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8 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
9 COUNTY OF ORANGE

10 JOHNETTE C. ALEXANDER, On Behalf of  
11 Herself and All Others Similarly Situated, and  
On Behalf of the General Public,

12 Plaintiff,

13 vs.

14 KIA MOTORS AMERICA, INC.,  
15 COUNTRY NISSAN, d.b.a. KIA  
COUNTRY, and DOES 1-100, inclusive,

16 Defendants.  
17

Case No. 04CC00612

**CLASS ACTION**

**PLAINTIFF'S MEMORANDUM OF  
POINTS AND AUTHORITIES IN  
OPPOSITION TO DEFENDANTS KIA  
MOTORS AMERICA, INC.'S  
DEMURRER TO PLAINTIFF'S FIRST  
AMENDED COMPLAINT**

Judge: Hon. Ronald L. Bauer  
Dept: CX103

Date: June 27, 2005  
Time: 10:30 a.m.

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Complaint Filed: July 19, 2004

1 **I. Introduction.**

2 Kia Motors America, Inc. (KMA) demurrers on two grounds: (1) uncertainty and (2)  
3 failure to state sufficient facts regarding alleged privity requirements under the First Cause of  
4 Action for Breach of Express and Implied Warranty. As to the first demurrer regarding  
5 uncertainty, this demurrer need never have been brought as it relates to an inadvertent omission  
6 of two words from one paragraph – an omission plaintiff’s counsel offered to correct  
7 immediately upon its having been brought to his attention. In short, the Court never need have  
8 been bothered by the first demurrer. The second demurrer, with citation to dicta from two cases,  
9 simply gets the law of warranty wrong as no requirement of privity is required under this cause of  
10 action. Even if it were, the allegations of the complaint clearly would satisfy any such  
11 requirement – allegations KMA simply ignores. As a matter of law and simple fairness, KMA  
12 cannot escape the warranties it makes to consumers every day based on out-dated doctrines of  
13 privity. In addition, both demurrers are substantively flawed as the first was never subject to  
14 adequate meet-and-confer and the second fails to dispose of an entire cause of action.

15 **II. Standards for Demurrer.**

16 For purposes of this demurrer, the court accepts the statement of facts contained in the  
17 complaint as true, interpreted in the light most favorable to the plaintiff, and most unfavorable to  
18 the defendant. *Stop Youth Addiction Inc. v. Lucky Stores, Inc.* (1998) 17 Cal. 4th 553, 558. As  
19 long as plaintiff is entitled to some form of relief under the circumstances plead under the  
20 particular cause of action challenged, and at least one aspect of the claim for relief would survive,  
21 the demurrer must be overruled. *Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th  
22 26, 38-39; *Kong v. City of Hawaiian Gardens Redevelopment Agency* (2002)108 Cal.App.4th  
23 1028, 1047; *Gressley v. Williams* (1961) 193 Cal.App.2d 636, 639. KMA’s demurrer to the first  
24 cause of action for breach of express and implied warranty must be overruled as it does not seek  
25 to dispose of an entire cause of action. KMA admits that plaintiff and at least some members of  
26 the class are not subject to demurrer regarding privity of contract. (Def.’s P&A at 4 (all  
27 purchasers and lessees from authorized Kia dealers).) Therefore, the Court’s decision cannot and  
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1 will not dispose of this cause of action in its entirety.

2 Demurrers on the ground of uncertainty are disfavored. Rutter Guide, *Civil Procedure*  
3 *Before Trial*, 7:85 (Rutter 2002)(noting all that is required are sufficient allegations so as not to  
4 substantially impair defendant's ability to respond and know generally what claims are asserted).  
5 If a demurrer is sustained, leave to amend both as to form and as to substantive defects is  
6 liberally granted. See *Angie M. v. Superior Court* (1995) 37 Cal.App.4th 1217, 1227; *Stevens v.*  
7 *Superior Court* (1999) 75 Cal.App. 594, 601; *Cordonier v. Central Shopping Plaza Assoc.*  
8 (1978) 82 Cal.App.3d 991, 998-999 (If, despite defects in form or substance, it is reasonably  
9 probable that the complaint can be cured by amendment, and if a fair, earlier opportunity to  
10 correct the substantive defect has not been given, a demurrer should not be sustained without  
11 leave to amend.) Indeed, failure to grant leave to amend unless the complaint shows on its face  
12 that it is incapable of amendment constitutes an abuse of discretion. *McDonald v. Superior*  
13 *Court* (1986) 180 Cal.App.3d 297, 303-04.

14 **III. Summary of Facts.**

15 Although advertising its Kia Sephias and the later renamed Kia Spectra as able to  
16 comfortably and safely accommodate rear-seat passengers, even average-sized adults will find  
17 difficult or impossible to strap themselves in with the rear safety belts. (First Amn. Compl. at ¶1.)  
18 If they do manage to pull the belts into position and buckle them together, they will invariably  
19 find the ratchet-system retractor retracting against them, pinning them against the seat back or  
20 otherwise preventing normal movement. (Id.) Consumers, therefore, are faced with the following  
21 unacceptable alternatives: not using the rear seats for passenger travel, transporting passengers  
22 without their using seatbelts, or attempting to transport passengers locked into an unreasonably  
23 restrictive position. (Id.) This is a simple problem to fix, and, plaintiff alleges, Kia not only  
24 knows of the problem, it currently has the ability to fix the problem. (Id.) Ms. Alexander, the  
25 class plaintiff, has not only been frustrated by the problem itself, during numerous trips to the  
26 dealership to get the seat belts fixed, she has had to contend with Kia employees alternatively  
27 telling her the seat belts don't work, that they do work, and that no known remedy exists. (First  
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1 Amn. Compl. at ¶10.) This is doubly frustrating in light of Kia’s awareness of the problem and a  
2 potential cure, which it apparently refuses to attempt. Ms. Alexander seeks to represent the class  
3 of Kia Sephia and Spectra owners as well as the general public in order to obtain relief Kia  
4 otherwise refuses to provide.

5 **III. Plaintiff’s Claims for Breach of Express and Implied Warranties Do Not Require**  
6 **Privity of Contract, and Plaintiff’s Complaint Alleges Facts Sufficient to Satisfy Any**  
7 **Such Requirement.**

8 KMA has admitted that none of the alleged privity issues arise where the putative class  
9 member purchased or leased their car from an authorized dealer. (Def.’s P&A at 4 (stating that  
10 “those purported class members who purchased or leased their vehicles directly from KMA or  
11 one of its authorized dealers could have the requisite privity of contract.”).) Nowhere in KMA’s  
12 brief does it indicate why any other scenario would or should be treated differently under the  
13 allegations of the First Amended Complaint. KMA leaves the Court and plaintiff to speculate  
14 how the allegations as to some purchasers have privity and others do not. KMA has failed to  
15 meet its burden to support with argument or authority its demurrer, and its demurrer must on this  
16 ground alone be overruled.

17 Even if the Court were to overlook KMA’s lack of argument regarding their inconsistent  
18 position regarding the specific allegations in the Complaint that are apparently sufficient for  
19 some putative class members but not others, KMA’s demurrer must be overruled for other  
20 reasons as well. First, KMA simply gets the law wrong as to privity requirements regarding  
21 express warranties. Privity of contract is not required for an claims based on express warranty.  
22 *See Seely v. White Motor Co.* (1965) 63 Cal.2d 9, 14 (holding that “no privity of contract  
23 required” regarding express warranty claims ). The rationale for doing away with technical  
24 privity requirements that would, in the past, allow manufacturers to escape responsibility for the  
25 warranty promises consumers are targeted with – basic fairness. In *Corporation of Presiding*  
26 *Bishop of Church of Jesus Christ of Latter Day Saints v. Cavanaugh* (1963) 217 Cal. App. 2d  
27 492, 513-514, the Court rejected the manufacturers claim that privity was required.

28 The defendant [manufacturer] by means of its representations hit the ultimate  
target at which it had aimed. That being the case, the concept of privity should not

1 be so narrowly construed that defendant is thereby insulated from responsibility  
2 for damage caused to the plaintiff by the inaccuracy of any representation made by  
it which was in the nature of a warranty.

3 Here, as alleged in the First Amended Complaint and amplified in discovery on repeated  
4 occasions, KMA's advertisements and statements in warranty and owner's manuals that make up  
5 her warranty claims were targeted at her and other members of the consuming public and, indeed,  
6 hit their target. (First Amn. Compl. at ¶¶ 5, 35, 36, 44.) Basic fairness dictates that KMA lives  
7 up to the express warranty statements it sent into the channels of commerce to promote its  
8 products.

9 KMA's authority is inapposite. The *All West Electronics* holding in no way addressed  
10 privity in breach of express warranty claims. Therefore, its passing statement regarding express  
11 warranty issues and privity are purely dicta. See *All West Electronics, Inc. v. M-B-W, Inc.* (1998)  
12 64 Cal.App.4th 717, 722 (listing issues in Complaint to not include breach of express warranty).  
13 *Fieldstone Company v. Briggs Plumbing Products, Inc.* (1997) 54 Cal.App.4th 357, the only  
14 other case cited by KMA, also does not address whether privity is required in express warranty  
15 claims in its holding. *Fieldstone*, 54 Cal.App.4th at 369 (dealing with notice issues only  
16 regarding express warranty claims). In fact, the plaintiff in that case specifically denied that there  
17 was privity between it and the manufacturer. *Fieldstone*, 54 Cal.App.4th at 369 (stating that  
18 plaintiff/appellant "contends... there was no privity of contract between it and the manufacturer.")  
19 Neither of the statements of dicta in either of these cases withstands the holding of the Supreme  
20 Court in *Seely* that privity is not required. Thus, as privity is simply not required in express  
21 warranty claims, KMA's demurrer must be overruled.

22 KMA's demurrer fails no better on implied preemption grounds. Neither of the two cases  
23 defendant cites deals with consumer, but rather business to business contracts. See *All West*  
24 *Electronics, Inc.* 64 Cal.App.4th at 718 (describing commercial status of parties); *Fieldstone*, 54  
25 Cal.App.4th at 362 (same). In contrast, in consumer cases, the Court's have held privity of  
26 contract is NOT required. In *Ghera v. Ford Motor Co.* (1966) 246 Cal.App.2d 639, a case  
27 dealing with the claim of an individual consumer for economic damages, the Court took judicial  
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1 notice of the fact that automobile manufacturers “undertake large-scale advertising programs  
2 over television, radio, in newspapers, magazines and other media of communication in order to  
3 persuade the public to buy their products.” *Gherna*, 246 Cal.App.2d at 652-53. It further held  
4 that “manufacturers who enter into promotional activities to stimulate consumer buying may  
5 thereby incur both express and implied warranty obligations.” *Id.* The Court in *Gherna* sighted  
6 with approval the leading case of *Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69 (N.J. 1960).  
7 The *Henningsen* case persuasively argues for doing away with antiquated notions of privity  
8 regarding implied warranty claims.

9 Under modern conditions the ordinary layman, on responding to the importuning  
10 of colorful advertising, has neither the opportunity nor the capacity to inspect or to  
11 determine the fitness of an automobile for use; he must rely on the manufacturer  
12 who has control of its construction, and to some degree on the dealer who, to the  
13 limited extent called for by the manufacturer's instructions, inspects and services it  
14 before delivery. In such a marketing milieu his remedies and those of persons who  
15 properly claim through him should not depend upon the intricacies of the law of  
16 sales. The obligation of the manufacturer should not be based alone on privity of  
17 contract. It should rest, as was once said, upon 'the demands of social justice. If  
18 privity of contract is required, then, under the circumstances of modern  
19 merchandising, privity of contract exists in the consciousness and understanding  
20 of all right-thinking persons.

21 Accordingly, we hold that under modern marketing conditions, when a  
22 manufacturer puts a new automobile in the stream of trade and promotes its  
23 purchase by the public, an implied warranty that it is reasonably suitable for use as  
24 such accompanies it into the hands of the ultimate purchaser.

25 *Henningsen*, 161 A.2d at 83-84.

26 Even if the Court were to overlook cases like *Seely*, *Gherna* and *Henningsen*, plaintiff has  
27 alleged facts sufficient to satisfy any privity requirement (although plaintiff specifically denies  
28 that any such requirement exists). It is well-established that privity of contract will exist between  
the ultimate purchaser and the manufacturer when the dealer is the agent of the manufacturer.  
29 *See Liberty Homes, Inc. v. Epperson*, 581 So.2d 449, 453 (Ala. 1991)(privity established because  
30 the dealer was agent of manufacturer); *Massey-Ferguson, Inc. v. Laird*, 432 So.2d 1259, 1263  
31 (1983)(same); *Church of the Nativity of Our Lord v. WatPro, Inc.*, 474 N.W.2d 605, 611  
32 (Minn.Ct.App. 1991)(privity established because sub-agent of manufacturer made warranties);  
33 *Gaha v. Taylor-Johnson Dodge, Inc.*, 632 P.2d 483, 486 (Or.App. 1981). As the First Amended

1 Complaint has specifically alleged that the dealers are agents of the manufacturer regarding all  
2 allegations in the Complaint, any requirements for privity have been satisfied. (First Amn.  
3 Compl. at ¶14.)<sup>1</sup>

4 **IV. Plaintiff's Inadvertent Error in Paragraph 2 of the First Amended Complaint Is Not**  
5 **Properly Before the Court and Will Be Corrected.**

6 KMA has demurred on the ground of uncertainty regarding the omission of "or were"  
7 from one paragraph in the preamble to the First Amended Complaint. KMA brought this issue to  
8 plaintiff's counsel's attention on March 24, 2005, only minutes before plaintiff's counsel had to  
9 travel abroad to attend a family funeral. Plaintiff's counsel informed KMA counsel at that time  
10 that the omission of these words was inadvertent and would be corrected without need to file a  
11 demurrer on those grounds, although such amendment would have to await plaintiff's counsel's  
12 return to the U.S. KMA counsel stated that he would file on those grounds nevertheless, and  
13 indeed KMA did file this demurrer on the last day possible for its demurrer, May 26, 2005.  
14 Plaintiff's counsel believes that this matter can and will be addressed in good faith between the  
15 parties' counsel and that the Court need not expend unnecessary time or energy to address this  
16 small matter. Now that counsel has returned and addressed the backlog of the most urgent  
17 matters, counsel intends to file in the next few days and after meet-and-confer with KMA  
18 counsel, either by stipulation or otherwise, an amendment to the First Amended Complaint  
19 making the requested correction in the next few days. The Court, therefore, need not and should  
20 not address this issue at this time.

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26 <sup>1</sup>In the last line of KMA's demurrers it raises, without explanation or authority, the issue  
27 of pleading to identify which contracts class members signed and to which KMA was a party.  
28 The Complaint refers to purchase contracts and lease contracts of the class members. It is  
unclear what other identification KMA desires and the above authority indicates that such  
pleading is unnecessary.

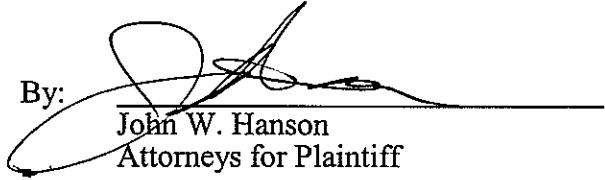
1 V. Conclusion.

2 For all of the reasons stated above, plaintiff respectfully requests the Court overrule  
3 defendant's demurrers.

4 DATED: *June 14*, 2005.

ROSNER, LAW & MANSFIELD

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7 By:



John W. Hanson  
Attorneys for Plaintiff

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