UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA

In re BRIDGESTONE/FIRESTONE, INC. ATX, ATX II AND WILDERNESS TIRES PRODUCTS LIABILITY LITIGATION	Master File No. IP 00-9373-C-B/S MDL No. 1373 (Centralized Before Judge Sarah Evans Barker)
THIS DOCUMENT RELATES TO ALL CLASS ACTIONS	

REPLY BRIEF I

REPLY MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS: REASONS TO DISMISS ALL CLAIMS OF PLAINTIFFS WHO HAVE NOT ALLEGED INJURY, AND REASONS TO DISMISS PLAINTIFFS' CLAIMS FOR A COURT-ORDERED RECALL (COUNT VIII)

Hugh R. Whiting
Mark Herrmann
JONES, DAY, REAVIS & POGUE
North Point
901 Lakeside Avenue
Cleveland, Ohio 44114
(216) 586-3939

John H. Beisner
Stephen J. Harburg
O'MELVENY & MYERS LLP
555 13th Street, N.W.
Washington, D.C. 20004
(202) 383-5370

Mark J.R. Merkle
KRIEG DEVAULT ALEXANDER & CAPEHART, LLP
One Indiana Square
Suite 2800
Indianapolis, Indiana 46204-2017
(317) 636-4341

Randall R. Riggs
LOCKE REYNOLDS LLP
1000 Capital Center South
200 N. Illinois Street
Indianapolis, Indiana 46204
(317) 237-3814

ATTORNEYS FOR DEFENDANT
BRIDGESTONE/FIRESTONE, INC.

ATTORNEYS FOR DEFENDANT
FORD MOTOR COMPANY

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES

Page

TABLE OF AUTHORITIES

Page

TABLE OF AUTHORITIES

Page

STATUTES

OTHER AUTHORITIES

I. OVERVIEW.

In their 165-page opposition to defendants' motion to dismiss, plaintiffs try mightily to avoid the hard reality that their Master Complaint is afflicted with myriad fatal deficiencies. For example, they effectively seek to amend their complaint by recharacterizing their claims and submitting affidavits, a tactic not permitted at this juncture.[1] Further, in an effort to mask the flaws in their claims, plaintiffs seek to deal with the motion on a very abstract, classwide basis, ignoring that the question presented by this motion is whether the ***named plaintiffs*** (*i.e.*, the purported class representatives) have stated legally valid claims, an issue that must be resolved before any consideration can be given to the claims of the purported class.[2]

In the pages that follow,[3] defendants demonstrate that notwithstanding all of plaintiffs' opposition rhetoric, the balance has not shifted – the named plaintiffs have not explained away the many flaws that render their individual claims legally untenable:

- The fundamental problem with plaintiffs' state law-based claims and RICO claims remains: the named plaintiffs themselves do not allege that they have experienced any malfunctions or other problems with the products at issue. Courts have uniformly rejected products liability claims where the plaintiff's product does not manifest the alleged defect, and plaintiffs have provided no basis for concluding that this case falls

---

[1] *See, e.g., Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1107 (7th Cir. 1984) ("[I]t is axiomatic that the complaint may not be amended by the briefs in opposition to a motion to dismiss."); *Implement Serv. Inc. v. Tecumseh Prods. Co.*, 726 F. Supp. 1171, 1176 (S.D. Ind. 1989) (affidavit excluded from consideration at 12(b)(6) stage).

[2] *See, e.g., Britt v. McKenny*, 529 F.2d 44, 45 (1st Cir. 1976) ("If none of the named plaintiffs may maintain this action on their own behalf, they may not seek such relief on behalf of a class.").

[3] For the Court's convenience, defendants have filed three separate reply briefs tracking their opening Motion to Dismiss briefing ("Defs. Brief I," "Defs. Brief II," and "Defs. Brief III"). Brief I ("Defs. Reply Br. I") addresses plaintiffs' failure to present actual injury with respect to their common law, equitable and statutory consumer protection claims and "injury to business or property" with respect to their RICO claims, as well as plaintiffs' failure to establish a basis for their claim for a vehicle recall. Brief II ("Defs. Reply Br. II") reaffirms the failure of plaintiffs' RICO claims. Brief III ("Defs. Reply Br. III") explains why plaintiffs' claims for violation of state consumer protection laws, the Magnuson-Moss Act, breach of warranty, redhibition, negligence, and unjust enrichment must be dismissed.

outside that substantial line of precedents. (*See* Defs. Reply Br. I, Part II.A (state law) and Part II.B (RICO) below.)

- Plaintiffs' arguments that this Court is authorized to conduct a motor vehicle recall program are off the mark. ***No*** court has ever ordered a recall outside the context of the Motor Vehicle Safety Act, which does not provide for a private right of action; in fact, many courts have concluded that no such remedy exists. Notwithstanding plaintiffs' strained efforts to distinguish the spate of recent Supreme Court cases discussing the preemptive effect of federal law, it is clear that Congress's comprehensive regulation of motor vehicle recalls, and its vesting of exclusive authority for recall initiatives in NHTSA, preempts plaintiffs' effort to establish a competing system of judicially administered recalls. (*See* Defs. Reply Br. I, Part III below.)

- In their Opposition, plaintiffs do not successfully refute defendants' arguments that their RICO claims must be dismissed for a variety of other reasons: (a) their "enterprise" pleadings have been soundly rejected by the Seventh Circuit (*see* Defs. Reply Br. II, Part II below); (b) their failure to plead their RICO allegations with particularity and their failure to plead reliance foreclose their RICO claims (*see* Defs. Reply Br. II, Parts III-IV below); and (c) plaintiffs' § 1962(a) and § 1962(d) claims are deficient on both the facts and the law. (*See* Defs. Reply Br. II, Parts V-VI below.)

- Plaintiffs' choice of law arguments – that is, their arguments that the laws of Tennessee, Michigan, or Indiana should apply to all state law claims – are wrong from start to finish. It is beyond reasonable dispute that the laws of all 50 states are implicated by this purported nationwide class action, and home state laws should be applied to the claims of the named plaintiffs. (*See* Defs. Reply Br. III, Part I below.)

- Regardless of which state's laws are applied to consumer protection claims, each named plaintiff loses for failure to allege the basic elements required for such claims. (*See* Defs. Reply Br. III, Part II below.)

- A variety of flaws mar plaintiffs' breach of express warranty claims. For example, none of the named plaintiffs can yet explain how the limited written warranties applicable to their tires and vehicles were breached. (*See* Defs. Reply Br. III, Part III.A below.)

- Plaintiffs' implied warranty claims are equally flawed, lacking several of the essential prerequisites for such a claim. (*See* Defs. Reply Br. III, Part III.B below.)

- Plaintiffs' continuing failure to plead an actual injury that substantially interferes with the use of their vehicles and tires requires the dismissal of their claims for redhibition under Louisiana law. And because plaintiffs' state law warranty claims fail, their Magnuson-Moss Act claims must suffer the same fate. (*See* Defs. Reply Br. III, Parts IV-V below.)

- The named plaintiffs' mischaracterizations of applicable state law cannot rescue their negligence claims. The negligence claim of every named plaintiff is barred by the economic loss rule, as well as by the same failure that recurs throughout their complaint: the failure to allege actual injury. (*See* Defs. Reply Br. III, Part VI below.)

- Plaintiffs' unjust enrichment allegations are subject to multiple flaws, none of which are explained away by plaintiffs' Opposition. (*See* Defs. Reply Br. III, Part VII below.)

In sum, plaintiffs' 165-page Opposition brief changes nothing. ***Each*** claim of ***every*** named plaintiff is due to be dismissed on ***multiple*** grounds.

II. PLAINTIFFS HAVE FAILED TO PLEAD INJURY.

The fundamental defect that permeates plaintiffs' Master Complaint is the failure to allege a present manifest injury. Of the 42 named plaintiffs (not including those listed in Exhibit A to the Master Complaint), only ***three*** allege any tire separation incident, and ***no*** named plaintiff alleges that he or she experienced a "rollover" incident with a Ford Explorer. Thus, for virtually all of the named plaintiffs, what is alleged is a multi-level exercise in "what-if" speculation: ***if*** a series of circumstances converge, there is a ***risk*** that a tire on their vehicle ***might*** suffer a tread separation event; and ***if*** such a tire separation event occurs or other circumstances converge, there is a ***risk*** that their Ford Explorer ***might*** roll over and cause injury and damage. Such ruminations about events that have not occurred and likely will never occur do not justify plaintiffs' demand that relief be awarded ***now.*** Because of the absence of any allegation of actual injury, plaintiffs' common law, equitable, and statutory consumer protection claims must fail. And for that same reason, plaintiffs' RICO claims are fatally flawed for failure to allege "injur[y] . . . [to] business or property." 18 U.S.C. § 1964(c).

A. The Courts' Uniform Rejection of "No Injury" Theories Requires the Dismissal of Plaintiffs' Common Law, Equitable, and Statutory Consumer Protection Claims.

Federal and state courts have repeatedly dismissed the sort of state-law claims plaintiffs assert. Over and over, courts have rejected claims based on a product's alleged "propensity" to fail or on a product's alleged diminution in value owing to that alleged propensity. And over and over, courts have reached this conclusion, whether the claims bear a tort, fraud, warranty, or statutory fraud label. (*See* Defs. Br. I at 7-9 (explaining five federal circuit decisions rejecting no-injury claims).) A "common thread" runs through all of these cases: "[T]he absence of manifest injury is so fundamental a deficiency in tort or implied warranty claims that such claims are more appropriately dismissed than preserved." *In re Air Bags Prods. Liab. Litig.*, 7 F. Supp. 2d 792, 804 (E.D. La. 1998).

Just one day after this motion was filed, another court joined this judicial chorus. In *In re General Motors Type III Door Latch Litig.*, No. 98 C 5836, MDL 1266, 2001 WL 103434 (N.D. Ill. Jan. 31, 2001), the court dismissed a variety of Illinois and Texas state law claims based on allegations that door latches on certain vehicles had a tendency to fail, resulting in diminished market value and the risk of personal injury. *Id.* at *3. The court held that under Illinois law, such allegations do not establish the "essential element" of "compensable injury." *Id.* at *2-3. Similarly, the court stressed that Texas courts "have generally opposed the idea that consumers should be able to recover damages for an allegedly defective product which has not yet malfunctioned or caused injury." *Id.* at *3.[4] The court thus concluded that "a defect must

[4] The decision cites *Microsoft Corp. v. Manning*, 914 S.W.2d 602, 609 (Tex. App. 1995) ("Software . . . is not like tires or cars. Tires and cars have a distinctly limited usable life. At the end of the product's life, the product and whatever defect it may have had pass[es] away. If a defect does not manifest itself in that time span, the buyer has gotten what he bargained for.").

manifest itself in plaintiff's vehicle before plaintiff can recover," and where "plaintiffs have alleged only a possibility of malfunction leading to a possibility of injury," there is no valid claim. *Id.* at *4-5.[5]

Faced with the uniform rejection of "no-injury" products liability claims, plaintiffs resort to a series of ill-conceived counter-maneuvers. ***First***, they offer an affidavit suggesting that it may be possible to demonstrate that as a general matter, Ford Explorers have lost resale value. But that affidavit does not show (or even assert) that any particular named plaintiff has sold any vehicle and actually incurred any loss. Moreover, even if the affidavit had any meaning here, it cannot be considered in the context of the pending Rule 12(b)(6) motion; plaintiffs' claims must be judged on the basis of the allegations in their complaint. *See, e.g., 420 East Ohio Ltd. P'ship v. Cocose*, 980 F.2d 1122, 1125 (7th Cir. 1992) (rejecting consideration of affidavits submitted in opposition to motion to dismiss); *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1107 (7th Cir.1984).[6]

---

[5] In dictum, the court suggested that a claim ***might*** be possible in some unspecified circumstances (*e.g.*, a case in which a vehicle was new). *Id.* at *5. But the court concluded that "[e]ven on [those] facts, one would have to go out on a legal limb to find injury." *Id.* In this case, as in *General Motors*, the alleged "facts . . . do not warrant a departure from our traditional understanding of what a legal injury is." *Id.* Plaintiffs' complaint encompasses a broad array of tires and vehicles, both older and newer. But except for three named plaintiffs whose claims must be dismissed for other reasons, ***none*** allege that their tires or vehicles have manifested a defect resulting in injury. And because none alleges that he or she attempted to resell any vehicle and suffered from diminished resale value, plaintiffs' hypothetical allegations of diminished resale value cannot preserve this lawsuit. *See, e.g., Yost v. Gen. Motors Corp.*, 651 F. Supp. 656, 658 (D.N.J. 1986) ("Damage is a necessary element of both counts – breach of warranty and common law fraud . . . . Plaintiff has not apparently attempted to sell his car in the used car market and simply asserts the bald conclusion that its value in the market has decreased."). Indeed, the only named plaintiff who did sell or trade in her vehicle did so in or about May 1999, well before any publicity about alleged defects could have affected the Explorer's resale value. (*See* Compl. ¶ 53.)

[6] Plaintiffs also attach a declaration from Richard Baumgardner to their opposition papers. That declaration, like the affidavit of Larry Batton, cannot be considered on a motion to dismiss. In any event, as of October 10, 2000, Mr. Baumgardner had looked at only eight tires out of the hundreds of tire populations subject to NHTSA's ongoing investigation. (*See* Baumgardner Dep. at 48 & Ex. 8 (Oct. 10, 2000).)

Second, plaintiffs assert for the first time that they have sustained injury in the sense that a subject tire may develop "fatigue cracks" as soon as the "rubber hits the road" and that these "imperceptible" cracks may over time "result in tread separation." (Pl. Opp. at 4, 54.) Of course, these new allegations are irrelevant to the pending motion, since no named plaintiff even suggests that these "fatigue cracks" ever developed in his or her tires, an important point because even in plaintiffs' view, these cracks do not occur in all subject tires. (*See id.* (asserting that "cracks" were found in 116 of 482 tires examined).) But even if the theory did apply to any named plaintiff, it is legally invalid because mere deterioration does not equate to an allegation of product failure and manifest injury. *See, e.g., Willett v. Baxter Int'l, Inc.*, 929 F.2d 1094, 1096-97 (5th Cir. 1991) (manifest injury is not present where plaintiffs allege that "stress fracture[s] can begin" in artificial heart valves that, in turn, could lead to a product failure and severe injury). Plaintiffs admit as much, acknowledging that the supposed cracks are merely a part of a "failure process" that over time could "result in tread separation." (Pl. Opp. at 54.) All products (including tires and motor vehicles) begin to wear upon their first use. But absent an allegation that a product has actually failed, plaintiffs' latest semantic effort to evade the solid line of "no injury" precedents does not rescue their claims. *See, e.g., Bravaman v. Baxter Healthcare Corp.*, 794 F. Supp. 96, 101 (S.D.N.Y. 1992) ("Liability [for a functioning product] is a rather novel, and dubious theory . . . ."); *Feinstein v. Firestone Tire & Rubber Co.*, 535 F. Supp. 595, 602 (S.D.N.Y. 1982) ("[t]ires which live . . . full, productive lives [are], by demonstration and definition, 'fit for the ordinary purposes' for which they [are] used").

Third, plaintiffs seek to evade the widespread rejection of "no-injury" products liability claims by citing a scattered few irrelevant cases, in which the courts found ***present*** manifest injury. (*See* Pl. Opp. at 54-56.) For example, in *San Francisco Unified School District*

v. W.R. Grace & Co.-Connecticut, 37 Cal. App. 4th 1318, 1330 (Cal. Ct. App. 1995) (cited in Pl. Opp. at 54-55), the court actually ***rejected*** any claim based on the mere "***risk*** of contamination endangering a building's occupants," concluding that "[p]hysical injury resulting from asbestos contamination [was required], not the mere presence of asbestos." In stark contrast, the named plaintiffs in this case merely assert that a defect ***might*** manifest itself under certain circumstances and ***might*** result in injury. Further, the court stressed that "the nature of the defect and the damage caused by asbestos differs from the defects and damages found in most other strict liability and negligence cases," indicating that this precedent is of dubious relevance in the first place. *See id.* at 1325.[7]

Similarly, in *In re Paoli Railroad Yard PCB Litigation*, 916 F.2d 829 (3d Cir. 1990) (cited in Pl. Opp. at 55), the Third Circuit noted that it was unlikely that the Pennsylvania courts would recognize "claims for enhanced risk of harm" – precisely what plaintiffs have brought here. *Id.* at 850. "'Consequences which are contingent, speculative, or merely possible are not properly considered in ascertaining damages.'" *Id.* at 851 (quoting *Askey v. Occidental Chem. Corp.*, 477 N.Y.S.2d 242, 247 (1984)).[8]

---

[7] In the "admittedly unique" context of "asbestos-in-building cases," contamination constitutes manifest injury because "[c]ontamination by friable asbestos is the physical injury and the actual, appreciable harm that must exist before a property owner's . . . cause of action against an asbestos manufacturer accrues." *W.R. Grace*, 37 Cal App. 4th at 1335.

[8] *Barth v. Firestone Tire & Rubber Co.*, 661 F. Supp. 193 (N.D. Cal. 1987) (cited in Pl. Opp. at 55), is even less relevant, except to underscore the importance of a present manifest injury. In *Barth*, the court allowed the action to proceed because the plaintiff alleged that "the plaintiff ***has*** [already] suffered a direct injury to his immune system and that the diseases are ***currently present*** in the plaintiff in their latency stage." *Id.* at 196 (emphasis added). The court "accept[ed] that this is a ***current***, physical injury," but refused to decide whether the mere "increased risk of contracting cancer constitute[d] a legal injury." *Id.* at 197. The *Barth* plaintiff thus survived a motion to dismiss only because he claimed precisely what plaintiffs cannot and do not allege here: that the alleged vehicle defect has ***already*** manifested itself and caused injury.

In the end, plaintiffs are unable to cite any cases that directly support their "no injury" theories, and the named plaintiffs' failure to allege actual present injury requires dismissal of their claims.

B. Plaintiffs' Failure To Allege "Injury To Business Or Property" Requires Dismissal Of Their RICO Claims.

Plaintiffs' efforts to forestall the dismissal of their RICO claims are equally unavailing. RICO claims arise only where plaintiffs can show actual injury to "business or property." 18 U.S.C. § 1964(c). RICO's injury to business or property requirement "helps to assure that RICO is not expanded to provide a federal cause of action and treble damages to every tort plaintiff." *Steele v. Hosp. Corp. of Am.*, 36 F.3d 69, 70 (9th Cir. 1994) (internal quotation omitted). RICO plaintiffs therefore must show a present "concrete financial loss." *Id.* at 70. It is thus "well established that potential exposure or a mere possibility of [a future injury] is insufficient to satisfy the requirement of injury necessary to maintain a suit pursuant to 18 U.S.C. § 1964(c)." *Arabian Am. Oil Co. v. Scarfone*, 713 F. Supp. 1420, 1421 (M.D. Fla. 1989).

Courts have repeatedly rebuffed efforts to assert RICO claims where (as here) the plaintiffs lack any present injury. For example, in *Tri-State Express, Inc. v. Cummins Engine Co.*, Civ. A. 99-00220 (HHK) (D.D.C. Sept. 11, 2000) (attached at Tab 8 to defendants' Motion to Dismiss), the court rejected RICO claims by vehicle owners who alleged that defects in their vehicles "reduc[ed] the present economic value of . . . [their] vehicles and engines." *Id.*, slip. op. at 14. Drawing on *Maio v. Aetna, Inc.*, 221 F.3d 472 (3d Cir. 2000), the court concluded: "[T]he class plaintiffs here have not alleged a concrete, realized injury, but have simply suggested speculative or future injuries which are insufficient to activate RICO's remedial scheme." *Id.*

In this case, the named plaintiffs (with the three exceptions noted above) have not experienced manifestations of any of the alleged defects that are the subject of this complaint. Instead, they rely on an alleged ***propensity*** of product failure. The named plaintiffs have working tires and vehicles that they allege ***may*** fail in the future, but for which they seek to impose the blunt instrument of RICO and its treble damages now. The "injury to business or property" requirement of 18 U.S.C. § 1964(c) forecloses such speculative claims. *See, e.g.*, *Hecht v. Commerce Clearing House, Inc.*, 897 F.2d 21, 24 (2d Cir. 1990) (alleged "lost business commissions" are "too speculative to confer standing" where plaintiff "only alleges that he would have lost commissions in the future, and not that he has lost any yet."); *Dornberger v. Metro. Life Ins. Co.*, 961 F. Supp. 506, 521 (S.D.N.Y. 1997) ("Injuries that are speculative or unprovable in nature or amount are not recoverable – recovery must wait until the nature and extent of damages becomes 'clear and definite.'").

Plaintiffs attempt to evade this rule by ignoring the allegations of their own Master Complaint. They urge that their RICO claims should survive because they "have ***already*** sustained real pecuniary losses." (Pl. Opp. at 43 (emphasis added).) Although that statement is significant because it concedes that plaintiffs must allege a ***present*** "injury to business or property," it fails to salvage their claims.

Plaintiffs assert that they have suffered three forms of present injury: "expenditures to replace tires, excessive purchase and lease prices for tires and Explorers, and the diminished market value of such products and lease[s]." (*Id.* at 45; *see also id.* at 43 (citing Compl. ¶¶ 241, 268, 278, 288, 292, 296).) But these bald, conclusory assertions are insufficient; they lack any connection to the named plaintiffs. *See, e.g.*, *Peterson v. Shanks*, 149 F.3d 1140, 1145 (10th Cir. 1998) (no RICO injury where complaint consisted of "conclusory allegations

without supporting factual averments" rather than "specific, actual injury"). Here, no named plaintiff alleges that he or she spent money to replace tires that had actually manifested the defects alleged.

Similarly, no named plaintiff offers a basis for the assertion that he or she paid "excessive purchase and lease prices for tires and Explorers." Plaintiffs simply state that they once owned or leased these vehicles – nothing more. It is not even clear from their pleadings whether many of these named plaintiffs ***still*** own the vehicles. (*See, e.g.*, Compl. ¶ 25 (plaintiff Martin "purchased a 1998 Ford Explorer equipped with Firestone Tires.").) More important, these named plaintiffs have not alleged the manifestation of any defect in their vehicles, and so they have enjoyed the full benefit of their bargains. *See, e.g., Tri-State Express*, slip op. at 14 ("[T]he class plaintiffs here have not alleged a concrete, realized injury, but have simply suggested speculative or future injuries which are insufficient to activate RICO's remedial scheme.").

As for plaintiffs' argument that they have suffered a RICO injury because of an alleged diminution in resale value, that contention again founders on the actual pleadings. No plaintiff pleads that he or she has resold (or even intends to resell) tires or vehicles at a diminished price.[9] If it is plaintiffs' intent to assert claims about future resales, such speculative claims are not cognizable under RICO.[10] Plaintiffs cannot escape the uniform rejection of RICO

[9] According to their own allegations, two of the named plaintiffs who purport to represent the proposed Explorer Diminution Class still own their vehicles and allege no effort whatsoever to resell these vehicles (*see* Compl. ¶¶ 52, 54 (named plaintiffs Grant and Romano)); the third named plaintiff alleges that she traded in her vehicle in or about May 1999, well before any diminution in resale value alleged in the complaint. (*See* Compl. ¶ 53 (named plaintiff Lill).) There is no allegation in the complaint about any effort to resell any tire.

[10] The notion of future resales is very speculative. Most people do not resell their used tires. And no one is compelled to resell their motor vehicle. Many consumers drive a vehicle to the end of its useful life and so never incur any supposed loss of resale value.

claims "predicated exclusively on the possibility that future events might occur, rather than on the actual occurrence of those events and their present effect on the value of [their vehicles]." *Maio*, 221 F.3d at 495.[11]

Plaintiffs' citation of scattered inapposite cases to bolster their RICO injury claims is unavailing. For example, the Seventh Circuit's dictum in *International Brotherhood of Teamsters v. Philip Morris Inc.*, 196 F.3d 818, 823 (7th Cir. 1999), suggesting that antitrust (not RICO) injury could be founded on "[p]aying too much, or getting an inferior product for the same money, or getting a product that causes deferred injury and medical expenses," points to what plaintiffs have ***not*** alleged here – a ***present*** failure to receive the benefit of a properly functioning vehicle.[12] And the alleged injury in *Grove Holding Corp. v. First Wisconsin Nat'l Bank of Sheboygan*, 803 F. Supp. 1486, 1509 (E.D. Wis. 1992), was the purchase of a corporation at an artificially inflated price – a ***present*** manifest injury in and of itself. The purchase of a corporate asset cannot be compared to plaintiffs' products liability claim, in which the plaintiffs continue to receive the benefit of their bargain – working tires and vehicles. *See also SK Hand Tool Corp. v. Dresser Indus., Inc.*, 852 F.2d 936 (7th Cir. 1988) (rejecting RICO

---

[11] *See, e.g., Oscar v. University Students Coop. Ass'n*, 965 F.2d 783, 787 (9th Cir. 1992) (en banc) (plaintiffs' speculation that their neighbors' activities might lower their subletting values did not satisfy RICO's requirement of a direct and actual financial loss; plaintiff "has not alleged that she ever sublet the apartment"); *Tri-State Express*, slip op. at 14 (plaintiffs' claims of "suggested speculative or future injuries . . . are insufficient to activate RICO's remedial scheme"); *Arabian Am. Oil*, 713 F. Supp. at 1421; *In re Taxable Mun. Bond Sec. Litig.*, 51 F.3d 518, 523 (5th Cir. 1995) ("[S]peculative damages are not compensable under RICO.").

[12] *Friedman v. General Motors Corp.*, No. 98 C 5821, 1998 U.S. Dist. LEXIS 15621 (N.D. Ill. Sept. 16, 1998) (cited in Pl. Opp. at 48-49) is another ***non-RICO*** case. Therein, plaintiffs alleged a vehicle paint defect. The court allowed a no-injury fraud claim to proceed (notwithstanding the weight of authority barring such cases) on the theory that recovery could be limited to those plaintiffs "whose paint has [already] peeled." *Id.* at *4.

Plaintiffs' "diminished market value" cases are similarly irrelevant. Those cases involved a ***present*** injury to property (typically real property), in which the intrinsic value of plaintiffs' property was already reduced. *See, e.g., Bennett v. Berg*, 685 F.2d 1053, 1056-58 (8th Cir. 1982) (cited in Pl. Opp. at 51) (plaintiffs contracted for a variety of services, including food and transportation services, laundry services, and medical care, but received no services or a vastly reduced quality and quantity of services).

claim involving misrepresented value of corporation); *Kaushal v. State Bank of India*, 1988 U.S. Dist. LEXIS 11988 (N.D. Ill. Oct. 24, 1988) (similar inapposite allegations of RICO injury).[13]

In sum, plaintiffs spend nine pages citing various inapposite cases without recognizing the common thread: where plaintiffs cannot establish a ***present*** manifest injury, they cannot claim RICO injury. The named plaintiffs allege no such injury, and their RICO claims therefore must be dismissed.

II. THE SAFETY ACT PREEMPTS ANY REMEDY OF A MOTOR VEHICLE-RELATED RECALL THAT MAY BE AUTHORIZED BY STATE LAW.

The Safety Act and its implementing regulations vest NHTSA, a federal agency with special expertise and experience in the field, with ***exclusive*** authority for determining whether the public interest warrants the broad, prophylactic remedy of a motor vehicle-related recall. State law does not authorize the sweeping notification and recall campaign sought by plaintiffs; and even if it did, such authorization would be preempted by the Safety Act. Plaintiffs' arguments to the contrary misperceive the scope of defendants' preemption argument and misapply basic preemption principles.

A. State Law Does Not Authorize The Remedy Of A Motor Vehicle Recall.

There is simply no basis in state law for the expansive recall remedy sought by plaintiffs. *See Nat'l Women's Health Network, Inc. v. A.H. Robins Co.*, 545 F. Supp. 1177, 1180 (D. Mass. 1982) (finding no basis for recall order under Massachusetts law and noting that "[n]o court has ever ordered a notification and recall campaign on the basis of state law"); *see also Chin v. Chrysler Corp.*, 182 F.R.D. 448, 464 n.6 (D.N.J. 1998) (same). To this day, in fact, only

[13] The quotation plaintiffs offer from *Kaushal* (*see* Pl. Opp. at 47) was part of its discussion of whether RICO's ***pattern*** requirement had been properly pleaded and has nothing to do with § 1964(c)'s RICO injury requirement. *See Kaushal*, 1988 U.S. Dist. LEXIS 11988, at *10.

one court has ever entertained a motor vehicle recall under state law, *see Howard v. Ford Motor Co.*, No. 7683785-2 (Cal. Super. Ct. Oct. 11, 2000), and plaintiffs not surprisingly place principal reliance on that lone outlier. (*See* Pl. Opp. at 18.[14])

Howard cannot bear the weight placed on it by plaintiffs. ***First***, the decision involves the law of only one state (California); and even as to that state, the decision is interlocutory and no final recall order has been issued or reviewed on appeal. ***Second***, the decision involves a statewide recall, not a nationwide recall like the one requested by plaintiffs. In fact, no matter what may be the ultimate resolution in *Howard*, the case of course could not give rise to a nationwide recall, as no state's laws could authorize a recall beyond its own borders. *See BMW of N. Am. v. Gore*, 517 U.S. 559, 570-73 (1996). State law thus provides no basis for the sweeping recall remedy sought by plaintiffs, and consideration of the recall request should be left to the agency particularly suited to deal with such matters: NHTSA.

B. The Safety Act Preempts Any Recall Remedy Under State Law.

Even assuming that state law authorizes a court-ordered motor vehicle recall, the Safety Act preempts any such remedy. Congress's objectives in comprehensively regulating motor vehicle recalls and vesting in NHTSA exclusive administrative authority over recall initiatives would be frustrated by a competing system of court-ordered and judicially-administered recalls conducted under state law.

---

[14] The other decisions invoked by plaintiffs do not aid their cause. For instance, plaintiffs place substantial reliance on a one-line order in a California proceeding that did nothing more than to deny the defendant's motion to "strike the prayer for recall." (*See* Pl. Opp. at 18-19 (discussing *Public Citizen v. Gen. Motors Corp.*, No. CV 766404 (Cal. Super. Ct. May 8, 2000)).) Of course, that order did not grant a recall, let alone conclude that a recall would be authorized by state law. Plaintiffs also receive no assistance from *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods.*, 55 F.3d 768, 811 (3d Cir. 1995) (cited in Pl. Opp. at 19-20). In that case, the court specifically observed that "no court has [ordered a vehicle recall] before" and ultimately "intimate[d] no view on the matter," although the court went on to speculate in dicta that a court might be able to order creation of a fund to finance vehicle repairs. *Id.*at 811-12 n.30.

1. The Court Has Full Authority To Address The Preemption Question At This Stage Of The Proceedings.

Plaintiffs begin by suggesting that this Court is barred from considering the preemption issue on a motion to dismiss. (*See* Pl. Opp. at 13-14.) According to plaintiffs, the Court should wait to assess whether the recall remedy they seek is preempted until after it hears evidence and issues a ruling on defendants' liability.

Whether the Safety Act preempts any state law recall remedy is a purely legal issue and is thus properly presented by a motion to dismiss. *See Moran v. Rush Prudential HMO, Inc.*, 230 F.3d 959, 966 (7th Cir. 2000) ("district court's preemption ruling is a question of law"). None of the decisions cited by plaintiffs address whether federal law preempts a state law remedy, and plaintiffs identify no unresolved factual considerations that could bear on that threshold legal question.[15] The Seventh Circuit has made clear that courts can resolve whether federal law preempts a particular state law remedy on preliminary motions, even though the defendant's liability remains unaddressed. In *Brown v. Kerr-McGee Chem. Corp.*, 767 F.2d 1234 (7th Cir. 1985), the defendant moved to dismiss plaintiffs' request for injunctive relief (*i.e.*, an order requiring the movement of hazardous wastes), arguing that the Atomic Energy Act preempts any state law-based demand for radioactive waste disposal. The district court granted the motion, and the Seventh Circuit affirmed. Because the defendant had attached documents to its motion to dismiss, the district court and the Seventh Circuit treated the motion as one for partial summary judgment. *See id.* at 1237 n.2. But the Seventh Circuit gave no indication that the distinction was a material one, and the dispositive point here is that the court held that federal

[15] Under plaintiffs' reasoning, this Court would be barred from addressing the preemption question on a motion to dismiss even if the federal statute at issue ***expressly*** preempted a particular state law remedy sought by plaintiffs.

law preempted a request for equitable relief, even though the defendant's liability had not been addressed or resolved.

2. Plaintiffs' Approach To The Preemption Issue Is Fundamentally Flawed In Several Respects.

a. Plaintiffs Misperceive The Relevant Preemption Question.

Contrary to what plaintiffs suggest, Ford and Firestone do ***not*** assert that the Safety Act preempts "the entire field of motor vehicle regulation" (Pl. Opp. at 24 n.24; *see id.* at 15) or that the Act preempts all state law actions seeking damages caused by motor vehicle defects. The Act's preclusive reach is more circumscribed: the Act preempts the particular remedy of a motor vehicle recall, vesting exclusive authority to compel and administer the prophylactic remedy of a motor vehicle recall program in an expert federal agency, NHTSA. The lion's share of preemption decisions relied upon by plaintiffs simply do not address that issue, dealing instead with state law actions seeking recovery in ***damages*** under common law standards of liability.

Plaintiffs err in suggesting that this Court's decisions in *Reed v. Ford Motor Co.*, 679 F. Supp. 873 (S.D. Ind. 1988), and *Heath v. General Motors Corp.*, 756 F. Supp. 1144 (S.D. Ind. 1991), hold that the Safety Act fails to preempt the remedy of a recall. (*See* Pl. Opp. at 15.) Both cases involved actions seeking damages; neither addressed whether the Safety Act preempts the remedy of a recall. *Reed*, in fact, emphasized exactly that point: the plaintiff in that case was "***not*** seeking 'the remedy of a recall,'" and there was thus no need to address whether the "court [was] empowered to order a recall." *Id.* at 880 (emphasis in original).[16]

[16] Plaintiffs likewise err in repeatedly invoking decisions holding that the Safety Act does not "completely preempt" state law for purposes of removal jurisdiction. (*See* Pl. Opp. at 16 & n.11 (relying on *Beatty v. Bridgestone/Firestone Inc.*, 2000 U.S. Dist. LEXIS 15406 (E.D. Pa. Oct. 19, 2000), *Dorian v. Bridgestone/Firestone Inc.*, 2000 U.S. Dist. LEXIS 15407 (E.D. Pa. Oct. 19, 2000), *Lennon v. Bridgestone/Firestone Inc.*, 2000 U.S. Dist.

b. Any Presumption Against Preemption Is Inapplicable Here.

In their counterarguments, plaintiffs misapply several basic preemption principles. Plaintiffs assert that "[t]here is a general presumption ***against*** preemption, applicable to cases involving public health and safety, based on the states' historical primacy in such matters." (Pl. Opp. at 28 (emphasis in original).) Any such presumption, however, would not apply here. At the time of the Safety Act's enactment, no court had ever ordered a recall under state law. The pre-Safety Act decisions discussed by plaintiffs involved actions seeking damages, not recalls. (*See* Pl. Opp. at 29-30.)[17] To this day, in fact, no court has ever issued a final order requiring a motor vehicle recall outise the context of the Safety Act, which does not provide for a private right of action. The recall sought by plaintiffs thus cannot be said to represent a field that the States have traditionally occupied, which fully negates the presumption that plaintiffs seek to invoke.

In fact, regulation of motor vehicle recall programs traditionally has been the exclusive responsibility of the ***federal*** government, not the states. (*See* Defs. Br. I at 26-32.) While neither federal nor state law regulated or authorized motor vehicle recalls before the

---

LEXIS 15405 (E.D. Pa. Oct. 19, 2000), *Miller v. Bridgestone/Firestone Inc.*, 2000 U.S. Dist. LEXIS 15292 (E.D. Pa. Oct. 19, 2000)); *id.* at 18 n.15 (relying on *Farkas v. Bridgestone/Firestone Inc.*, 113 F. Supp. 2d 1107 (W.D. Ky. 2000)).) As this Court has made clear, the doctrine of "complete preemption," which focuses on issues of subject matter jurisdiction, is entirely distinct from the defense of preemption on the merits. *See Analytical Surveys, Inc. v. Intercare Health Plans, Inc.*, 101 F. Supp. 2d 727, 731 (S.D. Ind. 2000) (Barker, C.J.) ("Conflict preemption should not be confused with the doctrine of complete preemption, which is an exception to the well-pleaded complaint rule."). Even on the complete preemption issue, the courts are split. *See Namovicz v. Cooper Tire & Rubber Co.*, No. WMN-00-3676 (D. Md. Feb. 26, 2001) (holding that the Safety Act "completely preempt[s] the area of vehicle and equipment recalls") (attached at Tab 1).

[17] In *Noel v. United Aircraft Corp.*, 342 F.2d 232 (3d Cir. 1964) (cited in Pl. Opp. at 16-17, 30), the Third Circuit affirmed a district court's determination that the defendant was negligent for not adhering to a post-sale duty to improve an airplane propeller seller, but the court made clear that it was reviewing only an award of money damages, not a request for the remedy of a recall. *See id.* at 234. The same is true of *Braniff Airways, Inc. v. Curtiss-Wright Corp.*, 411 F.2d 451 (2d Cir. 1969) (cited in Pl. Opp. at 30), in which the Second Circuit suggested that manufacturers might owe a post-sale duty to warn of product defects, but which did not involve any request for equitable relief.

Safety Act's enactment in 1966, the Act reflects Congress's determination that it had become "essential" to establish "Federal oversight of defect notification, and correction." S. Rep. No. 89-1301, at 2 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2709, 2710. And Congress later promulgated the Recall Amendments in 1974 establishing comprehensive federal regulations governing vehicle recalls – again, with no state law regulation of motor vehicle recalls in place or on the horizon – based on a "belie[f] that the public interest . . . requires that the manufacturer cause the defect or failure to comply to be remedied without charge to the owner or purchaser." H.R. Rep. No. 93-1191, at 24 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6046, 6059. The remedy of a recall thus does not represent "traditional state tort law which . . . predated the federal enactments in question." *Buckman Co. v. Plaintiffs' Legal Comm.*, 121 S. Ct. 1012, 1020 (2001). To the contrary, the entire scheme of federal regulations concerning motor vehicle recalls was shaped and founded on the assumptions that NHTSA's authority in the area was exclusive and that there was no competing system of judicially-administered recalls under state law. *See United States v. Locke*, 120 S. Ct. 1135, 1147 (2000) (admonishing that "an 'assumption' of nonpreemption is not triggered when the State regulates in an area where there has been a history of significant federal presence").

c. Neither The Safety Act's Express Preemption Provision Nor Its Savings Clauses Weigh Against A Finding Of Implied Preemption.

Plaintiffs submit that the Safety Act's express preemption provision and its savings clauses establish that Congress did not intend to preempt the remedy of a recall. (*See* Pl. Opp. at 23-26.) Plaintiffs are wrong on both scores. First, that the Act's ***express*** preemption language addresses only the Act's provisions governing "motor vehicle safety standards" in no way "reveals a Congressional intent that '***implied***' preemption should not apply" to the separate

provisions governing notification and recall programs. (Pl. Opp. at 25 (emphasis added).) The Supreme Court squarely rejected precisely that rationale in three recent decisions – one of which interpreted the Safety Act itself – holding that the scope of an express preemption provision has no bearing on the applicability of conflict preemption principles. *See Buckman*, 121 S. Ct. at 2001 WL 167647, at 1019 ("neither an express pre-emption provision nor a savings clause bars the ordinary working of conflict pre-emption principles"); *Crosby v. Nat'l Foreign Trade Council*, 120 S. Ct. 2288, 2302 (2000) ("A failure to provide for preemption expressly may reflect nothing more than the settled character of implied preemption doctrine that courts will dependably apply, and in any event, the existence of conflict cognizable under the Supremacy Clause does not depend on express congressional recognition that federal and state law may conflict."); *Geier v. Am. Honda Motor Co.*, 120 S. Ct. 1913, 1919 (2000) (the Safety Act's "pre-emption provision, by itself, does not foreclose (through negative implication) any possibility of implied conflict pre-emption").

Plaintiffs fare no better in citing the Safety Act's savings clauses and asserting that they "corroborate the Safety Act's nonpreemptive intent." (Pl. Opp. at 26.) Those clauses do not address the specific preemption question at issue here. (*See* Defs. Br. I at 37.) Moreover, the Supreme Court established just last term in *Geier* that the Safety Act's "saving clause (like the express pre-emption provision) does ***not*** bar the ordinary working of conflict pre-emption principles." *Geier*, 120 S. Ct. at 1919 (emphasis in original); *see Buckman*, 121 S. Ct. at 1019 (quoting *Geier* and reiterating the same). In fact, the Court ultimately held in *Geier* that the plaintiff's state law claim was barred by principles of conflict preemption notwithstanding the savings clause. *See also Hurley v. Motor Coach Indus., Inc.*, 222 F.3d 377, 381-83 (7th Cir. 2000) (relying on *Geier* and finding state-law based no-airbag claim preempted on conflict

grounds despite the savings clauses). The cases cited by plaintiffs do not suggest otherwise: all were decided before *Geier*, all involve claims for damages, and all stand for the unremarkable proposition that the savings clauses evince a congressional desire not to preempt every common law action involving motor vehicle standards. (*See* Pl. Opp. at 26-27.) *Geier* makes clear that the savings clauses do not affect the applicability of implied preemption principles.

3. A Proper Application Of Conflict Preemption Principles Establishes That Any State Law Recall Remedy Is Preempted.

Plaintiffs assume that there can be no preemptive conflict when state law and federal law pursue a common overarching objective. In their Opposition, they therefore expend substantial energy attempting to show that the Safety Act's principal goal is to enhance public safety. (*See* Pl. Opp. at 21-23.) As the Supreme Court made clear in *Crosby*, however, the "fact of a common end hardly neutralizes a conflicting means," and an "[i]dentity of ends" thus "does not end our analysis of preemption." 120 S. Ct. at 2297-98 & n.14; *see also Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1987) ("[I]t is not enough to say that the ultimate goal of both federal and state law is to eliminate water pollution. A state law is also pre-empted if it interferes with the methods by which the federal statute was designed to reach this goal."). "Conflict is imminent," the Supreme Court has explained, when – as is the case here – "two separate remedies are brought to bear on the same activity." *Crosby*, 120 S. Ct. at 2298.

Plaintiffs also assume erroneously there can be no finding of conflict preemption unless Ford and Firestone demonstrate that "they could not meet a recall ordered by this Court." (Pl. Opp. at 17.) Plaintiffs thus would confine conflict preemption to circumstances of factual impossibility. As this Court has recognized, however, conflict preemption arises "***either*** because no one could comply with both laws, ***or*** because the state law 'stands as an obstacle to the

accomplishment of the full purposes and objectives of Congress or the federal agency.'" *Heath v. General Motors Corp.*, 765 F. Supp. 1144, 1146 (S.D. Ind. 1991) (Barker, J.) (quoting *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 299-300 (1988)) (emphasis added). While plaintiffs disregard the latter, well-established category altogether, the Supreme Court does not. In *Geier*, the Court reiterated that there is no "legal wedge . . . between 'conflicts' that prevent or frustrate the accomplishment of a federal objective and 'conflicts' that make it 'impossible' for private parties to comply with both state and federal law." *Geier*, 120 S. Ct. at 1920. To the contrary, "both forms of conflicting state law are nullified by the Supremacy Clause, and it [is] assumed that Congress would not want either kind of conflict." *Id*. at 1921 (internal quotation marks omitted); *see Crosby*, 120 S. Ct. at 2298 ("the fact that some companies may be able to comply with both sets of sanctions does not mean that the state Act is not at odds with achievement of the federal decision about the right degree of pressure to employ").

Plaintiffs attempt to sidestep five key U.S. Supreme Court preemption decisions over the past two years by suggesting that those cases involved unique factual circumstances. (*See* Pl. Opp. at 34-39.) But the Supreme Court's analytical framework in those cases applies fully here. And the immaterial factual distinctions emphasized by plaintiffs overlook the broader thrust of those decisions. Over and over, the Supreme Court has found preemption where state law frustrates accomplishment of Congress's full objectives and interferes with the particular means chosen by Congress in a comprehensive regulatory regime. *See, e.g., Crosby*, 120 S. Ct. at 2298 (finding preemption because "the inconsistency of sanctions [threatened by state law] undermines the congressional calibration of force" reflected in the federal scheme); *Geier*, 120 S. Ct. at 1925 (finding preemption because state law "would have presented an obstacle to the variety and mix of devices that the federal regulation sought" and "would have stood as an

obstacle to the accomplishment and execution of . . . important means-related federal objectives"); *Locke*, 120 S. Ct. at 1151 (finding preemption based on analysis of "whether the purposes and objectives of the federal statutes, including the intent to establish a workable uniform system, are consistent with concurrent state regulation").

Just one month ago ago, the Supreme Court continued the pattern. In *Buckman Co. v. Plaintiff's Legal Committee*, 121 S. Ct. 1012 (2001), the Court unanimously held that federal law preempted state law "fraud-on-the-FDA" claims under principles of implied conflict preemption. The Court stressed the FDA's "variety of enforcement options" that allow it to select "a measured response to suspected fraud upon the Agency" and the "flexibility" to "pursue[] difficult (and often competing) objectives." *Id.* at 1018. According to the Court, the "delicate balance of statutory objectives" achieved by the agency would "be skewed by allowing fraud-on-the-FDA claims under state tort law." *Id.* In addition, the Court found, "complying with the FDA's detailed regulatory regime in the shadow of 50 States' tort regimes will dramatically increase the burdens facing potential applicants – burdens not contemplated by Congress in acting the FDCA and the MDA." *Id.* The Court concluded that state law actions "would exert an extraneous pull on the scheme established by Congress," *id.* at 1020, and would "inevitably conflict with the FDA's responsibility to police fraud consistently with the Agency's judgments and objectives." *Id.* at 1018.

Here, likewise, judicially-administered state law-based recalls would "exert an extraneous pull on the scheme established by Congress" and would "inevitably conflict with NHTSA's responsibility" to fashion and administer recall initiatives "consistently with its judgments and objectives." A judicial expansion of Firestone's recall program would frustrate the "full purposes and objectives of Congress" expressed in the Safety Act and its implementing

regulations. *E.g.*, *Geier*, 120 S. Ct. at 1921. While plaintiffs never squarely address that question – instead focusing exclusively on factual impossibility – the "frustration of purpose" inquiry reveals many ways in which a state law recall remedy would compromise Congress's "full purposes and objectives" in the Safety Act. (*See* Defs. Br. I at 34-38.) For instance:

- Manufacturers could be faced with inconsistent obligations if the terms of a court-ordered recall remedy under state law differed from the contours of a NHTSA-administered recall program.

- Consumers could receive a variety of inconsistent notices, giving rise to substantial public confusion and undermining Congress's objective of avoiding undue public concern.

- NHTSA's flexibility to fashion the most effective recall program would be compromised by a competing assortment of court-ordered recalls, for instance with respect to the availability of replacement parts and the timing of relief.

- A court-ordered recall in circumstances where NHTSA decides not to require a recall would conflict with the agency's determination that the risk to public safety does not warrant the broad prophylactic remedy of a recall. *See Crosby*, 120 S. Ct. at 2298.

- Manufacturers would be encouraged to delay instituting a voluntary recall under NHTSA's supervision – thereby undermining the statute's objectives – if the scope of the recall program could be second-guessed in litigation.

Plaintiffs' recent motion for a preliminary injunction highlights those conflicts. For example, plaintiffs ask this Court to ***re-recall*** the 6.2 million replacement tires already provided to consumers as part of the initial, NHTSA-supervised recall. This creates an unmistakable conflict between the federal remedy under the Safety Act and the recall remedy sought by plaintiffs in this lawsuit.

Plaintiffs openly invite "judicial intervention" into NHTSA's functions, asserting that the agency is incapable of fulfilling its statutory responsibilities effectively. (*See* Pl. Opp. at 20-21.) According to plaintiffs, "dangerous-to-the-public protracted delays . . . often plague NHTSA proceedings," and a competing system of court-ordered recalls would obtain "the

benefit of the plaintiff's bar's considerable discovery and investigatory efforts and resources." (*Id.* at 20.) Of course, that reasoning is irrelevant as a legal matter, because the question for preemption purposes is whether Congress ***intended*** to vest exclusive authority to administer motor vehicle recalls in NHTSA, not whether Congress's judgment in that regard is a sound one. And Congress vested administrative authority over recalls in an expert federal agency precisely to ensure an efficient and effective mechanism for protecting the public, and it designed the administrative process with those objectives firmly in mind.[18] There may be room to improve the NHTSA process. But the process of class action litigation is itself far from perfect – particularly nationwide class actions consisting of scores of named plaintiffs, involving a host of distinct legal claims, and implicating the laws of many different states. When it comes to motor vehicle-related recall programs, private litigation cannot be considered superior to an administrative process conducted by an agency with special expertise and experience in the area. *See Chin v. Chrysler Corp.,* 182 F.R.D. 448, 464-65 (D.N.J. 1998) ("availability of a NHTSA remedy . . . demonstrate[s] that issues" in the case "are likely to be more efficiently resolved by administrative action as opposed to a nation-wide, federal court class action adjudicating the rights of hundreds of thousands of potential class members"); *see also Gregory v. Cincinnati Inc.*, 538 N.W.2d 325, 334 & n.30 (Mich. 1995); *Patton v. Hutchinson Wil-Rich Mfg. Co.*, 861 P.2d 1299, 1316 (Kan. 1993).

---

[18] *See, e.g.*, S. Rep. No. 89-1301, at 2, *reprinted in* 1966 U.S.C.C.A.N. 2709, 2710 (observing that federal oversight was needed "to insure the speedy and efficient repair of such defects"); H.R. Rep. No. 93-1191, at 6, *reprinted in* 1974 U.S.C.C.A.N. 6046, 6051 ("The public needs informative and timely notice, followed by adequate and timely remedy of a motor vehicle with a defect."); H.R. Rep.93-1452, at 54, *reprinted in* IV NATIONAL TRAFFIC AND MOTOR VEHICLE SAFETY ACT LEGISLATIVE HISTORY at 34 (1985) (emphasizing intent "to insure the ability of the Secretary to act swiftly when a motor vehicle or item of replacement equipment presents an immediate and unreasonable risk").

Congress's recent amendments to the recall provisions – the "Transportation Recall Enhancement, Accountability, and Documentation (TREAD) Act," Pub. L. No. 106-414, 114 Stat. 1800 (2000) – reaffirm the congressional commitment to maximizing NHTSA's effectiveness. Those amendments impose new reporting requirements on manufacturers, with the objective of ensuring the agency's ability to respond in a timely and effective manner to motor vehicle defects that threaten public safety. *See* 49 U.S.C. § 30166(m)(3). The amendments also grant NHTSA new authority to accelerate a manufacturer's recall program if the agency concludes that "there is a risk of serious injury or death if the remedy program is not accelerated" and "that the acceleration of the remedy program can be reasonably achieved by expanding the sources of replacement parts, expanding the number of authorized repair facilities, or both." *Id.* § 30120(c). NHTSA's flexibility in administering its newly-minted acceleration power would be compromised by a parallel system of judicially-administered recalls under state law.

The TREAD amendments also underscore that Congress has occupied the field of motor vehicle recall regulation for purposes of field preemption analysis. (*See* Defs. Br. I at 38.) "[F]ield preemption may be understood as a species of conflict pre-emption," *Crosby*, 120 S. Ct. at 2294 n.6, and plaintiffs' argument that court-ordered recalls should supplement NHTSA's authority is equally wrong from the perspective of field preemption. *See Locke*, 120 S. Ct. 1135, 1151 (2000) (stating with respect to field preemption analysis that it "is not always a sufficient answer to a claim of pre-emption to say that state rules supplement . . . federal requirements"). In field preemption, as in conflict preemption, the "appropriate inquiry still remains whether the purposes and objectives of the federal statutes, including the intent to establish a workable,

uniform system, are consistent with concurrent state regulation." *Id.* For the reasons explained above, the answer here is no.[19]

[19] Although it was enacted over 30 years ago, the Magnuson-Moss Act has never been used to order a nationwide automotive recall or consumer notification campaign. Because the Magnuson-Moss Act applies exclusively to breach of warranty claims, which by nature require that the product already manifest a covered defect (*see supra* Part II.A; Defs. Br. III), the Act could not give rise to prophylactic recalls like the one sought by plaintiffs here. The exclusive means of obtaining such a recall is through NHTSA, under the provisions of the Safety Act and its implementing regulations. Even if the Magnuson-Moss Act encompassed prophylactic recalls, the Safety Act reflects a specific statutory regime intended by Congress to evaluate – through a scheme of administrative enforcement – whether the particular circumstances warrant the remedy of an automotive recall. As a result, under the doctrine of *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 20 (1981) (*see* Defs. Brief II, Part V), the Safety Act displaces the remedial provisions of other statutes of general application like the Magnuson-Moss Act. *Cf. Feinstein v. Firestone Tire & Rubber Co.*, No. 78 Civ. 4342-CSH, 1978 U.S. Dist. LEXIS 14408 (S.D.N.Y. Nov. 13, 1978) (noting the Safety Act's warranty savings clause and observing that "Congress must have intended the provisions of both [the Safety Act and the Magnuson-Moss Act] to be fully effective within their respective spheres, insofar as a motor vehicle or item of equipment subject to Safety Act recall might also be the subject of a [Magnuson-Moss] Warranty Act suit"). In any event, the manifest weaknesses in plaintiffs' Magnuson-Moss claims (*see* Defs. Br. III) render any determination of the availability of the remedy of an automotive recall under this legislation unnecessary.

CONCLUSION

For all of the foregoing reasons, defendants ask this Court (a) to dismiss the plaintiffs specified in the Motion to Dismiss for failure to allege a legally cognizable injury and (b) to dismiss or strike plaintiffs' request for a court-ordered recall.

Dated: March 19 , 2001

Respectfully submitted,

Hugh R. Whiting
Mark Herrmann
JONES, DAY, REAVIS & POGUE
North Point
901 Lakeside Avenue
Cleveland, Ohio 44114
(216) 586-3939

John H. Beisner
Stephen J. Harburg
O'MELVENY & MYERS LLP
555 13th Street, N.W., Suite 500 West
Washington, DC 20004-1109
(202) 383-5370

Mark J.R. Merkle
KRIEG DEVAULT ALEXANDER & CAPEHART, LLP
One Indiana Square
Suite 2800
Indianapolis, Indiana 46204-2017
(317) 636-4341

ATTORNEYS FOR DEFENDANT BRIDGESTONE/FIRESTONE, INC.

Randall R. Riggs
LOCKE REYNOLDS LLP
1000 Capital Center South
201 N. Illinois Street
Indianapolis, Indiana 46204
(317) 237-3814

ATTORNEYS FOR DEFENDANT FORD MOTOR COMPANY

CERTIFICATE OF SERVICE

Service of the foregoing was made to the following counsel of record on this ____ day of _____, 2001:

VIA HAND DELIVERY
Mark J.R. Merkle
Krieg DeVault Alexander & Capehart, LLP
One Indiana Square
Suite 2800
Indianapolis, IN 46204-2079

VIA HAND DELIVERY
Irwin B. Levin
David Cutshaw
Richard Shevitz
Cohen & Malad
136 North Delaware Street, Suite 300
Indianapolis, IN 46204-2529

VIA HAND DELIVERY
William E. Winingham
Wilson Kehoe & Winingham
2859 North Meridian Street
P.O. Box 1317
Indianapolis, IN 46206

Patrick B. Flanagan
Flanagan Maniotis & Berger
2586 Forest Hill Boulevard
West Palm Beach, FL 33406

Glen R. Goldsmith
Glen R. Goldsmith & Associates, P.A.
9130 South Dadeland Boulevard, Suite 1509
Miami, FL 33156

Louis A. Lehr, Jr.
Aimee B. Storin
Arnstein & Lehr
120 South Riverside Plaza, Suite 1200
Chicago, IL 60606

VIA HAND DELIVERY
Thomas G. Stayton
Ellen E. Boshkoff
Baker & Daniels
300 North Meridian Street, Suite 2700
Indianapolis, IN 46204

VIA HAND DELIVERY
Daniel P. Byron
McHale Cook & Welch, P.C.
1100 Chamber of Commerce Building
320 North Meridian Street
Indianapolis, IN 46204

Richard P. Schulkins
State Farm Mutual Automobile Insurance Company
One State Farm Plaza E-7
Bloomington, IL 61710-0001

Philip S. Gordon
Gordon Law Firm
4900 Woodway Drive, Suite 1250
Houston, TX 77056

Linda Skaggs
Sanders Conkright & Warren, LLP
10450 Holmes, Suite 330
Kansas City, MO 64131

Kevin B. Duckworth
Katherine Dedrick
Hinshaw & Culbertson
222 North LaSalle Street, Suite 300
Chicago, IL 60601-1081

Joel Smith
Nelson Mullins Riley & Scarborough
1330 Lady Street
Columbia, SC 29201

Andrew B. Cooke
Michael Bonasso
Flaherty Sensabaugh & Bonasso PLLC
200 Capitol Street
Charleston, WV 25301

Mark Bodin
McGlinchey Stafford
743 Magazine Street
New Orleans, LA 70130-3477

Walker W. Jones, III
Spencer Flatgard
Mike Dawkins
Barry Ford
Baker Donelson Bearman & Cadwell
4268 I-55 North
Meadowbrook Office Park
Jackson, MS 39211

Robert Toland
Dylan J. Walker
Cabaniss Conroy & McDonald LLP
Three Glenhardie Corporate Center
1265 Drummers Lane, Suite 200
Wayne, PA 19087

Paul F. Strain
Marina Sabett
Venable Baetjer and Howard, LLP
1800 Mercantile Bank & Trust Company
Two Hopkins Plaza
Baltimore, MD 21201

Wendy F. Lumish
Jeff Cohen
Carlton Fields
Ward Emmanuel Smith & Cutler, P.L.
4000 International Place, 1000 S.E. Second Street
P.O. Box 019101
Miami, FL 33131-9101

Eduardo Rodriguez
Marjory Batsell
Rodriguez Colvin & Chaney LLP
1201 East Van Buren
P.O. Box 2155
Brownsville, TX 78522

Nancy R. Winschel
Dickie McCamey & Chilcote, P.C.
Suite 400, Two PPG Place
Pittsburgh, PA 15222-5402

Paul Douglas Heard
Evan Kramer
Brown McCarroll & Oakes Hartline LLP
2727 Allen Parkway, Suite 1300
Houston, TX 77019-2100

Michael Eady
Brown McCarroll & Oaks Hartline LLP
111 Congress Avenue, Suite 1400
Austin, TX 78701-4043

James P. Feeney
Feeney Kellett Wienner & Bush
35980 Woodward Avenue
Bloomfield Hills, MI 48304

Keith W. McDaniel
Pulaski Gieger & Laborde, LLC
434 North Columbia Street, Suite 200
Covington, LA 70433

William L. Parker
Sean R. Levin
Mark Newcity
Fitzhugh & Associates
155 Federal Street
Boston, MA 02110

Karyn Bryant
Boult Cummings Conners & Berry
414 Union Street, Suite 1600
Nashville, TN 37219

Gary M. Glass
David A. Eberly
Thompson Hine & Flory LLP
312 Walnut Street, 14th Floor
Cincinnati, OH 45202-4029

Francis M. McDonald, Jr.
Carlton Fields
Ward Emmanuel Smith & Cutler, P.L.
450 South Orange Avenue, Suite 500
P.O. Box 1171
Orlando, FL 82802-1171

F. Faison Middleton, IV
Charles K. Reed
Long Aldridge & Norman LLP
303 Peachtree Street, N.E., Suite 5300
Atlanta, GA 30308

Vicki E. Turner
Michael Kalt
Wilson Petty Kosmo & Turner LLP
550 West "C" Street, Suite 1050
San Diego, CA 92101-3532

Hoot Gibson
Dan Rodman
Elizabeth Vanis
McNulty Snell & Wilmer LLP
1920 Main Street, Suite 1200
Irving, CA 92614-7060

Douglas W. Seitz
Barry Toone
Andrew Ashworth
Brad Peterson
Snell & Wilmer LLP
One Arizona Center
Phoenix, AZ 85004-2202

Robert T. Adams
John F. Murphy
Paul Williams
Shook Hardy & Bacon LLP
One Kansas City Place
1200 Main Street
Kansas City, MO 64105-2118

LOCKE REYNOLDS LLP
201 N. Illinois St., Suite 1000
P.O. Box 44961
Indianapolis, IN 46244-0961
(317) 237-3800

O'MELVENY & MYERS
555 13th Street, N.W., Suite 500 West
Washington, DC 20004-1109
(202) 383-5300

507350_1