their knowledge and mutually agreed to intentionally conceal it.

The already-dismissed § 1962(d) allegations against Mercedes are closest to plausibly alleging a violation. There, Plaintiffs allege that Mercedes "modified its own specifications for the Takata inflators so that they would be easier for Takata to meet, by agreeing to deviations in order to get the Inflators approved for installation." Plaintiffs also allege that Mercedes and Takata: "decided together to forego key performance requirements and resolve testing failures that they knew should have rendered the Defective Inflators unfit for approval"; "agreed to ignore tests related to ballistic performance at hot temperatures"; and later "worked together to try to convince NHTSA to reduce the scope of the recall." *In re Takata Airbag Prod. Liab. Litig.*, 396 F. Supp. 3d 1101, 1166 (S.D. Fla. 2019) (quoting the consumer complaint). Again, however, none of those allegations included a single date or identified a single person acting on behalf of Mercedes or Takata. As this Court held then, this failure does not enable the Court to "juxtapose communications between [Mercedes] and Takata with a timeline of Takata's alleged conspiratorial conduct to implicate that [Mercedes] acted in agreement with the objectives of the alleged conspiracy." *Id.* at 1167. The allegations against the remaining Defendants not addressed in the consumer order do not present nearly such a close call. Thus, the § 1962(d) claims against all

Defendants except Honda (discussed below) are **dismissed**.

IV. Racketeer Influenced and Corrupt Organizations Act (RICO) – Counts 1 and 2– Violation of 18 U.S.C. § 1962(c) and (d)

A. Sufficiency of the Allegations

Now the Court turns to the RICO allegations against Honda. The § 1962(c) allegations against Honda narrowly, but plausibly, state a claim. This Court has not previously ruled on the plausibility of a § 1962(c) claim against Honda—the Consumer Plaintiffs only brought (d) claims against Honda, which the Court held presented a close question, yet were enough to survive a motion to dismiss. *Id.* at 1163. Now considering the § 1962(c) allegations against Honda for the first time, the Court notes they suffer from some of the same defects described above—Plaintiffs do not specifically identify the employees that made the communications at issue and many of the allegations focus on Honda's knowledge of Takata's defects rather than the particulars of how Honda devised and executed its scheme to defraud the Recyclers. However, in the general allegations section of the complaint, Plaintiffs do allege a 2005 Honda email reports that Honda and Takata engineers in Japan agreed to hold a meeting about inflators that would "be 'secret' to the American associate(s)" in order to "make it an honest talk," and agreed to discuss "material that is modified to an innocuous version" that "delete[d]" certain data. **D.E. 3915-1 at ¶ 246.** Plaintiffs also allege that Honda knew Takata was lying about the inflator ruptures as early as 2012, but continued to use them until 2016. ***Id.* at ¶ 260.** Honda also conducted joint testing with Takata and communicated to regulators **together**. ***Id.* at ¶ 515(b)-(c).** To willingly participate in Takata's fraud is to adopt it as Honda's own. This behavior is distinct from the other automakers' perhaps improperly high-risk tolerance toward Takata's inflators or their own misleading of their customers. For that reason, as well as a closer business relationship between Takata and Honda,

the Plaintiffs' § 1962(c) and (d) allegations against Honda meet Rule 9(b)'s standard and are more plausible than those against the other automotive Defendants.

B. Proximate Causation

However, the Defendants also argue that Plaintiffs cannot meet RICO's heightened "direct causation" standard. *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 461 (2006) ("When a court evaluates a RICO claim for proximate causation, the central question it must ask is whether the alleged violation led directly to the plaintiff's injuries."). Above, the Court did not need to discuss 18 U.S.C. § 1964(c), the statutory requirement that a Plaintiff be injured "by reason of" the § 1962 violation in order to recover, because it found that Plaintiffs did not sufficiently allege a § 1962(c) or (d) violation against those Defendants.

The Supreme Court has interpreted this requirement as more than mere factual causation; it is a "demand for some direct relation between the injury asserted and the injurious conduct alleged." *Holmes v. Securities Investor Protection Corporation,* 503 U.S. 258, 268 (1992). A link that is "too remote," "purely contingent," or "indirect" is insufficient. *Corcel Corp. v. Ferguson Enterprises, Inc.*, 551 F. App'x 571, 576 (11th Cir. 2014) (quoting *Holmes*). In so interpreting, the Supreme Court relied on the legislative history of the RICO statute, which revealed that "Congress modeled § 1964(c) on the civil-action provision of the federal antitrust laws, § 4 of the Clayton Act." *Id.*, at 267; *see also Corcel Corp.*, 551 F. App'x 571 (11th Cir. 2014). In addition to analogizing to the antitrust laws, the Supreme Court has also provided motivating principles by which to evaluate proximate cause in RICO cases. They include (1) "the difficulty that can arise when a court attempts to ascertain the damages caused by some remote action"; (2) "the speculative nature of the proceedings that would follow if [the plaintiff] were permitted to maintain

its claim"; (3) whether the alleged harm "could have resulted from factors other than [the plaintiff's] alleged acts of fraud"; (4) "any appreciable risk of duplicative recoveries"; and (5) whether "the immediate victims of [the] alleged RICO violation can be expected to vindicate the laws by pursuing their own claims." *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 458-60 (2006).

The Supreme Court has been careful to limit the availability of RICO damages for Plaintiffs more than one "step" from the Defendants' conduct. In *Hemi Grp., LLC v. City of New York, N.Y.*, Chief Justice Roberts explained that the general tendency of the law, with respect to damages, is not to "go beyond the first step," and that the "general tendency of the law applies with full force to proximate cause inquiries under RICO." 559 U.S. 1, 10 (2010). In that case, the City of New York claimed it was harmed by Hemi Group's failure to submit tax information to the New York State. The failure to report to the State (step one) led to the City being unable to determine how much back tax to collect from the Defendant, Hemi Group (step two). The Court held that this theory of causation was too attenuated to meet "RICO's direct relationship requirement." *Id.* A Southern District of Florida Court applied *Hemi Grp.* to deny a RICO recovery in an almost identical scenario to which the Recycler Plaintiffs find themselves. In *Koch v. Royal Wine Merchants, Ltd.*, Plaintiff brought RICO claims (among others) against Defendant wine importers and sellers for importing and selling counterfeit high-end wines. 907 F. Supp. 2d 1332 (S.D. Fla. 2012) (Hurley, J.). The catch, relevant here, is that Plaintiff did not buy the wines from Defendants. He bought from third parties who had relied on Defendants' misrepresentations, and alleged he, too, relied on those misrepresentations. The Court went on to consider some of the factors described above and held 1) it was difficult to apportion damages between Defendants' conduct and independent factors, such as the price of wine set by the intermediate sellers, 2) there was a

risk of multiple recoveries because the original buyers already may have brought claims against Defendants for those same misrepresentations, and 3) directly injured victims could be counted on to vindicate the law and deter misconduct because there were more of them and they suffered greater harms. *Id.* at 1343-44. As a result of this analysis, the Court dismissed the RICO claims.

Applying these principles to the Recyclers' claims, the Court holds that Plaintiffs ask the Court to "go beyond the first step" of causal analysis and run afoul of the motivating principles the Supreme Court has set forth for RICO proximate cause. The direct victims of the Defendants' actions are the consumers who bought cars from Defendants and their dealerships. In brief, they overpaid for certain vehicles because Defendants concealed the airbag defect. It is true that Recyclers were then in turn harmed by overpaying for vehicles on the secondary or tertiary market, but their harm is derivative of the Consumers' harm. Because Consumers overpaid, the price the Recyclers paid was also artificially inflated. The Consumer Plaintiffs here are akin to the buyers who purchased wine directly from the Defendants in *Koch*, while the Recyclers are akin to the Plaintiff who could not recover, even though he relied on the Defendants' representations, because the causal chain was attenuated by the actions of the buyer. In *Koch*, those actions included an independently set price and potential quality representations by parties other than the Defendant. Here, it is difficult to say how much of the Plaintiffs' harm came from the Defendants' misrepresentations versus resale prices set in the secondary market. And there is clearly a risk of multiple recoveries—Consumer lawsuits are pending before this very Court. This also demonstrates that "direct victims" are more than capable of vindicating the law.

Additionally, the three Courts of Appeals that have addressed the issue have held that indirect purchasers cannot sue under RICO. *Trollinger v. Tyson Foods, Inc.*, 370 F.3d 602, 616

(6th Cir. 2004) ("[I]ndirect purchasers lack standing under RICO ... to sue for overcharges passed on to them by middlemen."); *McCarthy v. Recordex Serv., Inc.*, 80 F.3d 842, 855 (3d Cir. 1996) ("[A]ntitrust standing principles apply equally to allegations of RICO violations."); *Carter v. Berger*, 777 F.2d 1173, 1177 (7th Cir. 1985) ("The *Hanover Shoe-Illinois Brick* rule promotes enforcement and therefore applies to RICO, too."). These holdings were based on the Supreme Court's so-called "direct purchaser" rule first laid out in *Ill. Brick Co. v. Illinois.*, 431 U.S. 720 (1977). There, the Court held that an indirect-purchaser cannot use a pass-on theory to recover against an antitrust violator. The Supreme Court warned that allowing indirect purchasers to recover under such a theory would "transform treble-damages actions into massive multiparty litigations involving many levels of distribution and including large classes of ultimate consumers remote from the defendant." *Id.*

Although the Eleventh Circuit has not adopted this theory in the RICO context, it has made clear that "Congress modeled § 1964(c) on the civil-action provision of the federal anti-trust laws." *Corcel Corp. v. Ferguson Enterprises, Inc.*, 551 F. App'x 571, 576 (11th Cir. 2014). It logically follows that limits the Supreme Court has placed on anti-trust standing, namely the direct purchaser rule, would apply in the RICO context as well. Recycler Plaintiffs are not direct purchasers. They do not allege that they bought class vehicles from Defendants *or* their dealerships. *Cf. Apple v. Pepper*, 139 S. Ct. 1514 (2019) (holding that consumers who purchased apps whose prices were set by third parties can sue Apple under the anti-trust laws because consumers payments went directly to Apple).

It is true that this Court has previously sustained Plaintiffs' § 1962(d) claims against Honda. *In re: Takata Airbag Prod. Liab. Litig.*, No. 14-24009-CV, 2015 WL 9987659, at *1 (S.D. Fla.

Dec. 2, 2015). However, that order was exceedingly early in the litigation and thus could not provide, at that time, a deeper analysis. Upon that deeper analysis and with the benefit of several amended complaints—most importantly, including amendments that separated Consumer and Recycler Plaintiffs—the Court's thinking is now better informed. Thus, after close consideration of the Supreme Court's and Eleventh Circuit's guidance concerning the interpretation of "by reason of" in § 1964(c), the animating principles behind the direct-purchaser rule, and the RICO statute's similarity to the anti-trust laws, the Court holds Plaintiffs are unable to meet § 1964(c)'s strict causation requirement. The remaining RICO allegations against **Honda** are **dismissed**.

V. Lanham Act – Count 21 – Violation of 15 U.S.C. §§ 1501, *et. seq.*

All Plaintiffs bring claims for violation of the Lanham Act against Honda, BMW, Mazda, Nissan, Subaru, and Toyota; Plaintiffs Butler, Knox, Midway, Synder's, and Weaver bring them against New Chrysler; Plaintiffs Butler, Knox, Synder's, and Weaver bring them against the GM Defendants; and Plaintiffs Butler, Cunningham, Knox, Midway, Snyder's, and Weaver bring them against Mercedes and the Volkswagen Defendants. Each group of Plaintiffs brings this claim individually and on behalf of the Nationwide Automotive Recycler Class. Due to the personal jurisdiction holdings above, only the claims against Honda, BMW, Mazda, Nissan, Subaru, and Toyota remain.

To establish a false advertising claim under Section 1125(a), a plaintiff must allege that (1) the commercial advertisement was false or misleading; (2) the advertisement deceived, or had the capacity to deceive, consumers; (3) the deception had a material effect on purchasing decisions; (4) the misrepresented product or service affects interstate commerce; and (5) the plaintiff has been—or is likely to be—injured as a result of the false advertising. *Johnson & Johnson Vision*

Care, Inc. v. 1-800 Contacts, Inc., 299 F.3d 1242, 1247 (11th Cir. 2002). The allegations must also demonstrate plaintiff's standing under *Lexmark Int'l Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 133-34 (2014).

First, the Court addresses the statutory standing issue because it is dispositive. In *Lexmark*, the Supreme Court held that a Plaintiff must satisfy two prerequisites to have statutory standing under the Lanham Act: First, they must show that they are within the statute's zone of interests which the Court defined as "an injury to a commercial interest in reputation or sales." A mere disappointed **consumer** suffers Article III injury but does not have a cause of action under the Lanham Act. *Id.* at 132. Second, they must allege injuries "proximately caused by violations of the statute." *Id.* at 131-32. The crux of the Recyclers' claim is that Defendants' false advertising artificially inflated the price which Recyclers were willing to pay for cars because the Recyclers base their purchase price on what consumers are willing to pay, and consumers were duped by the false advertising. When the truth came out, Recyclers were left with used cars they paid too much for.

A. Zone of Interests Analysis:

The Lanham Act is, at its heart, a proscription on unfair competition. The Recycler Plaintiffs are not competitors of Takata, nor are they competitors of Honda, BMW, Mazda, Ford, etc. No consumer is faced with the decision of buying a new (or even used) Honda Civic or instead buying a tire and an airbag from one of the Plaintiffs. While the Supreme Court rejected the requirement that the challenged speech be made by a competitor, it is clear from the text of the Act itself that Congress' concern with respect to false advertising cases was protecting persons engaged in commerce against unfair competition. 15 U.S.C. § 1127 ("The intent of this Chapter is . . . to protect persons engaged in such commerce from unfair competition . . ."). Although hard to define,

unfair competition has historically been understood as injuries to business reputation and present and future sales. *See* Rogers, Book Review, 39 YALE L.J. 297, 299 (1929); *see generally* 3 Restatement of Torts, ch. 35, Introductory Note, pp. 536–537 (1938). As a result, **the Supreme Court explicitly held that "even a business misled by a supplier into purchasing an inferior product is, like consumers generally, not under the Act's aegis."** *Lexmark*, 572 U.S. at 132. That is the exact scenario in which the Recyclers find themselves. Even though their business model is to eventually re-sell used cars and car parts, their relationship to the automotive manufacturer defendants is one of disappointed consumer to hoodwinking supplier. And those plaintiffs are not the sort Congress intended to be able to sue under this section of the Act. Because Plaintiffs do not have statutory standing, their Lanham Act claims are **dismissed**.

VI. Common Law Fraudulent Concealment & Fraudulent Misrepresentation – Count 22

The basic elements of a fraudulent concealment claim are generally: (1) a duty to disclose on the part of defendant; (2) concealment or failure to disclose by defendant; (3) reliance by the plaintiff (or inducement of plaintiff to act); (4) damages; and (5) proximate causation. *Garcia v. Chrysler Grp. LLC*, 127 F. Supp. 3d 212, 234 (S.D.N.Y. 2015). In several different orders the Court has held that Plaintiffs alleged their fraud claims with particularity, both Takata and the Automotive Defendants actual knowledge of the defects, Consumer Plaintiffs' sufficiently alleged that Defendants made material misstatements/omissions, Consumer Plaintiffs' sufficiently alleged reliance, and thus declined to dismiss the plaintiffs' claims. *In re Takata Airbag Prod. Liab. Litig.*, No. 14-24009-CV, 2020 WL 3286821 at *7-8 (S.D. Fla. May 29, 2020) (consumer claims); *In re Takata Airbag Prod. Liab. Litig.*, 462 F. Supp. 3d. 1304, 1317 (2020) ("Therefore, as it had throughout this litigation under similar allegations, the Court declines to dismiss the fraud-based

claims on grounds that Defendants did not have a duty to disclose.").

In response to the Court's Summer 2020 order asking for briefing asking why the Court's previous orders should not also apply to this motion to dismiss, the Defendants make what is, at its core, a relatively simple argument—that the Recycler Plaintiffs are unlike the Consumer Plaintiffs because their connection to Defendants is too remote. This remoteness, the argument goes, affects everything from whether there is a duty to disclose to *these particular Plaintiffs* to whether the Defendants' misrepresentations proximately caused the Recyclers' injuries. The Court will not rehash the holdings that are applicable to both the Recycler and Consumer complaints but will address the Recycler-specific arguments below. After a comprehensive survey of state law, the Court dismisses a few claims entirely but allows most to proceed to summary judgment.[14]

A. Texas:

Defendants argue that they had no duty to disclose to the Recyclers, and thus cannot be held liable under Texas common law of fraudulent concealment. Plaintiffs argue this question has already been decided by this Court elsewhere in the litigation. In a 2017 order on the *consumer* side of this case, this Court wrote,

> Texas law states that "[a] duty to disclose may arise in four situations: (1) when there is a fiduciary relationship; (2) when one voluntarily discloses information, the whole truth must be disclosed; (3) when one makes a representation, new information must be disclosed when that new information makes the earlier representation misleading or untrue; and (4) when one makes a partial disclosure and conveys a false impression." *Vial v. Gas Sol., Ltd.*, 187 S.W.3d 220, 230 (Tex. App. 2006). For the reasons discussed *supra,* the Court finds that Plaintiffs have sufficiently alleged that Ford had a duty to disclose additional facts about the safety of its vehicles under Texas law.

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[14] The Court did previously did not address state law differences because Defendants did not raise them. Now, Defendants argue those differences are dispositive. *In re Takata Airbag Prod. Liab. Litig.*, 462 F. Supp. 3d 1304, 1317 n.6 (S.D. Fla. 2020)

In re Takata Airbag Prod. Liab. Litig., No. 14-24009-CV, 2017 WL 775811 (S.D. Fla. Feb. 27, 2017). However, subsequent Courts to consider the question of fraudulent concealment under Texas law have disagreed. Judge Jesse Furman of the Southern District of New York also analyzed Texas law in the context of an automobile MDL, finding, "Texas law requires proof of a transaction between the parties of *some sort* (even arm's length) before a duty to disclose will arise." *In re Gen. Motors LLC Ignition Switch Litig.*, 257 F. Supp. 3d 372, 454 (S.D.N.Y. 2017), *modified on reconsideration,* No. 14-MC-2543 (JMF), 2017 WL 3443623 (S.D.N.Y. Aug. 9, 2017). That Court noted Texas courts have been "to put it mildly, a tad inconsistent" on the question, but the weight of the case law (including Texas high court and Fifth Circuit decisions) suggests that in any of the four scenarios mentioned above, there must be at least some fiduciary or confidential relationship before there is a duty to disclose. *Id.*

In *In re Gen. Motors LLC Ignition Switch*, the Court found that Texas law did not even support a fraudulent concealment claim between a plaintiff-purchaser and defendant-manufacturer. Here, the connection is even more attenuated—the plaintiffs are second-hand purchasers. Several other federal courts have made similar rulings. *Id.* at 454-55 (collecting cases). However, considering the somewhat inconsistent and unclear nature of Texas law, it goes too far to say that, even taking all of Plaintiffs' factual allegations as true, that there could never be a duty to disclose under Texas law. It is a toss-up as to whether the *Butler* and *Sinclair* plaintiffs' Texas common law claims should survive a motion to dismiss. Because the Court has previously ruled to let Plaintiffs' Texas claims survive, the Court **denies** the Defendants' motion to dismiss on the point, although it acknowledges it is a close question.

B. Georgia:

The analysis of a duty to disclose under Georgia law is similar to the Texas analysis.

Specifically, whether or not such unique facts apart from a fiduciary relationship that could give rise to a duty to disclose exist here. *Bogle v. Bragg*, 248 Ga. App. 632, 636 (2001) (holding a duty to disclose may arise from the particular circumstances of the case); *Secklinger-Lee Co. v. Allstate Ins. Co.*, 32 F.Supp.2d 1348, 1354 (N.D. Ga. 1998) ("In the absence of special circumstances one must exercise ordinary diligence in making an independent verification of contractual terms and representations, failure to do which will bar an action based on fraud.") (citations omitted).

The Plaintiffs allege that special circumstances exist here as a result of the Defendants' "exclusive and/or far superior knowledge and access to the facts . . . and [knowledge] that the facts were not known to or reasonably discoverable by Plaintiffs and the Class." (D.E. 2781, ¶ 866(a).) In a similar automobile tort case, a Georgia federal court dismissed fraudulent concealment claims brought by consumer plaintiffs at the summary judgment stage writing, "Plaintiffs have failed to cite to a single case in which a court has applied Georgia law to find a duty to disclose outside of a confidential or special relationship in facts similar to this case, where there is no evidence that Defendants had direct knowledge of Plaintiffs' purchases of the vehicles in question and had no apparent relationship with Plaintiffs." *McCabe v. Daimler AG*, 160 F. Supp. 3d 1337, 1351 (N.D. Ga. 2015). The Court went on to explain that while a duty to disclose *can* arise under the "special relationship" prong, no evidence of such a relationship was before the Court at that time. *Id.*

Again, however, the Plaintiffs correctly point to this Court's prior refusals to dismiss common law claims based on no duty to disclose.

> In these prior orders, the Court found the duty to disclose was invoked based on the plaintiffs' allegations that certain automotive manufacturers: (1) failed to disclose their knowledge of the inflator defect prior to the plaintiffs' purchases; (2) made incomplete representations about the safety and reliability of their vehicles (while purposefully withholding material facts from the plaintiffs that contradicted the representations); and (3) highly touted through marketing materials their vehicles' safety features and overall safety quality.

In re Takata Airbag Prod. Liab. Litig., 462 F. Supp. 3d 1304, 1317 (S.D. Fla. 2020) (discussing the Court's prior Consumer Plaintiff orders). True, those prior orders had not specifically analyzed Georgia law. The Court understands Georgia fraudulent concealment law as encouraging potential plaintiffs to do their due diligence before engaging in a transaction. This explains why those in a fiduciary relationship or other special circumstances are owed a duty to disclose—we would not expect their counterparties to try to pull a fast on them. For other potential plaintiffs, it is caveat emptor. But these buyers—the Recyclers—could not protect themselves no matter how much diligence they performed because of the hidden nature of the inflator defect; the Court holds that the Plaintiffs have sufficiently alleged "special circumstances" that create a duty to disclose at this motion to dismiss stage.

Once again, this is a close question, but the decision is consistent with the Court's other orders. Thus, the Court **denies** the motion to dismiss with respect to Georgia common law.

C. Virginia:

The analysis under Virginia law is very similar to Georgia—this Court has not engaged in a state specific inquiry of the duty to disclose under Virginia law, but has declined to dismiss the Virginia fraud claims for the Consumer Plaintiffs as a general matter. Defendants do not give any reason why Virginia should be treated differently, nor has the Court found one. The one Virginia case Defendants cite for the proposition that a duty to disclose requires a fiduciary relationship does not clearly state that the Plaintiff's fraud claim failed for lack of a fiduciary relationship—the Court there also found no false statement or deliberate concealment, nor did the Court believe the allegations were sufficiently specific. *Murray v. Royal Const. Co.*, 61 Va. Cir. 643 (2002). Further, to the extent Defendants rely on a proximate cause defense, the Court intends to deal with those

fact-specific questions at the summary judgment stage. The motion to dismiss is **denied** with respect to Virginia common law claims.

D. Florida:

The Court has previously found a duty to disclose to the Consumer Plaintiffs under Florida common law. *Id.* at 1317. Under Florida law, this Court wrote,

> "A duty to disclose may also 'arise where a party undertakes to disclose certain facts, such that the party must then disclose the entire truth known to him.' *Marriot Int'l, Inc. v. Am. Bridge Bahamas, Ltd.*, 193 So. 3d 902, 908 (Fla. 3d DCA 2015). 'Such a claim, however, must be supported by some evidence of a statement that would trigger the further duty to disclose all known material facts.' *Id.*"

In re Takata Airbag Prod. Liab. Litig., No. 14-24009-CV, 2016 WL 11662171, at *6 (S.D. Fla. Sept. 30, 2016). Defendants argue that this complaint should be different because "unlike recyclers, consumers intend to drive cars when they buy them." This argument is unavailing at the motion to dismiss stage. Because the Recycler Plaintiffs plausibly allege that the Defendants' statements had a material effect on their decision to buy the cars, whether they intended to drive them or re-sell their parts, their claims survive a motion to dismiss. The Defendants' motion to dismiss is **denied** with respect to Florida common law claims.

E. Tennessee

First, Defendants argue, under Tennessee law, a fraudulent concealment claim cannot even stand when the Defendant was not a party to the transaction at issue. And second, there is no duty to disclose under Tennessee law absent an arms' length business relationship. Defendants also argue that proximate cause is a necessary element of the tort and does not exist here, but as the Court has already stated, that is a question for the summary judgment stage.

Defendants cite a 1933 Tennessee Supreme Court case for the proposition that parties must have some kind of relationship for there to be concealment in the first place. *Patten v. Standard*

Oil Co. of Louisiana, 55 S.W.2d 759, 761 (Tenn. 1933) ("Where there is no dealing between the parties, there can be no concealment."). Plaintiffs have no response to this argument. Plaintiffs also have no Tennessee specific response to the Defendants' argument that there is no duty to disclose absent a relationship between the parties. Instead, Plaintiffs cite to a 2017 order from this Court. That order, without considering the specifics of Tennessee common law, held that Plaintiffs had stated a viable fraudulent concealment claim. *In re Takata Airbag Prod. Liab. Litig.*, No. 14-24009-CV, 2017 WL 2406711 (S.D. Fla. June 1, 2017). However, that order came while Takata was still in the case and the consumer and recycler claims had yet to have been split. Additionally, the Court was considering the common law of 20 states at that time. Here, the Court only must deal with the common law of 7 states.

Under vastly different circumstances, it appears clear that the Plaintiffs fail to allege a duty to disclose, and thus fail to allege a fraudulent concealment claim under Tennessee law. "The duty to disclose arises in three distinct circumstances: (1) '[w]here there is a previous definite fiduciary relation between the parties,' (2) '[w]here it appears one or each of the parties to the contract expressly reposes a trust and confidence in the other,' and (3) '[w]here the contract or transaction is intrinsically fiduciary and calls for perfect good faith.'" *Shah v. Racetrac Petroleum Co.*, 338 F.3d 557, 571 (6th Cir. 2003) (citing *Domestic Sewing Mach. Co. v. Jackson,* 83 Tenn. 418, 425 (1885)). None of those three circumstances are present here. While the Sixth Circuit noted that some courts deviate from that 1885 opinion, it also held "federal courts considering fraudulent concealment under Tennessee law have made clear that *Domestic Sewing* is the governing law." *Id.* Thus, the Court **dismisses** Plaintiffs' Tennessee common law claims for failure to state a claim.

F. Missouri

Defendants make the same arguments in Missouri as they do in the other states. Again, this

Court will focus on the duty to disclose. In Missouri, a duty to disclose only arises when there is a confidential or fiduciary relationship, when there is privity of contract or when one party has superior knowledge or information not within the fair and reasonable reach of the other party. *In re Gen. Motors Corp. Anti-Lock Brake Prod. Liab. Litig.*, 966 F. Supp. 1525, 1535 (E.D. Mo. 1997), *aff'd sub nom. Briehl v. Gen. Motors Corp.*, 172 F.3d 623 (8th Cir. 1999) (internal citations and quotations omitted). The last category leaves significantly more leeway for the Court to find a duty to disclose at the summary judgment stage than does Tennessee common law, for instance. Thus, the Court will adhere to its general practice in this case and allow the Missouri common law claims to proceed to summary judgment; the motion to dismiss is **denied** on this point.

G. North Carolina

Defendants make the same arguments in attempting to dismiss the North Carolina fraudulent concealment claims. The Court has not previously addressed North Carolina *common law* in depth, but it did previously find that Plaintiffs "sufficiently alleged that Defendants had a separate and distinct duty under North Carolina law to not provide false information to induce the purchase of Defendants' vehicles." *In re Takata Airbag Prod. Liab. Litig.*, 462 F. Supp. 3d 1304 (S.D. Fla. 2020). However, this holding was in relation to North Carolina *statutory* law and it was on the consumer side of the case. Further, it was based on case law that held that, under North Carolina law, a party to a contract owes the other contracting party a separate and distinct duty not to provide false information to induce the execution of the contract. *Id.* at 1320. Here, the Recycler plaintiffs had no contractual relationship with the Defendants.[15]

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[15] To be fair, neither did the consumers (they were in contractual privity with the dealerships). But the Court did not elaborate in the Order.

There is significant case law holding that North Carolina law has a higher threshold for a duty to disclose. "North Carolina requires a relationship of trust or confidence to support finding a duty to disclose, based on a fiduciary relationship, a contractual relationship, or other similar relationship." *Ratcliff v. Am. Honda Motor Co, Inc.*, No. 17-CV-174, 2018 WL 3542865 (M.D.N.C. July 23, 2018), *report and recommendation adopted sub nom. Ratcliff v. Am. Honda Motor Co.*, No. 1:17-CV-174, 2018 WL 3849911 (M.D.N.C. Aug. 13, 2018). *See also Burnette v. Nicolet, Inc.*, 818 F.2d 1098, 1101 (4th Cir. 1986) ("The lower court found that North Carolina has never recognized a cause of action for fraudulent concealment in the absence of a relationship of trust or confidence created by a fiduciary, contractual or other similar relationship which imposes upon the defendant a 'duty to speak' to the plaintiff."); *Ponzio v. Mercedes-Benz USA, LLC*, 447 F. Supp. 3d 194, 232 (D.N.J. 2020) (dismissing North Carolina fraudulent concealment claim absent a contractual or other special relationship, even though Defendant may have taken affirmative steps to conceal material facts that only Defendant could have known).

On the other hand, one federal MDL court has found duties to disclose under North Carolina law in similar cases. For example, that court held the NC fraudulent concealment claim was clearly viable because a party to a contract owes the other contracting party a separate and distinct duty not to provide false information. *In re MyFord Touch Consumer Litig.*, 46 F. Supp. 3d 936 (N.D. Cal. 2014). In this case, plaintiff consumers purchased Defendant-Manufacturer vehicles through dealerships.

Because the balance of the case law supports Defendants' arguments that something more than no relationship at all is needed to create a duty disclose, the Court **dismisses** Plaintiffs' North Carolina common law claims.

VII. State Statutory Claims

Again, as a general matter, this Court has previously held that Plaintiffs have sufficiently alleged the basic elements of state statutory fraud claims such as knowledge of the inflator defect, Defendants' false statements/omissions, reliance, manifestation of defect, and particularity under Rule 9(b).[16] Below, the Court considers the state-specific differences Defendants raise.

A. Choice of Law Standard

Generally, a federal court hearing state law claims applies the choice of law rules of the forum state. *Grupo Televisa, S.A. v. Telemundo Commc'ns Grp., Inc.*, 485 F.3d 1233, 1240 (11th Cir. 2007). However, "[i]n cases transferred pursuant to 28 U.S.C. § 1407, the transferee district court must apply the state law, including its choice of law rules, that would have been applied had there been no change of venue." *In re Managed Care Litig.*, 298 F. Supp. 2d 1259, 1296 (S.D. Fla. 2003); *Van Dusen v. Barrack*, 376 U.S. 612, 639 (1964); *In re Toytota Motor Corp. Unintended Acceleration*, 785 F. Supp. 2d 925, 931 (C.D. Cal. 2011). Accordingly, "all states in which the transferor court of an individual action sits are considered forum states, and an independent choice of law determination is necessary for the states of all transferor courts." *In re Conagra Peanut Butter Prods. Liab. Litig.*, 251 F.R.D. 689, 693 (N.D. Ga. 2008).

This choice of law framework is not altered by the use of a consolidated complaint as a procedural device to streamline the litigation, unless the parties so consent. *See id.* ("[U]sing a master complaint as the operative pleading for choice of law purposes is not unprecedented in multidistrict litigation. However, it is generally used as a substantive pleading only when the

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[16] The only one of these elements the Defendants seriously contest in their supplemental briefing is reliance. They argue it is implausible to suggest that Recyclers *actually* rely on consumer advertisements in their purchasing decisions. **(D.E. 3863 at 7.).** This issue is best suited for the finder of fact.

parties have consented to such an arrangement." (citations omitted)); *see also In re Toyota Motor Corp. Unintended Acceleration*, 785 F. Supp. 2d at 931 (stating that "[n]either the general authorization of the coordination and consolidation under the MDL statute nor the more specific use of consolidated complaints, as the Court has required here, is intended to alter the substantive rights of the parties" and adding, "[t]he use of a consolidated complaint has been described as 'a procedural device rather than a substantive pleading with the power to alter the choice of law[] rules applicable to the plaintiffs' claims.'" (citing *In re Mercedes-Benz Tele Aid Contract Litig.*, 257 F.R.D. 46, 56 (D.N.J. 2009)).

B. Georgia:

Plaintiffs stipulate to dismissal of Weaver's Georgia state law claim. He is the only Georgia plaintiff. The Georgia state statutory claims are **dismissed**.

C. Florida:

Defendants argue ARA's and Butler's Florida Deceptive and Unfair Trade Practices Act claim fails because they did not plead (i) any injury legally caused by the Defendants, and (ii) that they were party to a consumer transaction with Defendants governed by FDUPTA. Defendants discount the Court's prior orders letting Florida statutory claims survive on the causation point because Consumer Plaintiffs are vastly different from Recycler Plaintiffs with respect to proximate causation. The essence of the argument is Defendants' that the representations about the safety of their vehicles were aimed at consumers—their representations should not have, and could not have, been taken to warrant anything about the quality of used and salvaged vehicles or vehicle parts. Thus, it is legally impossible for such representations to have caused they Plaintiffs' harm. Further, Defendants argue that the Recyclers do not even allege that Defendants made such representations.

As discussed above, this proximate causation debate is more appropriate for summary

judgment. This is especially considering that Plaintiffs have adequately alleged the Defendants made certain representations/misstatements and adequately alleged that Plaintiffs would have foregone or paid less for the vehicles in the absence of the representations/misstatements. Thus, the question is whether it is impossible, as a matter of law, for an indirect seller to have "caused" a Plaintiff's harm with their alleged misstatements. The Defendants do not cite a case that stands for such a proposition.

Second, Defendants argue that the Recycler Plaintiffs are not even "consumers" within the ambit of the FDUTPA. They cite to a prior order of this Court which held, "[u]nder FDUTPA, a plaintiff must plead an injury or detriment resulting from a consumer transaction." *Pinecrest Consortium, Inc. v. Mercedes-Benz*, USA, LLC, 2013 WL 1786356 at *3-4 (S.D. Fla. April 25, 2013). In the same opinion, this Court also wrote, "[a]lthough FDUTPA may extend to protect business entities by such violative practices, 'it has no application to entities complaining of tortious conduct which is not the result of a consumer transaction.'" *Id.* That is the language Defendants rely on.

However, the opinion went on to define "consumer" as "one who has engaged in the purchase of goods or services." *Id.* at 2. And other Courts in this district have held that a broader definition of "consumer" that includes other businesses is consistent with the overall purpose of FDUTPA which is to "protect the *consuming* public and legitimate business enterprises from those who engage in unfair methods of competition, or unconscionable, deceptive, or unfair acts or practices in the conduct of any trade or commerce." Fla. Stat. § 501.202(2) (emphasis added)." *Kertesz v. Net Transactions, Ltd.*, 635 F. Supp. 2d 1339, 1349 (S.D. Fla. 2009) (Marra, J.). My understanding is that a non-consumer should be understood as an entity with no connection to the transaction in question or a business competitor—here, the Recyclers are neither. And it should be

noted that the Plaintiff in this Court's *Pinecrest* opinion was a specially formed corporation for the purpose of litigation and had not engaged in any transaction, which is why the Court held that it had no standing under FDUTPA.

So, is a Recycler, a business that consumes used cars (albeit not directly from Defendants) to then re-sell them, engaged in a "consumer transaction?" Again, "a consumer is one engaged in the purchase of goods or services . . ." *Burger King Corp. v. H&H Restaurants, LLC*, No. 99-2855, 2001 WL 1850888, at *9 (S.D. Fla. Nov. 30, 2001) (Jordan, J.). While the Recyclers are in the business of *selling* parts, they are also *buyers* of goods. It is clear they qualify as "consumers" under the statute. Thus, Defendants' motion to dismiss is **denied** with respect to the Florida Deceptive and Unfair Trade Practices Act claim.

D. North Carolina:

Defendants argue that Plaintiffs' claims under the North Carolina Unfair and Deceptive Trade Practices Act should be dismissed because 1) Plaintiffs cannot demonstrate reliance and proximate causation and 2) Plaintiffs do not have statutory standing because the statute was intended to protect parties engaged in a direct commercial transaction or business competitors only.

On the reliance and proximate causation, Court again will address these challenges at the summary judgment stage. On the second point, Defendants' argument is very similar to their argument under the Florida statute—they cite *Food Lion, Inc. v. Cap. Cities/ABC, Inc.*, 194 F.3d 505, 520 (4th Cir. 1999), for the proposition that NCDUTPA could not apply because there was no business or competitive relationship between recyclers and auto manufacturers. However, other, more recent federal court rulings and opinions from the Supreme Court of North Carolina point to the opposite conclusion. **Supreme Court of North Carolina has held that, "any**

consumer injured by unfair or deceptive trade practices can bring a UDTP claim." *Walker v. Fleetwood Homes of North Carolina, Inc.,* 362 N.C. 63, 67 (N.C. 2007). The court also cited its own precedent stating that "[i]n enacting G.S. 75–16 ... our Legislature intended to establish an effective private cause of action for *aggrieved consumers* in this State." *Id.* "Federal courts interpreting the NCUDTPA have allowed claims asserted by businesses against one another as long as the challenged practices affect commerce or the marketplace." *Sheet Metal Workers Local 441 Health & Welfare Plan v. GlaxoSmithKline, PLC*, 737 F. Supp. 2d 380, 419 (E.D. Pa. 2010). Thus, on the basis of the more recent NC case law, the Court **denies** the Defendants' motion to dismiss the NCUDTPA claim.

E. Tennessee:

Defendants move to dismiss claims under Tennessee's Consumer Protection Act on 1) proximate cause grounds and 2) the argument that used cars are not "goods" within the definition of the statute. The Court holds for Defendants here—the statute and case law are clear that "goods" are defined to mean "any tangible chattels leased, bought, or otherwise obtained for use by an individual primarily for personal, family, or household purposes or a franchise, distributorship agreement, or similar business opportunity." Tenn. Code Ann. § 47-18-103(7); *Milan Supply Chain Sols. Inc. v. Navistar Inc.*, No. W201800084COAR3CV, 2019 WL 3812483 (Tenn. Ct. App. Aug. 14, 2019), *appeal granted* (Jan. 16, 2020). The used cars purchased by Recyclers are clearly not goods for personal use nor are they a franchise or similar business opportunity. In their reply, Plaintiffs do not attempt to address this argument. Thus, like the Tennessee common law claims, the Tennessee Consumer Protection Act claims are **dismissed.**

F. Texas:

As with every other state, Defendants argue the Texas Deceptive Trade Practices Act

claims should be dismissed because 1) Plaintiffs do not adequately plead proximate causation and 2) the claims are not "in connection with" a consumer transaction. These arguments are related. In support of their arguments, Defendants cite a Texas federal court which held, "[t]he Texas Supreme Court has made clear that DTPA claims based on allegedly false, misleading, deceptive, or unconscionable acts cannot be brought against remote, or 'upstream,' manufacturers and suppliers that never directly transacted with the plaintiff-consumer. *Chavez v. Ford Motor Co.*, No. EP-18-CV-109-KC, 2018 WL 6190601, at *3 (W.D. Tex. Sept. 26, 2018) (citing *Amstadt v. U.S. Brass Corp.*, 919 S.W.2d 644, 649 (Tex. 1996)).

In that *Amstadt* opinion, however, the Texas Supreme Court also made clear that the TDTPA is not limited to those in contractual privity with the Defendant. *Amstadt* at 649. Plaintiffs interpret the "in connection with" a consumer transaction requirement to focus on whether the Defendants' allegedly violative conduct influenced the consumers' behavior. Here, Plaintiffs argue that the auto makers' misrepresentations and omissions factored into their decision to purchase used cars. Thus, even though the Defendants did not sell the cars to the Plaintiffs directly, their allegedly deceptive acts were still the "producing cause" of Plaintiffs' injury.

Additionally, the *Chavez* case cited by Defendants is not quite on point. The plaintiff there complained of statements made by the *car salesman* at the dealership—there was no allegation that the *manufacturers'* advertising influenced the purchase. Ultimately the case law does not demonstrate that Plaintiffs, categorically, cannot prove proximate cause if all their allegations are taken as true. Defendants' arguments are better addressed at the summary judgment stage and the motion to dismiss is **denied** with respect to Texas state law claims.

VIII. CONCLUSION

Based on the foregoing, it is hereby

ORDERED AND ADJUDGED that Defendants' Motions **(D.E. 2887, 2976, 2981, 2984, 2985)** are **GRANTED IN PART** and **DENIED IN PART** as follows:

- All claims against Audi AG, Daimler AG, Volkswagen AG, Audi of America LLC, Mercedes-Benz USA LLC, Volkswagen Group of America LLC, FCA US LLC, and New GM are dismissed for lack of personal jurisdiction

- Counts 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19 20 of the *Butler* complaint and Counts 1 and 2 of the *Sinclair* complaint (the RICO claims) are dismissed for failure to state a claim for relief

- Count 21 of the *Butler* complaint and Count 40 of the *Sinclair* complaint (Lanham Act) are dismissed for failure to state a claim for relief

- Count 22 of the *Butler* complaint and Count 41 of the *Sinclair* complaint are dismissed for Tennessee and North Carolina claims **only** for failure to state a claim

- Counts 24 and 27 of the *Butler* complaint and Counts 36 and 38 of the *Sinclair* complaint are dismissed for failure to state a claim

DONE AND ORDERED in Chambers, Miami, Florida, this 9th day of March, 2021.

FEDERICO A. MORENO
UNITED STATES DISTRICT JUDGE

Copies furnished to:

Counsel of Record