

ENDORSED
FILED
ALAMEDA COUNTY

OCT 11 2000

CALIFORNIA SUPERIOR COURT
COUNTY OF ALAMEDA

CLERK OF THE SUPERIOR COURT
By BARBARA DELL
Deputy

ROBERT HOWARD, SUSAN VON RITTER,
DOUGLAS CURRAN, KIRK MORGANSON,
and JERRY MACALA, on behalf of themselves
and all others similarly situated,

Plaintiffs,

vs.

FORD MOTOR COMPANY, and DOES 1-100,
inclusive,

Defendants.

No. 763785-2

STATEMENT OF DECISION

**(CODE CIV. PROC. § 632;
CAL. R. CT. 232, 520)**

Hon. Michael E. Ballachey

I. INTRODUCTION

This is an action brought under the Unfair Competition Law (hereafter UCL) (Business and Professions Code sections 17200, *et. seq.*). Plaintiffs also seek relief, in this phase of this trial, under the equitable provisions of Consumers Legal Remedies Act (hereafter CLRA (Civil Code sections 1750, *et. seq.*, specifically, Civil Code section 1780(a)(3), (5))).

Having heard all of the evidence herein on the non-jury issues in a bifurcated trial, and having received extensive briefing from the parties (an Opening Trial Brief from plaintiffs, a responsive Trial Brief from defendant, a Reply Trial Brief from plaintiffs, a Surreply Brief from defendant, a Surrebuttal Brief from plaintiffs), along with briefs from both parties on the

significance of the California Supreme Court rulings in *Kraus v. Trinity Management Service, Inc.*, 23 Cal. 4th 116 (2000), and *Cortez v. Purolator Air Filtration Products, Co.*, 23 Cal 4th 163 (2000) (an opening brief from plaintiffs, a responsive brief from defendant, and a reply by plaintiffs), as well as Ford's written Request for a Statement of Decision, Plaintiffs' Proposed Statement of Decision, and Ford's Objections to Proposed Statement of Decision, the court now issues this final Statement of Decision pursuant to Code of Civil Procedure 632 and California Rules of Court 232 and 520.

II. PLAINTIFFS' CLAIMS FOR REMEDIES

1. Plaintiffs' claim for "disgorgement" as restitution is DENIED. Plaintiffs failed to establish, by a preponderance of the evidence, proof of "ill gotten gains" in the form of "avoided costs" with sufficient precision to warrant such an order. This claim also raises grave questions as to the constitutional appropriateness of such an order (*Kraus, supra; Cortez, supra*).

2. The plaintiffs' request for restitution is GRANTED. This order relates to those sums actually paid by Class Members to defendant for replacement of thick film ignition ("TFI") modules outside of warranty, whether or not payment was made at a time when the warranty had expired. Class Members are entitled to restitution under both the UCL (Bus. & Prof. Code § 17203) and the CLRA (Civ. Code § 1780(a)(3)). The parties are to be prepared to discuss the size of any such restitution fund, the content of notice to Class Members, and mechanisms of payment to appropriate Class Members. Defendant shall be liable for the cost of notice to Class Members of their entitlement to restitution. Determination of these issues shall be referred to Referee pursuant to Code of Civil Procedure section 639, subdivisions (c), (d) and (e), at defendant's expense, for recommendation to the court on the appropriate amount of a restitution fund and for appropriate procedures to ensure payment to Class Members. The expenses of the Referee shall include fees, administrative costs and any related expense reasonably incurred by the Referee. Amounts not paid out to Class Members due to inability to locate them may be held in a "fluid recovery" fund pending further order of the court. *See Code Civ. Proc. § 384*. It is clear that such relief is appropriate in a Class Action where members have sustained a monetary loss and cannot be located. *Kraus, 23 Cal. 4th at 127-37; Cortez, 23 Cal. 4th at 173-75*.

3. Plaintiffs' request for equitable relief in the form of affirmative orders regarding a "fix" of the problem giving rise to liability, namely the hidden defect in the distributor mounted TFI modules in Class Vehicles, is GRANTED. This issue requires additional proceedings at which evidence will be presented to assist the court in fashioning an appropriate remedy. The viable

alternatives appear to be: (1) a replacement program with a late iteration of the distributor mounted TFI module, (2) a remote-mount solution, or (3) a program whereby older vehicles are purchased from current owners by defendant, if more economically appropriate. The court is without sufficient information to resolve this question based on the record to date. To obtain this information, the Court shall, pursuant to Code of Civil Procedure section 639, subdivisions (c), (d), and (e), appoint a Referee who will have the authority to use Evidence Code section 730, *et. seq.*, to appoint expert witnesses, as the Referee deems appropriate, address discovery disputes, and take testimony on this question. The Referee will report to the court with recommendations on the issues referred to him, specifically regarding the appropriate remedy. The cost of any such Referee, including fees, administrative expenses, and any expert witness fees shall be borne by defendant. These proceedings will also be under both the CLRA (Civ. Code § 1780(a)(3), (5)) and the UCL (Bus. & Prof. Code § 17203).

4. Plaintiffs' request for reasonable attorney's fees and costs is GRANTED. *See, e.g.*, Civ. Code § 1780(d) (attorney fees and costs); Code Civ. Proc. § 1021.5 (attorney fees in cases involving questions of public concern); *Lealao v. Beneficial Cal., Inc.*, 82 Cal. App. 4th 19 (2000) (manner in which amount of attorney fees is determined California); *Hewlett v. Squaw Valley Ski Corp.*, 54 Cal. App. 4th 499, 543-44 (1997) (application of Code Civ. Proc. § 1021.5 in UCL action); *Flannery v. Cal. Highway Patrol*, 61 Cal. App. 4th 629, 634-38 (1998) (discussing application of Section 1021.5). Plaintiffs shall make such claim by way of a fee petition and cost bill to be filed herein in a timely fashion. This issue shall also be referred to the Referee, at defendant's expense as ordered above, pursuant to C.C.P. 639 (c), (d), and (e) for appropriate recommendation on all related issues.

III. ANALYSIS OF EVIDENCE

As Congress and various states began to demand increased mileage and better emissions performance from automobile manufacturers, the old “breaker points” ignition technology became inadequate to the task. All automobile manufacturers, including defendant Ford Motor Company, turned to electronic ignition systems to meet the challenge posed by these changes in the law. See Austin Tr. at 6357:16-6358:7 (“the breaker points in a mechanical, non-electronic ignition system were identified as a frequent source of emission problems in vehicles in customer service”); Davis Tr. at 4658:16-4659:5, 4659:6-4660:6 (the electronic ignition system assists with fuel economy and with emissions because both require accurate spark and timing).¹

Ford’s first effort was the “Duraspark,” commencing in the 1970s. See TX 154 at 3 (“all passenger cars incorporated electronic ignition systems beginning in 1975 and all light trucks adopted similar systems beginning in 1976”). The original Duraspark technology called for remote mounting at least in part because Ford knew that the reliability of electrical components depended on keeping them below maximum design temperatures. Miller V at 30:6-14, 34:2-38:5.

The decision to remote mount the Duraspark followed numerous meetings, at which people responsible for designing the engines and ignition systems for Ford vehicles sought to place the ignition electronics inside the passenger compartment. Their goal was to “avoid issues of splash, and as much of the temperature issue as we could from the engine directly” This suggestion to

¹As used in this Statement of Decision, all citations to “Tr.” are to the official trial transcript; all citations to “V” are to the videotaped deposition transcripts presented at trial; and all citations to “TX” are to trial exhibits that were admitted into evidence.

“invade the architecture of the interior of the automobile to mount this electronic computer to run our engine . . .” was met with “acrimonious” opposition from the “body engineers and stylists and the whole rest of the company.” Feaheny Tr. at 2008:8-2010:8.

The argument by Feaheny and his engineers to place ignition electronics in the passenger compartment was lost. *See, e.g.*, TX 215 at TFIX 9735. A design decision, made for reasons related to style and not concerned with safety, emissions control, or mileage, set Ford on a course which led directly to the TFI problems unveiled in this litigation. The decision not to place the delicate electronic, computer driven ignition technology inside the passenger compartment and directly on the distributor instead, flawed at the outset, has been fiercely and stubbornly defended ever since. *See, e.g.*, Davis Tr. at 4974:26-4975:3; Minear Tr. at 7793:20-24.

After the failure of the Duraspark technology, in the early 1980s, Ford decided to use “thick film” technology for its next generation of ignition modules. (Hereafter TFI modules) *See, e.g.*, Davis V at 17:13-18:6 (“we needed a new ignition system that would marry the operation of these two together properly”); TX 5089 at TFIX 0208 (enumerating reasons Ford replaced Duraspark with new generation of ignition modules). The TFI module is the electronic “brain” of the ignition system that controls the spark in the internal combustion process. It is designed to last for the life of the vehicle without the need for service or maintenance. *See, e.g.*, Miller V at 30:15-32:1; Pecht Tr. at 1627:5-1628:5; Davis Tr. at 4695:19-4696:3; TX 455 at TFI4 0142; TX 823 at TFI6 1237. *See also*, Ford’s Motor Company’s Opening Trial Brief, p. 6:9-23. Ford knew, from the very beginning of the shift to electronic technology, that the TFI module was vulnerable to “thermal stress” and that heat was the enemy of electronic devices. *See* Pecht Tr. at 1616:11-26, 1613:15-1614:4, 1617:28-16119:22, 1624:17-1625:6, 1637: 5-1638:3; Davis Tr. 4814:-4815:18; TX 958 at TFI5 2481 (“rule of thumb” is that TFI module life doubles with each 10° C in temperature); *see also* TX 4641 at TFLA 7170-7171 (Ford document defining TFI module as a “critical circuit”: one that can “disable the vehicle or severely impairs the driver’s ability to operate the vehicle”).

Because of earlier size considerations with respect to the Duraspark module, and because of the earlier “acrimonious” decision making process about vehicular architecture and style, the TFI module was ultimately designed for placement on the distributor. *See* Feaheney Tr. at 2008:8-2010:8; TX 215 at TFIX 9735 (memorandum from Ford upper management stating that plans to remote-mount the TFI module were abandoned for “cost/function reasons”).² Ford installed TFI modules on the distributors of approximately 23 million vehicles it manufactured and sold nationally, including the class vehicles involved in the present action. *See, e.g.*, TX 2560; TX 215 at TFIX 9735.

For reasons having to do with internal generation of heat (“dwell”) and external generation of heat (the engine and ambient temperature conditions), the TFI module began to manifest failure, both in pre-production testing and under field conditions almost immediately. *See, e.g.*, TX 283 at TFI4 4001; TX 308. Installing TFI modules on the distributors of class vehicles caused them to fail due to exposure to excessive heat and thermal stress. *See, e.g.*, Pecht Tr. at 1616:11-1619:16; Wuorenma V at 131:18-25; Paulsen Tr. at 5263:23-5264:7; TX 519; TX 585, TX 591; TX 721; TX 826.

The proof on this question is overwhelming. As pointed out above, Ford knew from the very beginning of the shift to electronic technology that the TFI module was vulnerable to thermal stress and that heat was the enemy of electronic devices. *See, e.g.*, Miller V at 30:6-14, 34:2-38:5; Davis Tr. 4814:9-14, 4815:5-10, 4928:23-4390:5; Hoffman V at 36:14-39:14; Minear V at 77:15-81:1; Partington V at 87:8-88:12, Paulsen Tr. at 5123:14-19, 5206:7-11, 5337:18-22; Paulsen V at 119:22-120:23; Pecht Tr. at 1613:15-1616:26, 1617:28-1619:4, 1624:26-1625:6, 1637:5-1638:3, 1659:9-1664:9, 1670:24-1676:22, 1731:14-20; Marlett V at 56:14-60:10; TX 838 at TFP6 3808; TX 4641 at TFIA 7170-7171; TX 391 at TFI4 1371-72, 1395-96; TX 5141 at TFI6 1273, 1276; TX

²Ford’s original engineering specifications (which were prepared in 1980) called for the TFI module to be mounted to a heatsink on the left-hand fender apron, one of the coolest locations under the hood. *See* TX 173 at TFIH 0027, 0034. As mentioned above, Ford management later abandoned that approach due to cost considerations. *See* TX 215 at TFIX 9735.

5081 at TSA 004209-10; TX 385; TX 273 at TFI4 3852; TX 283 at TFI4 4001; TX 823 at TFI6 1237; TX 5048 at TFI5 7749. Moreover, Ford has been aware, since at least 1982, that installing its TFI ignition modules on the distributors of class vehicles made them inordinately prone to failure due to exposure to excessive heat and thermal stress (the "TFI defect"). *See, e.g.*, TX 139 at TSA 004030-31; TX 273 at TFI4 3852; TX 283 at TFI4 4001; TX 308; TX 327; TX 385; TX 386; TX 389; TX 391; TX 437 at TFI4 3539; TX 471; TX 466; TX 495 at TFI5 0585-96; TX 510; TX 526-A; TX 734; TX 760; TX 4390; TX 838; TX 5082; TX 5130; TX 5138; TX 5351 at TFI7 5133; TX 5042 at 1; TX 5081 at TSA 004197, 004204, 004209-10; TX 5048 at TFI5 7749; TX 5085 at 1988-0825; TX 5087 at TSA 005573, 00579-80; TX 5698 at 2040 0202, 2040 0237; TX 5699 at TSA 000014; Paulsen V at 119:22-120:23; Paulsen Tr. at 5325:16-5326:25; Minear V at 77:15-81:1, 88:17-90:16, 115:5-116:24; Wuorenma V at 126:25-131:25.

The record is replete with internal Ford documents and testimony, all detailing the levels of failure, concerns with design (soldering), attempts to rectify the problem, cost concerns about warranty rates, and early consideration of remote mounting. *See generally* TX 273 at TFI4 3852; TX 283 at TFI4 4001; TX 526A; TX 215; TX 5130; TX 391; TX 139; TX 5698 at 2040 0237; TX 5699, TX 437 at TFI4 3539; TX 510; TX 4390; Paulsen Tr. at 5262:16-5267:8; Partington V at 24:18-25:5, 42:6-49:3. In fact, by 1987 (in the 1988 model year) certain automobiles were remote-mounted. These included Taurus/Sable 3.8-liter engines. Paulsen Tr. at 5325:16-5326:25. Several lines of Ford trucks were also later remote mounted. Minear V at 53:3-19; TX 742; TX 5140; TX 805; TX 806; TX 814; TX 821. The weight of the evidence is that these remote-mount decisions were based on Ford's concerns about its inability to control under-hood temperatures adequately.

It is true that Mr. Davis testified, in defense of his opinion that the TFI module is best mounted on the distributor, about theoretical problems of electro-magnetic interference and weakness associated with additional attachment mechanisms. No evidence was produced to demonstrate the reality of these concerns. Moreover, there was no evidence that Ford's conversion

to remote mount on the various vehicles discussed above gave rise to any of the problems that concerned Mr. Davis.

The clear weight of the evidence is that high temperatures are anathema to electronic components. *See, e.g.*, Pecht Tr. at 1637:15-19 (“the higher the temperature, the more opportunities there are for failures in the electronics”); Russell V at 78:6-80:8 (Ford’s designated witness on failure analysis unable to identify single latent defect that would not be affected by temperature); TX 391 at TFI4 1371-72, 1395-96; TX 5141 at TFI6 1273, 1276; TX 5081 at TSA 004209 4210; TX 385. TFI module failure can cause class vehicles’ engines to stall at any time, at any speed, under any circumstances, and the propensity to fail increases over time. *See, e.g.*, Hoffman V at 59:10-67:11; Hohnke V at 75:15-22; TX 492; TX 4119; TX 5130; TX 907; Russell V at 75:19-78:5; Wuorenma V at 126:25-131:25; Paulsen Tr. at 5338:26-5340:8; *see also* Bresnehan Tr. at 8089:4-8092:19; TX 576 at TFI8 4430. When a TFI module fails in a class vehicle, the vehicle can lose power steering and power-assisted brakes, and can become disabled on the roadway. *See, e.g.*, Richardson V at 33:3-38:12; TX 4301; TX 762; TX 526-A at TFI6 0815; at TX 5130 at TSA 005533.

Ford’s contention that there is no significant difference in remote mounted TFI module warranty returns and distributor mounted TFI module warranty returns is contrary to the weight of the evidence. *See, e.g.*, Minear V at 167:4-170:18 (explaining that high warranty rates in remote-mounted vehicles was caused by salt contamination); Davis V at 95:11-96:11 (same); *see also* Minear V at 99:2-20 (admitting that Ford was aware of no thermal stress-related problems with remote-mounted modules). Ford’s argument is not well taken in any event because it begs the question of whether or not its TFI modules, in either location, were free of defects.

The first person to try a remote mount on an older model automobile was Mr. Noettl, whose essentially amateur effort worked without encountering any of Mr. Davis’ theoretical problems. *See* Noettl Tr. at 3988-4117. His testimony about the vehicle that he modified was never rebutted.

During the same time period that much of the internal knowledge of the TFI module problem was being gained by Ford, and while Ford's efforts to achieve a cure for the problem were underway, the National Highway Traffic Safety Administration ("NHTSA") opened five separate investigations in response to stalling complaints. Ford's response to the information requests NHTSA served in those investigations, notwithstanding its own warranty experience and expense, was to resort to word games. Ford told NHTSA that "engine stalling may result from a wide variety of reasons, many of which have nothing to do with the failure of an ignition system component," rather than reveal what it obviously knew about the impact of TFI module failure on stalling. *See generally* TX 5761; TX 365; TX 5041; TX 762; TX 937. Ford's strategy, clearly established by the credible evidence was: If you don't ask the right question, we don't have to answer with what common sense tells us you want to know.

Ford withheld responsive information from NHTSA that it was obligated to divulge. For example, the declaration and trial testimony of Michael Brownlee (NHTSA's former Associate Administrator for Safety Assurance) was that Ford should have included, in response to NHTSA investigation No. PE84-05, at least the "Houston Study" (TX 391) and the minutes of a "5/50 Emission Warranty Problem/Resolution Meeting." (TX 5087). Mr. Brownlee also declared, and later testified at trial, that Ford had withheld 17 pertinent documents from NHTSA over the course of several investigations. Brownlee Tr. at 2680:8-18, 2865:23-2867:24, 2887:8-17. At trial, Mr. Brownlee described many other documents that Ford withheld from NHTSA during the same period. *Id.* at 2773:11-2861:28. His testimony and declaration on that subject are credible and persuasive. Similarly, Mr. Ditlow testified persuasively regarding a variety of documents that Ford withheld from NHTSA during the same investigations, as well as investigation Nos. E84-29, PE87-028, and PE89-011. Ditlow Tr. at 3380:3395:6, 3434:3-3481:24; 3484:21-3488:3, 3911:28-3915:19.³ To a lesser extent, far too late to do any good, NHTSA agreed. *See generally* TX 5067.

³Federal law prohibited Mr. Brownlee from testifying about PE87-028 and PE89-011 due to his direct involvement in those investigations as the Director of NHTSA's Office of Defect Investigations. *See* Brownlee Tr. at 2675:5-2676:20.

It is to be noted that neither NHTSA's findings in that regard, nor its determination to not re-open any of its investigations, is binding on this court. *See, e.g., Hewlett*, 54 Cal. App. 4th at 526 ("an erroneous administrative construction does not govern the court's interpretation of the statute"); *Huges v. Bd. of Architectural Examiners*, 17 Cal. 4th 763, 794 (1988) (non-adjudicatory administrative proceeding has no collateral estoppel effect); *Asuza Land Reclamation Co. v. Main San Gabriel Basin Watermaster*, 52 Cal App. 4th 1165, 1221 (1997) (collateral estoppel effect only given to final decision of agency that acted in a judicial capacity).

Ford's dissimulation reached its nadir in the testimony of Bob Wheaton, Ford's witness designated as most knowledgeable about safety issues, when he insisted that "safe is too subjective" and denied knowledge of any "written definition of what safe is within Ford Motor Company." Wheaton V at 29:17-31:16. Other Ford executives were similarly evasive when pressed on the question of whether or not a failed TFI module, under any circumstances, presented an unreasonable risk of safety. *See, e.g., Petrauskus V* at 20:16-34:19, 44:5-48:10 (Ford's Vice President of Safety and Environmental Engineering who could not conceive of circumstance in which stalling could create a safety risk); *Transou V* at 21:22-29:24 (Ford's Vice President of Car Engineering who felt that stalling on the roadway posed no safety risk).

Ford's use of language such as "stop, won't start," "quits on road," "starts after stop," "driveability," and other euphemisms for stalling problems, all of which were immersed in rhetoric claiming a multiplicity of causes for stalling (everything from running out of gas to a dead battery!) are at least disingenuous when juxtaposed with Ford's actual knowledge of the extent of the TFI module problem and its impact on vehicle operation and safety. *See generally* TX 273 (Ford internal memorandum dated April 13, 1982); TX 283 (Ford internal memorandum dated April 29, 1982); TX 308 (Ford internal memorandum, reviewed on May 24, 1983); TX 5130 (Ford internal memorandum dated October 17, 1983); TX 386 (Ford internal memorandum dated July 23, 1985); TX 391 (Ford internal memorandum dated June 6, 1985, and revised August 16, 1985); TX 510 (Ford internal memorandum dated October 15, 1986). More specifically TX 556 is a Ford FMEA

report, in which TFI module failure was rated as a "5" ("very high severity" in relation to safety). This report, dated December 16, 1986, was prepared one week after the Owner Notification Program was announced internally by Ford upper management, based on "driveability" concerns and not as safety recall. See TX 554; TX 7054 (Bradley Depo.) at V 46:24-48:18.

One need look no further than the evidence presented by Ben Kelley (Kelley Tr. at 1495-1563; Kelley V at 2254) and the materials relied upon by him to conclude, as this court does, that stalling, under almost any circumstances, presents an unreasonable risk to automobile safety and to the safety of the occupants of any such automobile. It would defy common sense and the weight of the evidence to find otherwise. See also *Schreidel v. Am. Honda Motor Co., Inc.*, 34 Cal. App. 4th 1242, 1250 (1995) (discussing safety risks created by stalled vehicle); *Ibrahim v. Ford Motor Co.*, 214 Cal. App.3d 878, 883 (1989) (same); *United States v. General Motors Corp.*, 417 F. Supp. 933, 935-36 (D.D.C. 1976) (same).

Rather Ford used tortured interpretations of common language to avoid its responsibilities to NHTSA, the Environmental Protection Agency ("EPA"), and the consuming public. The TFI module problem was, according to Ford either an emissions problem because it happened gradually and gave the driver a warning, or not an emissions problem because the modules failed suddenly, without warning. Compare, e.g., *Petrauskus V* at 127:19-131:4; TX 5084 and TX 4454 at 69:8-70:17 (Ford's answers to interrogatories) with *Hoffman V* at 59:10-67:11 and *Austin Tr.* at 6450:5-6451:9; see also *Macher V* at 56:9-57:10, 58:10-59:15, 89:10-104:20 (Ford could not confirm existence of prior warning before TFI-related stall occurs). By taking these inconsistent positions, separate divisions within Ford claimed justification for their failure to respond to governmental safety inquiries and to comply with statutory emission control responsibilities. The Ford Motor Company, as a single corporate entity, cannot claim such justification.

Ford improperly arrogated unto itself the task of defining terms and decided for itself what information to reveal. Michael Brownlee (regarding NHTSA Investigation Nos. P85-24 and PE85-

05) and Clarence Ditlow (regarding NHTSA Investigation Nos. E84-29, PE87-028, and PE89-011) with respect to NHTSA, and Charles Freed with respect to the EPA, have testified persuasively to that end. *See, e.g.*, Brownlee Tr. at 2889:3-2893:27; Ditlow Tr. at 3788:3-3792:22; Freed Tr. at 4507:15-4509:1.

In defense of plaintiffs' claims, Ford presented a blizzard of unpersuasive statistical evidence in an attempt to disprove the obvious: That TFI modules failed in enormous numbers from the outset, that they continued to fail in unacceptable numbers for many years before being replaced by successor technology, and that they presented a serious safety risk to its consumers. (As of 1998, approximately 15 million distributor-mounted TFI modules have been replaced in a population of fewer than 23 million vehicles: Ford replaced approximately 1.5 million distributor-mounted TFI modules under warranty; Ford sold approximately 3.2 million replacement TFI modules; and three third-party suppliers of replacement TFI modules sold approximately 10 million additional distributor-mounted TFI modules from 1988 through 1998. *See, e.g.*, TX 15; TX 16; TX 2676-B)

Ford's defense misses the point of this lawsuit. It was not for Ford to decide what "safety" meant, or what levels of warranty returns obligated it to report to the EPA. Ford's responsibility was to respond to legitimate government inquiries with appropriate information so that an independent evaluation could determine the presence or absence of a problem. *See* Freed Tr. at 4459:20-23, 4572:21-4573:22; Brownlee Tr. at 2800:14-23; *see also* Brownlee Tr. at 2689:11-2690:11 (testifying to the effect that NHTSA investigation would have proceeded to "Engineering Analysis" if Ford had not withheld information); TX 5076 at 16 ("Manufacturers may not pick and choose among relevant documents that are within an ODI inquiry").

As part of its blizzard of unpersuasive statistical evidence, Ford also contended that Class Vehicles are not involved in more crashes than non-class vehicles and that the distributor mounted TFI module was not a causal factor in crashes and hence not involved in vehicle safety. Without

resolving the question of the utility of crash statistics, which are conceded to be collected and reported in a haphazard fashion, the court finds that Dr. Robertson's analysis of these statistics, showing a 9% higher fatality rate for Class Vehicles over non-Class Vehicles, is persuasive. See Robertson Tr. at 2522:28-2523:13; TX 5713 (discussing FARS data); see also Ditlow Tr. at 3502:9-3504:16 (same).

Ford's expert on this subject, Dr. Wecker, achieved results similar to Robertson, using Robertson's data. Wecker Tr. at 6070:11-6071:13. Wecker disagreed with Robertson on the scope of the data, with Wecker being concerned about the "hot rod" factor (that is, that the higher fatality rate may have been attributable to drivers under 21 years of age driving "hot rod" Mustangs recklessly). Such manipulation of questionable data might lead a cynic to recall the aphorism about "Lies, Damned Lies, and Statistics." This court declines that temptation, but nonetheless finds the weight of the evidence to favor plaintiff on this issue.

Given the enormous financial impact of this problem, as revealed by the 5/50 Warranty Review (TX 526A), and given the much greater expense of an involuntary recall should NHTSA order one, it comes as no surprise that Ford did what it did: Make a show of concern by ordering a partial and much less expensive "Owner Notification" with respect to some of the cars subject to the problem. See TX 561; TX 7054 (Bradley Depo.) at V 46:24-48:18 (safety recall campaigns are almost twice as costly as owner notification programs).

Ford was required by law to report to the EPA when it became aware of 25 or more TFI module failures in a given model year during the entire class period. 40 C.F.R. § 85.1903. Ford was required by law to report to CARB when it became aware of 25 or more TFI module failures in a given model year, through the 1989 model year. 13 Cal. Code Reg. § 2146. Ford was aware that far more than 25 TFI modules failed each year during the entire class period. TX 15; TX 16. With the exception of a single report filed in connection with certain E- and F- Series trucks in 1995, Ford failed to report any TFI module failures to EPA, during the entire class period. See Austin, Tr.

At 6415:15-6417:9; Freed Tr. At 4448:21-4449:8. Ford also failed to report any TFI module failures to CARB regarding 1983 to 1989 model-year class vehicles. See Austin Tr. at 6415:4-6417:9; Freed Tr. at 4448:21-4449:8

Ford's deception of the government and the consuming public is especially clear in the case of emissions/warranty returns which are "presumed bad" unless later tested and found not defective. Minear V at 109:25-111:22; TX 491 at TF10 5241-43 (memorandum prepared by former Vice-Chairman Louis Ross regarding threat of litigation by EPA). That Ford understood its obligations to the EPA cannot be denied. Minear V at 109:25-112:13; Minear Tr. at 7910:23-7912:15; TX 491 at TF10 5243. That knowledge became focused when the EPA pressed Ford on the 5/50 warranty implications of ignition parts, triggering an internal discussion of the issue. See TX 491. Ford was acutely aware of the financial implications of making this extension of the warranty on the TFI module and yet, because of its understanding of EPA's position and authority, agreed to make the change. *Id.*

Ford knew the EPA reporting requirements. Minear V at 109:25-112:13; Minear Tr. at 7910:23-7912:15; TX 491 at TF10 5243 ("defective components covered under the 5/50 warranty and presumed to cause a failure to meet applicable emission standards . . ."). Nonetheless, in spite of internal information of warranty failures of this ignition/emission control device far in excess of statutory or regulatory standards, Ford repeatedly failed to report these returns to EPA. Freed Tr. at 4507:15-4509:1, 4537:11-17. Moreover, there was no evidence that any of the warranty-returned TFI modules were ever tested to ascertain the impact of their failure on air quality. Minear Tr. at 7910:23-7912:15. Ford's failure to respond to its responsibility to the EPA can only be interpreted as an effort to avoid discovery of the TFI module problem by the agency and the consuming public.

It is axiomatic that NHTSA and the EPA in the federal system, and the California Air Resources Board ("CARB") in California, are "watchdog" agencies designated to protect consumer safety and the environment. In the absence of information from the manufacturer it is through these

agencies that consumers are informed of problems with the products that they purchase. Warranty replacement, or even post-warranty replacement, without disclosure of the reason for the replacement, offer little insight to the consumer as to the nature of the problem. Ford never made any such disclosure to either the government or to any consumer.

Along with all of the evidence discussed above, additional evidence of Ford's intent to conceal this information is seen in its manipulation of testing procedures by reducing testing temperature levels. *See* TX 819 at TF14 5466; Russell V at 22:3-41:1; Pecht Tr. at 6581:6-6585:1. The unexplained reduction of temperature levels was suspicious even to Ford's emissions expert. *See* Austin Tr. at 6511:21-6516:14; TX 4123.

Additionally, there is evidence that Ford, as a condition of settling various civil lawsuits arguably involving evidence of TFI module failure, demanded the return of information disclosed in discovery during those lawsuits. *E.g.*, TX 5823 It is noteworthy that, notwithstanding the repeated promises from Ford to offer evidence countering the circumstantial evidentiary significance of this practice, none was forthcoming.

Ford's most significant effort to defeat plaintiffs' claim, at least from the point of view of expense to Ford, came from Dr. McCarthy, whose testimony was largely to the effect that there never was a TFI module problem in the first place. Dr. McCarthy's testimony is questionable on several grounds. Most significantly, he tested only approximately 4,000 TFI modules, which were selected for him by Ford dealers from warranty returns. The 4,000 modules tested by McCarthy must be compared to the total population of 1.5 million TFI modules replaced on warranty, the 13 million TFI modules sold after warranty, as well as the same number of original TFI modules. TX 2560; TX 2676-B; TX 5579. In addition, the persuasive evidence is that too many of the relatively few TFI modules tested by McCarthy were low mileage to lend any significant credence to his opinions. *See* Pecht Tr. at 6555:22-6562:23.

TFI modules that function in laboratory testing are deemed Trouble Not Identified (“TNI”), which means only that Ford did not detect a malfunction during testing. It does not mean the testing methodology was correct or adequate and it does not mean that the modules were non-defective. *See, e.g.*, Macher V at 108:2-16; Russell V at 14:4:-20:20; Marlett V at 68:12-69:6; Balock V at 9:6-48:13; Hohnke V at 75:15-22; Brownlee Tr. at 2703:26-2706:14, 3162:7-3164:2; Pecht Tr. at 6582:28-6585:1; Woronowicz V at 9:1-20, 13:21-14:7, 17:23-19:13, 32:20-33:8, 34:23-35:23; Hohnke V at 75:15-22; TX 5698 at 2040-0202; TX 4303 at TFI5 3731-3732; TX 4289; TX 4300; TX 4323. McCarthy’s conclusion that re-tested warranty returns which “passed” various tests as “TNI” (trouble not identified) and were therefore not defective is flawed. Again, “TNI” does not prove that the module was not defective. It merely establishes Ford’s, and McCarthy’s, inability to find the problem. The “TNI” finding did not exclude intermittent failures and did not establish that the particular TFI as non-defective. Macher V at 108:2-16; Russell V at 19:5-9; Marlett V at 13:14-14:9, 70:14-81:21; TX 5698 at 2040-0202; *see also* Brownlee Tr. at 2703:26-2706:14, 3162:7-3164:2. Finally, after all was said and done, McCarthy still found significant, unacceptable percentages of failed TFI modules in his study. *See* Pecht Tr. at 6583:3-6585:1.

It should also be pointed out that McCarthy’s reliance on the “*X-Car*” case is likewise flawed. He has confused performance problems with component failure. *See* Ditlow Tr. at 3491:9-3509:19; Brownlee Tr. at 3210:21-3211:13, 7641:12-7642:18.

Dr. Bresnehan’s testimony, which sought to establish that because Ford’s value held in the used car market there could be no defect in Ford products, is likewise unavailing. As pointed out on cross-examination, Ford’s efforts in the market, over the time from 1983 to 1999 had allowed it to come “up to below average.” Bresnehan Tr. at 8107:10-28.

Ford’s repeated arguments that Class Members who purchased their vehicles before January 1, 1993, and that plaintiffs’ UCL claims are barred by the Statute of Limitations are rejected for the same reasons that they have been previously rejected. The same is true of Ford’s repeated argument

that there can be no liability in this case in the absence of a direct sale. The court's position on these issues is clear from the record. There is no need for further comment at this juncture.

Ford failed to meet its obligations to report safety related defect information to relevant governmental agencies and, by so doing, concealed vital information related to vehicle safety from the consuming public. This fraudulent concealment is tantamount to fraudulent misrepresentation under the CLRA and constitutes a violation of both Civil Code sections 1770(a)(5) and (7). *Outboard Marine Corp. v. Superior Court*, 52 Cal. App. 3d 30, 36 (1975). Otherwise stated, by not telling the government and the consuming public about the defects in the distributor mounted TFI modules, Ford was, in effect, making positive statements about the durability and safety of the device. *See id.*

The same conduct is violative of the UCL under all three theories offered. The fraud of Ford in this part of the case, namely, concealment of a known safety defect, is actionable even if no one was actually deceived. Here, however, there was deception. *See* Curran Tr. at 2231:14-2232:2, 2236:6-9, 2236:14-17; Rams Tr. at 1438:13-15; Macala Tr. at 4262:28-4263:13; Benbow Tr. at 44:24-45:2; Provost V at 22:4-22. Moreover, it has been shown that members of the public were likely to be deceived. *See Chern v. Bank of Am.*, 15 Cal. 3d 866, 876 (1976); *Podolsky v. First Healthcare Corp.*, 50 Cal. App. 4th 632, 647-48 (1996). Ford's conduct, discussed above, which violated its obligations under various state and federal statutes and regulations, is more than sufficient to support a finding that Ford violated the UCL in that regard also.

Ford also engaged in "unfair" business practices for the same reasons: concealment of highly significant safety related information from the government's legitimate inquiry and from the consuming public. *See, e.g., People v. Cappuccio, Inc.*, 204 Cal. App. 3d 750, 760 (1988) (public was injured as a result of the defendant withholding information from Department of Fish and Game, "so that it could properly protect the public's interest . . .").

Ford's concern about resting liability on predicate statutes has been addressed early and often in this litigation. The result is the same here: Plaintiffs are not enforcing the predicate statutes, they seek to enforce the UCL and CLRA. That their proof includes evidence of unlawfulness in relation to these statutes does not bar them from recovery. Quite the contrary, such evidence constitutes the very proof necessary to establish the various violations of California consumer protection legislation. *Committee on Children's Television*, 35 Cal. 3rd 197, 210-211 (1983); *State Farm Fire & Casualty v. Superior Court*, 45 Cal. App. 4th 1093, 1102-1103 (1996).

The record is also replete with evidence of Ford's intent to keep the information about the TFI module secret from the consuming world, separate and apart from the government. Internal Ford documents make this clear. One need only refer to the instructions "don't include in minutes," TX 437; Partington V at 42:6-48:7, or to the failure of Ford to advise dealers about the TFI module problem in Technical Service Bulletins (called TSB), even though this was standard policy at Ford, see Minear V at 127:15-129:3, 117:14-129:16; Russell V at 66:12-67:11; Gunderson Tr. at 2104:1-2105:7; TX 960 (especially at TFO4 4091). Finally, there is uncontroverted evidence regarding Ford's insistence on the return of all discovery materials in settled civil actions.

It is interesting to note that while Ford argues, through McCarthy and others that there was never a TFI module problem related to safety, it is undisputed that Ford went to enormous expense and effort to correct this non-problem. See TX 4390 (Dilworth declaration); Ford Opening Brief at 11-46; see also Pecht Tr. at 1918:9-26 (Ford's efforts to improve TFI module were actually a form of "crisis management"). Most of the "improvements" to the TFI module related to concerns about heat and thermal stress.

One feels compelled to ask: If there was no problem, if the warranty returns of TFI modules were truly non-defective parts, if the problem was not related to automobile safety, why did Ford not disclose the information and make its case to NHTSA or to the EPA? That approach would have allowed for an independent analysis and would have avoided the difficulty of late revelation discussed in NHTSA's conclusion to the Special Order proceedings. *See* TX 5076.

The Ford engineers' stubborn commitment to a flawed decision (*see* Feahney Tr. at 2008:14-2009:12) is perhaps best demonstrated in Mr. Paulsen's reluctance to answer to Mr. Poling. *See* Paulsen Tr. at 5002:15-5003:21, 5042:22-5049:26, 5051:20-5053:7, 5263:1-4. In listening to Mr. Paulsen, the court was reminded of "The Emperor's New Clothes": No one wanted to be the one to deliver the bad news to the President of Ford. That reluctance, and Ford's commitment to failed technology, cannot be accepted as a realistic attempt to solve the obvious safety problem confronting Ford: the massive failure of distributor mounted TFI modules due to excessive heat and thermal stress.

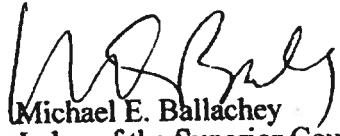
None of Ford's affirmative defenses is supported by any relevant or material evidence or by applicable law. Indeed, with the exception of its statute-of-limitations defense, Ford has expressly waived its affirmative defenses. Tr. at 6836:22-6838:16.

All of the findings and evidentiary comments contained herein are based upon the court's assessment of the credibility of the witnesses and weight to be given to the testimony of the various expert witnesses who testified at the trial. All testimonial conflicts and conflicts in opinion testimony have been resolved in support of the conclusions reached herein.

The court intends to issue orders compelling recall and repair of class vehicles regardless of the mileage on those vehicles, restitution of amounts actually paid by class members for replacement TFI modules during the Class Period, whether in or out of warranty, and award reasonable attorneys fees and costs as indicated.

DATED:

12/11/20


Michael E. Ballachey
Judge of the Superior Court