CASE NO. 12-80199

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GENE EDWARDS

Plaintiff-Petitioner,

v.

FORD MOTOR COMPANY

Defendant-Respondent.

PLAINTIFF'S REPLY IN SUPPORT OF PETITION FOR PERMISSION TO APPEAL THE DENIAL OF CLASS CERTIFICATION

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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Plaintiff submits this brief reply to address two arguments made by Ford that were not relied upon by the District Court in its order and so were not addressed in Plaintiff's opening papers. Plaintiff also wishes to direct the Court's attention to a 7th Circuit decision entered after Plaintiff's petition was filed. Like the *Wolin* and *Keegan* cases previously cited by Plaintiff, that case affirms the notion that resolving whether or not an alleged defect exists in a mass-produced consumer product is properly addressed through a class action.

I. Ford Made Two Arguments That Were Not Relied Upon By The District Court—Neither Warrants Denying Appellate Review.

Plaintiff's petition argued that the District Court's class certification order is contrary to this Court's opinion in *Wolin,* and at odds with the *Keegan* decision issued on the same day (which relied on *Wolin* to grant class certification). *See Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168 (9th Cir. 2010); *Keegan v. American Honda Motor Co., Inc.*, --- F.R.D. ----, 2012 WL 2250040 (C.D. Cal. June 12, 2012). This Court has since denied Honda's petition to review *Keegan*, so *Keegan* remains in direct conflict with the order entered in this case.

In its answering brief, Ford never once mentions *Keegan* or explains how it can be squared with the District Court's reasoning. Ford mentions *Wolin* only briefly, arguing that this case is different for two reasons. Neither reason was identified in the District Court's ruling, however, so Plaintiff responds to each argument for the first time now.

First, Ford argues that when Plaintiff moved for class certification, she "identified no specific defect" and instead relied on "a potpourri of potential defects." (Ford's Answer at 13, 17.) This contention is contradicted by the underlying record, which confirms that Plaintiff has consistently focused on the ETC computer defect, i.e., the Freestyle computer's inability to adapt to routine sludge build-up. (*See,* e.g., Class Cert. Reply at 1 [Doc. #80] ("the ETC computer does not properly take into account routine sludge build-up on the throttle body …"); Class Cert. Order at 9 [Doc. #106] (discussing Plaintiff's argument that "the 'root cause' . . . is the ETC system's inability to compensate for routine sludge buildup"); *see also* Rule 56(d) Reply at 5 [Doc. #99] (the "problem of the ETC computer inducing idle flares because of sludge build-up").)

Ford's second argument is that there were "numerous potentially significant changes in design and calibration" made to the ETC system throughout the class period. (Ford's Answer at 16-17.) Like Ford's first argument, this one was not credited by the District Court and so Plaintiff did not address it in her petition. The truth is that the ETC in class vehicles are uniformly referred to by Ford as the "Gen 2" ETC system. (*See* Stein Decl., Ex. A at 70 [Doc. #58-3].) Ford has told its own dealers as well as the NHTSA (but not class members) that the root cause and solution to surging complaints is the same across all class vehicles. (Stein Decl., Ex. C at 17-21, Ex. O.) Although there were some changes to the ETC during the

class period, Ford's brief reflects that neither Ford nor Plaintiff contends that these changes actually affected the ETC computer defect or the vehicles' propensity to surge. *Cf., Samuel-Bassett v. Kia Motors Am., Inc.*, 34 A.3d 1, 23 (Pa. 2011) ("Although KMA made several changes to the design of the Sephia's brake system during those years, the modifications did not significantly alter the basic defective design."); *In re Whirlpool Corp. Front-Loading Washer Products Liab. Litig.*, 678 F.3d 409, 419 (6th Cir. 2012) (citing *Samuel-Basset* for the same principle). Instead, the dispute between the parties is over whether Ford's actions during those years tend to show that Ford knew of the ETC computer defect that far back in time. Ford argues that the repairs were wholly unrelated to the ETC computer defect and surging; Plaintiff believes they show Ford was (unsuccessfully) trying to fix the problem while concealing its existence from consumers. Whatever the answer to that question may be, it will be common to the class.

II. The Recent *Butler* Opinion Reinforces The Logic of *Wolin* and *Keegan*.

A few weeks after Plaintiff filed her petition, the Seventh Circuit reversed a lower court's denial of class certification in *Butler v. Sears, Roebuck & Co.*, --- F.3d ----, 2012 WL 5476831 (7th Cir. Nov. 13, 2012). That opinion is not binding in this circuit, of course, but it does reinforce the logic of *Wolin* and *Keegan* relied upon by Plaintiff in her petition. As in *Wolin* and *Keegan* (and this case), the plaintiffs in *Butler* had alleged that a mass-produced consumer product suffered

from an undisclosed design defect (specifically, defects in Sears washing machines that led to mold or to machine shut-down). *Butler*, 2012 WL 5476831 at *1. And just as in *Wolin* and *Keegan* (but not this case), the *Butler* court found a class-based proceeding to be the best (and perhaps only) practical way to determine whether or not the alleged defect actually existed and, if so, what should be done about it. *Id.* at *2. As Judge Posner put it, "[a] class action is the more efficient procedure for determining liability and damages in a case such as this involving a defect that may have imposed costs on tens of thousands of consumers, yet not a cost to any one of them large enough to justify the expense of an individual suit." *Id.* The District Court erred in reaching a contrary conclusion, and in doing so contravened the binding analysis in *Wolin*, which is also found in the *Keegan* case. Immediate review is necessary to reverse that error and ensure that Freestyle owners will receive the benefit of a class trial, where it can be determined once and for all whether Ford sold them vehicles with an ETC computer defect that creates a dangerous risk of unexpected surging.

DATED: November 21, 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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I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on November 21, 2012, at San Francisco, California.

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