UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA

In re BRIDGESTONE/FIRESTONE, INC. TIRES PRODUCTS LIABILITY LITIGATION	)	Master File No. IP 00-9373-C-B/S
	)	MDL No. 1373
THIS DOCUMENT RELATES TO THE MASTER COMPLAINT	)	

MEMORANDUM IN SUPPORT OF FORD'S MOTION FOR RECONSIDERATION OF THE COURT'S "ORDER GRANTING IN PART AND DENYING IN PART THE MOTION TO DISMISS THE MASTER COMPLAINT"

In the Master Complaint, over 200 named plaintiffs allege that at numerous locations across the United States, they each separately purchased certain Firestone tires and/or certain Ford Explorer vehicles. They further allege that at those myriad locations, they were extended express warranties regarding the purchased products (some based on varied advertising and other representations that they received at the purchase location), and that as a matter of law, implied warranties arose regarding those products at the time of purchase. Those named plaintiffs contend that the products that were delivered to them were defective, resulting in a breach of the express and implied warranties at the time and place of delivery. Plaintiffs also urge that because of the alleged defects, the prices that they paid for their products at the place of purchase exceeded the products' value, unjustly enriching the defendants.

In its "Order Granting in Part and Denying in Part the Motion to Dismiss the Master Complaint" (dated July 27, 2001) ("the Order"), this Court correctly ruled that the potentially applicable state warranty and unjust enrichment laws conflict, requiring the Court to select which jurisdiction's laws should apply to which claims. (*See id.* at 5.) Citing Indiana

choice of law principles, the Court ruled that the situs at which a named plaintiff agreed to purchase an allegedly defective product, saw advertising and received representations regarding the product, received warranties regarding the product, took delivery of the product, allegedly overpaid for the product, and then used the product is "entirely irrelevant" to that determination. (*Id.* at 16.) Instead, the Court concluded that since defendants allegedly made pre-transaction "decisions" about product designs and express warranties at their respective principal places of business, each named plaintiff's warranty and unjust enrichment claims are governed by two sets of laws (regardless of where their products were purchased or used) – Tennessee laws apply to claims against Firestone, and the laws of Michigan apply to claims against Ford.[1]

In so ruling, the Court has effectively declared that under Indiana choice of law principles, non-personal injury warranty/unjust enrichment claims alleging defects in any mass produced products will almost invariably be governed by the laws of the manufacturer's principal place of business. That is because corporate headquarters (or the like) are typically the place where key decisions regarding product designs and express warranties are made. Ford respectfully submits that this ruling contradicts all federal court precedents on this subject and is inconsistent with the choices of law actually exercised by Indiana appellate courts in every non-personal injury product warranty case decided over the past 45 years. Further, the Court's ruling would effectively strip Indiana's legislature and judiciary of all authority to regulate mass produced products sold in Indiana (except those made by Indiana-based companies), ceding that role to other states and foreign countries. Finally, the ruling is constitutionally infirm.

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[1] For choice of law purposes, an unjust enrichment claim resembles a breach of contract/warranty claim. *See Micro Data Base Sys. v. Dharma Sys.*, 148 F.3d 649, 653 (7th Cir. 1998).

For these reasons, Ford respectfully requests that the Court revise its choice of law determination to embrace the heretofore unanimous view that state law-based nationwide product defect class actions (particularly those asserting breach of warranty claims) necessarily implicate the law of all jurisdictions in which the challenged product was sold.[2] (Alternatively, Ford requests that the Court certify this choice of law issue to the Indiana Supreme Court.) Ford further requests that the Court reconsider and dismiss the warranty and unjust enrichment claims of the named plaintiffs who do not allege experiencing a manifestation of any alleged defect.

I. THE COURT'S CHOICE OF LAW RULING IS A RADICAL DEPARTURE FROM GOVERNING LAW AND SHOULD BE RECONSIDERED.

Left unmodified, the Court's Order will be a one-of-a-kind deviation from prevailing choice of law rules in several respects:

A. The Court's Order Is Inconsistent With Every Other Federal Court Choice Of Law Determination In A State Law-Based Nationwide Product Defect Class Action.

In recent years, numerous federal courts have considered which laws should apply in proposed nationwide product defect class actions asserting state law-based claims. In every instance, those courts have ultimately concluded that the laws of all states in which purported

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[2] A motion to reconsider should be granted where (as here) a manifest error of law or fact needs correction, *see, e.g., Holman v. Indiana*, 24 F. Supp. 2d 909, 910 (N.D. Ind. 1998), *aff'd*, 211 F.3d 399 (7th Cir. 2000), *cert. denied*, 531 U.S. 880 (2000), or the court may have misunderstood a party's arguments, *see, e.g., Bank of Waunakee v. Rochester Cheese Sales, Inc.*, 906 F.2d 1185, 1191 (7th Cir. 1990). "'[M]otions to reconsider are not ill-founded step-children of the federal court's procedural arsenal, but rather effective yet quite circumscribed methods of "correcting manifest errors of law or fact. . . ." In matters involving interlocutory orders, such as motions to dismiss, or matters that have not been taken to judgment or determined on appeal, the Seventh Circuit has made clear that the district courts have the discretion to reconsider their decisions at any time.'" *Holman*, 24 F. Supp. 2d at 910 (quoting *In re Aug. 1993 Regular Grand Jury*, 854 F. Supp. 1403 (S.D. Ind. 1994), citing *Cameo Convalescent Center, Inc. v. Percy*, 800 F.2d. 108, 110 (7th Cir. 1986) ("Prejudgment orders, such as motions to dismiss, are interlocutory and may be reconsidered at any time.")).

class members purchased the products should come into play.[3] Nationwide breach of warranty class actions have been no exception.[4] It is true that in some cases, class certification proponents have urged the conclusion reached in this Court's Order – that in a nationwide product defect class action, the law of the defendants' principal place of business (presumably the situs of the defendants' pre-sale conduct regarding the allegedly defective products) should be applied. But typically, district courts have rejected that assertion out of hand. For example, in *Bronco II*, 177 F.R.D. at 370-71, the court rejected plaintiffs' proposal that Michigan law should be applied to all warranty claims regarding allegedly defective motor vehicles, since that jurisdiction was

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[3] *See, e.g., In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1302 (7th Cir. 1995); *Spence v. Glock, GES.m.b.H.*, 227 F.3d 308, 313-14 (5th Cir. 2000); *In re Am. Med. Sys.*, 75 F.3d 1069, 1085 (6th Cir. 1996); *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 741-43, 749-50 (5th Cir. 1996); *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 627 (3d Cir. 1996), *aff'd sub nom Amchem Prods. v. Windsor*, 521 U.S. 591 (1997); *Walsh v. Ford Motor Co.*, 807 F.2d 1000, 1017-19 (D.C. Cir. 1986) ("*Walsh I*"); *Zapka v. Coca-Cola Co.*, No. 99 CV 8238, 2000 U.S. Dist. LEXIS 16552, at *11-13 (N.D. Ill. Oct. 26, 2000); *Lyon v. Catepillar, Inc.*, 194 F.R.D. 206, 211-17 (E.D. Pa. 2000); *Clay v. Am. Tobacco Co.*, 188 F.R.D. 483, 500-01 (S.D. Ill. 1999); *Tylka v. Gerber Prods. Co.*, 178 F.R.D. 493, 498 (N.D. Ill. 1998); *Fisher v. Bristol-Myers Squibb Co.*, 181 F.R.D. 365, 369 (N.D. Ill. 1998); *Dahmer v. Bristol-Myers Sqibb Co.*, 183 F.R.D. 520, 532-34 (N.D. Ill. 1998); *Martin v. Am. Med. Sys.*, No. IP 94-2067-C H/G, 1995 U.S. Dist. LEXIS 22169, at *23-27, 34 (S.D. Ind. Oct. 25, 1995); *In re Ford Motor Co. Ignition Switch Prods. Liab. Litig.*, 194 F.R.D. 484, 487-90 (D.N.J. 2000) ("*Ignition Switch II*"); *Chin v. Chrysler Corp.*, 182 F.R.D. 448, 456-57 (D.N.J. 1998); *In re Masonite Corp. Hardboard Siding Prods. Liab. Litig.*, 170 F.R.D. 417, 422-23 (E.D. La. 1997) ("*Masonite I*"); *In re Ford Motor Co. Bronco II Prod. Liab. Litig.*, 177 F.R.D. 360, 369-71 (E.D. La. 1997) ("*Bronco II*"); *In re Ford Motor Co. Ignition Switch Prods. Liab. Litig.*, 174 F.R.D. 332, 341-42, 346-54 (D.N.J. 1997) ("*Ignition Switch I*"); *Walsh v. Ford Motor Co.*, 130 F.R.D. 260, 271-75 (D.D.C. 1990) ("*Walsh II*"); *Feinstein v. Firestone Tire & Rubber Co.*, 535 F. Supp. 595, 608 (S.D.N.Y. 1982).

In *Simon v. Philip Morris, Inc.*, 124 F. Supp. 2d 46 (E.D.N.Y. 2000), Judge Jack Weinstein stated that it "appears" that one state's laws might be applied to the proposed nationwide product liability class in that case. But he characterized that observation as "preliminary[] and tentative[]" and suggested that the issue should be examined by the appellate court pursuant to Fed. R. Civ. P. 23(f) in the event that a class is ultimately certified in that case. *Id.* at 78.

[4] *See, e.g., Spence*, 227 F.3d at 310; *In re Am. Med. Sys.*, 75 F.3d at 1074; *Castano*, 84 F.3d at 737; *Georgine*, 83 F.3d at 620, 627; *Walsh I*, 807 F.2d at 1017-19; *Ignition Switch II*, 194 F.R.D. at 487; *Fisher*, 181 F.R.D. at 369; *Chin*, 182 F.R.D. at 451; *Masonite I*, 170 F.R.D. at 419; *Ignition Switch I*, 174 F.R.D. at 338; *Walsh II*, 130 F.R.D. at 271-75; *Bronco II*, 177 F.R.D. at 364; *Feinstein*, 535 F. Supp. at 599; *see also Martin*, 1995 U.S. Dist. LEXIS 22169, at *23-27, 34 (S.D. Ind. Oct. 25, 1995) (characterizing claims as those for design defect, manufacturing defect, and misrepresentation).

defendant's principal place of business and the alleged location of key vehicle design decisions.[5] And in the few cases in which a district court has sought to apply a single law to all claims in a purported nationwide product defect class action (as this Court proposes), the attempt has been reversed, normally via immediate appellate review under Fed. R. Civ. P. 23(f). *See, e.g., Spence,* 227 F.3d at 314-15 (vacating class certification, rejecting notion that the law of the state "where the product was manufactured and where it was placed in the stream of commerce" should control warranty claims in nationwide product defect class action). *See also Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 674-75 (7th Cir. 2001) (vacating certification of nationwide product defect class, observing that "few warranty cases ever have been certified as class actions – let alone as nationwide classes, with the additional choice-of-law problems that complicate such a venture").[6] In short, the Court's Order is contrary to all federal law in nationwide product defect class actions.

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[5] *See also Clay*, 188 F.R.D. at 497-98 (rejecting proposed application of law of defendant's principal place of business in nationwide product defect class action); *Lyon*, 194 F.R.D. at 211-17 (in nationwide product defect class action, holding that "whether the applicable law is the place of the sale, the residency of the putative class members or the state where the boat containing the [allegedly defective engine] is docked, the applicable state law may not be limited to the law" of the defendant's principal place of business); *Chin*, 182 F.R.D. at 456-57 (in nationwide product defect class action, refusing to apply law of manufacturer defendant's home state to all claims, noting that each class member's home state "has an interest in protecting its consumers from in-state injuries caused by foreign corporations and in delineating the scope of recovery for its citizens under its own laws" and that "[t]hese interests arise by virtue of each state being the place where Plaintiffs reside, or the place where Plaintiffs bought and used their allegedly defective vehicles or the place where Plaintiffs' alleged damage occurred"); *Ignition Switch I*, 174 F.R.D. at 347-48 (same); *Masonite I*, 170 F.R.D. at 422-23 ("The center of the parties' relationship lies in each of the 51 jurisdictions where plaintiffs own Masonite products; thus the analysis favors application of some law other than that of Masonite's primary place of business."); *Feinstein,* 535 F. Supp. at 605-06 ("Plaintiffs do not persuade me that Ohio [as Firestone's principle place of business] satisfies that requirement in a case involving a tire which was, say, manufactured in Pennsylvania, purchased in Massachusetts, and had its defects manifest themselves in New Jersey.").

[6] *See also Rhone-Poulenc*, 51 F.3d at 1302 ("No one doubts that Congress could constitutionally prescribe a uniform standard of liability for manufacturers. . . . [but] the Article III of the Constitution does not empower the federal courts to create such a regime for diversity cases." (7th Cir.)); *In re Am.*

B. The Court's Order Does Violence To Indiana's Choice Of Law Precepts.

1. The Ruling Effectively Declares Erroneous All Parallel Rulings By Indiana's Appellate Courts.

As noted above, the Court's Order effectively declares that under Indiana choice of law principles, non-personal injury breach of warranty claims regarding mass-produced products must be determined under the law of the principal place of business of the manufacturer defendant. That conclusion is contrary to the choice of law actually exercised by Indiana state appellate courts in every such case published since 1945.[7] For example:

- In *Rheem Mfg. Co. v. Phelps Heating & Air Conditioning, Inc.,* 746 N.E.2d 941 (Ind. 2001), plaintiffs alleged that in Indiana, they bought mass-produced furnaces that were in breach of the express warranties included in the shipping boxes and in breach of implied warranties arising as a matter of law. In assessing the claims, the Indiana Supreme Court applied the law of the state in which the allegedly defective furnaces were purchased and used (Indiana), not the law of the principal place of business of the non-Indiana manufacturer. *Id.* at 945.

- In *Hahn v. Ford Motor Co.,* 434 N.E.2d 943 (Ind. Ct. App. 1982), plaintiffs alleged that the new 1977 Ford LTD that they purchased in Indiana contained a variety of defects that gave rise to breaches of express and implied warranties. As to those claims, the Indiana court applied the law of the state in which the allegedly defective vehicle was purchased and used (Indiana), not the law of the principal place of business of the manufacturer (Michigan). *Id.* at 947.

Med. Sys., 75 F.3d at 1085 (vacating class certification and faulting lower court for failure to consider the variation among the laws of all states (6th Cir.)); *Castano*, 84 F.3d at 749-50 (vacating certification due to district court's failure to consider variations in state law for each claim) (5th Cir.)); *Walsh I*, 807 F.2d at 1017-19 (vacating certification of nationwide class in part because variations in state law would destroy predominance (D.C. Cir.)).

[7] In 1945, the Indiana Supreme Court first articulated the "most intimate contact with the transaction" test presently used to assess warranty/contract choice of law issues. *See W.H. Barber Co. v. Hughes*, 63 N.E.2d 417 (Ind. 1945). That test is discussed below. *See* Part I.B.2 *infra.*

- In *Ludwig v. Ford Motor Co.*, 510 N.E.2d 691 (Ind. Ct. App. 1987), plaintiff alleged that it bought in Indiana mass-produced trucks and engines, made by Ford and General Motors, whose principal places of business are in Michigan. Plaintiff contended that the trucks and engines were defective, breaching express and implied warranties. As to those claims, the Indiana state court applied the law of the state in which the allegedly defective vehicles were purchased and used (Indiana), not the law of the principal place of business of the non-Indiana manufacturers.

- In *Dutton v. International Harvester Co.*, 504 N.E.2d 313 (Ind. Ct. App. 1987), the plaintiff alleged that it purchased in Indiana a mass-produced planter implement manufactured by a defendant with an out-of-state principal place of business. The court addressed plaintiff's breach of warranty claims under the law of the place of purchase and use (Indiana), not the principal place of business of the manufacturer defendant.

- In *Prairie Production, Inc. v. Agchem Division-Pennwalt Corp.*, 514 N.E.2d 1299 (Ind. Ct. App. 1987), plaintiff alleged that it was sold in Indiana a defective mass-produced pesticide manufactured by the out-of-state defendant, breaching express and implied warranties. The Indiana state court applied the law of the state in which the allegedly defective pesticide was purchased and used (Indiana), not the law of the principal place of business of the non-Indiana manufacturer.

- In *Martin Rispens & Son v. Hall Farms, Inc.*, 621 N.E.2d 1078 (Ind. 1993), the plaintiff alleged that it had been sold in Indiana defective watermelon and cantaloupe seeds developed and supplied by an out-of-state defendant, giving rise to express and implied warranty claims. The Indiana Supreme Court addressed the warranty issues in the case based on the law of the place of purchase and use (Indiana), not the principal place of business of the out-of-state seed supplier (Petoseed). *Id.* at 1081.

- In *Richards v. Goerg Boat & Motors, Inc.*, 384 N.E.2d 1084 (Ind. Ct. App. 1979), plaintiff alleged that he bought in Indiana a defective houseboat manufactured by an

Arkansas company. The Indiana appellate court applied Indiana law to plaintiff's warranty claims, not the law of the defendant's apparent principal place of business (Arkansas).

- In *Jones v. Abrianai,* 350 N.E.2d 635 (Ind. Ct. App. 1976), plaintiffs asserted a variety of breach of warranty claims, alleging that they bought in Indiana a defective mobile home manufactured by an Alabama company. The Indiana appellate court applied Indiana law to those claims, not the law of the defendant's principal place of business (Alabama).[8]

To be sure, these cases do not contain explicit choice of law analyses. Yet, given the conflicts among state warranty laws acknowledged by this Court (*see* Order at 5), it is significant that in every case, the Indiana courts and the parties instinctively applied the law of the place where the product was purchased and used. In neither these cases nor any other Indiana non-personal injury product warranty case that Ford has located has the court's choice of law decision been guided primarily by the location at which pre-sale product design and warranty decisions were made. In essence, the Court's Order declares all of this Indiana law to be in error.

2. The Court's Ruling Contravenes Indiana Choice Of Law Policies.

Indiana follows the "most intimate contacts to the transaction" test to ascertain the law that applies to contracts. *See Nucor Corp. v. Aceros y Maquilas de Occidente,* 28 F.3d 572, 582-83 (7th Cir. 1994); *Travelers Indem. Co. v. Summit Corp. of Am.,* 715 N.E.2d 926, 931 (Ind. Ct. App. 1999). That test tracks § 188 of the RESTATEMENT (SECOND) CONFLICT OF LAWS

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[8] Similarly, in *Sanco, Inc. v. Ford Motor Co.,* 771 F.2d 1081 (7th Cir. 1985), the plaintiff alleged that defendant defectively designed and manufactured certain trucks purchased in Indiana, breaching the implied warranty of merchantability. In deciding the warranty claims, the Seventh Circuit applied the law of the state of purchase of purchase and use (Indiana), not the law of defendant's principal place of business (Michigan). *Id.* at 1085-86.

("RESTATEMENT"). *See Travelers*, 715 N.E.2d at 931. The Court's choice of law ruling runs afoul of the tenets of the RESTATEMENT in several dispositive respects.

First, as this Court previously recognized, Indiana's choice of law rules for contract-based claims require a court to consider "'all acts of the parties touching ***the transaction.***'" *Marshall v. Wellcraft Marine, Inc.*, 103 F. Supp. 2d 1099, 1112 (S.D. Ind. 1999) (quoting *Travelers*, 715 N.E.2d at 931) (emphasis added) (Barker, C.J.). As noted in *Marshall*, the RESTATEMENT specifies six factual considerations for consideration: (1) the place of contracting; (2) the place of contract negotiations; (3) the site of performance; (4) the location of the contract's subject matter; (5) the domicile of the plaintiff; and (6) the domicile of the defendant. *See* RESTATEMENT § 188(2)(a)-(e).

In a mass-produced product warranty action (like this one), five of these six factors favor application of the law of the state in which the plaintiff purchased and used the product. The "place of contracting" "is the place where occurred the last act necessary . . . to give the contract binding effect." *Id.* § 188, cmt. e. In this instance, that would be the state in which a plaintiff purchased his/her vehicle and/or tires, since no contractual obligation can arise until a purchase occurs. Any "contract negotiations" (*e.g.*, negotiations regarding the purchase of the tires and/or vehicle, any extended warranties, any warranties-by-representation) would have likewise occurred in the state where the purchase occurred. (The Court's suggestion that the parties did not negotiate the terms of the warranty (Order at 16) misses the point; there likely were negotiations about the overall transaction (*e.g.*, the purchase of the vehicle), which is the

proper inquiry under the RESTATEMENT.[9]) Similarly, the "site of performance" is the state in which the vehicle and/or tires were delivered to the buyer in accordance with the purchase agreement. And finally, with respect to "the location of the contract's subject matter," where (as here), a contract deals with "a specific physical thing" and that item is "the principal subject of the contract, it can often be assumed that the parties . . . would expect that the local law of the state where the thing . . . was located would be applied to determine many of the issues arising under the contract." RESTATEMENT § 188, cmt. e.[10] Thus, that factor weighs in favor of calling into play the laws of the state in which the allegedly defective product was purchased and presumably used.[11]

Even though Indiana choice of law principles clearly focus on the ***transaction*** (as evidenced by the foregoing factors), this Court's Order declared the foregoing transaction-related considerations to be "entirely irrelevant." (Order at 16.) In place of the transaction-related choice of law factors actually dictated by Indiana law, the Court focused exclusively on the supposed location of ***pre***-transaction decision-making about the design and manufacture of the

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[9] Further, even if the Court's line of inquiry were correct, there is no basis for the Court's assumption that there were no negotiations about warranty terms. There may have been discussion about the purchase of extended warranties or there may be been discussions and resulting representations that gave rise to express warranties.

[10] Master Complaint allegations support this understanding of events. (*See, e.g.*, Compl. ¶¶ 12, 15, 53.)

[11] In retrospect, Ford acknowledges that defendants may have created some confusion on this issue by arguing that the plaintiffs' "place of residence" should dictate the choice of law. *See* Reply Mem. In Support Of Defs.' Mot. To Dismiss, Brief III at 3 (filed Mar. 19, 2001). Since consumers normally buy tires and vehicles at or near their place of residence, defendants intended the term "residence" to be shorthand for an amalgam of these factors – the place of contracting to buy the tires and/or vehicle, the place of contract negotiations, the site of performance, and the location of the contract's subject matter.

allegedly defective products and about the product warranties, effectively yielding a presumption that the laws of the defendant manufacturer's principal place of business should apply.[12]

There is no Indiana law precedent supporting (or even suggesting) that such an analysis should be substituted for the RESTATEMENT factors. Indeed, Indiana choice of law precedents contain no hint that the situs of manufacturer's ***pre***-transaction decision-making is a factor to be considered in product warranty cases. For example, in *Marshall*, plaintiffs alleged that the mass-produced boat lights that they were sold contained design or manufacturing defects. *See* 103 F. Supp. 2d at 1104 n.3, 1105. Nevertheless, in determining which state's laws should apply to plaintiffs' warranty claims, this Court made no inquiry about where the manufacturer's pre-transaction decision-making occurred. Instead, the Court looked solely at ***the transaction –*** at factors relating to the actual purchase of the allegedly defective product. In that case, the Court determined that Florida law should apply to the warranty claims because plaintiffs "purchased the [product] in Florida, so any alleged contracts or warranties arising from that transaction originated in that state," because any "performance" on the contract or warranty would have occurred there, and because the "subject matter" of the contract (defined as the product) was located and used there. *Id.* at 1113. No inquiry was made about where design and warranty decisions were made about the allegedly defective product. *See also Kamel v. Hill-*

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[12] Even if taking account of pre-transaction decision-making were appropriate, it should not lead to the result reached by the Court. For example, to the extent that the named plaintiffs' claims concern the purchase of Ford Explorers equipped with Firestone tires, the provisions of the Master Complaint cited by the Court for its choice of law determination tend to allege joint activity by Firestone and Ford – "'Ford, with Bridgestone and Firestone's agreement, utilized a 'quick fix;'" "'Defendants failed to conduct safety tests;'" "'Defendants knew that the Explorer's weight capacity . . . was likely to be exceeded;'" "'Defendants knew of the defects in the Firestone tires and the Explorer . . . but chose to 'cover up' those defects;'" "'Defendants made fraudulent misrepresentations."' (Order at 8-9 (quoting Compl. ¶¶ 70-71, 77, 78, 79-93, 122).) With these activities occurring in multiple locations (favoring application of neither Tennessee nor Michigan law), the predominant location would be the place at which a vehicle equipped with Firestone tires was purchased and used.

Rom Co., 108 F.3d 799, 805 (7th Cir. 1997) (in contract cases, Indiana law mandates the application of the law of the place where "the contract was negotiated and performed and where its subject matter can be found"); *F. McConnell & Sons, Inc. v. Target Data Sys., Inc.*, 84 F. Supp. 2d 961, 973 n.15 (N.D. Ind. 1999) (refusing to apply law of defendant's principal place of business to contract claims, since contract was signed and performed in Indiana and subject matter of contract was presumably located, in part, in Indiana); *Dohm & Nelke v. Wilson Foods Corp.*, 531 N.E.2d 512, 513-14 (Ind. Ct. App. 1988) (same).

In conducting its choice of law analysis, this Court also deviated from Indiana law in rejecting the need to consider whether the home states of plaintiffs "have a greater interest in having their law applied to the protect their residents than do the home states of Defendants." (Order at 14 n.10.) As noted previously, Indiana follows the RESTATEMENT on choice of law matters, *see Travelers*, 715 N.E.2d at 930, and the RESTATEMENT explicitly instructs courts to consider "the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue." RESTATEMENT § 6. This state interest inquiries "underlie all rules of choice of law and are used in evaluating the significance of a relationship, with respect to the particular issue, ***to the potentially interested states***, the transaction, and the parties." *Id.* § 188, cmt. b (emphasis added).

It is well-established that "[e]ach plaintiff's home state has an interest in protecting its consumers from in-state injuries caused by foreign corporations and in delineating the scope of recovery for its citizens under its own laws." *Ignition Switch I*, 174 F.R.D. at 348. In contrast, the courts of Michigan and Tennessee have each affirmatively expressed minimal interest in applying their laws to regulate the conduct of home-state manufacturers as to matters

outside their borders.[13] *See Hall v. Gen. Motors Corp.*, 582 N.W.2d 866, 868-69, 871 (Mich. Ct. App. 1998), *appeal denied*, 459 Mich. 986 (1999); *Farrell v. Ford Motor Co.*, 501 N.W.2d 567, 572-73 (Mich. Ct. App. 1993); *cf. Smith v. Priority Transp., Inc.*, No. 02A01-9203-CV-00074, 1993 Tenn. App. LEXIS 90, at *9-10 (Tenn. Ct. App. Feb. 9, 1993).[14] To be sure, the imposition of Michigan and Tennessee law on these claims would "conflict[] with the federalist concept which inherently limits the reach of any state's perceived interest to matters which occur within its boundaries or which impact its citizens." *Rutherford v. Goodyear Tire & Rubber Co.*, 943 F. Supp. 789, 792 (W.D. Ky. 1996), *aff'd*, 142 F.3d 436 (6th Cir. 1998).[15]

The reasoning of Indiana precedent and the RESTATEMENT is sound. The state in which a given named plaintiff acquired his/her vehicle and/or tires and received any warranties obviously has the most significant relationship to the transaction and the most significant interest in applying its contract law. The vehicle purchase contracts that purportedly form the basis for plaintiffs' contract claims would have been negotiated and executed there. Any implied

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[13] Because Tennessee still applies the rule of *lex loci* in resolving choice of law issues in contract actions, *see Vantage Tech., LLC v. Cross*, 17 S.W.3d 637, 650 (Tenn. Ct. App. 1999), *application denied*, 2000 Tenn. LEXIS 236 (2000), Tennessee itself would apply the law of place of each plaintiff's domicile as the place of injury to any contract-based claims against Michigan or Tennessee companies.

[14] *Cf. Phillips v. Gen. Motors Corp.*, 995 P.2d 1002, 1012 (Mont. 2000) ("[Under the Restatement approach] stressing the importance of the place of manufacture for choice of law purposes in a product liability case would be unfair."); *Dorman v. Emerson Elec. Co.*, 23 F.3d 1354, 1360 (8th Cir. 1994) (noting Missouri's interest in "corporate citizens" outweighed by another state's interest in compensating victims under its law).

[15] Over the past two years, Congress has repeatedly criticized state courts for applying the law of one jurisdiction to all claims asserted in nationwide class actions (regardless on which state in which they arose), finding the practice to be an abuse of the class action device and prone to "undermin[e] basic federalism principles." *The Class Action Fairness Act,* S. REP. NO. 106-420, 106th Cong., 2d Sess. 20-22 (2000); *see also Interstate Class Action Jurisdiction Act*, H. REP. NO. 106-320, 106th Cong., 1st Sess. 8 (1999) ("To facilitate the certification of nationwide or multi-State classes, some State courts have declared the laws of [a single state] to apply to all claims in the action, even where . . . [that] law is inconsistent with the laws of other jurisdictions that should be applied.").

warranty created as a matter of law with respect to that vehicle obviously would have arisen under the law of the state in which the sale occurred. As to the express warranty claims, any express warranty by advertising or representation would have been delivered, and thereby would have become the basis of the bargain, in the state where the plaintiff received the statement (presumably the state of purchase). In sum, both plaintiffs and defendants obviously would have expected that the law of that state would govern any lawsuits arising under the buyer's contract.

It is inconceivable that a state would willingly abdicate its role in governing contracts made within its borders for the purchase of products imported to the jurisdiction. And it is an even bigger stretch to assume that a state has no interest in setting the appropriate balance between encouraging business in the state and protecting the interests of its consumers. In sum, every relevant factor in the choice of law analysis with respect to plaintiffs' contract-based claims points to the state of purchase or acquisition, negotiation, and use (*i.e.*, each plaintiff's home state) as the state whose law applies.

C. Overarching Policy Dictates That Plaintiffs' Indiana Choice Of Law Rules Counsel Against The Application Of Michigan And Tennessee Law.

If ultimately adopted, this Court's choice of law analysis would have the astounding effect of basically putting Indiana's legislature and judiciary out of business when it comes to warranty claims involving products made by out-of-state companies. Under that analysis, any action alleging a defective product would be governed by the law of a jurisdiction other than Indiana (unless the product happened to be made by an Indiana-based company). In short, product liability claims raised in Indiana by Indiana residents would typically be governed by the law of ***another*** jurisdiction. Thus, if other jurisdictions elect to protect their manufacturing companies by limiting or eliminating warranty claims, consumers purchasing

products in Indiana made by those out-of-state manufacturers would have their rights limited as dictated by those other jurisdictions. Or if the defendant manufacturer's principal place of business were a foreign country that does not recognize U.S.-style warranty concepts, the Indiana purchaser presumably would receive no product warranties at all. Even if such protectionist behavior does not occur, Indiana residents presumably would still be displeased (if not downright outraged) to discover that if they walk into an Indianapolis store and buy a mass produced product made by a Belgian company, their warranty rights regarding the product most likely will be governed by the laws of Belgium and that Indiana law provides no protection whatsoever.

If this Court's choice of law determination stands, Indiana's legislature and judiciary presumably will be stunned to learn that they have been declared irrelevant to virtually all warranty claims that may be asserted regarding mass-produced products purchased in Indiana and that all of Indiana's policies concerning products purchased within this state have been nullified in favor of the laws of other jurisdictions. Those institutions presumably would roundly reject the choice of law policy that this Court has articulated. Indeed, the legislature has already declared that Indiana law – not the law of some other jurisdiction – should be applied to "transaction[s]" with an "appropriate relation" to the state. Ind. Code Ann. § 26-1-1-105.

D. The United States Constitution Prohibits The Application of Tennessee And Michigan Law.

The Court's Order also presents serious constitutional issues. Even if Indiana choice of law principles did dictate applying Tennessee and Michigan law to the warranty claims in this case, due process would bar that outcome. In *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), the Supreme Court recognized a due process constraint on Indiana and other states'

choice of law rules, such that courts must apply the law of a jurisdiction with significant contacts to "the claims asserted by each member of the plaintiff class." *Id.* at 821.

In its Order, this Court rejected the notion that *Shutts* posed any impediment to its choice of law determination, since defendants had engaged in pre-sale "actions" relevant to plaintiffs' claims in Michigan and Tennessee, the states whose laws the Court selected to apply to plaintiffs' warranty claims. (Order at 14 n.10.) But that analysis misses the Supreme Court's point in *Shutts.* In that case, plaintiffs alleged that the defendant had wrongfully delayed royalty payments on natural gas leases in 11 states. *See* 472 U.S. at 799. The question was whether Kansas law could constitutionally be applied to claims regarding all leases in that case, since most arose outside Kansas. The Court noted that the defendant engaged in substantial business in Kansas, and that many facts regarding the litigation arose there, including the suspension of royalty payments to hundreds of Kansas residents regarding natural gas properties in that state. *See id.* at 819. Yet, the Court found that such contacts were insufficient to permit application of Kansas law to claims regarding leases entered into in other jurisdictions. The Court concluded that in a multi-state class action, a court "may not take a ***transaction*** with little or no relationship to [a] forum and apply the law of the forum in order to satisfy the procedural [class action prerequisite] that there be a 'common question of law.'" *Id.* at 821. Under *Shutts*, the required inquiry is not the one made by this Court (*i.e.*, where did the ***defendant*** engage in potentially relevant ***pre-transaction*** behavior?). Instead, the proper inquiry under *Shutts* is directed to the location at which ***all parties*** actually engaged in the ***transaction*** and related events.

The insight that *Shutts* requires focus on the ***transaction*** (not on defendant's pre-transaction behavior) is strongly confirmed by the Supreme Court's admonition that the due process constraints on choice of law determinations are guided in large part by the "expectations

of the party." *Shutts*, 472 U.S. at 822 ("There is no indication that when the leases involving land and royalty owners outside of Kansas were executed, the parties had any idea that Kansas law would control."). As in *Shutts*, the named plaintiffs in this case who purchased their tires and/or vehicles in California would have had no reason to believe that their transactions would be governed by the laws of Tennessee or Michigan, particularly given that plaintiffs affirmatively allege that defendants concealed from them the pre-transaction behavior upon which this Court grounded its choice of law analysis. Moreover, given the plaintiffs' own testimony about their lack of contacts with Michigan or Tennessee, they could have had no expectations that the laws of those jurisdictions would apply to their claims.[16]

In virtually identical circumstances, other federal courts have found this Court's choice of law conclusion to violate the Due Process Clause. For example, in *Bronco II*, class members asserting warranty claims on behalf of a proposed class of owners of allegedly defective vehicles made the same argument made by plaintiffs in this case – that Michigan's laws should be applied to all such claims because the defendant "has its principal place of business in Michigan and design decisions [regarding the vehicles] were made in Michigan." 177 F.R.D. at 371. The court in *Bronco II* unhesitatingly found *Shutts* to be controlling, precluding plaintiffs' proposal that Michigan law be applied to all such claims. *Id.* (noting that all 51 jurisdictions "have some contact with the [class] claims, whether by virtue of being the place where plaintiffs are domiciled or the place where plaintiffs purchased their Bronco IIs"). *See also Ignition Switch I*, 174 F.R.D. at 347-48 (same result as to other defective product claims).

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[16] *See* Defs.' Supp. Mem. In Opposition To Class Certification at 14-16 (filed this date).

In addition to the due process barrier, the Commerce Clause and Full Faith and Credit Clause prohibit one state from seeking to regulate transactions in other states. Under the Commerce Clause, the Supreme Court has repeatedly rejected attempts by states to "control conduct beyond the boundaries of the State" and regulate "commercial activity occurring wholly outside" their borders. *Healy v. Beer Inst.*, 491 U.S. 324, 336-37 (1989); *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 582-83 (1986) (rejecting New York's attempt to "project its legislation" into other states); *see also BMW of N. Am. v. Gore*, 517 U.S. 559, 572 (1996) (constitutional restraints prohibit one state from regulating transactions in other states). For example, Louisiana has enacted a redhibition statute giving its consumers specified rights and remedies with respect to redhibitory defects that may be identified in products sold in Louisiana. *See* La. Civil Code § 2520. However, this Court's choice of law ruling effectively repeals that statute, essentially holding that since neither Tennessee nor Michigan has passed a redhibition statute, the rights and remedies established by the state of Louisiana law are not available to its citizens. (Order at 16-17.) In sum, "[p]rinciples of comity and Federalism, as well as the implications of the Due Process Clause and the Full Faith and Credit Clause, militate against" the imposition of Michigan or Tennessee law upon every claim in a nationwide class action. *Russo v. Mass. Mut. Life Ins. Co.*, 680 N.Y.S.2d 916, 919 (Sup. Ct. 1998), *aff'd*, 711 N.Y.S.2d 254 (App. Div. 2000).

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For all of the foregoing reasons, Ford respectfully requests that the Court revise its choice of law ruling to declare that the law of the jurisdiction in which an allegedly defective tire or vehicle was bought will govern the claims asserted herein. In the alternative, Ford asks that the choice of law question be certified to the Indiana Supreme Court. *See* Ind. R. App. P.

64. Such a certification would be appropriate, since the issue may be determinative of many claims in this action, and this Court has cited no clear Indiana precedent in support of its choice of law determination, which significantly limits the reach of Indiana's own warranty law. *Id.*[17]

II. THE COURT SHOULD ALSO RECONSIDER ITS REJECTION OF DEFENDANTS' "NO INJURY" ARGUMENTS.

Defendants sought dismissal of virtually all of the named plaintiffs' warranty and unjust enrichment claims on the grounds that they had not alleged that they had experienced any manifestation of the alleged defects with the products that they had purchased. In their earlier motion to dismiss briefing, defendants provided a state-by-state review of the case law of each jurisdiction on this issue. *See* Mem. In Support Of Defs.' Mot. To Dismiss, Brief I at 5-17 & n.14 (filed Jan. 29, 2001); Reply Mem. In Support Of Defs.' Mot. To Dismiss, Reply Brief I at 3-8 (filed Mar. 19, 2001). Indeed, as the Court seemed to acknowledge (*see* Order at 46-47), "[i]n most jurisdictions, the courts recognize that unless a product actually manifests the alleged defect, no cause of action for breach of express or implied warranty . . . is actionable." *Chin*, 182 F.R.D. at 460.[18] If the Court concludes that the law of the state of product purchase and use applies to the named plaintiffs' warranty/unjust enrichment claims, Ford respectfully requests

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[17] Certification is "all the more appropriate where the certified question implicates a state's important public policy concerns." *Shirley v. Russell*, 69 F.3d 839, 844 (7th Cir. 1995). Choice of law questions implicating policy choices best resolved by the affected state are appropriate subjects for certification to state courts. *See, e.g., Baxter v. Sturm, Ruger & Co.*, 13 F.3d 40, 42-43 (2d Cir. 1993); *Boardman v. United Servs. Auto. Assn.*, 763 F.2d 663, 663 (5th Cir. 1984) (certifying question about the weight that the RESTATEMENT should be afforded in a choice of law determination).

[18] The Court recognized that "numerous courts" have rejected warranty claims for a lack of manifest injury and cited two decisions purportedly to the contrary. (*See* Order at 46-47.) In fact, those two decisions explicitly ***declined*** to extend their limited holdings to cases like this one where no product defect manifested itself. *See Rivera v. Wyeth-Ayerst Labs.*, 121 F. Supp. 2d 614, 619 (S.D. Tex. 2000) (distinguishing case from the ones "involving tires, airbags, and the like"); *Microsoft v. Manning*, 914 S.W.2d 602, 609 (Tex. App. 1995) (distinguishing case from ones involving tires or cars).

that the Court review the previously submitted briefing and reconsider whether the laws of the various additional jurisdictions that would come into play would require the dismissal of claims asserted for failure to allege any manifestation of the alleged defects.

Even if the Court continues to conclude that Michigan law applies to all warranty/unjust enrichment claims, Ford respectfully requests that this Court reconsider whether Michigan law dictates that the warranty claims must be dismissed on "no injury" grounds. In deciding the motion to dismiss, the Court did not have any briefing on that question (since none of the named plaintiffs purchased products in Michigan). But like "most jurisdictions," *Chin*, 182 F.R.D. at 460, Michigan law holds that no warranty claim arises absent manifestation of the alleged product defect. As this Court noted, under Michigan law, "breach of implied warranty and negligence . . . require proof of exactly the same elements." Order at 46 n.36 (quoting *Prentis v. Yale Mfg. Co.*, 365 N.W.2d 176, 186 (Mich. 1984) (quotation and citation omitted)). The law is clear that a negligence claim under Michigan law, as in most states, requires actual injury, and this Court so held. Warranty claims in Michigan carry the same requirement. *See, e.g.*, *Jodway v. Kennametal, Inc.*, 525 N.W.2d 883, 889 (Mich. Ct. App. 1995) ("In order to prove the breach of an implied warranty, plaintiffs must show that the product left the manufacturer in a defective condition, ***and that the defect caused the plaintiffs' injuries.***") (emphasis added); *Gregory v. Cincinnati Inc.*, 538 N.W.2d 325, 329 (Mich. 1995) ("A breach of warranty claim tests the fitness of the product and requires that the plaintiff prove a defect attributable to the manufacturer and causal connection between that defect and the injury or damage of which he complains.") (quotation and citation omitted); *Smith v. E.R. Squibb & Sons, Inc.*, 245 N.W.2d 52, 55 (Mich. Ct. App. 1976), *aff'd*, 273 N.W.2d 476, 479 (Mich. 1979) ("These latter two elements of proof—a defect attributable to the manufacturer and an injury

resulting therefrom—are, of course, essential to a cause of action based on breach of an implied warranty."). Nothing in this basic requirement should compel this Court to depart, with respect to plaintiffs' warranty claims, from what it recognized to be the overwhelming weight of authority in courts across the country rejecting claims for breach of warranty absent some actual, manifest injury. *See* Order at 46-47. Thus, if Michigan law is to be applied to all warranty/unjust enrichment claims in this action, all of the named plaintiffs' claims should be dismissed on this ground. (If the Court concludes not to reconsider its interpretation of Michigan law, it should at minimum certify this "no injury" issue to the Michigan Supreme Court to obtain its proper resolution under Michigan law.[19])

[19] Michigan allows for the certification to its supreme court of "a question that Michigan law may resolve and that is not controlled by Michigan Supreme Court precedent." Mich. Court R. 7.305(B)(1). The purpose of certification in Michigan is to "enable federal courts . . . to defer to [the Michigan Supreme Court] on matters of first impression concerning state law in order that the federal court will not be placed in the position of construing the state constitution or a state statute or declaring state common law when [the Michigan Supreme Court] has not spoken to the subject." *In re Certified Question (Jewell Theater Corp.)*, 359 N.W.2d 513, 515 (Mich. 1984). Therefore, certification to the Michigan Supreme Court would be proper in a situation where the Court still believes no controlling Michigan Supreme Court precedent on the "no injury" matter exists. (*See* Order at 46 n.36.)

Dated: August 14, 2001

Respectfully submitted,

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CERTIFICATE OF SERVICE

Service of the foregoing was made by hand delivery or by placing a copy of the same into the United States Mail, first class postage prepaid, this _____ day of _____, 2001, addressed to all counsel of record appearing on the Panel Attorney Service List, and others, as necessary.

_____

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