No. 13-55331

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GENE EDWARDS,

Plaintiff/Appellant,

v.

FORD MOTOR COMPANY,

Defendant/Appellee.

On Appeal from the United States District Court
for the Southern District of California
No. 3:11-cv-01058-MMA-BLM

MOTION FOR LEAVE TO FILE BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF APPELLEE

Kathryn Comerford Todd
Tyler R. Green
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, DC 20062
Telephone: (202) 463-5337

Ashley C. Parrish
Counsel of Record
Karen F. Grohman
KING & SPALDING LLP
1700 Pennsylvania Avenue, N.W.
Washington, DC 20006
Telephone: (202) 737-0500
Facsimile: (202) 626-3737
Email: aparrish@kslaw.com

Counsel for the Amicus Curiae
Chamber of Commerce of the United States of America

March 7, 2013

CORPORATE DISCLOSURE STATEMENT

The Chamber of Commerce of the United States of America is a nonprofit corporation organized under the laws of the District of Columbia. It has no parent corporation. No publicly held corporation owns ten percent or more of its stock.

MOTION FOR LEAVE TO FILE BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF APPELLEE

Pursuant to Fed. Cir. R. 29, the Chamber of Commerce of the United States of America respectfully moves for leave to file the accompanying *amicus curiae* brief. Appellee Ford Motor Co. consents to the filing of the brief and does not oppose this motion. Counsel for *amicus* endeavored to obtain Appellant's consent, but she has not informed *amicus* whether she will oppose or file a response.

INTEREST OF *AMICUS CURIAE*

The Chamber represents a diverse array of businesses and business interests across the United States, including manufacturers, retail merchants, and professional organizations. The Chamber is filing this brief because it has a strong interest in ensuring that courts undertake the proper analysis required under Federal Rule of Civil Procedure 23 before permitting a case to proceed as a class action.

The Chamber is the world's largest business federation, representing three hundred thousand direct members and indirectly representing an underlying membership of more than three million U.S. businesses and professional organizations. Among its members are

companies and organizations of every size, in every industry sector, and from every region of the country. The Chamber represents its members' interests by, among other activities, participating as *amicus curiae* in cases raising issues of concern to the nation's business community, including cases (like this one) that address the proper application of Rule 23's class-action requirements. *See* http://www.chamberlitigation.com/cases/issue/class-actions.

The Chamber supports appellee in this appeal and urges the Court to affirm the decision below. Under controlling Supreme Court precedent, appellant has not carried her burden to demonstrate that this case is suitable for class action treatment. That is particularly true because there are administrative procedures better suited for addressing the individualized issues raised by appellant's claims, including warranties and voluntary recalls that operate to remedy individual customer complaints. Because many of the Chamber's members sell products in interstate commerce or manufacture products that are sold in interstate commerce, the Chamber is concerned that accepting appellant's invitation to depart from precedent and certify a

class action in this case would dramatically increase its members' exposure to expansive class-action liability.

The Chamber's brief does not duplicate Ford's brief and provides its own perspective on the important issues before the Court. In particular, the Chamber's brief describes the class action requirements that apply in circumstances where the class is not cohesive and common issues do not predominate. As the Chamber's brief explains, common questions do not predominate over individual ones in this case because the proposed class covers consumers who purchased different model cars with different designs; experienced different alleged surging problems for different reasons; repaired their vehicle's electronic throttle control system for different reasons; drove and maintained their vehicles differently; and would have responded differently to the types of disclosures that appellant contends are required. Moreover, the concerns appellant raises have already been addressed through an administrative recall program, overseen by the National Highway Transportation Safety Administration.

Virtually all products engender a small percentage of customer complaints, and it is not difficult to plead that an isolated problem is

representative of a broader product-wide defect. Appellant's theory in this case would improperly force manufacturers to act as guarantors of complaint-free products. The consequences of this case are far-reaching, and the Chamber is well positioned to help the Court understand the importance of these issues to the nation's business community.

For the foregoing reasons, the Chamber requests that the Court grant this motion for leave to file the accompanying brief in support of appellee and affirmance of the district court's decision below.

Respectfully submitted.

/s/ Ashley C. Parrish

Kathryn Comerford Todd
Tyler R. Green
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, DC 20062
Telephone: (202) 463-5337

Ashley C. Parrish
Counsel of Record
Karen F. Grohman
KING & SPALDING LLP
1700 Pennsylvania Avenue, N.W.
Washington, DC 20006
Telephone: (202) 737-0500
Facsimile: (202) 626-3737
Email: aparrish@kslaw.com

Counsel for Amicus Curiae *the Chamber of Commerce of the United States of America*

March 7, 2014

CERTIFICATE OF SERVICE

Pursuant to Federal Rule of Appellate Procedure 25, I certify that on March 7, 2014, I filed this brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Ashley C. Parrish

No. 13-55331

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GENE EDWARDS,

Plaintiff/Appellant,

v.

FORD MOTOR COMPANY,

Defendant/Appellee.

On Appeal from the United States District Court
for the Southern District of California
No. 3:11-cv-01058-MMA-BLM

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF APPELLEE

Kathryn Comerford Todd
Tyler R. Green
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, DC 20062
Telephone: (202) 463-5337

Ashley C. Parrish
Counsel of Record
Karen F. Grohman
KING & SPALDING LLP
1700 Pennsylvania Avenue, N.W.
Washington, DC 20006
Telephone: (202) 737-0500
Facsimile: (202) 626-3737
Email: aparrish@kslaw.com

Counsel for the Amicus Curiae
Chamber of Commerce of the United States of America

March 7, 2013

CORPORATE DISCLOSURE STATEMENT

The Chamber of Commerce of the United States of America is a nonprofit corporation organized under the laws of the District of Columbia. It has no parent corporation. No publicly held corporation owns ten percent or more of its stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

INTEREST OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America represents a diverse array of businesses and business interests across the United States, including manufacturers, retail merchants, and professional organizations. The Chamber is filing this brief because it has a strong interest in ensuring that courts undertake the proper analysis required under Federal Rule of Civil Procedure 23 before permitting a case to proceed as a class action.

The Chamber is the world's largest business federation, representing three hundred thousand direct members and indirectly representing an underlying membership of more than three million U.S. businesses and professional organizations. Among its members are companies and organizations of every size, in every industry sector, and from every region of the country. The Chamber represents its members' interests by, among other activities, participating as *amicus curiae* in cases raising issues of concern to the nation's business community. Cases raising questions concerning the proper application of Rule 23's class-action requirements are of particular concern to the Chamber and

its members. *See* http://www.chamberlitigation.com/cases/issue/class-actions.

The Chamber supports appellee in this appeal and urges the Court to affirm the decision below. Under controlling Supreme Court precedent, appellant has not carried her burden to demonstrate that this case is suitable for class action treatment. That is particularly true because there are administrative procedures better suited for addressing the individualized issues raised by appellant's claims, including warranties and voluntary recalls that operate to remedy individual customer complaints. Because many of the Chamber's members sell products in interstate commerce or manufacture products that are sold in interstate commerce, the Chamber is concerned that accepting appellant's invitation to depart from precedent and certify a class action in this case would dramatically increase its members' exposure to expansive class-action liability. That is especially a concern in cases, like this one, where there is no proof of a common design or defect, and no proof that any meaningful portion of putative class members has suffered a cognizable injury.

STATEMENT OF COMPLIANCE WITH RULE 29(a)

This brief is submitted pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure. No party or party's counsel authored this brief in whole or in part; no party or party's counsel contributed money to fund the preparation or submission of this brief; and no other person except *amicus curiae*, its members, or its counsel contributed money intended to fund the preparation or submission of this brief.

Appellee Ford Motor Company has consented to the filing of the brief. Appellant Gene Edwards has not yet informed *amicus* whether she consents.

INTRODUCTION AND SUMMARY OF ARGUMENT

The class certification requirements of Federal Rule of Civil Procedure 23 are not mere conveniences for streamlining litigation, but crucial safeguards "grounded" in fundamental notions of constitutional due process. *Taylor v. Sturgell*, 553 U.S. 880, 901 (2008). Before a plaintiff may take advantage of the class action device, she must prove that class members possess claims that present a "common question" that, if adjudicated on a class basis, "will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011). In addition, the plaintiff must satisfy the "far more demanding" requirement of proving that any common questions "predominate" over individual ones. *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 624 (1997). These essential protections preserve the rights of both absent class members and defendants.

In this case, appellant seeks to certify a class of California consumers who currently own or lease a 2005 through 2007 Ford Freestyle or who previously owned or leased a 2005 through 2007 Freestyle and paid for repairs to the vehicle's electronic throttle control

system. *See* Mot. to Certify, *Edwards v. Ford Motor Co.*, No. 11-1058, Dkt. No. 58 (S.D. Cal. Feb. 23, 2012) (defining the proposed class). She contends that her 2006 Freestyle experienced sudden, unintended acceleration — what she refers to as "surging" — and alleges that this problem is the result of an unspecified defect.

As the district court recognized, and as explained in more detail below, appellant has not carried her burden to justify class certification. Most significantly, appellant has not demonstrated that common questions predominate over individual ones. The proposed class covers consumers who purchased different model cars with different designs; experienced different alleged surging problems for different reasons; repaired their vehicle's electronic throttle control system for different reasons; drove and maintained their vehicles differently; and would have responded differently to the types of disclosures that appellant contends are required. Indeed, her own evidence establishes that many customers who own or lease a 2005 through 2007 Freestyle have not experienced any type of surging problem with their vehicles. Moreover, the concerns she raises have already been addressed through an administrative recall program, overseen by the National Highway

Transportation Safety Administration ("NHTSA"), designed to address each customer's individualized issues and to ensure they receive necessary repairs free of charge.

In these circumstances, allowing this case to proceed as a class action would require ignoring controlling precedent and significantly relaxing Rule 23's protections. It would also pose grave threats to businesses and consumers by encouraging class action abuse and authorizing class actions even in circumstances where the class is not cohesive and common issues do not predominate. The Court can and should defuse those threats by affirming the district court.

ARGUMENT

I. The District Court's Decision Denying Class Certification Comports With Controlling Supreme Court Precedent.

Supreme Court precedent requires that plaintiffs "affirmatively demonstrate" their compliance with Rule 23's requirements to be entitled to litigate their claims in the posture of a class action. Appellant here has not satisfied that burden. Instead, as the district court correctly concluded, the differences between class members make the case unsuitable for class action treatment.

A. Supreme Court Precedent Requires That Common Questions Predominate.

Rule 23's essential class action prerequisites protect the rights of both absent class members and defendants, ensuring that the procedures for aggregating claims and streamlining litigation are employed fairly and only in appropriate circumstances. *Taylor*, 553 U.S. at 901 (Rule 23's "procedural protections" are "grounded in due process"); *Unger v. Amedisys Inc.*, 401 F.3d 316, 320–21 (5th Cir. 2005) (there are "important due process concerns of both plaintiffs and defendants inherent in the certification decision"); *see also Miller v. Thane Int'l, Inc.*, 615 F.3d 1095, 1103 (9th Cir. 2010) (citing *Unger* and discussing the unique due process concerns present in class certification context). As the Supreme Court has noted, aggregating individual claims for joint resolution endangers the right of absent class members to press their distinct interests and undermines the right of defendants "to present every available defense." *Philip Morris USA v. Williams*, 549 U.S. 346, 353 (2007) (quoting *Lindsey v. Normet*, 405 U.S. 56, 66 (1972)). Class actions under Rule 23 are therefore "an exception to the usual rule that litigation is conducted by and on behalf of the individual

named parties only." *Califano v. Yamasaki*, 442 U.S. 682, 700–01 (1979).

No aspect of Rule 23 has tested the due process dimensions of class actions more than section 23(b)(3), the "most adventuresome" class certification provision. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614 (1997). The drafters of that provision "were aware that they were breaking new ground and that those effects might be substantial." Stephen B. Burbank, *The Class Action Fairness Act of 2005 in Historical Context: A Preliminary View*, 156 U. Pa. L. Rev. 1439, 1487 (2008). Rule 23(b)(3) thus contains special "procedural safeguards," including the requirement that courts take a "close look" to ensure that common issues predominate over individual ones. *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013). The drafters added those essential protections to avoid having "their new experiment . . . open the floodgates to an unanticipated volume of litigation in class form." John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 Colum. L. Rev. 370, 401–02 (2000).

The predominance requirement works in tandem with Rule 23(a)'s commonality requirement to ensure that, at a minimum, "proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem*, 521 U.S. at 623. That means that "a class representative must be part of the class and possess the same interest and suffer the same injury as the class members." *East Tex. Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977) (internal quotation marks omitted). It also means that a "shared experience," without more, does not justify class certification. *Amchem*, 521 U.S. at 624.

As the Supreme Court recently stressed, plaintiffs must "affirmatively demonstrate" their compliance with Rule 23's requirements to be entitled to litigate their claims in the posture of a class action. *Comcast*, 133 S. Ct. at 1432 (quoting *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011)). Courts "must conduct a 'rigorous analysis' to determine whether" Rule 23 has been satisfied, "even when that requires inquiry into the merits of the claim." *Id.* at 1433 (quoting *Dukes*, 131 S. Ct. at 2551–52). It is not enough merely to plead "a violation of the same provision of law" and label it a common

question, for "any competently crafted class complaint literally raises common questions." *Dukes*, 131 S. Ct. at 2551 (internal quotation marks omitted).

Equally important, the common questions must *predominate* over individual ones, which is a "demanding" requirement. *Amchem*, 521 U.S. at 624. Predominance "call[s] for caution when . . . disparities among class members [are] great," *id.* at 623–25, and dissimilarities within the proposed class may defeat class certification even when some degree of commonality exists. *See* Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 131–32 (2009). Accordingly, to make the necessary showing, plaintiffs must offer "a theory of liability that is . . . capable of classwide proof." *Comcast*, 133 S. Ct. at 1434. It is not enough that a class propose "*any* method[ology] . . . so long as it can be applied classwide." *Id.* Nor can the methodology generate answers that are "arbitrary" or "speculative." *Id.* at 1433–34. Instead, class litigation must generate common answers to common questions and be capable of resolving the ultimate validity of individual claims "in one stroke." *Dukes*, 131 S. Ct. at 2551.

B. Appellant Has Not Demonstrated That Common Questions Predominate.

The district court's decision denying class certification in this case correctly applied Supreme Court precedent. Appellant has not demonstrated that common questions predominate over individualized ones. On its face, her proposed class — encompassing all California customers who currently own or lease a 2005 through 2007 Ford Freestyle or who have in the past paid to repair their vehicle's electronic throttle control system — is too broad to allow a single litigation to generate common answers to common questions. *See Amchem*, 521 U.S. at 620 (predominance inquiry protects absent class members "by blocking . . . overbroad class definitions"). The obvious differences between customers — *i.e.*, customers whose vehicles were not defective, those who experienced different problems, and those who made repairs for different reasons — mean that questions of liability are not capable of resolution through classwide proof. *Comcast*, 133 S. Ct. at 1434.

Perhaps recognizing the flaws in the broad class definition she proposed below, appellant seeks to narrow the class definition by focusing only on those class members who have allegedly experienced

what she refers to as a problem of idle "surging." But that is not proper. *See, e.g.*, *Randleman v. Fidelity Nat'l Title Ins. Co.*, 646 F.3d 347, 352 n.2 (6th Cir. 2011) ("we cannot redefine the class on appeal"). The district court should not be faulted for failing to address a theory of class liability that appellant did not press below.

In any event, appellant still has not proposed a class definition that would allow a court to resolve liability questions on a classwide basis. Although she asserts that an unspecified defect in the electronic throttle control system is common to every Freestyle manufactured from 2005 to 2007, Op. Br. 12, she has not backed up that assertion with evidence, much less shown that the reports of "surging" on which she relies are attributable to a common defect in design. *See generally* Resp. Br. 28–29. Nor can she escape that the evidence shows that Ford made numerous changes to its vehicles during the class period; that many customers' vehicles have not experience surging problems; and that other customers' vehicles experienced different surging problems of different origins and with different effects.

In fact, appellant's own evidence demonstrates that her proposed class is not sufficiently cohesive. On appellant's view, out of the

170,000 relevant vehicle sales, only 4,000 resulted in "complain[ts] to Ford and the NHTSA" about problems, which may or may not have involved surging. Op. Br. 9–10. Even if these numbers are accepted at face value, they suggest that at most only 2.4% of customers complained about a problem with their vehicle. That leaves a massive number of uninjured customers in the putative class — customers who received exactly what they paid for: a Ford Freestyle with no surging problem or other identified defect.

Moreover, among those class members who have allegedly experienced problems with their vehicles, the problems are neither uniform nor consistent. For example, some class members complain about the opposite of "surging" — a failure to accelerate when requested. Resp. Br. 7; *see also, e.g.*, Op. Br. 9 ("While driving at slow speeds the vehicle will abruptly surge in drive or reverse"). Similarly, the circumstances surrounding many of the alleged surges range from high rates of speed or idling, to brakes failing to stop the surge or a failure to accelerate past 30 miles per hour. Resp. Br. 22–23. These significant differences between class members should not be surprising because the proposed class definition encompasses a variety of different

models, with different hardware and calibration changes. As a result, the vehicles have different reported rates of surging depending on the year, whether the vehicle is front- or all-wheel drive, and even the specific month of production. Resp. Br. 29–30.

Appellant does not even attempt to explain why the wide variety of individualized issues should not defeat class certification. She argues instead that the alleged presence of an unspecified defect is a common issue for class-wide adjudication because failing to disclose a defect would violate California law. But that defines the common question at much too high a level of generality. As the Supreme Court emphasized in *Dukes*, alleging that class members "have all suffered a violation of the same provision of law" does not satisfy the commonality requirement. 131 S. Ct. at 2551. Defining the common issues at that level of abstraction renders Rule 23 meaningless, which is precisely why courts must dig deeper and consider both "the elements of the underlying cause of action" and the proof needed to establish each element. *Erica P. John Fund, Inc. v. Halliburton*, 131 S. Ct. 2179, 2184 (2011). That is also why the rigorous analysis required under Rule 23 will often "entail some overlap with the merits of the plaintiff's

underlying claim." *Dukes*, 131 S. Ct. at 2551. As the Supreme Court has observed, "[t]hat cannot be helped" because "the class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action." *Id*. at 2551–52 (internal quotation marks omitted).

II. The Court Should Reject Appellant's Invitation To Relax The Requirements For Class Certification.

Largely ignoring the Supreme Court's recent decisions in *Wal-Mart v. Dukes* and *Comcast v. Behrend*, appellant relies heavily on this Court's older decisions in *Wolin v. Jaguar Land Rover North America, LLC*, 617 F.3d 1168, 1170 (9th Cir. 2010) , and *Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 962 (9th Cir. 2005) (per curiam). But both decisions contain reasoning inapplicable here, and appellant's reading of them conflicts with *Dukes* and *Comcast*. Especially in light of the adequate remedies available to consumers that are more efficient and less unwieldy than proceeding through a class action, appellant's request that the Court relax Rule 23's requirements for class certification should be rejected.

A. Appellant's Heavy Reliance On *Wolin* And *Chambers* Is Unavailing.

Citing *Wolin* and *Chamberlan*, appellant argues that the district court failed to follow this Court's precedent in cases certifying similar product-defect classes. Op. Br. 27–28. It is true that the Court in *Wolin* and *Chamberlan* permitted class actions to go forward against auto manufacturers for alleged design defects. But both cases contain reasoning inapplicable here, and both were decided before *Dukes*, where the Supreme Court rejected the approach proposed by appellant.

In *Wolin*, the Court concluded that Rule 23's commonality and predominance requirements were satisfied because there, unlike here, the Court found that the class sought to litigate a "single" defect in vehicle alignment geometry that resulted in the same injury to all customers in the form of premature tire wear. *Wolin*, 617 F.3d at 1174–76; *see* Resp. Br. 29. Rejecting defendant's argument that "automobile defect cases can categorically never be certified as a class," the Court emphasized that plaintiffs had identified with specificity a common defect that applied to all vehicles sold during the class period. *Wolin*, 617 F.3d at 1173. Nonetheless, the Court also noted that whether the single, identifiable common defect caused tire damage raised

"individual causation and injury issues that could make classwide adjudication inappropriate," and remanded to the district court for further proceedings. *Id.* at 1174.

Chamberlan is also inapplicable. There, the Court declined an interlocutory appeal under Rule 23(f) because it concluded that the defendant had not proven that the certification decision was "manifestly erroneous." 402 F.3d at 962. That is a different standard than the one the Court must apply here, where the Rule 23(f) appeal has already been accepted.

More fundamentally, the Court should reject appellant's invitation to extend those cases beyond their precise holdings because in neither case did the Court address the analysis required under more recent Supreme Court precedent. In *Dukes*, which was decided after *Wolin*, the Supreme Court made clear that generalized questions such as "Do our managers have discretion over pay?" and "Is that an unlawful employment practice?" are not satisfactory common questions, let alone common questions that *predominate*. *Dukes*, 131 S. Ct. at 2551. Yet these questions are functionally identical to the ones appellant asserts justify class certification here — namely, "Did Ford know of the defect?"

and "Did Ford fail to disclose the defect?" Op. Br. 20–21. It is hard to fathom how these issues could be susceptible to common proof. *See* Resp. Br. 34–42. But *even if* appellant could identify a common defect and prove that Ford knew about it and violated a duty to disclose, she still is not able to prove that Ford is *liable* to the class as a whole. *See Comcast*, 133 S. Ct. at 1434 (rejecting a "methodology that identifies damages that are not the result of the wrong"); *see also Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1143 (2013) (even an "objectively reasonable likelihood" of "future injury" is "too speculative").

Wolin sidestepped this analysis because, applying then-controlling precedent, the Court viewed the "merits" inquiry as separate from Rule 23's requirements. *Wolin* thus excused the plaintiff from presenting "proof of the manifestation of a defect" because the Court concluded that proof of injury is a merits question that "does not overlap with the predominance test." 617 F.3d at 1173. In support of that conclusion, *Wolin* cited *Blackie v. Barrack*, 524 F.2d 891, 901 (9th Cir. 1975), which held that the class certification "determination does not permit or require a preliminary inquiry into the merits." *Id.* ("the possibility that

a plaintiff will be unable to prove his allegations" is not a basis for declining class certification).

As this Court has recognized, the Supreme Court has since rejected that approach. *See Ellis v. Costco Wholesale Corp.*, 657 F.3d 970 (9th Cir. 2011). As *Dukes* explained, because a putative class action plaintiff must establish her compliance with Rule 23, any resulting "overlap with the merits of the plaintiff's underlying claim . . . cannot be helped." 131 S. Ct. at 2551. Accordingly, contrary to *Wolin* and the precedent on which it relied, "a district court *must* consider the merits if they overlap with the Rule 23(a) requirements." *Ellis*, 657 F.3d at 981.

It is therefore not enough that appellant merely alleged, without detail, that 2005 through 2007 Ford Freestyles are defective. Instead, appellant had the obligation to come forward with factual evidence sufficient to establish that a common design defect exists that could affect the class as a whole. Because appellant has not satisfied that burden and cannot answer, as a factual matter, the question of Ford's liability "in one stroke," she does not have a viable class petition. *Cf. Dukes*, 131 S. Ct. at 2551.

B. Strong Policy Reasons Counsel Against Relaxing The Requirements For Class Certification.

Appellant's invitation to put this sprawling class on the fast-track to class certification could have acute consequences. Under appellant's reasoning, a customer with a grievance may essentially sue on behalf of *everyone* who has purchased a product, regardless of customers' individual experiences. Virtually all products engender a small percentage of customer complaints, and it is not difficult to plead that an isolated problem is representative of a broader product-wide defect. Appellant's theory in this case would thus force manufacturers to act as guarantors of complaint-free products.

There is no reason class action law should be contorted in this fashion. The existing warranty system ensures that individual customer complaints can be properly addressed. Indeed, virtually all manufacturers and retailers provide warranties for their products, and by doing so, they are able to deal with the inevitable problems that arise when selling products to a large, diverse base of customers and in contexts where attempting to eliminate all potential defects is impracticable.

This case confirms the point. As the record shows, appellant first experienced her alleged "surging" problem in 2008, a year and a half after she purchased her vehicle. Resp. Br. 6. After driving the vehicle for two more months and 6,600 miles, appellant took the vehicle to a Ford dealer, which replaced the throttle body for only a $100 deductible. *See* Opposition to Mot. to Certify 4, *Edwards v. Ford Motor Co.*, No. 11-1058, Dkt. No. 75 (S.D. Cal. Apr. 9, 2012). Two years and 103,778 miles later, appellant again took the vehicle to her Ford dealer and complained that it was again "surging." *Id.* This time the dealer again replaced the throttle body and appellant was charged $941 for repairs. *Id.* Appellant never again experienced problems with "surging," even though she drove the vehicle for approximately 135,000 miles before the engine blew and she decided to purchase a new car. *Id.*; Resp. Br. 6.

The warranty system thus worked to address appellant's individualized concerns. Significantly, however, the warranty system contains proper safeguards to protect consumers and manufacturers from the costs of litigation abuse. In California, "[t]o recover on a breach of warranty cause of action, the plaintiff must show the breach caused the plaintiff to suffer injury, damage, loss or harm." *Cardinal*

Health 301, Inc. v. Tyco Elecs. Corp., 87 Cal. Rptr. 3d 5, 29 (Ct. App. 2008) (internal quotation marks omitted). In addition, the plaintiff must give pre-suit notice to the seller of an alleged breach of warranty. *Alvarez v. Chevron Corp.*, 656 F.3d 925, 932 (9th Cir. 2011). This rule is "designed to allow the defendant opportunity for repairing the defective item, reducing damages, avoiding defective products in the future, and negotiating settlements." *Pollard v. Saxe & Yolles Dev. Co.*, 525 P.2d 88, 92 (Cal. 1974).

That is precisely what Ford has done in this case. In conjunction with NHTSA, Ford has instituted a voluntary recall, providing notice to all customers, offering a solution free of charge to any customer who wants it, and reimbursing customers for repairs. *See* Mot. to Dismiss Appeal at 2–4 (Dkt. No. 6-1, Apr. 1, 2013). NHTSA, as an expert regulatory agency with jurisdiction over defendant's products, is in a superior position to judge the defect and the remedies that are warranted. *See Johnson v. Harley-Davidson Motor Co. Grp., LLC*, 285 F.R.D. 573, 584 (E.D. Cal. 2012). Congress has given the agency authorization to seek remedies against manufacturers for defects relating to motor vehicle safety, including requiring manufacturers to

repair or replace vehicles or their component parts. 49 U.S.C. § 30120(a). The agency is also authorized to bring civil enforcement actions and to seek civil penalties for noncompliance. *Id.* §§ 30121, 30163, 30165.

In this context, burdensome class action procedures are neither necessary nor appropriate. In general, where "the subject matter is technical" and "the relevant history and background are complex and extensive," *Geier v. American Honda Motor Co.*, 529 U.S. 861, 883 (2000), the decision as to what penalties should apply for any alleged regulatory violation is best left in the first instance to the expert regulator, not to juries wielding the blunt tool of damages awards. More fundamentally, questions concerning what defects are acceptable in which consumer products involve careful trade-offs among competing goals — not only to protect consumers, but also to ensure that they can obtain access to the products they demand at reasonable prices.

In contrast, regulation through litigation upsets delicate policy balances and can impose significant costs on society. *See* W. Kip Viscusi, *Does Product Liability Make Us Safer?*, Regulation, Spring 2012, at 24, *available at* http://www.cato.org/sites/cato.org/files/serials/

files/regulation/2012/4/v35n1-4.pdf; George L. Priest, *The Culture of Modern Tort Law*, 34 Val. U. L. Rev. 573, 574 (2000). The approach espoused by appellant would impose a costly overlay of easy-to-satisfy class action requirements that "can be employed abusively to impose substantial costs on companies and individuals whose conduct conforms to the law." *Cf. Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007). Accepting appellant's theory would mean that every potential glitch becomes a massive class-action-in-waiting. And for small businesses, every product sold may become a bet-the-company proposition.

By easing the path to certification, appellant's theory also prejudices the outcome. Although nominally a threshold question, "[w]ith vanishingly rare exception[s], class certification sets the litigation on a path toward resolution by way of settlement, not full-fledged testing of the plaintiffs' case by trial." Nagareda, 84 N.Y.U. L. Rev. at 99; *see also* Barbara J. Rothstein & Thomas E. Willging, Fed. Judicial Ctr., *Managing Class Action Litigation: A Pocket Guide for Judges*, at 9 (3d ed. 2010), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/classgd3.pdf/$file/classgd3.pdf. In light of the costs of discovery

and trial, certification unleashes "hydraulic" pressure to settle. *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 165 (3d Cir. 2001); *see also* Frank H. Easterbrook, *Discovery as Abuse*, 69 B.U. L. Rev. 635, 639 (1989). As the Supreme Court has recognized, "[c]ertification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978); *see also* Fed. R. Civ. P. 23(f) advisory committee's notes, 1998 Amendments (defendants may "settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability").

The resulting economic distortion harms not only defendants but also consumers. Businesses have little choice but to incorporate the cost of litigation and litigation avoidance into the prices paid by their customers. *See* Joseph A. Grundfest, *Why Disimply?*, 108 Harv. L. Rev. 727, 732 (1995). Here, that would have the perverse effect of having the class pay for its own recovery, subject to a substantial tax in the form of attorneys' fees.

CONCLUSION

The district court's order denying class certification should be affirmed.

Respectfully submitted,

/s/ Ashley C. Parrish

Ashley C. Parrish
Counsel of Record
Karen F. Grohman
KING & SPALDING LLP
1700 Pennsylvania Avenue, N.W.
Washington, DC 20006
Telephone: (202) 737-0500
Facsimile: (202) 626-3737
Email: aparrish@kslaw.com

Kathryn Comerford Todd
Tyler R. Green
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, DC 20062
Telephone: (202) 463-5337

Counsel for Amicus Curiae *the Chamber of Commerce of the United States of America*

March 7, 2014

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure Rule 32(a)(7)(C), I certify that this brief complies with the length limitations set forth in Rule 32(a)(7)(B)(i) because it contains 4,674 words, as counted by Microsoft Word, excluding the items that may be excluded under Rule 32(a)(7)(B)(iii).

/s/ Ashley C. Parrish

CERTIFICATE OF SERVICE

Pursuant to Federal Rule of Appellate Procedure 25, I certify that on March 7, 2014, I filed this brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Ashley C. Parrish