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
THIS DOCUMENT RELATES TO ALL CLASS ACTIONS	

MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR INJUNCTIVE RELIEF AGAINST DEFENDANT FORD MOTOR COMPANY

On May 22, 2001, Ford announced that it would be voluntarily replacing the approximately 13 million remaining Firestone Wilderness AT tires not covered by Firestone's August 2000 recall that were used as original equipment on Ford vehicles. That program, which resulted from Ford's own research efforts and communications with the National Highway Traffic Safety Administration ("NHTSA"), effectively mooted much of the relief that is sought in plaintiffs' original motion for preliminary injunction, which was filed on January 29, 2001. Apparently seeing their case and their potential fees slipping away, plaintiffs' counsel responded by suddenly determining that the supposed Ford Explorer rollover defect alleged in their Master Complaint (*see* ¶¶ 63-66, and 161-99) warrants not only the monetary "diminution-in-value" relief for which the complaint prays, but also an immediate preliminary injunction requiring that Ford recall (that is, repair, replace, or buy back) every Ford Explorer on the road today.

This desperate attempt to throw a completely brand new claim for relief into this proceeding not only contravenes the procedures for amending the Master Complaint set forth in the Case Management Order ("CMO"), but also flies in the face of the Seventh Circuit's preliminary injunction standards. Moreover, the factual premise of plaintiffs' argument – that the Ford Explorer is somehow unique among SUVs – is flatly contradicted by the Explorer's strong 10-year safety record. SUV stability has long been the subject of NHTSA scrutiny and has resulted in a NHTSA grading system that places the Ford Explorer well within the mainstream of comparable SUVs. Further, the Firestone evidence upon which plaintiffs seek to rely has already been given to NHTSA, which is in the process of determining whether there is a basis for conducting a formal investigation of these issues. In the end, plaintiffs' new-found sense of urgency about alleged safety defects in the Explorer seems to be driven less by a

concern for public safety and more by a concern for public relations. Rather than wasting more time on plaintiffs' baseless, ill-conceived injunction proposal and allowing matters to move toward a hearing that would be nothing more than a media event, the Court should reject plaintiffs' motion now.

I. PLAINTIFFS IMPROPERLY SEEK "PRELIMINARY" INJUNCTIVE RELIEF THAT IS NOT SOUGHT IN THEIR COMPLAINT.

As an initial matter, plaintiffs' new demand that the Court order Ford to recall (that is, repair, replace or buy back) every Ford Explorer built over the past ten years fails for the simple reason that the Master Complaint contains no foundation for such wide-ranging relief. The only injunctive relief sought in the Master Complaint concerns the recall of Firestone tires; no mention is made of a recall of Ford Explorers. (*See* Master Complaint ("Compl."), Prayer for Relief, ¶ B.) In fact, the Center for Auto Safety's proposal that the Master Complaint include a request for a recall of the Explorer was ***rejected*** by the MDL Executive Committee. (*See* Center for Auto Safety's Opposition to Defendants' Motion to Strike Center for Auto Safety's Motion for Preliminary Injunction, dated March 16, 2001, at 6.)

Plaintiffs' new freestanding demand for "preliminary" injunctive relief that is not tied to any permanent relief sought in their complaint is improper on its face. Preliminary injunctions are available to facilitate the award of ultimate relief, not provide a mechanism for securing forms of relief unrelated to the demands in the complaint. *See, e.g., Africa v. Vaughn*, No. Civ. A. 96-649, 1996 WL 677515, at *1 (E.D. Pa. 1996) ("Because the purpose of preliminary injunctive relief is to maintain the status quo or prevent irreparable injury pending the resolution of an underlying claim on the merits, the injury claimed in a motion for such relief must necessarily relate to the conduct alleged ***and permanent relief sought in a plaintiff's***

complaint.") (emphasis added); *Devose v. Herrington*, 42 F.3d 470, 471 (8th Cir. 1994) (to same effect); *cf. Rivera v. Dick McFeely Pontiac, Inc.*, 75 F.R.D. 1, 2 (N.D. Ill. 1977) ("[A] plaintiff who seeks injunctive relief must be threatened by 'substantial and immediate threat' of injury ***within the scope of the complaint***.") (emphasis added).

The Case Management Order in this proceeding prohibits the amendment of the Master Complaint until after the Court rules on the pending class certification motions. (*See* CMO, Section IV.) Plaintiffs should not be permitted to evade that CMO provision by demanding new relief in the form of a preliminary injunction, particularly when the purported need to order the recall of millions of Explorers arose only after the relevance of plaintiffs' original motion for preliminary injunction was undermined by Ford's Firestone Wilderness AT Tire Replacement Program.

II. PLAINTIFFS FAIL TO MEET ANY OF THE MULTIPLE REQUIREMENTS FOR OBTAINING A PRELIMINARY INJUNCTION.

Plaintiffs' new motion for a preliminary injunction simply repeats the legal arguments made in support of plaintiffs' last preliminary injunction bid. (*See* Mem. of Points and Authorities in Support of Pltfs.' Mot. for Injunctive Relief Against Defendant Ford Motor Co. (dated June 7, 2001) ("Pl. Mem."), at 4 (incorporating by reference the legal standard set out in plaintiffs' prior brief).) As Ford (along with its co-defendant Bridgestone/Firestone, Inc.) demonstrated previously, those legal arguments badly misapprehend the Seventh Circuit's demanding test for the granting of preliminary injunctions. (*See* Defs. Mem. in Opposition to "Class" Plaintiffs' Motion for Preliminary Injunction (dated March 19, 2001) ("Defs. P.I. Opp.").)

The current motion suffers from a host of irremediable defects:

- The motion seeks permanent and mandatory relief (not true preliminary relief), ignoring binding Supreme Court and Seventh Circuit authority barring such relief at this stage of this proceeding.
- The motion ignores the fact that no class has been certified in this case and that the demanded class relief is therefore presently unavailable.
- And most importantly, the motion fails to meet ***any*** of the Seventh Circuit's requirements for a preliminary injunction.

Collectively, these flaws are so fundamental that they require the immediate denial of plaintiffs' motion.

A. Plaintiffs' Request For "Preliminary" Injunctive Relief That Is Actually Mandatory And Permanent Violates Fed. R. Civ. P. 65.

As the Supreme Court has noted, even truly preliminary injunctive relief (that is, relief intended "to preserve the relative positions of the parties until a trial on the merits can be held," *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981)) is "extraordinary" and "drastic." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997). But when plaintiffs seek preliminary injunctive relief that would require a defendant "to take a particular action," such relief must be even more "cautiously viewed and sparingly issued." *Graham v. Med. Mut. of Ohio*, 130 F.3d 293, 295 (7th Cir. 1997); *see also Kimbley v. Lawrence County*, 119 F. Supp. 2d 856, 874 (S.D. Ind. 2000) (Barker, C.J.) (mandatory injunctions issue only in "exceptional circumstance[s]").

The relief sought by plaintiffs is anything but "preliminary." It goes far beyond the bounds of what is permissible at this stage. Apparently not satisfied with their request for a recall of tens of millions of Firestone tires, plaintiffs now demand an "immediate safety recall,

replacement, or refund" of every single Ford Explorer vehicle from model years 1991-2001. (Not. of Mot. for Preliminary Injunctive Relief Against Def. Ford Motor Co., dated June 1, 2001, at 1.) To be sure, plaintiffs acknowledge that such mandatory injunctions are "cautiously viewed and sparingly issued." (Pl. Mem. at 4 (citing *Graham*, 130 F.3d at 295). And they cite *Jordan v. Wolke*, 593 F.2d 772, 774 (7th Cir. 1978), for the proposition that such relief can sometimes be justified (even though *Jordan* is a case in which the Seventh Circuit ***reversed*** the grant of a preliminary injunction because it was permanent and mandatory in nature). But beyond those two points, plaintiffs make no real effort to justify this extraordinary request. Nor can they. Plaintiffs cannot explain how the order they request can be anything other than mandatory and permanent. As defendants have shown, federal courts routinely reject such requests. *See, e.g.*, *Camenisch*, 451 U.S. at 395 (it is "inappropriate for a federal court at the preliminary-injunction stage to grant a final judgment on the merits."); *see also Chathas v. Local 134 IBEW*, 233 F.3d 508, 513 (7th Cir. 2000) ("A plaintiff cannot obtain a permanent injunction merely on a showing that he is likely to win when and if the merits are adjudicated.") *cert. denied*, 2001 WL 184851 (U.S. June 29, 2001). Moreover, plaintiffs' demand for a recall order, even though this Court has made no determination on the merits of plaintiffs' highly contestable defect claims, effectively attempts to skip the necessary step of actually having a trial on the merits in this case. *See Jordan*, 593 F.2d at 774; *see also Plummer v. Am. Inst. of Certified Pub. Accountants*, 97 F.3d 220, 229 (7th Cir. 1996) (plaintiffs must succeed on merits at trial before receiving permanent injunctive relief). The Court should reject such an improper demand out of hand.

B. Plaintiffs' Proposed Preliminary Injunction Ignores The Procedural And Constitutional Protections Of Fed. R. Civ. P. 23.

As they did in their last brief requesting preliminary injunctive relief, plaintiffs ignore the fact that no class has been certified in this proceeding. Nevertheless, they seek injunctive relief that would apply to the entire putative class of Ford Explorer owners. But absent class certification, this Court cannot be assured that both Ford and the absent plaintiffs will enjoy the protection of their constitutional right to due process. *See, e.g., Phillips Petroleum Co. v. Shutts,* 472 U.S. 797, 810-14 (1985); *Hansberry v. Lee,* 311 U.S. 32, 40-44 (1940). Thus, this motion is thus wholly improper and entirely premature. Plaintiffs seek to order defendants to recall, replace, or buy back millions of Ford Explorers owned by individuals who are not before this Court, and whose interests are not protected by notice, by counsel, by opt-out provisions, or by any other of the myriad procedural protections afforded by Fed. R. Civ. P. 23. In fact, given the superior safety record of the Ford Explorer (*see* pp. 12-17 *infra*), the relief plaintiffs seek to impose on the purported class could well result in the members of the purported class driving less safe vehicles. This is particularly true now that Ford has agreed to replace the allegedly defective Wilderness AT tires not covered by the Firestone recall that plaintiffs claim create a "deadly combination" when mounted on Explorers. (*See* Compl., p. 16.)

As defendants explained in their earlier brief in opposition to plaintiffs' request for a preliminary injunction, the Seventh Circuit has squarely rejected the grant of wide-ranging injunctive relief in such circumstances. (*See* Defs. P.I. Opp. at 14-15.) In *McKenzie v. City of Chicago,* 118 F.3d 552 (7th Cir. 1997), the Seventh Circuit rejected the attempt of certain building owners to win a preliminary injunction against the City of Chicago barring it from demolishing vacant and dilapidated buildings while their motion for class certification was still

pending. The court held that "plaintiffs lack standing to seek – and the district court therefore lacks authority to grant – relief that benefits third parties." *Id.* at 555. The court wisely asked, "Why else bother with class actions?" *Id.* ("[A] wrong done to plaintiff[s] in the past does not authorize prospective, class-wide relief unless a class has been certified.").[1] As in *McKenzie*, since this Court has made no determination that the named plaintiffs in this proceeding are entitled to represent anyone but themselves, they lack standing to demand relief for the putative class. Their motion for classwide relief therefore should be summarily denied.

C. Plaintiffs Have Not Established That They Meet Any Of The Four Prerequisites For A Preliminary Injunction.

"A preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion." *Boucher v. School Bd.*, 134 F.3d 821, 823 (7th Cir. 1998) (quoting *Mazarek*). "A preliminary injunction that would give the movant substantially all the relief he seeks is disfavored, and courts have imposed a higher burden on a movant in such cases." *Id.* at 826-27 n.6. Plaintiffs' request for preliminary injunctive relief seeking the replacement or buy back of all Ford Explorers goes far beyond the "diminution in value" relief sought in the Master Complaint. If this Court even reaches plaintiffs' request, it should therefore impose a high burden in considering whether to grant the "preliminary" relief plaintiffs seek.

Under this Circuit's test for preliminary injunctions, plaintiffs first bear the burden of establishing:

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[1] *See also Adams v. Freedom Forge Corp.*, 204 F.3d 475, 490 (3d Cir. 2000) ("Merely petitioning for class certification cannot provide plaintiffs the right to be treated collectively."); *Nat'l Ctr. for Immigrants Rights, Inc. v. INS*, 743 F.2d 1365, 1371 (9th Cir. 1984) ("absen[t] . . . class certification, the preliminary injunction may properly cover only the named plaintiffs"); *Chavez v. Ill. State Police*, 27 F. Supp. 2d 1053, 1081 (N.D. Ill. 1998) ("To the extent that the plaintiffs seek injunctive relief on behalf of the putative class, the absence of an order certifying a class dooms any such request.").

(1) that [they have] some likelihood of succeeding on the merits; and

(2) that [they have] no adequate remedy at law and will suffer irreparable harm if the injunction is denied.

Heller v. Hodgin, 928 F. Supp. 789, 794 (S.D. Ind. 1996) (Barker, C.J.)

Where plaintiffs cannot establish both of these elements, the "court's inquiry is over and the injunction must be denied." *Marion County Comm. of the Ind. Democratic Party v. Marion County Election Bd.*, No. IP 00-1169-C H/G, 2000 U.S. Dist. LEXIS 12226, at *6 (S.D. Ind. Aug. 3, 2000) (denying motion for preliminary injunction where plaintiff failed to prove likelihood of success on merits although evidence favored plaintiff on every other element) (quoting *Abbott Labs. v. Mead Johnson & Co.*, 971 F.2d 6, 11 (7th Cir. 1992)); *see also Ty, Inc. v. GMA Accessories, Inc.*, 132 F.3d 1167, 1172 (7th Cir. 1997). Even if plaintiffs ***can*** satisfy both of these two threshold elements, then they still must bear the burden of proving:

(3) that the injury to the moving party if the injunction is denied outweighs the harm to the non-moving party if the injunction is granted; and

(4) the public interest is best served by granting the injunction.

Heller, 928 F. Supp. at 794; *see also Abbott Labs.*, 971 F.2d at 11-12. In this case, it is apparent without further inquiry that plaintiffs meet ***none*** of these factors – neither the necessary threshold factors nor the subsequent factors. Accordingly, their motion must be denied.

1. Plaintiffs Cannot Meet Their Substantial Burden Of Showing A Likelihood of Success On The Merits.

Plaintiffs urge that the requisite likelihood of success on the merits exists if the moving party shows a better than negligible chance of succeeding on the merits. (*See* Pl. Mem. at 5.) But that statement, without more, is misleading. As Ford explained in its earlier brief (*see* Defs. P.I. Opp. at 17-18), and as Judge Hamilton explained in *Flotec, Inc. v. S. Research, Inc.*, 16

F. Supp. 2d 992, 998-99 n.4 (S.D. Ind. 1998), while "[t]he Seventh Circuit has sometimes phrased the standard for the first element of a preliminary injunction in terms of a 'better than negligible' likelihood of success on the merits," that element must be considered in the proper context. Under the Seventh Circuit's "sliding scale" approach to preliminary injunctions, the "better than negligible" test is the lowest possible standard for the first element of the test for preliminary injunctions, and applies only where the other elements of the "sliding scale" are heavily weighted against the non-moving party. As Judge Hamilton explained:

> Where the moving party faces a threat of immediate and disastrous harm, and where the balance of harms tips decidedly in favor of the moving party, the court has the discretion to prevent irreparable harm and to preserve the status quo even if it appears at the early stage of the lawsuit that the moving party is not likely to prevail on the merits. *See Abbott Laboratories v. Mead Johnson*, 971 F.2d at 12 & n. 2 (explaining "sliding scale" approach to preliminary injunctive relief). ***Such cases are rare . . . .***

Flotec, Inc., 16 F. Supp. 2d at 998-99 n.4 (emphasis added); *see also Ty, Inc. v. The Jones Group, Inc.*, 237 F.3d 891, 895 (7th Cir. 2001) ("This process involves engaging in what we term the sliding scale approach; the more likely the plaintiff will succeed on the merits, the less the balance of irreparable harms need favor the plaintiff's position."). This is not one of those "rare" cases in which such a lax standard is appropriate. Because plaintiffs' requested injunction "would not preserve the status quo . . . and would inflict substantial harm on defendants," plaintiffs must establish a "likelihood" of success on the merits, not a mere negligible chance of success. *Flotec*, 16 F. Supp. 2d at 998-99 n.4.

Not only do plaintiffs misstate the applicable test for a likelihood of success on the merits in this case, but they are purposefully vague about what success on the merits ***means*** in this case. Plaintiffs assert that they can present evidence to show that the Ford Explorer has an "unreasonable ***propensity*** to roll over," and they argue that Ford made design choices with which

plaintiffs apparently disagree. (Pl. Mem. at 5 (emphasis added).) But a Court cannot find a likelihood of success on the merits on the mere basis that plaintiffs may be able to make factual showings of some sort. What plaintiffs must show is that they can prove ***all*** the elements of their ***legal*** claims. *See Roland Mach. Co. v. Dresser Indus.*, 749 F.2d 380, 387 (7th Cir. 1984) ("Equity jurisdiction exists only to remedy legal wrongs; without some showing of a probable right there is no basis for invoking it."); *AgMax, Inc. v. Countrymark Coop.*, 795 F. Supp. 888, 898 (S.D. Ind. 1992) (Barker, J.) (refusing preliminary injunction where plaintiff "fail[ed] to support essential elements of" pleaded claims).

Reading plaintiffs' brief, it would be impossible to guess ***what*** plaintiffs' legal claims are, let alone figure out that they are proceeding on the highly dubious ground – repeatedly rejected by courts across the country – that uninjured plaintiffs are entitled to recover for such novel damages as "diminution in value" on the basis of mere "propensities" of a product to fail. (*See, e.g.*, Compl. ¶¶ 5-6.) Ford has already explained in extensive detail why plaintiffs' claims are legally groundless, and will not rehash those arguments here other than to note the following deficiencies:

- Plaintiffs cannot state a claim for these "no injury" plaintiffs under any theory of state or federal law. (*See* Defs. Mot. to Dismiss, Br. I at 7-23.)

- Plaintiffs ignore the carefully drafted, comprehensive provisions of the Safety Act, which preempts efforts to turn courts into shadow-NHTSA officials and bars attempts by plaintiffs to engage in precisely this sort of disruption of the ongoing investigative and supervisory role of NHTSA. (*See* Defs. Mot. to Dismiss, Br. I at 24-41.)

- A host of other legal doctrines, such as RICO's many exacting requirements and the widely accepted economic loss doctrine, bar any remaining claims by plaintiffs and so leave no basis upon which an injunction might be granted. (*See* Defs. Mot. to Dismiss, Brs. II & III.)

Plaintiffs do not even make a pretense of acknowledging the myriad legal difficulties which require the dismissal of their action. That silence speaks volumes.[2] This Court cannot act on plaintiffs' factual claims in the abstract, but must determine whether plaintiffs can show a likelihood of success in proving ***legal*** wrongs. This they cannot do.

Beyond this fundamental legal flaw, plaintiffs' motion founders on a basic fact which overwhelms plaintiffs' recycled rhetoric about an imminent catastrophe that necessitates Court action: regardless of model year, the Ford Explorer has performed comparably with other sport utility vehicles in measures of safety and stability. While SUVs ***as a class*** are more likely to rollover than passenger cars ***as a class***, this fact in no way supports plaintiffs' request that this Court order a recall of all Explorers. Contrary to plaintiffs' assertions, the Explorer simply does not exhibit an "unreasonable propensity to roll over," if by that allegation plaintiffs mean that the Explorer performs worse than comparable vehicles.[3] If this Court were to order a recall of all Ford Explorers, it would be tantamount to a declaration by this Court that the overwhelming majority of SUVs are unsafe and similarly should come off the road. NHTSA has not made such a finding – nor should this Court. Because there is no factual basis to support plaintiffs' request

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[2] In their dubious argument that the Ford Explorer is simply the Bronco II *redux*, plaintiffs also fail to note even ***one*** of the many cases in which state and federal courts have rejected similar claims against Ford for alleged defects in that vehicle. *See, e.g., In re Ford Motor Co. Bronco II Prod. Liab. Litig.*, 982 F. Supp. 388 (E.D. La. 1997) (granting Ford's motion for summary judgment in eight claims consolidated for multidistrict treatment).

[3] Of course, simply because a particular vehicle performs worse than comparable vehicles on some measure does not make the vehicle "defective." As plaintiffs themselves must recognize, NHTSA has given some SUVs a one-star rollover resistance rating, while giving the Explorer a two-star rating. *See e.g.*, Model Year 2001 Front, Side and Rollover Resistance Ratings *at* http://www.nhtsa.dot.gov/cars/testing/ncap. Yet neither NHTSA, nor plaintiffs, are seeking the recall of those one-star vehicles, let alone all of the two-star vehicles. Further, these same NHTSA charts show that the 2001 Explorers have four-star frontal crash test and five-star side crash test ratings, making them among the best performers of any vehicles in these tests. *Id.*

for a Court-ordered recall of all Explorers, this Court should deny plaintiffs' motion for preliminary injunction against Ford.[4]

Plaintiffs focus on alleged problems with the Explorer's stability and handling as the basis for their request that this Court order all Explorers off the road. (*See, e.g.*, Pl. Mem. at 21- 33.)[5] These allegations of an Explorer defect – whether related to the "twin I beam" suspension, SLUMS-type suspension, the center of gravity or track width – go to one central issue: stability. As Ford has already made abundantly clear in its prior submissions to this Court, regardless of the model year, Ford Explorers have performed comparably with other compact sport utility vehicles in terms of stability and rollover performance.

For example, Ford's statistical expert, Dr. William Wecker, explained in a declaration submitted in support of defendants' opposition to plaintiffs' motion for class certification that the data from the U.S. Department of Transportation's Fatal Accident Reporting System ("FARS") show that the rollover performance rates of Explorer vehicles from each model year are well within the range of the rates of other SUVs.[6] A similar analysis of FARS data that Ford has presented to NHTSA shows that not only are compact SUVs, as a group, safer than passenger cars, but that the Explorer is safer than other compact SUVs. (S*ee* Chart, "Compact SUVs are Safer than Cars (dated June 13, 2001) (attached at Tab A).) Moreover,

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[4] Plaintiffs make repeated reference to an appendix of documentary materials that support their factual assertions. (*See, e.g.*, Pl. Mem. at 9 n.2; Pl. Mem. at 33 n.64.) To date, Ford has not received the referenced appendix. Ford requests that it be permitted to supplement this opposition if and when plaintiffs file an appendix of documentary materials, if the Court does not summarily reject plaintiffs' motion.

[5] This Court should not be distracted by plaintiffs' digressions about the alleged stability problems of Bronco II vehicles. As is detailed below, plaintiffs are simply attempting to rehash arguments that led nowhere in the *Bronco II* class litigation. (*See* p. 17 *infra.*)

[6] *See* Ford's Evidentiary Appendix, Tab 2, Declaration of William E. Wecker ("Wecker Decl."), ¶¶ 5, 6(3) & Exs. 3, 5 (submitted with Defendants' Opposition to Plaintiffs' Motion for Class Certification ("Defs. Opp. to Class Cert."). *See also* Defs. Opp. to Class Cert. at 34 (and accompanying chart).

although compact SUVs as a group are more likely to be involved in fatal rollover accidents than passenger cars, the Explorer has a lower rollover fatality rate than other compact SUVs. (*Id.*)

Similarly, Ford's expert Lee Carr has shown that Ford Explorers have tested comparably to other SUVs, as measured by the "static stability factor" (SSF), on which plaintiffs now primarily rely.[7] The static stability factor is a number that is derived from dividing half the track width of a vehicle by its center of gravity height above the ground.[8] As Mr. Carr explained, the SSFs for all utility vehicles generally range between 1.01 and 1.20.[9] The SSFs of the various Explorer models and configurations as measured by Mr. Carr are well within this range.[10]

The NHTSA data upon which plaintiffs rely upon only highlight the fact that the SSFs of Explorers are actually comparable to the SSFs of other sports utility vehicles.[11] For example, according to the chart that NHTSA has published of SSF measurements, the 1991-1994 4-door Explorer has an SSF of 1.08, better than or equal to the SSF of 11 other non-Explorer vehicles measured by NHTSA, including the 1988-1996 4-door Toyota 4Runner (1.00), the 1988-1991 4-door Isuzu Trooper (1.02), the 1991-1997 4-door Honda Passport and Isuzu Rodeo

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7 *See* Ford's Evidentiary Appendix, Tab 1, Declaration of Lee Carr, ¶ 13 ("Carr Decl.") (submitted with Defs. Opp. to Class Cert.).

8 *Id*. ¶ 7.

9 *Id.* ¶ 13.

10 *Id*.

11 The variation in the SSFs calculated by Mr. Carr and NHTSA demonstrates that the SSF can vary according to two wheel drive and four wheel drive, different mechanical configurations, passenger and cargo loading, and suspension types, among other things. (*See* Carr. Decl. ¶¶ 7-13 (explaining the myriad of configurations and variables that would cause different Explorers to have different track widths and center of gravity heights).) *See also In re Ford Motor Co. Bronco II Prod. Liab. Litig.*, 177 F.R.D. 360, 372-73 (E.D. La. 1997) (denying motion for class certification and rejecting the SSF as a method of common proof of class defect because of the myriad factors that affect stability and a vehicle's propensity to roll over). Nevertheless, both NHTSA's SSF calculations and Mr. Carr's SSF calculations demonstrate that the Explorers have SSFs comparable to other sports utility vehicles.

(1.06), the 1997-1998 4-door Toyota 4Runner (1.06), the 1992-1994 4-door Isuzu Trooper (1.07), the 1988-1995 4-door Nissan Pathfinder (1.07), the 1993-1998 4-door Jeep Grand Cherokee (1.07), the 1992-1998 4-door Chevrolet and GMC V1500/V2500 Suburban (1.08) and the 1988-1997 4-door Jeep Cherokee (1.08).[12] Similarly, NHTSA's measurement of the 1991-1994 2-door Explorer (1.07), the 1995-1998 2-door Explorer (1.06) and the 1995-1998 4-door Explorer (1.06) are also equal to or better than a number of the other SUVs measured by NHTSA. Moreover, plaintiffs' selective reliance on the NHTSA SSF measurements as proof of an alleged defect in all Explorers ignores the fact that NHTSA itself did not conclude that the SSF measurements it found in the various Explorer configurations and models were evidence of a defect. To the contrary, NHTSA gave all of the Explorer configurations and models two-star ratings, which NHTSA applies to any vehicle which it found to have an SSF of between 1.05 and 1.12.[13] Thus, the two-star rating given to the Explorers by NHTSA is the same rating that would apply to 19 of the 26 non-Explorer SUVs measured by NHTSA, not to mention a number of the vans and pick-up trucks. Plaintiffs' claim that the NHTSA SSF study supports their contention that the Explorer is "unreasonably dangerous" is patently wrong.[14]

It is widely recognized that SUVs as a vehicle class have a higher rollover rate than passenger cars, pickup trucks, or vans.[15] For every 100 single vehicle crashes involving

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[12] *See* Rollover Prevention Docket No. NHTSA-20000-6859 RIN 2127-AC64 Consumer Information Regulations; Federal Motor Vehicle Safety Standards; Rollover Prevention, Appendix: Association Between SSF and Rollover Risk Estimated from Crash Data, Table A-2: The SSF for SUVs, *at* http://www.nhtsa.dot.gov/cars/rules/rulings/rollover/Appendix.html. Plaintiffs have selectively quoted from this NHTSA chart on p. 27 of their Memorandum and left out the 1991-1994 4-door Explorer.

[13] *See* Rollover Prevention, Docket No. NHTSA-2000-6859, Supplementary Information, Chapter VII, Converting SSF Measurements to Star Ratings, *at* http://www.nhtsa.dot.gov/cars/rules/rulings/rollover/Chapt07.html.

[14] *See* Pl. Mem. at 35.

[15] *See* NHTSA-- FAQs About Rollover Resistance Ratings (Figure 4); *at* http://www.nhtsa.dot.gov/hot/rollover. (*See also* Carr Decl. ¶ 6.)

SUVs, five result in rollovers, whereas for passenger cars fewer than 2 out of 100 crashes result in rollovers.[16] Because SUVs are taller and narrower than other vehicles, SUVs as a class "are more likely than lower, wider vehicles, such as passenger cars, to trip and roll over once they leave the roadway."[17] However, this fact has not led NHTSA to seek to remove SUVs from the road. Rather than seeking to ban SUVs, the result to which plaintiffs' theory would lead, NHTSA instead has adopted regulations to provide consumers with information and warnings about the possibility of rollovers. For example, in the defendants' class certification opposition brief, Ford described the various warning labels that NHTSA has required to be placed on all SUVs since 1984.[18] Moreover, beginning this year, NHTSA is rating vehicles for rollover resistance. After terminating a rulemaking on a minimum standard for rollover resistance, NHTSA decided instead to engage in a consumer information approach to rollover risk.[19] NHTSA explained:

> We have decided to pursue consumer information, through NCAP [New Car Assessment Program], to enable consumers to make informed choices about the tradeoffs in vehicle attributes, such as high ground clearance, and rollover resistance. . . . [The information] would inform drivers of the general difference in rollover resistance between light trucks and cars and among vehicles within the various classes. Consumers who need, or desire, a particularly large cargo space, high ground clearance or narrow track width, would not be denied the chance to purchase such vehicles.[20]

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16 *See* Figure 4, *at* http://www.nhtsa.dot.gov/hot/rollover.

17 *See* FAQs, *at* http://www.nhtsa.dot.gov/hot/rollover.

18 *See* Defs. Opp. to Class Cert. at 48-52.

19 *See* Rollover Prevention Docket No. NHTSA -2000 RIN 2127-AC64 (Executive Summary), *at* http://nhtsa.dot.gov/cars/rules/rulings/rollover/Chapt01.html

20 *Id.*

NHTSA is well aware of the higher rate of rollovers among SUVs and has instituted measures to address it. Plaintiffs have offered no support for bypassing these measures and finding the Explorer to be so far below the accepted performance levels to justify a recall.

Astoundingly, plaintiffs are so lacking in any support for their proposed injunctive relief that their supporting brief is devoted largely to recycled arguments about Bronco II vehicles (Pl. Mem. at 11-22), not Explorers. Plaintiffs' focus on Bronco IIs is truly ironic, given that several years ago, similar class actions were brought making similar challenges against Bronco II vehicles. In those cases, plaintiffs sought "diminution-of-value" damages and/or a retrofit based on arguments that the center of gravity and track width of Bronco II vehicles allegedly rendered them unreasonably dangerous, just as plaintiffs argue here with respect to Explorers. But in the federal multidistrict litigation on Bronco II vehicles, the court ultimately denied class certification. *See In re Ford Motor Co. Bronco II Prod. Liab. Litig.*, 177 F.R.D. 360, 373 (E.D. La. 1997) (holding no "credible classwide proof of a common defect" where accident statistics showed that various model years of Bronco IIs performed comparably with peer utility vehicles). Then, that court granted summary judgment for Ford regarding the claims of the named plaintiffs. *See In re Ford Motor Co. Bronco II Prod. Liab. Litig.*, No. 991, 1998 WL 308013 (E.D. La. 1998). Both of those rulings were affirmed by the U.S. Court of Appeals for the Fifth Circuit. *See Bates v. Ford Motor Co.*, 174 F.3d 198 (5th Cir. 1999). And in the only parallel class action that ultimately proceeded in state court regarding Bronco IIs, the Alabama Supreme Court ultimately ruled that Ford was owed summary judgment on the class claims. *See Ford Motor Co. v. Rice,* 726 So.2d 626, 631 (Ala. 1998). In sum, plaintiffs' effort to hold up the Bronco II litigation as a model for what lies ahead here simply reinforces the obvious – the likelihood of plaintiffs' prevailing on the merits here is nil.

2. Plaintiffs Fail To Show A Threat Of Irreparable Harm.

Plaintiffs are equally unsuccessful in meeting their burden under the second prong of the test for a preliminary injunction – proving a threat of irreparable harm. "Irreparable harm is harm [that] cannot be repaired, retrieved, put down again, atoned for . . . . The injury must be of a particular nature, so that compensation in money cannot atone for it." *Graham*, 130 F.3d at 296. Where the question is "one of monetary compensation, a plaintiff would be hard pressed to demonstrate either irreparable harm or an inadequate remedy at law." *Wisconsin Cent. Ltd. v. Pub. Serv. Comm'n*, 95 F.3d 1359, 1369 (7th Cir. 1996).

Plaintiffs assert that no adequate remedy at law exists here and that an irreparable injury is threatened because this case endangers public safety. But this argument again ignores the seminal document – plaintiffs' own Master Complaint. That document conclusively establishes that plaintiffs' claims with respect to the Ford Explore seek primarily ***monetary*** compensation, and undeniably recognizes that monetary compensation is an adequate remedy here. (*See* Compl. at 85-86, Prayer for Relief ¶¶ F (demanding that Ford disgorge profits from sale of Explorers "and/or make full restitution to Plaintiffs and the members of the Class[ ]"), G (seeking punitive damages), H (seeking treble damages for, *inter alia*, "the diminution in value of the Explorers . . . [and] the excessive sums paid by Plaintiffs . . . to purchase or lease Explorers"), I (to same effect), K (seeking rescission of sales of Explorers to Redhibition Subclass members).)

As a further fatal flaw, plaintiffs fail to recognize the speculative nature of the claimed injuries, which renders any finding of irreparable harm impossible. *See Roland Mach.*, 749 F.2d at 386 ("[i]n every case in which the plaintiff wants a preliminary injunction he must show . . . that he ***will*** suffer 'irreparable harm' if the preliminary injunction is not granted.")

(emphasis added); *Heller*, 928 F. Supp. at 798-99 (no irreparable injury where evidence did not demonstrate that alleged injury would ever materialize). This failing is again evident throughout plaintiffs' complaint. ***None*** of the named plaintiffs alleges that he or she has ever suffered an incident related to any purported defect in the Ford Explorer; that defect, if it exists at all, is a "propensity" at best. (Pl. Mem. 5.) Thus, plaintiffs' motion is based on a risk of harm, not harm itself. Yet they have offered the Court no evidence that the alleged risk rises to a level that would justify the massive recall they seek as preliminary injunctive relief.

In sum, for a host of reasons, plaintiffs fail to show a threat of irreparable harm. The fact that the named plaintiffs could replace their vehicles and sue for damages alone destroys plaintiffs' argument. *See Wisconsin Cent.*, 95 F.3d at 1369; *see also McKenzie*, 118 F.3d at 555 ("It is not an appropriate use of judicial power to issue an injunction that adds nothing to the protections plaintiffs already have or can obtain by taking rudimentary precautions."); *Curtis 1000, Inc. v. Youngblade*, 878 F. Supp. 1224, 1248 (N.D. Iowa 1995) ("Irreparable harm will not be found where alternatives already available to the plaintiff make an injunction unnecessary.")[21] Their alarmist arguments cannot alter the law.

3. Ford Would Suffer Significant Harm If The Proposed Injunction Were Issued.

Because plaintiffs fail to pass either of the two primary tests for a preliminary injunction, their motion must fail. *See, e.g., GMA Accessories, Inc.*, 132 F.3d at 1172; *Abbott Labs.*, 971 F.2d at 11. Even if plaintiffs passed both tests, however, the Court would then be

[21] Plaintiffs' cited cases are readily distinguishable. (*See* Pl. Mem. at 6 (citing *EPA v. Envtl. Waste Control, Inc.*, 917 F.2d 327 (7th Cir. 1990); *Envtl. Def. Fund v. Va.*, 714 F.2d 331 (4th Cir. 1983).) As the titles of these cases indicate, these cases involve diffuse, long-lasting, and widespread environmental harm, in which the injury, "by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.*, irreparable." *Envtl. Waste Control*, 917 F.2d at 332 (quotation and citation omitted). Of course, that is not the situation here.

required to balance that fact against the risk of harm to Ford if an injunction is granted erroneously. *See Flotec*, 16 F. Supp. 2d at 998.[22] In this case, the risk is one of staggering harm to Ford. Plaintiffs demand that Ford recall an entire vehicle line, comprising millions of vehicles, in an unspecified time period and without any more specific instructions or suggestions. Apart from the logistical and financial nightmare plaintiffs' "plan" presents – the very reason why Congress entrusted NHTSA with jurisdiction over vehicle recalls – plaintiffs' requested injunction would also deal a crippling blow to Ford's reputation that could not be cured if a final merits determination were then to be made in Ford's favor. *See Novo Nordisk v. Eli Lilly & Co.*, No. 96 Civ. 5787 (BSJ), 1996 U.S. Dist. LEXIS 12807, at *33 (S.D.N.Y. Aug. 30, 1996) (refusing injunction where recall would cause "irreparable injury to [defendant's] reputation").

Fully aware of the magnitude of their request and its crippling cost to Ford, plaintiffs' counsel – having repeatedly assured this Court (and boasted to the press) that they "have the financial resources" to "vigorously prosecut[e] this action on behalf of the Explorer Diminution Class" and other putative class members (Compl. ¶ 198) – now show their true colors: they turn to the small-print argument that, despite the mandatory terms of Fed. R. Civ. P. 65(c), they ought not be required to post anything more than a nominal bond in the face of the billion-dollar relief they seek. (*See* Pl. Mem. 8-9 n.1.) Although plaintiffs manage to reach back

[22] Citing one Seventh Circuit case, plaintiffs assert that where a defendant's conduct is willful, the court need not balance the equities. *See* Pl. Mem. at 7 (citing *Envtl. Waste Control*, 917 F.2d at 332); *see also United States v. Bethlehem Steel Corp.*, 38 F.3d 862, 867 (7th Cir. 1994). A careful reading of these cases and their antecedents shows that plaintiffs misconstrue their import. Both Seventh Circuit cases noting this rarely-used proposition relied equally on the finding that where the plaintiff is the ***government***, acting to safeguard the public health, "injunctive relief is proper, without resort to balancing." *Bethlehem Steel*, 38 F.3d at 867-68 (citation and quotation omitted). Of course, that is not the case here. Moreover, the case on which both these Seventh Circuit cases rely, *Guam Scottish Rite Bodies v. Flores*, 486 F.2d 748, 749 (9th Cir.1973), recognizes that a finding of willfulness is far from automatic. *See id.* at 749 (refusing to find willfulness where neighbor deliberately encroached on neighbor's property despite warning from neighbor, because neighbor relied on survey he performed himself). It is difficult to conceive how plaintiffs will be able to show that Ford "willfully" failed to advise its customers about the rollover

a quarter-century to find cases in which the Seventh Circuit excused the bond requirement, the fact is that the Seventh Circuit now recognizes that "***security [is] mandatory***" under Rule 65(c). *Gateway E. Ry. Co. v. Terminal R.R. Ass'n of St. Louis*, 35 F.3d 1134, 1141 (7th Cir. 1994); *see also Moltan Co. v. Eagle-Picher Indus., Inc.*, 55 F.3d 1171, 1176 (6th Cir. 1995) (noting that "many circuits" [including the Seventh Circuit] hold Rule 65(c) to be mandatory) (cited in Pl. Mem. at 8 n.1 without noting this fact).

Nor do plaintiffs provide any legitimate reason to allow them to post only a nominal bond. Whether or not plaintiffs are "ordinary consumers" (Pl. Mem. at 9 n.1), plaintiffs' counsel are far from ordinary counsel. They are far from indigent, they have not even attempted to show a "strong likelihood of success" on the merits in this case, and they can afford a sizable bond. If this Court ***did*** grant a preliminary injunction ordering a vast recall of Ford Explorers, plaintiffs' counsel should properly be expected to post a bond sufficient to fund that recall.

The clear point of plaintiffs' scramble to avoid posting a bond is that plaintiffs' counsel themselves recognize what Ford asserts here: that when the Court properly balances the equities, it must find that Ford would be subject to enormous financial and reputational losses, which will be impossible to recoup when Ford prevails on the merits in this case. Once again, this factor favors the refusal to grant plaintiffs' request for staggeringly broad relief.

4. The Public Interest Favors Deferring To The Congressionally Designated Guardian Of Auto Safety.

Plaintiffs' assertion that the public interest would be served by granting a sweeping preliminary injunction is as flawed as its other showings. Plaintiffs ignore the fact that, as they themselves have alleged throughout this litigation, the incidents that they allege

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potential of the Explorer when that vehicle (like all SUVs) came with a government-mandated rollover warning sticker on the sun visor.

have resulted in injury or death involved Firestone tires, which are already the subject of Firestone's voluntary recall and Ford's tire replacement program. Plaintiffs do not – and cannot – present similar evidence of an extreme risk presented by the Ford Explorer itself; indeed, on the basis of the safety ratings relied on by plaintiffs themselves, the Explorer is comparable to other compact sport utility vehicles. (*See* pp.12-17 *supra*.)

In any event, if "[p]ublic health and safety is at the very core of the relief [plaintiffs] request here" (Pl. Mem. at 8), then this Court should look to Congress's designated guardian of the public interest with respect to vehicle safety – NHTSA. Throughout this litigation, plaintiffs have sought to heap scorn and contempt on that agency. But the fact remains that only NHTSA has the experience and the congressionally delegated authority to quickly and effectively examine vehicle defect claims and, where necessary, fashion and administer a national recall or other remedies (such as the safety warnings that are already present on the visors of Ford Explorers and in Explorer owner manuals) to address those concerns. *See, e.g.*, *Restatement (Third) of Torts: Product Liability*, § 11, cmt. a (1997) ("Issues relating to product recalls are best evaluated by governmental agencies. . ."); *Ford Motor Co. v. Magill*, 698 So. 2d 1244, 1245 (Fla. Dist. Ct. App. 1997) (rejecting request for court-ordered recall in part because "courts should defer to NHTSA"); *Am. Suzuki Motor Corp. v. Superior Court*, 37 Cal. App. 4th 1291, 1299-1300 (Cal. Ct. App. 1995) ("The remedy which will best promote consumer safety[ ] and which will address [the plaintiffs] concern" is to petition NHTSA.") The applicable public interest factors certainly do not require this Court to muscle aside the nation's vehicle safety administrator simply because plaintiffs are not certain that they will like the results they receive from NHTSA. This is particularly true now that NHTSA has decided to treat Firestone's request for an investigation of the Explorer as a formal petition for a formal investigation. (*See*

Statement of Michael P. Jackson, Deputy Secretary of Transportation before the Subcommittee on Telecommunications, Trade and Consumer Protection and Oversight and Investigation of the Committee on Energy and Commerce, U.S. House of Representatives, June 29, 2001, p. 5 (attached at Tab B).) This Court's consideration of the public interest must surely conclude that it favors permitting remedies such as nationwide recalls of every Ford Explorer produced in the past ten years to remain in the hands of the one governmental entity specifically charged with the task of administering such recalls.

CONCLUSION

For the reasons stated above, plaintiffs' motion for a preliminary injunction seeking a Court-ordered recall of all Ford Explorers should be denied forthwith.

Dated: July 9, 2001

Respectfully submitted,

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CERTIFICATE OF SERVICE

Service of the foregoing was made 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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