UNITED STATES DISTRICT COURT
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

FORD MOTOR COMPANY'S INITIAL MEMORANDUM IN RESPONSE TO OBJECTIONS TO PROPOSED SETTLEMENT

Ford Motor Company ("Ford" or "Defendant") respectfully submits this memorandum pursuant to the Court's Order (Dkt. No. 258) directing each side to submit a separate response to any and all objections to the proposed settlement before the May 9, 2013 telephonic status conference.

Having sent over 1.1 million class notices to current and former owners and lessees of approximately 650,000 class vehicles, Ford is aware of approximately 150 communications from purported settlement class members (or less than 0.02% of class members) commenting on the proposed settlement. The vast majority of these communications are letters to counsel for the parties not filed with the court. Over 70 percent express support for the proposed settlement. As an example, one putative class member wrote: "[i]f I never see a dollar of reimbursement out of this, I'll take comfort in knowing someone will." (Letter from Larry Hamm, to Caddell &

Chapman (Mar. 3, 2013)). Only nine purported objections were filed with the Court,[1] which implicitly suggests an overwhelming "silent majority" in favor of the proposed settlement. *See In re AT&T Mobility Wireless Data Servs. Sales Tax Litig.*, 789 F. Supp. 2d 935, 965 (N.D. Ill. 2011) ("[The millions of] Class Members have filed only 10 objections with specific arguments. Such a remarkably low level of opposition supports the settlement."). Of the attempted objections, only one (Robert G. Burress (Dkt. No. 259) satisfies the criteria for a valid objection as set forth in the Court's Preliminary Approval Order.[2] (Preliminary Approval Order ¶ 17 (Nov. 14, 2012) (Dkt. No. 242) (specifying that objections must be filed with the Court no later than April 24, 2013, signed by the class member and any attorney, and contain certain information,

[1] Three additional purported class members filed documents with the Court that do not appear to be objections: **Coy Adkerson** (Dkt. No. 250) submitted a copy of the class notice and appended copies of several invoices; **Glenn and Rhonda May** (Dkt. No. 262) forwarded a letter they had previously sent to Ford, but do not say whether they support or oppose the settlement; and **Jerome and Connie Walker** (Dkt. No. 263) submitted a letter saying they "were very happy to receive" the Class Notice, and "ask the court to really consider finding in favor of this Class action lawsuit." One other purported class member (**Craig Cooley**) filed a purported objection (Dkt. No. 246), but Ford understands from plaintiffs' counsel that he subsequently withdrew it.

[2] The other eight are missing at least one of the elements required to be deemed a valid objection. Four cannot constitute a valid objection because the purported objector lacks standing. *See* **Michael Ackerman** (Dkt. No. 243) (lacks standing because he requests exclusion from the settlement class; fails to include proof of ownership, a statement regarding prior objections, or a statement regarding intent to appear at fairness hearing); **Coy Adkerson** (Dkt. No. 250) (lacks standing because the Vehicle Identification Number ("VIN") is not a class vehicle; fails to include a signature, written statement of grounds for objection, list of prior objections, or statement regarding intent to attend hearing); **David Stevens** (Dkt. No. 266) (lacks standing because VINS not included in class; fails to include proof of ownership, telephone number, statement of grounds for objection, copies of documents upon which the communication is based, and statement regarding intent to attend hearing); **Mark and Rhoda Lewis** (Dkt. No. 268) (lacks standing because VIN not included in class and filing was untimely; fails to include a signature and statement regarding prior objections). The remaining four are deficient for a variety of reasons. *See* **Harrison E. Lash** (Dkt. No. 251) (no VIN, model or model year, telephone number proof of ownership, written statement of grounds for objection, listing of prior objections, statement regarding intent to attend hearing, and signature); **Rory Lehrer** (Dkt. No. 255) (no statement regarding prior objections); **Michael A. Neill** (Dkt. No. 261) (no statement regarding prior objections by objector or counsel); **Anthony Wess** (Dkt. No. 267) (no statement regarding prior objections); and **Michael Simons** (Dkt. No. 269) (no statement of grounds for objection, telephone number, statement regarding prior objections, statement of intent to attend hearing, and signature).

and stating that any class member who fails to follow these requirements "shall be foreclosed from seeking any adjudication or review of the settlement by appeal or otherwise").)

The purported objections filed by the other commenters fail to provide information that the Court rightly required be provided in order to determine whether (1) they are class members, (2) their objections are heartfelt (as opposed to contrived in order to support the objectives of professional objector lawyers), and (3) are legitimate (in the sense that they have viable claims that would not be compensated by the proposed settlement). Having failed to comply with the Court's Order regarding the content of objections, these remaining commenters lack the right to object to the proposed settlement, appear at the May 22, 2013 fairness hearing, or delay the prompt implementation of the settlement (if approved by this Court) by filing a notice of appeal. *See, e.g., Turner v. Murphy Oil USA, Inc.*, 472 F. Supp. 2d 830, 855 (E.D. La. 2007) (objector who failed to provide proof of ownership of property subject to class action settlement, as required in settlement notice, "lacks standing to file an objection"); *In re Union Carbide Corp. Consumer Prods. Business Secs. Litig.*, 718 F. Supp. 1099, 1108 (S.D.N.Y. 1989) (objector who is not class member "lacks standing to assert his objection").

Notwithstanding the paucity of properly filed objections, Ford here summarizes the criticisms made of the proposed settlement in all communications (whether properly or improperly submitted to the Court or sent to the parties), and its responses thereto. Ford addresses these criticisms mindful of the broader criteria by which this Court will determine whether to approve the proposed settlement. *See Synfuel Techs., Inc. v. DHL Express, Inc.*, 463 F.3d 646, 653 (7th Cir. 2006).

The small handful of settlement critics collectively advance three general arguments about the proposed settlement: (1) some class members receive no benefits from it; (2) its

benefits should be more generous; and (3) the release given to Ford in exchange for the settlement benefits is too broad. The following three sections elaborate upon these criticisms and state Ford's responses. A fourth section identifies and responds to miscellaneous additional criticisms that have been levied against the proposed settlement.

A. "Some Class Members Receive No Benefit."

Several commenters argue that the proposed settlement is unfair because some settlement class members will receive no benefit from it. One commenter, who clearly does not understand the settlement, argues that ***almost no*** settlement class members will benefit because the six-year-from-initial-purchase extended warranty provided by the settlement expires as to 2007 model year vehicles in 2013.

In reality, every settlement class member will receive a benefit from the settlement. The settlement class consists of current and former owners/lessees of 2003-2007 Ford vehicles equipped with 6.0-liter PowerStroke diesel engines that received a repair to a fuel injector, EGR valve, EGR cooler, oil cooler, or turbocharger under Ford's 5-year/100,000-mile engine warranty. The proposed settlement gives every class member an extended warranty to 6 years/135,000 miles on any such component that malfunctioned under warranty. As explained in the declaration of Ford's expert, Paul Taylor, over **240,000** class vehicles received an oil cooler or EGR cooler repair under warranty, meaning the proposed settlement provides an extra 1 year/35,000 miles of warranty coverage on those components in those vehicles. *See* Decl. of Paul M. Taylor, Ph.D, P.E., ("Taylor Decl."), Ex. 3 to Pls.' Mot. for Attorneys' Fees, Expenses, and Service Awards, Table 1, April 9, 2013 (Dkt. No. 256-8). Likewise, the proposed settlement gives over **310,000** class vehicles an extended warranty on fuel injectors, over **410,000** vehicles an extended warranty on EGR valves, and over **300,000** vehicles an extended warranty on the turbocharger. (These component-specific vehicle totals are about double the

approximately 650,000 class vehicles because, on average, these vehicles experienced warranty repairs to two or more components covered by the settlement.)

By definition, the proposed settlement provides every class member with an enhanced legal right from Ford—the right to a partially subsidized repair to an engine component that previously malfunctioned if it fails again during the 1 year or 35,000 miles beyond the warranty coverage period that came with their vehicle. This enhanced legal right provides a tangible benefit to all class members responsive to the central allegation in this case—that Ford's repairs to or replacements of key engine components that malfunctioned during the 5-year/100,000-mile warranty period were ineffective, meaning that vehicle owners were vulnerable to repeat malfunctions of those same components shortly after their warranty coverage expired.

Some commenters note that many settlement class members will not receive money from this aspect of the settlement because their vehicles did not experience a repeat malfunction of these previously repaired engine components during the extended 1-year/35,000-mile warranty period offered by the settlement. (The parties do not know how many settlement class members experienced repeat post-warranty repairs of previously malfunctioning engine components because post-warranty repairs, many of which are not performed at Ford dealerships, typically are not reported to Ford.) But this does not mean the settlement is unfair. It instead means that such class members lack a meritorious claim under plaintiffs' theory of relief. Where a settlement offers enhanced legal entitlements responsive to plaintiffs' litigation allegations, it cannot be labeled unfair because some class members lack entitlement to cash payments under the terms of those enhanced legal rights. *See Vaughn v. Am. Honda Motor Co.*, 627 F. Supp. 2d 738 (E.D. Tex. 2007) (approving class settlement centered on extension of warranty benefits which may or may not result in cash payments to particular class members). Stated differently, a

proposed class settlement is not unfair because it does not make windfall payments to class members who have no legally meritorious claim. *Dewey v. Volkswagen of Am.*, --- F. Supp. 2d, No. 07-2249, 07-2361, 2012 WL 6586511, *10 (D.N.J. Dec. 14, 2012) ("Allowing compensation for those who actually incur an expense is a reasonable remedy, but permitting those who expended no funds to obtain money would be tantamount to an impermissible windfall. The requirement that cash payments be limited to those who expended money on repairs is therefore reasonable and the objection to this limitation does not render the settlement unfair or unreasonable.")

The proposed settlement in this case offers an alternative benefit to many of those class members who do not qualify for cash payments under the partial reimbursement of extended warranty repairs provision of the settlement. In response to plaintiffs' litigation argument that 6.0-liter PowerStroke engines were "bad engines" that required more than their fair share of repairs under Ford's 5-year/100,000-mile engine warranty (which required owners to pay $100 deductibles for each engine warranty repair after expiration of the 3-year/36,000-mile basic warranty), the proposed settlement offers to reimburse half of the $100 deductible payments class members made to Ford dealers in connection with their second, third, fourth, and fifth engine repairs under Ford's engine warranty. This is an alternative benefit available to those class members who did not experience a post-warranty malfunction of an engine component that previously had malfunctioned under warranty. Approximately **250,000** (or almost **40%**) of the class vehicles received two or more engine warranty repairs susceptible to the $100 deductible, meaning that a substantial number of class members are eligible to submit claims for this benefit, even if they are not eligible to recover under the extended warranty benefit.

In sum, while it is impossible to know today how many settlement class members ultimately will receive cash payments from the proposed settlement, it is clear that all class members will receive a benefit from the settlement in the form of enhanced legal rights to obtain monetary compensation from Ford, and many of those class members will receive the ability to obtain cash payments under the terms of the proposed settlement. The class members who can exercise those rights to obtain cash payments under the settlement will be the same people who would have a potential entitlement to such recovery under plaintiffs' litigation theory, were plaintiffs to prevail. Such claimants will receive, on average, 50% of the amount they would have recovered had plaintiffs' proposed class action been certified, survived all pre-trial challenges, succeeded at trial, and survived post-trial appeals. Further, they will have the certainty of receiving those amounts (without deductions for contingency-based attorneys' fees) this year or next, rather than waiting many more years to see if any recovery occurs.

B. "The Benefits Are Too Small."

Several commenters complain about the boundaries the parties negotiated to Ford's enhanced legal obligations to class members under the proposed settlement. Some argue that the additional one year and 35,000 miles of warranty coverage to which Ford agreed for previously repaired engine components should be longer or, indeed, unlimited. Others argue that the extended warranty should be applied to all engine components, including those that never previously malfunctioned. Still others quarrel with the capped dollar amounts Ford agreed to reimburse for repairs to certain engine components during the extended warranty period. Several have the mistaken belief that the proposed $150,000 service award to the named plaintiffs reflects the total amount Ford will pay to the settlement class. None of these objections is well founded. *See Schulte v. Fifth Third Bank*, 805 F. Supp. 2d 560, 595 (N.D. Ill. 2011) (an

objection simply arguing "that the amount awarded to Class Members should be increased… is tantamount to complaining that the settlement should be better, which is not a valid objection").

These commenters fail to acknowledge that class action settlements are the product of compromise. As Ford will discuss in its forthcoming fairness brief, plaintiffs faced substantial hurdles to obtaining any monetary recovery at all in this litigation. Indeed, they had a very high chance of recovering nothing for the putative class members and, instead obtaining a court order holding that they had no legally viable claims against Ford under their warranties.

Ford's pending summary judgment motions against the named plaintiffs' individual claims pose a serious challenge to legal theories underlying plaintiffs' master complaint, which in Ford's view are barred by the express terms of the written warranties to which vehicle purchasers agreed when they bought their Ford vehicles. *See Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 525 (1992) ("A manufacturer's liability for breach of an express warranty derives from, and is measured by, the terms of that warranty.").

Even if the claims of some or all named plaintiffs survived those motions, they would thereafter face serious impediments to obtaining class certification given the myriad plaintiff- and vehicle-specific issues of fact and law they present. *See Cox House Moving, Inc. v. Ford Motor Co.*, No. 7:06-1218-HMH, 2006 WL 3230757, at *3 (D.S.C. Nov. 6, 2006) (denying class certification in litigation based on a similar theory regarding the 6.0L diesel engine). In the unlikely event that the action both survived the summary judgment motions and was certified for class treatment, Ford would have presented compelling evidence at trial that (1) Ford addressed in relatively short order the design and manufacturing problems experienced by early-production 6.0-liter PowerStroke diesel engines, and (2) most problems experienced by owners of vehicles with these engines occurred due to inadequate maintenance, owner abuse, or illegitimate

modifications to the engines that invalidated the warranty. Accordingly, the putative class would either suffer an adverse classwide judgment or, at best, be afforded an opportunity to submit individualized claims against Ford akin to those that are today asserted by Lemon Law lawyers based on vehicle-specific facts.

Recognizing the significant possibility that plaintiffs may have recovered nothing through this litigation, and the certainty that even if successful, putative class members would not have recovered any money for many years, the compromise terms reflected in the proposed settlement cannot be deemed inadequate simply because uninformed commenters advance the unrealistic view that plaintiffs' counsel could and should have forced Ford to pay even more money to settle their legally and factually challenged claims. *See, e.g.*, *Henry v. Sears Roebuck & Co.*, No. 98-CV-4110, 1999 WL 33496080, at *6 (N.D. Ill. Jul. 23, 1999) (rejecting objections that the amount of consideration was inadequate where objectors argued that "they should receive 100% of their damages" because "those objections ignore the reality of the negotiation process"); *Isby v. Bayh*, 75 F. 3d 1191, 1200 (7th Cir. 1996) (the "essence of settlement is compromise," and so a settlement "will not be rejected solely because it does not provide a complete victory to the plaintiffs") (internal quotation marks and citations omitted).

Accordingly, there is no basis to credit those who criticize the settlement for "only" extending class members' warranty coverage by one year and 35,000 miles beyond Ford's previous 5-year/100,000-mile engine warranty. The notion underlying their criticisms—that Ford should have agreed to provide free repairs to vehicle engines for an unlimited number of years and miles—is absurd. Ford's 5-year/100,000-mile engine warranty already was an industry-leading warranty. Engines (particularly diesel engines, which require special maintenance) can and will malfunction. No manufacturer has any legal obligation (unless it

voluntarily assumes it by issuing a warranty) to provide free post-sale repairs to such engines at all, much less for eternity. No vehicle manufacturer would agree to an unlimited warranty for hundreds of thousands of vehicles, sight-unseen, in order to settle a proposed class action lawsuit.

Some commenters contend that the monetary capped amounts Ford has agreed to pay for the repair of certain components during the extended warranty period represent only a small fraction of the amounts they actually paid to obtain repairs to those components. In fact, the capped amounts for such repair costs to which Ford agreed (ranging from $200 to $1,250) are 50% of the average cost (both parts and labor) of a repair to or replacement of the designated components.[3] *See* Taylor Decl., ¶ 9. Class members whose vehicles experienced repeat malfunctions during the extended warranty coverage period to several of these components can submit claims for all such repairs (*e.g.*, up to $825 for replacement of both an oil cooler and EGR cooler ***and*** up to $200 for replacement of an EGR valve ***and*** up to $1,250 for replacement of 8 injectors ***and*** up to $750 for replacement of a turbocharger). These are substantial dollar amounts to pay to qualifying claimants in a one-million member class action settlement. By definition, reimbursing 50% of a class member's costs of repairing a component after Ford's engine warranty expires (especially given the sums involved) constitutes a fair compromise of plaintiffs' claims which at most could have recovered 100% of these amounts.

Finally, one commenter criticizes the proposed settlement for providing extended warranty coverage only to the five components that were the focus of plaintiffs' lawsuit, arguing that the settlement should provide extended warranty coverage for all engine components. The theory of plaintiffs' case was that the 6.0-liter PowerStroke engine contained components—the

fuel injectors, the EGR valve, the EGR cooler, the oil cooler, and the turbocharger—that Ford dealers repeatedly were unable to adequately repair, and which often necessitated repeated repairs to the same component. In response to these allegations, the proposed settlement class was limited to vehicles that received a repair or replacement to one of those five components during its 5-year/100,000-mile warranty. For any of these components that required a repair during warranty, the proposed settlement offers extended warranty coverage designed to provide reimbursement for repeat repairs to the same component. Given that the five components eligible for extended warranty coverage are directly tied to plaintiffs' theory of the case, this is a fair and understandable way to compromise plaintiffs' claims.

C. "The Release Is Too Broad."

Two commenters criticize the settlement's release on the grounds that it releases claims of class members who may receive no monetary payment, it is not limited to breach of warranty claims, and it releases claims against non-parties.

The release to which the negotiating parties agreed (Settlement Agreement, sections I.O and P) releases Ford and its employees, directors, agents, dealers, etc. from claims under any theory based upon the 6.0-liter PowerStroke engine. It does not release claims based on other aspects of the vehicle. For example, it would not prevent a class member from suing Ford for personal injuries based on the vehicle's crashworthiness. It does not limit the rights of the owners of the approximately 350,000 6.0-liter PowerStroke-equipped engines that never experienced a warranty repair to the oil cooler, EGR cooler, EGR valve, fuel injectors or turbocharger—those vehicles are not part of the settlement class. And it does not terminate

[3] The reimbursement for the second through fifth deductibles paid during the warranty period likewise reimburses half the amount class members paid.

pending individual lawsuits involving vehicles with this engine—persons who filed such lawsuits before November 1, 2012 are automatically excluded from the settlement class.

So crafted, the proposed release is appropriately tailored to achieve its legitimate objective of obtaining litigation closure regarding claims by class members based upon their 6.0-liter PowerStroke engines. A more limited release that allowed class members to accept the settlement's benefits and then file new lawsuits invoking slightly different legal or engine defect theories would not provide Ford with the litigation peace to which it is entitled in exchange for the substantial costs it will spend under this settlement. *See Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 106 (2d Cir. 2005) (recognizing "[b]road class action settlements are common, since defendants and their cohorts would otherwise face nearly limitless liability from related lawsuits in jurisdictions throughout the country"); *Mangone v. First USA Bank*, 206 F.R.D. 222, 231 (S.D. Ill. 2001) ("There is nothing unusual or unfair about Defendants' interest in finality and their desire to be released from Class Member's claims").

In any event, settlement class members who believe the scope of release outstrips the value of their claims and think they can recover more through individual claims or lawsuits are free to exclude themselves from the proposed settlement. Indeed, while purported requests for exclusion are still being reviewed for completeness and accuracy, it appears that at least 1,300 individuals or entities have excluded themselves from the settlement class with respect to claims collectively addressing about 3,500 vehicles.[4] While this constitutes less than 0.2% of the proposed settlement class, the fact that over a thousand class members opted out of the

[4] Ford does not mean to suggest that the right to opt out is an all-purpose balm that can cure any deficiency in any settlement. It is, however, an important element when class members point to inherently individualized reasons why the settlement, while valuable to many, is not sufficiently valuable to them to justify releasing their individual claims.

settlement illustrates that those who believe they can recover more money through individual litigation were able to implement their right to do so.

D. Miscellaneous Criticisms.

One putative objector criticizes the proposed settlement for providing few if any benefits to class members who bought post-warranty service plans. Ford suspects that few class members have service plans that go beyond the 5 year/100,000 engine warranty coverage. Further, such service plans often provide post-warranty coverage for less than one year or 35,000 miles, have more restricted terms, and require co-payments or large deductibles. Hence, a settlement class member with such a plan may still, depending on his or her individual situation, recover reimbursement for extended warranty repairs. In any event, class members are free to evaluate whether either the various settlement benefits are of value to them and, if not, exclude themselves from the class.

One putative objector asserts that Ford could "easily offset the amount of the rebate by elevating its charges for these particular repairs." Even indulging the speculative nature of this concern, virtually all claimants will seek partial refunds for engine repairs that occurred before the settlement was announced, so there is no opportunity for dealers to inflate their charges. Moreover, nothing in the settlement requires repairs to occur at Ford dealers.

Several commenters note that the proposed settlement benefits do not track each damage theory pled in the master complaint (*e.g.*, diminution in value, time out of service, towing charges, etc.) These damage theories were not likely to succeed and there is no requirement that a settlement's negotiated, compromise benefits precisely match every demand plaintiffs asserted in their complaint.

One commenter advances the generic objectors' argument that plaintiffs' litigation case was exceptionally strong, and so any compromise resolution is unfair to the class. As explained

above, and as will be explained in more detail in Ford's fairness brief, plaintiffs faced enormous obstacles to any recovery, which in any event would not have occurred until after still more years of litigation.

Several commenters question the amount of attorneys' fees and expenses and the service award sought by plaintiffs. Ford has agreed not to dispute or oppose plaintiffs' petition, and further notes that the Court will ultimately set these amounts.

One commenter states that the litigation should have been brought against the manufacturer of the 6.0L engine (Navistar) instead of Ford. Navistar was a defendant early on, but plaintiffs decided voluntarily to dismiss it from the litigation. This settlement releases no claims against Navistar, and so the commenter's observation is irrelevant.

Conclusion

The proposed settlement of this litigation plainly is fair to the parties and deserving of approval. The exceedingly small number of purported objections to the settlement are *pro forma* and substantively baseless. Ford looks forward to discussing the fairness of the proposed settlement in more detail in the coming weeks.

Dated: May 8, 2013

Respectfully submitted,

/s/ Brian C. Anderson

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CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that a true and correct copy of the foregoing document was served upon the counsel of record on May 8, 2013, through the court's electronic filing system.

/s/ Jonathan H. Singer