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

[PROPOSED] FINAL ORDER AND JUDGMENT

On November 14, 2012, the Court entered a Preliminary Approval Order, (Dkt. 242), that preliminarily approved the proposed Settlement Agreement in this Litigation and specified the manner in which Class Notice was to be provided to the Settlement Class. All capitalized terms used in this Order have the meaning as defined in the Settlement Agreement, which is attached hereto and incorporated herein by reference.

Following the dissemination of Class Notice to Settlement Class Members, and notice to federal and state-level attorneys general as required by 28 U.S.C. § 1715(b), Settlement Class Members were given an opportunity to (a) request exclusion from the Settlement Class, or (b) object to the Settlement Agreement (including Class Counsel's request for fees and expenses and the Named Plaintiffs' application for a Service Award).

A Fairness Hearing was held on May 22, 2013, at which time all interested persons were given a full opportunity to state any objections to the Settlement Agreement. The Fairness Hearing was held more than 90 days after Ford provided notice of the proposed

Settlement to federal and state-level attorneys general as required by 28 U.S.C. § 1715(b), thus complying with 28 U.S.C. § 1715(d).

Having read and fully considered the terms of the Settlement Agreement and all submissions made in connection with it and considered the arguments and presentations at the Fairness Hearing, the Court finds that the Settlement Agreement should be finally approved and the Litigation dismissed with prejudice as to all Settlement Class Members who have not excluded themselves from the Settlement Class, and without prejudice as to all persons who timely and validly excluded themselves from the Settlement Class.

IT IS HEREBY ORDERED that:

1. The prior provisional certification of the Settlement Class is hereby confirmed and made final for purposes of the Settlement Agreement as approved by this Order. The Settlement Class is defined as:

> All entities and natural persons in the United States (including its Territories and the District of Columbia) who currently own or lease (or who in the past owned or leased) a model year 2003–2007 non-ambulance Ford vehicle sold or leased in the United States and equipped with a 6.0-liter PowerStroke diesel engine that received one or more repairs covered by Ford's New Vehicle Limited Warranty during the vehicle's first five years in service or 100,000 miles, whichever comes first, to: a fuel injector; the exhaust gas recirculation ("EGR") valve; the EGR cooler; the oil cooler; or the turbocharger.
>
> Excluded from the Settlement Class are: (a) all federal court judges who have presided over this case and their spouses and anyone within three degrees of consanguinity from those judges and their spouses; (b) all entities and natural persons who elect to exclude themselves from the Settlement Class; (c) all entities and natural persons who have previously executed and delivered to Ford Motor Company releases of all their claims, including, but not limited to, members of the settlement class in *Williams A. Ambulance, Inc., et al. v. Ford Motor Company*, Case No. 1:06-cv-776 in the United States District Court for the Eastern District of Texas, Beaumont Division; (d) all entities and natural persons who: (1) prior to November 1, 2012, filed an individual lawsuit

> (*i.e.*, a lawsuit that does not seek certification as a class action) in any court asserting causes of action of any nature, including but not limited to claims for violations of federal, state, or other law (whether in contract, tort, or otherwise, including statutory and injunctive relief, common law, property, warranty and equitable claims) based upon the 6.0L engine in a Class Vehicle, and (2) have not voluntarily dismissed such lawsuit without prejudice; and (e) Defendant's employees, officers, directors, agents, and representatives and their family members.

2. The Court hereby finds and concludes that personal Class Notice has been given to all Settlement Class Members known and reasonably identifiable in full satisfaction of the requirements of Rule 23 of the Federal Rules of Civil Procedure and due process.

3. The Court hereby approves the terms of the Settlement Agreement as fair, reasonable, and adequate as it applies to the Settlement Class. In arriving at this conclusion, the Court has considered:

a. The strength of the Class Members' case compared to the amount of Ford's settlement offer;

b. The likely complexity, length, and expense of the litigation;

c. The amount of opposition to settlement among affected parties;

d. The opinion of competent counsel; and

e. The stage of the proceedings and the amount of discovery completed at the time of settlement.

See Synfuel Technologies, Inc. v. DHL Express (USA), Inc., 463 F.3d 646, 653 (7th Cir. 2006).

4. Regarding the first factor, the Court finds that the Settlement will result in a recovery that is fair in light of the likely outcome of the litigation. Both categories of Settlement benefits—the extended warranty benefit and the deductible reimbursement benefit—are calibrated to reimburse approximately 50% of the average amounts actually paid by those Class Members who assert valid claims under the eligibility criteria established in the Settlement.

Those eligibility criteria (and, indeed, the Class definition itself) are designed to provide monetary benefits to those vehicle owners who, had the litigation succeeded, are most likely to have asserted successful claims in a post-class trial individualized claim process. Hence, in a general "ballpark valuation" sense, the Settlement can be viewed as paying roughly 50% of the full value of the Class Members' claims, were they to succeed. Whatever discounted value may exist from the above-noted 50% valuation is likely offset by Ford's agreement to pay Plaintiffs' attorneys' fees and expenses over and above the amounts it is paying to Class Members themselves, which means that Class Member awards will not be reduced by the need to pay contingency fees to their counsel (which often are 30–40% of recovery) and out-of-pocket expenses of litigation.

5. Further support for this assessment of the Settlement's value comes from Plaintiffs' fairness submission and the declaration of Professor Rubenstein, who performs an analysis based on the one suggested by *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277 (7th Cir. 2002) when a proposed settlement is presented amidst indications of collusion (which do not exist here). Professor Rubenstein's analysis, which the Court finds reasonable, demonstrates that the class is receiving roughly 50% of the full value of its claims, and that when adjusted for the absence of complete relief in extending the warranty, the value comes down to 42.5%.

6. These Settlement benefits are being made available in a litigation that, as both parties acknowledge, faced many difficult hurdles to success. Pending at the time of Settlement were motions by Ford seeking summary judgment or orders to compel arbitration against all proposed Class Representatives. Those motions collectively challenged the legal and factual basis of the Class Representatives' individual claims and, by extension, the claims they sought to assert on behalf of unnamed putative class members. The parties' fairness briefs recite Ford's

arguments and, without ruling on them here, the Court agrees that they are serious arguments that may well have succeeded, thus terminating the litigation via entry of judgment against Plaintiffs. Further, as the parties both note and extensively discuss in their fairness briefs, Plaintiffs' bid to obtain certification of different multi-state class actions based on a variety of claims that may turn on a variety of individualized issues would have been aggressively opposed by Ford, which had already defeated certification in another federal district court in a similar matter. *See Cox House Moving, Inc. v. Ford Motor Co.,* No. 7:06-1218-HMH, 2006 WL 3230757 (D.S.C. Nov. 6, 2006). Had this Court certified some form of class litigation, it is entirely possible that it would have involved a bifurcated proceeding—a class trial on common issues followed by an individualized claims litigation process applying class-wide findings to the individual facts presented by Class Member's distinct vehicle ownership experiences. The Court notes that such an outcome would resemble the type of claims process envisioned by the Settlement. Finally, the Court notes that Plaintiffs' merits case was heavily dependent upon the Court admitting into evidence the opinion testimony of Plaintiffs' technical experts over the *Daubert*—based objections that Ford indicates it would have made.

7. The Court's conclusion that this litigation faced substantial merits and procedural obstacles to success is supported by Professor Rubenstein's analysis, which projects that the "net expected value" of Class Members' claims based on these litigation risks, discounted to recognize that any recovery would likely be delayed at least four years, is 37% of their fully successful value, and that, accordingly, the settlement value substantially exceeds the net expected litigation value. For these reasons, the Court finds the Settlement clearly fair in light of the likely outcome of the Litigation.

8. Regarding the second factor, the Court finds that continued litigation would be complex, lengthy, and expensive. This litigation has already been pending for nearly 3 ½ years and, were it to resume, it likely would take many more years to proceed through dispositive motions, class certification litigation (and perhaps interlocutory appeal), trial preparation, trial, a possible post-trial individualized claim process, and post-trial appeal. Further, the factual issues presented by Plaintiffs' challenges to the design and manufacture of the 6.0L diesel engine are exceedingly complex, requiring elaborate evidentiary proceedings and expert testimony to debate before the Court and a jury. The substantive and procedural legal issues presented by Plaintiffs' claims and class certification proposal are likewise complicated and difficult. Continued litigation efforts accordingly would be exceedingly expensive for the parties and counsel.

9. Regarding the third factor, the Court finds that reaction to the Settlement from Class Members has been positive, with only a relatively small number of Class Members objecting or opting out of the Settlement, and no governmental officials responding to the 28 U.S.C. § 1715(b) notice with any objections. Of the approximately 1.1 million Class Members, only one (Robert G. Burress (Dkt. No. 259) filed an objection that complies with the requirements of the Court's Preliminary Approval Order. By contrast, MDL Lead Counsel have received over 150 letters from absent Class Members expressing a desire to participate in the Settlement and supporting it. While only one objection complied with the requirements set forth in the Preliminary Approval Order, the Court nonetheless considered all points raised by anyone who filed an objection (or letter) commenting on the Settlement. The objections, generally speaking, misunderstand the Settlement Agreement, understate the risks of non-success this Litigation faced, complain about the amount of fees, expenses, and service awards requested,

and/or generically assert that the benefits should be more generous without showing that the compromise benefits being offered are unfair.

10. Regarding the fourth factor, the Court finds that Plaintiffs' counsel, who support the Settlement, are competent and experienced in class-action litigation.

11. Regarding the fifth factor, the Court finds that the parties to this case have engaged in significant adversarial discovery and motion practice and that this Settlement is based on a well-developed record.

12. Having reviewed the declaration of Judge Richard Neville, the Court further finds that the Settlement is the product of arm's length negotiations presided over by a competent mediator.

13. Having found the Settlement to be "fair, reasonable, and adequate" (FED. R. CIV. P. 23(e)(2)), the Court directs consummation of all the terms and provisions of the Settlement Agreement.

14. The Court awards a Service Award of $150,000 in total and directs Ford to pay this amount to the Named Plaintiffs through Class Counsel, to be distributed as shown in the table below.

PLAINTIFF	**AWARD**
Geno Boggero	$6,486.49
Heather & Scott Gray	$6,486.49
Custom Underground	$47,837.49
Frank Brown Towing	$6,486.49
Georjean Vogt	$6,486.49
Phillip Marcum	$6,486.49
Karl Strong	$6,486.49
John Prebish	$6,486.49

PLAINTIFF	AWARD
John Barrett	$6,486.49
Cecil & Tressie Fulton	$6,486.49
Anthony Mawyer	$6,486.49
Steve Santilli	$6,486.49
James Hutton	$6,486.49
Charles Clark	$6,486.49
Carl Atwell	$6,486.49
DiNonno Enterprises	$11,351.35
Total	$150,000.00

15. The Court finds that these amounts are reasonable in light of the Named Plaintiffs' contributions to the litigation, with the larger awards to DiNonno Enterprises (owner of three Class Vehicles) and Custom Underground (owner of eighteen Class Vehicles) being justified by the greater inconvenience experienced by these Named Plaintiffs with multiple vehicles involved in the litigation. The amounts were calculated by a formula awarding five shares per Named Plaintiff plus an additional three shares for each Class Vehicle owned.

16. Plaintiffs' Motion for Attorneys' Fees and Expenses will be the subject of a separate Order.

17. The Settlement Agreement shall be binding on Ford and all Plaintiffs, including all members of the Settlement Class who have not been excluded pursuant to the Settlement Agreement.

18. The Court dismisses on the merits and with prejudice *In re: Navistar Diesel Engine Products Liability Litigation*, Case No.: 1:11-cv-02496 (MDL 2223) and each and every action transferred to MDL No. 2223. In addition, the Court also dismisses all claims which any

Settlement Class Members alleged or could have alleged against the Released Parties in any complaint, action, or litigation based upon the 6.0-liter engines in the Class Vehicles.

19. Upon the Effective Date of the Settlement, the Named Plaintiffs, the Unnamed Plaintiffs, and each Settlement Class Member shall be deemed to have, and by operation of this Final Order and Judgment shall have, released, waived and discharged Ford Motor Company, their past or present directors, officers, employees, partners, principals, agents, heirs, executors, administrators, successors, reorganized successors, subsidiaries, divisions, parents, related or affiliated entities, authorized dealers, underwriters, insurers, co-insurers, re-insurers, licensees, divisions, joint ventures, assigns, associates, attorneys, and controlling shareholders from any and all other claims, demands, actions, causes of action of any nature whatsoever, including but not limited to any claim for violations of federal, state, or other law (whether in contract, tort, or otherwise, including statutory and injunctive relief, common law, property, and equitable claims), and also including Unknown Claims that were or could have been asserted against the Released Parties in the Litigation, or in any other complaint, action, or litigation in any other court or forum based on the 6.0-liter diesel engines in the Class Vehicles.

20. All members of the Settlement Class who did not duly request exclusion from the Settlement Class in the time and manner provided in the Class Notice are hereby barred, permanently enjoined, and restrained from commencing or prosecuting any action, suit, proceeding, claim, or cause of action in any jurisdiction or court against Ford or any of the other entities or persons who are to be discharged as noticed above in paragraphs 18–19 based upon, relating to, or arising out of, any of the matters which are discharged and released pursuant to paragraphs 18–19 hereof. Identification information about Settlement Class Members who excluded themselves from the Class is attached as Exhibit A to this Order.

21. Of the persons who filed with the Court objections or letters commenting on the Settlement, the Court finds that only Robert G. Burress fulfilled the Preliminary Approval Order requirements to assert objections, which requirements are necessary for the Court to determine whether the purported objector has standing to object and to evaluate the credibility of the stated objection. (*See* Dkt. 242 ¶ 17.) While the Court considered all points raised by anyone who filed an objection to the Settlement, other than objector Robert G. Burress (Dkt. 259), all other persons are foreclosed from seeking any adjudication or review of the Settlement by appeal or otherwise. Given the dramatic impact an objector can have on the implementation of a settlement such as this one, the Court feels it is more than justified in requiring strict compliance with its Preliminary Approval Order.

22. If (a) the Effective Date of Settlement does not occur for any reason whatsoever, or (b) the Settlement Agreement becomes null and void pursuant to the terms of the Settlement Agreement, this Final Order and Judgment shall be deemed vacated and shall have no force or effect whatsoever.

23. Without affecting the finality of the Final Order and Judgment in any way, the Court reserves continuing and exclusive jurisdiction over the parties, including all members of the Settlement Class as defined above, and the execution, consummation, administration, and enforcement of the terms of the Settlement Agreement.

24. The Clerk is directed to enter this Final Order and Judgment forthwith.

SIGNED at Chicago, Illinois this ____ day of _____, 2013

MATTHEW F. KENNELLY
UNITED STATES DISTRICT JUDGE