CASE NO. 12-80199

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GENE EDWARDS

Plaintiff-Petitioner

v.

FORD MOTOR COMPANY

Defendant-Respondent.

DEFENDANT-RESPONDENT FORD MOTOR COMPANY'S ANSWER IN OPPOSITION TO PETITION FOR PERMISSION TO APPEAL FROM DISTRICT COURT'S RULING DENYING PLAINTIFFS-RESPONDENTS' MOTION FOR CLASS CERTIFICATION

Appeal Sought From The United States District Court
For The Southern District of California
District Court Case No. 3:11-cv-01058-MMA-BLM

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INTRODUCTION

Interlocutory review of class certification decisions are most appropriate where (1) there is a death knell situation for plaintiff or defendant, coupled with a class certification decision that is "questionable"; (2) the certification decision presents an "unsettled and fundamental issue of law," important both to the specific litigation and generally; or (3) the district court's decision is "manifestly erroneous." *Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 959 (9th Cir. 2005). This case meets none of these criteria.

First, the arguments Plaintiff makes in this Court are *not* the arguments she made in her initial motion for class certification; they are arguments she made for the first time in a motion for reconsideration. As the district court observed, reconsideration is an "extraordinary remedy, to be used sparingly," and it denied reconsideration because Plaintiff (1) presented no evidence she could not have presented initially, and (2) made new arguments that "shift[ed] course dramatically." (Dkt. 125, Order Denying Motion for Reconsideration ("Recon. Order") p. 3.) These rulings are not "questionable," they present no "unsettled or fundamental issue of law," and they are not "manifestly erroneous." In fact, Plaintiff makes no argument to the contrary.

Plaintiff's Petition is equally meritless if it can somehow be interpreted to challenge the district court's initial decision on her motion for class certification. Plaintiff's claims are predicated on a vague allegation that Ford knew that the

electronic throttle control ("ETC") in 2005-2007 Ford Freestyles "was causing uncontrolled surging in the Freestyles." (Dkt. 1-2, Complaint ¶¶ 18-22.) The evidence in this case is undisputed that there are numerous types of "surging" with numerous potential causes. But in her motion, Plaintiff failed to identify any particular type of "surging," let alone a common cause for that "surging." Instead, she relied indiscriminately upon documents and reports concerning alleged "surging" of all types, with no attempt to identify a common cause for all of these disparate issues. Thus, "[t]he breadth of possible defects involved required the court to rule that common issues did not predominate over the case." (Dkt. 125, Recon. Order p. 3.)

STATEMENT OF THE FACTS

A. Plaintiff's Complaint.

On April 15, 2011, Plaintiff filed a purported class action complaint alleging that her 2006 Ford Freestyle repeatedly "surged forward" while "her foot was on the brake and she was bringing the vehicle to a stop." (Dkt. 1-2, Complaint ¶ 1.) She alleged the surging was caused by a defective "electronic throttle control (ETC)." (*Id*. ¶ 18.) She asserted claims under the California Consumers Legal Remedies Act ("CLRA"), Cal. Civ. Code §§ 1750 et. seq., and California's Unfair Competition Law, Cal. Bus. & Prof. Code § 17200, et. seq.

B. Plaintiff, Her 2006 Freestyle, And Her Toyota Camry.

In October 2006, Plaintiff purchased a used 2006 Ford Freestyle from a Ford dealership in San Diego, California. Plaintiff visited no other dealerships, she did

no research, she recalled no television or magazine advertisements, and she read no materials provided by Ford. (Dkt. 75-1, Nassihi Dec., Ex. C [Edwards Dep. Transcript ("Dep.")] pp. 23, 35.) In April 2008, a year and a half later, Plaintiff began to experience what she characterized as a "surge" while the vehicle was idling with her foot on the brake. But pressing harder on the brake would always stop the car. (Dep. pp. 61-62.) Plaintiff drove the vehicle for another two months and 6,600 miles, even though she was experiencing this low-speed "surging" at idle on a daily basis. (Dep. pp. 60-61, 98-99.) The problem continued to get progressively worse. (Dep. p. 68.) As soon as she concluded that her vehicle may no longer be safe, she immediately took it to the Ford dealer. As Plaintiff testified, as soon as she felt there was a safety issue, "I did not delay." (Dep. p. 99.)

Ultimately, the Ford dealer replaced the throttle body, which fixed the problem. Plaintiff was charged only a $100 deductible under her extended warranty. (Dep. p. 59; Dkt. 75-1, Nassihi Dec., Ex. B [Pl's Dep. Ex. 5] pp. PLTF003434-35.) In July 2010, two years later, the vehicle had been driven 103,778 miles. At that time, Plaintiff took her vehicle back to the Ford dealer, complaining that it was once again "surging." (Dep. pp. 68-69; Pl's Dep. Ex. 5 pp. PLTF003439-40.) The dealer again replaced the throttle body. This time, Plaintiff was charged $941 for the repairs. (*Id.*) Plaintiff never again experienced a problem with surging. (Dep. p. 70.)

By about January 2012, the vehicle had been driven around 135,000 miles.

(Dep. pp. 14-15.) At that time, the engine "blew," and Plaintiff elected not to have it repaired. (*Id*. pp. 13-15.) Instead, she purchased a used 2006 Toyota Camry from a Ford dealer. (*Id*. pp. 14, 70-71.) She purchased the Camry just before she filed a brief in the district court asserting that 2000-2011 Toyota Camrys "made national headlines by accelerating out of control." (Dkt. 58-1, Plaintiff's Memo In Support of Motion for Class Certification ("Cert. Memo."), pp. 1-2.) Plaintiff was aware of the Camry's alleged "surging" problems, but made no serious attempt to investigate the validity of the highly-publicized allegations. (Dep. pp. 70-71, 101-102.)

C. The 2005-2007 Freestyle.

1. October 2004 – March 2005: New Engine Calibration.

The Ford Freestyle was introduced in late 2004 for the 2005 model year. Shortly after introduction some fleets began reporting incidents of stalling on deceleration. (Dkt. 75-6, Shanahan Dec. ¶ 6 and Exs. A-B.) To address this issue, Ford modified the engine calibration to "[p]revent combustion instability at low injector pulse widths," which could lead to a "speed dip or stall." (Dkt. 75-6, Shanahan Dec. ¶¶ 6-7 and Ex. B.) The new calibration was introduced in production vehicles on October 14, 2004. (*Id*.) To assist dealers in servicing vehicles built before this change, Ford issued a Technical Service Bulletin ("TSB") in March 2005. (Dkt. 75-6, Shanahan Dec. ¶ 8 and Ex. C.) With respect to vehicles built on or before October 13, 2004 (i.e., before the calibration change

was introduced in production), the TSB instructed dealers to "[r]eprogram the powertrain control module (PCM) to the latest calibration" to address "drivability concerns during deceleration." (Dkt. 75-6, Shanahan Dec. Ex. C.)

In her motion for class certification, Plaintiff asserted that this TSB contained "ETC repair instructions," and she suggested that the "repair instructions" were intended to address a "surging" issue common to all 2005-2007 Freestyles. (Dkt. 58-1, Cert. Memo. p. 3.) Assuming Plaintiff was correct (she was not; no "surging" of any kind was at issue), the potential for "surging" was reduced (or Ford at least believed it had been reduced) with respect to vehicles with the new calibration.

2. June 2005: New Throttle Position Sensors.

In about June 2005, Ford redesigned the throttle position sensor and incorporated the new design into production vehicles. (Dkt. 75-5, Hall Dec. ¶ 6; Dkt. 58-1, Cert. Memo. Ex. F.) The new design was compatible with the old design, and would have been available as a service part for vehicles produced prior to June 2005. Plaintiff in her motion suggested that this change to what she calls the "troublesome throttle position sensors" was intended to address "surging" concerns known to Ford at the time. (Cert. Memo. p. 3.) If the throttle position sensor fails, it is theoretically possible for the engine speed to increase and cause some additional forward motion or "surge" at the instant of failure, but if this occurs at all it will be only "very momentary, very transient." (Dkt. 75-1, Nassihi

Dec. Ex. D [Paul Taylor Dep.] pp. 73-74.) Assuming Plaintiff was correct concerning the reason for this change (she was not), the potential for this type of one-time, transient surging was eliminated or reduced (or Ford at least believed it had been eliminated or reduced) with respect to vehicles with throttle position sensors produced after June 2005.

3. August 2005: New Transmission Calibration.

In the summer of 2005, Ford also recognized an issue with the CVT transmission in the Freestyle. When travelling at highway speeds, engine speed fluctuations of between 50-100 RPMs could "result[] in a surging feel." (Dkt. 58-1, Cert. Memo. Exs. B and H; Dkt. 75-6, Shanahan Dec. ¶¶ 6, 10 and Ex. D.) To address this, Ford developed a new calibration for the transmission and implemented it in production on August 2, 2005. (Shanahan Dec. Ex. E.) To assist service technicians in servicing vehicles made before August 2, 2005, Ford published a TSB which instructed dealers to address RPM fluctuations at highway speed by updating the powertrain control module and the transmission control module to the latest calibration. (Shanahan Dec. ¶ 11 and Ex. E.)

Plaintiff in her motion characterized this TSB as containing "ETC repair instructions" designed to address a "surging" issue. (Dkt. 58-1, Cert. Memo. p. 3.) If Plaintiff was correct (she was not; the issue related to the transmission, not the ETC), the potential for this type of "surging" at highway speed was eliminated or reduced (or Ford at least believed it had been eliminated or reduced) with respect

to vehicles with the new calibration.

4. November 2005: Throttle Body Redesign.

Beginning in about November 2005, the throttle body design was changed to remove "coolant heat." (Dkt. 75-5, Hall Dec. ¶ 7.) Plaintiff in her motion suggested that this change too was intended to address "surging" of some unidentified kind. (Dkt. 58-1, Cert. Memo. p. 3.) Assuming Plaintiff was correct (she was not; no "surging" of any kind was at issue), the potential for this type of "surging" was eliminated or reduced (or Ford believed it had been eliminated or reduced) with respect to vehicles with the new throttle body design.

5. February 2006: Plaintiff's Vehicle Is Built.

Plaintiff's vehicle was built on February 6, 2006. (Dkt. 75-3, Engle Dec. Ex. A [Ford Records].) Based on its build date, it had the new engine calibration introduced in production in October 2004; the new transmission calibration introduced in August 2005; the new throttle position sensor introduced in June 2005; and the new throttle body introduced in November 2005.

6. May 2006: Another New Throttle Position Sensor.

In about May 2006, at the beginning of the 2007 model year, the throttle position sensor supplied by one company (CTS) was replaced in production with a new sensor with an improved design supplied by another company (ALPS). (Dkt. 75-5, Hall Dec. ¶ 8.) Plaintiff in her motion once again suggests that this change, like the prior ones, was intended to address an unidentified "surging" issue. (Dkt. 58-1, Cert. Memo. p. 3.) Assuming she was correct (she was not; no "surging"

issue of any kind was involved), the potential for that unidentified type of "surging" was once again reduced for vehicles with the new sensors (or Ford at least believed this to be the case).

7. September 2010-August 2011: "Surging" At Idle.

In mid-2010, long after Plaintiff purchased her vehicle in 2006, Ford noticed an increase of customer reports of idle speed dips and flares in some 2005-2007 Freestyle vehicles. (Dkt. 75-1, Nassihi Dec. Ex. F [7/28/11 Shanahan Dec.] ¶ 5; Dkt. 58-1, Cert. Memo. Ex. C [Ford's NHTSA Response ("NHTSA Response")] p. 17.) Rates were low, and varied depending on model year, date of production, and drivetrain (AWD vs. FWD). (Dkt. 75-3, Engle Dec. ¶¶ 14-18 and Exs. C-F.) Nevertheless, Ford began an investigation and by August 2011 had identified both the source of the concern and the solution. (7/28/11 Shanahan Dec. ¶ 5; NHTSA Response p. 17.) The concern related to the progressive build-up of sludge on the throttle body that could cause the vehicle's idle speed control system to over-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. (NHTSA Response p. 1.) Any idle speed flare that occurred would last for approximately one second, and could occur only during low speed maneuvers or while the vehicle was idling at a stop.

To address this specific type of "surging"—a "surging" that occurred only at idle speeds of less than 3.5 mph—Ford developed and released a new calibration

for the PCM specifically designed to address idle rpm fluctuation. A TSB was issued notifying mechanics of this solution. (Dkt. 75-6, Shanahan Dec. ¶¶ 6, 12 and Exs. F and G; Dkt. 58-1, Cert. Memo. Ex. O.)

D. The District Court's Decision Denying Class Certification.

The district court denied class certification because it "agree[d] with Ford that individual questions predominate regarding the existence and definition of the alleged defect." (Dkt. 106, Class Cert. Order p. 6.) In support, the district court cited other decisions denying class certification on the basis of the plaintiff's inability to identify a common source of an alleged defect. (*Id.* at 10, citing *Arabian v. Sony Electronics, Inc*., No. 05-CV-1741 WQH (NLS), 2007 WL 627977 (S.D. Cal. Feb. 22, 2007) and *Cholakyan v. Mercedes-Benz, USA, LLC*, 281 F.R.D. 534 (C.D. Cal. 2012)).

With respect to Plaintiffs claim under the CLRA, the district court also denied certification because "causation and Ford's duty under the CLRA cannot be determined by common proof in this case." (Dkt. 106, Class Cert. Order p. 16.) The district court noted that Ford had presented "persuasive" expert testimony that "it is unlikely that all consumers considering purchase or lease of the vehicle would have noticed and read the information." (*Id.* p. 13.) Further, those consumers who would have noticed and read a disclosure "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 purchasing decisions." (*Id.* p. 14.) Plaintiff never challenged the admissibility of this expert testimony, and presented no evidence to the contrary.

The district court noted that the testimony of Plaintiff herself supported this expert testimony. "[Plaintiff] did not research the Freestyle before buying it, recall any commercials or other Freestyle advertisements, read the owner's manual, or request a Carfax report to determine the vehicle's history or safety risks." (*Id.* p. 13.) Thus, "Plaintiff may not have been aware of Ford's disclosure had it been made or considered it in her purchase decision." (*Id.* p. 14.) Further, the district court found, Plaintiff's testimony suggested she would not have altered her behavior even if she had seen a truthful disclosure:

> 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. 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.

(*Id.* p. 15.)

E. Plaintiff's Motion for Reconsideration.

Plaintiff filed a motion for reconsideration in which she "shift[ed] course dramatically." (Dkt. 125, Recon. Order p. 3.) Instead of relying on the potpourri of alleged "surging" issues addressed and resolved by Ford between 2004 and 2011, Plaintiff "focus[ed] entirely on one specific type of surging, dubbed 'idle surging'"—*i.e.*, the idle dip and flare issue first identified by Ford in September 2010, long after the last 2007 Freestyle was produced. Moreover, the district court

recognized that the "new" evidence relied on by Plaintiff to justify this dramatic shift was not new at all; on the contrary, the "idle surging" issue and its cause—along with the other "surging" issues relied on by Plaintiff and the causes of those issues—had been addressed in Ford's brief in opposition to class certification. (*Id.* p. 4.) Therefore, the district court held, "Plaintiff's 'new' facts do not constitute persuasive grounds for reconsideration." (*Id.*)

ARGUMENT

I. THE DISTRICT COURT'S ORDER DENYING CLASS CERTIFICATION IS NOT A "DEATH KNELL" AND IS NOT "QUESTIONABLE."

Plaintiff first argues that review of the district court's decision is warranted "[b]ecause the decision is questionable, and because Plaintiff cannot afford to proceed with her suit on an individual basis." (Petition ("Pet.") p. 10.) The district court's orders are not "questionable," as discussed below, but even if they were there is no evidence that Plaintiff "cannot afford" to proceed on an individual basis.

Plaintiff suggests that she "submitted a declaration" to support this claim, but the declaration was from Plaintiff's counsel, *not* from Plaintiff herself. Moreover, that declaration only vaguely asserted that "[g]iven the great time and expense that is required to litigate an automobile defect case like this one, Plaintiffs' [sic] individual stake is not enough, alone, to make prosecution of the case economically viable." (Dkt. 114-1, Munroe Dec. ¶ 3; Pet. p. 8.) But most of the work necessary to prepare this case for trial has already been done. Fact

discovery is closed and expert reports—including Plaintiff's principal expert report—have already been exchanged. All that is necessary to accomplish before trial is the exchange of supplemental or rebuttal expert reports (if any) and expert depositions. To the extent that Plaintiff incurs additional attorney fees in the future, they likely will be recoverable under the CLRA if she prevails. Under these circumstances, Plaintiff's counsel's conclusory declaration that individual prosecution is not "economically viable" is not sufficient to support Plaintiff's "death knell" argument. *See Chamberlan,* 402 F.3d at 961 (rejecting Ford's "death knell" argument because it was "conclusory and . . . not backed up by declarations, documents, or other evidence.").

Plaintiff's counsel's declaration also asserts that if class certification is denied, "Plaintiff intends to seek voluntary dismissal of this action." (Dkt. 114-1, Munroe Dec. ¶ 3.) But it would make no sense for Plaintiff herself to simply abandon this litigation without even discussing a potential individual settlement with Ford. Thus, it cannot be Plaintiff herself who wants to simply give up if a class is not certified; rather, it must be her lawyers, who for reasons of their own are not interested in pursuing their client's individual claims.

II. THE DISTRICT COURT COMMITTED NO MANIFEST ERROR.

Plaintiff asserts that the district court "committed manifest error by holding that it would be necessary for each class member to prove individually that his or her surging is a manifestation of the alleged defect." (Pet. p. 9.) But the district

court denied class certification not for the reason stated by Plaintiff, but 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."[1] (Dkt. 106, Class Cert. Order p. 4.)

Individual inquiry would in fact be necessary to determine whether any out-of-pocket expenses incurred by class members were attributable to whatever defect Plaintiff is claiming in this case. Plaintiff herself, for example, cannot recover the $1,041 she paid to repair her "surging" problems without showing that those problems were in fact caused by a defect. But as the district court recognized, the problem with Plaintiff's class certification motion was even more fundamental. Plaintiff presented no expert testimony in support of her motion and identified no specific defect. Instead, she relied on Ford documents addressing various issues that had nothing in common except that Plaintiff characterized them all (often erroneously) as "surging." (*See, e.g.*, Dkt. 58-1, Cert. Memo. pp. 3-4.) In addition, Plaintiff relied on numerous consumer complaints describing numerous phenomena that might be characterized as "surging." For example, she relied on reports of "harsh engagement in drive and reverse." (Cert. Memo. p. 4.) She

[1] Plaintiff argues that "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)." (Petition p. 13.) Ford agrees with Plaintiff on this academic point. But this Court in *Mazza v. American Honda Motor Co.*, 666 F.3d 581, 589 (9th Cir. 2012) held that the "individualized issues raised go to preponderance under Rule 23(b)(3), not to whether there are common issues under Rule 23(a)(2)." (Class Cert. Order pp. 5-6, quoting *Mazza*.) The district court can hardly be accused of manifest error in following this Court's decision. Besides, it makes no difference whether the analysis is conducted under Rule 23(b)(3) or Rule 23(a)(2); the individualized issues in this case preclude class certification under either rule.

relied on reports of a "surge" that was "so strong that even with my foot firmly pressed on the brake, the car still moves." (Cert. Memo. p. 5.) She relied on reports both of engines "missing" and of engines "racing." (Cert. Memo. pp. 3-4.) She relied on numerous similarly dissimilar reports, each varying in significant detail.

At the most fundamental level, therefore, the supposedly common "defect" or "defects" on which Plaintiff was purporting to rely could not even be identified without examining each of the Ford documents and each of the consumer complaints to determine what type of surging was involved and whether each of them could be explained by a common cause. As the district court summarized in denying reconsideration, "the breadth of possible defects involved required the Court to rule that common questions did not predominate." (Dkt. 125, Recon. Order p. 3.)

Thus, individual inquiry would be necessary, not necessarily or solely to determine whether each class member experienced a "surging" defect of some sort, but to determine, for example, (1) whether the vehicle purchased by each class member had the original throttle position sensor, the new throttle position sensor introduced (in production and service) in June 2005, or the even newer throttle position sensor introduced (in production and service) in May 2006; (2) whether it had the original throttle body or the new throttle body introduced (in production and service) in November 2005; (3) whether it had the original engine calibration,

the new engine calibration introduced (in production and service) in October 2004, or the even newer engine calibration introduced (in service) in 2011; (4) whether it had the original transmission calibration or the new transmission calibration introduced in August 2005; (5) whether the particular combination of design features in each class member's vehicle created a potential for some sort of "surging," (6) whether that potential "surging" in that vehicle created an unreasonable safety risk, and (7) whether Ford knew at the time each class member purchased his or her vehicle that the combination of design features in that particular vehicle created a potential for some type of "surging," and that the potential surging created an unreasonable safety risk.

Plaintiff's vehicle, for example, was built in February 2006. It did not have the newer engine calibration introduced in 2011. But unlike other vehicles purchased by other class members, it *did* have the new engine calibration introduced in production in October 2004; the new transmission calibration introduced in August 2005; the new throttle position sensor introduced in June 2005; and the new throttle body introduced in November 2005. Moreover, further investigation would be necessary to determine whether the throttle position sensor introduced in May 2006 was installed as a service part in Plaintiff's vehicle before she purchased it in October 2006.

In short, the very design of the vehicle purchased by Plaintiff herself cannot be determined without individual inquiry. The same is true with respect to every

member of the purported class. It was Plaintiff, not Ford, who relied on all of these design and calibration changes as significant events, relevant to her claim—whatever the nature of that claim. Indeed, even though Plaintiff now focuses on one specific type of surging with one specific cause—the surging at idle issue recognized by Ford in 2010 and attributable to the idle control system—her Petition in this Court *continues* to rely on the design changes she claims were made in earlier years. For example, Dkt. 80-1, Ex. B (Pet. p. 5) does not mention surging, but does describe changes to ETC strategy and throttle position sensor design; Dkt. 80-1 Ex. C does not concern the sludge-induced "stack-up condition" referenced in Plaintiff's Petition, but instead references an idle flare caused by an induced communication failure, which flare was resolved through a pre-production calibration change. Thus, Plaintiff's belated attempt to focus on one specific defect with one specific cause does not solve her problem; under *Plaintiff's* theory, the potential for "surging" of any relevant type (and Ford's knowledge of this potential) varies depending on when any particular vehicle was sold, both new and used; when and how it was serviced; and what combination of the design and calibration features that Plaintiff finds significant are in each individual vehicle.

For these reasons, this case bears almost no similarity to the facts in *Wolin v. Jaguar Land Rover N. Am.*, 617 F.3d 1168 (9th Cir. 2010). As the district court correctly noted, the plaintiffs in *Wolin* relied on a "single, identifiable" defect in vehicle alignment geometry resulting in the same symptoms, *i.e.*, premature tire

wear. Nothing in the *Wolin* opinion suggests that there were any relevant differences in design among class vehicles. Here, in contrast, Plaintiff's motion relied on a potpourri of potential defects resulting in a variety of symptoms, and she presented no evidence that all of these phenomena had a common cause. Moreover, Plaintiff herself relied on numerous potentially significant changes in design and calibration, changes that *she* claimed were intended to eliminate or reduce the potential for surging.

As this Court observed in *Chamberlan*, "[c]lass certification decisions rarely will involve legal errors . . . simply because class actions typically involve complex facts that are unlikely to be on all fours with existing precedent." 402 F.3d at 962. A better case to illustrate this point would be difficult to find.

III. THE DISTRICT COURT'S ORDERS INVOLVE NO SIGNIFICANT "UNSETTLED AND FUNDAMENTAL ISSUE OF LAW."

Plaintiff also argues that review is warranted because her Petition raises an "unsettled and fundamental issue of law." (Pet. p. 9.) She seems to be referring to her argument that the district court "decline[d] to apply the 'reasonable consumer' standard" for determining the materiality of non-disclosed information, a ruling which she says "reflects a deepening split" in the district courts. (*Id.* p. 18.)

In fact, however, the district court did not "decline to apply" the "reasonable consumer" standard for materiality. Rather, the district court held only that, given the evidence in this case, "the reasonable consumer standard cannot be applied *on a classwide basis.*" (Dkt. 106, Class Cert. Order p. 13, emphasis added.)

Plaintiff's real but poorly-articulated argument seems to be that materiality must *always* be a common issue because it is an objective standard based on what a reasonable consumer would find important. But this argument is based on the unstated assumption that reasonable consumers will *always* agree about what information is—or is not—important. The expert testimony presented by Ford shows that this assumption is false; under some circumstances, reasonable consumers can and do disagree about what information, including safety information, is important.

But there is no need in this case to rely solely on this expert testimony. Plaintiff herself bought a 2006 Toyota Camry *knowing* that this was one of the vehicles that "made national headlines by accelerating out of control." (Dkt. 58-1, Cert. Memo. pp. 1-2.) And yet, she made no serious attempt to investigate the truth of these allegations, demonstrating that this widely publicized potential for "surging" out of control was of no real importance to her. Plaintiff's lawyers presumably are not claiming that their client acted unreasonably in purchasing the Camry in the face of these allegations; if they were, class certification should be denied because Plaintiff cannot meet the typicality or adequacy requirements of Rule 23(a). *See Red v. Kraft Foods, Inc*., No. CV 10-1028-GW(AGRx), 2011 WL 4599833 (C.D. Cal. Sept. 29, 2011) (where named plaintiffs purchased allegedly unhealthy products knowing that representations on the packages were false, either they "would not be typical of the class" or "Plaintiffs have almost certainly

destroyed the ability of the class to ever establish reliance and/or materiality"). Nor is Ford denying that *other* reasonable consumers might take such allegations more seriously than Plaintiff. The point is simply that the importance of the information will vary from one reasonable consumer to the next, and that there is no one, uniform answer to the question "Would a reasonable consumer consider the information at issue in this case to be important?"

Nor is this an undecided or unsettled issue. The nature of materiality as a basis for creating a duty of disclosure is a matter of California state law, and the California Court of Appeal has repeatedly recognized that materiality is *not* necessarily a common issue but can in some cases "vary from consumer to consumer." *Tucker v. P. Bell Mobile Services*, 208 Cal. App. 4th 201, 221 (2012) ("If the issue of materiality or reliance, however, 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."); *In re Vioxx Class Cases*, 180 Cal. App. 4th 116, 129 (2009) (same).

In any event, even an unsettled question of law will justify review under Rule 23(f) only if it is "important *both* to the specific litigation and generally." *Chamberlan*, 402 F.3d at 959. Here, Plaintiff concedes that "this issue affects only one of the claims that the district court declined to certify," *i.e.*, the CLRA claim. (Pet. p. 20.) There is no dispute that proof of liability under the CLRA requires proof of reliance. *See, e.g., Tucker*, 208 Cal. App. 4th at 221; *Cohen v. DIRECTV,*

Inc., 178 Cal. App. 4th 966, 980 (2009); *In re Sony Gaming Networks and Customer Data Sec. Breach Litig.*, Nos. 11CV2119-20, 2012 WL 4849054 (S.D. Cal. Oct. 11, 2012). To prove reliance on an omission, a plaintiff must prove that he or she would have been aware of a disclosure, had one been made, and would have acted differently based on that disclosure. *Mirkin v. Wasserman*, 5 Cal. 4th 1082, 1093 (1993). Thus, the district court's rationale for concluding that materiality is not a common issue applies with even more force to the issue of reliance. Even if the district court's analysis of materiality was erroneous, the exact same analysis with respect to reliance would necessarily lead the district court to the same result.[2]

CONCLUSION

Plaintiff's Petition should be denied.

Dated: November 13, 2012

Respectfully submitted,
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[2] Under some circumstances, proof that the undisclosed information is material will create a presumption that the plaintiff relied on the omission. *See, e.g.*, *Tucker*, 180 Cal. App. 4th at 221. Assuming that materiality can be established on a classwide basis here, and further assuming that a presumption of reliance can properly arise in this case with respect to each class member, the testimony of Plaintiff herself demonstrates that the presumption is capable of being rebutted based on individual facts. *See, e.g., In re St. Jude Med., Inc.*, 522 F.3d 836, 840 (8th Cir. 2008) ("]Even if the law] does not require the plaintiffs to present direct proof of individual reliance, [the law] surely does not prohibit St. Jude from presenting direct evidence that an individual plaintiff . . . did not rely on representations from St. Jude."). Thus, reliance on such a presumption would not assist Plaintiff in this case.

Certificate of Service

I hereby certify that on November 13, 2012, I electronically filed the documents described as follows:

DEFENDANT-RESPONDENT FORD MOTOR COMPANY'S ANSWER IN OPPOSITION TO PETITION FOR PERMISSION TO APPEAL FROM DISTRICT COURT'S RULING DENYING PLAINTIFFS-RESPONDENTS' MOTION FOR CLASS CERTIFICATION

with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system as follows:

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