

**IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN**

**In re FORD MOTOR COMPANY SPEED
CONTROL DEACTIVATION SWITCH
PRODUCTS LIABILITY LITIGATION**

**MDL DOCKET NO. 1718
JUDGE: Bernard A. Friedman
MAGISTRATE JUDGE: Steven Whalen**

**WEST AMERICA INSURANCE
COMPANY,**

CASE NO. 6-02-2894-25

Plaintiff,

vs.

FORD MOTOR COMPANY

**RESPONSE OF WEST AMERICAN INSURANCE COMPANY IN OPPOSITION TO
PLAINTIFFS' MOTION FOR ORDER ESTABLISHING A FUND FOR COMMON
BENEFIT FEES AND EXPENSES AND REQUIRING ASSESSMENTS FROM
SETTLEMENTS AND JUDGMENTS PAID BY DEFENDANTS**

Incident Plaintiff in the tag-along action of *West America Insurance Company vs. Ford Motor Company*, transferred from the District of South Carolina, Case No. 6-02-2894-25, through undersigned counsel, hereby files this Response in Opposition to the Motion, filed Friday, November 14, 2008, of the Co-Lead Counsel on the Plaintiffs Steering Committee for an order establishing an 8% assessment of any settlement monies that the Incident Plaintiffs might receive at the upcoming December 9-14, 2008 mediation and immediately beyond, and as grounds states:

The Plaintiffs' Co-Lead Counsel have taken no steps since October 2005 to bring any benefit to any party any of the tag-along actions in the form of any favorable rulings or the taking of any depositions or the production or exchange of any discovery and they have obtained no scheduling order in place to do so. The mediation process scheduled for December 9-14, 2008 is likely to clear up the docket significantly and reduce the work load of the Co-Lead Attorneys, light as it already is. However, subjecting settlements from that process to an 8% fee will likely

impede the settlement process and will create a fund from which none of the settling parties can possibly benefit given that nothing has happened to advance this case forward for three years.

Accordingly, and as set forth further the attached Brief, this Court should deny the motion at this time, without prejudice to the right of the Co-Lead Counsel to re-file after establishing that they have obtained or propounded reviewable discovery documents and have taken or have scheduled depositions from which the existing and future Incident Plaintiffs can benefit.

Respectfully submitted this 19th day of November 2008 by:

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**BRIEF OF WEST AMERICAN INSURANCE COMPANY IN OPPOSITION TO
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SETTLEMENTS AND JUDGMENTS PAID BY DEFENDANTS**

Incident Plaintiff in the tag-along action of *West America Insurance Company vs. Ford Motor Company*, through undersigned counsel, hereby files this Brief in Opposition to the Motion, filed Friday, November 14, 2008, of "Plaintiffs' Co-Lead Counsel" for an order establishing a common benefit fund:

STATEMENT OF ISSUE PRESENTED

Is it appropriate at this stage in the proceedings to subject all Incident Plaintiffs to a full 8% assessment of anticipated settlements in a case where the pleadings have not been closed, no discovery has taken place, no discovery is scheduled to take place, no scheduling order is in place, one case management conference has occurred in over two years, nearly all tag-along cases have attorneys representing the parties, no class action has been certified, no Initial Class Statement has been drafted, and indeed the Co-Lead Counsels on the Plaintiffs' Steering Committee have actually drafted a Stipulation Dismissing with Prejudice All for Dismissal with Prejudice of All Incident Plaintiff Class Certification Requests?

MOST APPROPRIATE AUTHORITY

<i>Camden I Condominium Association, Inc. v. Dunkle</i> , 946 F.2d 768 (11 th Cir. 1991)	4
<i>In re Bausch & Lomb Contact Lens Solution Products Liability Litigation</i> , 2008 WL 2330571 (D. SC)	7, 8
<i>In re Ford Motor Co. Speed Control Deactivation Switch Products Liability Litigation</i> , 398 F.Supp. 2d 1365, 1366 (Jud. Pan. Mult. Lit. 2005)	3
<i>Turner v. Murphy Oil USA, Inc.</i> , 472 F.Supp.2d 830 (E.D. LA. 2007)	4, 6
<i>Turner v. Murphy Oil USA, Inc.</i> , 422 F.Supp.2d 676 (E.D. LA 2006)	4, 6, 7
<i>Turner v. Murphy Oil USA, Inc.</i> , 2008 WL 4661806 (E.D. LA.)	4, 6, 7
<i>In re Zyprexa Products Liability Litigation</i> , 467 F.Supp.2d 256 (E.D. N.Y. 2006)	5, 7, 8
<i>In re Zyprexa Products Liability Litigation</i> , 2007 WL 2340790 (E.D. N.Y.)	5, 7
<i>State Farm Mutual Automobile Insurance Company v. Ford Motor Company</i> , 925 So.2d 1 (L.A. Ct App., 1 st Circuit, June 15, 2005)	11

I. FACTUAL BACKGROUND

West American Insurance Company was brought into this MDL proceeding nearly two years ago as a tag-along plaintiff by the Transfer Order attached hereto as Exhibit “A” issued by the Judicial Panel on Multidistrict Litigation February 7, 2007, denying Motions to Vacate Conditional Transfer Orders, though the MDL Docket does not reflect its existence in the case. The original Case Management Order of June 15, 2006 anticipated discovery on class certification – though allowed none on the underlying defect cases -- once the Plaintiffs Steering Committee (PSC) filed their Initial Class Statement on class certification and such discovery was not to last past 240 days thereafter, a period that anticipated Spring of 2007. This still has not occurred and is not on track to occur.¹

Class action certification was primary charge of the PSC after this MDL proceeding was formed. This MDL was formed October 28, 2005 by consolidation of five class action cases with similar allegations regarding Ford’s defective speed control deactivation switches (SCDS).

In re Ford Motor Co. Speed Control Deactivation Switch Products Liability Litigation, 398 F.Supp. 2d 1365, 1366 (Jud. Pan. Mult. Lit. 2005). Since then, the PSC has drafted no Initial Class Certification; to the contrary, the PSC has drafted a proposed Stipulation Dismissing with Prejudice All for Dismissal with Prejudice of All Incident Plaintiff Class Certification Requests, as reflected in Exhibit “B.”

¹ The abandonment of case activity appears to correspond to the Court’s August 24, 2007 Order that dismissed counts 1-9 of the Plaintiffs Third Amended Master Complaint.

II. LEGAL STANDARD FOR CREATING A COMMON BENEFIT FUND

A. Assessment not justified without certification of a class and creation of a body of discovery

Common benefit funds traditionally refer to the settlement or judgment fund established after years of heavy litigation that produces (1) a certified class, and (2) a financial result. *E.g.*, *Camden I Condominium Association, Inc. v. Dunkle*, 946 F.2d 768 (11th Cir. 1991) (“Attorneys in a class action in which a *common fund is created* are entitled to compensation for their services from the common fund, but the amount is subject to court approval.”) (emphasis added). While the courts allow such funds, they do so after a class has been created, after discovery is fully underway, and with caution as “[p]ecuniary self-interest of class counsel has long been cited by courts and scholars as a threat to performance of counsel’s professional and fiduciary obligations to class members.” *Turner v. Murphy Oil USA, Inc.*, 472 F.Supp.2d 830, 845 (E.D. LA. 2007) (citations omitted.) (fund established in *Turner v. Murphy Oil USA, Inc.*, 422 F.Supp.2d 676 (E.D. LA 2006)); *see also Turner v. Murphy Oil USA, Inc.*, 2008 WL 4661806 (E.D. LA.).

1. *Certification of the class*

The cases cited by Co-Lead Counsel in support of a common benefit fund all involve cases of sufficient numerosity and complexity to have been certified as class actions well before any attorney sought to impose a common benefit fund. This case has not been so certified and will not be, as all request for class action certification is on the verge of dismissal with prejudice. Exhibit “B.”

2. *Creation of body of discovery*

Virtually all cases cited in the motion establishing a common benefit fund assessment did so well after discovery was underway and other high quality and intensive work was done by the

Plaintiffs Steering Committee justifying the assessment. In *In re Zyprexa Products Liability Litigation*, 467 F.Supp.2d 256 (E.D. N.Y. 2006), in response to an objection to a request for a common benefit fund as premature, the court noted that the members of the Plaintiffs Steering Committee “have conducted a significant amount of discovery.” 467 F.Supp.2d. Indeed, the case had been litigated for a significant period and generated a body of discovery “*made available to all plaintiffs, state and federal.*” 467 F.Supp.2d at 264 (emphasis added). That case then reached a settlement agreement in November 2005 before any common benefit was sought. 467 F.Supp.2d at 262-264. Out of the settlement, the court ordered a 1% assessment of the gross settlement amount. 467 F.Supp.2d at 263. The court emphasized the “large scope and high quality of the work being performed by” the plaintiffs’ steering committee and that during discovery, “thousands of additional cases” were transferred into the MDL proceeding. 467 F.Supp.2d at 264. *See also* 467 F.Supp.2d at 265 (1% assessment on cases that settled and a 3% assessment for future settlements and noting the Plaintiffs Steering Committee “has undertaken and performed significant discovery work in connection with these cases, as well as the many cases pending in state courts: millions of pages of documents recently produced by Lilly have been reviewed, and witnesses have been deposed.”); *see also In re Zyprexa Products Liability Litigation*, 2007 WL 2340790 (E.D. N.Y.).

In *Turner v. Murphy Oil USA, Inc.*, 422 F.Supp.2d 676 (E.D. LA 2006), cited in Co-Lead counsel’s brief as an example of establishing a common benefit fund before a global settlement is reached, the class was certified and discovery fully underway before the motion to assess was filed, as is clear when reading the case in conjunction with *Turner v. Murphy Oil USA, Inc.*, 472 F.Supp.2d 830 (E.D. LA. 2007) and *Turner v. Murphy Oil USA, Inc.*, 2008 WL 4661806 (E.D. LA.).

The *Turner* court would ultimately establish a common benefit fund – after class certification and after discovery -- that the *defendant* would fund “over and above the class recovery.” *Turner*, 472 F.Supp.2d at 845. The court noted that “it is increasingly common for class action settlements to provide that such fees are to be paid separately by the defendant, that is, over and above the class’s recovery, rather than subtracted from the common benefit fund.” 472 F.Supp.2d at 844. The assessment did not apply to individuals that settled before or regardless of the class certification. *Turner*, 422 F.Supp.2d at 679 (motion was “not aimed at individuals who accept a settlement offer ‘that would have been made regardless of class certification.’”); *Turner*, 2008 WL 4661806 *2 (E.D. LA) (noting that the court “exclude[ed] from the computation the sum of \$83,264,000 paid by Murphy in its voluntary settlement program established before suit was filed and \$51,862,000 in pre-class settlement remediation costs” because “they were not product by plaintiffs’ counsel’s efforts.”).

The *Turner* case involved “approximately 3,800” victims of an oil spill arising from Hurricane Katrina, and the class was certified before anyone filed a motion to establish a common benefit fund. *Turner*, 472 F.Supp.2d at 846; *Turner*, 422 F.Supp.2d at 678; *Turner*, 2008 WL 4661806 *1-2. The class was certified January 30, 2006, after which a discovery plan was approved and discovery was taking place and cases settling. 422 F.Supp.2d at 678; *Turner*, 2008 WL 4661806 *1-2. The case was set for a Phase One trial on liability to start October 2, 2006. *Turner*, 2008 WL 4661806 *2. After discovery and settlements were underway, the Plaintiff’s Steering Committee sought a set aside on March 15, 2006. *Turner*, 422 F.Supp.2d at 678. Here, discovery is not even scheduled to take place.

b. Amount of assessment decreases with decreased complexity, numerosity, and damages

An example of an appropriate assessment is *In re Zyprexa Products Liability Litigation*, 2007 WL 2340790 (E.D. N.Y.). In that complex personal injury matter involving thousands of individual claimants, a settlement was reached and a common benefit fund sought from that settlement and from future settlements. The court ordered a 1% assessment from the existing settlement and ordered that all future personal injury cases not part of that settlement would be subject to a 3% assessment out of the plaintiff's gross recovery. *In re Zyprexa Products Liability Litigation*, 467 F.Supp.2d 256, 263-265 (E.D. N.Y. 2006). Of the 3%, one-half (1.5%) came from the plaintiff's share and one-half (1.5%) came from the attorney fee portion. The court also emphasized in its prior order that "the common benefit set-aside is a holdback, not a levy." 467 F.Supp.2d at 265.

The assessment should be lower for property-only cases, as was the case in *In re Bausch & Lomb Contact Lens Solution Products Liability Litigation*, 2008 WL 2330571 (D. SC). There, the court ordered a 6% assessment against personal injury claimants (of which 4% was to go toward attorney's fees and 2% toward expenses), and a 4% assessment as to economic-damage-only claimants. *Id.* at *1-2. The court also ordered that after the case was closed the attorneys' fees and expenses disbursed, any amount left over would be refunded to those who had contributed in proportion to the amount of the contributions. *Id.* at *4.

As discussed below, the SCDS cases at issue do not involve the typical complexity of other product liability class action suits, given that there already have been several adjudications of the defectiveness of the SCDS design and nearly every Incident Plaintiff's case in this MDL involves property damages only.

c. Assessment is refundable

An assessment is to be refunded back to those who paid into the fund where the fund is not depleted, in proportion what each payee paid. *In re Bausch & Lomb Contact Lens Solution Products Liability Litigation*, 2008 WL 2330571 *4 (D. SC) (any amount left over would be refunded to those who had contributed in proportion to the amount of the contributions); *In re Zyprexa Products Liability Litigation*, 467 F.Supp.2d at 266 (same: “[T]he common benefit set-aside is a holdback, not a levy.”).

III. ARGUMENT

No case is known to have imposed an assessment of anticipated settlements under circumstances as these. The pleadings are not even closed yet, and it is possible that the court will dismiss or summarily adjudicate all claims drafted by the PSC. No discovery has taken place. No discovery is scheduled to take place. No scheduling order is in place. One case management conference has occurred in over two years. No class action has been certified. No Initial Class Statement has been drafted. Indeed, the PSC attorneys have actually drafted a Stipulation Dismissing with Prejudice All for Dismissal with Prejudice of All Incident Plaintiff Class Certification Requests. Exhibit “B.”

Imposing the assessment before the upcoming mediation process of December 9-14, 2008 will have a chilling effect on the settlement process if Ford and the Incident Plaintiffs and their attorneys know that 8% of the payment will go a common benefit fund from which they will receive no benefit. Such assessment would unjustly reward the PSC attorneys, whose motion is uncannily timed in relation to the settlement conference.

The Incident Plaintiffs all were part of active lawsuits in which their cases were moving forward and likely to result in settlement or trial, when they were transferred to the MDL. Over

objection, the Judicial Panel on Multidistrict Litigation transferred these cases, but did so expecting “a pretrial program that: 1) allows discovery with respect to any individual issues to proceed concurrently with pretrial proceedings on common issues, … and 2) ensures that pretrial proceedings will be conducted in a streamlined manner leading to the just and expeditious resolution of all actions to the overall benefit of the parties.” Exhibit “A.” But for the transfers to and the delays in this proceeding, most of the Incident Plaintiff claims would have settled or been tried long ago. Instead, they have languished while witness memories fade, evidence (the stored cars) degrade, and storage costs amass.

The PSC has not yet provided and is not on track to provide future value to the Incident Plaintiffs. The problem of the SCDS is now well-documented and has been well-litigated in courts throughout the country, with documents and information accumulated by attorneys having no relationship to PSC attorneys. As shown in Exhibit “C,” the PSC attorneys only this month have begun trying to get Ford to provide some previously generated discovery from older cases, but apparently have none of them. Undersigned counsel – just one attorney of many who has litigated these cases -- has accumulated thousands of pages of documents on the switch problem (Bates labeled Plaintiff 0001-2500), none of it from the PSC. There already exists a depository of documents accumulated in the Texas MDL, *In re For Motor Company Speed Control Deactivation Switch Litigation*, Case No. D-1-GN-08-00901 (Texas Dist. Ct.), as shown in Exhibit “D.”

As an example of how well-documented the switch problem is, below are a list of articles and media releases that can be found on the Internet pertaining to the switch problem:

http://www.antony-anderson.com/cruise/Cruise_Deactivation_Switch.html
http://www.consumeraffairs.com/news04/2005/ford_f150_recall.html
http://www.fordf150.net/ford_news/2000-2001-ford-f150-cruise-control-recall.php
<http://khwbtv.trb.com/khwb-031805-fordrecall,0,34043.story?coll=khwb-home-1>

http://www.wxyz.com/wxyz/ys_investigations/article/0,2132,WXYZ_15949_3583105,00.html
http://www.consumeraffairs.com/news04/2005/nhtsa_ford_fires.html
http://www.usatoday.com/money/autos/2005-04-26-ford-usat_x.htm
www.wesh.com
http://www.ennislaw.com/ford_recall.html
<http://www.internetautoguide.com/auto-news/25-int/13200/>
http://www.cnn.com/2005/US/06/16/ford.vehicles/index.html?section=cnn_topstories
<http://www.ford.com/en/innovation/safety/cruiseControl.htm>
<http://www.cnn.com/2005/US/06/16/ford.vehicle.faq/>
http://www.cnn.com/2005/US/06/29/iowa.vehicle.fire/?section=cnn_topstories
<http://www.cnn.com/2005/US/06/16/ford.vehicles/:>
<http://www.fordfires.com>
<http://www.wesh.com/news/4314934/detail.html>
<http://images.ibsys.com/2005/0323/4312429.pdf>
<http://images.ibsys.com/2005/0323/4312433.pdf>
<http://www.safetyforum.com/fordfires/buf.html>
<http://www.theautochannel.com/news/2005/05/23/103307.html>
http://www.automotivedigest.com/view_art.asp?articlesID=16231
[http://www.injuryhelpline.com/index.rwl?category=news§ion=product+liability&article=gir
l+dies+due+to+a+faulty+part&id=1568](http://www.injuryhelpline.com/index.rwl?category=news§ion=product+liability&article=girl+dies+due+to+a+faulty+part&id=1568)
<http://www.bizactions.com/index.cfm/ba/e105/fa/33656921G909J556457P0P62849T0/>
<http://152.122.48.13/prepos/files/Artemis/Public/Recalls/1999/V/RCDNN-99V124-7421.pdf>
http://www.cnn.com/2005/AUTOS/09/07/ford_recall/index.html
<http://www.vehicle-injuries.com/ford-fire.htm>
http://media.ford.com/article_display.cfm?article_id=21522&make_id=trust
<http://www.ford.com/en/innovation/safety/cruiseControl.htm?referrer=home>
http://www.cnn.com/2006/AUTOS/08/03/ford_recall/index.html
<http://www.chron.com/Disp/story.mpl/ap/fn/4092048.html>
http://media.ford.com/newsroom/release_display.cfm?release=23957
http://www.wsoctv.com/automotive/13816704/detail.html?treets=char&tml=char_natlbreak&ts=T&tmi=char_natlbreak_1_03400208032007 (The August 3, 2007 recall)
http://money.cnn.com/2007/08/03/autos/ford_recall/index.htm?eref=rss_topstories
<http://www.washingtonpost.com/wp-dyn/content/article/2007/08/03/AR2007080301845.html>
<http://www.sports.autoblog.com/bloggers/frank-filipponio/>
<http://nhthqnwws111.odi.nhtsa.dot.gov/acms/docservlet/Artemis/Public/Recalls/2007/V/RCDNN-07V336-1234.PDF>
<http://www.detnews.com/apps/pbcs.dll/article?AID=/20080202/AUTO01/802020321-1/ARCHIVE>
http://www.usatoday.com/money/autos/2008-02-02-fordrecall_N.htm
<http://www.iht.com/articles/ap/2008/02/02/business/NA-FIN-COM-US-Ford-Recall.php>
<http://www.nytimes.com/2008/04/13/automobiles/13RECALL.html?r=1&ref=automobiles&oref=slogin>

The defectiveness of the switch was adjudicated as a matter of fact and law by the Louisiana Court of Appeals in *State Farm Mutual Automobile Insurance Company v. Ford Motor Company*, 925 So. 2d 1 (L.A. Ct App., 1st Circuit, June 15, 2005), which announced:

The trial court found that a defectively designed and manufactured speed control deactivation switch, utilized in the vehicle's cruise control system, had caused the vehicle fire and resultant damage. We affirm on the basis that the switch is unreasonably dangerous in design.

The court described the defective design as follows:

Kaplon [plaintiff's expert] testified that Ford had designed the electrical system in the 1992 Town Cars such that the vehicle's battery provided twelve volts of power to the speed control deactivation switch whether the ignition switch was turned "on" or "off." He explained that the Stephens' Town Car fire would not have occurred if the switch had not been energized, and that the switch could "most definitely" have been designed so that it did not remain constantly energized when not in use.

Kaplon described the speed control deactivation switch as an exemplar switch with two sides, one side being hydraulic and one side being electrical. He explained that Ford's investigation of the underhood fires revealed there was a crimping problem in the band that secured the two portions of the switch together. The design was susceptible to brake fluid leaking from the hydraulic side into the electrical side of the switch, which contaminated the electrical side of the switch and caused a corrosive ground fault and a conductive path within the switch. Kaplon explained that over a period of time, the switch generated sufficient heat to ignite the switch enclosure and the wiring harness surrounding it. Because the switch failure occurred over time, he explained that the mileage and age of the car were significant factors. Kaplon explained that the switch design was inherently dangerous due to its potential leakage problem and because it was constantly energized. He explained that the constant energization expedited the switch failure.

Kaplon further opined that a speed control deactivation switch should be designed such that it will last safely for the life of the vehicle. Alternatively, he stated that the switch should have been designed to fail in such a way that would not cause a fire. He further testified that a mechanical switch, used subsequently by Ford, presented a safer alternative. He explained that Ford's more recent design does not allow for brake fluid leakage; it is a mechanical switch activated by the brake pedal, which activates an electrical switch.

According to Hoffman [Ford's expert], prior to using the hydraulic/electrical switch, Ford had used a vacuum-actuated speed control system in its Town Cars that preceded the 1992 model line. He explained that that speed deactivation in this previous system was accomplished by opening a valve, and the system did

not involve electricity. He described it as being “very unlikely” to have caused a fire.

The record before us establishes that the constantly-energized hydraulic/electrical switch presented a risk of fire that Ford could have easily prevented. At the time Stephens’ 1992 Town Car left Ford’s control, there existed one or more safer, alternative designs for the speed control deactivation switch which were available and could have been implemented by Ford and which would have prevented the risk of fire. Hoffman, Ford’s own expert, testified that a vacuum-actuated speed control system, which had been previously implemented in earlier model Town Cars, did not present a risk of fire. The danger of the risk of fire and the serious damages that might result clearly outweighed any benefit any benefit that may have resulted from the use of the constantly energized, hydraulic/electrical switch in the vehicle’s speed control system. The evidence revealed no adverse effects that might have resulted from the use of an alternative design. Accordingly, we find that the trial court reasonably concluded that Ford should have employed an alternative design for the switch and that the switch was unreasonably dangerous in design.

On August 2, 2006, the NHTSA’s Office of Defects Investigation (ODI) issued a 29-page Engineering Analysis Closing Report under Investigation No. EA 05-005, which further detailed the problems with the switch. This can be found by doing the following:

1. Click onto <http://www-odi.nhtsa.dot.gov/cars/problems/defect/defectsearch.cfm>;
2. Enter "EA05005" in the "Quick Search" box and left-click on the "Search" button (Enter "PE04078" for the second set of documents);
3. Left-click on the "Document Search" button towards the bottom of the page; and
4. Left-click on each document link.

The sum of those findings was that the switch has the following design defects: (1) all of the contacts in the switch cavity are constantly energized; (2) many of the switches are oriented in such a way that brake fluid can drip through the hexport area into the switch cavity allowing in corrosive agents that can attack the constantly energized components in the switch; (3) the design parameters given by Ford to Texas Instruments (which designed the switch) did not include vacuum or negative pressures caused by release of the brake pedal; (4) such vacuum pressures can cause an “oil can” effect on the Kapton seal that is supposed to seal off brake fluid from entering the electrical portion of the switch cavity; (5) such oil can effect makes the Kapton seal

subject to accelerated degradation; (6) once the seal degrades and the brake fluid enters the electrical portion of the switch cavity, water-contaminated brake fluid corrodes the switch electrical contacts; (7) a brake fluid slurry fills the gap between the electrical contacts and the grounded hexport body acting as an electrolytic medium; (8) in this condition, conductive metal atoms are deposited on the negative electrode and can grow (dendrites) on the grounded base plate (cathode) towards the energized switch (anode); (9) as dendrites grow and accumulate, their electrical resistance drops and their current carrying capacity increases; (10) if the dendrites complete an electrical pathway between power and ground, increased heat and arcing can cause brass and copper beads to form in the plastic base; (11) if the plastic housing experiences high enough temperatures, ignition of the switch might result in an open flame; (12) in some instances, the combustion is confined to the switch housing, but in other cases, depending on factors like orientation of the switch and the proximity of other combustive material, flames can propagate to the area surrounding the brake switch.

On March 28, 2008, the Honorable L. Felipe Restrepo entered a Memorandum and Order explaining the nature of the SCDS in the matter of *David Giorgini and Diane Giorgini v. Ford Motor Company*, in the United States District Court for the Eastern District of Pennsylvania, Case No. 06-CV-00968, <http://www.paed.uscourts.gov/documents/opinions/08d0370p.pdf>. The order denied in part and granted in part Ford Motor Company's Motion in Limine to Exclude the Testimony of Steven C. Rowe, expert for plaintiff (Order at 25), allowing Mr. Rowe to testify the cause of the fire was at the area of the switch. In ruling on the motion, the court noted that "Ford does not dispute that the SCDS is defective in its gasoline-powered engines, nor does it dispute the mechanism by which the SCDS may cause a fire" and described the switch problem as follows:

The SCDS serves as a “backup” hydraulic pressure switch, with the purpose of disconnecting the speed control “servo valve” for the cruise control when the vehicle’s brakes are applied. If the primary disconnect switch fails, the SCDS operates to disconnect the cruise control. (See Pls.’ Mem. 3.) Briefly, the mechanism by which the SCDS may cause an engine fire is as follows:

The SCDS has two sides, a “wet” side that interfaces with the vehicle’s master brake cylinder and its hydraulic brake fluid, and a “dry” side, which interfaces with the vehicle’s cruise control electrical wiring. A multi-layer seal of a high performance polymer film, called “Kapton,” separates the wet and dry sides from one another. (See Pls.’ Ex. 4, National Highway Traffic Safety Administration (“NHTSA”) ODI Resume and Failure Report Summary, 8/02/2006, 3-4).

The failure occurs when the Kapton seal becomes fatigued and permits brake fluid to leak from the wet side to the dry side of the SCDS. Once the leak develops, water-contaminated brake fluid finds its way into the dry side and corrodes the switch’s electrical contacts. (Id. at 4.)

In gasoline engines, the SCDS constantly receives voltage from the vehicle’s battery; thus, the SCDS’s electrical contacts are constantly energized. Because of the brake fluid leak, an electrically conductive “brake fluid slurry” may develop on the dry side, causing conductive metal atoms to be deposited on the negative electrodes of the electrical contacts, which in turn may grow “dendrites.” If these dendrites grow and accumulate sufficiently, they complete an electrical pathway between the power source in the engine and the ground. In certain cases, ignition of the SCDS can result in an open flame, causing an electrical fire in the vehicle’s engine in the brake switch and surrounding area. (Id. at 5.) Because the SCDS is constantly energized, this reaction can occur even when the car is at rest with the ignition off. (See Def.’s Mot. *In Limine* 3-4).

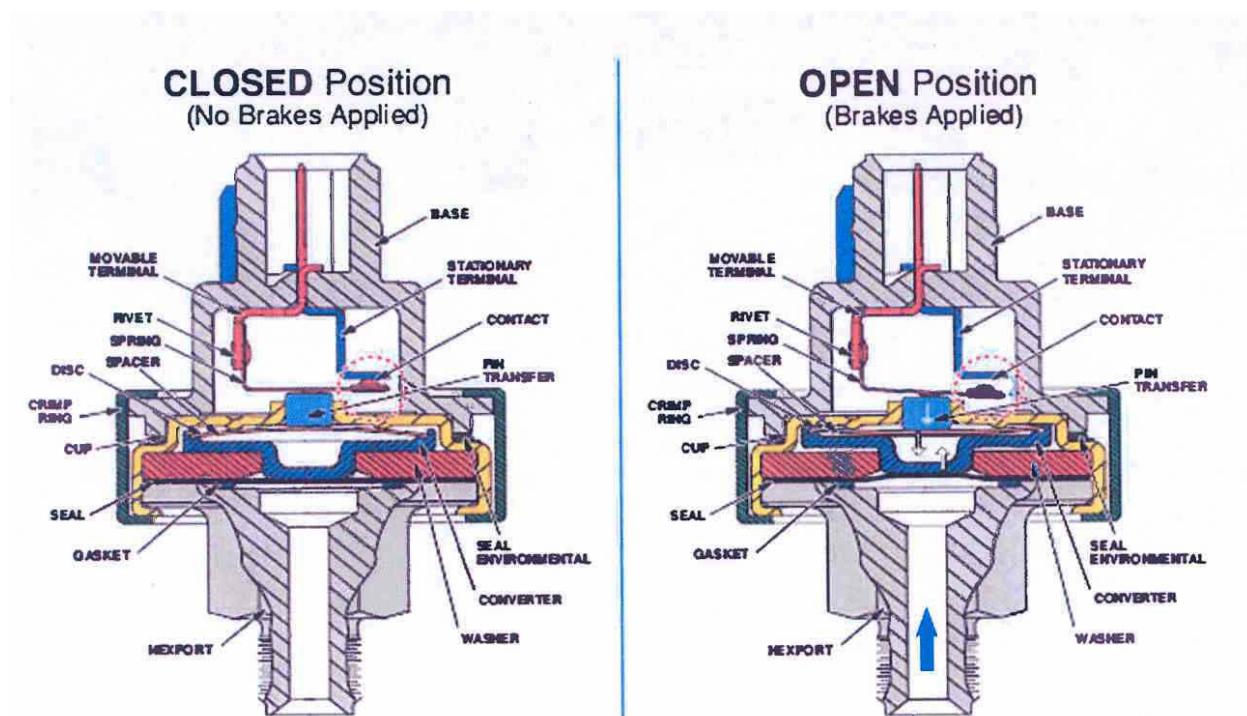
The potential for an SCDS to cause electrical fires in Ford gasoline engines *via* the aforementioned mechanism is well-known and well-documented by both Ford and the National Highway Traffic Safety Administration (NHTSA). (See, e.g., Pls’ Exs. 4-7; see also *In re Ford Motor Speed Control Deactivation Switch Products Liability Litig.*, 2007 U.S. Dist. LEXIS 62483 (E.D. Mich. August 24, 2007)). In response to complaints and after its own investigation, Ford recalled numerous models of 1992-2004 Ford vehicles in which the defective SCDS model was installed. A total of 6.7 million vehicles were recalled including the 1996 gasoline-powered counterpart model to Mr. Giorgini’s diesel-powered truck.

Ford does not dispute that the SCDS is defective in its gasoline-powered engines, nor does it dispute the mechanism by which the SCDS may cause a fire. (See Def.’s Mot. 2-4). However, Ford argues that this mechanism could not have caused the fire in Mr. Giorgini’s truck because it has a diesel engine. [bold face of words “diesel engine” in original; emphasis on no dispute that SCDS is defective added]

(emphasis added). In Ford's motion that prompted the Order, Ford explained the speed control deactivation switch at pages 2-4 of the motion as follows:

B. DESCRIPTION OF THE SCDS DESIGN

The SCDS is a redundant or back-up device designed to deactivate a vehicle's speed control when the driver brakes. The application of the brakes causes brake fluid to enter the SCDS. This portion of the SCDS is sealed from the other side of the SCDS, which contains normally-closed electrical contacts, by multi-layer, thin plastic seals made of Kapton with Teflon coating. The pressure of the brake fluid entering the SCDS acts against a converter to release a disc which otherwise acts as through a transfer pin to keep the electrical contacts closed. When the disc is released the pin "drops" and the electrical contacts open a circuit that will physically disconnect the speed control module from the engine throttle . (Dep. of Mark Hoffman at 24:24 to 25:18; see 74:16 to 77:21 attached hereto as Exhibit "A")



The SCDS was designed and manufactured by Texas Instruments. Similar designed-and-manufactured switches were installed on various makes and model year Ford vehicles. However, the incorporation and wiring of an SCDS into a diesel vehicle – like the 1996 F-250 at issue – is different. (Exh. A at 54:6-56:2). Most importantly, the SCDS in the 1996 F-250 is in a circuit which only receives

power when the ignition is in the “RUN” position – as opposed to a circuit which receives power even when the ignition is off. (Exh. A at 55:16-22).

Plaintiffs’ claims and Mr. Rowe’s opinions are based almost entirely on the fact that Ford initiated SCDS-related recalls regarding these *other, different* vehicles. [emphasis in original]. However, it is undisputed that the Giorgini vehicle – a 1996 F-250 with a diesel engine – was not the subject of any SCDS recall in large part because one of the features of the failure mode identified in the recalled vehicles is a “powered at all times” SCDS circuit which is not used in the subject vehicle. (Exh. A at 38:23-39:19).

Some additional information regarding this distinction is useful. In connection with its investigation that led to the SCDS recall, Ford learned brake fluid could leak into the side of the SCDS which contains electrical contacts. (Exh. A at 74:17 to 75:13). The brake fluid absorbs moisture, which, in combination with the fluid itself, and in the presence of the electrical current in the SCDS facilitates corrosion of metals such as copper and brass within the electrical portion of the switch. (Exh. A at 76:17 to 77:1). This corrosion increases the conductivity within the switch and can cause electrical current to flow to the base of the switch instead of flowing through the intended circuit. (Exh. A at 77:1-21). Over time and in the presence of these conditions, the SCDS can overheat, smoke and in some cases burn. Again, however, this process requires and depends on electrical power and, in the diesel F-250, this power is only present when the vehicle is in the run position. (Exh. A 82:21-84:21). Moreover, even if this process occurs in a diesel, it must happen when the engine is running and/or the truck is moving – as claimed by Mr. Giorgini – and there is no evidence that this can occur given the airflow through the engine compartment. (Exh. A 88:12-89:12).

Given the well-documented nature of the problem, the fact that many of the attorneys for the Incident Plaintiffs have this information and documentation, it would be unjust to reward the PSC attorneys with a common benefit fund that they can begin to charge against just to catch up with the universe of knowledge already in existence. If the PSC begins to amass new information and documentation not previously accumulated, the PSC would be on the path to providing a benefit to the Incident Plaintiffs. Until then, their motion is premature.

Wherefore, Incident Plaintiff respectfully requests that the motion be denied as premature, without prejudice to re-file after unchartered discovery is significantly underway. In the alternative, the motion, if granted, should require that the assessment: (1) not exceed 1%; (2) not be imposed until the pleadings are closed, a class is certified, and discovery is underway

which is placed into a searchable database or depository accessible to all parties to this action and in related state court actions; (3) be paid by Ford over and above the settlement amounts; and (4) be subject to proportional refund if any the funds remain when the case is closed.

Respectfully submitted this 19th day of November 2008:

s/ John W. Reis
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CERTIFICATE OF SERVICE

I hereby certify that on November 19, 2008, the foregoing document was electronically filed with the Clerk of the Court using the ECF system which will, in turn, serve this document electronically on Plaintiff's Co-Lead Counsel, Defendant's Lead Counsel and those other parties to this action who are part of the ECF system.

/s/ John W. Reis
John W. Reis