CASE NO.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GENE EDWARDS

Plaintiff-Petitioner,

v.

FORD MOTOR COMPANY

Defendant-Respondent.

PETITION FOR PERMISSION TO APPEAL THE DENIAL OF CLASS CERTIFICATION PURSUANT TO FED. R. CIV. P. 23(f)

On Appeal From The United States District Court
For The Southern District Of California
District Court Case 3:11-cv-01058-MMA-BLM

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Pursuant to Federal Rule of Civil Procedure 23(f), Plaintiff Gene Edwards seeks permission to appeal the orders of the U.S. District Court for the Southern District of California denying class certification on June 12, 2012, and denying reconsideration of that decision on October 17, 2012.

INTRODUCTION

Recently, two California district courts—including the court in this case—issued certification rulings directly at odds with one another. In both cases, the plaintiffs allege that a defendant automobile manufacturer violated California law by failing to disclose a known vehicle defect. And in both cases, the defendant manufacturers opposed certification on the grounds that a classwide defect could not be proved using common evidence. The defendants argued instead that individualized proof was needed to show that each vehicle in the proposed class was manifesting symptoms *because of* the alleged defect, rather than due to some other cause.

In the other case, *Keegan v. American Honda Motor Co.*, the district court certified the class, correctly recognizing that defendants' argument is foreclosed by binding precedent in *Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168, 1173 (9th Cir. 2010). *Keegan*, CV 10-09508, 2012 WL 2250040, at *20-22 (C.D. Cal. June 12, 2012). A manufacturer violates the consumer protection statutes at the moment it fails to disclose a known defect—not months or years later once the

product in question begins to malfunction. Accordingly, a plaintiff's burden is to show that each vehicle was defective when sold, not that each vehicle later manifested symptoms because of that defect. This can be accomplished using common proof. *Wolin*, 617 F.3d at 1173 ("Although individual factors may affect [symptoms], they do not affect whether the vehicles were sold with [the alleged] defect."), *cited in Keegan*, 2012 WL 2250040, at *21 ("plaintiffs' claim is not that each and every class vehicle exhibited [symptoms]; it is that as a result of the design defect, class vehicles had a likelihood of doing so").

In this case, the district court began its opinion by acknowledging that the existence of a defect poses a question "common to the class" under Rule 23(a)(2). (Ex. A at 5.) But the court then decided that the question was not "amenable to common proof," and held that it therefore weighed against predominance under Rule 23(b)(3). (*Id.* at 6-7.) So on the same day that the *Keegan* court rejected the manufacturers' argument, the district court in this case accepted it, ruling "the exact source of each class vehicle's [symptoms] requires individualized analysis." (*Id.* at 7.)

The district court's failure to follow *Wolin's* binding precedent constitutes manifest error and justifies Rule 23(f) review. *Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 962 (9th Cir. 2005) (per curiam). In addition, this case represents the prototypical "death knell" scenario, because Plaintiff cannot afford to continue

pursuing her claims if no class is certified. In light of these circumstances, Plaintiff asks the Court to grant review and to reverse.

STATEMENT OF FACTS

I. The Subject Matter Of The Lawsuit

In older automobiles, engine speed was controlled by a cable that connected the gas pedal directly to the vehicle's throttle. When a driver stepped on the gas pedal, the cable would open the throttle, and engine speed would increase. In the 2005-2007 Ford Freestyle, there is no cable. Instead, each Freestyle is equipped with an electronic throttle control or "ETC" system. This means that when a driver steps on the gas pedal in a Freestyle, the ETC computer sends a signal for the throttle to open, and engine speed increases.

The ETC computer is also supposed to be controlling engine speed when the gas pedal is not applied and the vehicle is idling, such as in parking lots, driveways, or when the vehicles are slowing down at a red light or stop sign. In this lawsuit, Plaintiff alleges that the Freestyle's ETC computer suffers from a defect that can generate abrupt increases in engine speed at idle. These "idle flares" can cause the Freestyle to unexpectedly surge forward or backward even though the driver has not touched the gas pedal.

This defect has led to an unprecedented rate of complaints from Freestyle drivers. (Dkt. #58-2, ¶ 27.) Although fewer than 200,000 Freestyles were ever

manufactured, thousands of drivers have complained to Ford and the National Highway Traffic Safety Administration (NHTSA) about the surging. They report that the surging has sent their Freestyles up on to sidewalks, through crosswalks, and into intersections, causing dozens of accidents and many more near-misses. (Dkt. #58-1 at 4-6; Dkt. #121 at 6.) Some drivers report they are too scared to continue driving their Freestyles, and many have incurred expensive and repeated repairs to try to fix the problem.

Plaintiff filed suit in April 2011, alleging that Ford violated two California consumer protection statutes by concealing its long-standing knowledge of the ETC computer defect. *See generally* Consumers Legal Remedies Act (CLRA), Cal. Civ. Code § 1750, *et seq.*; Unfair Competition Law (UCL), Cal. Bus. & Prof. Code § 17200, *et seq.* One month later, the NHTSA announced it was opening an investigation, which to this day remains in the "preliminary evaluation" phase.

II. Plaintiff's Motion For Class Certification

Plaintiff filed her motion for class certification in February 2012, proposing to prove, using common evidence, that Ford (i) knew of the ETC computer defect in the 2005-2007 Freestyle, (ii) had a duty to disclose it, and yet (iii) failed to do so. To prove that each Freestyle has the ETC computer defect, Plaintiff presented several sources of common evidence. For example, internal Ford documents dating back to 2004 discussed concerns that the Freestyle's ETC computer has a

problem and that the problem could cause surging. (*See* Dkt. #80-1, Ex. B at 13 of 16; *id.*, Ex. C; *see also* Dkt. #112-2, Ex. H at 3,5; *id.* Ex. I at 1 of 10.) Even more notably, in its efforts to convince the NHTSA not to order a recall, Ford had provided a number of details about the technical cause of the surging.

Ford told the NHTSA that, after reviewing the many complaints about Freestyle surging, Ford was able to say with confidence that most were due to the same problem—a defect that Ford refers to as a "stack-up condition." (Dkt. #58-5 at 2 of 25; Dkt. #58-2, Ex. BB at 3 of 4.) Ford provided a thorough explanation to the NHTSA about the technical details of the stack-up condition: in short, the Freestyle's ETC computer is not calibrated to adapt to the routine build-up of engine sludge, so when sludge builds up over time, the computer sometimes increases the engine speed too much at idle. (Dkt. #58-2, Ex. BB at 3 of 4; *see also* Dkt. #58-5 at 2, 20-21, 24 of 25.) If the vehicle is in gear, or shifting into gear, when that happens, the engine speed increase can cause the vehicle to move forward or backward even with no driver input.

According to Ford, the stack-up condition can be found in all vehicles in the proposed class—each 2005-2007 model year Freestyle. (Dkt. #58-2, Ex. BB.) Ford also told the NHTSA that it developed a repair procedure that, again, applies to each 2005-2007 Freestyle. (Dkt. #58-2, Ex. BB at 1-3 of 4; *see also* Dkt. #58-5 at 24 of 25.) Finally, Ford made a number of similar statements to the district

court when, earlier in the case, it had sought a stay and opposed a motion to compel. For example, Ford wrote in one brief that it "identified the root cause of the alleged 'surging' and [was] orchestrating a fix." (Dkt. #30 at 1.)

Notwithstanding this generalized evidence of a defect in the Freestyle, and without holding a hearing, the district court denied Plaintiff's motion for class certification on June 12, 2012. The court reasoned that that since Ford had not "definitively admitted" that the Freestyle was defective, it would be necessary to find out why each particular class vehicle was surging. (Ex. A at 9.) The court concluded that since vehicles can surge for different reasons and in different ways, "the exact source of each class vehicle's [surging] requires individualized analysis." (*Id.* at 7.)

Although the district court listed only this one reason for declining to certify Plaintiff's UCL claim, it listed a second reason for declining to certify her CLRA claim. Crediting Ford's expert testimony that not "all" consumers would have reacted uniformly to a warning about the Freestyle defect, the court declined to apply California's "reasonable consumer" standard for materiality. (*Id.* at 14-16.) Since materiality helps establish both a duty to disclose and a classwide inference of reliance, the court concluded that individual issues would predominate with respect to Plaintiff's CLRA claim for this reason as well.

III. Plaintiff's Motion For Reconsideration

Following the court's ruling, Plaintiff filed a motion for reconsideration. (Dkt. #112.) In the motion, Plaintiff informed the district court about the contrary *Keegan* decision, which suggested the court should re-examine its analysis and follow *Wolin*. In addition, Plaintiff noted that even if the court declined to follow *Keegan* and *Wolin*, and required Plaintiff to prove the cause of each Freestyle's surging, Plaintiff was able to do just that using generalized evidence.

After the class certification motion had been fully briefed, but before the district court announced its ruling, Plaintiff had continued with discovery. Ford's engineers were deposed and testified that, after a thorough investigation, they had concluded that the stack-up condition was the *only* known cause of idle surging in Freestyles. (Dkt. #112-2, Ex. E at 115:24-116:5; *id.*, Ex. D at 321:11-19.) Asked how they could be sure after only testing a single class vehicle, Ford's Rule 30(b)(6) designee testified that the Ford engineers "felt that [the Freestyle they tested] was typical. I mean, there's no reason to think that this vehicle would [surge] and, you know, any differently than – than another vehicle." (Dkt. #112-2, Ex. F at 144:13-23.) In support of the motion for reconsideration, Plaintiff also provided the district court with Ford's latest letter to the NHTSA, which set forth Ford's own position that the "vast majority" of driver complaints were due to the

stack-up condition (and the small minority that were not were identifiable as such). (Dkt. #112-2 at 5 of 16; *see* Dkt. #58-5 at 3 of 25.)

Once again, the district court denied Plaintiff's motion without holding a hearing. The court explained that its "reasoning in its June 12 Order—that other causes of surging exist and preclude certification," still applied and still justified denying certification. (Ex. B at 4.) The court also declined to reconsider its ruling on CLRA materiality.

IV. Plaintiff's Petition For Permission To Appeal

Recognizing that her individual stake in this litigation is not enough, by itself, to make prosecution of the case economically viable, Plaintiff submitted a declaration to the district court stating as much and asking it to vacate all deadlines while she petitioned for permission to appeal. (Dkt. #114-1, ¶ 3.) If no class is certified, Plaintiff will not persist with her lawsuit. (*Id.*)

Following the court's October 17th ruling on her motion for reconsideration, Plaintiff timely filed this petition on October 31st. *Gelder v. Coxcom Inc.*, --- F.3d ----, 2012 WL 3194826, at *2 (10th Cir. Aug. 8, 2012) ("plaintiffs had 14 days from the date the district court denied the motion for reconsideration to file their petition in this court").

QUESTIONS PRESENTED

1. Whether the district court erred when it chose not to follow *Wolin* and held that each class member would need to prove individually why their class vehicles are surging.

2. Whether expert testimony that not "all" consumers would react uniformly to a warning can justify a decision to not apply California's objective "reasonable consumer" standard for materiality.

REASONS FOR GRANTING THE PETITION

Review of a class certification decision is appropriate when: (1) the class certification decision is "manifestly erroneous"; (2) there is a "death knell situation," coupled with a decision by the district court that is questionable; or (3) the certification decision presents an important, "unsettled and fundamental issue of law" which is likely to evade end-of-the-case review. *Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 959 (9th Cir. 2005) (per curiam); *see also* Fed. R. Civ. P. 23(f). In this case, each *Chamberlan* factor supports appellate review.

First, as explained above, the district court committed manifest error by holding that it would be necessary for each class member to prove individually that his or her vehicle's surging is a manifestation of the alleged defect. This analysis is directly contrary to *Wolin*, which is binding precedent. ***Second***, even assuming the court's analysis is not "manifest error," it is certainly questionable in light of

the irreconcilable *Keegan* decision that was issued on the very same day. Because the decision is questionable, and because Plaintiff cannot afford to proceed with her suit on an individual basis, the decision is reviewable on "death knell" grounds. ***Third***, the district court's ruling on CLRA materiality reflects a deepening split among the courts in this circuit that has evaded appellate review. Three courts have now relied on human behavioral expert testimony to depart from the objective "reasonable consumer" standard used by the majority of the courts in this circuit. The effect is that in some courts a defendant can now hire an expert to provide general testimony about human nature—that not all consumers ever behave in exactly the same way—to avoid certification of CLRA claims. This practice will continue (and likely expand) until it is addressed by this Court.

I. The District Court's Predominance Analysis Regarding The Existence Of A Common Defect Is Contrary To *Wolin*.

A court's predominance analysis should begin "with the elements of the underlying cause of action." *Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 2179, 2184 (2011). Liability under California's consumer protection statutes, when premised on an omission, requires a plaintiff to establish the following elements: (i) the defendant's knowledge, (ii) a legal duty to disclose that knowledge, and (iii) a failure to disclose. *See Falk v. Gen. Motors Corp.*, 496 F. Supp. 2d 1088, 1098 (N.D. Cal. 2007) (breaching a duty to disclose is likely to deceive consumers and thus violates the UCL); *Daugherty v. Am. Honda Motor*

Co., 144 Cal. App. 4th 824, 835 (2006) (omitting a fact one has a legal duty to disclose constitutes a violation of the CLRA). Twice, Ninth Circuit panels have evaluated these elements in the automobile defect context, and both times ruled that common questions predominated. *Chamberlan v. Ford Motor Co.*, 402 F.3d 952 (9th Cir. 2005) (per curiam); *Wolin v. Jaguar Land Rover N. Am.*, 617 F.3d 1168, 1170 (9th Cir. 2010).

In *Chamberlan*, the district court certified a Rule 23(b)(3) class, holding that the following common questions predominated:

> (1) whether the [vehicle] design . . . was defective;
>
> (2) whether Ford was aware of alleged design defects;
>
> (3) whether Ford had a duty to disclose its knowledge;
>
> (4) whether it failed to do so;
>
> (5) whether the facts that Ford allegedly failed to disclose were material; and
>
> (6) whether the alleged failure to disclose violated the CLRA.

Id. at 962. Even though Ford accused the district court of performing a cursory analysis, this Court declined review, reasoning that the common issues were "readily apparent" and "plain enough that no further explanation [was] required to justify the district court's decision." *Id.* The Court also explained that requiring the district court to say more "would produce nothing more than a lengthy explanation of the obvious." *Id.*

Five years later, in *Wolin*, the Court reached a nearly identical conclusion, reversing a decision not to certify under Rule 23(b)(3). The *Wolin* panel held that "[c]ommon issues predominate such as [1] whether Land Rover was aware of the existence of the alleged defect, [2] whether Land Rover had a duty to disclose its knowledge and [3] whether it violated consumer protection laws when it failed to do so." *Wolin*, 617 F.3d at 1173 (also explaining that each issue was "susceptible to proof by generalized evidence").

In this case, the district court's certification analysis began correctly. The court held that Plaintiff satisfied her burden of demonstrating commonality under Rule 23(a)(2) by "identifying questions common to the class, including [1] whether a defect existed, [2] whether Ford was aware of the . . . defect, [3] whether Ford had a duty to disclose, and [4] whether Ford violated consumer protection laws when it failed to disclose the . . . defect." (Ex. A at 5.) In other words, the district court identified fundamentally the same common questions that predominated in *Wolin* and *Chamberlan*.

But the court quickly veered off track in several meaningful ways. First, the court immediately contradicted itself by announcing that common questions did not predominate because individual proof would be needed to answer two of the "common" questions the court had just identified—whether a defect existed and whether Ford had a duty to disclose the defect. (*Id.* at 6.) (With respect to the

latter question, the Court's predominance analysis applied to Plaintiff's CLRA claim but not her UCL claim). This analysis misunderstands the certification standard under Rule 23, since if a question is "common" for purposes of Rule 23(a)(2), it cannot also be said to require individualized evidence for purposes of Rule 23(b)(3). *See, e.g.*, *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 609 (1997) (the "'commonality' requirement is subsumed under, or superseded by, the more stringent Rule 23(b)(3) requirement"); *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011) (for a question to be common for Rule 23(a)(2) purposes, it "must be of such a nature that it is capable of classwide resolution").

The district court then opted to proceed through the predominance analysis, but rather than following *Chamberlan* or *Wolin*, it began by quoting a district court opinion for the proposition that "*the critical question that must be answered is why each class member's vehicle*" is surging. (Ex. A at 7 (quoting *Cholakyan v. Mercedes-Benz, USA, LLC*, 281 F.R.D. 534, 552 (C.D. Cal. 2012) (emphasis in original).) Crediting evidence from Ford that vehicle surging can vary in type and in root cause, the court held that "the trier of fact necessarily must determine which system in each putative class member's Freestyle was the source of that particular plaintiff's surge phenomenon and under what driving conditions the surge occurred." (Ex. A at 9.)

This analysis is directly contrary to *Wolin*. In *Wolin*, as here, the defendant manufacturer argued against certification on the grounds that the symptoms in question could stem from various causes, not just the alleged defect. *Wolin v. Jaguar Land Rover N. Am.*, 617 F.3d 1168, 1173 (9th Cir. 2010). In fact, since the symptom at issue in *Wolin* was tire wear—a far more common symptom than the sudden surging at issue here—the potential alternative causes were many and implicated individualized factors like weather and personal driving habits. *Id.* ("Land Rover argues that . . . the prospective class members' vehicles do not suffer from a common defect, but rather, from tire wear due to individual factors . . . ."). The *Wolin* court still found that common questions predominated, however, because the plaintiffs' burden was to prove that each vehicle was sold with a defect, not that each vehicle now manifested symptoms *because of* that defect. *Wolin*, 617 F.3d at 1173 (reasoning that establishing whether the class vehicles have a defect is "susceptible to proof by generalized evidence" and holding that "manifestation of a defect is not a prerequisite to class certification."). Put another way, *Wolin* teaches that "[a]lthough individual factors may affect [symptoms], they do not affect whether the vehicles were sold with [the alleged] defect," which is what plaintiffs actually have the burden of proving at trial. *Id.*

The recent decision in *Keegan v. Honda Motor Co.*, No. CV 10-09508, 2012 WL 2250040 (C.D. Cal. June 12, 2012), makes this same point. In *Keegan*, the

defendant similarly argued that the plaintiffs would "have to prove that *each* class vehicle experienced [symptoms] *as a result of* the purported design defect." *Id.* at *21 (second emphasis added). The court not only rejected this argument, but explained it was "aware of no case authority supporting this proposition. Indeed, the case law suggests the contrary." *Id*. As the court explained, the defendant's proposed analysis improperly "confused the defect at issue with the consequences of that defect." *Id*. at *19. As the *Keegan* court noted, the "Ninth Circuit disfavors this type of mingling of issues," and just a few years ago "the *Wolin* court considered and rejected this very argument." *Id*. at *19-20; *see also Yamada v. Nobel Biocare Holding AG*, 275 F.R.D. 573, 579 (C.D. Cal. 2011) ("The relevant inquiry focuses on the existence of the defect as manufactured and not on the factors leading to failure and injury. Though individual factors might affect implant failure, they do not affect whether the implants were sold with a defect …."). The district court's failure to follow the binding precedent in *Wolin* constitutes manifest error and warrants review and reversal.

II. The District Court Erred By Not Applying California's "Reasonable Consumer" Standard For Materiality.

Under the UCL, relief is available "without individualized proof of deception, reliance and injury." *Stearns v. Ticketmaster Corp.*, 655 F.3d 1013, 1020 (9th Cir. 2011). The CLRA, on the other hand, requires a showing of actual injury as to each class member. *In re Steroid Hormone Prod. Cases*, 181 Cal. App.

4th 145, 155 (2010). Although this might seem to pose hurdles for class certification, in reality it "does not make [CLRA] claims unsuitable for class treatment [because] '[c]ausation as to each class member is commonly proved more likely than not by materiality.'" *Mass. Mut. Life Ins. v. Superior Court*, 97 Cal. App. 4th 1282, 1292 (2002).

Materiality under California law is evaluated under an objective standard, often referred to as the "reasonable consumer" standard. *E.g., Collins v. eMachines, Inc.*, 202 Cal. App. 4th 249, 256 (2011). By proving materiality for a reasonable consumer, a plaintiff can establish CLRA causation classwide, since "plaintiffs satisfy their burden of showing causation as to each by showing materiality as to all." *Mass. Mut. Life Ins.*, 97 Cal. App. 4th at 1292. Although, generally speaking, any important fact can be material, courts applying California law have concluded that safety defects are material as a matter of law. *See, e.g., In re Toyota Motor Corp.*, 754 F. Supp. 2d 1145, 1173 (C.D. Cal. 2010) ("Nondisclosures about safety considerations of consumer products are material."); *Marsikian v. Mercedes Benz*, No. CV 08-04876, 2009 WL 8379784, at *5 (C.D. Cal. May 4, 2009) ("An example of a material fact … is an unreasonable safety risk.").

In this case, Plaintiff proposed to prove classwide CLRA reliance in this usual manner, by establishing that the Freestyle's defect poses an unreasonable

safety risk and would therefore be material to a reasonable consumer. Plaintiff proposed to offer several forms of common proof including her own testimony about the danger. (Dkt. #80-1 Ex. F at 68:8-12 ("Q. … were you concerned about the safety of the vehicle and driving it? A. Yes."), 100:18-21 ("Q. … is there another vehicle you would have purchased if you had been told [about the idle surging] issues with the throttle body? A. I would not have purchased the vehicle."), 122:3-12 ("you need to inform the consumer that there is a safety issue with the car.").) Historically in this circuit, establishing classwide causation through the objective materiality standard would not have been controversial, as courts have universally applied the standard in automotive defect class actions. *See Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017, 1025-27 (9th Cir. 2008); *Cholakyan v. Mercedes-Benz USA*, 796 F. Supp. 2d 1220, 1233 (C.D. Cal. 2011); *Falk v. Gen. Motors Corp.*, 496 F. Supp. 2d 1088, 1095-96 (N.D. Cal. 2007); *Chamberlan v. Ford Motor Co.*, 369 F. Supp. 2d 1138, 1145 (N.D. Cal. 2005); *In re Toyota Motor Corp.*, 790 F. Supp. 2d 1152, 1173 (C.D. Cal. 2011); *Parkinson v. Hyundai Motor Am.*, 258 F.R.D. 580, 596 (C.D. Cal. 2008); *Ehrlich v. BMW of N. Am.*, 801 F. Supp. 2d 908, 917-18 (C.D. Cal. 2010); *Shin v. BMW of N. Am.*, No. CV 09-00398, 2009 WL 2163509, at *1-3 (C.D. Cal. July 16, 2009); *Kearney v. Hyundai Motor Am.*, No. SACV09-1298, 2010 WL 8251077, at *7 (C.D. Cal. Dec.

17, 2010); *Marsikian*, 2009 WL 8379784, at *6; *Keegan v. Am. Honda Motor Co.*, No. CV 10-09508, 2012 WL 2250040, at *20 (C.D. Cal. June 12, 2012).

The district court, however, became the third court in this circuit to decline to apply the "reasonable consumer" standard based on a defendant's expert testimony that not "all" consumers respond the same to warnings. (Ex. A at 13-15); *see also Johnson v. Harley-Davidson Motor Co.*, 2:10-CV-02443, 2012 WL 1898938, at *5-6 (E.D. Cal. May 23, 2012); *Webb v. Carter's, Inc.*, 272 F.R.D. 489, 502–03 (C.D. Cal. 2011). Relying on the same human behavioral expert as the *Johnson* and *Webb* courts, the district court concluded that "even if Ford had warned consumers about the alleged defect, 'all of those consumers who noticed and read it would not uniformly change their buying decisions.'" (Ex. A at 14.) The court held this constituted an independent basis for denying certification of Plaintiff's CLRA claim (but not her UCL claim). (*Id.* at 16.)

The expert relied upon by the district court, Dr. Christine Wood, opined that people never behave perfectly uniformly. Dr. Wood has acknowledged that her opinion is a global one that would not vary with "the nature of the alleged defect," "the severity of the risk," or "the likelihood of harm occurring." (Dkt. #121-1, Ex. A at 41:15-42:2, 42:18-21,57:24-58:22.) Instead, her conclusion is based on the truism that not *all* consumers will ever behave uniformly:

> [A]s I see in this class action, [consumers] would ***all*** have to have made a decision based on this one piece of information that you're

> claiming Ford should have provided and that they ***all would have uniformly*** behaved the same way in order to have your class. And people don't behave in that kind of uniform fashion.

(*Id.* at 58:13-19 (emphasis added).) The universality of Dr. Wood's opinion explains why she has been able to submit, in three different cases, remarkably similar expert reports. *Compare* (Dkt. #75-2 at 95-105 of 105); *with* (report in *Johnson*, No. 2:10-CV-02443-JAM, Dkt. #82-1 (E.D. Cal. Mar. 26, 2012)); *with* (report in *Webb*, No. 2:08-CV-07367-GAF, Dkt. #197-23 (C.D. Cal. Oct. 18, 2012)).

The notion that every consumer is innately different should not have any bearing in a CLRA case, precisely because it is the "reasonable consumer" that matters. *Mass. Mut. Life Ins.*, 97 Cal. App. 4th at 1292 ("The fact a defendant may be able to defeat the showing of causation as to a few individual class members does not transform the common question into a multitude of individual ones. . . ."). Another recent district court case confirmed as much when it found human behavioral testimony like that submitted by Dr. Wood to be irrelevant. The question of whether to apply an objective standard or a subjective standard is a legal one, and thus not a subject for expert testimony. *See Guido v. L'Oreal*, No. CV 11-1067, 2012 WL 1616912, at *4 n.6 (C.D. Cal. May 7, 2012), *reconsidered in part on other grounds*, 2012 WL 2458118 (C.D. Cal. June 25, 2012) ("whether the lack of a warning label may not have had the 'same impact on all consumers'

and may not have informed an individual's buying decision is not relevant, because the standard is an objective one").

The courts that have relied on expert testimony to depart from the traditional "reasonable consumer" standard are still in the minority, but they are growing in number and present an issue of significant import. The "CLRA class action remedy further[s] a 'strong public policy of th[e] state [of California]," yet would be unavailable in district courts that elect to apply a subjective standard of materiality rather than an objective one. *Fisher v. DCH Temecula Imports LLC*, 187 Cal. App. 4th 601, 616 (2010) (quoting *Am. Online, Inc. v. Superior Court*, 90 Cal. App. 4th 1, 15 (2001)). While this issue affects only one of the claims that the district court declined to certify, its importance to class action jurisprudence nonetheless makes it another compelling reason to grant immediate review.

CONCLUSION

For the reasons above, Plaintiff respectfully requests appellate review of the district court's decisions denying class certification on June 12, 2012, and denying reconsideration of that decision on October 17, 2012.

DATED: October 31, 2012 Respectfully submitted,

By: */s/ Eric H. Gibbs*

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PROOF OF SERVICE

I, Eric H. Gibbs, hereby declare as follows:

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PETITION FOR PERMISSION TO APPEAL THE DENIAL OF CLASS CERTIFICATION PURSUANT TO FED. R. CIV. P. 23(f)

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on October 31, 2012, at San Francisco, California.

/s/ *Eric H. Gibbs*

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EXHIBIT A

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

GENE EDWARDS,

Plaintiff,

vs.

FORD MOTOR COMPANY,

Defendant.

CASE NO. 11-CV-1058-MMA(BLM)

ORDER DENYING MOTION FOR CLASS CERTIFICATION

[Doc. No. 58]

Plaintiff Gene Edwards brings this putative consumer class action against Defendant Ford Motor Company for alleged violations of California's Consumers Legal Remedies Act ("CLRA"), Cal. Civ. Code §§ 1750, *et seq.*, and Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code §§ 17200, *et seq.* Plaintiff now moves for class certification, which Ford opposes on a variety of grounds. The matter was submitted on the papers pursuant to Local Civil Rule 7.1. For the reasons set forth below, the Court **DENIES** Plaintiff's motion for class certification.

I. BACKGROUND

Plaintiff sues on behalf of herself and a putative class of current and former California-based owners of the 2005 through 2007 Ford Freestyle, who paid for repairs to their vehicles' electronic throttle control ("ETC") system. [Compl., Doc. No. 1-2 at 10, ¶ 28.][1] Modern ETC systems electronically control vehicle acceleration and usually consist of a throttle body,

[1] All citations to documents filed on the Court's docket refer to the documents' renumbered CM/ECF page numbers, not to the documents' native pagination.

powertrain control module, gas pedal assembly, wiring, and various sensors. [*Id.* ¶¶ 18-19.] In older vehicles, a cable linked to the gas pedal mechanically controlled acceleration.

Plaintiff alleges that her 2006 Ford Freestyle repeatedly stalled or accelerated forward without her corresponding input while she drove at low speeds or while completely stopped. [*Id.* ¶ 24.] In an attempt to rectify these problems, a Ford dealership replaced her vehicle's throttle body while it was under warranty. [*Id.* ¶ 25.] However, the problem returned two years later, and the out-of-warranty throttle body replacement cost Plaintiff $900. [*Id.* ¶ 26.]

Plaintiff alleges that the sudden, unintended acceleration she experienced, which she refers to as "surging," was common in the 2005 through 2007 Freestyle model years and was the product of a defective ETC system. [*Id.* ¶¶ 18-22.] She claims Ford knew about the defective ETC system as early as April 2005, but failed to disclose its existence to consumers while continuing to market and sell the Freestyle. [*Id.* ¶¶ 20, 22.] She alleges that Ford sold over 150,000 defective Freestyles. [*Id.* ¶ 29.]

Plaintiff now sues "to require Ford to notify its customers and prospective customers of the defect and to reimburse Freestyle owners for the costs" of any repairs to their vehicles' ETC system. [*Id.* ¶ 4.]

II. LEGAL STANDARD

A. Class Certification

A plaintiff seeking class certification must affirmatively show the class meets the requirements of Federal Rule of Civil Procedure 23. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011). First, a plaintiff bears the burden of proving that the class meets all four requirements of Rule 23(a): numerosity, commonality, typicality, and adequacy. *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 979-80 (9th Cir. 2011). If a plaintiff meets these prerequisites, the Court must then decide whether the class action is maintainable under Rule 23(b). Here, Plaintiff invokes Rule 23(b)(3), which authorizes certification when "questions of law or fact common to class members predominate over any questions affecting only individual class members," and when "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy."

The Court is required to perform a "rigorous analysis," which may require it "to probe behind the pleadings before coming to rest on the certification question." *Dukes*, 131 S. Ct. at 2551. "'[T]he merits of the class members' substantive claims are often highly relevant when determining whether to certify a class. More importantly, it is not correct to say a district court *may* consider the merits to the extent that they overlap with class certification issues; rather, a district court *must* consider the merits if they overlap with Rule 23(a) requirements." *Ellis*, 657 F.3d at 981 (emphasis in original; citations omitted). Nonetheless, the district court does not conduct a mini-trial to determine if the class "could actually prevail on the merits of their claims." *Id.* at 983 n.8; *see also United Steel, Paper & Forestry, Rubber, Mfg. Energy, Allied Indus. & Serv. Workers Int'l Union v. ConocoPhillips Co.*, 593 F.3d 802, 808 (9th Cir. 2010) (citation omitted) (while the Court may inquire into substance of case to apply the Rule 23 factors, it "may not go so far . . . as to judge the validity of these claims.").

B. Consumers Legal Remedies Act

The CLRA "proscribes specified 'unfair methods of competition and unfair or deceptive acts or practices' in transactions for the sale or lease of goods to consumers." *Daugherty v. Am. Honda Motor Co.*, 51 Cal. Rptr. 3d 118, 125 (Cal. Ct. App. 2006) (quoting Cal. Civ. Code § 1770(a)). Such acts and practices include representing that goods have characteristics that they do not have, Cal. Civ. Code § 1770(a)(5), and representing that goods are of a particular standard, quality, or grade, if they are of another, *id.* § 1770(a)(7). Conduct that is "likely to mislead a reasonable consumer" violates the CLRA. *Colgan v. Leatherman Tool Grp.*, 38 Cal. Rptr. 3d 36, 46 (Cal. Ct. App. 2006) (citation omitted).

C. Unfair Competition Law

Under the UCL, any person or entity that has engaged "in unfair competition may be enjoined in any court of competent jurisdiction." Cal. Bus. & Prof. Code §§ 17201, 17203. "Unfair competition" includes "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising." *Id.* § 17200. The UCL's "coverage is sweeping, embracing anything that can properly be called a business practice and that at the same

time is forbidden by law." *Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co.*, 973 P.2d 527, 539 (Cal. 1999) (internal quotations and citation omitted). The UCL essentially "borrows violations of other laws and treats them as unlawful practices that the unfair competition law makes independently actionable." *Id.* at 539-40 (internal quotations and citation omitted).

III. DISCUSSION

As explained below, Plaintiff satisfies Rule 23(a)'s commonality requirement. However, this action is not amenable to class treatment under Rule 23(b)(3) because the most basic common questions in this case–whether a defect exists and how that defect is defined–cannot be answered without individual factual determinations. In addition, individual factual issues predominate over the questions of causation and Ford's duty of disclosure under the CLRA. Because the predominance of these individualized questions is sufficient to preclude certification, the Court does not address Ford's remaining arguments against certification.

A. Rule 23(a)'s Commonality Requirement

Although Plaintiff originally identified seven common questions in her Complaint, her motion for class certification identifies only three. [*Compare* Compl., Doc. No. 1-2 ¶ 30, *with* Doc. No. 58-1 at 16 (Ford's knowledge, duty to disclose, and failure to disclose).] The Complaint identifies the following common questions: (1) whether class vehicles suffer from a defect that causes surging and stalling; (2) whether the defect constitutes an unreasonable safety risk; (3) whether Ford knows about the defect and, if so, how long Ford has known about the defect; (4) whether the existence of the defect would be considered a material fact by a reasonable consumer; (5) whether Ford was or is legally obligated to disclose the defect to Plaintiff and class members; (6) whether Ford's failure to disclose the defect violates the CLRA or UCL; and (7) whether Plaintiff and class members are entitled to be notified of the defect, receive reimbursement for ETC system repairs, or both. Ford argues that these questions are not common to the class because individual factual differences exist between class members.

To show commonality, a plaintiff must demonstrate that there are questions of fact and law that are common to the class. Fed. R. Civ. P. 23(a)(2). The requirements of Rule 23(a)(2) have "been construed permissively," and "[a]ll questions of fact and law need not be common to satisfy

the rule." *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998). However, it is insufficient to merely allege a common question in order to satisfy the commonality requirement. *Dukes*, 131 S. Ct. at 2551 ("Rule 23 does not set forth a mere pleading standard."). Rather, the Supreme Court recently explained that a plaintiff must pose a question that will produce a common answer to a crucial question. *See id.* at 2551-52 ("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.") (citation and quotations omitted; emphasis in original). The Supreme Court emphasized that commonality requires that class members' claims "depend upon a common contention" such that "determination of its truth or falsity will resolve an issue that is central to the validity of each [claim] in one stroke." *Id.* at 2551.

Here, Plaintiff has satisfied her limited burden of identifying questions common to the class, including whether a defect existed, whether Ford was aware of the existence of the alleged defect, whether Ford had a duty to disclose, and whether Ford violated consumer protection laws when it failed to disclose the existence of the alleged defect. *Accord Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168, 1173 (9th Cir. 2010). For example, if the trier of fact determines that the Freestyle was not defective, such a threshold finding would uniformly apply to all class members' claims. Further, if the alleged defect did not pose an unreasonable safety risk, such a finding would apply to the CLRA claim on a classwide basis. *See Wilson v. Hewlett-Packard Co.*, 668 F.3d 1136, 1141-43 (9th Cir. 2012) ("[F]or the omission [of fact] to be material [for purposes of the duty to disclose under the CLRA], the failure must still pose safety concerns.") (internal quotations marks and citation omitted). Similarly, a finding regarding Ford's knowledge will apply to the UCL and CLRA claims on a classwide basis.

Ford contends that Plaintiff does not meet her burden under *Dukes* to affirmatively demonstrate that there is even a single common question that can resolve important issues in one stroke. "But commonality only requires a single significant question of law or fact." *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 589 (9th Cir. 2012) (citing *Dukes*, 131 S. Ct. at 2556). Further, while Ford raises various individual differences between the class members, the

"individualized issues raised go to preponderance under Rule 23(b)(3), not to whether there are common issues under Rule 23(a)(2)." *Id.* As the Supreme Court explained in *Dukes*, the Court considered "dissimilarities not in order to determine (as Rule 23(b)(3) requires) whether common questions *predominate*, but in order to determine (as Rule 23(a)(2) requires) whether there *is* '[e]ven a single [common] question.'" *Dukes*, 131 S. Ct. at 2556 (emphasis in original; citation omitted). In *Dukes*, not even a *single* common question existed. *Id.* Here, however, Plaintiff has satisfied her "limited burden under Rule 23(a)(2) to show that there are 'questions of law or fact common to the class.'" *Mazza*, 666 F.3d at 589; *see also Wolin*, 617 F.3d at 1172. Nonetheless, the Court will consider Ford's arguments in its analysis of Rule 23(b)(3)'s predominance requirement.

B. Rule 23(b)(3)'s Predominance Requirement

Ford argues that various individual factual questions preclude adjudication of Plaintiff's claims on a classwide basis. Of Ford's various arguments, the Court agrees with Ford that individual questions predominate regarding the existence and definition of the alleged defect, Ford's duty to disclose under the CLRA, and causation under the CLRA.

Rule 23(b)(3)'s "predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997). The predominance standard requires a stronger showing than Rule 23(a)'s commonality standard. *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998). "In contrast to Rule 23(a)(2) [*i.e.*, the commonality requirement], Rule 23(b)(3) focuses on the relationship between the common and individual issues. '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.'" *Id.* at 1022 (citation omitted). Accordingly, a plaintiff must demonstrate that the claims are "capable of proof at trial through evidence that is common to the class rather than individual to its members." *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 311-12 (3rd Cir. 2008).

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1. Question of the Existence of a Defect

Plaintiff's claims depend on the existence of a defect that causes surging. Thus, the most fundamental questions in this case are whether the 2005 through 2007 Ford Freestyle models contain a defect that causes the cars to accelerate without corresponding driver input, and, if so, how to define the defect. *Accord Cholakyan v. Mercedes-Benz USA, LLC*, 2012 U.S. Dist. LEXIS 44073, *56 (C.D. Cal. Mar. 28, 2012) ("These safety problems and electrical failures form the gravamen of his complaint; they are critical to his ability to show materiality on his consumer protection claims . . . . ¶ Assuming *arguendo* that class vehicles experience water leaks, and that the leaks have a propensity to cause electrical malfunctions, *the crucial question that must be answered is why each class member's vehicle experienced water leaks*.") (emphasis added). However, Plaintiff does not address these threshold questions and asserts that Ford concedes that the Freestyle contains a defective ETC system. [Reply, Doc. No. 82 at 5 ("The first major issue that will need to be resolved at trial is not whether the Freestyle's ETC leads to surging in class vehicles–Ford has admitted as much–but rather when Ford knew this information.")]. To the contrary, Ford vigorously disputes that a defect exists. [*See generally* Opposition, Doc. No. 75 at 16-21.] Ford argues that the existence of a defect is not an issue that can be resolved by common proof for two reasons. First, several other systems in the Freestyle's engine independently influence the ETC system's performance. Second, Freestyle owners have reported the surge phenomenon under various driving conditions. As a result of these numerous contributing factors, Ford argues, the exact source of each class vehicle's unintended acceleration requires individualized analysis. The Court agrees and finds that the fundamental issues of the existence and definition of a defect are not amenable to resolution by proof on a classwide basis.

Ford presents uncontested expert testimony that ETC systems contain several components and operate in conjunction with other independent systems in automobile engines.[2] First, ETC

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[2] Ford submits the expert report of Paul M. Taylor, Ph.D., P.E., which Ford produced to Plaintiff on December 5, 2011. [*See* Ex. E to Nassihi Decl., Doc. No. 75-2 at 67-83; *see also* Nassihi Decl., Doc. No. 75-1 ¶ 9.] Although Plaintiff has not objected to Dr. Taylor's expert report, the Court has undertaken to review Dr. Taylor's qualifications and opinions pursuant to the standard set forth in *Kilby v. CVS Pharm., Inc.*, 2012 U.S. Dist. LEXIS 47855 (S.D. Cal. Apr. 4, 2012). The Court finds that Dr. Taylor is a qualified expert in the field of mechanical engineering with specialized knowledge of automotive engine systems. The Court also finds that Dr. Taylor's technical and specialized knowledge support the opinions in his expert report. Finally, Dr. Taylor's report is based

systems contain components that “continuously monitor[] the performance of various sensors and operating conditions” to “determine how much to change the throttle value position” to control acceleration. [Ex. E to Nassihi Decl., Doc. No. 75-2 at 73-74, ¶¶ 13-14.] Dr. Taylor further explains that various engine systems and conditions besides the ETC system can affect engine surge, including:

> [C]hanging engine loads (for example, transmission loads, the air conditioner compressor, alternator, or power steering pump), issues with the fuel system (for example, fuel injectors, the fuel pump, or the fuel injection control system), ignition systems (for example, intermittent sparks, ignition timing, or the knock control system), air induction system (for example, air leaks, throttle body . . .), the exhaust system (for example, the exhaust gas recirculation system (EGR) or vapor recovery system), and the transmission system (for example, shifting or torque converter issues).

[*Id.*]

Further, Dr. Taylor briefly suggests that the external driving conditions under which each individual class vehicle operates can affect engine surge. [Doc. No. 75-2 at 74, ¶ 16 (“[S]urging that results from a combination of factors, such as maintenance and operation of the air conditioner, will be less likely to be observed in climactic areas where the air conditioner is rarely used or for drivers who properly maintain their engines.”).] Indeed, the consumer complaints Plaintiff submits in support of her motion demonstrate that putative class members experienced the surge phenomenon under various conditions. For example, Freestyle owners reported experiencing surges while driving forward at slow speeds, [Doc. No. 58-26 at 3, 19; Doc. No. 61-2 at 16], while driving in reverse, [Doc. No. 58-26 at 2, 11, 14, 18; Doc. No. 61-2 at 41-42], while starting to engage the brakes, [Doc. No. 58-26 at 2, 12; Doc. No. 61-2 at 8-9], with the brake fully depressed, [Doc. No. 58-26 at 5, 18; Doc. No. 61-2 at 7], and when the air conditioner or heater were turned on, [Doc. No. 58-26 at 9, 13]. Moreover, while some drivers reported that their vehicles entered “fail safe mode”[3] after they surged, others did not. [*Compare* Doc. No. 58-26 at

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upon sufficient facts or data, is the product of reliable principles and methods, and a sufficient factual basis supports his opinions and conclusions.

[3] Dr. Taylor explains that failsafe mode is a safety feature that allows a vehicle’s engine computer to “run at a reduced power or shut down the engine completely” when the computer “senses certain faults in the operation of components, particularly faults that have the potential to cause the engine to operate at high power when such power is not requested by the driver . . . .” [Doc. No. 75-2 at 73, ¶ 14.]

2, 6-8, 13, 15; Doc. No. 61-2 at 10 (reporting vehicles stalled or entered failsafe mode after surging), *with* Doc. No. 58-26 at 9, 17; Doc. No. 61-2 at 6-9 (no such reports).]

Dr. Taylor ultimately concludes that, "[t]he type of surging that occurs can depend on the root cause for the surging. The root cause can depend on many factors . . . . Thus, depending on the root cause, surging by some definition may or may not be experienced by any particular current owner during the period of time of his or her ownership." [Doc. No. 75-2 at 83, ¶ 37.]

The uncontested evidence above supports Ford's argument that in order to determine whether a defect existed and how that defect is defined, the trier of fact necessarily must determine which system in each putative class member's Freestyle was the source of that particular plaintiff's surge phenomenon and under what driving conditions the surge occurred. *Accord Cholakyan v. Mercedes-Benz USA, LLC*, 2012 U.S. Dist. LEXIS 44073, *59-*60 (C.D. Cal. Mar. 28, 2012) ("There is also no evidence that a single design flaw that is common across all of the drains in question is responsible for the alleged water leak defect. . . . [P]utative class members could trace alleged water leaks to one of several independently operating vehicle components, each of which may or may not be functioning properly.").

In her reply brief, Plaintiff references Ford's previous filings in this case and asserts that Ford has admitted that the "root cause" of the surge phenomenon is the ETC system's inability to compensate for routine sludge buildup in the Freestyle's throttle body assembly. [Doc. No. 82 at 5.] Plaintiff then asserts that expert testimony has a limited role at the class certification phase. [*Id.*] The Court has reviewed Ford's prior filings and finds that Ford has not definitively admitted that a defect exists. Not only does Ford now vigorously dispute that a defect exists, Ford's prior filings also discussed the various other systems and driving conditions that may cause surging. [*See, e.g.*, Doc. No. 30 at 3 ("This sludge buildup may result in system disturbance, *just as other engine accessories* (such as air conditioning compressor, power steering pump, transmission, or alternators) may also cause system disturbances") (emphasis added). Thus, Ford's prior filings are consistent with its current position that surging may have multiple causes. Moreover, courts have routinely considered expert testimony at the class certification phase, and it is entirely appropriate for the Court to do so here. *See, e.g.*, *Johnson v. Harley-Davidson Motor Co.*, 2012 U.S. Dist.

LEXIS 72048, *16-*17 (E.D. Cal. May 23, 2012) (involving multiple experts, including Dr. Christine Wood, one of Ford's experts); *Cholakyan v. Mercedes-Benz USA, LLC*, 2012 U.S. Dist. LEXIS 44073 (C.D. Cal. Mar. 28, 2012); *Webb v. Carter's Inc.*, 272 F.R.D. 489, 502-03 (C.D. Cal. 2011).

Other courts have denied class certification motions on the basis of the plaintiff's inability to identify a common source of an alleged defect. For instance, in *Arabian*, while the plaintiffs alleged that their laptop computers failed to recognize available memory cards, they could not identify a common source of the problem, which may have resulted from "a variety of apparent causes, from the use of incompatible or bad RAM modules, to a malfunctioning LCD screen, to a software conflict between the BIOS update for new memory and the operating system, to an unspecified cause which was resolved by phone technical support." *Arabian v. Sony Elecs., Inc.*, 2007 U.S. Dist. LEXIS 12715, *38 (S.D. Cal. Feb. 22, 2007).

More recently, in *Cholakya*n, the plaintiffs alleged that a water leak in their vehicles' roofs caused electrical shorts circuits. The court found that their claims were not amenable to common proof because several independent systems, and components within those systems, could have caused the water leaks. *Cholakyan v. Mercedes-Benz, USA, LLC*, 2012 U.S. Dist. LEXIS 44073, *56-*61 (C.D. Cal. Mar. 28, 2012) ("Cholakyan has not adduced evidence that there is *a single source* of the alleged injuries suffered by putative class members, as *Dukes* demands.") (emphasis added). The court concluded that the plaintiff's "failure to identify a single part or system that [caused] the water leaks defeats" class certification. *Id.* at *73.

In contrast to these cases, *Wolin* involved a simple defect, namely a "geometry defect in the vehicles' alignment," that caused premature tire wear. *See Wolin v. Jaguar Land Rover N. Am.*, 617 F.3d 1168, 1170 (9th Cir. 2010). This "geometry defect" was a single, identifiable source and, unlike in *Arabian*, *Cholakyan*, and Plaintiff's case, there was no indication that any other system or component in the class vehicles influenced or combined with the alignment geometry to cause premature tire wear.

Here, while Plaintiff identifies the ETC system as the defective system, she ignores Dr. Taylor's identification of multiple other systems, components, and driving conditions that may

independently, or may combine to, cause surging. These other factors are analogous to the multiple systems in *Cholakyan* and the multiple potential sources of the computer malfunction in *Arabian*. The Court finds that the question of the existence of a defect is not capable of proof at trial through evidence that is common to the class rather than individual to its members.

2. Proof of Causation and Ford's Duty Under the CLRA

Ford also argues that Plaintiff cannot prove a CLRA violation on a classwide basis because the materiality of the alleged undisclosed defect varies from class member to class member. [Doc. No. 75 at 23-26.] Materiality relates to causation and Ford's duty of disclosure under the CLRA. Plaintiff replies that, in cases involving defects that pose safety concerns, materiality of an undisclosed defect may be proven on a classwide basis under the "reasonable consumer" standard. [Doc. No. 61 at 18; Doc. No. 82 at 10.]

Ford's first materiality argument involves Ford's duty to disclose the Freestyle's alleged defect. Under the CLRA, omissions of fact are actionable "only when the omission is contrary to a representation actually made by the defendant or where a duty to disclose exists." *Keegan v. Am. Honda Motor Co.*, ___ F. Supp. 2d ___, 2012 U.S. Dist. LEXIS 3007, *21 (C.D. Cal. 2012) (citing *Bardin v. DaimlerChrysler Corp.*, 39 Cal. Rptr. 3d 634, 648 (Cal. Ct. App. 2006). The facts the defendant knows and conceals must be material. *Oestreicher v. Alienware Corp.*, 544 F. Supp. 2d 964, 970-71 (N.D. Cal. 2008); *see LiMandri v. Judkins*, 60 Cal. Rptr. 2d 539, 543 (Cal. Ct. App. 1997). Where the alleged misrepresentation is an omission, a plaintiff must show she "would have been aware of it" had the omitted fact been disclosed. *Buckland v. Threshold Enters., Ltd.*, 66 Cal. Rptr. 3d 543, 549 (Cal. Ct. App. 2007); *see also Webb v. Carter's Inc.*, 272 F.R.D. 489, 502 (C.D. Cal. 2011).

Ford's second materiality argument involves causation under the CLRA. "[T]he CLRA requires each class member to have an actual injury caused by the unlawful practice." *Stearns v. Ticketmaster Corp.*, 655 F.3d 1013, 1022 (9th Cir. 2011). Under the CLRA, "[c]ausation as to each class member is commonly proved more likely than not by materiality." *Mass. Mut. Life Ins. v. Superior Court*, 119 Cal. Rptr. 2d 190, 197 (Cal. Ct. App. 2002) (quoting *Blackie v. Barrack*, 524 F.2d 891, 907 n.22 (9th Cir. 1975)).

Materiality may be proven on a classwide basis "with reference to a 'reasonable consumer' standard." *Webb*, 272 F.R.D. at 502 (citing *Mass. Mut. Life Ins.*, 119 Cal. Rptr. 2d at 197). Thus, where material misrepresentations are made, "at least an inference of reliance would arise as to the entire class." *Id.* (quoting *Vasquez v. Superior Court*, 484 P.2d 964, 973 (Cal. 1971)). "This is so because a representation is considered material if it induced the consumer to alter his position to his detriment." *In re Vioxx Class Cases*, 103 Cal. Rptr. 3d 83, 95 (Cal. Ct. App. 2009) ("*Vioxx*"). However, where individual issues as to materiality predominate, the record will not permit such an inference. *Mass. Mutual Life Ins. Co.*, 119 Cal. Rptr. 2d at 197; *see also Webb*, 272 F.R.D. at 501-02. "[I]f the issue of materiality or reliance is a matter that would vary from consumer to consumer, the issue is not subject to common proof, and the action is properly not certified as a class action." *Vioxx*, 103 Cal. Rptr. 3d at 95; *see also Stearns*, 655 F.3d at 1022-23 (quoting *Vioxx*); *Webb*, 272 F.R.D. at 502 (same).

Vioxx is particularly instructive. The plaintiffs in that case alleged Merck & Co. advertised its drug, Vioxx, without mentioning the risk of adverse cardiovascular risks. *Vioxx*, 103 Cal. Rptr. 3d at 89. However, the California Court of Appeal found that individual issues predominated because consumers would have differed in what they considered material. *Id.* at 98-99. Merck's expert evidence established that Vioxx increased the risk of death for only some patients, that some patients would take the drug even knowing about the risks, that some physicians would not have paid attention to statements by the drug manufacturer, and that many factors informed doctors' decisions to prescribe the drug. *Id.* Plaintiff's attempt to cabin *Vioxx* to pharmaceutical drug cases is unpersuasive. Other courts have cited *Vioxx* in a variety of contexts, and Plaintiff does not cite any authority that limits *Vioxx* to pharmaceutical drugs. *See, e.g.*, *Stearns v. Ticketmaster Corp.*, 655 F.3d 1013, 1022-23 (9th Cir. 2011) (applying *Vioxx* in a consumer class action involving a customer rewards program); *Webb*, 272 F.R.D. at 502 (same involving infant clothing); *Davis-Miller v. Auto. Club of S. Cal.*, 134 Cal. Rptr. 3d 551, 563 (Cal. Ct. App. 2011) (same involving roadside assistance program); *see also Konik v. Time Warner Cable*, 2010 U.S. Dist. LEXIS 136923, *26 (C.D. Cal. Nov. 24, 2010) (discussing *Vioxx* in context of cable television services).

Here, Ford presents persuasive expert evidence that the level of importance a potential car buyer places on safety concerns varies from consumer to consumer such that the reasonable consumer standard cannot be applied on a classwide basis.[4] First, Dr. Wood explains that the presence of product warnings does not necessarily mean that every consumer would notice, read, or seriously consider them. [Ex. I to Nassihi Decl., Doc. No. 75-2 at 98-99.] She explains that, when making purchasing decisions, potential car buyers consult different sources of information to varying degrees, including the car's window sticker, its owner's manual, and the internet. [*Id.* at 99.] She explains that, "[a]lthough vehicle safety is important to consumers, it is not information that is systematically reviewed by all purchasers." [*Id.* at 102.] Dr. Wood thus opines that even if Ford had knowledge of the alleged defect during the time it marketed and sold the Freestyle, "it is unlikely that all consumers considering purchase or lease of the vehicle would have noticed and read the information." [*Id.* at 99.]

Ford points out that even Plaintiff likely would not have been aware of a defect notice if one had existed. As Plaintiff testified, she purchased her Freestyle because it caught her attention while she perused the first car lot she visited. [Edwards Dep., Ex. C to Nassihi Decl., Doc. No. 75-2 at 19.] She did not research the Freestyle before buying it, recall any commercials or other Freestyle advertisements, read the owner's manual, or request a Carfax[5] report to determine the vehicle's history or safety risks. [*Id.* at 19-20, 26-27.] Although it is not clear whether she ever read the brochure the salesperson handed her, she suggests that she may not have understood the meaning of warnings or vehicle specifications even if she had read it. [*Id.* at 20.] Plaintiff's

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[4] Ford submits the expert report of Christine T. Wood, Ph.D., in the form of a letter addressed to defense counsel, Mr. Nassihi. [*See* Ex. I to Nassihi Decl., Doc. No. 75-2 at 95-105.] Dr. Wood's expert report addressed "human attention and information processing" and opines "as to whether, had Ford disclosed the information about the alleged defect that the plaintiff claims was concealed, members of the class 1) would have been aware of such disclosures, and 2) if aware, behaved differently and would have not purchased the vehicles." [*Id.* at 96.] Mr. Nassihi certifies that Ford produced this report to Plaintiff on December 5, 2011. [Nassihi Decl., Doc. No. 75-1 ¶ 10.] Plaintiff has neither objected, nor presented counter evidence, to Dr. Wood's expert report. The Court finds that Dr. Wood is an expert qualified in the field of experimental psychology with specific knowledge of, and experience with, consumer product warnings. Further, Dr. Wood's report is based upon sufficient facts or data, is the product of reliable principles and methods, and a sufficient factual basis supports her opinions and conclusions. *See*, *supra*, n.2.

[5] "CARFAX is a private company that provides a national, online database that tracks and reports the history of vehicles concerning title, ownership, accidents, and service." *Auto Fin. Specialists, Inc. v. ADESA Phx., LLC*, 2010 U.S. Dist. LEXIS 46231, *1 n.2 (D. Ariz. May 10, 2010) (citation and internal quotations omitted).

deposition testimony demonstrates that she did not research her Freestyle ahead of time, did not seriously investigate the car on the date of her purchase, and that she essentially made her decision to purchase her car on the spot and without express concern for safety issues. Thus, Plaintiff may not have been aware of Ford's disclosure had it been made or considered it in her purchase decision. *Accord Webb v. Carter's Inc.*, 272 F.R.D. 489, 502 (C.D. Cal. 2011) ("Defendants cite to evidence that even the named plaintiffs would not have been aware of disclosures had [Defendants] made them. For example, [one named plaintiff] testified that she never researched children's clothes online before buying them."); *Baghdasarian v. Amazon.com, Inc.*, 2009 U.S. Dist. LEXIS 115265, *15 (C.D. Cal. Dec. 9, 2009) ("Plaintiff here cannot take advantage of a presumption or inference of reliance. In this case, Plaintiff's own deposition testimony undermines his own claims, showing that he did not actually rely on Defendant's statements. Plaintiff admits that the alleged misrepresentation was not an influential factor in his decision to buy from the marketplace.")

Moreover, as Dr. Wood explains, even when consumers research a car before they purchase one, they differ as to what information they deem relevant when making purchase decisions. Not every consumer places the same level of importance on safety issues. For example, in one study of the sources of information potential car buyers consulted, of those individuals who consulted the internet,

> [a]bout half of the respondents did not mention safety as a factor in their purchase decision. Even those who did, or who rated safety as somewhat or very important, reported that they first chose the vehicle they wanted and then made sure the one they selected was one of the safest of its type. Hence, for these respondents, safety was not a primary selection criterion, but rather validation or confirmation of the selection they made. One third of the respondents reported that they believed most vehicles were quite safe and thus concentrated on the other factors, somewhat ignoring safety as a selection criterion.

[*Id.* at 101.] Dr. Wood opines that "these differences in priority make it apparent that there is considerable diversity among the respondents, and automobile buyers do not cohere into a uniform group." [*Id.*] She concludes that even if Ford had warned consumers about the alleged defect, "all of those consumers who noticed and read it would not uniformly change their buying decisions in order to avoid possible exposure to a potential safety risk, completely disregarding the many other factors that influence their vehicle purchase decisions." [*Id.* at 105.]

In addition to Dr. Wood's report, Ford notes that Plaintiff's own "behavior belies any claim that a disclosure related to the idle speed control issue in the Freestyle . . . would have been uniformly material to ordinary consumers in their vehicle purchasing decision." [Doc. No. 75 at 23.] Ford argues that Plaintiff apparently did not believe the surging posed a grave safety risk for some time. Plaintiff continued to drive her Freestyle for months and waited to take it to the dealership for repairs until she felt that the car was too unsafe to drive. [Doc. No. 75 at 9-10; *see also* Edwards Dep., Doc. No. 75-2 at 52-53.] Moreover, the fact that Plaintiff purchased a 2006 Toyota Camry after her Freestyle ceased to operate supports Ford's argument that she did not place much importance on acceleration-related safety issues even after her experience with the Freestyle.[6] The uncontested evidence before the Court supports Ford's argument that materiality varies from consumer to consumer.

The Court has reviewed *Johns v. Bayer Corp.*, 2012 U.S. Dist. LEXIS 13410 (S.D. Cal. Feb. 3, 2012), in which The Honorable Anthony J. Battaglia granted the plaintiffs' motion for class certification. However, *Johns* involved a common advertising campaign with affirmative false statements of fact, namely that Bayer's products improved men's prostate health when in fact it had no such benefit. *Id.* at *3, *16. Moreover, a review of Bayer's opposition to class certification reveals a glaring distinction between *Johns* and this case: the absence of evidence, in the form of expert testimony or otherwise, of varying reliance and materiality. Thus, when Judge Battaglia certified a class, he did not do so with such evidence before him. The same is true in *Montanez v. Gerber Childrenswear*, LLC, 2011 U.S. Dist. LEXIS 150942, *7 (C.D. Cal. Dec. 15, 2011). Although the court noted that materiality under the CLRA is *generally* amenable to

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[6] Plaintiff purchased her 2006 Camry in early 2012, after significant press coverage of surging issues with the Camry, including a highly-publicized fatal incident in this District. [*See id.* at 17; *see also* Steve Schmidt & Debbi Baker, *Toyota to Recall 4 Million Vehicles; Changes to Address Sudden Acceleration*, San Diego Union-Trib., Nov. 26, 2009, at A-1, *available at* http://www.utsandiego.com/news/2009/nov/26/toyota-recall-4-million-vehicles/.] Plaintiff testified that she purchased her Camry despite knowledge of the Camry's widely-publicized unintended acceleration issue and without much pre-purchase research. [Doc. No. 75-2 at 40, 54-55.] Moreover, although Toyota's 2009 recall involved the 2007 through 2010 model years, Plaintiff's argument–that her Camry purchase should be disregarded because the 2006 model year did not suffer from surges–is not persuasive. Because Plaintiff did not conduct any research before she purchased her Camry, she could not have known that the 2006 model was safe at the time of her purchase.

classwide proof, the order in *Montanez* made no mention of expert testimony that directly cast doubt on this general principle.

Based on Ford's expert evidence and Plaintiff's own testimony, the Court concludes that causation and Ford's duty under the CLRA cannot be determined by common proof in this case.

IV. CONCLUSION

Based on the foregoing, Plaintiff does not satisfy Rule 23(b)(3)'s predominance requirement. Accordingly, the Court **DENIES** Plaintiff's motion for class certification.

IT IS SO ORDERED.

DATED: June 12, 2012

Hon. Michael M. Anello
United States District Judge

EXHIBIT B

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

GENE EDWARDS,

Plaintiff,

vs.

FORD MOTOR COMPANY,

Defendant.

CASE NO. 11-CV-1058-MMA (BLM)

ORDER DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION

[Doc. No. 112]

This case involves alleged "surging" defects in the Ford Freestyle automobile. On June 12, 2012, the Court issued an order ("June 12 Order") denying Plaintiff Gene Edwards' ("Plaintiff") Motion for Class Certification. [Doc. No. 106.] Presently before the Court is Plaintiff's Motion for Reconsideration of the Court's June 12 Order. [Doc. No. 112.] Defendant Ford Motor Company ("Defendant") opposed the motion [Doc. No. 118], and Plaintiff filed a reply [Doc. No. 121]. The matter was submitted on the papers pursuant to Local Civil Rule 7.1.d.1. [Doc. No. 122.] For the reasons set forth below, the Court **DENIES** Plaintiff's Motion for Reconsideration.

I. BACKGROUND AND PROCEDURAL POSTURE

The Court detailed the events giving rise to this action in its June 12 Order denying Plaintiff's motion for class certification. [Doc. No. 106.] Those sections of the Court's June 12 Order are incorporated by reference herein. The Court in the June 12 Order ultimately denied Plaintiff's motion for class certification based on its findings that the predominance requirement of

Federal Rule of Civil Procedure 23(b)(3) was not met. Specifically, the Court concluded that individual, rather than collective, questions predominate regarding the existence and definition of the alleged automobile defect. Now, Plaintiff claims she has acquired both new law and new facts which require the Court to reverse course and grant class certification.

II. LEGAL STANDARD

Once the Court has issued an order or entered judgment, reconsideration may be sought by filing a motion under either Federal Rule of Civil Procedure 59(e) (motion to alter or amend a judgment) or Federal Rule of Civil Procedure 60(b) (motion for relief from judgment). *See Hinton v. NMI Pac. Enters.*, 5 F.3d 391, 395 (9th Cir. 1993).

"Although Rule 59(e) permits a district court to reconsider and amend a previous order, the rule offers an extraordinary remedy, to be used sparingly in the interests of finality and conservation of judicial resources." *Kona Enters., Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000) (internal quotation marks omitted). "Indeed, a motion for reconsideration should not be granted, absent highly unusual circumstances, unless the district court is presented with newly discovered evidence, committed clear error, or if there is an intervening change in the controlling law." *Id*. (quoting *389 Orange St. Partners v. Arnold*, 179 F.3d 656, 665 (9th Cir. 1999)) (internal quotation marks omitted). Further, a motion for reconsideration may not be used to raise arguments or present evidence for the first time when they could reasonably have been raised earlier in the litigation. *Id*. It does not give parties a "second bite at the apple." *See id.*

Similarly, Rule 60(b) provides for extraordinary relief and may be invoked only upon a showing of exceptional circumstances. *Engleson v. Burlington N.R. Co.*, 972 F.2d 1038, 1044 (9th Cir. 1994). Under Rule 60(b), the Court may grant reconsideration based on: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered before the court's decision; (3) fraud; (4) the judgment being void; (5) the judgment having been satisfied; or (6) any other reason justifying relief. Fed. R. Civ. P. 60(b). The last prong is "used sparingly as an equitable remedy to prevent manifest injustice" and is "utilized only where extraordinary circumstances prevented a party from taking timely action to prevent or correct an erroneous judgment." *Delay v. Gordon*, 475 F.3d 1039, 1044 (9th Cir. 2007).

III. DISCUSSION

Plaintiff raises three arguments in support of her motion for reconsideration: (1) new facts have surfaced which strongly point to a single cause of the "surging" defect; (2) new case law suggests there is no need to determine the cause of each class vehicle's symptoms; (3) new case law suggests that a "reasonable consumer" standard can be applied on a classwide basis. [*Pl.'s Mot.* 2.] Defendant argues that Plaintiff's motion raises nothing new, but merely reformulates previous discussions. [*Def.'s Opp.* 2.] The Court agrees with Defendant that Plaintiff has not shown new facts or law to warrant reconsideration.

First, Plaintiff has not so much uncovered new facts as highlighted old ones. In her complaint, Plaintiff stated that the automobile's "surging" defect manifested itself in a variety of different ways. [*See Compl.*, Doc. No. 1-2, ¶ 11 ("surging can occur whenever the vehicle's engine is turned on, including at low speeds, such as when parking or approaching a stop, at highway speeds, and even at complete stops.") (emphasis added).] The breadth of possible defects involved required the Court to rule that common questions did not predominate over the case. [*See* Doc. No. 106.] Instead, individual findings for each unique instance of "surging" was necessary, thereby precluding the Court from certifying Plaintiff's requested class.

Plaintiff's motion for reconsideration shifts course dramatically, focusing entirely on one specific type of surging, dubbed "idle surging," for which she has uncovered one common cause. [*See generally Pl.'s Mot.*] Thus, Plaintiff attempts to overcome her inability to state a common cause for surging by narrowing the type of surges considered. However, contrary to Plaintiff's assertion, the cause of "idle surging" was not recently discovered. Instead, Defendant specifically included information pertaining to this type of surge in its previous Opposition to Plaintiff's Motion to Certify Class. [Doc. No. 75.] There, Defendant stated:

> In September 2010, as part of Ford's ongoing monitoring of vehicles in service, Ford noticed an increase of customer reports of low speed vehicle surging in some 2005-2007 Freestyle vehicles . . . . Ford began an investigation and by August 2011 had identified both the source of the concern and the solution.
>
> Ford summarized the results of its investigation for [the National Highway Traffic Safety Administration], which opened an investigation into this *surging-at-idle* condition on May 11, 2011. As Ford told NHTSA, Ford found that the most unstable idle speed control complaints

> relate to deposit build-up on the throttle body that is a progressive condition, which over time, may cause the vehicle's idle speed control system to compensate for potential engine idle speed dips. An operator of a vehicle with the condition will observe progressively rougher idles (idle speed dips and flares) as an indication that the vehicle needs service.

[*Def.'s Opp.*, Doc. No. 75, pp. 8-9 (citations omitted).] In the present motion, Plaintiff provides largely identical information as "new" evidence in support of her request for reconsideration. For instance, Plaintiff states: "new evidence reveals . . . that there is one root cause of most if not all instances of Freestyle *idle surging*. On June 6th[, 2012], Ford sent a letter to NHTSA stating that Ford was confident that the vast majority of reports of *idle surging* in the Freestyle are due to sludge build-up." [*Pl.'s Mot.*, Doc. No. 112, p. 2 (emphasis added).] However, as described, Defendant previously outlined this evidence, which the Court duly considered prior to its June 12 Order. Thus, Plaintiff's evidence is not so much new as merely repackaged. The fact remains that other causes of surging–as alleged by Plaintiff–remain at issue. Plaintiff cannot escape this by picking and choosing which allegations the Court should consider. The Court's reasoning in its June 12 Order–that other causes of surging exist and preclude certification–is not adequately addressed by simply overlooking the other causes of surging, or narrowing the types of surging considered. A motion for reconsideration is not the proper stage for such an endeavor. In sum, the Court finds that Plaintiff's "new" facts do not constitute persuasive grounds for reconsideration.

Relatedly, the natural result of Plaintiff's considerable tapering of her case theory is a significantly overbroad class. [*See Compl.* ¶ 28; *Pl.'s Mot.* 8 (defining class as: "All persons in California who own or lease a 2005-2007 Ford Freestyle, and all persons in California who previously owned or leased a 2005-2007 Ford Freestyle and paid for repairs to the vehicle's Electronic Throttle Control.").] Therefore, even if the Court were persuaded that new facts warranted reconsideration, the reformulated case posture would likely still prevent the Court from certifying the class. This order is not, however, intended to preclude Plaintiff from seeking to modify the class definition and attempting to certify an alternate proposed class.

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Finally, the Court notes that the "new" cases cited by Plaintiff have no precedential effect on this Court, as they are non-binding district court decisions from the Central District of California. Further, these cases apply the same established legal principles which the Court previously discussed and applied.

IV. CONCLUSION

For the reasons set forth above, the Court **DENIES** Plaintiff's Motion for Reconsideration.

IT IS SO ORDERED.

DATED: October 17, 2012

Hon. Michael M. Anello
United States District Judge

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Molly C. Dwyer
Clerk of Court

October 31, 2012

No.: 12-80199
D.C. No.: 3:11-cv-01058-MMA-BLM
Short Title: Gene Edwards v. Ford Motor Company

Dear Appellant/Counsel

This is to acknowledge receipt of your Petition for Permission to Appeal under 23(f).

All subsequent letters and requests for information regarding this matter will be added to your file to be considered at the same time the cause is brought before the court.

The file number and the title of your case should be shown in the upper right corner of your letter to the clerk's office. All correspondence should be directed to the above address pursuant to Circuit Rule 25-1.