IN THE UNITED STATE DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In re: NAVISTAR DIESEL ENGINE PRODUCTS LIABILITY LITIGATION	))))	Case no. 11 CV 2496 MDL No. 2223

This document relates to: All Cases

OBJECTION TO PROPOSED SETTLEMENT AGREEMENT

NOW COMES Class Member Robert G. Burress ("Objector") by and though his attorney Donald K.Birner ("Attorney") and in support of his Objection states as follows:

I. Introduction

Neither this Objector, nor his Attorney, have ever filed an Objection to any proposed class settlement; the subject vehicle is one 2005 F-350 Ford Truck: Vehicle ID # 1FTWW33PO5ED15309; the Objector's address is 713 Deerfield Dr., Pekin, IL 61554; his attorney's name, address and telephone number is: Donald K. Birner 337 Court Street, Pekin, IL 61554, phone 309-347-7058; e-mail address; d.birner@comcast.net. Objector and his attorney intend to attend the hearing. [A copy of the vehicle's title is attached hereto as "Group Exhibit 1"]

The objector has received the class member notice sent by the Settlement Administrator dated November 14, 2012. The vehicle has received repairs to components related to this lawsuit, among other repairs. Copies of such invoices are attached hereto. ["Group Exhibit 2"]

II. Basis of Objection to Proposed Settlement Agreement—Ineligibility & Inadequate compensation

A. Class members eligible for the 'repair rebate' is exceedingly limited by settlement terms

(1) The six year or 135,000 miles durational limitation is unfair, arbitrary, capricious excluding most class members vehicles

The durational window for partial reimbursement of specific post warranty repairs to the EGR cooler, oil cooler, EGR valve, turbo charger or fuel injectors are limited to six years or 135,000 miles, which ever occurs first.

The six year limitation alone disqualifies class members vehicles which were manufactured in **2003, 2004, 2005, 2006** as well as **many 2007 vehicles**. Additionally, if the proposed settlement were approved by the court and effective May 22, 2013, being the date of the fairness hearing, the only vehicles that would qualify, for the most part, would be those vehicles that were manufactured since May 22, 2007 to the close of that model year, which is usually prior to October 1st .[1]

Since most class members will not receive any benefit whatsoever, the settlement represents a windfall to Ford. "Although a settlement agreement should not be viewed solely on how it affects the defendant, a settlement that provides a windfall to the defendant while providing little or no value to the class should not be approved." *Bloyed v. Gen. Motors Corp., 881 S.W.2d 422, 431 (Tex. App. 1994) aff'd, 916 S.W.2d 949 (Tex. 1996)*

Ironically, MDL lead counsel for Plaintiffs [Lead Counsel] in its Motion for Preliminary Approval states: "*Finally, Plaintiffs' counsel acknowledge the reality that many of the Class vehicles have already been in service for almost a decade and that relief is needed sooner rather*

[1]In this case October 1, 2007 or earlier when the next year's (2008) model production begins.

than later." Yet notwithstanding this realization, the harsh reality is that the settlement proposed only reaches vehicles six years old or younger and then only if they meet the mystical mileage limitation of 100,000 to 135,000 miles.

(2) The additional requirement that the same component needs to have been repaired by Ford during the original warranty period renders a repeat repair reimbursement less probable

Even if the vehicle is young enough to qualify, less that six years old — which incidentally is only one year longer than the original warranty — and is fortunate enough to have between 100,000 to 135,000 miles on its odometer, the add on qualification, that the repairs to the same component during the original warranty period is required for reimbursement renders it less likely the need for repair will occur either one year after the original warranty expires or within 135,000 miles. Additionally, many of Ford's competitor's , such as Chevrolet, warrant their repairs for one year or 12,000 miles further limiting the real world benefit of the rebate.

(3) Class members like this Objector who purchased Ford's extended warranty have little or nothing to gain by the proposed benefits

It seems reasonable to presume— especially with a vehicle possessing a diesel engine that has unenviable reputation, a high defect ratio and has been the subject of numerous lawsuits across the country— that a considerable percentage of class member vehicle owners have purchased, at considerable cost, Ford's extended warranty, which covers these vehicles from 100,000 to 200,000 miles or seven years. These members have little or nothing to gain from the proposed settlement because any repairs are already covered from a 'collateral source' that benefits Ford and has been previously prepaid by these class members.

The small minority of class members, who take it upon themselves to research several

years of records, might reap a humble $50.00 deductible up to a limit of $200.00, but even that miserly benefit is limited, because it is only effective after the second deductible is incurred 'out of pocket' by the class member.

Moreover if one seeks the deductible allowance the member cannot also seek the repair rebate. See paragraph 5. of class notice—9 ("Settlement Class Members can seek one, but not both, of these benefits.")

Finally in the event someone else owned the vehicle during the original warranty period the class member is ineligible to receive even that token deductible benefit.

B. Limited Reimbursement for Post Warranty Repairs under this Proposed Settlement Agreement Has No Relationship to the Actual Costs of the Repairs Nor Is the Repair Cost to Class Members Limited or Restrained in Any Manner

(1) The Repair rebate has no relationship to the actual cost to repair the selective components nor is it transferable or redeemable for use with competitive repairers.

Presuming the class member qualifies for the 'repair rebate', the term 'extended warranty' used by lead counsel, implies that the amount of the repair rebate, has some relationship to that actual cost of the repairs, when it bears no relationship whatsoever. This fact alone renders the proposed agreement unfair and inequitable to class members.

Lead counsel's memorandum headlines "reimbursement for repairs during 'extended warranty period'" is misleading. (*See Doc. #236, pg. 9*)

The term 'Warranty' implies that the repairs both labor and material will be paid for by Ford, yet only a fraction of that cost is borne by Ford under the settlement proposed. The overwhelming majority cost of repairs is the sole responsibility of eligible class members.

Hence, the repair reimbursement or so called extended warranty, which is not transferable to another repairer, is nothing more that a scant repair rebate — in other words the coupon game in transparent disguise.

Conceivably, if an eligible class member's vehicle required all five repairs to his vehicle within the so called extended warranty period the class member would be reimbursed the sum of $2,150.00.[2] However in comparison, a recent repair estimate from a Central Illinois Ford Dealer estimates that such repairs would cost the vehicle owner about $7,500.00. [Group Exhibit 3 attached]. It is reasonable to presume the cost would be even higher in greater metropolitan areas.

(2) Repair costs charged by Ford are unlimited and unrestrained

The plaintiff's memorandum supporting the settlement touts: "no cap to valid claims" on the amount Ford will pay. Yet there is no estimation of the overall value of the settlement or an estimate of the amounts Ford expects to pay out.

Moreover, Ford, who would monopolize the repairs associated with the rebates, has unilateral power over the amount it elects to charge class members and may easily offset the amount of the rebate by elevating its charges for these particular repairs. Also the rebate is likely to erode in value with the passage of time. Further as we have seen, the repair rebate, is available to very few class members.

C. The Proposed Settlement Fails to Estimate the Monetary Value of the Settlement Nor Does it Contain Any Provision to Ensure a Minimum Payout

There is no minimum amount set forth that defendant must pay. Settlements, such as this one, that do not establish a definite cost for which the vehicles could be effectively repaired are

[2] Oil cooler and EGR Cooler $825: EGR valve $200; Turbocharger $750 and Fuel injector $375.00 totaling $2,150.

rightfully criticized. *Bloyd at 430.* The primary touchstone of the range of reasonableness is the economic valuation of the proposed settlement. *In re Gen, Motors Pick up Truck 55 f2d 768, 788 (3d Cir. 1995)* Here there is no valuation whatsoever.

This repair rebate simply constitutes a Ford marketing bonanza designed to create more revenue through its franchised dealer's service department. Ludicrously, the settlement provides Ford with a captive repair clientele, which has voiced vociferous disdain for its 6.0 L engine. See: *In re Gen. Motors Corp. Pick up Truck Fule Tank Products laib. Litig. 55 F. 2d 768, 808 (3rd Cir. 1995)* citing *Bloyed at 431* for an analogous sales advantage with the use of certificates.

Significantly, nothing in the settlement keeps Ford from unilaterally inflating the price of these repairs rendered to its captive clientele to cover the 'repair rebate cost" especially since the rebate is not transferable to or redeemable with other vehicle repairers. Cf. *In re Montgomery County Real Estate Antitrust litig. 83 F,R.D. 305, 314 (D.md. 1979)* (recommending that coupons for reduced brokerage commission be redeemable with nondefendant brokers)

Settlements that do not indicate their value or a reasonable estimate of the amount of damages that will accrue to the class are suspect at best. *Bloyed at 431* In addition, courts are rightfully disturbed by class action settlements that contain no provision for a minimum payout. *Buchet v. ITT Consumer Fin. Corp. 845 F. Supp. 684, 696 (D. Minn. 1994) see also In re Mid-Atlantic Toyota Anti TrustLig. 546 F. Supp. 1379, 1382.*

"The district court in the *Buchet* case decided that the refusal to establish a minimum cash contribution indicated the low economic value the defendant placed on the settlement agreement as presented to the court." *Buchet 845 F.Supp. at 696. Bloyed v. Gen. Motors Corp., 881 S.W.2d 422, 431 (Tex. App. 1994) aff'd, 916 S.W.2d 949 (Tex. 1996)*

D. Non-Parties potentially liable to Class Members are released without consideration

In the case of the Objector and surely other class members who claim that third parties, such as Ford dealers misrepresented the product inducing the purchase of the vehicle on false pretenses are released by acceptance of this meager an illusory settlement, regardless of any benefit received. (See page one of class notice. "All persons who agree to accept these benefits will be barred from pursuing individual lawsuits against Ford *and others* based on the 6.0 liter engines in these vehicles.")

How is it just and reasonable that non parties to the action gain immunity, if the proposed settlement with Ford is approved, when the overwhelming majority of class members will receive nothing but yet are required to sacrifice their claims against all other unnamed potentially responsible parties.

E. The Partial Repair Rebate Is Unfair, Unreasonable and Inadequate in Comparison to the Actual Damages Suffered by Class Members

One acknowledged principle used to determine if the proposed settlement is adequate and fair is to compare the relief requested by the Complaint with the relief afforded by the pending settlement. *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Products Liab. Litig., 55 F.3d 768, 806 (3d Cir. 1995)* (Have major causes of action or types of relief sought in the complaint been omitted by the settlement?) It also gives one a sense of the range of possibilities. According to *Girsh*, courts approving settlements should determine a range of reasonable settlements in light of the best possible recovery (the eighth *Girsh* factor) *Girsh v. Jepson, 521 F.2d 153 at 157.*

The massively redacted Master Complaint (Doc. # 58) requests the following relief:

a. Out of pocket damages for expenditures related to the cost to repair/service the

engines;

b. Deductibles paid when repairs were covered by warranty;

c. Towing charges incurred form having incapacitated vehicles towed in for repair;

d. Lost profits

e. Cost to overhaul and/or replace the engine in all vehicles equipped with 6.0L engines;

f. Diminution in value of vehicles attributable to the defect;

g. Decreased value received for vehicles, as a result of the defect, when trading in or selling the vehicle;

h. Increased equipment expense caused by need to purchase additional vehicle to keep in reserve;

i. Increased salary expenses caused by the need to hire additional mechanics to deal with the repeated problems with th 6.0L Engine; and

j. Increased expenses caused by the need to keep additional tools and parts on hand to deal with repeated problems with the 6.0L Engine.

It is apparent that the proposed settlement partially addresses subparagraphs a. and b. above and only in a very restricted and partial manner as discussed previously in the Objection.

The proposed settlement wholly fails to address the diminution in vehicle value or for that matter the retrofit of a permanent solution to the root cause of the defects.

F. The Class Definition Used in the Complaint Does Not Coincide with the Class Definition Used in the Proposed Settlement

Plaintiff's MDL lead counsel owes all class members a fiduciary duty once the class

complaint is filed. *Greenfield v. Villager Industries, Inc., 483 F2d 824, 832 (3rd Cir 1973)* The adequacy of representation embodied in Rule 23 (a) (4) "is to be strictly applied to ensure that the interests of the absent class members are well protected. Helfand v. Cenco Inc. 80 F.R.D. 1, 6-7 (N.D. Ill 1977) " *Issen v. GSC Enterprises, Inc. 508 f. Supp. 1278, 1296 (N.D. Ill. 1981)*

Essentially this class action was brought to afford relief to owners of Ford vehicles model years 2003-2007 equipped with a 6.0 Liter power stroke diesel engine with the condition that one or more repairs were made to the components alleged during the original warranty period. Doc. #226, page 8, III A.

Yet, class membership that would actually receive a repair rebate is limited to those vehicles six years or younger and with only 100,000 to 135,000 miles, which sacrifices most original class member claims and pervasively restricts class membership participation in the proposed settlement.

III. The Risks Attendant to Litigation Such as Liability, Damages Are Fairly Minimal Based upon Unqualified Material Admissions by Ford on the Record

A. Massive redaction of the Master Complaint as well as the Master Answer creates a significant barrier to a risk assessment and hides discovery of the truth by class members

Unfortunately, class members such as this Objector, who does not have, at this time, access to the un-redacted sealed Master Complaint or Answer, is placed at a great disadvantage in assessing the relative strength of the action against Ford. Notwithstanding this barrier, it is evident that Ford's Answer to the Complaint alone reflects the parties are at legal issue in this matter and that the Complaint states a legal claim or claims for trial purposes. [3]

Notwithstanding the voluminous redaction of the Complaint and Answer, several material

[3]Ford has filed a motion for summary judgment but quite frankly it is difficult to conceive there are no genuine issue of facts present in this case.

facts and reasonable inferences are to be gleaned from the face of the Complaint and Ford's Answer to such allegations, along with Ford's representations contained in sworn affidavits and legal memoranda in its lawsuit against Navistar in Michigan court.

See "Exhibit 4" page 3-5 of the First Amended Complaint and page 21 of the Master Answer in this matter 1:11-CV-02496 Doc. #15 & 100 respectively for the myriad negative statements by Ford related to the 6.0 l Navistar diesel engine, which documents are incorporated by reference, illustrating the profundity of the defects in this engine and Ford's appreciation of their enormity as well as the costs associated with these defects.

B. Ford's Redacted Answer and affidavits contain material and damaging admissions that lend great strength to plaintiffs' action

In *Girsh* and other cases one guideline used to determine if the settlement is fair and reasonable are the attendant risks of litigation both in terms of liability, damages and maintaining the class. *Girsh at 157* .

Ford either admits or in some instances claims no knowledge of material facts by its answer which tend to establish both Ford's liability and damages to the class.

Ford sued Navistar, the manufacturer of the Engine, stating among other things that it experienced unprecedented repair rates with its 6.0 L engines and that although the 6.0L engine accounted for only 10% of Ford's total engine volume it accounted for approximately 80% of all Ford's warranty spending on engines and Ford's lawsuit stated that Navistar owed Ford $400 million as a result. Ford admits it spent over 84 million dollars in reacquiring vehicles attributable to issues with the 6.0L engine. See Document #100 filed 10/07/11 Page 21 Page ID # 1063 for more detail.

Ford admits, by way of answer, that when fuel injectors were tested under real world cold

start conditions that 86% were found to have problems. [See same document and page as above.]

Ford admits during such difficulties with the engine it boasted in advertisements that it was "Best in Class", Longest- Lasting Diesel Engine. See Doc. #100 page 24 ID 1066 for more detail. (Note pages 25-39 of the Ford's answer Doc. 100 are almost entirely redacted.)

Significantly, plaintiffs claim in paragraph 79 of the Master Complaint that: *an Arizona Company Developed a True Root Cause Solution: Redesigned EGR and Oil Coolers***.**

Such a claim is naturally quite damaging to Ford, a claim Ford would be in a position to and expected to forcibly deny, as well as recent articles in several respected magazines all extensively quoted in paragraph 79 that markedly criticizes the EGR cooler failure as well as fuel injection issues and other repetitive failures. Yet Ford fails to explicitly deny any of these harsh criticisms and root cause solutions to the problems with the 6.0L engine. [See said paragraph 79 for more detail.]

Ford's unconvincing response to these claims, was that it was without information to form a belief as the truth of such statements, even though these articles and claims gravely criticize its product, which Ford would be expected to rebut, if it could.

C. Plaintiff counsel claims the class satisfies class action certification and that Plaintiffs can succeed on the merits if necessary

Lead Counsel in this litigation states that they "are confident they could succeed on the merits in this litigation."

As far the Class certification is concerned, Lead counsel states the class satisfies numerosity, commonality, typicality, adequacy, and predominance requirements. Doc. 236, page 18-21.

IV. Attorney's Fees Are Excessive When Compared to the Result.

A. Settlement consideration is grossly inadequate and benefits an extremely small proportion of class members

The contention by Lead Counsel, that the settlement consideration is adequate is seriously flawed. Lead counsel's Memorandum includes appropriate boiler plate language but lacks any analysis of the benefits conferred to members or the scope of the members benefitted.

B. Due the lack of any significant class benefit 12.8 million in attorney's fees is absurd.

Lead counsel does not use any of the conventional methods to calculate such immense fees. Lead counsel admits the fee request exceeds the lodestar method. Counsel does not mention the percentage of recovery method probably because the value of the settlement is not stated, probably unknown and cannot be coupled to the fee or at least to do so is not in counsel's pecuniary interest to do so. *Vincent v. Huges Air West 557 F2d 759 (9th Cir 1977)* See also *General Motors, 55 F3D 768 AT 819.*

The pretentious claim on the part of counsel— that the amount of attorneys fees and service awards do not impact the settlement— is nonsensical because the Defendant is only interested in the overall amount it needs to pay to resolve the matter. Attorney fees and potential class benefits come from one source—Ford. See: ***In re Gen motors corp. Pick up Truck at 55 F2d at 821.***[4]

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[4] The district court did not accommodate practical realities here when, rationalizing its initial refusal to review the fee, it stated that the fee award was "*to be paid by General Motors Corporation and will in no way reduce the recovery to any of the settlement class members."* Indeed, this court has recognized that "*a defendant is interested only in disposing *820 of the total claim asserted against it; ... the allocation between the class payment and the attorneys' fees is of little or no interest to the defense."* *Prandini v. National Tea Co.*, 557 F.2d 1015, 1020 (3d Cir.1977); 2 Newberg & Conte 11.09 (purpose of judicial review is to police abuses even where defendant pays plaintiff's fees). In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Products Liab. Litig., 55 F.3d 768, 819-20 (3d Cir. 1995)

V. The Proposed Settlement Does Not Fall Within the Range of Reasonableness and Should Be Disapproved by the Court in its Sound Discretion

The settlement does not fall within the range of reasonableness because the repair rebate is minimal and potentially impacts a small minority of vehicle owners and for all the other reasons set forth above.

VI. Opting out is not a realistic alternative in cases of this type.

Objector should mention that the fairness of any settlement is crucial to class members because opting out is not a reasonable or realistic alternative. Class members' individual damages are insufficiently large to warrant individual litigation, particularly against a well funded opponent with unlimited resources, but a class action offers those with relatively small claims the opportunity for meaningful redress. *In re High-Tech Employee Antitrust Litig. 11-CV-02509 LHK, 2013 WL 1352016 (N.D. Cal. Apr.5, 2013*

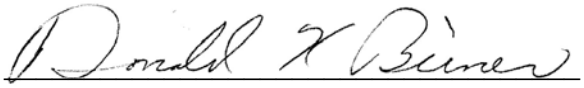
WHEREFORE, the Objector request the following relief:

1. That the settlement be disapproved by the Court; and

2. That Objector be allowed to testify at the fairness hearing in support of his written Objection.

Dated April 23, 2013

ROBERT G. BURRESS, Objector



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