No. 13-55331

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GENE EDWARDS,

Plaintiff-Appellant,

v.

FORD MOTOR COMPANY,

Defendant-Appellee.

On Appeal from the United States District Court
for the Southern District of California

BRIEF OF PRODUCT LIABILITY ADVISORY COUNCIL, INC. AS *AMICUS CURIAE* IN SUPPORT OF APPELLEE

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

FEDERAL CASES

TABLE OF AUTHORITIES

Page

STATE CASES

OTHER AUTHORITY

TABLE OF AUTHORITIES

Page

CORPORATE DISCLOSURE STATEMENT

Amicus Curiae The Product Liability Advisory Council, Inc. has no parent corporation, and no company owns 10% or more of its stock.

BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC. AS *AMICUS CURIAE* IN SUPPORT OF APPELLEE

The Product Liability Advisory Council ("PLAC") respectfully submits this brief as *amicus curiae* in support of appellee Ford Motor Company ("appellee" or "Ford").[1]

STATEMENT OF INTEREST

PLAC is a non-profit association with over 100 corporate members representing a broad cross-section of American and international product manufacturers.[2] These companies seek to contribute to the improvement and reform of the law in the United States and elsewhere, with emphasis on the law governing the liability of product manufacturers. PLAC's perspective is derived from the experiences of a corporate membership that spans a diverse group of industries in various facets of the manufacturing sector. In addition, several hundred of the leading product-liability defense attorneys in the country are sustaining (non-voting) members of PLAC.

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[1] PLAC submits this brief in accordance with Federal Rule of Appellate Procedure 29 and Circuit Rule 29-2. PLAC simultaneously submits a Motion for Leave to File. Pursuant to Circuit Rule 29-3, PLAC states that it endeavored to obtain the consent of all parties to the filing of the brief before moving the Court for permission to file the proposed brief. *Amicus* certifies that no party's counsel authored this brief in whole or in part, and that no party, party's counsel, or other person or entity contributed money that was intended to fund preparing or submitting this brief.

[2] A list of PLAC's current corporate membership is attached to this brief as Appendix A.

Since 1983, PLAC has filed more than 1,000 briefs as amicus curiae in both state and federal courts, including this one, presenting the broad perspective of product manufacturers seeking fairness and balance in the application and development of the law as it affects product liability. PLAC's members have an interest in this case because reversal of the decision below would potentially suggest that materiality is a common issue in all cases, even those in which reasonable consumers disagree about what information is important with respect to a particular transaction. In addition, this case presents an opportunity for the Court to confirm that a defendant has a right to rebut any presumption of reliance that may apply in consumer-fraud cases – and that where a defendant requires individualized evidence to rebut that presumption, reliance is an individualized issue that supports denial of class certification.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case involves an allegation that Ford failed to disclose an alleged defect in the electronic throttle control system of certain Ford Freestyle vehicles that caused the vehicles to surge unexpectedly at idle speeds. The plaintiff, Gene Edwards, sought certification of claims under California's Consumers Legal Remedies Act ("CLRA") and Unfair Competition Law, urging the district court to hold that the materiality of Ford's alleged nondisclosure was a common issue that could be determined on a classwide basis.

What discovery revealed, however, is that plaintiff herself did not find the alleged nondisclosures of defect to be material. She continued to drive her Freestyle after allegedly experiencing idle-speed surging, seeking repair only after she developed more serious safety concerns. And when she purchased another vehicle – a Toyota Camry – she did so fully aware of the well-publicized allegations that a broad range of Toyota vehicles had "sudden acceleration" problems (including at high speeds), further undermining her claim that additional information about a vehicle's throttle behavior would have affected her decision to purchase that vehicle.

The district court rightly denied class treatment under these circumstances, concluding that materiality could not be proven on a classwide basis both because the severity of the alleged throttle problem varies and because reasonable buyers would differ as to whether reports of idle-speed surging problems would affect their purchasing decisions. Alternatively, the district court's conclusion is justified because, even if it were proper to presume classwide reliance as an initial matter in this case, Ford would be entitled to rebut that presumption, and plaintiff's own testimony illustrates that such rebuttal would inevitably vary from one class member to the next, precluding class treatment.

Reversing the trial court's well-supported ruling would not only defy common sense but also encourage litigation abuse. If plaintiff's arguments were

accepted, the result would be lowering the bar to class treatment and allowing all class members to recover in a class action even though many of them could never prevail in individual trials. Such an expansion in liability would significantly harm product manufacturers and result in higher prices for consumers.

ARGUMENT

I. THE DISTRICT COURT PROPERLY HELD THAT MATERIALITY CANNOT BE DETERMINED ON A CLASSWIDE BASIS.

The Court should affirm the district court's denial of class certification because the evidence – particularly plaintiff's own testimony – establishes that materiality cannot be determined on a classwide basis.

Under the CLRA, an omission is only actionable if the allegedly concealed facts are "material." *Webb v. Carter's Inc.*, 272 F.R.D. 489, 502 (C.D. Cal. 2011). The parties agree that, under California law, the test for whether an alleged omission is material is whether a reasonable consumer would find the omitted information important. *See, e.g., In re Apple & AT & TM Antitrust Litig.*, 596 F. Supp. 2d 1288, 1310-11 (N.D. Cal. 2008) ("Materiality depends on a plaintiff showing that had the omitted information been disclosed, a reasonable consumer would have been aware of it and behaved differently.") (internal quotation marks and citation omitted); *Mirkin v. Wasserman*, 858 P.2d 568, 574 (Cal. 1993) (to be material, plaintiff must show that "had the omitted information been disclosed one would have been aware of it and behaved differently").

Applying this standard, the district court determined that reasonable consumers would have responded differently, and that materiality would therefore have varied among class members, because "the level of importance a potential car buyer places on safety concerns varies from consumer to consumer." *Edwards v. Ford Motor Co.*, No. 11-CV-1058-MMA(BLM), 2012 WL 2866424, at *9 (S.D. Cal. June 12, 2012). In support of this conclusion, the district court relied both on Ford's expert evidence and plaintiff's own experience with her Freestyle, concluding that plaintiff's delay in seeking repairs and her indifference to news reports regarding alleged high-speed acceleration problems in Toyota vehicles "'belie[] any claim that a disclosure related to the idle speed control issue in the Freestyle . . . would have been uniformly material to ordinary consumers in their vehicle purchasing decision.'" *Id.* at *10-11 (quoting and agreeing with Ford's argument) (citation omitted).

Plaintiff takes the position that this reasoning is erroneous because materiality is an "objective standard" and thus by its nature must be uniform throughout the class – i.e., that under California law, materiality will *always* be a "common question of fact." (Appellant's Br. at 31-32.)[3] Plaintiff believes that she has made a sufficient showing that a reasonable consumer would find the alleged

omission to be material because it concerns the safety of the vehicle (*id.*), *even though the evidence shows that the information would not have been material to her*.

Plaintiff's position defies common sense and misreads the law. The reality is that, in many cases, reasonable consumers may differ as to whether allegedly omitted information would have been material to a purchasing decision. Consistent with this reality, courts have long understood that, although "materiality is considered pursuant to [an] objective standard," materiality may nonetheless be "subject to individual proof under the circumstances of th[e] case." *Fairbanks v. Farmers New World Life Ins. Co.*, 197 Cal. App. 4th 544, 565 (2011). Accordingly, courts examine the record evidence to ascertain whether or not the materiality of an alleged omission varied among class members. And where "the issue of materiality . . . is a matter that would vary from consumer to consumer," these courts recognize that "the issue is not subject to common proof, and the action is properly not certified as a class action." *In re Vioxx Class Cases*, 180 Cal. App. 4th 116, 129 (2009); *see also Stearns v. Ticketmaster Corp.*, 655 F.3d 1013, 1022-23 (9th Cir. 2011) ("If the misrepresentation or omission is not material as to

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[3] In support of this proposition, plaintiff cites *Yokoyama v. Midland National Life Insurance Co.*, 594 F.3d 1087 (9th Cir. 2010). (Appellant's Br. at 31-32.) *Yokoyama* – which involved Hawaii, and not California, law – is inapposite for the reasons set forth in Ford's brief.

all class members . . . the class should not be certified."), *cert. denied*, 132 S. Ct. 1970 (2012).

In *Johnson v. Harley-Davidson Motor Co. Group*, 285 F.R.D. 573 (E.D. Cal. 2012), for example, the plaintiffs alleged that motorcycles manufactured and sold by the defendants generated excessive heat, creating an unreasonable risk of burns to users and causing premature wear on the mechanical systems. *Id.* at 576. The plaintiffs argued that whether a "reasonable consumer" would find the "safety-related defects" to be material could be determined on a class-wide basis. *Id.* at 580. The court disagreed, explaining that "while materiality is generally determined by the 'reasonable consumer standard,' there [we]re numerous individualized issues as to whether the reasonable consumer purchasing one of Defendants' motorcycles would find the excessive heat material." *Id.* at 581. According to the court, this was so because the evidence made clear that "[e]ven the former named plaintiffs, knowing that the motorcycles cause excessive heat, would still buy" the motorcycles. *Id.* Because "multiple factors affect[ed] what 'reasonable consumers' would consider material when purchasing one of the class motorcycles," materiality could not be determined on a class-wide basis. *Id.*; *see also, e.g.*, *Webb*, 272 F.R.D. at 503 (concluding that materiality was "not subject to common proof under the reasonable consumer standard and that individual issues predominate" because defendant presented expert evidence that if a disclosure had

been provided, "consumers would not be expected to respond uniformly to the message") (internal quotation marks and citation omitted).

The district court here followed the same sensible approach. The court recognized that plaintiff continued to drive her vehicle for months after the idle-speed surging defect manifested itself because she "apparently did not believe the surging posed a grave safety risk." 2012 WL 2866424, at *10. And once plaintiff's Ford Freestyle "ceased to operate" altogether, she purchased a Toyota Camry. *Id.* In purchasing her Toyota, plaintiff was aware of widespread news coverage regarding claims that Toyota Camrys had experienced unintended acceleration, but she did not conduct any further research or investigation into the severity of the alleged acceleration problems. *Id.* at *10 n.6. To find materiality under these circumstances would have required the court to ignore reality. For these reasons, the district court correctly found that the "uncontested evidence" demonstrated that materiality varied from consumer to consumer, thus defeating Rule 23(b)(3)'s predominance requirement and precluding certification. *Id.* at *10-11.

II. CLASS CERTIFICATION CANNOT BE JUSTIFIED BY A PRESUMPTION OF RELIANCE IN LIGHT OF THE RECORD IN THIS CASE.

Even if plaintiff had made a preliminary showing that the information Ford allegedly failed to disclose was material on a classwide basis, denial of class

certification would still have been proper because Ford would be entitled to rebut any presumption of reliance at trial with individualized evidence.

A presumption does not alter the fundamental elements of a cause of action. Instead, it is merely a "legal fiction" that allows a finding in the absence of direct evidence. Joel S. Hjelmaas, *Stepping Back from the Thicket: A Proposal for the Treatment of Rebuttable Presumptions and Inferences*, 42 Drake L. Rev. 427, 430-31 (1993). In cases involving claims of statutory or common-law fraud, a plaintiff may sometimes invoke a "presumption of reliance," which at least initially operates to relieve the plaintiff of the requirement to proffer evidence of reliance by class members when the alleged fraud reaches the entire class and is objectively material. Such a presumption may serve to facilitate class treatment where the defendant cannot rebut it with individualized evidence since the case could be resolved using classwide proof.

By contrast, however, where the record demonstrates that the defendant *could* rebut reliance as to at least some class members on an individual basis, class certification based on a presumption of reliance is improper and unfair. After all, in an individual trial, there is no question that a defendant would be entitled to rebut a presumption of reliance with evidence that the named plaintiff in fact did not rely on an alleged representation or omission. Indeed, as the Supreme Court has consistently held, the right to rebut a presumption that is contrary to fact is

rooted in due process. *See, e.g.*, *Vlandis v. Kline*, 412 U.S. 441, 446 (1973) (noting that the Supreme Court has repeatedly held that rules that "creat[e] a presumption which operates to deny a fair opportunity to rebut it violate[] the due process clause") (internal quotation marks and citation omitted). Thus, a defendant may not be deprived of this right merely to facilitate class certification. As the Supreme Court stated in *Dukes*, "a class cannot be certified on the premise that [the defendant] will not be entitled to litigate its . . . defenses to individual claims." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2561 (2011) (citing 28 U.S.C. § 2072(b)). Otherwise, the class action procedure would effectively curtail substantive rights, in contravention of the Rules Enabling Act. *Id.*

Consistent with these principles, decisions applying California law have declined to apply a presumption of reliance or to certify a class where the record demonstrated that a presumption would be subject to rebuttal by individualized evidence. For example, in *Caro v. Procter & Gamble Co.*, 18 Cal. App. 4th 644, 667 (1993), the plaintiff claimed that the defendants' orange-juice carton misleadingly described the orange juice as "fresh," even though the juice was "reconstituted from frozen concentrate, contained additives" and was "not made from oranges picked and squeezed the same day." *Id.* at 652. The plaintiff admitted, however, that he had not been misled into buying the orange juice by the "fresh" representation, rendering any inference that the class was deceived

inappropriate. *Id.* at 663, 668. The court explained that reliance could not be presumed on a classwide basis because class members could have interpreted the terms "fresh," "no additives" and "premium" differently, particularly since the product label also indicated that the juice was from concentrate. *Id.* at 668-69. In light of these considerations, "the record indicated that consumers – who thought they were buying different products such as 'premium,' 'fresh,' or 'from concentrate' orange juice based upon their personal assumptions about the nature of the products they wanted to buy and upon reading various portions of the labels – would be required individually to prove liability and damages." *Id.*; *see also Baghdasarian v. Amazon.com, Inc.*, No. CV 05-8060 AG (CTx), 2009 U.S. Dist. LEXIS 115265, at *15 (C.D. Cal. Dec. 9, 2009) (granting summary judgment on class representative's claims and holding that "Plaintiff here cannot take advantage of a presumption or inference of reliance. In this case, Plaintiff's own deposition testimony undermines his own claims, showing that he did not actually rely on Defendant's statements. Plaintiff admits that the alleged misrepresentation was not an influential factor in his decision to buy from the marketplace."), *aff'd*, 458 F. App'x 622 (9th Cir. 2011).

The same reasoning applies here. As the district court found, plaintiff's own testimony confirmed that not every Ford Freestyle purchaser would "have been aware of Ford's disclosure had it been made or considered it in her purchase

decision." 2012 WL 2866424, at *9. Indeed, plaintiff herself purchased the Freestyle "because it caught her attention while she perused the first car lot she visited" – and she "did not research the Freestyle before buying it, recall any commercials or other Freestyle advertisements, read the owner's manual, or request a Carfax report to determine the vehicle's history or safety risks." *Id.* (footnote omitted). Certainly, all of this evidence would be highly relevant to rebutting any presumption of materiality with respect to plaintiff in an individual trial. Because "a class cannot be certified on the premise that [the defendant] will not be entitled to litigate its . . . defenses to individual claims," *Dukes*, 131 S. Ct. at 2561, Ford is entitled to present the same defense with respect to each other class member, and certification would be inappropriate for this reason as well.[4]

III. REVERSAL THREATENS TO CREATE GRAVE RISKS FOR PRODUCT MANUFACTURERS.

The Court should also affirm the decision below to limit abuse of the class action device by attorneys who seek to leverage hefty settlements in meritless class actions.

[4] The result would be the same if Ford lacked evidence to rebut a claim of reliance by plaintiff but had other evidence that would undermine claims of reliance by other class members. The existence of a presumption changes nothing unless, based on the evidence, the defendant is unable to overcome the presumption as to *any* class member. As with materiality, a manufacturer should not be subject to liability on reliance grounds to an entire class where the facts would at most support liability as to some class members.

Class actions already pose a significant burden on American car manufacturers and other product makers because, once certified, they create undue pressure to settle claims regardless of their merit. Indeed, it is well known that, "[f]aced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims. Other courts have noted the risk of 'in terrorem' settlements that class actions entail . . . ." *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1752 (2011); *see also, e.g.*, Bruce Hoffman, Remarks, *Panel 7: Class Actions as an Alternative to Regulation: The Unique Challenges Presented by Multiple Enforcers and Follow-On Lawsuits*, 18 Geo. J. Legal Ethics 1311, 1329 (2005) (panel discussion statement of Bruce Hoffman, then Deputy Director of the Federal Trade Commission's Bureau of Competition) ("Following certification, class actions often head straight down the settlement path because of the very high cost for everybody concerned, courts, defendants, plaintiffs of litigating a class action . . . ."). For this reason, "certification is the whole shooting match" in most cases, and defendants faced with carelessly certified, meritless lawsuits are often pressured into settling claims, David L. Wallace, *A Litigator's Guide to the 'Siren Song' of 'Consumer Law' Class Actions*, LJN'S Product Liability Law & Strategy (Feb. 2009); *see also In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995) (observing that many defendants will decline to "roll the[] dice" after certification because the risk of

enormous liability creates an "intense pressure to settle"), a reality that one court described as "judicial blackmail," *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996).

The adoption of loose materiality and reliance standards in the Ninth Circuit would exacerbate this burden on American businesses. As commentators have noted, "the relaxation of the need to show proof of actual, reasonable reliance . . . has [already] made it easier to bring class action lawsuits." Victor E. Schwartz & Cary Silverman, *Common-Sense Construction of Consumer Protection Acts*, 54 U. Kan. L. Rev. 1, 33 (2005). The approach advanced by plaintiff in this case – that classes can be certified based on fictional presumptions, even if those presumptions have been rebutted by real evidence – would make the problem even worse, significantly expanding the class action exposure of consumer product companies doing business in California. *See, e.g.*, Sheila B. Scheuerman, *The Consumer Fraud Class Action: Reining in Abuse by Requiring Plaintiffs to Allege Reliance as an Essential Element*, 43 Harv. J. on Legis. 1, 2, 10 (2006) (consumer-fraud class actions devoid of proof of reliance are "more akin to corporate blackmail than to consumer protection"; lack of reliance requirement "fuel[s] class action abuse"); David E. Sellinger & Theodore J. McEvoy, *Courts Must Closely Evaluate Rule 23 'Predominance' Factor In Food Labeling Class Actions*, Washington Legal Found., Vol. 21, No. 16, Aug. 3, 2012 ("[T]he potential

exposure for a corporate defendant once a case is certified creates enormous settlement pressure on a company. This concern is heightened by the danger that the court may not apply the necessary analysis of individual consumers' decision-making in determining whether to certify a class.").

The increased burden on businesses would also have adverse consequences on American consumers, because the cost of defending against an increasing volume of frivolous class actions would inevitably be passed on to consumers in the form of higher prices in the marketplace. *See* Lisa Litwiller, *Why Amendments to Rule 23 Are Not Enough: A Case for the Federalization of Class Actions*, 7 Chap. L. Rev. 201, 202 (2004) ("Businesses spend millions of dollars each year to defend against the filing and even the threat of frivolous class action lawsuits. Those costs, which could otherwise be used to expand business, create jobs, and develop new products, instead are being passed on to consumers in the form of higher prices.") (internal quotation marks and citation omitted).

For these reasons too, the Court should affirm the district court's denial of class certification.

CONCLUSION

For the foregoing reasons, as well as those set forth in Ford Motor Company's brief, the district court's order denying class certification should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32(A)(7)(C) AND CIRCUIT RULE 32-1 FOR CASE NUMBER 13-55331

I certify that, pursuant to Fed. R. App. P. 29(d) and 9th Cir. R. 32-1, the attached amicus brief is proportionally spaced, has a typeface of 14 points or more and contains 7000 words or less.

March 7, 2014

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CERTIFICATE OF SERVICE

Undersigned counsel hereby certifies that the Brief of Product Liability Advisory Council, Inc. as *Amicus Curiae* in Support of Appellee was electronically filed with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on March 7, 2014

March 7, 2014

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