UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

BRANDON KOMMER, Plaintiff, v. FORD MOTOR COMPANY, Defendant.	Case No. 1:17-cv-00296 (LEK/DJS)

FORD'S MEMORANDUM IN SUPPORT OF PLAINTIFF'S UNOPPOSED MOTION FOR (1) PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT; (2) PROVISIONAL CERTIFICATION OF THE SETTLEMENT CLASS; (3) APPOINTMENT OF CLASS COUNSEL; (4) APPROVAL OF CLASS NOTICE AND DISSEMINATION OF CLASS NOTICE; AND (5) SETTING A HEARING FOR FINAL APPROVAL

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Pursuant to Federal Rule of Civil Procedure 23(c)(2), (d), and (e), Ford Motor Company ("Ford") respectfully submits this memorandum in support of preliminary approval of the class settlement and proposed class notice in this case.

Ford has reviewed Plaintiff's Motion and memorandum in support thereof, and although it does not agree with everything said therein, it agrees with Plaintiff's bottom-line assessment that the Settlement Agreement proposed by the parties reflects a reasonable compromise resolution of Plaintiff's class claims and agrees that the Court should authorize the formal settlement approval process to begin. Rather than rehash Plaintiff's arguments in support of preliminary approval, Ford seeks to complement Plaintiff's Motion by offering its perspective on the litigation and settlement.

I. The Proposed Settlement Is a Reasonable Compromise That Provides Meaningful Benefits to Settlement Class Members.

Plaintiff's lawsuit asserts various causes of action against Ford premised on the belief that certain model year 2015-2019 Ford F-150 trucks and certain 2017-2019 Ford F-250, F-350, F-450, and F-550 trucks had defective door latch mechanisms that would cause the doors to fail to open, fail to close, or open while the vehicle was moving during freezing temperatures. Ford acknowledges that a small number of vehicles experienced problems with their door latches, but disagrees that the vehicles were defective in design or manufacture, or that Ford failed to meet any legal obligation to disclose a known defect. To the contrary, upon learning that some customers experienced problems with their truck's door latches, Ford provided free repairs under its existing warranty coverage, and launched an extended warranty program that provides a free repair to any Class Vehicles that experience a door latch problem through October 31, 2028. Incidences of door latch problems in Class Vehicles are not widespread. Ford's warranty data shows that less than 2.5 percent of Class Vehicles have obtained a warranty repair for a door

latch problem. Because Ford dealers performed these repairs for free under Ford's warranty coverage, those few Class Members who did require a repair almost never had to pay for it.

"The most important factor" in assessing whether a settlement should be approved "is the strength of the case for plaintiffs on the merits, balanced against the amount offered in settlement." *Am. Med. Ass'n v. United Healthcare Corp.*, No. 00 CIV. 2800 (LMM), 2009 WL 4403185, at *4 (S.D.N.Y. Dec. 1, 2009) (quoting *Detroit v. Grinnell Corp.*, 495 F.2d 448, 455 (2d Cir. 1974), *abrogated on other grounds by Goldberger v. Integrated Res., Inc.*, 209 F.3d 43 (2d Cir. 2000)). Relatedly, the Court considers "the risks of establishing liability" and "the risks of establishing damages." *In re GSE Bonds Antitrust Litig.*, 414 F. Supp. 3d 686, 694 (S.D.N.Y. 2019) (quoting *Grinnell*, 495 F.2d at 463). The factual record of this case, combined with the availability of legal defenses to Plaintiff's proposed classwide claims, suggests that Plaintiff faced substantial obstacles in obtaining at trial, and preserving on appeal, a substantial monetary award for the proposed class, thereby suggesting that the settlement terms reflect a fair and reasonable compromise.

A. Plaintiff's Case Faces Considerable Substantive and Procedural Hurdles.

As to the first prong of this analysis—the strength of Plaintiff's case—the Court dismissed Plaintiff's affirmative misrepresentation claims with prejudice, allowing only Plaintiff's omission-based claims to proceed. To prevail on those claims, Plaintiff must prove that, at the time of purchase, Ford had exclusive knowledge that there was a defect on all of the F-Series trucks in the proposed class that would likely cause door latch malfunctions to occur in all (or virtually all) such trucks. *See, e.g.*, *Tomassini v. FCA U.S. LLC*, No. 14-CV-1226, 2015 U.S. Dist. LEXIS 81009, at *7 (N.D.N.Y. June 23, 2015). Discovery in this case generated a body of evidence that likely precludes Plaintiff from successfully making this showing. Less

than 2.5 percent of all Class Vehicles obtained a door latch repair under Ford's warranty. This suggests that the door latch problems upon which this action is based occur rarely, under idiosyncratic conditions, and do not constitute the kind of problem that, due to frequency of occurrence or threats to passenger safety, give rise under the law of any state to an obligation by the vehicle manufacturer to broadcast to all potential vehicle buyers a warning that all F-Series trucks have a serious, safety-related, defect involving door latch design. *See, e.g., Smith v. Ford Motor Co.*, 749 F. Supp. 2d 980, 993 (N.D. Cal. 2010), *aff'd*, 462 F. App'x 660 (9th Cir. 2011) (granting summary judgment on plaintiffs' fraudulent concealment claim because Ford "owed plaintiffs no duty to disclose the risk that its ignition locks would fail" where Plaintiffs failed to establish a safety risk); *Resnick v. Hyundai Motor Am., Inc.*, No. CV1600593BROPJWX, 2017 WL 6549931, at *14 (C.D. Cal. Aug. 21, 2017).

Recognizing the challenge of prevailing in a conventional fraudulent nondisclosure case, Plaintiff argued that Ford's Technical Service Bulletins ("TSBs") regarding door latch repairs proved that Ford had knowledge of a systemic classwide door latch defect that it failed to disclose to its customers. Plaintiff faced a stiff challenge trying to characterize a document describing a uniform repair protocol for the small percentage of F-Series trucks that experience a door latch malfunction as an admission that every Ford F-Series truck has a uniform defect that requires a repair. Courts regularly reject such litigation efforts to mischaracterize manufacturer-issued repair instructions, explaining that TSBs do not constitute evidence of an automobile manufacturer's exclusive knowledge of a defect that broadly affects a given class of vehicles. *See, e.g., Davisson v. Ford Motor Co.*, No. 2:13-CV-00456, 2014 WL 4377792, at *9 (S.D. Ohio Sept. 3, 2014) (mere identification of TSB not sufficient to show knowledge for fraudulent omission); *Alban v. BMW of N. Am.*, No. 09-5398, 2011 WL 900114, at *12 (D.N.J. Mar. 15,

2011). To the contrary, setting aside questions about how often a design or manufacturing issue results in real-world malfunctions, courts have found that manufacturer TSBs "indicate . . . that Ford did not conceal or omit information about particular defects, but instead had very intentionally made that information public." *Darne v. Ford Motor Co., No. 13 CV 03594*, 2017 U.S. Dist. LEXIS 142425, at *38 (N.D. Ill. Sep. 1, 2017). Moreover, courts have expressed reluctance to rely solely on TSBs as evidence of a motor vehicle defect, as they recognize that TSBs reflect early attempts to diagnose an issue and develop a repair, as opposed to certain knowledge of an actual product defect. *See, e.g.*, *Alban*, 2011 WL 900114, at *12 ("[A]s a practical matter, the Court is hesitant to view technical service bulletins, or similar advisories, as potential admissions of fraudulent concealment of a defect. Such advisories are generally the result of consumer complaints that cause a manufacturer to investigate, diagnose, and remedy a defect in one of its products. Accepting these advisories as a basis for consumer fraud claims may discourage manufacturers from responding to their customers in the first place.")

In short, even under the fraudulent omission-based claims the Court's rulings restricted Plaintiff to pursue, Plaintiff faced serious hurdles in proving that (1) Ford was aware of a known design or manufacturing defect that would cause widespread door latch malfunctions in the Class Vehicles, and (2) that Ford concealed from dealers and its customers information known to it about the instances of door latch malfunctions in F-Series trucks that did occur.

Turning from substantive challenges with Plaintiff's claims to due process-based challenges with Plaintiff's effort to pursue his claim on behalf of a class of other F-Series truck owners, Ford believes that the presence of myriad class member-specific issues relevant to the elements of or defenses to Plaintiff's proposed classwide claims would have made this case unmanageable to try as a class action.

It is more difficult for a Court to certify a class action for purposes of trying the proposed class claims to final judgment in a contested proceeding than it is for the Court to certify a proposed class for purposes of assessing the fairness of a proposed negotiated settlement designed to provide benefits to the proposed settlement class members. *See Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 623 (1997) ("The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation. The inquiry appropriate under Rule 23(e), on the other hand, protects unnamed class members from unjust or unfair settlements affecting their rights when the representatives become fainthearted before the action is adjudicated or are able to secure satisfaction of their individual claims by a compromise."). This is because, in the context of a proposed settlement class, the superiority requirement of FRCP 23(b)(3) need not include consideration of the manageability of a proposed class trial that affords both class members and the defendant full due process rights because, in the settlement context, "the proposal is that there be no trial." *Id.* at 620.

Rather than considering whether the facts and legal issues presented by the proposed class claims can be adjudicated before a single jury based upon a uniform body of evidence equally applicable to every class member, and assessed by the jury as against elements of legal claims that apply uniformly with respect to every class member, the Court's certifiability assessment in the settlement context is somewhat less rigorous, focusing on whether the array of settlement benefits offered to the settlement class constitutes a reasonable negotiated response to the strength and weakness of their claims, and whether the Plaintiff and Class Counsel can institutionally give fair representation to the interests of the settlement class. *See, e.g., Yim v. Carey Limousine NY, Inc.*, No. 14-CV-5883 (WFK), 2016 WL 1389598, at *5 (E.D.N.Y. Apr. 7, 2016) (preliminarily approving settlement where "[t]he proposed settlement takes into account

. . . factors that would reasonably affect the recovery of class members"); *Danieli v. Int'l Bus. Machines Corp.*, No. 08 CV 3688 (SHS), 2009 WL 6583144, at *5 (S.D.N.Y. Nov. 16, 2009) (granting preliminary approval where "the proposed plan is rationally related to the relative strengths and weaknesses of the respective claims asserted").

Were this case to proceed to a jury trial, a number of individualized issues potentially would have rendered such trial unmanageable, including the evolution of Ford's knowledge throughout the class period, the lack of uniform adverse effects of the alleged defect across all class vehicles, the class members' varying individual experiences with their vehicles, and the fact that few class members incurred legally compensable damages associated with door latch issues in the relevant vehicles. Even if Plaintiff could overcome these manageability concerns, he would need to present a *Daubert*-worthy damages model to prove the dollar amount of monetary damages each Class Member is legally entitled to receive given their unique and varying experiences with the door latches on their trucks. Proving that every current and former owner of the relevant model years of F-Series trucks should receive a monetary damage award would have been difficult given that more than 97 percent of Class Vehicles did not experience any warranty repairs for their door latches—suggesting that they experienced no malfunction. Further, as to the small percentage of Class Vehicles that were brought to a Ford dealer for repair of a door latch malfunction, the fact that Ford repaired those malfunctions for free under its standard warranty, and further issued ***extended*** warranty coverage providing a free repair through October 31, 2028 (over eight years into the future), makes it difficult for Plaintiff to prove that ***anyone*** in the proposed class, much less ***everyone*** in the proposed class, incurred monetary damages that a class trial could properly award on a classwide basis.

B. The Settlement Benefits Are Reasonable.

Turning from the first prong of the analysis—the strength of Plaintiff's case—to the second prong of the analysis, the benefits offered in this proposed settlement are reasonably structured to accommodate the differing situations of Class Members. The settlement, crafted under the direction of a neutral mediator, seeks to (1) alert all class members of the availability of a free warranty repair for door latch problems through October 31, 2028, (2) allow those class members who actually incurred out-of-pocket monetary costs due to door latch problems in their vehicles to obtain reimbursements of such costs, and (3) offer monetary awards to any other class members who experienced dissatisfaction from door latch problems, but incurred no concrete monetary damages from them.

There can be no doubt that the proposed settlement benefits are the product of arms-length negotiation, with no hint of collusion. Each side was represented by experienced counsel and had the benefit of significant discovery. The parties had engaged in multiple rounds of motions practice and were prepared to proceed to class certification, summary judgment, and on to trial, should a settlement prove impossible. The ultimate settlement agreement was negotiated under the auspices of a broadly respected mediator.

Likewise, there can be no doubt about the substantive reasonableness of the array of benefits offered in the proposed settlement. These benefits are in addition to Ford's extended warranty coverage, which allows each owner of a Class Vehicle to receive a free door latch repair through October 31, 2028.[1]

[1] Although Plaintiff's original Complaint and First Amended Complaint involve a putative New York class, Plaintiff's counsel has repeatedly attempted to expand the lawsuit to other states. In Ford's experience, settlements of one-state class actions often lead to the filing of identical putative class actions on behalf of similar vehicle owners in other states. Therefore, to ensure that the settlement achieves Ford's goal of bringing final resolution to this litigation, the parties agreed upon a nationwide settlement. The proposed Settlement Class was also expanded to

First, Ford has agreed to notify Class Members of the currently available repair program as part of Class Notice. Ford has also agreed to maintain a website, at its own expense, that allows owners of Class Vehicles to enter their vehicle information to determine their eligibility for the available repairs. This benefit is designed to alert all Class Members to the availability of free repairs to which they are entitled under Ford's extended warranty.

Second, Class Members who establish that, prior to the date of entry of the Preliminary Approval Order, they (1) paid a service provider to perform one or more Door Latch Repairs to their Class Vehicle, and/or (2) paid out-of-pocket expenses for towing charges or for a rental car in connection with obtaining a Door Latch Repair to their Class Vehicle may receive reimbursement of such out-of-pocket expenses up to a maximum of $400 for all such Door Latch Repairs on their Class Vehicle. While Ford believes that the vast majority of Class Members who obtained a repair received that repair for free under Ford's warranty coverage, it recognizes some Class Members may have paid for repairs either at a non-Ford service provider, or at a Ford provider if they obtained a repair after their standard warranty had expired, but before Ford issued its extended warranty coverage. It also recognizes that some Class Members may have incurred incidental expenses for towing or rental cars. This benefit is designed to provide compensation for those Class Members who previously experienced out-of-pocket costs in connection with obtaining a door latch repair.

Third, Class Members who establish that, between the date of entry of the Preliminary Approval Order and one year after the date of entry of the Preliminary Approval Order, they (1)

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include Ford Super Duty trucks (F-250s, F-350s, F-450s, and F-550s) as well as model year 2018 and certain model year 2019 trucks. Because Ford included these vehicles along with the 2015-2017 model year F-150s in certain of its programs, including the extended warranty, including these vehicles in the settlement provides benefits to owners and lessees of vehicles that could have experienced similar door latch problems, and furthers Ford's goal of foreclosing subsequent suits based on substantially identical allegations.

paid a service-provider to perform one or more Door Latch Repairs to their Class Vehicle, and/or (2) paid out-of-pocket expenses for towing charges or for a rental car in connection with obtaining a Door Latch Repair to their Class Vehicle may receive reimbursement of such out-of-pocket expenses up to a maximum of $200 for all such Door Latch Repairs on their Class Vehicle. All Class Vehicles are covered by Ford's extended warranty coverage, which provides for a free repair designed to prevent door latch malfunction. As such, Ford anticipates that nearly every Class Member who seeks a repair in the future will not need to pay for that repair. Only if the extended warranty repair is unsuccessful, and a Class Member returns for another repair, would they potentially incur any costs. This benefit is designed to provide compensation to any Class Members who incur costs associated with such repairs.

Fourth, to the extent there are "silent sufferers" who experienced a door latch malfunction but did not seek a repair, these Class Members are eligible for compensation for Dissatisfaction with Door Latch Performance if they attest that they experienced dissatisfaction with a door latch in their Class Vehicle and submit basic information to allow the Settlement Administrator to verify their ownership. The amount of this benefit (up to $10) reflects the low likelihood that any of these vehicle owners would have viable legal claims in a litigation context.

Fifth, to the extent any funds would remain in the $5.3 million Qualified Settlement Fund after all costs are paid, including any valid claims, all notice and administration costs, attorneys' fees and expenses, and any Service Award, none of the remaining funds would revert to Ford. Rather, these funds will be distributed to all Original Owners or Lessees of a Class Vehicle that received one or more Door Latch Repairs as identified in Ford's Warranty Records and all Settlement Class Members who submitted a valid claim on a *per capita* basis. This provides the potential for additional monetary compensation to Class Members who do and do not submit

claims. This provision protects against the possibility of a low claims rate resulting in the Qualified Settlement Fund being distributed only to the small number of Class Members who submitted a valid claim. Rather than having those Class Members receive a windfall, this benefit would provide compensation to the original owners of a Class Vehicle that obtained a door latch repair under warranty.[2] In the event the *per capita* amount of the residual payment would be less than five dollars, residual funds will be distributed only to Settlement Class Members who submitted a valid claim, as it would be administratively infeasible to mail payments for less than five dollars. Such a concern would not exist for those Settlement Class Members who submitted a valid claim because any residual amount would be added to the payment they would be receiving for their claim.

Ford believes that the package of benefits offered in the proposed settlement allows Class Members with plausible claims for monetary damages to submit claims for compensation in amounts that incentivize them to submit claims. Ford believes that, absent settlement, the Class Members were unlikely to obtain any recovery through continued litigation. And in the unlikely event of recovery, years would elapse before trial and subsequent appeals allowed for a final judgment. Accordingly, applying the standard established in *City of Detroit v. Grinnell Corp.*, the certainty and immediacy of the proposed settlement benefits provide a far better outcome to the Settlement Class than would continued litigation.

II. The Proposed Class Notice Is Adequate and Should Be Approved.

The Court should approve the proposed class notice, which "fairly apprise[s] the prospective members of the class of the terms of the proposed settlement and of the options that

[2] Because Ford's records do not indicate whether a vehicle has multiple owners or who owned a vehicle at the time of any repair, the Parties assume the Original Owner or Lessee was the recipient of the warranty repair for purposes of this benefit.

are open to them in connection with the proceeding." *Interchange Fee & Merch. Disc. Antitrust Litig.*, 330 F.R.D. 11, 58 (E.D.N.Y. 2019) (quoting *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 114 (2d Cir. 2005)).

Specifically, the parties propose to send a Short Form Class Notice by U.S. Mail to the name and last known address of each potential Settlement Class Member. The last known address of potential Settlement Class Members will be obtained from Department of Motor Vehicles records. The Settlement Administrator will use its best efforts to mail the Short Form Class Notice to all potential Settlement Class Members no later than 120 days of the Court's issuance of a Preliminary Approval Order.

Substantively, the Short Form Class Notice (attached to the Settlement Agreement as Exhibit 1 and submitted with Plaintiff's Motion) defines the Class Vehicles, describes the litigation, outlines the benefits available to Class Members who file claims, and advises that the class is represented by counsel, who will seek an award of attorneys' fees. It sets out in clear terms the procedures that Class Members must follow in order to receive benefits, object to the settlement terms, or exclude themselves from the Settlement Class. In addition, the Short Form Notice directs Class Members to a website providing the Long Form Class Notice (attached to the Settlement Agreement as Exhibit 2 and submitted with Plaintiff's Motion) and other relevant documents from the litigation and provides a phone number at which they can receive additional information.

Thus, the Class Notice "describe[s] the terms of the settlement generally[,] and inform[s] the class about the allocation of attorneys' fees, and provide[s] specific information regarding the date, time, and place of the final approval hearing." *Charron v. Pinnacle Grp. N.Y. LLC*, 874 F. Supp. 2d 179, 191 (S.D.N.Y. 2012), *aff'd sub nom. Charron v. Wiener*, 731 F.3d 241 (2d Cir.

2013) (alterations in original) (citations omitted)). It is adequate under Rule 23 and this Circuit's precedents and should be approved.

III. The Court Should Adopt the Parties' Proposed Schedule.

In the Settlement Agreement, the parties have jointly proposed a schedule for taking the steps that will allow the Court to determine whether to grant final approval of the proposed settlement. The schedule is designed to give all interested persons an opportunity to learn about the settlement benefits and to have their views heard, while at the same time moving toward an expeditious payment of monetary benefits to qualifying Class Members. The general schedule that the parties propose before and after the fairness hearing is as follows:

Event	**Proposed Deadline**
Notice Completion Date	120 days after Preliminary Approval Order
Motion for Class Counsel's Fee and Named Plaintiff's Service Award	45 days before Fairness Hearing
Opt-Out Deadline	30 days before Fairness Hearing
Deadline to Object to Settlement	30 days before Fairness Hearing
Motion for Final Approval	14 days before Fairness Hearing
Deadline to Respond to Objections	14 days before Fairness Hearing
Deadline to Submit List of Exclusions	14 days before Fairness Hearing
Final Fairness Hearing	Approximately 210 days after Preliminary Approval Order
Claims Deadline	210 days after Preliminary Approval Order (or 30 days from the date of the repair, if later, for Future Door Latch Repairs)

Ford agrees with Plaintiff's request that the Court enter a Preliminary Approval Order substantially in the form attached to the Settlement Agreement as Exhibit 3 and submitted with Plaintiff's Motion.

IV. Ford Will Comply With the Pre-Approval Requirements of the Class Action Fairness Act.

In addition to satisfying Rule 23's notice and other requirements following submission of the proposed Class Settlement, Ford is prepared to comply fully with the pre-approval requirements created by the Class Action Fairness Act, 28 U.S.C. § 1715. As set forth in the Settlement Agreement, Ford will dispatch by March 16, 2020, a notice of the Settlement Agreement to the Attorney General of the United States and the attorneys general of each U.S. state and territory in which a Class Member resides. Ford will include for reference: (1) a copy of the original and amended complaints, (2) a copy of the Court's Preliminary Approval Order (if entered at the time the notice is sent), (3) a copy of the Settlement Agreement and its exhibits, and (4) a reasonable estimate of the number of Class Members in each state or territory and their percentage representation in the Settlement Classes.

Dated: March 5, 2020

By: PETER J. FAZIO /S/

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CERTIFICATE OF SERVICE

I hereby certify that on March 5, 2020, I electronically filed the foregoing document with the United States District Court for the Northern District of New York by using the CM/ECF system.

By: PETER J. FAZIO /S/
Peter J. Fazio, Esq.