UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

YANDERY SANCHEZ, et al.,

Plaintiffs,

v.

KIA MOTORS AMERICA, INC.,

Defendant.

CASE NO. 8:20-cv-01604-JLS-KES

ORDER: (1) GRANTING IN PART AND DENYING IN PART MOTIONS TO EXCLUDE EXPERT TESTIMONY (Docs. 126, 127) and (2) GRANTING IN PART PLAINTIFFS' MOTION FOR CLASS CERTIFICATION (Docs. 76, 110)

Before the Court is a Motion for Class Certification ("Motion") filed by Plaintiffs Louise Knudson, Andrea Reiher-Odom, Amber Witt, Mark Treston, Margaret Ritzler, Hank Herber, Linda Wilber, Jennifer Rocco, Jerry Dubose, April Fisher, and Tewana Nelson ("Plaintiffs"). (Mot., Doc. 76.) Plaintiffs also filed a Supplemental Memorandum of Points and Authorities in Support of their Motion. (Supp. Mem., Doc. 110.) Defendant Kia Motors America, Inc. ("Kia") opposed, and Plaintiffs replied. (Opp., Doc. 124; Reply, Doc. 143.) Kia also filed two opposed *Daubert* motions: one to exclude Plaintiffs' glass expert Thomas Read (Read Mot., Doc. 126; Read Opp., Doc. 145; Read Reply, Doc. 159), and another to exclude Plaintiffs' automotive expert, Darren Manzari (Manzari Mot., Doc. 127; Manzari Opp., Doc. 144; Manzari Reply, Doc. 160).[1] Having considered the parties' briefs and underlying evidence, and having held oral argument, the Court GRANTS IN PART and DENIES IN PART the *Daubert* motions and GRANTS IN PART and DENIES IN PART the Motion for Class Certification for the reasons set forth below.

I. BACKGROUND

This is a putative class action involving the 2020–2023 model years of the Kia Telluride (the "Class Vehicles"). (Amended Consolidated Complaint ("ACC") ¶ 1, Doc. 103-2.) Plaintiffs allege that "the Class Vehicles contained defective windshields which cause the windshields to crack, chip, and/or fracture under normal driving conditions." (*Id.* ¶ 2.) Plaintiffs further allege that Kia knew of the windshield defect as early as 2019 but failed to disclose the defect to purchasers and lessees of the Class Vehicles, replace the defective windshields under Kia's warranty, or issue a recall. (*Id.* ¶¶ 4–5, 7, 9.)

[1] All of these motions and several of the attached exhibits have been publicly filed with partial redactions to protect Kia's confidential business information. Because the parties failed, in almost every instance, to comply with Local Rule 79-5.2.2(c), which requires the filing party to convert the "PROPOSED sealed document submitted with the Application into a new filing," the unredacted versions exist only as attachments to sealed declarations in support of applications to seal (and sometimes, improperly, as publicly available attachments to the applications themselves). The Court will not go through and identify the docket entries for these unredacted versions. The Court reminds the parties to be diligent moving forward in converting proposed sealings into formally sealed filings so that it is easier to find these documents on the docket.

Plaintiffs are twelve individuals who purchased or leased a Class Vehicle and were harmed by the purported defect when their windshields cracked unexpectedly or in conditions that should not have produced a crack. (*See generally* ACC.) They seek to represent, and have moved for certification of, twenty-two classes of purchasers or lessees of the Class Vehicles and bring a mix of claims for violations of state consumer protection laws, breach of the implied warranty of merchantability, and breach of express warranty on behalf of each Class:

- **California Class:** All persons who purchased or leased any 2020–2023 Kia Telluride vehicle in the State of California. On behalf of the California Class, Plaintiffs bring claims for violations of the Consumer Legal Remedies Act, Cal. Civ. Code §§ 1750, *et seq.* ("CLRA"), violations of the Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200, *et seq.* ("UCL"), breach of implied and express warranty under the Song-Beverly Consumer Warranty Act, Cal. Civ. Code §§ 1790, *et seq.*, and breach of express warranty pursuant to the California Commercial Code § 2313. (ACC ¶¶ 236–311.) For the express warranty claims, Plaintiffs propose a further sub-Class.
    - **California Breach of Express Warranty Subclass:** All persons who (1) purchased or leased any 2020–2023 Kia Telluride vehicle in the State of California; (2) requested a replacement windshield from a Kia dealership during the 60 months/60,000 miles "Basic Warranty Coverage" period set forth in Kia's New Vehicle Limited Warranty; but (3) were not provided a non-defective replacement windshield during the warranty period and at no charge.
- **Georgia Class:** All persons who purchased or leased any 2020–2023 Kia Telluride vehicle in the State of Georgia. Though the Complaint brings claims on behalf of the Georgia Class for violations of the Georgia Fair Business Practices Act, Ga. Code Ann. §§ 10-1-390, *et seq.*, Plaintiffs represent that they seek to certify the

Class only as to their claims for breach of implied warranty and breach of express warranty, pursuant to Georgia Code § 11-2-314, § 11-2A-212, and § 11-2-313. (*See* ACC ¶¶ 312–334.) For the express warranty claims, Plaintiffs propose a further sub-Class.

- **Georgia Breach of Express Warranty Subclass:** All persons who (1) purchased or leased any 2020–2023 Kia Telluride vehicle in the State of Georgia; (2) requested a replacement windshield from a Kia dealership during the 60 months/60,000 miles "Basic Warranty Coverage" period set forth in Kia's New Vehicle Limited Warranty; but (3) were not provided a non-defective replacement windshield during the warranty period and at no charge.

- **Indiana Class:** All persons who purchased or leased any 2020–2023 Kia Telluride vehicle in the State of Indiana. Though the Complaint brings claims on behalf of the Indiana Class for violations of the Indiana Deceptive Consumer Sales Act, Ind. Code § 24-5-0.5-1, *et seq.*, Plaintiffs represent that they seek to certify the Class only as to their claims for breach of implied warranty and breach of express warranty pursuant to Indiana Code § 26-1-2-314 and § 26-1-2-313. (*See* ACC ¶¶ 335–366.) For the express warranty claims, Plaintiffs propose a further sub-Class.
  - **Indiana Breach of Express Warranty Subclass:** All persons who (1) purchased or leased any 2020–2023 Kia Telluride vehicle in the State of Indiana; (2) requested a replacement windshield from a Kia dealership during the 60 months/60,000 miles "Basic Warranty Coverage" period set forth in Kia's New Vehicle Limited Warranty; but (3) were not provided a non-defective replacement windshield during the warranty period and at no charge.

- **Iowa Class:** All persons who purchased or leased any 2020–2023 Kia Telluride vehicle in the State of Iowa. On behalf of the Iowa Class, Plaintiffs bring claims for violations of the Iowa Private Right of Action for Consumer Frauds Act, §§ 714H.1, *et seq.*, breach of implied warranty pursuant to Iowa Code § 554.2314, and breach of express warranty pursuant to Iowa Code § 554.2313. (ACC ¶¶ 367–396.) For the express warranty claims, Plaintiffs propose a further sub-Class.
    - **Iowa Breach of Express Warranty Subclass:** All persons who (1) purchased or leased any 2020–2023 Kia Telluride vehicle in the State of Iowa; (2) requested a replacement windshield from a Kia dealership during the 60 months/60,000 miles "Basic Warranty Coverage" period set forth in Kia's New Vehicle Limited Warranty; but (3) were not provided a non-defective replacement windshield during the warranty period and at no charge.
- **New Mexico Class:** All persons who purchased or leased any 2020–2023 Kia Telluride vehicle in the State of New Mexico. On behalf of the New Mexico Class, Plaintiffs bring claims for violations of the New Mexico Unfair Trade Practices Act, N.M. Stat. § 57-12-2, *et seq.*, breach of implied warranty pursuant to New Mexico Statute § 55-2-314, and breach of express warranty pursuant to New Mexico Statute § 55-2-313. (ACC ¶¶ 397–418.) For the express warranty claims, Plaintiffs propose a further sub-Class.
    - **New Mexico Breach of Express Warranty Subclass:** All persons who (1) purchased or leased any 2020–2023 Kia Telluride vehicle in the State of New Mexico; (2) requested a replacement windshield from a Kia dealership during the 60 months/60,000 miles "Basic Warranty Coverage" period set forth in Kia's New Vehicle Limited Warranty; but (3) were not provided a non-defective replacement windshield during the warranty period and at no charge.

- **New York Class:** All persons who purchased or leased any 2020–2023 Kia Telluride vehicle in the State of New York. On behalf of the New York Class, Plaintiffs bring claims for violations of the New York General Business Law, N.Y. Gen. Bus. Law § 349, and breach of express warranty pursuant to New York Uniform Commercial Code § 2-313. (ACC ¶¶ 419–438.) For the express warranty claims, Plaintiffs propose a further sub-Class.
    - **New York Breach of Express Warranty Subclass:** All persons who (1) purchased or leased any 2020–2023 Kia Telluride vehicle in the State of New York; (2) requested a replacement windshield from a Kia dealership during the 60 months/60,000 miles "Basic Warranty Coverage" period set forth in Kia's New Vehicle Limited Warranty; but (3) were not provided a non-defective replacement windshield during the warranty period and at no charge.
- **North Carolina Class:** All persons who purchased or leased any 2020–2023 Kia Telluride vehicle in the State of North Carolina. On behalf of the North Carolina Class, Plaintiffs bring claims for violations of North Carolina's Unfair and Deceptive Trade Practices Act, N.C. Gen. Stat. § 75.1.1, *et seq.* and breach of express warranty pursuant to North Carolina General Statute § 25-2-313. (ACC ¶¶ 439–457.) For the express warranty claims, Plaintiffs propose a further sub-Class.
    - **North Carolina Breach of Express Warranty Subclass:** All persons who (1) purchased or leased any 2020–2022 Kia Telluride vehicle in the State of North Carolina; (2) requested a replacement windshield from a Kia dealership during the 60 months/60,000 miles "Basic Warranty Coverage" period set forth in Kia's New Vehicle Limited Warranty; but (3) were not provided a non-defective replacement windshield during the warranty period and at no charge.

- **Pennsylvania Class:** All persons who purchased or leased any 2020–2023 Kia Telluride vehicle in the Commonwealth of Pennsylvania. On behalf of the Pennsylvania Class, Plaintiffs bring claims for violations of the Pennsylvania Unfair Trade Practices and Consumer Protection Law, 73 Pa. Stat. §§ 201-1, *et seq.*, breach of implied warranty pursuant to 13 Pa. Stat. § 2314, and breach of express warrant pursuant to 13 Pa. Stat. § 2313. (ACC ¶¶ 440–479.) For the express warranty claims, Plaintiffs propose a further sub-Class.
    - **Pennsylvania Breach of Express Warranty Subclass:** All persons who (1) purchased or leased any 2020–2023 Kia Telluride vehicle in the Commonwealth of Pennsylvania; (2) requested a replacement windshield from a Kia dealership during the 60 months/60,000 miles "Basic Warranty Coverage" period set forth in Kia's New Vehicle Limited Warranty; but (3) were not provided a non-defective replacement windshield during the warranty period and at no charge.
- **Tennessee Class:** All persons who purchased or leased any 2020–2023 Kia Telluride vehicle in the State of Tennessee. On behalf of the Tennessee Class, Plaintiffs bring claims for violations of the Tennessee Consumer Protection Act of 1977, Tenn. Code §§ 47-18-101, *et seq.*, breach of implied warranty pursuant to Tennessee Code § 47-2-314, and breach of express warranty pursuant to Tennessee Code § 47-2-313. (ACC ¶¶ 480–501.) For the express warranty claims, Plaintiffs propose a further sub-Class.
    - **Tennessee Breach of Express Warranty Subclass:** All persons who (1) purchased or leased any 2020–2023 Kia Telluride vehicle in the State of Tennessee; (2) requested a replacement windshield from a Kia dealership during the 60 months/60,000 miles "Basic Warranty Coverage" period set forth in Kia's New Vehicle Limited Warranty; but (3) were not provided a

non-defective replacement windshield during the warranty period and at no charge.

- **Texas Class:** All persons who purchased or leased any 2020–2023 Kia Telluride vehicle in the State of Texas. On behalf of the Texas Class, Plaintiffs bring claims for violations of the Texas Deceptive Practices Act, Tex. Bus. & Com. Code §§ 17.41, *et seq.*, breach of implied warranty pursuant to Texas Business & Commercial Code § 2.314, and breach of express warranty pursuant to Texas Business & Commercial Code § 2.313. (ACC ¶¶ 502–528.) For the express warranty claims, Plaintiffs propose a further sub-Class.
    - **Texas Breach of Express Warranty Subclass:** All persons who (1) purchased or leased any 2020–2023 Kia Telluride vehicle in the State of Texas; (2) requested a replacement windshield from a Kia dealership during the 60 months/60,000 miles "Basic Warranty Coverage" period set forth in Kia's New Vehicle Limited Warranty; but (3) were not provided a non-defective replacement windshield during the warranty period and at no charge.
- **Virginia Class:** All persons who purchased or leased any 2020–2023 Kia Telluride vehicle in the State of Virginia. As to the Virginia Class, Plaintiffs bring claims for violations of the Virginia Consumer Protection Act, Va. Code §§ 59.1-196, *et seq.*, breach of implied warranty pursuant to Virginia Code § 8.2-314, and breach of express warranty pursuant to Virginia Code § 8.2-313. (ACC ¶¶ 529–551.) For the express warranty claims, Plaintiffs propose a further sub-Class.
    - **Virginia Breach of Express Warranty Subclass:** All persons who (1) purchased or leased any 2020–2023 Kia Telluride vehicle in the State of Virginia; (2) requested a replacement windshield from a Kia dealership during the 60 months/60,000 miles "Basic Warranty Coverage" period set forth in Kia's New Vehicle Limited Warranty; but (3) were not provided a

non-defective replacement windshield during the warranty period and at no charge.

(*See* ACC; Mot. at 2–3; Supp. Mem. at 7–9.)

1. FACTUAL BACKGROUND

Plaintiffs allege that, as early as 2019, Kia learned that windshields in the 2020 Telluride were cracking and requiring replacement at rates that were troubling consumers. (ACC ¶ 200.) After conducting internal testing of the windshields and monitoring the complaints lodged with the National Highway Traffic Safety Administration ("NHTSA"), Kia decided to implement ameliorative measures. (*Id.* ¶¶ 182, 185, 190, 200.)

First, Kia redesigned its original equipment manufacturer ("OEM") windshield for the Telluride. Kia's evaluations of the original Telluride windshield—what Kia calls the Gen I windshield—revealed elevated levels of stress around the cowl top, the piece of plastic that sits behind the windshield wipers. (Ex. H to Mot., Tr. of Andrew Owen Dep. at 15, Doc. 76-8.) Kia increased the thickness of the windshield by 0.1 millimeters and modified the cowl top. (*Id.* at 16, 20.) These modifications did not alter the part number or the part drawings required for the windshield. (*Id.* at 16.) Kia refers to this modified windshield as Gen II, and Gen II windshields were installed in all Class Vehicles for the model year 2021 and onward. (Opp. at 8.)

Next, Kia launched a Customer Satisfaction Initiative ("CSI") for 2020 Telluride owners, which explained that "customers have reported windshield chipping followed by extensive cracking within a short period of time, thereby preventing repair of the chip." (Ex. T to Mot., CSI Letter at 2, Doc. 76-17.) For context, Plaintiffs' automotive expert explains that road debris that causes damage to a windshield "will normally produce a small chip or star like crack, but these are easily repaired and normally will not quickly spread further," thereby giving the driver time to seek repair; but a chip that has expanded into a full crack will require replacement rather than repair of the windshield. (Ex. J to Mot., Manzari Report ¶ 40, Doc. 76-10.) Kia's CSI was therefore aimed at offering

replacement windshields for the 2020 Tellurides that experienced unrepairable cracking. Kia explained that, although "[w]indow glass that is broken, chipped, scratched or damage from outside influence is not considered a defect in material or workmanship" and is, therefore, not covered by Kia's New Vehicle Limited Warranty, it wanted "to provide [customers] with repair support." (*See* Ex. Z to Mot., Warranty at 11, Doc. 76-18; Ex. T to Mot., CSI Letter at 2.) Kia offered to cover the replacement of 2020 Telluride windshields that were cracked and could not be repaired, unless the windshield damage was caused by a vehicle collision. (Ex. T to Mot., CSI Letter at 2.) Kia also reimbursed 2020 Telluride owners who had already paid out of pocket to replace a cracked windshield. (*Id.*) Customers were instructed to contact their local Kia dealer to coordinate windshield replacement. (*Id.*) Cracked Gen I windshields were replaced with the updated Gen II windshield.

But according to Plaintiffs, the Gen II redesign did not sufficiently fix the problems with the Gen I windshield. (ACC ¶¶ 2, 194, 198.) Plaintiffs' glass expert opines that Kia's internal testing, which revealed elevated stress levels in the Gen I windshield, attributed the problem to more than just the cowl top: the glass manufacturing process, the glass curvature, the mounting angle, and the thinness of both the inner and outer layers of windshield glass were all identified as contributors to the high stress in the Gen I windshield. (Ex. I to Mot., Read Report ¶¶ 139–44, Doc. 76-9.) Read opines that the countermeasures—an additional 0.1 millimeter of thickness in only the outer glass and a modified cowl top—failed to address the problem because the changes were minor and left all of the other contributing problems unaddressed. (*Id.* ¶¶ 127–28.)

As a result, Plaintiffs allege that the defect in the Gen I windshield persists in the Gen II windshield, as confirmed by the fact that customers continue to submit NHTSA complaints about windshield cracks even in Gen II windshields. (ACC ¶ 198.) Plaintiffs allege that, because the Gen II windshield is still defective, 2021–23 Tellurides are also affected and 2020 Tellurides with a newly installed Gen II windshield have not received a

competent repair. (*Id.* ¶¶ 194, 198.) Plaintiffs attached as exhibits to the ACC more than 100 NHTSA complaints filed about the 2021 and 2022 Telluride windshields. (*Id.* ¶ 211; Exs. C & D to ACC, Docs. 95-3, 95-4.) Plaintiffs also point to the rate at which Telluride windshields have been replaced, as reflected in data submitted by Safelite, a third-party automotive glass repair and replacement service, and Kia's part sales data. (*See* Ex. DD to Supp. Mem., Safelite Data, Doc. 111-7; Ex. CC to Supp. Mem., Windshield Part Sales, Doc. 111-6.) The replacement rate itself is confidential, but Plaintiffs compare the windshield part sales for the Kia Sorento, a comparable SUV model, and show that Telluride windshields are purchased and replaced at a much higher rate than Sorento windshields. (*See* Supp. Mem. at 10–11; Ex. FF to Supp. Mem., Sorento Windshield Part Sales, Doc. 111-8.)

Plaintiffs bring claims on behalf of all 2020–23 Tellurides in the putative Classes. Plaintiffs allege that the windshield defect represents a safety hazard because it impacts driver visibility. (ACC ¶ 183.) Plaintiffs also point out that it is unlawful in many states to operate a motor vehicle with a cracked windshield. (*Id.* ¶ 186.) Plaintiffs allege that Kia has known of this defect since early 2019 but has failed adequately to remedy the defect or inform consumers of the defect. (*Id.* ¶¶ 200–206, 214–15.) Plaintiffs add that, because there is a latent defect in all Gen I and Gen II windshields, the repair or replacement *should* be covered by Kia's New Vehicle Limited Warranty because the cracks are caused by the manufacturing and design defect rather than "outside influence." (*Id.* ¶ 195.)

All named Plaintiffs allege that they purchased new Kia Tellurides, with model years of either 2021 or 2022 and all experienced large cracks in their Telluride windshield, despite operating the vehicle normally and not witnessing any large windshield impacts that might have caused the crack. (*Id.* ¶¶ 43–179.) Many Plaintiffs also requested replacement of the windshield under their New Vehicle Limited Warranty but were denied coverage. (*See id.*) Plaintiffs' claims allege violations of state consumer protection

statutes, as well as breaches of Kia's express warranty and the implied warranty of merchantability. (*See generally id.*)

2. PROCEDURAL BACKGROUND

Plaintiffs initiated this action on August 27, 2020. (*See* Compl., Doc. 1.) Initially, the action proceeded on behalf of putative classes from Texas, New York, Iowa, California, and North Carolina, as well as a nationwide class that sought to bring claims under the Magnuson Moss Warranty Act. (*See* First Amended Compl., Doc. 19.) On March 1, 2021, Kia moved to dismiss the First Amended Complaint; the Court granted the motion in part, dismissing the implied warranty claims for the North Carolina and New York Classes, striking the nationwide class allegations, and granting leave to amend certain claims for breach of implied warranty and equitable relief. (Order on First Mot. to Dismiss ("MTD"), Doc. 43.) After Plaintiffs filed the Third Amended Complaint, Kia again moved to dismiss; the Court decided that the implied warranty claims had been sufficiently pleaded but dismissed with prejudice the claims for equitable relief. (Order on Second MTD, Doc. 65.)

On January 27, 2023, Plaintiffs moved for class certification but did not originally seek certification of a Texas Class. (*See* Mot.) On April 13, 2023, Plaintiffs' counsel filed a related class action complaint, *Ritzler v. Kia America, Inc.*, Case No. 8:23-cv-00639-JLS-KES, which made similar allegations about the Telluride's windshield defect but as to putative classes from Georgia, Indiana, New Mexico, Pennsylvania, Tennessee, Texas, and Virginia. (*See* Stipulation to Continue Class Certification Opposition, Doc. 88.) On May 1, 2023, the Court ordered the actions consolidated. (Consolidation Order, Doc. 92.) The consolidation required several deadline extensions to accommodate the need for additional discovery and supplemental briefing in support of Plaintiffs' pending Motion for Class Certification. (*See* Order re Scheduling in Consolidated Case, Doc. 94.) On August 18, 2023, Plaintiffs filed the operative ACC. And on November 16, 2023, Plaintiffs filed the Supplemental Memorandum, addressing the new putative classes. (*See* Supp. Mem.)

The Motion for Class Certification is now fully briefed, as are Kia's motions to exclude the expert opinions of Plaintiffs' glass expert, Thomas Read, and automotive expert, Darren Manzari (*see* Read Mot.; Manzari Mot.).

II. ADMISSION OF EXPERT TESTIMONY

Because Kia has filed *Daubert* motions to exclude the testimony of Plaintiffs' experts Read and Manzari and those motions affect the evidence the Court will consider when evaluating the Motion for Class Certification, the Court addresses the *Daubert* motions before examining whether Plaintiffs have satisfied the strictures of Rule 23.

A. LEGAL STANDARD

Whether expert testimony is admissible is determined under Federal Rule of Evidence 702, *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999). Rule 702 provides that an expert opinion is admissible if (1) the witness is sufficiently qualified as an expert by knowledge, skill, experience, training, or education; (2) the scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (3) the testimony is based on sufficient facts or data; (4) the testimony is the product of reliable principles and methods; and (5) the expert's opinion reflects a reliable application of the principles and methods to the facts of the case. Fed. R. Evid. 702; *see also City of Pomona v. SQM N. Am. Corp.*, 750 F.3d 1036, 1043 (9th Cir. 2014).

Through the *Daubert* line of cases, the Supreme Court has made clear that Rule 702 imposes a "gatekeeping" obligation on the district court to ensure that proposed expert testimony is relevant and reliable. *United States v. Hankey*, 203 F.3d 1160, 1167 (9th Cir. 2000). Testimony rests on a "reliable foundation" if it is rooted "in the knowledge and experience of the relevant discipline." *City of Pomona*, 750 F.3d at 1044. In turn, testimony is "relevant" if the knowledge underlying it has a "valid connection to the pertinent inquiry." *Id.* "*Daubert*'s general holding—setting forth the trial judge's general gatekeeping obligation—applies not only to testimony based on scientific knowledge, but

also to testimony based on technical and other specialized knowledge." *United States v. Alatorre*, 222 F.3d 1098, 1101 (9th Cir. 2000) (cleaned up). The test for reliability is flexible and depends on the discipline involved. *Kumho Tire*, 526 U.S. at 141.

The proponent of the expert carries the burden of proving admissibility. *Lust ex rel. Lust v. Merrell Dow Pharm., Inc.*, 89 F.3d 594, 598 (9th Cir. 1996). Expert testimony is admissible if the above-listed requirements are met by a preponderance of the evidence. *Daubert*, 509 U.S. at 593 n.10 (discussing applicability of Federal Rule of Evidence 104(a) to expert testimony and citing *Bourjaily v. United States*, 483 U.S. 171, 175–76 (1987), for preponderance standard). A district court possesses "considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable." *Kumho Tire*, 526 U.S. at 152. Furthermore, the exclusion of expert testimony is "the exception rather than the rule." *See* Fed. R. Evid. 702 advisory committee note to 2000 amendment.

B. READ'S REPORT AND TESTIMONY

Plaintiffs contend that certification is appropriate because the Class Vehicles "share common windshields with the same design specification and drawings that are produced by the same supplier and are unique to the Class Vehicles." (Mot. at 9 (citations omitted).) Plaintiffs' defect theory relies in part on the opinions of their glass expert, Dr. Thomas Read. Read opines that a design and manufacturing defect in the windshields results in the windshields cracking and failing, rather than chipping, under normal driving conditions. (Ex. I to Mot., Read Report ¶ 5, Doc. 76-9.) Kia challenges Read's qualifications, and the data and methodology underlying his opinions. (Read Mot. at 10.)

Kia acknowledges that Read has an impressive material sciences background: Read has a BS in Metallurgical Engineering from the University of Pennsylvania, and a MS and PhD in Materials Science and Engineering from Stanford University. (Ex. I to Mot., Read Report ¶ 6.) Read is a licensed manufacturing engineer and has 45 years of experience in glass, glass processing, and glass failure analysis. (*Id.* ¶ 7.) But Kia argues that Read's

glass experience does not include a background in testing and analyzing automotive windshields and he is insufficiently trained in windshield design. (Read Mot. at 10.) Because Read clearly has the expertise to testify as a glass expert based on his background and training, the Court will not exclude him simply because he does not have a specific background in windshields.

Before addressing Kia's arguments regarding Read's proffered opinion, the Court frames its understanding of what that opinion is. Read is focused on an alleged defect caused by four windshield features that result in the windshield cracking and failing in circumstances where it should only chip, or should not chip or crack at all: the tensile stress levels of the windshields introduced during the manufacturing process; the glass thickness; the windshield curvature; and the mounting angle of the windshields. (*See* Read Opp. at 13; Ex. I to Mot., Read Report ¶ 5.) As Read explains in his report: "there are several aspects of the windshields which collectively impose an unacceptably high level of tensile stress in the windshield and render them unfit for normal use and defective." (Ex. I to Mot., Read Report ¶ 137.) Specifically, Read catalogs flaws in the glass manufacturing process for the Class Vehicle windshields, including the cooling parameters and sag bending process that contribute to the high levels of stress in the final windshield product. (*Id.* ¶ 140.) Read identifies a recommended stress measurement of 6.89 Megapascal ("MPa") and opines that testing on the Gen I windshields showed that they exceeded that limit. (*Id.* ¶ 94.) Read also contends that the curvature, thinness, and installation angle of the Class Vehicle windshields all contribute to the strain on the glass. (*Id.* ¶¶ 140, 142, 143.) He adds that, based on his analysis, this defect affects both the Gen I windshields (installed in 2020 Tellurides) and Gen II windshields (installed in 2021–23 Tellurides) and that the modifications to the Gen II windshields were not sufficiently ameliorative because Kia addressed only glass thickness and did so in a marginal way. (*Id.* ¶¶ 127–28.)

Kia attacks several aspects of Read's proffered opinion, but filtered through the Court's framing of Read's opinion, several of Kia's arguments are easily dispensed with.

First, Kia disputes whether Read has a viable theory of how the windshields were defective. (Read Mot. at 14–15.) According to Kia, Read identifies the defect as a "windshield that has a delayed crack" but lacks sufficient data to show that delayed cracking amounts to a defect. Kia also argues that Read bases this delayed-cracking theory on a single article from 1996 and has no other support for the premise that delayed cracking signals a defect. (*Id.*) But Kia has mischaracterized Read's analysis of the defect, which alleges a more specific flaw in the windshields and is not premised exclusively on delayed cracking. Read's defect theory is based on the windshield features that contribute to unacceptably high stress measurements and make the windshield prone to cracking. Further, this defect theory is adequately supported by the available literature, which identifies an acceptable stress level in windshields and posits that higher stress levels will result in delayed cracking and cause glass flaws from road debris and pebbles to expand into full cracks. (*Id.* ¶¶ 68–71 (citing Gulati, et al., *Delayed Cracking in Automotive Windshields*, Materials Science Forum (1996)).)

Kia further argues that Read has offered speculative suggestions about what features of the Telluride windshields contributed to the defect without testing that those features actually had an effect. (Read Mot. at 16.) And to the extent that Read tried to rely on Kia's own data from its internal investigations, Kia argues that Read's review of that data was "high level, cursory, and error prone." (*Id.*) But the Court concludes that Read has reasonably examined and interpreted the available data from the testing performed on the Gen I windshields and explained why those test results suggest that the windshields suffered from unacceptably high levels of tensile stress. It does not matter that Read did not do any of his own stress testing; "the reliability of an expert's theory turns on whether it can be tested, not whether he has tested it himself." *Ramirez v. ITW Food Equipment Grp., LLC*, 686 F. App'x 435, 440 (9th Cir. 2017).

Kia next challenges Read's opinion that the failure rate of the Class Vehicle windshields is "significant and unacceptably high." (Read Mot. at 20; Ex. I to Mot., Read

Report ¶ 5.) As Kia argues, Read has done no comparative testing, cannot say whether the Class Vehicle windshields are replaced at a higher rate than any industry competitors, and cannot estimate what an acceptable failure rate would be. (*See* Read Mot. at 20.) The Court agrees that these holes in Read's analysis prevent him from opining in any comparative manner about the failure rate of the Class Vehicle windshields. But this is a minimal aspect of Read's analysis. The meat of Read's opinion, as explained above, is that several manufacturing and design features produce an unacceptably high level of tensile stress and make the windshields prone to cracking—an opinion that his qualifications and analysis permit him to give. As Plaintiffs point out, they rely on other evidence for their comparative analysis. (Read Opp. at 21.)

Finally, and most centrally, Kia argues that Read has not effectively shown that the identified defect persisted in the Gen II windshields. (*Id.* at 22.) Read opines that the marginally thicker glass and the cowl top modification did not "materially change[] the defective nature of the Class Vehicle windshields." (Ex. I to Mot., Read Report ¶¶ 127–28.) But Kia points out that Read did not do any testing to confirm that the changes had no effect. (Read Mot. at 23.)

Plaintiffs respond that this lack of testing is not fatal because Read provides several reasons why these two countermeasures did not remedy the defect. (Read Opp. at 22–23.) Namely, Read cites the fact that Kia's own agent "expressed skepticism that the cowl top modification would cure the windshield failures." (Ex. I to Mot., Read Report ¶ 126.) Read shares that skepticism and notes that it was unlikely that "soft plastic material" would have a "substantial impact on the windshield's propensity to fail." (*Id.* ¶ 127.) Read also notes that the "slight increase" in "windshield thickness" did not even alter the part number or the glass specification for the Gen II windshields. (*Id.* ¶ 128.) Read claims that other than these changes, the Gen II windshields are identical to the Gen I windshields. (*Id.* ¶ 129.) The curvature and mounting angle of the windshields were not adjusted, and no changes were made to the cooling or sag bending processes. (*Id.* ¶ 140.) Because no

changes were made to any of the other features that Read identified as contributing to the tensile stress in the windshields, he concludes that the defect must persist. (*Id.*)

Kia is incorrect that this analysis warrants exclusion. Read has identified four features that contributed to a defect in the Gen I windshields and opines that only *one* of those features was altered by the countermeasures. And as to that single alteration, it was so minor that it did not alter the part specifications for the Gen II windshields; further, the Class Vehicle windshields remain thinner and lighter than the windshields installed in Kia's other models. (*Id.* ¶¶ 128, 130.) Read's opinion, based on his material sciences background, is that this alteration was not sufficient. The Court concludes that Read has adequately supported this opinion with his experience, the data, and his methodology of analyzing how the four identified weaknesses in the Class Vehicle windshields contribute to the identified defect.

As a result, the *Daubert* motion to exclude the expert testimony of Dr. Thomas Read is GRANTED IN PART and DENIED IN PART. The Court agrees that Read may not opine as the comparative performance of the Class Vehicle windshields. But the bulk of Read's opinion regarding the windshield defect and why that defect was not altered by the minimal additional thickness of the Gen II windshields is admissible expert testimony.

C. MANZARI'S REPORT AND TESTIMONY

Kia also seeks to exclude Plaintiffs' automotive expert, Darren Manzari. (Manzari Mot. at 7.) Manzari has worked in the automotive industry for 35 years, has a degree in Automotive Engineering, and operates his own repair facilities. (Ex. J to Mot., Manzari Report ¶¶ 1, 3–6, Doc. 76-10.) He opines that the Class Vehicle windshields are defective because the replacement rate is "unacceptably high and is higher than I would expect to see in [] non-defective windshields." (*Id.* ¶ 38.) He further opines that windshield cracking represents safety concerns. (*Id.* ¶¶ 42–45.) Finally, Manzari offers an opaque opinion on the cost of repair, concluding that "the total cost of replacing Class Vehicles' windshields with non-defective windshields would be, for the consumer, substantially the

same or more than the cost to replace windshields reflected in Kia's warranty and goodwill data." (*Id.* ¶ 58.)

Kia argues that Manzari's opinions should be excluded because (1) his safety opinion lacks sufficient facts and data to support it; (2) his opinion that the failure rates support the existence of a common defect is not based on sufficient facts or reliable methodology; (3) he has no data to support his opinions about consumer expectations; and (4) his cost-of-repair opinion is vague and speculative. (*See generally* Manzari Mot.) The Court agrees, for the most part, with Kia, and excludes the bulk of Manzari's opinion.

First, Kia argues that the Court must exclude Manzari's safety opinion because the testimony boils down to his say-so and is supported by only anecdotal consumer complaints about Class Vehicle windshields. (Manzari Mot. at 13.) Manzari opines that windshields that crack extensively and unexpectedly can create "significant visibility issues," "distract drivers," violate state laws that require drivers to maintain intact windshields, and interfere with the "proper operation of certain 'advanced driving assistance systems.'" (Ex. J to Mot., Manzari Report ¶¶ 44–47, 56.) Plaintiffs argue that these opinions are adequately supported by his automotive background and based on "uncontroversial premises." (Manzari Opp. at 12–13 (citing *Johnson v. Nissan N. Am. Inc.*, 2022 WL 2869528, at *10–11 (N.D. Cal. July 21, 2022).)

Plaintiffs are right in theory—Manzari could rely on his automotive experience to explain the danger in windshield cracks—but in practice, Manzari's opinion does not cite to his automotive experience. Manzari does not explain how he knows that cracked windshields cause visibility issues or distracted driving, and he does not describe any experience with repairing advanced driving assistance systems that have been affected by a cracked windshield; he makes conclusory statements about those safety concerns and then quotes consumer complaints that purportedly reflect the same concerns. (*See* Ex. J to Mot., Manzari Report ¶¶ 49–56.) "An expert who parrots an out-of-court statement is not giving expert testimony; he is a ventriloquist's dummy." *United States v. Brownlee*, 744

F.3d 479, 482 (7th Cir. 2014). Manzari's failure to connect any of the consumer anecdotes to his automotive expertise means that the bulk of his safety opinion must be excluded.

The one exception is Manzari's opinion that windshield cracks can violate state laws. He describes actual experience with state laws that recognize the safety risks associated with cracked windshields; he inspected vehicles and failed them if a crack was too large. (*See* Ex. J to Mot., Manzari Report ¶¶ 46–47.) Though still sparse, Manzari has at least attempted to explain how his expertise allows him to opine about state laws that codify windshield cracks as safety risks. Manzari can offer that portion of his opinion.

Second, Kia moves to exclude Manzari's opinion that the Class Vehicle windshields are defective based on the replacement rate. (Manzari Mot. at 14.) Manzari's opinion here is like his opinion regarding safety; it fails to connect his automotive expertise to the proffered testimony. Manzari repeats the failure rates of the Class Vehicle windshields, based on the total number of windshield replacements, and then describes it as "higher than [he] would expect to see." (*See* Ex. J to Mot., Manzari Report ¶¶ 38.) But Manzari does not explain how his automotive repair experience has helped him to "expect" a certain windshield replacement rate in various car models. As a result, Manzari cannot opine that, in his experience, this is a higher rate than he would expect. But two portions of this opinion are adequately supported by his experience and are admissible: (1) his opinion regarding the parts of the car that are expected to last the life of the vehicle; and (2) his opinion that when he worked on windshields, they were usually chipped and could be repaired, rather than cracked and requiring replacement. (*Id.* ¶¶ 37, 40.)

Third, Kia argues that Manzari does not have sufficient data to opine that the replacement rates place the Class Vehicles "outside the range of what a reasonable consumer would accept." (*Id.* ¶ 41; Manzari Mot. at 20.) Because the Court has excluded Manzari's opinion about the replacement rate, it follows that Manzari cannot opine about the effect of that replacement rate on consumer expectations. This portion of Manzari's opinion is excluded.

Fourth, Kia moves to exclude Manzari's opinion about the cost of repair because it is vague and speculative. (Manzari Mot. at 21.) The Court agrees. The two paragraphs in this portion of Manzari's report are confusing and vague; even if the Court could determine what Manzari's proffered opinion truly was, it is supported by no explanation, no connection to Manzari's expertise, and no methodological analysis. This is not sufficient under Rule 702. This portion of Manzari's opinion is excluded.

Kia's *Daubert* motion to exclude the expert testimony of Darren Manzari is DENIED IN PART as to the limited aspects of his opinion that the Court has singled out as admissible; the motion is GRANTED IN PART as to the remainder of Manzari's proffered expert testimony.

III. CLASS CERTIFICATION

A. LEGAL STANDARD

"A party seeking class certification must satisfy the requirements of Federal Rule of Civil Procedure 23(a) and the requirements of at least one of the categories under Rule 23(b)." *Wang v. Chinese Daily News, Inc.*, 737 F.3d 538, 542 (9th Cir. 2013). Rule 23(a) "requires a party seeking class certification to satisfy four requirements: numerosity, commonality, typicality, and adequacy of representation." *Id.* (citing *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349 (2011)); *see also* Fed. R. Civ. P. 23(a). "Rule 23 does not set forth a mere pleading standard. A party seeking class certification must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are in fact sufficiently numerous parties, common questions of law or fact, etc." *Dukes*, 564 U.S. at 350. This requires a district court to conduct a "rigorous analysis" that frequently "will entail some overlap with the merits of the plaintiff's underlying claim." *Id.* at 350–51.

"Second, the proposed class must satisfy at least one of the three requirements listed in Rule 23(b)." *Id.* at 345. Here, Plaintiffs seek certification of the class under Rule 23(b)(3), which permits maintenance of a class action if "the court finds that the questions

of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3).

The Supreme Court has explained that Rule 23(b)(3) "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997). "Implicit in the satisfaction of the predominance test is the notion that the adjudication of common issues will help achieve judicial economy." *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996). "When common questions present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication, there is clear justification for handling the dispute on a representative rather than on an individual basis." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1022 (9th Cir. 1998) (quotations omitted).

B. NUMEROSITY

Rule 23(a)(1) requires that the class be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). This Court has repeatedly held that "[a]s a general rule, classes of forty or more are considered sufficiently numerous." *Crews v. Rivian Auto., Inc.*, 2024 WL 3447988, at *3 (C.D. Cal. July 17, 2024) (Staton, J.) (quoting *Mazza v. Am. Honda Motor Co.*, 254 F.R.D. 610, 617 (C.D. Cal. 2008), *vacated on other grounds*, 555 F.3d 581 (9th Cir. 2012)). Plaintiffs have shown that there are thousands of purchasers or lessees of Class Vehicles in each relevant state, meaning that the numerosity requirement for the state Classes is easily met. (Mot. at 19; Supp. Mem. at 21.)

Plaintiffs also assert that, the express warranty sub-Classes, which are limited to Class Members that presented their Class Vehicle to Kia for repair and were denied coverage for the repair under their warranty, are sufficiently numerous. (*See* Mot. at 19; Supp. Mem. at 22.) Because the Court is not certifying the express warranty sub-Classes, *see infra*, it need not consider the numerosity of those Classes.

C. COMMONALITY

Rule 23(a)(2) requires that "there are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). "Commonality requires the plaintiff to demonstrate that the class members have suffered the same injury." *Dukes*, 564 U.S. at 349–50. The Plaintiff must allege that the class's injuries "depend upon a common contention" that is "capable of classwide resolution." *Id.* at 350. In other words, the "determination of [the common contention's] truth or falsity will resolve an issue that is central to the validity of each of the claims in one stroke." *Id.* "What matters to class certification . . . is not the raising of common questions—even in droves—but rather, the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation." *Id.* (cleaned up).

Plaintiffs contend that the "questions of law and fact common to all class members include, among others: (1) whether the Class Vehicles' windshields are defective; (2) whether Kia had knowledge or should have known about the Windshield Defect; (3) whether Kia failed to disclose material facts; (4) whether Kia had a duty to disclose the Defect; (5) whether Kia violated state consumer protection statutes by failing to disclose the Defect; and (6) whether under Kia's promise in its New Vehicle Limited Warranty to 'provide for the repair of your vehicle if it fails to function properly during normal use,' Class Vehicle owners are entitled to non-defective replacement windshields." (Mot. at 20.) Plaintiffs argue that commonality is usually satisfied in class actions alleging a common defect across all Class Vehicles. (*Id.*); *see Wolin v. Jaguar Land Rover N. Am., LLC*, 627 F.3d 1168, 1172 (9th Cir. 2010) (finding that plaintiffs "easily satisfy the commonality requirement" when "[t]he claims of all prospective class members involve the same alleged defect . . . found in vehicles of the same make and model"); *Keegan v. Am. Honda Motor Co., Inc.*, 284 F.R.D. 504, 523–24 (C.D. Cal. 2012).

Kia does not dispute that a common defect is sufficient to satisfy the commonality requirement; rather, Kia argues that Plaintiffs have not succeeded in showing that there *is* a common defect across all Class Vehicles because Plaintiffs have failed to show that any

purported defect persisted in the Gen II windshields. (Opp. at 22.) According to Kia, this dooms Plaintiffs' Motion for two related reasons: first, it precludes a Class that features Class Vehicles with both Gen I and Gen II windshields as the windshields are "materially different"; second, because Plaintiffs rely heavily on the testing of the Gen I windshields to support their theory that *all* windshields are defective and failed to conduct independent testing of the Gen II windshields, Plaintiffs have failed to show that the Gen II windshields contain a defect. (*Id.* at 20–22.)

But the Court concludes that Plaintiffs have adduced sufficient evidence of a common defect. First, Read, Plaintiffs' glass expert, opines that there was a windshield defect originating in the Gen I windshields, as confirmed by Kia's own testing and analysis, and continuing into the Gen II windshields because Kia failed to address the relevant windshield features that would have ameliorated the defect. (*See* Ex. I to Mot., Read Report ¶ 140.) Though Kia reiterates its arguments for why Read's expert opinion should be excluded and explains that Read's analysis does not support the conclusion that the modifications to the Gen II windshields had no impact (*see* Opp. at 20–21), the Court already reasoned that Read's opinion is admissible and supports the inference that the Gen II windshields remain defective (*see supra* at Part II.B).

Second, Plaintiffs have offered evidence from Kia's own windshield sales data and Safelite's windshield replacement data to show the high rate of replacement for the Class Vehicles. (*See* Ex. R to Mot., Windshield Part Sales, Doc. 77-14; Ex. V to Mot., Safelite Data, Doc. 77-17; Ex. CC to Supp. Mem., Windshield Part Sales, Doc. 111-6; Ex. DD to Supp. Mem., Safelite Data, Doc. 111-7.) Plaintiffs compare these replacement rates to the replacement rates of the 2017–2020 Kia Sorrentos and find the replacement rates in Class Vehicles to be much higher. (Supp. Mem. at 11.)

Kia contests the admissibility and relevance of this evidence. Kia objects to the Safelite data, presented in affidavits from Elliot Asch, the Assistant Vice President of Recalibration Services for Safelite, on the basis that Asch fails to establish his personal

knowledge of the facts or to establish foundation for his testimony, rendering the testimony inadmissible hearsay. (*See* Objections to Asch Affidavit, Doc. 125.) These objections are overruled for the purposes of deciding this Motion. Asch's testimony clearly derives from his review of records kept in the regular course of business and Kia has not shown a lack of trustworthiness. *See* Fed. R. Evid. 803(d).

Kia next argues that the windshield sales data and Safelite data are "irrelevant" because the data does not account for why a windshield needed to be replaced and is, therefore, necessarily overinclusive. (Opp. at 21.) Kia's expert argues that other data sets, such as warranty claims made, customer pay data derived from service invoices, case reports from Kia's Technical Assistance Center, and call center records from Kia's Customer Assistance Center are all more accurate sources for determining the rate at which windshields were replaced due to the alleged defect because these data sets provide more information about why a repair was made. (Ex. 20 to Mallow Decl., Padmanaban Expert Report at 2–3, 7, Doc. 128-20.) But this argument asks the Court to weigh the evidence, which is not proper at this stage. The question before the Court is whether Plaintiffs have sufficient evidence of a common defect, and the Court concludes that the windshield replacement data identified by Plaintiffs supports their theory that the windshields in the Class Vehicles crack at an unacceptably high rate.

Third, Plaintiffs rely on complaints to the NHTSA, in which putative Class Members report windshield cracks. (Mot. at 10–12; Supp. Mem. at 13–14.) Plaintiffs use these anecdotes to confirm their other evidence of a common defect. (*See id.*) Kia urges the Court to disregard this evidence because "[c]ustomer complaints are not evidence of a common defect." (Opp. at 22.) Kia adds that the complaints do not confirm why a windshield cracked, making it impossible to confirm whether the complaints are related to the purported defect. (*Id.*) If the NHTSA complaints were Plaintiffs' only classwide evidence of a common defect, the Court may share Kia's concerns. But, given that these complaints serve merely a confirmatory role, in addition to Read's expert opinion and

replacement data, the Court concludes that Plaintiffs' evidence of a common defect is sufficient to meet the commonality requirement.

Plaintiffs have also proffered sufficient evidence to show that the common defect is a safety issue. Kia does not appear to contest this conclusion. Kia does assert that its countermeasure efforts were motivated by a need to address customer satisfaction and not consumer safety, but nowhere does Kia argue that Plaintiffs have insufficient evidence to support the argument that cracked windshields pose a safety concern. (*See* Opp. at 13.) As a result, despite the exclusion of the bulk of Manzari's expert opinion, Plaintiffs still have sufficient evidence that the alleged common defect renders the Class Vehicle's unsafe. Plaintiffs rely on anecdotal customer complaints that report safety concerns and on state laws that make it unlawful to operate a motor vehicle with a windshield that impairs visibility. (Mot. at 10–12; Supp. Mem. at 17–19.) Therefore, the Court concludes that commonality is met on the basis of the alleged common safety defect in all Class Vehicle windshields.

D. TYPICALITY

Rule 23(a)(3) requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). "Under the rule's permissive standards, representative claims are 'typical' if they are reasonably coextensive with those of absent class members; they need not be substantially identical." *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571, 613 (9th Cir. 2010) (en banc) *rev'd on other grounds*, 564 U.S. 338 (2011) (quotations omitted). As to the representative, "[t]ypicality requires that the named plaintiffs be members of the class they represent." *Id.*

Plaintiffs state that they "each purchased a Class Vehicle from a Kia dealer in the state they seek to represent," the alleged defect was not disclosed, and they "seek to recover under the same legal theories as their putative class members." (Mot. at 21; Supp. Mem. at 22–23.) Kia does not contest that Plaintiffs generally meet the typicality requirements. But Kia does argue that the 2020 models of the Class Vehicles must be

excluded from the proposed Class because no Plaintiff purchased or leased a 2020 model. (Opp. at 23–24.) And, because 2020 models have Gen I windshields and were subject to the CSI, Plaintiffs' claims are not typical as to that model year. (*Id.*)

In addition to arguing that this raises typicality issues, Kia also argues that this presents issues with standing and due process. First, because 2020 models of the Class Vehicles are differently situated, Plaintiffs have no standing to assert claims on behalf of those vehicles. (*Id.* at 23.) Second, Kia argues that, "[b]y allowing the Named Plaintiffs to stand in for" Class Members who received a remedy under the CSI, it will be denied its due process right to launch a full defense because it will be limited in its ability to show that Class Members subject to the CSI were uninjured. (*Id.* at 25.)

But none of Kia's arguments defeat Plaintiffs' typicality showing or cause the Court to question Plaintiffs' standing or the adequacy of Kia's due process protections. Because Plaintiffs have sufficient evidence to support their theory that there was a common windshield defect across all Class Vehicles, the Class Members subject to the CSI are similarly situated to all other Class Members because they never received an adequate repair. As Plaintiffs point out, "[a]t most," Class Members subject to the CSI had their Gen I windshield replaced with the equally defective Gen II windshield. (Reply at 13.) Kia has not given the Court any basis for doubting the assertion that the only solution offered under the CSI was the installation of a Gen II windshield; further, since Class Members had to visit an authorized Kia dealer to receive a covered repair under the CSI, the Court assumes that Kia dealers installed OEM Gen II windshields. (*See* Ex. T to Mot., CSI Letter.) Therefore, Plaintiffs' claims are still typical of the claims of Class Members who received a repair under the CSI.

For similar reasons, Plaintiffs also have standing to pursue claims on behalf of Class Members who were subject to the CSI. And Kia has failed to show how any purported differences between those Class Members implicate its due process concerns, particularly

because Kia does not explain with any particularity how its ability to put on evidence will be constrained. (*See* Opp. at 25.)

E. ADEQUACY

Rule 23(a)(4) permits certification of a class action only if "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). "Resolution of two questions determines legal adequacy: (1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998), *overruled on other grounds by Dukes*, 564 U.S. 338 (2011).

Plaintiffs assert that they have no conflicts of interest, understand their roles and duties as proposed class representatives, have assisted Counsel with the prosecution of the action by providing documents and sitting for their depositions, and have been and will continue vigorously litigating the matter. (Mot. at 22; Supp. Mem. at 23.) Further Plaintiffs' Counsel—Sergei Lemberg, Stephen Taylor, and Joshua Markovits of Lemberg Law, LLC—have also shown that they are adequate to represent the Classes based on their vigorous prosecution of the action and their extensive experience with consumer protection class actions. (Mot. at 22; Lemberg Decl., Doc. 76-1; Taylor Decl., Doc. 76-2; Markovits Decl. ¶¶ 1–11, Doc. 76-3.) Kia does not dispute Plaintiffs' showing on adequacy. (*See generally* Opp.) The adequacy requirement is met.

F. PREDOMINANCE

The Rule 23(b)(3) predominance inquiry "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Windsor*, 521 U.S. at 623. It "asks whether the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues." *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 453 (2016) (quotations omitted). "An individual question is one where members of a proposed class will need to present

evidence that varies from member to member, while a common question is one where the same evidence will suffice for each member to make a prima facie showing or the issue is susceptible to generalized, class-wide proof." *Id.* (cleaned up). "Implicit in the satisfaction of the predominance test is the notion that the adjudication of common issues will help achieve judicial economy." *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996). "Considering whether 'questions of law or fact common to class members predominate' begins . . . with the elements of the underlying cause of action." *Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804, 809 (2011).

Plaintiffs argue that they can establish predominance for all of their claims, which they divide into three categories: claims for violations of consumer protection laws; claims for breach of the implied warranty of merchantability; and claims for breach of express warranty. (Mot. at 23–29; Supp. Mem. at 24–28.) Within each broad category, Plaintiffs assert that, although the claims are brought under various state laws, the elements do not differ materially. (*See id.*) Kia does not dispute that predominance can be broadly analyzed in this manner and raises only a handful of arguments about how specific state laws should affect the Court's analysis. (*See* Opp. at 25–35.) The Court therefore adopts the parties' assumption that the predominance inquiry can proceed as to these three categories of claims and largely without a need to differentiate between various state doctrines. Plaintiffs also claim that their damages model satisfies the predominance requirement. (Mot. at 29.) Kia strongly objects to Plaintiffs' damages model. Therefore, to conduct the predominance inquiry, the Court first addresses Plaintiffs' damages model and then analyzes predominance as to each category of claims.

1. Damages

Plaintiffs' damages model is developed in the expert report of Edward Stockton, an economics expert who currently serves as the Vice President and Director of Economic Services at a consulting firm called The Fontana Group. (Ex. BB to Mot., Stockton Decl. ¶ 1, Doc. 76-20.) Stockton's model calculates the "amount by which Class Members

overpaid for Class Vehicles"—otherwise known as benefit-of-the-bargain damages—by estimating "what it would have cost to remedy or negate the [d]efect at the time of acquisition." (*Id.* ¶ 10.) Stockton asserts that this is a "well-established and theoretically sound economic model," particularly for "durable goods, like automobiles" because a reasonable consumer expects to use the good over a long period of time; the consumer is, therefore, immediately harmed by the presence of a material defect, even if the defect has not visibly manifested yet, because the defect upsets the expectation of future performance. (*Id.* ¶¶ 10, 21, 36.) Stockton posits that the "market value of the repair is one way to restore a consumer to an equitable position based on the originally negotiated terms of the transaction," and suggests that the "market cost of a competent repair can be consistently applied on a Class-wide basis." (*Id.* ¶¶ 40, 45.) Stockton also proposes a "credit" to Kia to account for the possibility that some Class Members have received a competent repair. (*Id.* ¶ 11.) As to those Class Members, Stockton "calculate[s] economic harm only for the period of time between sale and the date that the competent repair was performed." (*Id.*) Kia mounts four challenges to this model.

First, Kia argues that this model does not support Plaintiffs' theory of harm. (Opp. at 25–27.) Kia argues that this model is insufficient because it does not consider: "(1) the fact that all windshields have some probability of failure and (2) the purported enhanced probability of windshield failures in the Putative Class Vehicles." (Opp. at 26.) Kia points to the rebuttal report of its expert, Keith Ugone, who argues that the cost-of-repair damages should be discounted to account for the likelihood that a Class Vehicle windshield will crack. (Ex. 22 to Mallow Decl., Ugone Decl. ¶¶ 24–27, Doc. 128-22.) But, as an initial matter, Kia does not contest the admissibility of any part of Stockton's expert opinion; therefore, for the purposes of deciding this Motion, the Court assumes that Stockton's opinion uses a reliable method and reflects a reliable application of that method to the facts. *See* Fed. R. Evid. 702. And, to the extent Kia is asking the Court to resolve a battle of the experts and decide which economist, Stockton or Ugone, the Court finds more

persuasive, the request is denied. It is not the Court's role to weigh the evidence at this stage. *See Marlo v. United Parcel Serv., Inc.*, 639 F.3d 942, 949 (9th Cir. 2011).

Further, the Court sees no fatal flaw in Stockton's model or how it maps onto Plaintiffs' defect theory. The model does not need to account for the probability that a Class Vehicle's windshield will require repair because the theory of harm is not based on the out-of-pocket costs a Class Member paid to replace a windshield after it cracks. Rather, the model is based on Plaintiffs' theory that all OEM windshields in the Class Vehicles are inherently defective, and the model assumes that all Class Members will not be made whole until they have a non-defective windshield. (*See* Ex. BB to Mot., Stockton Decl. ¶ 36.) This means all Class Members are entitled to the full cost of repair as a measure of damages, regardless of whether the defect in their windshield ever manifests. (*Id.*) Stockton "permissibly assum[es] that reasonable consumers who are subjected to the same safety defect in their vehicle would each be expected to seek a remedy that restores them to the position of receiving the non-defective vehicle for which they bargained." *Siqueiros v. General Motors LLC*, 2022 WL 74182, at *11 (N.D. Cal. Jan 7, 2022); *see also Nguyen v. Nissan N. Am., Inc.*, 932 F.3d 811, 819–822 (9th Cir. 2019) (approving of a damages model based on the benefit of the bargain, as measured by the cost to repair the defect, in cases where "Plaintiff's theory is that the defect was inherent in each of the Class Vehicles at the time of purchase").

Second, Kia argues that the damages model will necessitate a "series of mini trials." (Opp. at 27.) Specifically, Kia claims that mini trials will be needed to determine the cost of repair owed to each Class Member. (*Id.* at 28–29.) But Plaintiffs have proposed using an average cost-of-repair, calculated for each state Class, and Kia has not offered any authority suggesting that inserting an average repair cost into Stockton's damages model is improper. (*See* Reply at 17; Opp. at 29.) Kia states only that Stockton's estimates are "inappropriate" without explaining why or citing authority. (Opp. at 29.)

Kia also asserts that there will need to be mini trials to accommodate Stockton's formula to credit a competent repair. (Opp. at 28.) These mini trials include determining which Class Vehicle windshields were replaced, which of those replacements amounted to a competent repair, and how much time passed between the vehicle's sale and repair. (*Id.*) Kia adds that this is further "complicate[d]" by Plaintiffs' request for reimbursement of out-of-pocket costs incurred replacing a cracked windshield with a similarly defective OEM windshield. (*Id.* at 29.)

"In this circuit, however, damage calculations alone cannot defeat certification." *Leyva v. Medline Indus. Inc.*, 716 F.3d 510, 513 (9th Cir. 2013); *see also Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1131 (9th Cir. 2017) (explaining that Rule 23 contemplates the possibility of "individualized claim determinations after a finding of liability"). Therefore, the presence of some individual issues in Plaintiffs' damages model is not sufficient grounds to deny class certification. Nor is this the kind of case where the number of individual issues burdening the damages model creates too many distinctions between Class Members, as Kia argues. (*See* Opp. at 29.) In the two cases Kia cites, *Britton v. Servicelink Field Services, LLC*, 2019 WL 3400683 (E.D. Wash. July 26, 2019) and *Daniel F. v. Blue Shield of California*, 305 F.R.D. 115 (N.D. Cal. 2014), the district courts were concerned because every single class member was subject to individualized damages calculations. *See Britton*, 2019 WL 3400683, at *6 (damages model required determining the rental value of each class member's property and the days each class member was locked out); *Daniel F.*, 305 F.R.D. at 131 (damages model required determining benefits owed under each class member's ERISA-governed health plan, which varied extensively because class members received different services, at different facilities, under different plans). The distinctions between Class Members here require individualized damages calculations for only a subset of the Class and do not create the individual variety in recovery that troubled the courts in *Britton* and *Daniel F.*

Third, Kia argues that the damages model is not a valid measure of damages in certain states and cannot be used to certify the sub-Classes in those states. (Opp. at 30–31.) In determining that a benefit-of-the-bargain theory of recovery, measured by the cost of repair, was an acceptable form of damages under the CLRA and the Song-Beverly Act, the Ninth Circuit has looked directly to the relevant state statutes to determine what damages were permitted, either under the statutory text or judicial interpretation. *See Nguyen*, 932 F.3d at 817–19. The Court will do the same here.

As to the claims for breach of implied warranty, Georgia, Indiana, Iowa, New Mexico, Pennsylvania, Tennessee, Texas, and Virginia have all adopted analogs of the Uniform Commercial Code's ("UCC's") provision governing a buyer's damages for breach of warranty. *See* UCC § 2-714; Ga. Code Ann. § 11-2-714; Ind. Code Ann. § 26-1-2-714; Iowa Code Ann. § 554.2714; 55 N.M. Stat. §§ 55-2-714; 13 Pa. Stat. § 2714; Tenn. Code Ann. § 47-2-714; Tx. Bus. & Com. Code § 2.714; Va. Code Ann. § 8.2-714. This provision expressly permits benefit-of-the-bargain damages because it measures damages as "the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted." *See id.* Furthermore, under this provision, "[t]he buyer's damages may be measured in terms of the reduction in the value of the property, or the cost of repair." 4A Part II Anderson U.C.C. § 2-714:85 (3d. ed.); *see also Wright Schuchart, Inc. v. Cooper Indus., Inc.*, 40 F.3d 1247, at *1 (9th Cir. 1994). Kia has not identified any authority, and the Court is not aware of any, suggesting that these states have deviated from this standard interpretation of the UCC. *See, e.g.*, *In re Fried Grp., Inc.*, 218 B.R. 247, 251 (Bankr. M.D. Ga. 1998) ("repair costs can satisfy [the] proof requirement" for damages under § 11-2-714 of the Georgia Code); *Curtis v. Murphy Elevator Co.*, 407 F. Supp. 940, 948 (E.D. Tenn. 1976) ("The cost of repairing the elevators serves as a useful measurement of the difference in value as is and as warranted.").

For the consumer protection claims, Iowa, New Mexico, North Carolina, Pennsylvania, Tennessee, Texas, and Virginia all permit cost of repair to serve as the measure of benefit-of-the-bargain damages. Courts interpreting several of these state laws have explicitly found that cost-of-repair damages are permissible. *See Hale v. Basin Motor Co.*, 110 N.M. 314, 319 (1990) (diminution in value, measured by cost to repair, permitted by New Mexico Unfair Trade Practices Act); *Lapierre v. Samco Dev. Corp.*, 103 N.C. App. 551, 559–60 (1991) (actions for unfair or deceptive trade practices under North Carolina law may "award[] plaintiffs the cost of [what] they bargained for," and can be measured by cost of repairs); *Zwiercan v. General Motors Corp.*, 58 Pa. D. & C. 4th 251, at *1 n.2 (C.P. Phila. 2002) ("[C]ost to repair the alleged [automotive defect] is sufficient to sustain a claim of damages in a [Pennsylvania Unfair Trade Practices and Consumer Protection Law] action.").

Meanwhile, under Iowa and Tennessee law, the damages for consumer protection claims must be ascertainable. *See* Iowa Code Ann. § 714H.5(1); Tenn. Code Ann. § 47-18-109(a)(1). To be "ascertainable," courts typically require the damages to be "measurable." *See Poller v. Okoboji Classic Cars, LLC*, 960 N.W.2d 496, 522–23 (Iowa 2021). Plaintiffs' cost-of-repair damages are certainly measurable, and Kia has not argued otherwise.

As to Texas, the consumer protection law itself specifies that a "consumer may maintain an action" if "breach of an express or implied warranty" caused "economic damages." Tex. Bus. & Com. Code § 17.50(a)(2). Because benefit-of-the-bargain damages, measured by the cost of repair, are proper for breaches of warranty, Texas courts have reasoned that similar damages are recoverable for deceptive trade practices. *See Smith v. Kinslow*, 598 S.W.2d 910, 913 (Tex. App. 1980).

Finally, Virginia's consumer protection law permits "[a]ny person who suffers a loss . . . to recover actual damages, or $500, whichever is greater." Va. Code Ann. § 59.1-204. The Court agrees with the observation of a district court in the Southern District of

New York: "[T]he Virginia courts have provided little guidance with respect to the meaning of 'loss' under the Virginia [Consumer Protection Act]." *In re Gen. Motors LLC Ignition Switch Litig.*, 339 F. Supp. 3d 262, 332 (S.D.N.Y. 2018). But, as the Supreme Court of Virginia observed, courts "construe remedial legislation liberally, in favor of the injured party." *Ballagh v. Fauber Enters., Inc.*, 290 Va. 120, 125 (2015). Without any authority to suggest that Virginia's Consumer Protection Act does not permit a damages model like the one Plaintiffs have proffered, Plaintiffs' damages calculations are liberally construed as a reasonable measure of their actual damages.

The only exception is New York's consumer protection law, which requires plaintiffs bringing claims under the General Business Law to establish "actual injuries or damages, resulting from defendants' conduct." *Frank v. DaimlerChrysler Corp.*, 292 A.D.2d 118, 121 (N.Y. 2002). The actual-injury requirement has been interpreted in automobile defect cases to limit damages to "the form of personal or property damage incurred by the defect, out-of-pocket repair costs, or sale at a loss." *In re Ford Motor Co. E-350 Van Prod. Liab. Litig. (No. II)*, 2012 WL 379944, at *21 (D.N.J. Feb. 6, 2012). As a result, Plaintiffs proposal to measure their damages according to the cost of repairing the windshields fails to meet the actual-injury requirement under New York law. *See Nuwer v. FCA US LLC*, 343 F.R.D. 638, 655 (S.D. Fla. 2023).

Plaintiffs argue that this does not preclude certification of the New York Class because the Court can simply modify the Class and limit it to Class Members "who paid for replacement windshields." (Reply at 19.) But Plaintiffs do not support that assertion with any legal authority or explain how an amended New York Class would be ascertainable. (*See id.*) And in the cases that take note of this substantive New York requirement, the request to certify a New York Class is not modified; it is outright denied. *See In re Ford Motor Co. E-350 Van*, 2012 WL 379944, at *21; *Nuwer*, 343 F.R.D. at 655; *Feinstein v. Firestone Tire & Rubber Co.*, 535 F. Supp. 595, 603 (S.D.N.Y. 1982). As a

result, the Court concludes that the New York Class cannot be certified using the proffered damages model because it contravenes New York's actual-injury requirement.

Fourth, Kia argues that predominance cannot be met as to any Class Member who was subject to the CSI because there is no classwide evidence that those Class Members were harmed by Kia's conduct. (Opp. at 24.) Because Kia asserts that it "provided a competent repair," there is no measurable harm under Plaintiffs' damages model. (*Id.*) But, as discussed *supra* at Part III.D, this argument assumes that the Gen II windshield is not defective and that the replacement of Gen I windshields with Gen II windshields amounted to a competent repair. Because Plaintiffs have proffered sufficient evidence that the same defect persisted in Gen II windshields, Class Members who were subject to the CSI may rely on the same classwide evidence of harm as all other Class Members. Further, because the damages model accounts for the possibility of a competent repair, the possibility that the CSI remedied the defect for some Class Members does not undermine the applicability of Plaintiffs' classwide damages calculations.

Therefore, Kia's arguments defeat predominance only as to the New York Class's claims for violations of New York's General Business Law. Plaintiffs' remaining Classes and claims may rely on the proposed damages model.

2. Consumer Protection Claims

The key elements for the consumer protection claims are that (1) Kia failed to disclose a material defect and (2) consumers relied on Kia's omission in purchasing the Class Vehicles. (Mot. at 25–26; Supp. Mem. at 24–26); *see, e.g.*, *Sonneveldt v. Mazda Motor of Am., Inc.* ("*Sonneveldt I*"), 2022 WL 17357780, at *28–30, 32 (C.D. Cal. Oct. 21, 2022) (Staton, J.) (discussing elements for consumer protection claims under North Carolina, Texas, and Virginia law). To determine whether a defect is material, courts use an objective standard and ask whether the defect would be material to a reasonable consumer. *See, e.g.*, *State ex rel. Miller v. Rahmani*, 472 N.W.2d 254, 258 (Iowa 1991)

("[A] material misrepresentation is any untruthful statement which is likely to affect a consumer's conduct or decision with regard to a product or service.").

Plaintiffs argue that they have classwide evidence to show "(1) the Class Vehicles share a common, material safety defect, (2) Kia knew of the defect, [and] (3) Kia failed to disclose the defect." (Mot. at 24.) Plaintiffs add that they can demonstrate that the windshield defect is material, under a reasonable consumer standard, because the defect poses a safety issue and requires costly repairs. (*Id.* at 25; Supp. Mem. at 68.) Indeed, courts typically treat "defects that create unreasonable safety risks" as material. *Daniel v. Ford Motor Co.*, 806 F.3d 1217, 1225 (9th Cir. 2015) (quotations omitted).

Finally, Plaintiffs argue that the element of reliance does not defeat predominance because, under the various state laws, reliance is either not required or can be presumed on a classwide basis if the alleged misrepresentation is material. *See id.* (reliance can be presumed under California law if an omission or misrepresentation is material); *State ex rel. Miller v. Hydro Mag, Ltd.*, 436 N.W.2d 617, 622 (Iowa 1989) (Iowa Consumer Fraud Act eliminates the common-law fraud element of reliance); *Lohman v. Daimler-Chrysler Corp.*, 142 N.M. 437, 444 (Ct. App. 2007) (New Mexico's Unfair Practices Act does not require claimant to prove reliance); *In re TD Bank, N.A. Debit Card Overdraft Fee Litig.*, 325 F.R.D. 136, 161 (D.S.C. 2018) (classwide reliance can be presumed under North Carolina law if misrepresentation or omission is material and "was uniformly made to the putative class"); *Zwiercan*, 58 Pa. D. & C. 4th at *2 ("reliance is not a required element for a Plaintiff to proceed under a [Pennsylvania] deceptive practice claim"); *Messer Griesheim Indus., Inc. v. Cryotech of Kingsport, Inc.*, 131 S.W.3d 457, 469 (Tenn. App. 2003) (reliance not required under Tennessee Consumer Protection Act); *In re ConAgra Foods, Inc.*, 90 F. Supp. 3d 919, 1017 (C.D. Cal. 2015) (reliance can be proved on classwide basis under Texas law if misrepresentation was material); *Chisolm v. TranSouth Fin. Corp.*, 194 F.R.D. 538, 563 (E.D. Va. 2000) (reliance can be inferred on a classwide basis under Virginia law).

Kia does not contest that the elements of Plaintiffs' consumer protection claims can be proved on a classwide basis. But Kia does argue that the Texas Class cannot be certified as to the claims for violations of the Texas Deceptive Trade Practices Act because those claims do not allow the possibility of a defect's manifestation to be hypothetical. (Opp. at 31–32); *see Everett v. TK-Taito, L.L.C.*, 178 S.W.3d 844, 858 (Tex. App. 2005) ("At some point, potential loss-of-benefit-of-the-bargain injuries and potential cost-of-repair or replacement injuries from a defect that has not manifested itself simply become too remote in time to constitute an 'injury' for statutory standing purposes under the [Deceptive Trade Practices Act]."). As this Court previously noted, "no case has identified what *potential* economic injury from an unmanifested defect is not too remote to be actionable under the [Texas Deceptive Trade Practices Act]." *Sonneveldt v. Mazda Motor of Am., Inc.* ("*Sonneveldt II*"), 2023 WL 1812157, at *5 (C.D. Cal. Jan. 25, 2023) (Staton, J.). But, at the very least, in a case where there is "no evidence regarding failure rates" or the evidence suggests that the defect's manifestation is "unlikely to occur in the vast majority of cases," the chance of injury was too remote and not actionable under Texas law. *Id.*

Kia argues that the same reasoning should apply here. (Opp. at 31.) But as Plaintiffs point out, they *have* submitted evidence of failure rates and shown that the chance of injury is high enough for the Texas claims to survive. (Reply at 19.) This leaves the Court's past analysis in *Sonneveldt II* less applicable, particularly since the class vehicles in that case were significantly older than the Class Vehicles here and the water pump defect that was at issue manifested in less than 3% of class vehicles, making the chance of future failure low. 2023 WL 1812157, at *1–2. Kia does not suggest that Plaintiffs' proffered failure rate is insufficient under Texas law or point the Court to any authority discussing where Texas draws the line for unmanifested defects that are too remote. (*See* Opp. at 31–32.) Therefore, the Court concludes that Plaintiffs' evidence is sufficient to certify a class for consumer protection claims under Texas law because the

failure rate is much higher than the 3% in *Sonneveldt II* and much more likely to occur over the course of a Class Vehicle's lifetime given the recent model years.

3. Implied Warranty Claims

The implied warranty of merchantability requires that consumer goods be "fit for the ordinary purposes for which such goods are used." (Mot. at 26; Supp. Mem. at 26–27); *see* Cal. Civ. Code § 1791(a)(2). "Federal courts considering implied warranty claims in auto defect litigation consistently have held that an automobile is merchantable or fit for its intended purpose only where it is able reliably to operate in a 'safe condition' or to provide 'safe transportation.'" *Francis v. Gen. Motors, LLC*, 504 F. Supp. 3d 659, 676 (E.D. Mich. 2020) (collecting cases).

Plaintiffs argue that "[w]hether the vehicles were fit for ordinary purpose 'bears a strong resemblance to the inquiry the jury will be conducting under the consumer protection statutes.'" (Mot. at 26 (quoting *Johnson v. Nissan N. Am., Inc.*, 2869528, at *21 (N.D. Cal. July 21, 2022)).) To that end, Plaintiffs assert that the same common evidence used to prove their consumer protection claims—including deposition testimony, Kia's own investigation, and Plaintiffs' expert testimony—will also establish a breach of implied warranty; that evidence will show that the safety defect affecting the windshields makes the Class Vehicles unfit for their ordinary purpose and, indeed, can render the vehicles inoperable under state laws that make it illegal to drive with a cracked windshield. (Mot. at 27; Supp. Mem. at 27.)

Again, Kia does not dispute Plaintiffs' ability to prove breach of implied warranty using common, classwide evidence. But Kia does argue that, like the Texas consumer protection claim, the California claim for breach of implied warranty also requires more evidence that the defect will actually manifest. (Opp. at 31–32.) Under California law, "proof of breach of warranty does not require proof the product has malfunctioned but only that it contains an inherent defect which is substantially certain to result in malfunction during the useful life of the product." *Hicks v. Kaufman & Broad Home Corp.*, 89 Cal.

App. 4th 908, 918 (2001). Relying once more on the Court's prior reasoning in *Sonneveldt II*, Kia argues that Plaintiffs cannot show that the purported defect is substantially certain to manifest. (Opp. at 32.) But, as mentioned, *Sonneveldt II* dealt with different failure rates, which occurred later in the life of the class vehicles, and the decision cannot bear the weight that Kia places on it. 2023 WL 1812157, at *1–2.

Kia has not identified any other cases interpreting what amounts to a substantially certain manifestation of the defect under California law. (Opp. at 32.) Some cases have suggested that a failure rate of under 10% is too low. *See Keegan v. Am. Honda Motor Co., Inc.*, 284 F.R.D. 504, 534–35 (C.D. Cal. 2012) (design defect not substantially certain to manifest where plaintiff had no evidence to contest defendant's showing that defect affected less than 10% of class); *Am. Honda Motor Co. v. Superior Court*, 199 Cal. App. 4th 1367, 1377 (2011) (design defect not substantially certain to manifest where it affected less than 4% of class). But Plaintiffs have evidence that the failure rate here significantly exceeds that 10% mark. Therefore, the Court concludes that Plaintiffs' evidence regarding the certainty of the defect's manifestation is sufficient to certify a class for breach of implied warranty under California law.

4. Express Warranty Claims

Finally, a claim for breach of express warranty requires a plaintiff to show that there was "(1) an express warranty as to a fact or promise relating to the goods, (2) which was relied upon by the plaintiff in making his decision to purchase, (3) and that this express warranty was breached by the defendant." *Presnell v. Snap-On Securecorp, Inc.*, 583 F. Supp. 3d 702, 710 (M.D.N.C. 2022) (stating the elements for breach of express warranty from the UCC). Because these elements derive from the UCC, they are relatively standard across all the states, and Kia has not argued otherwise.

Here, it is undisputed that Kia issues a uniform New Vehicle Limited Warranty that provides for repair of a covered vehicle "if it fails to function properly during normal use." (Ex. Z to Mot., Warranty at 6.) Based on that warranty provision, Plaintiffs argue that they

have common evidence showing that the windshields are defective, crack and fail due to that defect, and, as a result, should be repaired under Kia's uniform express warranty. (Mot. at 28; Supp. Mem. at 28.) Class certification for the express warranty claims is proper, according to Plaintiffs because the "'terms of the standard warranty do not vary materially, if at all, among class members'; 'the promise-to-repair, the core of any warranty, either was or was not part of the basis of the bargain for all class members'; 'every class member has an identical claim for breach—they are entitled to replacement of their defective [windshield] with non-defective [windshields]'; and 'every Class Vehicle contains defective [windshields] and so every class member has been injured by the breach.'" (Mot. at 28 (quoting *Alger v. FCA US LLC*, 334 F.R.D. 415, 428–29 (E.D. Cal. 2020)).)

But Plaintiffs reliance on *Alger v. FCA US LLC*, which dealt with a defect in active head restraint systems, is misplaced. *See* 334 F.R.D. at 421. In *Alger*, only the purported defect could cause the head restraint system to fail, and, therefore, all repairs to the system were necessarily the result of the defect's manifestation. *See id.* But as Kia argues, a windshield may need to be replaced for reasons other than the purported defect. (Opp. at 33.) And Kia's express warranty does not cover windshield repairs when the glass is damaged "from outside influence." (Ex. Z to Mot., Warranty at 11.) Though Plaintiffs claim that any crack in a Class Vehicle windshield is attributable to the alleged defect, "rather than any outside influence," Plaintiffs cannot seriously contend that *no* Class Vehicles experienced a windshield crack caused by other forces such as accidents or road debris. (*See* Mot. at 28.) This creates a predominance problem for the express warranty claims because "[a] determination whether the [defect] caused a given class member's [vehicle damage] requires proof specific to that individual litigant," which in turn creates "individual causation and injury issues that could make classwide adjudication inappropriate." *Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168, 1174 (9th Cir.

2010). Kia makes a convincing argument that the individualized inquiries required here—when and how each windshield cracked—have that precise effect. (Opp. at 33.)

Plaintiffs fail to show how these individualized inquiries can be overcome. They argue that common issues still predominate over individual ones because the existence of a common defect is so central to a claim for breach of express warranty. (Reply at 20.) But the ability to prove that Kia's failure to offer a free repair amounted to a breach of the express warranty is also central to these claims, and Plaintiffs have offered no way to meet that element with classwide evidence. The Court concludes that the predominance requirement cannot be met as to the express warranty claims and will not certify the sub-Classes as to those claims. As a result, the Court will not certify a New York Class because neither the New York consumer protection claims, nor the New York express warranty claims can be adjudicated on a classwide basis.

Plaintiffs argue in the alternative that the Court should certify common issues under Rule 23(c)(4) and identify the issues for the express warranty claims that can be answered on a classwide basis. (Mot. at 31; Reply at 20.) But the only issues that can be answered on a classwide basis will be addressed by the claims that are being certified. Plaintiffs propose eight common issues: "whether (1) Class Vehicle windshields are defective; (2) Kia knew about the Defect; (3) Kia omitted and concealed the Windshield Defect from Class members; (4) the Windshield Defect is material to a reasonable buyer; (5) the Defect poses a safety risk; (6) Kia had a duty to disclose the Defect; (7) the Class Vehicles are unmerchantable; and (8) under Kia's New Vehicle Limited Warranty Kia had an obligation to replace defective Class Vehicle windshield." (Mot. at 31.) Any findings of fact related to Plaintiffs' consumer protection claims and implied warranty claims will resolve the first seven issues; as a result, separately certifying those common issues will not "materially advance[] the disposition of the litigation as a whole." *Rahman v. Mott's LLP*, 693 F. Appx. 578, 579 (9th Cir. 2017) (quotations omitted). That leaves only the eighth issue—whether Kia's warranty required Kia to repair a Class Vehicle's windshield—which is the

precise issue that the Court just decided cannot be resolved on a classwide basis. Therefore, the request to certify common issues is DENIED.

G. SUPERIORITY

"The superiority inquiry under Rule 23(b)(3) requires determination of whether the objectives of the particular class action procedure will be achieved in the particular case." *Hanlon*, 150 F.3d at 1023. "This determination necessarily involves a comparative evaluation of alternative mechanisms of dispute resolution." *Id.* Here, each member of the class pursuing a claim individually would burden the judiciary and run afoul of Rule 23's focus on efficiency and judicial economy. *See Vinole v. Countrywide Home Loans, Inc.*, 571 F.3d 935, 946 (9th Cir. 2009) ("The overarching focus remains whether trial by class representation would further the goals of efficiency and judicial economy."). Further, litigation costs would likely "dwarf potential recovery" if each class member litigated individually. *Hanlon*, 150 F.3d at 1023. "[W]here the damages each plaintiff suffered are not that great, this factor weighs in favor of certifying a class action." *Zinser v. Accufix Rsch. Inst. Inc.*, 253 F.3d 1180, 1198 n.2 (9th Cir. 2001) (quoting *Haley v. Medtronic, Inc.*, 169 F.R.D. 643, 652 (C.D. Cal. 1996)).

Plaintiffs argue that a class action is a superior method of adjudication, considering that the alternative is "tens of thousands individual cases." (Mot. at 30; Supp. Mem. at 29.) This would "unnecessarily burden the judiciary." (Mot. at 30 (quoting *Hanlon*, 150 F.3d at 1023).) Plaintiffs add that, because individual recovery would be relatively small, it would be unfeasible for individual plaintiffs to pursue their claims without class certification. (*Id.*)

Kia argues that a class action is not a superior or manageable method of adjudication because there are "numerous individual issues" that will have to be addressed and Plaintiffs have failed to show how those individual issues can be handled if this proceeds as a class action. (Opp. at 35–36.) But the Court already considered Kia's arguments that individual issues predominate and found them unpersuasive as to the

consumer protection claims and the implied warranty claims. (*See supra* at Part III.E.) Further, Kia does not identify any specific manageability concerns, and the Court agrees with Plaintiffs that there are sufficient procedural tools to manage the administration of this class litigation. (*See* Opp. at 36; Mot. at 30.)

Therefore, keeping in mind Rule 23's focus on efficiency and judicial economy, the Court concludes that Plaintiffs have met the superiority requirement.

H. ARBITRATION

Kia belatedly argues that Class Members who signed up for Kia Connect Services should be excluded from the proposed Classes because they signed arbitration agreements. (*See* Opp. at 35.) But, as Plaintiffs point out, Kia has waived the opportunity to enforce arbitration agreements by making no effort to compel arbitration at any point in these years-long proceedings. (Reply at 21–22.)

"[A] court must hold a party to its arbitration contract just as the court would to any other kind," but "may not devise novel rules to favor arbitration over litigation." *Morgan v. Sundance, Inc.*, 596 U.S. 411, 418 (2022). As a result, the "ordinary procedural rule[s]" for contract enforcement, such as waiver and forfeiture, apply with equal weight in the arbitration context. *Id.* "Waiver . . . is generally defined . . . as the voluntary and intentional relinquishment of a known and existing right." 13 Williston on Contracts § 39:14 (4th ed.). "'There is no concrete test to determine whether a party has engaged in acts that are inconsistent with its right to arbitrate'; rather, we consider the totality of the parties' actions." *Newirth ex rel. Newirth v. Aegis Senior Cmtys., LLC*, 931 F.3d 935, 941 (9th Cir. 2019) *abrogated on other grounds by Morgan*, 596 U.S. 411 (2022) (internal citations omitted) (quoting *Martin v. Yasuda*, 829 F.3d 1118, 1125 (9th Cir. 2016)). The Ninth Circuit has made clear that defendants can waive the ability to arbitrate, even in class actions and even as to unnamed class members. *See Hill v. Xerox Bus. Servs., LLC*, 59 F.4th 457, 480 (9th Cir. 2023).

Here, there is no question that Kia knew of the arbitration agreements it now seeks to enforce. Further, Kia's actions over the course of almost four years of litigation demonstrate a clear intent to litigate this matter on the merits and are inconsistent with the intent to arbitrate. Kia filed two motions to dismiss, engaged in extensive discovery, mounted a full merits-based defense to the present Motion, and never raised the right to compel arbitration as a defense. Kia cites a single case, *Maranda v. Hyundai Motor America, Inc.*, in support of its argument that the arbitration agreements should be enforced but that case provides no support for Kia's position. *See* 2023 WL 6474450 (C.D. Cal. Oct. 2, 2023). In *Maranda*, the defendants affirmatively moved to compel arbitration, about seven months into the litigation. *See id.* at *1. Kia did not make a similar, timely effort to enforce its contractual rights here.

The Court will not exclude any Class Members on the basis of the arbitration agreements Kia has identified.

IV. CONCLUSION

For the above reasons, the Motion for Class Certification is GRANTED IN PART and DENIED IN PART. The two Motions to Exclude Plaintiffs' Experts are also GRANTED IN PART and DENIED IN PART, in the manner described above.

- The Court CERTIFIES the following ten Classes:
    1. **California Class:** All persons who purchased or leased any 2020–2022 Kia Telluride vehicle in the State of California.
    2. **Georgia Class:** All persons who purchased or leased any 2020–2023 Kia Telluride vehicle in the State of Georgia.
    3. **Indiana Class:** All persons who purchased or leased any 2020–2023 Kia Telluride vehicle in the State of Indiana.
    4. **Iowa Class:** All persons who purchased or leased any 2020–2022 Kia Telluride vehicle in the State of Iowa.

5. **New Mexico Class:** All persons who purchased or leased any 2020–2023 Kia Telluride vehicle in the State of New Mexico.
6. **North Carolina Class:** All persons who purchased or leased any 2020–2022 Kia Telluride vehicle in the State of North Carolina.
7. **Pennsylvania Class:** All persons who purchased or leased any 2020–2023 Kia Telluride vehicle in the Commonwealth of Pennsylvania.
8. **Tennessee Class:** All persons who purchased or leased any 2020–2023 Kia Telluride vehicle in the State of Tennessee.
9. **Texas Class:** All persons who purchased or leased any 2020–2023 Kia Telluride vehicle in the State of Texas
10. **Virginia Class:** All persons who purchased or leased any 2020–2023 Kia Telluride vehicle in the State of Virginia.

- The Court appoints Mark Treston, Tewana Nelson, Linda Wilbur, Andrea Reiher-Odom, Margaret Ritzler, Amber Witt, Jennifer Rocco, Hank Herber, Jerry Dubose, and April Fisher as Class Representatives of the Classes that they seek to represent.
- The Court appoints Sergei Lemberg, Stephen Taylor, and Joshua Markovits of Lemberg Law, LLC as Class Counsel.
- The Court DENIES certification of Plaintiffs' proposed New York Class.
- The Court DENIES certification of subclasses as to the express warranty claims.
- The Court directs the parties to meet and confer and to submit an agreed-upon form of class notice that will advise Class Members of, among other things, the damages sought and their rights to intervene, opt out, submit comments, and contact Class Counsel. The parties shall also jointly submit a plan for the dissemination of the proposed notice. The parties must work together to generate a class list to be used in disseminating class notice, and they must work together to create a notice that satisfies Rule 23. The proposed notice and plan of dissemination, as well as a

proposed order granting approval, shall be filed with the Court on or before **December 13, 2024.**

DATED: November 07, 2024

JOSEPHINE L. STATON

HON. JOSEPHINE L. STATON
UNITED STATES DISTRICT JUDGE