DOT Docket No. NHTSA-02-12150
Docket Management
U.S. Department of Transportation
Room PL-401
400 Seventh Street, SW
Washington, DC 20590

Supplemental Comments of Public Citizen
Regarding 49 CFR Part 512
Confidential Business Information
67 Federal Register, April 30, 2002

Dear Dr. Runge,

We submit these supplemental comments to the National Highway Traffic Safety Administration's (NHTSA's) rulemaking on Part 512 as a brief answer to the retort of December 2002 by the Alliance of Automobile Manufacturers ("the Alliance") and the Rubber Manufacturers' Association (RMA). The intense animosity on display in the Alliance's comments is a further sign of the significance of this rulemaking, and an excellent indication of industry's fear of an informed public.

We object to the Alliance's effort to highjack what should be a relatively straightforward review of the agency's procedures of its current practices under Part 512. The initial rulemaking notice on the revisions of Part 512 contained only a glancing discussion of the rule's impact upon the administration of the early warning rule, consisting merely of a re-statement of the statutory language, without any substantive discussion. Neither the agency's early warning Advanced Notice of Proposed Rule Making (ANPRM) nor the Notice of Proposed of Proposed Rulemaking (NPRM) provided any indication that public disclosure of early warning information would trigger such heated controversy. To the contrary, both contained important, but routine statements of NHTSA's policy that disclosure of early warning information would be governed by the agency's existing policies and practices.

This rulemaking is therefore allowing the Alliance a third bite at the apple, and far off-topic as well, to hear an argument in this rulemaking regarding disclosure of early warning data. Though unwarranted, it is unsurprising that the Alliance and RMA would inject consideration of early warning disclosure obligations into this rulemaking in this

manner: the groups are also attempting to delay, block and obfuscate development of the statutorily mandated early warning database by filing several dozen petitions for reconsideration of that rule. These petitions were filed not only by the trade association, but by many companies individually. Their suggestions should be set aside, however, so that NHTSA may focus its efforts on the far more important work of perfecting the submission and publication of early warning information.

As laid out in our previously submitted comments, the legislative history and hearing record regarding the industry's malfeasance and deception, which led Congress to pass the Transportation, Recall Enhancement, Accountability and Documentation (TREAD) Act, should guide the agency's implementation of its duties under the statute. As the events described in our comments may be confirmed by NHTSA's own Office of Chief Counsel staff, there should be no question as to the accuracy of our description of the events just prior to enactment of the TREAD Act.

Furthermore, the public history is perfectly clear. Against the backdrop of Congressional outrage over the secrecy of international recalls conducted by Ford, the elaborate cover-up of these recalls as negotiated between Ford and Firestone, and repeated litigation in which the companies imposed gag orders upon the injured victims and families of people killed in Ford/Firestone crashes, it is truly "hostile" to suggest, as does the Alliance, that Congress intended for early warning information submitted by manufacturers to remain a secret kept by the government from the public.

Regardless of the Alliance's attempt to cast Public Citizen as a reluctant bedfellow by disaggregating our positions well beyond recognition, it is apparent that there remains considerable controversy regarding the proper disclosure of early warning information. Rather than rebutting the rebuttal in the bulleted list by the Alliance, we wish to enunciate three key principles to assist the agency as it moves forward from this issue.

I. It would pervert the class determination mechanism to cast it as a carte blanche which allows industry to evade its evidentiary and procedural burdens under the Freedom of Information Act (FOIA).

Legalese aside, it is clear that the Alliance is after every industry's dream, *i.e.*, a near-total escape from the clear statutory requirement that requests for exemptions under FOIA be specific, narrowly tailored and well-pled. As detailed in the agency's Part 512 NPRM, the class determination mechanism, as employed by NHTSA prior to this rulemaking and for the past 30 years of the agency's history, has been very narrowly drawn; encompassing only actual documents with great specificity and obvious competitive value, such as blueprints for vehicle designs and the like.

Yet the Alliance would have the agency believe that summary figures of early warning data are not merely competitively harmful – they are all equally competitively harmful, and they are so much so that industry should be let off the hook from even having to say so or to demonstrate this as they are submitted. The breadth and arrogance

of this position, and its departure from well-accepted principles under FOIA, requires it be disregarded.

The slender thread by which the Alliance attempts to hang its arguments for new exemptions from FOIA is the language of the disclosure section in the early warning statute. Yet that language is far too specific for such a wide purpose, as it refers only to a particular set of disclosure practices seldom used by NHTSA, and utterly fails to encompass any larger approach to NHTSA's traditional obligations under FOIA. The early warning statute read in this way is not surplusage, but simply irrelevant to NHTSA's disposition of disclosure under FOIA and the existing class determinations. The statute addresses only a very specific sub-category of the information permitted to be retained by NHTSA, but which is nonetheless disclosable under certain conditions. On its face, the early warning language modifies only that section. Despite the Alliance's audacious attempts to force an elephant through the eye of this tiny needle, the poor beast will not fit.

II. NHTSA's statements that its disclosure obligations are unaffected by the new categories of information available under the TREAD Act remain the lodestone for the agency's interpretation of its duties under Part 512.

Congressional interest, including questioning during the hearings, concerned NHTSA's failure to detect a dangerous developing defect and failure to investigate or publicly release information regarding the Ford/Firestone debacle. After all, it was not the agency that diagnosed the problem, despite a file submitted for the agency's record by a State Farm agent in 1998, as well as a raft of deaths, injuries and resulting lawsuits. Instead, the problem was introduced to the public by a local television reporter in Houston, Texas, after which the number of deaths and injuries quickly grew in a manner indicating a probable safety defect, a defect later confirmed by a NHTSA investigation.

In view of this experience and record, the clear intent of the TREAD Act was to redress both the industry's and agency's failures by creating a location for an ongoing record of public experience regarding a defect. The new law's effectiveness will in large part be a result of the availability of a database in which the public may see reflected its own experiences regarding defects, and to which it may contribute. Regardless of this history, the Alliance suggests that the agency view the TREAD Act as a "ratification" of obscure defect investigation disclosure practices; practices of which Congress, as a whole, was certainly unaware.

To do so would be a clear distortion of any reasonable doctrine of legislative intent, as it would ask the agency to both ignore the harsh Congressional criticism of the industry and agency's secrecy, and would subvert a clear mandate from Congress to bring precisely this kind of information to light for public examination and contribution. No canon of construction could legitimately produce a result so perverse. Moreover, the information released by the Office of Defects Investigation is different in character, scope and specificity from the data that will be contained in the early warning database; so no precedent from this existing practice could apply.

Instead, the agency should stick to the course outlined in the early warning rules and in its announcement of the rulemaking on Part 512. Nothing presented in the TREAD Act asks the agency for a wholesale revision of its disclosure practices; only the Alliance has. Yet the Alliance, even in its supplemental comments, did not articulate a much-needed limiting principle, or boundary, around the kinds of information that it would now deem to require secrecy as trade secret information, nor did it demonstrate that early warning information will be different in kind, or unique in a manner meriting special treatment under Exemption Four. There is simply no logical basis for such treatment, and we urge the agency to treat the Alliance's pipe-dream as the fantasy it is.

III. Under the TREAD Act and FOIA, NHTSA's first duty is to make safety information available to interested consumers.

The Alliance gives no response to our allegation that industry cover-ups of defects are common, and that a long-standing statutory duty for manufacturers to tell NHTSA when they "learn" of a defect has been honored mainly in the breach. Yet the Alliance does, unconvincingly, attempt to impugn the credibility of our deposition excerpt by quoting a trial judge's musings about the witness, Mr. Cline, as well as a predictable refutation of the witness's statements by quoting counsel for Ford Motor Company.

Although the Alliance may bicker over particular cases, our general point that industry repeatedly puts economic interests before public safety in delaying the disclosure of, or in failing to disclose, defects remains unrefuted. Attached as further evidence of this propensity in Appendix A is a very partial list of major safety defects covered up by automotive manufacturers since the Safety Act was passed, and excerpts from an opinion by a California court that spells out this malfeasance in no uncertain terms.

Transportation Secretary Federico Pena emphasized this point in making the initial defect determination on GM's pickups with the side saddle gas tanks in 1994 by saying, "GM management in place at that time appears to have made a decision favoring sales over safety." In making that statement, Secretary Pena relied heavily on hundreds of previously confidential internal GM documents that demonstrated "GM was aware, possibly as early as the mid-1970's but certainly by the early-1980's, that this design made these trucks more vulnerable and that fatalities from side-impact fires were occurring. However, GM chose not to alter the design for 15 years." (Statement by Transportation Secretary Federico Pena Initial Decision that a Safety Defect Exists in Certain General Motors C/K Pickup Trucks, Oct. 17, 1994.) [*See* Appendix B]

Attached to these comments is a short communication between Ford executives in March 1999, discussing the legal ramifications of conducting a recall of Firestone tires in Saudi Arabia. [*See* Appendix C.] The memo makes it clear that Ford officials were aware of a belief held by lawyers for Firestone that the companies should report such action to NHTSA, and that Ford officials deliberately tried to evade these reporting requirements by re-packaging and de-formalizing what was essentially a foreign recall. Yet when company officers were questioned by members of Congress regarding their

statutory duty to inform NHTSA of actions overseas, Congress was told that executives believed that the duty did not exist. Voila, the TREAD Act.

In this case, good information, made publicly available, *is* the safety program. And NHTSA is proposing to collect and publish no more information than what industry, in every case, always already knows, and to release it in a format far less detailed than what is routinely released during the agency's defect investigations. Summary information in the categories requested under the early warning final rule do not raise privacy concerns, as may be the case with detailed customs or medical records containing consumer identifiers. This authority was awarded after decades of cover-ups, and after Congress grew tired of seeing the bodies pile up on the highway before a safety problem could come to light.

Arguably, if the industry had collaborated with NHTSA when "learn[ing]" of a defect in the manner clearly envisioned by the original statute, the TREAD Act may not have been necessary. Our sad history shows that it was necessary, because automakers are too often, if given an option, the last ones to warn consumers, or even the agency, of hazards latent in vehicles on the road. Therefore, NHTSA must honor its obligation under the statute, as well as its wider duty to public safety, by setting out a provision for the routine disclosure of early warning information, just as every one of the agency's rulemakings on the issue anticipates.

After all, it is the public which time and again suffers the consequences of manufacturer negligence in the form of quadriplegia, paraplegia, brain damage, loss of limbs and death. Surely they are entitled to be as informed as the manufacturers and NHTSA of the potential risks imposed upon them. As painful as it must be for the industry, the manufacturers' information monopoly must be transformed, at long last, into a truly functional information democracy.

Sincerely,
Joan Claybrook
President, Public Citizen

Appendix A

Ten Major Safety Defects Initially Covered Up By Automobile Manufacturers

1) **Ford Pinto Exploding Gas Tanks:** Ford Motor Co., Pinto (1971-76); Mercury Bobcat (1975-76); Fuel tanks and filler necks installed on these vehicles were subject to failure when vehicles were struck from rear. The failures could result in fuel leakage, which, in the presence of external ignition sources, common on the highway, in turn could cause fire. The recall was agreed to only after an article was published in *Mother Jones* about the decision by Ford that it would be "cheaper" for the company to pay fire injury and burn death liability claims than to fix the vehicle, a full investigation by NHTSA and demand for a recall, and an extremely large punitive damages award ($125 million, later reduced to 3.5 million) in the case of *Grimshaw v. Ford*. Between the date of the beginning of the recall and the date when parts to repair the vehicles became available, six people died in Pinto fires following a rear impact crash. 1,400,000 cars recalled.

2) **Ford Flying Fan Blades Recall:** Ford Motor Co., Various models (1972-83); Flexible blade engine cooling fans can crack, causing portions of the fan blades to separate. Flying blades can damage underhood components and cause severe personal injury to mechanics and others inspecting the engine. 3,597,214 vehicles recalled.

3) **Ford Park-to-Reverse Defect:** Ford Motor Co., Some Lincoln and Mercury vehicles (1970-80); Parking gear may not securely engage after the operator attempts to shift the vehicle's gear selector to "P" (park), and transmission may shift to reverse by itself without warning, allowing vehicle to move when unattended. Movement may result in injury or death to vehicle occupants or to persons outside the vehicle. As of the date of NHTSA's initial determination of a defect, NHTSA had received 23,000 complaints about Ford transmissions, including reports of 6,000 crashes, 1,710 injuries and 98 fatalities. Yet Ford conducted only a consumer satisfaction action, mailing warning labels to 23 million owners rather than recalling them for mechanical repair. A 1985 NHTSA study found that Ford "park-to-reverse" crashes had caused a total of at least 306 deaths, yet the agency still declined to reopen its investigation files.

4) **Firestone 500 Disaster:** Firestone, Various radial tires in the 500 series (1974-77); Failure of the steel belted radial tire could result in loss of air and/or tread and loss of control of the vehicle, which may result in a vehicle crash. On May 12, 1980, NHTSA imposed a $500,000 fine on Firestone for selling tires which the company knew to be defective and they failed to comply with the high speed requirements of Safety Standard 109. 19,620,000 tires recalled.

5) **GM Engine Mount Breakdown:** General Motors, Various Chevrolet models (1965-70); Engine mount breakage causes a self-perpetuating chain of events. When the left side mount breaks, engine torque causes the engine to rise up, pulling open the accelerator linkage; causing more upward movement and further opens accelerator linkage until the engine's movement is finally stopped by the closed hood and the accelerator is at full throttle. The engine's upward movement pulls the power brake booster vacuum hose loose, thus greatly increasing the force needed to stop the car, which is racing, often out of control. 6,6800,000 vehicles serviced through a voluntary recall by GM, after much publicity, in which 95 percent of the cars did not receive new engine mounts, but instead were fitted only with a much cheaper cable and bracket assembly to restrict engine movement if a mount broke.

6) **C/K Pickup Side Saddle Gas Tank Debacle:** General Motors, Full-size pickups, various models (1973-87); Fuel tank outside frame rail of vehicle made tanks more vulnerable to rupture and puncture in side impact crashes. Fatal Analysis Reporting System data indicate that over 1,800 people were killed in fire crashes in the U.S. involving trucks from model years 1973 to 1987. Despite a voluntary recall request from NHTSA and an initial defect determination by Secretary Pena in October 1994, GM refused to initiate a recall. NHTSA's data gathering was hampered by GM's withholding of hundreds of accident reports on gas tank fires until forced to disclose them in February 1994. There were hundreds of lawsuits seeking redress for horribly injured plaintiffs and survivors of those killed, most of which were settled, totaling almost half a billion dollars.

7) **Chrysler Minivan Rear Door Latch Tragedy:** Chrysler, Minivans (1984-95); Weak rear liftgate latch pops open in moderate rear impacts at speeds less than 20 miles per hour. At least 41 people, mostly children, have been killed as of 1998 when liftgates opened in crashes, and the removable rear seats and their occupants were ejected, some still strapped into their safety belts. Chrysler resisted a recall and used Congressional pressure to head off a voluntary recall request. A voluntary service campaign for replacement of the door latches was finally carried out, after extensive publicity, though the delay in the campaign and its voluntary nature substantially reduced the number of vehicles fixed. 4,500,000 vehicles subject to voluntary recall.

8) **Takata Seat Belt Cover-Up:** Takata Corporation, Various models (1986-91); Seat belt buckles fail to latch, or latch and release automatically or release in crashes. A NHTSA investigation revealed that the buckles were made of a plastic that becomes brittle in ultraviolet light and that pieces of the buckle may detach and jam the release button mechanism. NHTSA assessed $50,000 penalties against both Honda and Takata for failing to notify the agency about the defect in a timely manner. 8,435,917 recalled.

9) **Ford Ignition Switch Fires Fiasco:** Ford Motor Co., Ford, Lincoln and Mercury vehicles, Various models (1988-93); A defect in the ignition switch causes the

vehicles to catch fire spontaneously. After three investigations by NHTSA of this defect across several models, Ford agreed to conduct a recall limited to only some of the vehicles with this defect. In March 1999, NHTSA and Ford entered into a settlement in which Ford agreed to pay a $425,000 fine for ailing to provide documents covered by information requests in the defect investigation and for failing to do the ignition switch recall earlier. 7,900,000 vehicles were subject to recall; approximately 15 million additional vehicles affected.

10) **Ford Thick Film Ignition Module Malfeasance:** Ford Motor Co., Various models (1983-95). The thick film ignition (TFI) systems installed in various Ford vehicle models and located near the engine distributor places the module at risk of heat-induced meltdown. In a ruling by the Honorable Michael Ballachey in California Superior Court, the court found that Ford had refused to fix the problem, despite the fact that "Ford has been aware, since at least 1982, that installing its TFI modules on the distributors of class vehicles made them inordinately prone to failure due to exposure to excessive heat and thermal stress." The court also found that the "TFI module failure can cause the class vehicles' engines to stall at any time, at any speed, under any circumstances, and the propensity to fail increases over time." [*See* Appendix D.]

The judge found numerous instances in Ford had deceived NHTSA and concealed crucial documents, stating:

- "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 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 the capital TFI module failure on stalling. [Citations omitted.] Ford's strategy, clearly, established by the credible evidence was: If you don't ask the right question, with what common sense tells us you want to know."
- "Ford withheld responsive information from NHTSA that it was obligated to divulge."
- "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 is safe within Ford Motor Company." [Citations omitted.] 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.,*

Petrauskas [citations omitted] (Ford's Vice President of Safety and Environmental Engineering who could not conceive of a circumstance in which stalling could create a safety risk); Transou [citations omitted] (Ford's Vice President of Car Engineering who felt that stalling on the roadway posed no safety risk)."

- "Rather Ford used tortured interpretations of common language to avoid its responsibilities to NHTSA, the Environmental Protection Agency (EPA), and the consuming public."
- "Ford improperly arrogated unto itself the task of defining terms and decided for itself what information to reveal."
- "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."
- "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. [Citations omitted.] The unexplained reduction of temperature levels was suspicious even to Ford's emission expert."
- "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."
- "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 [various statutes]."
- "The fraud of Ford in this part of the case, namely, concealment of known safety defect is actionable even if no one was actually deceived. Here, however, there was deception."
- "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."
- "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."

23 million vehicles affected.

Appendix B

U.S. Department of Transportation

News:

Office of the Assistant Secretary for Public Affairs
Washington, D.C. 20590

STATEMENT BY SECRETARY OF TRANSPORTATION FEDERICO PEÑA
INITIAL DECISION THAT A SAFETY DEFECT EXISTS IN
CERTAIN GENERAL MOTORS C/K PICKUP TRUCKS
OCTOBER 17, 1994

Today, I am announcing the Department's Initial Decision that a safety defect exists in General Motors C/K pickup trucks with fuel tanks outside the frame rails. As in any decision that involves the safety of the traveling public, we have faced many difficult issues in this case. This is a case that is virtually unprecedented, extremely complex, and highly-charged. Before going further, I want to commend the professionalism and expertise of the staff at NHTSA for their work on this matter.

BACKGROUND

Since this investigation began in December 1992, NHTSA has received and reviewed well over 100,000 pages of documents, conducted crash tests, and completed statistical and other analyses related to the alleged defect. It is that extensive investigation that has led to this decision. Today, we are distributing the Engineering Analysis Report that details the major points of this investigation. I believe that this report speaks for itself. I want to take a few minutes to discuss the major findings that served as the basis for this Initial Decision. I will then outline the process that the Department will follow over the coming weeks.

FINDINGS

First, NHTSA found that, since these GM pickups were first introduced in 1973, approximately 150 people have died as a result of side-impact fires in these trucks, in crashes that were otherwise survivable. Many others suffered serious burn injuries in such crashes.

Second, based on past trends, NHTSA projects that 32 more lives will be lost over the remaining use of the vehicles, compared to what would occur if these trucks had the same side-impact fire performance as comparable Ford pickups.

Third, NHTSA attributes this vulnerability to fatal side-impact fires to GM's design and placement of the fuel tanks outside of the frame rails of these trucks. This design was selected for marketing reasons, including a desire to increase fuel capacity and driving range, a feature GM believed appealed to certain drivers. But, because the tanks are outside of the frame rails, they do not have the protection offered by the frame rails.

Fourth, NHTSA's review of police accident reports of side-impact fatal crashes with fires in these GM trucks demonstrates that they occurred at speeds less than those required to cause side-impact fires in comparable Ford pickups.

Fifth, and of critical importance in this matter, is the evidence that GM was aware, possibly as early as the mid-1970's but certainly by the early-1980's, that this design made these trucks more vulnerable and that fatalities from side-impact fires were occurring. However, GM chose not to alter the design for 15 years.

It is also important to note that the National Traffic and Motor Vehicle Safety Act places manufacturers under two broad mandates: first, to meet applicable safety standards in producing vehicles; and second, to produce vehicles that operate safely in real-world conditions. Meeting a safety standard does not absolve a manufacturer of its responsibility to produce safe vehicles.

DECISION-MAKING PROCESS

This investigation opened in December 1992, in response to a petition submitted by the Center for Auto Safety and Public Citizen in August of that year. I first became involved in the matter in April 1993, when there was no senior appointee at NHTSA. The Safety Act assigns the responsibility for carrying out these investigations to the Secretary. In general, these responsibilities have been delegated to senior officials at NHTSA. However, due to the complexity and degree of public concern over the alleged defect, those officials brought this issue to me. At that point, I assumed the role of the decision-maker in this process, and will continue to do so. Since he joined NHTSA, Deputy Administrator Chris Hart has provided some factual analysis. But, I made the judgment call in this case. Dr. Ricardo Martinez, the new Administrator, recused himself from this matter, and has not played a role.

Under the Safety Act, manufacturers must conduct a recall campaign if their vehicles contain a defect that relates to motor vehicle safety. Consistent with the law, the analysis of whether a defect exists in this case has focused on two primary questions: first, is there an increased risk associated with the alleged defect; and, if so, is that risk unreasonable?

The investigation to date has demonstrated that the answer to both questions is yes. The record clearly shows that there is an increased risk associated with these GM pickups, and leads me to conclude at this point that that risk is unreasonable.

This initial conclusion is supported by these key factors:

- Unlike many of the investigations that NHTSA conducts, this case involves not only serious injuries, but a significant number of fatalities, in crashes that were otherwise survivable.
- There is evidence that GM was aware of the increased risk associated with this design at the time that the vehicle was introduced, but did not take steps to provide adequate

protection. In addition, despite mounting evidence of a safety risk over the intervening years, GM did not move the tanks inside the frame rails until model year 1988.

- An alternative design, similar to that used by its competitors, was available, and could have addressed the problem for little or no cost. Instead, GM management in place at that time appears to have made a decision favoring sales over safety. As Secretary of Transportation, charged with overseeing the safety of our highways and all other modes of transportation, I believe that auto manufacturers can and should do better than that, especially when safer and viable alternatives exist.

MOVING FORWARD

As required under law, the next step is for the Department to conduct a public proceeding to allow all interested parties to provide additional information and arguments on the issues raised by this investigation. This proceeding will be chaired by NHTSA Deputy Administrator Chris Hart, and will be held in Washington beginning on Tuesday, December 6. I want to ensure that this process is open and fair to everyone, and that we have as much relevant information as possible before moving on to the next decision.

I also recognize that consumers may continue to be confused over the status of these trucks. It is my intention to bring this work to a conclusion as quickly as possible after the public meeting.

I again want to note that this case has been a very difficult and complex one. There has been a great deal of discussion and various views about it in many quarters. But, based on NHTSA's technical analysis, this was my decision to make.

In closing, let me say that there is a new management team at General Motors, which was not in place at the time that these decisions were made. It's a new generation of leadership that has demonstrated its commitment to new ways of thinking and acting. I sincerely hope that they'll work with us to address this problem.

Thank you.

Appendix D

ENDORSED
FILED
ALAMEDA COUNTY

OCT 11 2000

CLERK OF THE SUPERIOR COURT
By BARBARA DELL
Deputy

CALIFORNIA SUPERIOR COURT
COUNTY OF ALAMEDA

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

[1]As 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 controlsthe 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 TFIS 2481 ("rule of thumb" is that TFI module life doubles with each 10° C in temperature); *see also* TX 4641 at TFIA 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").

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/[illegible]

Michael E. Ballachey
Judge of the Superior Court

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

[2]Ford'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.

[3]Federal 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.