UNITED STATES DISTRICT COURT
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 the Honorable Sarah Evans Barker)
THIS DOCUMENT RELATES TO THE CLASS ACTION MASTER COMPLAINT	:	

REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF CLASS PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

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INTRODUCTION

Notwithstanding Defendants' protestations to the contrary, strewn over 170 pages of briefing, it is clear that the fundamental issues in this litigation will be decided based upon predominantly common factual issues turning on expert statistical analyses, tire and automotive experts, and predominantly common legal issues focusing on Defendants' decade-long course of misconduct. This is not a case where individualized facts surrounding each class member's claim swamp common issues. Rather, the classwide issues in this case — whether the Tires' and Explorers' common flaws, whether and how the Tire flaws and Explorer flaws interact to create a heightened risk, when Defendants knew about the problems, and whether they are legally responsible to fix them and/or compensate Class members — are *the* critical issues to the legal claims alleged by Plaintiffs in this case.[1]

The proof of superiority and manageability resides in the ability to decide these core claims and issues by classwide proof. Plaintiffs have demonstrated that, regardless of Defendants' vociferous, highly technical, and largely inaccurate and inapposite objections to

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[1]Indeed, as one court has already found:

> [A] common question of fact and/or law predominates and is significant to the included cases. Although different models of Firestone tires are involved in some cases, and although different vehicle makes and models were involved in some cases, these factors do not diminish the importance of predominating common questions and their related variants — Is Firestone and/or Ford liable for the injuries and deaths allegedly caused by their SUV tires and vehicles? Those questions apparently trace back to common, overlapping design and manufacturing issues that pervade, in varying degrees, each of the included cases. At least as to Firestone's and Ford's liability, common questions of fact and law appear to predominate.

Firestone Tire Cases, Statement of Decision re Petition for Coordination, J.C.C.P. No. 4160 (L.A. County, Ca. April 6, 2001) at 7, Plaintiffs' Appendix ("Pltfs' App."), Tab 1A.

class certification, both sides approach the key issues in this case from a categorical viewpoint. No experts, on either side, utilize or endorse a methodology that requires a tire-by-tire or vehicle-by-vehicle inspection, or a class member-by-class member inquisition, to hold Defendants accountable for, or to exonerate them from, legal liability and equitable responsibility for the risks and damages involved in the class case.

This is a paradigmatic "core" class action. Plaintiffs have asserted claims that sound in injunctive, declaratory, and equitable relief, accompanied by claims for relatively modest, purely economic damages, that would not, as a general rule, be economically feasible to prosecute on an individual basis. A class action is not only, therefore, a superior means of litigating these claims, but also, in all likelihood, the only way to test Plaintiffs' allegations and assess Defendants' liability. Moreover, even if this Court denies class certification, it nonetheless will have to manage the procedural complexities of litigating the individual claims of over 500 named Plaintiffs in the cases transferred to this Court, and coordinate its efforts with those of state courts who will, in the absence of federal class certification, have statewide or perhaps even nationwide class questions before them. As a result, denial of class certification would frustrate the ability of this Court to manage the proceedings before it, and to play a decisive coordinating role vis-a-vis the state courts.

For these reasons, and for the reasons set forth more fully below, Plaintiffs respectfully request that the Court grant their motion for class certification.

ARGUMENT

I. CHOICE OF LAW

Defendants' contention that this Court must apply the law of each Class member's home jurisdiction to the state law claims is simply wrong. Defendants ignore the fact that Plaintiffs

have plead a RICO claim, under which the Court will apply a single body of federal law to the claims against all Defendants. In addition, this Court, under well-settled precedent, and applying ordinary choice of law doctrine, may constitutionally apply Tennessee law to the state law claims against Firestone and Bridgestone, and Michigan law to the state law claims against Ford. Finally, Defendants grossly misstate the nature and degree of variation in the state laws potentially applicable to this action.

A. Plaintiffs' Federal RICO Claims Present No Choice of Law Issues.

Six of the causes of action in the Master Complaint (Counts II through VII) assert claims against all Defendants under the federal RICO statute based upon predicate acts of federal mail and wire fraud. Such claims present no choice of law issues, as they rest entirely on federal law. See Illinois v. Brown, 227 F.3d 1042, 1045 (7th Cir. 2000) (RICO standing, like other RICO issues, is matter of federal law); Nelson v. Nationwide Mort. Corp., 659 F. Supp. 611, 615 (D.D.C. 1987) (court must decide choice of law on state claims but not RICO claim); Vanguard Financial Serv. Corp. v. Johnson, 736 F. Supp. 832, 843-44 (N.D. Ill. 1990). Consequently, Defendants' dire predictions about lack of manageability have no bearing whatsoever on Plaintiffs' federal RICO causes of action, making certification of those claims proper. See, e.g. In re Consol. "Non-Filing Ins." Fee Litig., 195 F.R.D. 684, 693 (M.D. Ala. 2000) (no need to consider variations in laws of 50 states on federal RICO and TILA claims).

B. The Court Can — and Should — Apply Defendants' Home State Laws to the State Law Claims.

Defendants' dire prediction with respect to variations in Plaintiffs' state law claims is also unavailing, as it skips a crucial first step: a conflict or choice-of-law analysis to select the appropriate state's law to apply. See Phillips Petroleum v. Shutts, 472 U.S. 797 (1985). Under

Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941), and S.A. Healy Co. v. Milwaukee Metro. Sewage Dist., 50 F.3d 476, 478 (7th Cir. 1995), the Court applies the choice of law rules of Indiana, the forum in which the Master Complaint was filed.[2]

Indiana's choice of law rule in the non-personal injury context "calls for applying the law of the forum with the most intimate contacts to the facts." Marshall v. Wellcraft Marine, Inc., 103 F. Supp. 2d 1099, 1112 (S.D. Ind. 1999) (citing, inter alia, Travelers Indem. Co. v. Summit Corp. of Am., 715 N.E.2d 926, 931 (Ind. Ct. App. 1999)). As this Court understands, Indiana has adopted a two-step choice of law analysis. See Cutshall v. Ford Motor Co., 719 F. Supp. 782, 783-84 (S.D. Ind. 1989); Hubbard Mfg. Co. v. Greeson, 515 N.E.2d 1071 (Ind. 1987). "First, the court must determine whether the connection between the place of the tort and the legal action is significant. If the connection is indeed significant, the court will apply the law of the place where the tort occurred. No further analysis is necessary." Cutshall, 719 F.

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[2]As Shutts instructs, the necessity for a choice-of-law analysis depends upon whether, as a threshold matter, the court identifies a true conflict, that is, a difference among the potentially applicable laws that is outcome determinative. 472 U.S. at 816. As Judge Posner put it in Barron v. Ford Motor Co., 965 F.2d 195, 197 (7th Cir. 1992), in analyzing and rejecting a non-outcome-determinative distinction between the application of negligence or strict liability theories to an injury accident product liability case: "it is not easy to see what difference [selection of Illinois as opposed to North Carolina law] would have made to the outcome of the case; and before entangling itself in messy issues of conflict of laws a court ought to satisfy itself that there actually is a difference between the relevant laws of the different states."

Distinctions among states' laws that are not outcome-determinative, that is, the "nuances" among states' laws that defendants often claim render class actions brought under multiple states' laws unmanageable, do not rise to the level of true conflict that mandates a choice of law other than that of the forum state. They constitute, rather, the "false conflict" discussed in Barron, 965 F.2d at 197. Thus, Defendants' emphasis on purported differences among the states' consumer laws that do not affect the availability of a specific remedy (since all states' laws provide categorically for damages and injunctive relief) and do not rise to the level of a true conflict (since no states condone deceptive conduct that would violate of other states' statutes) is beside the point as to this Court's ability to select and apply, the laws of the state(s) with the most intimate contacts to the facts giving rise to Defendants' liability.

Supp. at 783; see also Hubbard, 515 N.E.2d at 1073-74.

However, "if the court finds that the place of the tort bears little connection to the legal action, the court must proceed to the second step of the analysis. This involves a consideration of the following factors: 1) the place where the conduct causing the injury occurred; 2) the residence or place of business of the parties; and 3) the place where the relationship is centered." Cutshall, 719 F. Supp. at 784; see also Hubbard, 515 N.E.2d at 1073-74. This second step of the analysis is in the nature of a "most significant contacts" test, a choice of law test expressly found by the Supreme Court to fulfill constitutional due process requirements in a multi-state class action. See Shutts, 472 U.S. at 821-22; see also Sun Oil Co. v. Wortman, 486 U.S. 717 (1988) (post-Shutts; affirming application of Kansas law to multi-state class action).

This Court's analysis of the choice of law issue in Cutshall is instructive. In Cutshall, a truck driver from Indiana picked up a pre-loaded trailer at a Ford plant in Missouri, and drove to North Carolina where he was injured while unloading the trailer and treated for his injuries before returning to Indiana. Cutshall, 719 F. Supp. at 783. Defendant Ford sought application of North Carolina law to the driver's claims, while plaintiff sought application of Missouri law. This Court found that the events that took place in North Carolina were "insignificant and bear little relation to the legal action filed against Ford," and that Missouri had the most significant contacts, because the truck was loaded at the Ford plant in Missouri, and the only connection between the parties was in Missouri. Id. at 784-85. Accordingly, this Court applied Missouri substantive law to all claims.

Here, this Court's analysis in Cutshall warrants application of Tennessee law to the claims against Firestone and Bridgestone, and Michigan law to the claims against Ford. While the last event necessary to make these Defendants liable (purchases of the Tires and Explorers)

may well have occurred in Class members' home states, these facts are fortuitous, insignificant and bear little relation to the class claims alleged here. As in Cutshall, the alleged misconduct occurred in Defendants' headquarter states, when Firestone and Ford designed the Tires and Explorers, crafted their respective warranties and marketing campaigns, and made the decisions to conceal the danger of their products. Firestone is headquartered in Tennessee (Bridgestone acts in this country largely through its subsidiary Firestone), and Ford is headquartered in Michigan. All of the tortious and fraudulent conduct emanated and was directed from Tennessee and Michigan, respectively. Accordingly, here, as in Cutshall, it is appropriate to apply the Defendants' headquarters' state law to the claims against them. See also Hubbard, 515 N.E.2d at 1074 (applying Indiana law in tort action arising out of accident in Illinois involving lift unit manufactured by defendant in Indiana).[3]

The Illinois appellate court's recent decision in Avery v. State Farm, 2001 Ill. App. LEXIS 249 (Ill. App. Apr. 5, 2001) (Pltfs' App., Tab 1B), leads to the same conclusion. In Avery, plaintiffs brought a nationwide class action against State Farm, a company incorporated and headquartered in Illinois, alleging a state statutory claim for consumer fraud and a common law claim for breach of contract arising out of a standard provision in insurance policies sold throughout the United States.[4] The trial court certified the class, and conducted a class-wide trial

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[3]See also Stillwell v. Brock Bros., Inc., 736 F. Supp. 201, 204-05 (S.D. Ind. 1990) (Barker, C.J.) (applying defendant's home state law in dispute arising out of insurance contract); Castelli v. Steele, 700 F. Supp. 449, 454-55 (S.D. Ind. 1988) (applying Indiana law in medical malpractice suit brought by plaintiff who resided in Illinois and whose injuries manifested in Illinois, where doctor practiced in Indianapolis); Garner v. Healy, 184 F.R.D. 598, 602-03 (N.D. Ill. 1999) (applying defendants' home state laws to nationwide class action involving consumer fraud, consumer protection, and warranty claims).

[4]Avery, like this case, was a non-personal injury nationwide class action involving state law-based claims. The relevant documents from Avery that are discussed below can be found at

of all issues on both claims, which resulted in a verdict and judgment against State Farm for over $1 billion. On post-judgment appeal, State Farm contended, among other things, that the class had not been properly certified and that the trial court erred in conducting a Shutts analysis and applying Illinois law to the claims of all class members. State Farm contended that "the claims of non-Illinois class members are governed by varying consumer-fraud laws in [the] states." Id. at *28. The Illinois appellate court rejected this argument and affirmed.

First, the appellate court in Avery noted that "whether laws of different states apply to specific transactions alleged in a class action does not ordinarily prevent certification of the class." Id. at *28. Next, the court affirmed the trial court's finding that there were no true conflicts between the laws of Illinois and the other states with respect to the claims asserted, and that State Farm's conduct was neither specifically authorized by any state's law, nor would

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Tab 2 of Pltfs' App. The trial court conducted a concurrent bench/jury trial, with the jury determining liability for breach of contract, and compensatory damages thereunder; and the court determining liability, injunctive relief, and punitive damages under Illinois's consumer fraud statute. On appeal from the judgment, the appellate court affirmed the class certification, the nationwide application of Illinois law, the trial court's choice of law analysis and application of Illinois law, and the structure and conduct of the classwide trial. Defendant had urged that the determination of the key issue, whether or not the non-original equipment ("non OEM") replacement "crash parts" State Farm specified for policyholders' repairs were categorically inferior to OEM parts. This issue was important, since the uniform contractual provision at issue was a promise by State Farm to pay to replace its policyholders' damaged crash parts with parts of "like kind and quality." Avery at *7. Defendant urged that this determination required individualized inspection and evaluation of each class member's parts, a process that was, as a practical matter, impossible, since State Farm did not save the replaced parts or document the replacement process. Moreover, plaintiffs' plan of proof utilized expert testimony to establish the categorical inferiority of the non-OEM parts at issue, by showing that they were neither designed nor manufactured to OEM standards. Id. at *9. Here, Defendants attempt similar arguments with respect to the individualized inspection of Class members' Tires and Explorers; however, as in Avery, the products at issue are uniformly designed, and mass-produced within close tolerances, lending issues relating to the characteristics of these products to categorical proof, via expert testimony and other evidence as to their design, material specification, and mode of manufacture.

compliance with Illinois law force State Farm to violate any other state's law. See id. at *29-30. Finally, and of perhaps most significance here, the court analyzed application of Illinois law to the claims of all class members under Shutts, and found that Illinois had sufficient contacts to the claims asserted *by all class members* to warrant application of Illinois law. See id. at *31-32. In so finding, the court stated: "This action was filed against an Illinois company chartered and headquartered in Illinois. There is substantial evidence the deceptive claims practices were designed, established, and initiated from State Farm's corporate headquarters in Bloomington, Illinois, and dictated and disseminated to State Farm employees nationwide. Illinois has a legitimate interest in applying its law to adjudicate this dispute and to insure that its residents comply with its consumer-protection laws while serving Illinois and out-of-state consumers." Id. at *31-32.

The analysis in Avery applies with equal force here. First, Defendants have failed to identify any true conflicts between potentially applicable laws, any state in which Defendants' acts were specifically authorized, or any way in which compliance with their home states' laws would cause them to violate other relevant laws. Second, this action was filed against Tennessee and Michigan corporations, and Plaintiffs allege that Firestone's and Ford's relevant design work, decision-making and misconduct took place in and was implemented from those two states. Clearly, Tennessee and Michigan have a legitimate interest in applying their own laws and ensuring that their corporate residents comply with their laws vis-a-vis consumers.

Indeed, application of Tennessee and Michigan law to classwide claims against Firestone and Bridgestone, and Ford, respectively, comports with the "obvious and substantial interest [that a state has] in ensuring that it does not become either a base or a haven for lawbreakers to wreak injury nationwide." Simon v. Philip Morris, Inc., 124 F. Supp. 2d 46, 72 (E.D.N.Y. 2000); see

also Avery, 2001 Ill. App. LEXIS 249, at *31-32; American Law Institute: Complex Litigation: Statutory Recommendations and Analysis § 6.01, Comment A ("state where the defendant acted clearly may have a legitimate interest in regulating that conduct and controlling defendant's potential tort liability").[5]

Application of a single state's law in multi-state class actions has repeatedly passed Constitutional muster. The United States Supreme Court's decision in Shutts stands for the unremarkable proposition that the due process and full faith and credit clauses of the Constitution place "modest restrictions" on the choice of substantive law, and held that for a state's substantive law to be selected in a constitutionally permissible manner, that state "'must have a significant contact or significant aggregation of contacts' to the claims asserted by each member of the class, contacts 'creating state interests,' in order to ensure that the choice of [that State's] law is not arbitrary or unfair." Id., 472 U.S. at 821-22 (quoting Allstate Ins. Co. v. Hague, 449 U.S. 302 (1981)). So long as this constraint is observed, "a state may be free to apply one of several choices of law." Id. at 822. In Shutts, the Court applied this rule to reverse the Kansas Supreme Court's application of substantive Kansas law to a class action against a Delaware corporation whose principal place of business was in Oklahoma.[6] No such constitutional

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[5]To the extent "each jurisdiction has an interest in having its own law applied, the interest of each jurisdiction in having the injuries of its citizens litigated and compensated outweighs any interest in applying its own law." Randle v. Spectran, 129 F.R.D. 386, 394 (D. Mass. 1988); see also In re Pizza Time Theatre Sec. Litig., 112 F.R.D. 15, 20 (N.D. Cal. 1986). Thus, if Defendants seek to force a choice between application of all states laws in a way that defeats class action manageability, and the application of a single state's law that affords manageability but eliminates the purported advantages of some Class members' home states' laws, the choice of law that preserves class treatment must prevail.

[6]Notably, following its opinion in Shutts the Supreme Court had occasion to revisit application of Kansas's statute of limitations to the claims of out-of-state plaintiffs in a nearly identical case, and found that application of one state's statute of limitations to the claims of all

infirmity or illogic underlies application of Tennessee law to Firestone and Bridgestone and Michigan law to Ford here.

Just as the doctrine of general jurisdiction overrides any due process objection to accountability in a corporation's home state, so too does the principle of Shutts override any due process objection to accountability under the Defendants' home state's laws for conduct undertaken in that state. In addition to Avery, many courts have followed this approach and applied the defendant's home state law to state law claims in nationwide class actions.[7]

The Seventh Circuit's recent opinion in Szabo v. Bridgeport Mach., Inc., 2001 U.S. App.

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class members passed constitutional muster. See Sun Oil Co., 486 U.S. 717.

[7]See e.g., In re Bendectin Litig., 857 F.2d 290, 304-305 (6th Cir. 1988) (applying Ohio law in nationwide class action against Ohio-based defendant); Grove v. Principal Mut. Life Ins. Co., 14 F. Supp. 2d 1101, 1106-07 (S.D. Iowa 1998) (applying Iowa law in nationwide class action against Iowa-based defendant); Perry v. Household Retail Servs., Inc., 953 F. Supp. 1378, 1382-83 (M.D. Ala. 1996) (applying Illinois Consumer Fraud Act in nationwide class action against Illinois-based defendant); In re Badger Mountain Irrigation Dist. Sec. Litig., 143 F.R.D. 693, 699-700 (W.D. Wash. 1992) (applying Washington law in nationwide class action against Washington-based defendant); In re Kirshner Med. Corp. Sec. Litig., 139 F.R.D. 74, 84 (D. Md. 1991) (applying Maryland law in nationwide class action against Maryland-based defendant); Grace v. Perception Technology Corp., 128 F.R.D. 165, 171 (D. Mass. 1989) (applying Massachusetts law in nationwide class action against Massachusetts-based defendant); Randle, 129 F.R.D. at 394 (applying Massachusetts law in nationwide class action against Massachusetts-based defendant); Clothesrigger, Inc. v. GTE Corp., 236 Cal. Rptr. 605, 613-14 (Ct. App. 1987) (applying California law in nationwide class action where one defendant's headquarters was in California and other defendants all did business in California), cited with approval in Washington Mut. Bank v. Superior Court, 15 P.3d 1071 (Cal. 2001); Martin v. Heinold Commodities, Inc., 510 N.E.2d 840, 846-847 (Ill. 1987) (applying Illinois law in nationwide class action against Illinois-based defendant); In re Orfa Sec. Litig., 654 F. Supp. 1449, 1455 (D.N.J. 1987) (applying New Jersey law in nationwide class action against New Jersey-based defendant); Gruber v. Price Waterhouse, 117 F.R.D. 75, 82 (E.D. Pa. 1987) (applying Pennsylvania law in nationwide class action against Pennsylvania-based defendant); In re Pizza Time, 112 F.R.D. at 20 (applying California law in nationwide fraud class action against California-based defendant); In re Computer Memories Secs. Litig., 111 F.R.D. 675, 686-87 (N.D. Cal. 1986) (applying California law in nationwide class action against California-based defendant).

LEXIS 8474 (7th Cir. May 4, 2001) (Pltfs' App., Tab 1C), does not mandate otherwise. Indeed, Szabo merely confirms that the law of the defendant's home state may be applied to claims such as those here under Indiana choice of law analysis. In Szabo, the district court certified a nationwide express warranty and affirmative misrepresentation claims of purchasers of machine tools manufactured in Connecticut, and applied Connecticut law to the claims of all class members. The Seventh Circuit reversed class certification for a variety of reasons, none of which applies here. With respect to the choice of law issue, the Seventh Circuit found that the express warranty claim was governed by Connecticut law (as specified in the contract itself) and, with respect to the fraud claim, stated: "Were the[] misrepresentations made with [Defendant's] approval (or knowledge)? If so, then Connecticut law might apply across the board (as the district court concluded), but if not then the applicable law likely would be supplied by the state in which the statements were made." Szabo, 2001 U.S. App. LEXIS at *2. Here, Plaintiffs' claims are not premised on affirmative misrepresentations made by retailers or distributors, but rather on misrepresentations and fraudulent concealments/omissions *by Defendants themselves*, made in and from their own home states. There simply is no issue of varying statements made by third parties in multiple states. As Szabo itself recognizes, in such situations, application of the defendant's home state law is appropriate.

The principal cases relied upon by Defendants simply do not support their position. The center piece of every brief filed in opposition to class certification, Castano v. American Tobacco Co., 84 F.3d 734 (5th Cir. 1996), does not address or decide the choice of law issue this case presents. The Castano court did not analyze the propriety of applying the law of the home states of each of the many defendants in that case; instead, it chastised the district court for failing to undertake *any* meaningful choice of law analysis at all at the time of class certification, and for

failing to "properly consider how variations in state law affect predominance." Id. at 742. Here, by contrast, Plaintiffs have requested that the Court undertake a well-established, and constitutionally permissible, choice of law analysis that reinforces the predominance of common issues of law as between the Class and each Defendant.[8]

The Seventh Circuit's opinion in In re Rhone-Poulenc Rorer, Inc., 51 F.3d 1293 (7th Cir. 1995), is similarly inapposite, and for the same reason. Nothing in Rhone-Poulenc addresses the propriety of applying the law of the defendant's home state to the claims of all class members. Judge Posner's choice of law discussion focused solely on the district court's apparent intention to have the jury decide Rhone-Poulenc's liability "under a legal standard that does not actually exist anywhere in the world." Id. at 1300. Judge Posner concluded that "the diversity jurisdiction of the federal courts is, after Erie, designed merely to provide an alternative forum for the litigation of state-law claims, not an alternative system of substantive law for diversity cases. But under the district judge's plan the thousands of members of the plaintiff class will have their rights determined, and the four defendant manufacturers will have their duties determined, under a law that is merely an amalgam, an averaging, of the nonidentical negligence laws of the 51 jurisdictions." Id. at 1302.[9] Here, Plaintiffs are *not* seeking to have this Court try this case under a legal standard concocted solely for this case, or some indeterminate composite

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[8]The class in Castano suffered from a host of other problems the court found fatal to class certification that are simply not present here, including the fact that plaintiffs were pursuing personal injury claims (with all the attendant difficulties of establishing causation and damages) against multiple defendants involving multiple products sold over a period of many decades and involving what the court called "novel" and "immature" tort theories.

[9]As with Castano, the class in Rhone-Poulenc suffered from a host of other problems the court found fatal to class certification that are not present here, revolving around the personal injury claims asserted and what the court described as a "novel" tort theory.

of all state laws. To the contrary, under ordinary choice of law doctrine, Plaintiffs ask this Court to apply the existing law of the two states in which Defendants are headquartered and from which their misconduct has emanated. As demonstrated above, such choice of law is both appropriate and constitutional.

The District of Columbia Circuit's opinion in Walsh v. Ford Motor Co., 807 F.2d 1000 (D.C. Cir. 1986), is also inapposite, and again for the very same reason. In Walsh, the court determined that the Magnuson-Moss Act did not federalize state warranty law, such that the court had to undertake an analysis of variations in state warranty law before certifying a class. See id. at 1006-17. Nothing in the opinion addresses the propriety of applying the law of a defendant's home state to the claims of all class members. Indeed, in the lone reference to such a potential choice, the court explicitly noted that "the [district court] judge did not say whether she had in mind applying the law of one particular state to all members of a nationwide class." Id. at n.90. The District of Columbia Circuit did not indicate whether such a choice of law would be proper or improper, and in its subsequent opinion on remand, the district court never revisited the issue.

Finally, Chin v. Chrysler Corp., 182 F.R.D. 448 (D.N.J. 1998), is also inapposite. In a replay of the situation that gave rise to the Supreme Court's Shutts decision, the plaintiffs sought to have the court apply the law of the forum state, New Jersey, to a nationwide class, although neither the defendant nor the overwhelming majority of class members resided in or had any other connection to New Jersey. As with the other cases relied upon by Defendants, nothing in Chin addresses the propriety of applying the law of a defendant's home state to the claims of all

class members.[10]

Thus, in contrast to the present case, none of these courts availed themselves of the choice of law analysis laid out in Shutts itself as the due process solution to ensuring predominance and manageability in the nationwide class action context.

There is one issue on which the choice of law makes a difference: while the law of Tennessee, like most states, provides for punitive damages; the law of Michigan does not.[11] Thus, under the choice-of-law analysis dictated by Indiana rules, two Defendants, Firestone and Bridgestone, will face a potential award of punitive damages to the Class; Ford may not. While Plaintiffs might wish to avoid this result, by espousing an all-states' approach (under which Class members in some states could recover punitive damages against all Defendants), this outcome is not unique to the choices a court must make in the class certification context. It is a feature of many complex non-class cases, notably air disaster MDL litigation, in which fortuitous circumstances of the place of departure, destination, and disaster leave some passengers without punitive damages claims against some defendants, or insulate some defendants against all punitive damages claims. See, e.g., In re Air Crash Disaster Near Chicago, Illinois on May 25,

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[10]Zandman v. Joseph, 102 F.R.D. 924 (N.D. Ind. 1984), similarly rejected plaintiffs' attempt to apply forum state substantive law to a nationwide class against an out-of-state defendant. Zandman, however, predated Indiana's rejection of the old *lex loci dilecti* choice of law rule.

[11]While Michigan does not allow punitive damages *per se*, for which the sole purpose is to punish or to make an example of a defendant, Jackovich v. Gen. Adjustment Bureau, Inc., 326 N.W.2d 458, 464 (Mich. App. 1982) (gathering cases), it does recognize "exemplary damages" which are compensatory in nature and may be awarded in a statutory or common-law consumer fraud case "for the distress, vexation, insult, indignity and humiliation accompanying an injury that is intentional or willfully inflicted." Temborius v. Slatkin, 403 N.W.2d 821 (Mich. App. 1986) (Michigan Consumer Protection Act and common-law misrepresentation claims). Moreover, the federal civil RICO claim shared by all Class members provides for a functional equivalent of punitive damages, statutory treble damages. 18 U.S.C. § 1964(c).

1979, 644 F.2d 594 (7th Cir. 1981) (a case presenting complex conflicts-of-law questions regarding the allowance of punitive damages in wrongful death actions for passengers from multiple states arising out of an air crash). The laws of the place of the disaster, the law of the place of manufacture of the airplane, and the law of the primary place of business of the airline did not allow punitive damages; the law of the primary place of business of the airplane's manufacturer, and the place of its maintenance, did. Nonetheless, the Seventh Circuit ruled, at the conclusion of a thorough, thoughtful and principled choice-of-law analysis, that punitive damages could not be allowed against either the manufacturer or the airline.

C. State Law Variations Are Minimal, Non-Existent, or Irrelevant to the Class Claims.

Even if the Court's choice of law analysis yields the conclusion that it cannot apply Tennessee and Michigan law to Plaintiffs' state law claims, class certification of these claims is nonetheless proper. Throughout their eighty-one page "Appendix" on choice of law, Defendants overstate (and misstate) the number, the materiality, and the relevance of purported variations of state laws to the claims at issue in this case.

As an initial matter, potential variations in state laws do *not* preclude multi-state class certification as a matter of course.[12] Otherwise, multi-state class certification would virtually

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[12]See, e.g., Hanlon v. Chrysler Corp., 150 F.3d 1011, 1022 (9th Cir. 1998) ("Variations in state law do not necessarily preclude a 23(b)(3) action . . ."); In re Prudential Ins. Co. of Am., 148 F.3d 283 (3d Cir. 1998) ("Courts have expressed a willingness to certify nationwide classes on the ground that relatively minor differences in state law could be overcome at trial by grouping similar state laws together and applying them as a unit"; upheld district court's conclusion that state law variations fell into a limited number of predictable patterns and did not render action unmanageable); In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 815 (3d Cir.), cert. denied, 516 U.S. 824 (1995) ("to the extent that state-by-state variations in procedural laws created legal obstacles, the district court should have considered dividing the action into geographic sub-classes instead of considering the entire nationwide class to be hobbled"); In re Synthroid Marketing Litig., 188 F.R.D. 295, 302 (N.D.

always be impossible, and Rule 23 would be eviscerated. See Telectronics, 172 F.R.D. at 292 ("only particular nuances should be relevant to the question of class certification . . . insignificant differences cannot preclude class certification or else no class could even be certified").

Ill. 1999) (same); In re Telectronics Pacing Sys., Inc., 172 F.R.D. 271, 292 (S.D. Ohio 1997) ("state law does not need to be universal in order to justify nationwide class certification"; district court has discretion to decide if variances would make the case manageable); In re Copley Pharmaceutical, Inc., 161 F.R.D. 456, 465 (D. Wyo. 1995) ("Application of law of all fifty states does not make class 'per se unmanageable'"; defendants' real motivation for moving to decertify was to slam the courthouse door on individual plaintiffs) (quoting In re Lilco Sec. Litig., 111 F.R.D. 663, 670 (E.D.N.Y. 1986)); Weiss v. Mercedes-Benz, No. 2-93-CV-00096, at 39-41 (D.N.J. Mar. 28, 1994) (Pltfs' App., Tab 1D) (national automobile class asserting common law fraud, breach of express and implied warranties, and negligent misrepresentation claims certified as "fairly uniform" despite "modest variations sometimes in terminology and perhaps in the case law of a given state"); Washington Mut. Bank, 15 P.3d 1071 (court "may certify the nationwide class despite such complexity [arising from the need to apply laws of class members' home states] if it determines the legal questions are sufficiently similar to be manageable"); Avery, 2001 Ill. App. LEXIS 249, *29 ("the question of whether laws of different states apply to specific transactions alleged in a class action does not ordinarily prevent certification of the class").

In any event, the limited variations among the relevant state laws on issues pertinent here may be managed through the use of subclasses, with a corresponding manageable number of jury instructions. See GM Pick-Up Truck Fuel Tank, 55 F.3d at 817-818 (expressing no reason to doubt that grouping of fifty states' laws could be done); In re Diamond Shamrock Chemicals Co., 725 F.2d 858, 861 (2d Cir. 1984) (subclasses can be created corresponding to variations in state law); Rivera v. Wyeth-Ayerst Labs., 197 F.R.D. 584, 591 (S.D. Tex. 2001) ("The Court can overcome difficulties created by variations in state law through the judicious use of subclasses"); In re Prudential Ins. Co. of Am. Sales Practices Litig., 962 F. Supp. 450, 525 (D.N.J. 1997) ("Plaintiffs' claims can be grouped into a manageable number of categories accommodating any variations in the elements of the potentially applicable states' laws); Telectronics, 168 F.R.D. at 221 (where the class action proponent shows that state law variations can be effectively managed through the creation of subclasses grouping the states that have similar legal doctrines, class certification is appropriate); School Asbestos, 789 F.2d at 1010 (class plaintiffs met burden of proving predominance; law separated into 4 categories). And, "the Court finds that the manageable number of jury instructions could be fashioned to comport with the elements of the common law claims in the many jurisdictions"). Moreover, the "variances, if any, cited by [Defendants] . . . are incidental to the legal theories under which [Plaintiffs] . . . bring[ ] this lawsuit." Hill v. Galaxy Telecom, 184 F.R.D. 82, 87 (N.D. Miss. 1999) (rejecting defendants' argument regarding involvement of 15 states' laws in that the law primarily in dispute was similar in all relevant jurisdictions).

Plaintiffs previously provided the Court with detailed charts demonstrating the commonality of the relevant elements of the applicable laws of the jurisdictions.[13] In those charts and prior briefs, Plaintiffs have made the requisite "creditable showing" that state law variations do not pose "insuperable obstacles" to class certification. School Asbestos, 789 F.2d at 1010.[14] Plaintiffs therefore confine this reply to highlighting a few of the many errors in Defendants' Appendix. Plaintiffs are prepared to provide the Court with a more detailed response regarding purported variations in state law upon the Court's request.

With regard to Plaintiffs' specific claims, courts have concluded that:

- **Unjust enrichment** is "universally recognized" as a cause of action that is "materially the same throughout the United States." Singer v. AT&T Corp, 185 F.R.D. 681, 692 (S.D. Fla. 1998);

- "[R]elevant **warranty laws** are essentially the same in every state." Shaw v. Toshiba Am. Information Sys., Inc., 91 F. Supp. 2d 942, 956 (E.D. Tex. 2000); Weiss v. Mercedes-Benz, No. 2-93-CV-00096, at 40-41 (the "whole underlying rationale" of breach of express and implied warranty claims is "uniformity");

- "Idiosyncratic differences between **state consumer protection laws** are not sufficiently substantive to predominate over the shared claims." Hanlon, 150 F.3d at 1022-23;

- "The standard for ordinary **negligence** does not significantly differ throughout the country, and the differences that do exist can be remedied through careful instructions to

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[13] See Declaration of Elizabeth Cabraser in Support of Plaintiffs' Motion for Class Certification, Exs. I-A to I-J, annexed to Plaintiffs' motion for class certification (the "Cabraser Decl.").

[14] The conclusion of Plaintiffs' expert that state law variations are manageable has been approved by other courts. See Bussie v. Allmerica Fin. Corp., 50 F. Supp. 2d 59, 71 (D. Mass. 1999) ("the Court credits the testimony of . . . Professor Samuel Issacharoff . . . that any variations of law that might have applied to certain of the plaintiffs' state law claims would neither compromise the capacity of counsel to prosecute the claims on behalf of the Class or defeat . . . predominance"). Thus, Defendants' contention that such experts must be ignored on the present motion is wrong and asks this Court to improperly limit consideration of pertinent issues.

the jury." Copley, 158 F.R.D. at 491.[15]

Finally, variations in state laws are of particularly limited relevance in economic (i.e. non-injury) damages cases such as this. The "elements of proof" and complexity of physical injury cases greatly exceeds that presented in cases alleging economic injury as a result of deceptive practices. See, e.g., Prudential, 148 F.3d at 315; Hanlon, 150 F.3d at 1021.

D. Defendants' Appendix is Replete With Inaccuracies.

Defendants' Appendix is replete with inaccuracies; mis-cites; attempts to demonstrate conflicts in areas irrelevant to the gravamen of Plaintiffs' complaint; and purported "subtle variations" among state laws which, in actuality, are merely semantic differences. Every state does not express the same concept in precisely the same language, an unsurprising observation, since English possesses more synonyms than any other language, and despite its claim to precision, the law persists in using three words when one will do.[16] Moreover, many of these purported variations involve issues that this Court will decide as finder of fact, such that these

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[15]Moreover, "all states use the same elements to define a cause of action in negligence, and many of those states look to the same source [Restatement (Second) Torts, § 395 (Negligent Manufacture of Chattel Dangerous Unless Carefully Made) and Appendix (cited with approval by courts in 36 states)] for a standard in products liability cases." Telectronics, 172 F.R.D. at 291; see also Cabraser Decl., Ex. I-A.

[16]The fallacy that the choice of a different word connotes a different legal meaning was refuted by Mellinkoff, The Language of the Law at 120-25 (Little, Brown & Co. 1963) who traced the law's habit of doubling and trebling words and utilizing essentially synonymous words derived from Latin, Law French, and English, out of fear that settling upon one word would result in loss of precision. For a substantial period of our legal history, the three languages were used simultaneously in legal documents and case reports. The law has clung to all of these words, unwilling to let them go. The result is not, as some would prefer to believe, heightened legal precision; rather, the language of the law has become wordy, unclear, pompous, and dull. See id. at 124. It is erroneous to assume that the use of one word rather than other available synonyms in a particular statute, case, or jury instruction is intended to communicate a distinct or unique legal meaning.

issues have no relevance to the manageability of a *jury* trial.

1. Examples of Defendants' Unjust Enrichment Law Inaccuracies.

Contrary to Defendants' suggestions, nationwide classes asserting unjust enrichment claims have been certified. See Rivera, 197 F.R.D. 584; Avery, 2000 Ill. App. LEXIS 249.[17]

A particularly egregious example of Defendants' inaccuracies is their attempt to portray the definition of "unjust" as varying from state-to-state, when it is well-recognized that unjust enrichment laws are universal across the country. See Singer, 185 F.R.D. 681, 692 (S.D. Fla. 1998). For example, Defendants attempt to manufacture differences among the following states:

- **Minnesota**: Defendants claim that "Minnesota defines unjust to 'mean illegally or unlawfully'." However, the case they cite, ServiceMaster v. GAB Bus. Servs., Inc., 544 N.W.2d 302 (Minn. 1996), simply illustrates the universal concept that unjust enrichment claims do not lie against innocent beneficiaries of the efforts or obligations of others, but rather, against recipients of such benefits that accrue "under [a] cloud of impropriety." Id. at 306. Indeed, ServiceMaster goes on to set forth the universal test for unjust enrichment: "To establish an unjust enrichment claim, the claimant must show that the defendant has knowingly received or obtained something of value for which the defendant 'in equity and good conscience' should pay." Id. See also Lyman v. Ricsons, Inc., No. C-99-4329, 2000 Minn. App. LEXIS 68 (Minn. App. Jan. 25, 2000) (Pltfs' App., Tab 1E) (same). The other cases cited by Defendants are to the same effect. See Custom Design Studio v. Chloe, Inc., 584 N.W.2d 430, 433 (Minn. App. 1998) ("it must be shown that a party was unjustly enriched in the sense that the term 'unjustly' *could* mean illegally or unlawfully"); TCF Banking & Savs., Inc. v. Loft Homes, Inc., 439 N.W.2d 735, 738 (Minn. App. 1989) ("Appellant argues that because its actions were not unlawful, the doctrine of unjust enrichment cannot be invoked against it. We cannot agree."). Thus, Defendants' implication that Minnesota requires an unjust enrichment

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[17]Defendants' case citations do not hold to the contrary. Schmidt v. Interstate Fed. Sav. & L. Ass'n, 74 F.R.D. 423 (D.D.C. 1977), denied certification of mortgage prepayment penalty unjust enrichment claims because the District of Columbia, Maryland and Virginia each had enacted specific statutory provisions governing prepayment of mortgages in that respective jurisdiction, and *these* differing bodies of substantive law would need to be applied to plaintiffs' claims; Schmidt contained no holding regarding unjust enrichment claims *per se*. Heartland Communications, Inc. v. Sprint Corp., 161 F.R.D. 111 (D. Kan. 1995), merely notes that "[i]f, upon later motion of the defendant, the court ultimately determines that there are numerous substantively different state laws which apply . . . certification of those [unjust enrichment] claims will be reconsidered at that time." Id. at 118 n.4.

claim to be premised on an illegal act is wrong.

- **Illinois**: Defendants compound this error by contending that "Illinois expressly rejects Minnesota's approach." In fact, Illinois' unjust enrichment test is in accord with Minnesota's approach. Neither state requires a determination of illegality; both states require only retention of a benefit to the plaintiff's detriment that "violates fundamental principles of justice, equity and good conscience." See ServiceMaster, 544 N.W.2d at 306; Firemen's Annuity & Ben. Fund v. Mun. Employees', Officers' & Officials' Annuity & Ben. Fund, 579 N.E.2d 1003, 1007 (Ill. App. 1991) (plaintiff must allege defendant's unjust retention of a benefit to plaintiff's detriment violates "principles of *justice, equity and good conscience*"); Williams v. National Hous. Exch., Inc., 45 F. Supp. 2d 648, 651 (N.D. Ill. 1999) ("to recover under a theory of unjust enrichment in Illinois, 'plaintiffs must show that defendant voluntarily accepted a benefit which would be *inequitable* for him to retain without payment'").

Far from delineating interstate differences, the other cases cited in Defendants' Appendix reveal that the same "equity and good conscience" language and approach used by Illinois and Minnesota courts are applied in other states:

- **New York**: Mayer v. Bishop, 158 A.D. 2d 878, 880 (N.Y. 1990) ("the enrichment must be such that *in equity and good conscience* its retention would be unjust");

- **District of Columbia**: 4934, Inc. v. District of Columbia Dept. of Employment Servs., 605 A.2d 50, 55 (D.C. App. 1992) ("Unjust enrichment occurs when a person retains a benefit (usually money) which in *justice and equity* belongs to another") (citing Partipilo v. Hallman, 510 N.E.2d 8, 11 (Ill. App. 1987));

- **New Hampshire**: Petrie-Clemons v. Butterfield, 441 A.2d 1167, 1171 (N.H. 1982) ("a trial court may require an individual to make restitution for unjust enrichment if he has received a benefit which would be *unconscionable* to retain"); Pella Windows & Doors v. Faraci, 580 A. 2d 732 (NY 1990) (same). New Hampshire does *not* equate "unjust" with "unlawful";

- **Arkansas**: Arkansas law incorporates the same "equity and good conscience" standard: "an action based upon [unjust enrichment] . . . is maintainable in all cases where one person has received money or its equivalent under such circumstances that, in equity and good conscience, he ought not to retain it." Merchants & Planters Bank & Trust Co. v. Massey, 790 S.W.2d 889 (Ark. 1990) (citing Frigillana v. Frigillana, 584 S.W. 2d 30, 35 (Ark. 1979));[18]

[18]Even in Whitley v. Irwin, 465 S.W. 2d 906 (Ark. 1971), where the court initially stated that "unjustly" means "unlawfully," one paragraph later the court held that either a legal *or*

- **Connecticut**: Greenwich Contracting Co. v. Bonwit Constr. Co., 239 A.2d 519, 523 (Conn. 1968), held that unjust enrichment would not stand because "there was no *inequitable* or fraudulent conduct," (emphasis added), and adopted "good conscience" language, holding that because "enforcement of the contract is not *unconscionable*, [ ] the doctrine of unjust enrichment does not apply." Id.

Defendants' claim of differing "analytical frameworks" provides still another example of the misleading nature of Defendants' Appendix.[19] For example, the "differing" analytical frameworks Defendants set forth for proving unjust enrichment vary only according to word grouping and syntax, but are consistent in meaning.[20]

Defendants' claim that there are "subtle variations" in the wording of the elements of unjust enrichment, falling into three categories, which "reflect substantive incongruities that create the potential for inconsistent and unpredictable outcomes" is nonsense. The first element in all three "categories" is identical and the latter two elements are virtually identical: the sole "differences" are synonyms (*i.e.*, "acceptance" versus "retention" of the benefit are synonymous

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equitable situation may bring a case within the scope of the unjust enrichment doctrine.

[19]Defendants support their dubious notion that "[t]here is no uniform framework for analyzing unjust enrichment claims" with an inapplicable law review article, Candace S. Kovacic, A Proposal to Simplify Quantum Meruit Litigation, which proposes two-tier framework for *quantum meruit* actions "*to recover payment for labor* performed in a variety of situations in which plaintiff would not be able to recover under an express contract." The article does *not* examine consumer unjust enrichment actions. Likewise, Defendants' case citations regarding purportedly differing "elements" adopted by various states are all *quantum meruit* cases, and thus, like the Kovacic article, are inapposite.

[20]There is no logical difference between the Georgia definition of unjust enrichment Defendants proffer, "The party sought to be charged has been conferred a benefit by the party contending an unjust enrichment which the benefitted party equitably ought to return or compensate for," and the proffered Massachusetts definition, "The plaintiff demonstrates that [the] defendant was enriched under circumstances which make retention unjust."). Both mean the same thing: the defendant received something that it ought to give back.

in the unjust enrichment context, as are "appreciate" versus "knowledge"[21] of the benefit). Synonyms are not "substantive incongruities."

These are but some examples of Defendants' attempt to invent distinctions among state unjust enrichment laws that simply cannot withstand analysis. What Defendants really urge is that, when it comes to class treatment of the claims arising from their common course of conduct, because some states "say tomato (toe-may-toe)" and others "say tomato (toe-mah-toe)," this Court should just call the whole thing off.[22]

2. Examples of Defendants' Warranty Case Law Distortions.

Defendants contend that "lack of uniformity has frequently been held to preclude certification of nationwide warranty classes," even though those decisions were due to other non-common factual and legal issues, or merely due to the failure to analyze warranty laws. Defendants claim, for example, that Walsh v. Ford Motor Co., 130 F.R.D. 260 (D.D.C. 1990), stands for the proposition that state variations in vertical privity requirements "present a troublesome stumbling block" that "strongly counsels against" class certification. Defendants' incomplete quote misrepresents Walsh's holding: Walsh held that privity issues alone should not preclude class certification, and should, in the ordinary case, proceed:

> While the Court does *not* agree with the defendant that state variations in vertical privity requirements are an insuperable obstacle to class certification, they do present a troubling stumbling block.

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[21]Even if Defendants were correct that "states differ over whether or not the defendant must know of the benefit that he has received in order to prove unjust enrichment," the distinction is irrelevant in the instant case: Plaintiffs have alleged and will prove that Defendants here are well aware of the revenue they received from selling the products at issue. Accordingly, Defendants would both "appreciate" and have "knowledge" of the benefits.

[22]With apologies to Ira Gershwin, "Let's Call the Whole Thing Off" from Shall We Dance (RKO 1937).

. . . .

> To deny certification on these grounds alone [variations among states' implied warranty laws] would thwart future multistate class actions involving implied warranty claims. Were the Court not faced with numerous other non-common issues of law and fact, it would be willing to proceed by subclassing states according to their approach of warranty claims.

Id. at 272-73 (emphasis added).[23]

3. Examples of Defendants' State Consumer Protection Law Inaccuracies.

Defendants' claims of variations in state consumer protection laws are similarly inaccurate. While defendants cite a 1979 Georgia case to show that Georgia's Fair Business Practices Act ("FBPA") is at variance with the laws of "no intent" states because it requires "intent to deceive," more recent Georgia case law holds that "A private FBPA claim has three essential elements: a violation of the act, causation, and injury. A violation of the act requires no knowledge of the deception or intent to deceive." Crown Ford, Inc. v. Crawford, 473 S.E. 2d 554, 556 (Ga. App. 1996) (citation omitted). Similarly, the case Defendants cite from New Jersey on "intent to deceive" states that "affirmative" misrepresentations and deceptive acts "*do not require proof of intent to deceive*," Knapp v. Potamkin Motors Corp., 602 A.2d 302, 303 (N.J. Super. Ct. 1991) (emphasis added). Here, Defendants affirmatively portrayed their products as having qualities they lack; thus no proof of intent to deceive would be required under the New Jersey statute.[24]

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[23]See also Georgine v. Amchem Prods., Inc., 83 F.3d 610 (3d Cir. 1996) (class certification for personal injury cases involving different diseases and differing exposures to asbestos was denied due to multiplicity of individualized factual and legal issues; variations in state warranty law did *not per se* render the case unmanageable for class certification).

[24]Likewise, the case Defendants cite as showing Utah's CPA requires "intent to deceive" explains that "[t]he UCSPA states that it should be 'construed liberally' to . . . creat[e] uniformity

Defendants cite an inapposite 1978 Colorado case based on a version of the Colorado Consumer Protection Act that has been amended many times since. Defendants also insist that New Mexico requires a showing "that the defendant *knew* his conduct was deceptive to recover under the CPA," despite the fact that the same case explains (as Defendants concede) that "the 'knowingly made' requirement of New Mexico's CPA is met "if a party . . . in the exercise of reasonable diligence *should have been aware* that the statement was false or misleading." Stevenson v. Louis Dreyfus Corp., 811 P.2d 1308, 1311-12 (N.M. 1991) (emphasis added).

Defendants' citations also fail to support their assertion that a nationwide class cannot be certified because states follow "non-common rules as to the requisite showing of the effect of allegedly deceptive practices on consumers." Defendants claim that some states (referring only to Connecticut and Texas), "[f]ollowing older FTC precedents," "apparently" measure the effect of deceptive practices on the least sophisticated consumers, while other states (pointing to New York and California) "follow more recent guidance," and measure the effect of deceptive practices on the average person or reasonable consumer. However, the type of consumer to be used as a yardstick is not specified in Connecticut, and the case Defendants cite says, "courts construing the statute be guided by the interpretations given to the Federal Trade Commission Act . . . by the Federal Trade Commission ("FTC") and the federal courts." Aurigemma v. Arco Petroleum Prods., 734 F. Supp. 1025, 1029 (D. Conn. 1990). In Texas, a reading of the underlying case (Spradling v. Williams, 566 S.W. 2d 561 (Tex. 1978)) cited by the case that Defendants quote (RRTM Restaurant Corp. v. Keeping, 766 S.W.2d 804 (Tex. App. 1988)),

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in the law between Utah and other states enacting similar consumer protection laws." Wade v. Jobe, 818 P.2d 1006, 1014-15 (Utah 1991). Moreover, the UCSPA, in addition to prohibiting deceptive acts, prohibits "*unconscionable*" acts, which do *not* require proof of specific intent. Id. at 1016.

reveals that the "average" consumer includes the huge numbers of consumers who are ignorant: "Since 1910, the federal courts have applied the standard . . . in these words: 'The law is not made for the protection of experts, but for the public, that vast multitude which includes the ignorant, the unthinking and the credulous, who, in making purchases, do not stop to analyze, but are governed by appearances and general impressions.'" 566 S.W.2d at 563. Hence there is no difference in the standard.

Overall, Defendants' Appendix distorts state laws while dodging the critical issues in this case: whether the Tires and Explorers have common flaws, whether and how the Tire flaws and Explorer flaws interact to create a heightened risk, when Defendants knew about the problems, and whether they are legally responsible to fix them and/or compensate Class members.

II. PLAINTIFFS' RICO AND CONSUMER PROTECTION CLAIMS TURN ON PREDOMINANTLY COMMON ISSUES.

A. There is No Requirement That Plaintiffs Prove a Particular "Defect".

Defendants apparently believe that certification is appropriate only if Plaintiffs can establish – at this early procedural stage – that there are specific "defects" common to all Tires and all Explorers. However, the premise of this argument is simply wrong. Plaintiffs' RICO and consumer protection act ("CPA") claims center on Defendants' fraudulent scheme to conceal and misrepresent information regarding the safety of the Tires and Explorers. Thus, the success of those claims will depend upon evidence of Defendants' actions relating to such matters as the marketing of the Tires and Explorers and, ultimately, the public disclosure of information regarding the Tires and Explorers that led to a marketwide drop in value for such products. Consequently, technical differences between specific models of the Tires or the Explorer are of no significance to the RICO and CPA claims, which will be established through classwide proof

regarding Defendants' misconduct.

Defendants largely rely on two cases, In re Ford Motor Co. Bronco II Prods. Liability Litig., 177 F.R.D. 360 (E.D. La. 1997) ("Bronco II") and Walsh, 130 F.R.D. 260 ("Walsh II"). Neither of these cases included RICO claims, with their predominantly common legal and factual issues. Further, Walsh II did not, as here, involve claims relating to marketwide deception but instead focused on a specific allegedly defective transmission system. 130 F.R.D. at 261. Thus, these cases are inapposite.

B. Issues of Reliance and/or Causation Do Not Support Denial of Certification Here.

Despite their attempts to divert attention solely to the state common law claims, Defendants cannot avoid the overwhelming predominance of common legal issues on Plaintiffs' RICO claims – to which a single federal law applies – and state CPA claims, which rest on elements common to all such statutes. As a result, hoping to avoid the logical conclusion that class certification should be granted on such claims, Defendants invoke the alternative argument that the claims are filled with individual factual determinations. To that end, they point to differences in advertising to which Class members were exposed and varied factors that may have affected the decision to purchase or lease an Explorer or the Tires, asserting that this will require Class members to make individualized showings of reliance and/or causation.

These arguments are predicated on fundamental misconceptions of Plaintiffs' claims. This litigation, and the RICO and state CPA claims, center on Defendants' uniform *concealment* of dangers in and misrepresentation of essential characteristics of their products. Plaintiffs allege that these concerted actions kept material information from the market and led Plaintiffs to purchase dangerous Tires and vehicles, and supported and perpetuated market prices for such

products that were uniformly inflated compared to prices that would have prevailed had the truth been known. Similarly, once Defendants' deception was disclosed in the summer of 2000, the market responded by reducing demand for and thus the price/value of such products. Thus, any difference among Class members with regard to advertising exposure or decisionmaking factors is of no relevance to their claims that arise from the financial injury all of them sustained by purchasing Tires and/or Explorers at prices inflated by Defendants' marketwide deception.

RICO claims typically present a factual scenario in which common issues will necessarily predominate. A RICO claim based upon predicate acts of mail or wire fraud revolves around the activities and knowledge of the defendant, not the plaintiffs. As a result, the elements of such a claim, including the existence of a pattern of racketeering activity, the existence of an enterprise and whether the enterprise affects interstate commerce, all relate to matters of classwide proof. See, e.g., In re Synthroid Mktg. Litig., 188 F.R.D. 295, 300 (N.D. Ill. 1999); Dornberger v. Metropolitan Life Ins. Co., 182 F.R.D. 72, 79 (S.D.N.Y. 1998) (common issues predominated in RICO claim involving alleged fraud in sale of life insurance policies in nine European countries from 1957 through 1998); Johnson v. Aronson Furniture Co., 1998 U.S. Dist. LEXIS 14454, at *8 (N.D. Ill.) (Pltfs' App., Tab 1F); Heastie v. Community Bank of Greater Peoria, 125 F.R.D. 669, 674-75 (N.D. Ill. 1989).

As discussed in Oregon Laborers-Employers Health & Welfare Trust Fund v. Philip Morris, Inc., 188 F.R.D. 365 (D. Ore. 1998), the parties' positions on the issue of predominance in RICO litigation will often be similar to those here:

> Defendants' argument with respect to individualized inquiries concerning plaintiffs' knowledge is merely the flip side of plaintiffs' argument. Plaintiffs argue that common issues predominate and a class action would be superior because the relevant inquiry is defendants' conduct (or allegedly concealing information), while defendants argue that the relevant inquiry is plaintiffs'

> knowledge (of the substance of the allegedly concealed information). The answer to the question of whether common issues predominate and whether a class action is a superior method of resolving this case lies in the answer to the question of which parties' conduct is most central to the case.

Id. at 376. This Court applied a similar standard in finding predominance in a class action by automobile dealers against General Motors based upon disputes over the company's use of funds paid by dealers for marketing activities. See Hubler Chevrolet Inc. v. General Motors Corp., 193 F.R.D. 574, 580 (S.D. Ind. 2000) ("is there an essential factual link between all class members and the defendant for which the law provides a remedy" which provides the "dominant, central focus" of the action?).

The dominant, central focus of this litigation, particularly with regard to the RICO and CPA claims, is the conduct and knowledge of the Defendants, including but not limited to their knowledge of the flaws in their products, efforts to conceal those flaws, marketwide misrepresentation of the characteristics of their products, and recovery of enormous profits as a result of such activities. Plaintiffs, who were the unwitting victims of Defendants' concerted misconduct, have little to add to the relevant factual scenario other than to show – through an appropriate claims or damages process – that they purchased Defendants' products. Thus, as in other consumer fraud cases, the present circumstances are precisely the type in which a finding of predominance is warranted. See, e.g., Amchem Prods. Inc. v. Windsor, 521 U.S. 591, 625 (1997) ("predominance is a test readily met in certain cases alleging consumer . . . fraud"); Chisholm v. TranSouth Fin. Corp., 184 F.R.D. 556, 565 (E.D. Va. 1999) (same); Synthroid, 188 F.R.D. at 292 (consumer plaintiffs asserting claim for economic injury particularly suited to class treatment).

Further, as shown below, the purported factual differences among the Plaintiffs to which

Defendants point are not only irrelevant, but are more hypothetical than real. For example, the pertinent legal principles establish that issues of causation and/or reliance can be resolved through classwide proof and do not justify denial of class certification and consequent death-knell to the only viable mechanism for millions of consumers to obtain redress for Defendants' misconduct.

1. Variations in Reliance Do Not Preclude Certification.

a. Reliance is Not an Element of Plaintiffs' RICO claims.

The law in this Circuit is clear that RICO claims based on predicate acts of mail and wire fraud do not require an individualized showing of reliance. See, e.g., Synthroid, 188 F.R.D. at 300; Garner, 184 F.R.D. at 602 n.4; Peterson v. H&R Block Tax Servs., Inc., 174 F.R.D. 78, 84 (N.D. Ill. 1997); Cannon v. Nationwide Acceptance Corp., 1997 WL 779086, at *3 (N.D. Ill. 1997) (Pltfs' App., Tab 1G); Arenson v. Whitehall Convalescent & Nursing Home, Inc., 164 F.R.D. 659, 666 (N.D. Ill. 1996); Hill v. Gateway 2000, Inc., 1996 U.S. Dist. LEXIS 16581, at *6 (N.D. Ill. 1996) (Pltfs' App., Tab 1H); Heastie, 125 F.R.D. at 674.[25] As explained in Peterson:

> The mail fraud statute, 18 U.S.C. § 1341, focuses on the defendant's conduct in devising or intending to devise a scheme to defraud, not the individual experiences of each defrauded person. Ward v. United States, 845 F.2d 1459, 1462 (7th Cir. 1988); see [United States v.] Biesiadecki, 933 F.2d [539,] 544 [(7th Cir. 1991)] (stating that "[t]hose who are gullible, as well as those who are skeptical, are entitled to the protection of the mail fraud statute"). In Biesiadecki, the Seventh Circuit ruled that certain class members' testimony that they did not feel they were defrauded was properly excluded because it would have "improperly shifted the jury's attention away from the knowledge and intent of [the defendant] and focused instead on the beliefs of the victims of the alleged

[25]The apparently contrary ruling in Rohlfing v. Manor Care, Inc., 172 F.R.D. 330 (N.D. Ill. 1997), on which Defendants rely, is inconsistent with the overwhelming weight of authority in this Circuit, including subsequent decisions in Garner and Synthroid.

> scheme to defraud." Id. at 544. Accordingly, variations in individual reliance do not defeat certification because a scheme to defraud, as alleged here, violated RICO regardless of the characteristics of the scheme's intended victims. Heastie v. Community Bank, 125 F.R.D. 669, 674-75 (N.D. Ill. 1989).

174 F.R.D. at 84; see also Synthroid, 188 F.R.D. at 300. Reference to the RICO pattern jury instructions utilized by the federal courts underscores this point: the jury is not instructed on reliance, but not on materiality. Devitt, Blackmar & Wolff, Federal Jury Practice and Instructions, Civil §§ 100.08, 100.10.

RICO plaintiffs need establish only that their injuries were proximately caused by defendants' scheme. In other words, "plaintiffs must show that the 'purchases occurred after the allegedly fraudulent statements were made, and that the alleged fraud 'directly or indirectly' injured plaintiffs.'" Synthroid (quoting Garner, 184 F.R.D. at 602).[26] Thus, issues of proximate cause will turn on matters of classwide proof as to Defendants' fraudulent scheme and the injury necessarily sustained by all Class members who purchased or leased dangerous products, paid prices inflated by Defendants' misconduct, and are now burdened with worthless Tires and vehicles of reduced value.

b. Individualized Proof of Reliance/Causation is Not Required.

(1) Defendants' Uniformly Deceptive Market Image of Their Products Supports Classwide Proof.

To the extent that reliance is an element of the state CPA claims, proof on that issue can be made on a classwide basis. Indeed, this litigation presents the paradigmatic factual scenario

[26] See Krause v. GE Capital Mortgage Servs., Inc., 1998 WL 831896, at *5 (N.D. Ill. 1998) (Pltfs' App., Tab 1I); Lorentzen v. Curtis, 18 F. Supp. 2d 322, 327 (S.D.N.Y. 1998) ("a RICO violation proximately causes an injury if the violation is 'a substantial factor in the sequence of responsible causation, and if the injury is reasonably foreseeable or anticipated as a natural consequence.'").

for a classwide presumption or inference of reliance. The presumption of reliance in consumer actions based on uniform misrepresentation and/or concealment of material information is well established in the federal courts.[27] This principle has been specifically adopted in class actions – such as this case – involving uniform advertising or product image. For example, Amato v. General Motors Corp., 463 N.E.2d 625 (Ohio App. 1982) upheld certification of a class of consumers who bought Oldsmobiles equipped with Chevrolet engines. In rejecting the assertion that individual class members must show that they saw or relied upon allegedly misleading advertisements, the court explained:

> In a day of mass media advertising hype intended to saturate markets with inducements to purchase the heralded product, consumer claims would amount to little if acceptance of the representations made for the product could be manifested only by one-on-one proof of individual exposure…. The implication of such a requirement is that a multiplicity of individual claims would have to be proven in separate lawsuits, or not at all. That consequence would result in the utter negation of the fundamental objectives of class-action procedure both expressed and implicit in Civ.R. 23.
>
> For these reasons proof of extensive advertising is sufficient to make a prima facie case for actual exposure. Of course exposure proof may be enhanced by additional evidence of exposure such as, but not limited to, a custom or practice of distributing express written warranties to prospective buyers with terms relevant to the plaintiff's claim. Id. at 628-29.

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[27] See, e.g., Chisolm, 194 F.R.D. 538, 559, and 184 F.R.D. 556, 562-63 (certifying class where defendants uniformly concealed information as to consumer rights upon vehicle repossession); Johnson v. Rohr-Ville Motors, Inc., 189 F.R.D. 363, 370 (N.D. Ill. 1999) (certifying consumer class for concealment of financial information by automobile dealer); Synthroid, 188 F.R.D. at 300 (certifying class where defendants uniformly concealed medical information and studies from consumers); Krause, 1998 WL 831896, at *6 (certifying consumer class for nondisclosure of mortgage company billing practices); Singer, 185 F.R.D. at 691 (certifying class based on uniform misrepresentation of telephone billing practices); Garner, 184 F.R.D. at 602 (certifying consumer class for uniform misrepresentation to public that products were "wax"); Peterson, 174 F.R.D. at 84; Fogie v. Rent-a-Center, Inc., 867 F. Supp. 1398, 1403 (D. Minn. 1993); see also Hubler, 183 F.R.D. at 501 (coercion may be implied classwide when based on uniform conduct).

Similar conclusions have been reached by courts in this Circuit when certifying consumer classes, despite a defendant's protestations regarding the number or claimed variety of underlying advertisements.[28] For example, in Tylka v. Gerber Products Co., 178 F.R.D. 493 (N.D. Ill. 1998), Judge Norgle certified a consumer fraud class based on allegations that the defendant had fundamentally misrepresented the nature of its products as "the best that money can buy, the most nutritious, and trusted by mothers who only want the best." Id. at 495. The court held that common issues of fact predominated and explicitly rejected the defendant's claim that "no common nucleus of facts exists where consumers are subject to different ads run in a variety of mediums, at different times," because the action rested on the "central claim that the advertisements were designed to deceive consumers," id. at 497, and "[a]ll allegedly fraudulent representations were conveyed through widely circulated and generalized advertisements," id. at 499. Further, any variation in reliance was presumed to be reflected in each plaintiff's damages and thus "can be resolved when damages are determined." Id.

In addition, as explained in Falise v. American Tobacco Co., 94 F. Supp. 2d 316, 335 (E.D.N.Y. 2000):

> Where, however, the fraudulent scheme is targeted broadly at a large proportion of the American public the requisite showing of reliance is less demanding. Such sophisticated, broad-based fraudulent schemes by their very nature are likely to be designed to distort the entire body of public knowledge rather than to individually mislead millions of people. From the perspective of the fraudulent actors, clear efficiencies are gained by co-opting the media and other outlets of information as unwitting tools for the pervasive scheme.

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[28] See, Garner, 184 F.R.D. at 600 (certification of consumer claims based on fundamental misrepresentation of the nature of the defendants' product); Synthroid, 188 F.R.D. at 300 (that some misrepresentations were in advertisements did not preclude certification); see also Sikes v. AT&T, 179 F.R.D. 342, 347 (S.D. Ga. 1998) (certifying class when advertisements were "fundamentally the same over the relevant time period").

As set forth in the Master Complaint, the RICO and CPA claims here rest upon Defendants' uniform concealment of the dangers inherent in their products and broad-based public misrepresentation of those products as safe, durable, reliable, and roadworthy. Consequently, the present action involves precisely the type of fundamental misrepresentation to the public at large found to justify class certification in such cases as Amato, Garner, Tylka, and Sikes.

Defendants' assertion that purported variations in their advertisements preclude certification are no more credible than those made by the defendants in the cases cited above.[29]

Indeed, Firestone makes no effort to challenge the predominance of common classwide actual issues as to its advertising. The examples offered in the Master Complaint confirm that Firestone uniformly proclaimed the quality, reliability, safety, and roadworthiness of the Tires. Thus, there can be no doubt that there will be classwide proof of the marketwide advertising relating to the Tires. Although Ford attempts to convince the Court of the wide variation of its advertising, Ford's advertising for the Explorer has a common and quite obviously intended theme. The vehicles are consistently depicted in or near difficult off-road conditions. If Ford's advertising is to be believed, the Explorer, whose very name suggests its intrepid image, climbs

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[29]Indeed, the advertisements for Explorers appended to the Affidavit of Douglas W. Scott demonstrate a strong degree of similarity. For example, most of the 1990 Explorer advertisements contain the following language: "BEST BUILT AMERICAN CARS AND TRUCKS. The best built American cars and trucks are built by Ford Motor Company. . . . At Ford 'Quality is job 1'." Id., Ex. A. Likewise, all of the 1991-92 advertisements and some of those from 1993 proclaim "Your Explorer is ready," implying that the vehicle is fully fit for on- and off-road use. Id., Exs. B-D. Similarly, the 1995 Explorer advertisements contain numerous safety promises, such as "you take *safe*, for example, and make it *safer*" (emphasis in original); "Features that pamper, protect, surprise & delight" that include "ride & handling"; and "Safer. . . . The Best Explorer Ever." Id., Ex. F. Such product claims are not materially different from the examples in the Master Complaint.

mountains, fords river basins, and traverses rocky ground seemingly with the ease of an M1 Abrams tank. This gives the consumer a strong impression and expectation of safety. Any vehicle, and any set of tires, capable of overcoming Mother Nature's worst ground conditions surely can take the kids safely to their soccer game or on a visit to grandma in Vermont.

Not only has Ford conveyed, through carefully chosen imagery, a consistent safety message, it also expressly touts the Explorer's safety as a major selling point in numerous advertisements. For example, in one print advertisement, Ford proclaimed that the Explorer has features to "protect" the passenger, which include the "ride, handling and steering." See Declaration of Dr. Michael A. Kamins, Pltfs' App., Tab 3, C.

If there were any doubt that Ford made safety its core message for the Explorer, Ford itself has admitted as much. In a press release dated March 27, 2001, entitled "Ford Explorer: The Most Popular SUV Ever," Ford boasts that safety has always been the major selling point for its Explorer product and the reason for its success: "Customer comfort, customer safety. From the first Explorer off the line in 1990 to today's 2002 model Explorer improvements, caring about how customers feel and making sure they're safe have been the keys to Explorer's unparalleled success." See Pltfs' App. Tab 3, B.

The foregoing conclusions are fully supported by Dr. Kamins, whose credentials and expertise in the subjects of marketing, advertising, and their impact on consumers are unsurpassed. Dr. Kamins analyzed Ford's advertising of the Explorer line of vehicles during the period at issue in this case. In Dr. Kamins' expert opinion, Ford consistently has advertised in such a way that consumers were led to believe that the Explorer is a safe vehicle. Kamins Decl., ¶¶ 5, 12-18.

Nor does it matter, for certification purposes, that some non-uniform or oral

representations may have been heard or seen by individual class members. When class claims revolve around certain uniform representations or omissions, variance in other representations to some or all class members does not undermine a determination that common issues predominate.[30]

(2) Reliance/Causation Will Be Established Classwide By Circumstantial Evidence.

There is no requirement under RICO, state CPA statutes, or the common law that reliance or proximate cause be proven only by the direct testimony of the plaintiff/victim. Indeed, it is well recognized that such elements may be established entirely by circumstantial evidence. See Chisolm, 194 F.R.D. at 563 ("Often reliance is a matter that is demonstrated inferentially and by circumstantial proof."); In re Austin, 138 B.R. 898, 915 (Bankr. N.D. Ill. 1992) ("The Seventh Circuit has held that actual reliance may be proved by circumstantial evidence of reliance.").[31]

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[30]See, e.g., Dornberger, 182 F.R.D. at 79-81 (individual sales pitches by insurance agents did not preclude finding of predominance); Sikes, 179 F.R.D. at 347 (individual reliance issues do not defeat certification; marketing of product in "similar manner nationwide" is enough); Elkins v. Equitable Life Ins. Co., 1998 WL 133741, at *17 (M.D. Fla. 1998) (Pltfs' App., Tab 1J) (fraud encompassed "oral misrepresentations, which arguably may be susceptible to individual variation"); Duhaime v. John Hancock Mut. Life Ins. Co., 177 F.R.D. 54, 64 (D. Mass. 1997) (if there is common fraudulent scheme, fact that it was accomplished largely through potentially differing oral presentations is immaterial); Peterson, 174 F.R.D. at 83 (that claims may be based in part on potentially non-uniform oral representations, advertisements, or materials was immaterial, so long as some standardized documents containing written misrepresentations were also in mix of misleading information; Arenson, 164 F.R.D. at 665 (supplementary oral misrepresentations did not defeat certification); Scholes v. Moore, 150 F.R.D. 133, 136 (N.D. Ill. 1993) (fact that oral misrepresentations were made in addition to written ones did not undermine finding of predominance); Hill, 1996 WL 650631, at *6 (following Scholes with respect to oral misrepresentations and citing Riordan v. Smith Barney, Inc., 113 F.R.D. 60, 62 (N.D. Ill. 1986)); Weiss v. Winner's Circle of Chicago, Inc., 1992 WL 220686, at *3 (N.D. Ill. 1992) (Pltfs' App., Tab 1K) (that persons who received written mailings were also subject to "individualized oral solicitation" did not defeat certification of RICO claims).

[31]See also Kline's Service Center, Inc. v. Fitzgerald, 109 B.R. 893, 897 (Bankr. N.D. Ind. 1989); Amato, 463 N.E.2d at 629-30; Sangster v. Paetkau, 68 Cal. App. 4th 151, 170 (Cal. App.

For example, reliance is presumed when a plaintiff took action – *e.g.*, purchased a product – following a material misrepresentation or the concealment of material information. See M. Berenson Co. v. Faneuil Hall Markeplace, Inc., 100 F.R.D. 468, 471 (D. Mass. 1984).[32] In such cases, "the reasonableness of reliance is strong circumstantial evidence in the factual determination regarding actual reliance." Allison v. Roberts, 960 F.2d 481 (5th Cir. 1992). In other words, a finding of reliance or causation may be predicated on the fact that the fraudulent conduct in question would engender certain actions by the objectively reasonable person, and the plaintiff took those actions.

Indeed, "[a] course of action pursued after exposure to a false representation, or after being deceived by a concealed fact, may be better evidence of reliance than a self-serving statement that one did rely." Cedar Creek Oil and Gas Co. v. Fidelity Gas Co., 249 F.2d 277, 284 (9th Cir. 1957); see also State v. First Nat'l Bank, 660 P.2d 406, 422 n.26 (Alaska 1982) (reliance presumed when representations made and action taken). For example, when a gallery made representations of the authenticity of certain artworks, the fact that the art was sold for far more than its true value, alone, was ample proof of detrimental reliance. See FTC v. Austin, 138 B.R. 898, 915 (Bankr. N.D. Ill. 1992).

When circumstantial proof of reliance is presented, there is no need for individual testimony by each victim of the fraudulent scheme. See, e.g., Amato, 463 N.E.2d 625; Elk River Assocs. v. Huskin, 691 P.2d 1148, 1154 (Col. App. 1984). Such a method of classwide proof is

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1998); Kopeikin v. Merchants Mortgage and Trust Corp., 679 P.2d 599, 602 (Col. 1984) (en banc); Alley Construction Co. v. State, 219 N.W. 2d 922, 294-95 (Minn. 1974).

[32]See also Morrison v. Goodspeed, 68 P.2d 458, 463 (Col. 1937); Enequist v. Bemis, 55 A.2d 617, 621 (Vt. 1947).

particularly appropriate where, as here, the consumer fraud involves a decade-long course of deception affecting millions of consumers. See Group Health Plan, Inc. v. Philip Morris Inc., 621 N.W.2d 2 (Minn. 2001).[33]

The use of circumstantial evidence to establish reliance on a classwide basis has been embraced by federal courts considering class certification in consumer fraud litigation. For example, in Peterson, 174 F.R.D. 78, the court observed:

> [C]ourts will presume class members' reliance when it is logical to do so or when the complaint's allegations make reliance apparent. In Johnson v. Midland Cancer Institute, Inc., 1993 WL 420954 (N.D. Ill. Oct. 18, 1993) [Pltfs' App., Tab 1L], class members alleged that the defendant violated RICO and ICFA [Illinois Consumer Fraud Act] by operating a fraudulent trade school scheme, inducing the class members to enroll and take out loans for tuition only to close the school a short time later. Id. at *1. The court found that reliance by all class members on the defendant's misrepresentation that they would get the education they paid for was shown "by the simple fact that the class members enrolled and by their willingness to take on student loans to pay tuition." Id. at *6. R[eli]ance was likewise apparent in Smith v. MCI Telecommunications Corp. 124 F.R.D. 665, 679 (D. Kan. 1989), a RICO case in which MCI had allegedly misrepresented its commission plans to coax the class member-salespersons to work for the company. The court inferred universal reliance because "it is implausible that, in initiating or continuing their employment with MCI, the salespersons did not rely on the commission plans which they were required to sign." Id.

174 F.R.D. at 84-85. Many courts have applied these principles to establish reliance in the class action context, *e.g.*, when class members purchased a defendant's products or services following the defendant's misrepresentations or in the face of defendant's concealment of material

[33]The Group Health Plan decision noted that requiring individual reliance as proof of "causation" would effectively impose a reliance requirement where the applicable statute did not. Id. at 15. Similarly, here, where RICO does not require individualized proof of reliance, a requirement of such proof as an element of causation would be improper.

information.[34]

Similarly, the actions taken by plaintiffs may alone establish the necessary proximate cause. For example, when the alleged fraud involved nondisclosure or misrepresentation regarding the likelihood of success in a "900" number game, "reliance could virtually be presumed under the facts of this case, as any caller who played the game and who was charged more than he or she won in prizes was necessarily injured 'by reason of' the game." Sikes, 179 F.R.D. at 347; see also Chisolm, 194 F.R.D. at 560 n.24 (fact that transaction occurred may provide conclusive proof of reliance).

Here, Plaintiffs have alleged that Defendants – knowing that their Tires and Explorers were unsafe and the recommended tire pressure only increased this danger – engaged in a nationwide advertising scheme extolling the quality and safety of Explorers and the Tires. Master Complaint, ¶¶ 122-29. Those advertisements *uniformly* failed to disclose the risks of the Tires, the stability and handling problems of the Explorer, the danger associated with a tire pressure recommendation of 26 psi, and severe risks posed by the combination of these factors.

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[34]See, e.g., Chisolm, 194 F.R.D. at 560-61, n.24, and 184 F.R.D. at 563 (reliance inferred from plaintiffs' payment of fraudulently sought loan deficiencies); Singer, 185 F.R.D. at 691 (reliance inferred from entry into agreements containing overcharges for key equipment); Garner, 184 F.R.D. at 602 (defendants' marketing of falsely represented car wax product meant that individual reliance issues would not predominate as to class purchases of such wax); Sikes, 179 F.R.D. at 347 (reliance inferred from class members' participation in fraudulent 900-number "Let's Make A Deal" game); Spark v. MBNA Corp., 178 F.R.D. 431, 435 (D. Del. 1998) (reliance inferred from opening of credit account after receiving fraudulent advertisement); Cannon, 1997 WL 779086, at *3 (reliance inferred from fact that class members entered into fraudulently induced refinancing contracts); Pickett v. Holland America Line – Westours, Inc., 6 P.3d 63, 71-72 (Wash. App. 2000) (reliance inferred from payment of fees). In re Ford Motor Co. Vehicle Paint Litig., 182 F.R.D. 214 (E.D. La. 1998), did not consider many of the decisions cited above and was not guided by the strong line of caselaw in this Circuit recognizing the presumption of reliance or absence of a requirement that individual reliance be shown in cases of this nature.

The specific dangers associated with these particular products were not mentioned, at *any* time, in *any* Ford or Firestone advertisement or public statement before the announcement of the Firestone tire recall in August 2000. Nor is such information found in any of the standardized owners' manuals or materials Defendants supplied with Explorers or the Tires. As a result Plaintiffs and Class members purchased or leased their Tires and/or Explorers. Thus, all the circumstances necessary for an inference of reliance and/or causation are present here.

Furthermore, in a case such as this, where omissions predominate, a presumption of reliance necessarily follows from a finding of materiality. See Waters v. Int'l Precious Metals Corp., 172 F.R.D. 479, 504-505 (S.D. Fla. 1996); Engalla v. Permanente Med. Group, 938 P.2d 903, 919 (Cal. 1997); Restatement (Second) Torts §§ 550, 551. There can be no doubt that any reasonable purchaser or lessee of these products would find information on intrinsic dangers in Explorers and the Tires that create a risk of death or severe bodily injury to be material. Consequently, Plaintiffs' classwide evidence that Defendants withheld such information and publicly touted an inaccurate image of safety, reliability, durability, and roadworthiness for their products will support a presumption of reliance by all Class members that ensures these issues can be resolved without individualized proof.[35]

Finally, a classwide inference of reliance is also permissible when the fraudulent scheme perpetrated a "fraud on the market." In particular, as the Supreme Court recognized in Basic, Inc. v. Levinson, 485 U.S. 224, 248 (1988), when the market for the defendant's product meets certain parameters with regard to information, independent pricing analysis, and efficiency, it is

[35]Hardee's v. Hardee's Food Sys., Inc., 31 F.3d 573 (7th Cir. 1994), does not hold that reliance may not be inferred in the case of omissions. It merely holds that any such reliance must be reasonable, see id. at 580, an element clearly satisfied here. Again, this is an objective test conducive to classwide application.

not necessary to establish that any particular plaintiff relied on particular information. Instead, when the defendant's misconduct concealed information from the market that, if known, would reduce the price of that product, it is reasonably presumed that the market price was overstated due to the lack of such information. In other words, any fraud perpetrated on that market as a whole is presumed to have a causal connection to the purchaser's loss.

The "fraud on the market" presumption of reliance was initially recognized for securities violations under section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder. It has since been extended to many other scenarios including common law fraud, consumer fraud, and mail and wire fraud as predicate acts for civil RICO claims. See, e.g., Blue Cross & Blue Shield v. Philip Morris, Inc., 113 F. Supp. 2d 345, 370-71 (E.D.N.Y. 2000); Becher v. Long Island Lighting Co., 64 F. Supp. 2d 174, 179-80 n.1 (E.D.N.Y. 1999); Oregon Laborers-Employers, 188 F.R.D. at 376; In re Sumitomo Copper Litig., 995 F. Supp. 451, 458 (S.D.N.Y. 1998); Waters v. Int'l Prec. Metals Corp., 172 F.R.D. 479, 505 (S.D. Fla. 1996); see also Varacallo v. Massachusetts Mut. Life Ins. Co., 752 A.2d 807, 816-18 (N.J. 2000).

This litigation presents facts and claims for which a "fraud on the market" presumption of reliance is most appropriate. As explained in the Declaration of John P. Matthews, Pltfs' App., Tab 4, the new and used car markets in the United States share almost all of the characteristics found to be relevant to an analysis of the applicability of the fraud-on-the-market doctrine to the securities market. Matthews Decl., at 2-10. Thus, such markets are properly characterized as "efficient" and appropriate for the use of that doctrine. Id. at 9.

This conclusion is supported by the testimony of one of Ford's own experts – Dr. George Hoffer – in a case in which he opined that the use of non-OEM replacement parts in repaired vehicles did not diminish the value of such vehicles. In fact, during the course of that testimony,

Dr. Hoffer specifically recognized that used-car markets are highly "sophisticated" and "competitive." Trial Testimony of Dr. George Hoffer in Snider v. State Farm Mut. Ins. Co., No. 97 L 114 (Williamson County Cir. Ct.) at 10, 22 (Sept. 17, 1999).[36] In such a market, a presumption of reliance is thoroughly warranted.

Like investors in the securities and commodities markets, automobile and tire purchasers lack the technical expertise, funds, and facilities necessary to evaluate all of the information relevant to product pricing and necessarily rely upon the market mechanisms discussed in the Matthews Decl. However, Defendants' concealment of the dangers inherent in their products kept from the market information essential to a proper valuation of such products. As a result, to the extent that Plaintiffs establish that the market in which they acquired such items was defrauded, Plaintiffs will show that they, too, were victims of Defendants' scheme and should benefit from a presumption of reliance.

The validity of a presumption of reliance in this case is further confirmed by the facts already well known here. For example, sales of new and used Explorers dropped following the Firestone tire recall and attendant publicity about Explorers. On February 23, 2001, the Associated Press reported that new Explorer sales were down by 23 percent in January of 2001 and Richard Beattie, Ford's Vice President for investor relations admitted that the brand's image "has clearly been dented." See Pltfs' App., Tab 6. The article also reported that George Pipas, a company sales analyst said "'common sense tells me there's got to be something there' in

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[36] Pltfs' App., Tab 5. Dr. Hoffer further admitted that there are "tons and tons of publications" and Internet sites that provide market data on vehicles, including comparative pricing information, id. at 17-18, and that information relevant to car values would be promptly considered and processed in that market, id. at 20-21. Indeed, he testified that "Vehicles which are alleged to be unsafe do not do well in the market." Id. at 54-56.

blaming the drop-off on the Firestone flap." See id. Drops in sales and thus price also occurred in the market for used Explorers. For example, in September 2000, Automotive Lease Guide — a well-recognized source of data on used car pricing, see Deposition of George E. Hoffer at 29, 50-53 (Pltfs' App., Tab 7) — reduced the projected resale value of an Explorer after a 36-month lease by $1,850, a decrease of 6 percent from the previous year and less than the average for other SUVs. At least $600 worth of that decrease was attributed to the effects of the Firestone tire recall and related publicity. See Pltfs' App., Tab 8.[37]

Indeed, Ford's expert witness on diminution in value, George E. Hoffer, was quoted on numerous occasions as to the negative effect on Explorer sales associated with the Firestone recall. Hoffer Depo. at 256-60. He also noted that, while he did not analyze the effect of the August 2000 events on Explorer value, he had observed a higher rate of depreciation for Explorers from August 2000 to January 2001 in some initial data. Hoffer Depo. at 122, 179. In sum, whether viewed as a matter of circumstantial evidence or as a legal presumption or inference, it is readily apparent that classwide proof of reliance and/or proximate cause on Plaintiffs' RICO and consumer fraud claims is appropriate here.

c. Individual Issues of Reliance or Causation Would Not Bar Certification.

Even if certain claims require an individualized showing of reliance – which they do not – the law in this Circuit is also clear that individualized proof of reliance, causation or damages will not defeat certification.

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[37] See also Pltfs' App., Tab 9 (Cara Buckley, "South Florida Market for Ford Explorers Cools In Wake of Tire Recall Lawsuits," Miami Herald (Oct. 17, 2000) (2000 WL 28273001) (sales of used Explorers in the Miami area dropped off dramatically because "[p]eople think it's a dangerous car")). Indeed, Ford's expert, Dr. Hoffer, recognized the link between safety concerns and vehicle sales in Snider.

> [A]ssuming reliance were relevant in this case, it is well-established that individual issues of reliance do not thwart class actions. Riordan v. Smith Barney, 113 F.R.D. 60, 65 (N.D. Ill 1986); see Ridings v. Canadian Imperial Bank, 94 F.R.D. 147, 151 (N.D. Ill. 1982) ("[T]he existence of individual questions of reliance does not necessarily bar class certification on the common questions involved."); Issen v. GSC Enterprises, Inc., 522 F. Supp. 390, 403 (N.D. Ill. 1981) (same).

Peterson, 174 F.R.D. at 84.[38]

2. Any Variations in the Reasons for Plaintiffs' Purchase Decisions Are Irrelevant.

Defendants' contention that individual Plaintiffs may have had unique reasons for buying Firestone tires or Ford Explorers similarly does not militate against class certification. Indeed, the law has never required that fraudulent conduct be the *sole* reason for a plaintiff's injury in order to establish proximate cause. "Instead, reliance may be established on the basis of circumstantial evidence showing the alleged fraudulent misrepresentation or concealment *substantially influenced* the party's choice, even though other influences may have operated as well." Restatement (Second) of Torts § 546 & cmt. b; see also Veilleux v. NBC, 206 F.3d 92, 123-24 (1st Cir. 2000); Pelster v. Ray, 987 F.2d 514, 524 (8th Cir. 1993); Sangster, 68 Cal. App. 4th at 170.

Further, as previously discussed, Defendants' fraud injured all purchasers and lessees of Explorers and Tires by inflating the market prices for such items and leaving current owners with Tires of no value and Explorers of reduced value. Thus, even if some Class members had unique

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[38] Accord Synthroid, 188 F.R.D. at 293; Garner, 184 F.R.D. at 602; Tylka, 178 F.R.D. at 499; Johnson v. Aronson Furniture Co., 1998 WL 641342, at *8 (N.D. Ill. 1998); Krause, 1998 WL 831896, at *6; Arenson, 164 F.R.D. at 666; Sparano v. Southland Corp., 1996 WL 681273, at *3 (N.D. Ill. 1996); Hill, 1996 WL 650631, at *6; see also Oregon Laborers, 188 F.R.D. at 376 ("the defense of non-reliance is not a basis for denial of class certification."); Chisolm, 184 F.R.D. at 563; Sikes, 179 F.R.D. at 346-47 ("issues of individual reliance, injury and damages do not, by themselves, preclude class certification").

or varied reasons for buying or leasing Explorers or Tires, the Defendants' fraudulent scheme, at least indirectly, injured them as well. On that basis, alone, Plaintiffs can establish proximate cause or — for the purposes of RICO — injury "by reason of" Defendants' fraudulent scheme.

3. Defendants' Claims of Changes in Public Awareness of Such Risks Are Not Pertinent.

a. NHTSA-Mandated Generic Disclosures of SUV Rollover Risks.

Ford contends that NHTSA-mandated warning labels adequately informed consumers of the risks of operating an Explorer and, therefore, that purchasers or lessees of vehicles with these labels may not assert concealment-based claims. Again, Defendants miss the mark.

Plaintiffs do not dispute that, starting in 1984 — when the Explorer did not even exist as an SUV — federal regulations, 49 C.F.R. § 575.105, required manufacturers to place a generic advisory in *all* multipurpose passenger vehicles (MPVs), other than passenger car derivatives, and in their owner's manuals. See 64 Fed. Reg. 11724, 11724 (Mar. 9, 1999). The advisory applied to a broad class of multipurpose and/or utility vehicles and vaguely discuss a possibility of rollover only in certain circumstances. By contrast, partly as a result of strong opposition from automobile manufacturers, NHTSA never adopted a rule it considered in the 1990s that would have required manufacturers to post information about the rollover resistance of each specific vehicle type. See 59 Fed. Reg. 33254 (June 28, 1994); 61 Fed. Reg. 28560 (June 5, 1996).

In response to the regulatory mandate, before September 1999, Ford posted language in the interior of Explorers – and other Ford MPVs – meeting the nominal federal requirement with only the following nebulous addition: "[R]ead the Owner Guide and the Supplement for instructions on how to handle this vehicle during emergency maneuvers, and for other safety

information concerning safe driving precautions and proper tire replacement." Affidavit of Alfred J. Darold, Ex. B (Mar. 23, 2001) (submitted by Defendants). Thus, even when it was purportedly advising Explorer owners to avoid rollovers, Ford directed them to the very document recommending that they underinflate their tires to a level Defendants knew was dangerous.

The revised NHTSA-imposed in-vehicle advisory, initiated in 1998, 63 Fed. Reg. 17974 (Apr. 13, 1998), and effective on September 1, 1999, 64 Fed. Reg. 11725 (Mar. 9, 1999), amended, 64 Fed. Reg. 47119 (Aug. 30, 1999), uses colored graphics and short bulleted text in lieu of a text-only format. The header says: "WARNING: Higher Rollover Risk" and the text states "Avoid Abrupt Maneuvers and Excessive Speed," "Always Buckle Up," and "See Owner's Manual for Further Information." 64 Fed. Reg. at 11734; 49 C.F.R. §575.105. Ford has used the NHTSA model label in Explorers since September 1, 1999. Darold Aff., Ex. A.

Again, however, this language is generic. Nothing is said about the excessive risks of Explorers or Firestone Tires; they only vaguely-described rollover potential for all SUVs which, the label suggests, can be addressed by wearing a seatbelt and not speeding or turning quickly. Nothing is said about the particular risks of underinflating tires on the Explorer, which Ford recommended up to December 2000, or the heightened stability and handling problems even if tires were properly inflated. And nothing is said about how Explorers equipped with the Tires are involved in fatal rollovers far more than any other vehicle. Thus, the presence of NHTSA-mandated warning labels or owner's manual statements gave Plaintiffs no insight into the unique dangers of the Explorer or the Tires, known to, but concealed by, Defendants. Thus, such labels cannot reasonably be presumed to have counteracted the overarching marketing and brand image of Explorers and the Tires as safe, rugged, reliable, and roadworthy.

b. Media Discussion of SUV Rollover Risks Did Not Alert Consumers to the Explorer's Dangers.

Defendants also contend that Plaintiffs' claims are nullified because the media purportedly widely publicized the stability and handling risks associated with SUVs. Even if that assertion was correct – and it is not – general press statements regarding *all SUVs* would have given the consumers no insight into the specific dangers associated with Explorers and the Tires. Indeed, virtually none of the 199 articles listed in the Ford Appendix specifically mention the Explorer and the few that do so were published on the eve of the Firestone recall, as the news regarding Explorers and the Tires was first reaching the general public. The overwhelming majority of the articles on which Defendants rely simply repeat general NHTSA statistics and describe steps in the regulatory process leading to in-vehicle labels.[39]

Such articles were of particularly limited value to potential Explorer buyers since NHTSA publicly asserted, even as late as 1999, that SUVs, *as a class*, were not necessarily unsafe compared to other vehicle types. See 64 Fed. Reg. at 11724. Further, neither NHTSA nor the media had reported the heightened rollover propensity of the Explorer, with its underinflated tires, led to rollover fatality rates far exceeding those of other SUVs. See "The Real Root Cause of the Ford-Firestone Tragedy: Why the Public Is Still At Risk," at 4 (April 2001), Public Citizen and Safetyforum.com, Pltfs' App., Tab 10 ("Real Root Cause").

Thus, Ford can point to no information publicly disclosing the unique dangers of

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[39]In addition, more than two-thirds of the articles on Ford's list appeared in regional or local publications of limited circulation (*e.g.*, The Patriot Ledger (Quincy, MA) or Ford's list were essentially identical to other articles appearing in or around the same date in different regions of the country (*e.g.*, stories on or around March 1999 regarding warning labels). As a result, the number of such articles read by any individual consumer – even one who read a newspaper daily – would be only a small fraction of 199 listed.

Explorers and the Tires before the summer of 2000. On the contrary, even after the Firestone tire recall, Ford expressly and impliedly represented that Explorers are safer than their competitors. The Ford Website asserts that any concerns were uniquely tire-related and not linked to the Explorer itself, which, according to Ford, is a particularly safe SUV. See "Hard Facts on the Firestone Tire Recall." Pltfs' App., Tab 11 (reproduced as downloaded from website). Similarly, in his September 2000 testimony before a House of Representatives subcommittee, Jacques Nasser, Ford's President and CEO, called the Explorer "one of the safest SUVs on the road." Pltfs' App., Tab 12.

Neither the vehicle labels nor the media would have given consumers information on the significant dangers associated with the Explorer and the Tires. Consequently, Defendants cannot hide behind either to avoid responsibility for their orchestrated campaign to conceal the truth from NHTSA, the media, and the public.

4. Diminution-in-Value Will be Established by Classwide Proof.

Ford's arguments and experts' opinions regarding the diminution in value of Ford Explorers again seek to create the appearance of a lack of commonality by raising issues that are not implicated in this litigation.[40] Specifically, the report of George Hoffer and David Harless ("H-H Report") purports to show that Explorers retain a higher percentage of their value than competitive vehicles and that Explorers depreciate differently depending on configuration and/or model year. H-H Report at 2.[41] Even if the H-H Report is correct in both of these propositions,

[40]Again, Firestone makes no effort to challenge the proposition that, as a result of the disclosure of the Tires' dangers, those products are of much reduced, if any, resale value.

[41]Dr. Hoffer's opinion was apparently fixed before he began his work here. Before he was retained in this case, Dr. Hoffer expressed his view that such a class claim was "ridiculous." Hoffer Depo. at 287.

however, it provides no information relevant to this Court's class certification decision or even to the merits of this case.[42]

The issue is, did all Explorers lose some value due to the disclosures of Explorer dangers and the Firestone tire recall?[43] On that subject, the H-H Report is silent and the authors admit that they did not even analyze that issue. Hoffer Depo. at 180, 205; Deposition of David W. Harless. at 76-77, 141 (Pltfs' App., Tab 13).

Similarly, the H-H Report's conclusion that Explorers have not depreciated as much as "comparable" vehicles – even if correct – is of no utility in discerning whether and to what extent Explorers have lost value as a result of the Firestone tire recall and associated disclosures. Indeed, one of the major selling points for the Explorer – other than its advertised safety and reliability – was that it retained resale value better than comparable vehicles. It is Plaintiffs' contention – and one of the many common issues at the heart of this case – that Explorers would have depreciated even less but for the events of last August. See Hoffer Depo. at 213 (he does

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[42]The authors admit that they originally intended to perform a far different analysis than that presented in the H-H Report but failed to obtain necessary data and settled for a different analysis. Hoffer Depo. at 115; Harless Depo. at 47-49; 58-60; 69-77.

[43]It is undisputed that differences in the amount of damages due to individual class members will not defeat certification. See, e.g., Synthroid, 188 F.R.D. at 293; Heastie, 125 F.R.D. at 679. In fact, the present case offers a far more manageable context for determination of damages than many class actions. Here, even if the exact amount of diminution in value varied by model year and configuration, such damages would be calculable for each such category of Explorer and distributed under a straightforward proof of claim system requiring class members to establish only the year and configuration of their Explorer. There would be no need for individual hearings or calculations as have been predicted in other large consumer class actions. Therefore, even if such diminution in value and, thus, specific damages due individual Class members vary by model or configuration, class certification of the underlying claims remains appropriate in light of the overarching common questions relating to the Defendants' dangerous products, Defendants' fraudulent scheme, and the consequent harm to all Class members.

not know if Explorer would have retained more value).

Defendants' apparent desire to use the H-H Report to raise doubt as to the merits of Plaintiffs' claims is unavailing. See Szabo, 2001 U.S. App. LEXIS 8474 at *4; Hubler, 193 F.R.D. at 516. The H-H Report presents unreliable and unhelpful analyses of merits issues. For example, as noted above, the authors admit that they did not even look at the real issue here: whether Explorers have lost value disproportionately since August 2000. Moreover, the H-H Report depends solely on N.A.D.A. data, ignoring a plethora of information on vehicle pricing which Dr. Hoffer previously found to be pertinent to such an analysis.[44] In addition, the H-H Report fails to explain the substantial discrepancies between the vehicles its authors considered to be the "competitive cohort" of other SUVs for purposes of valuation analysis and the vehicles deemed comparable to the Explorer by Ford's other proposed experts. For example, William Wecker, a statistician who provided a declaration on the Explorer's safety, looked at all configurations of over 33 other SUV models. Declaration of William E. Wecker, ¶5 (Pltfs' App., Tab 28) By contrast, the H-H Report considers only 11 SUV models and certain subsets thereof. H-H Report at 10-12. In that process, Drs. Hoffer and Harless eliminate many of the relatively higher-priced SUVs that, by their nature, are more prone to retain resale value. Harless Depo. at 119-120. For all these reasons, the H-H Report is of no value in the present context.[45] See

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[44]For example, in another case in which Dr. Hoffer sought to determine whether certain vehicles had suffered a diminution in value Dr. Hoffer did not look merely at N.A.D.A. guides, as he did here, but also considered other consumer and professional valuation guides, auction data, manufacturer used car certification programs, some of the 200 Internet sites devoted to car sales, buy-back agreements for fleet cars, and consultations with active participants in the used vehicle market at automobile auctions, auction associations, new- and used-car dealerships, and car rental franchises. See Pltfs' App., Tab 5 at 12-20; Hoffer Depo. at 27, 46-47, 81-82.

[45]Further, the H-H Report does not advance Defendants' position that each line of Explorer for each model year depreciates differently. In at least half the model years studies,

Declaration of Harry S. Rosen, (Pltfs' App., Tab 33)

Defendants' suggestion that diminution in value will require a vehicle-by-vehicle analysis is also without merit. The essence of the diminution in value claims is that *all* Explorers and *all* Tires sustained a measurable loss of value solely as a result of the disclosure of serious dangers associated with these products. Such loss of value is distinct from any natural depreciation associated with such vehicles or tires based upon their mileage, accident history, or other characteristics. Consequently, such a loss of value can be calculated on a classwide basis using amounts, percentages or formulas adopted by the finder-of-fact following testimony from both Defendants' and Plaintiffs' experts on diminution in value. For this reason, individual "proof" required to identify Class members' vehicles and/or tires will be minimal (*e.g.*, model year, configuration) and damages will be readily calculable.

III. COMMON FACTUAL ISSUES PREDOMINATE FOR ALL TIRE-RELATED CLAIMS.

The fundamental issue in this litigation with respect to the Tires is simple: did Firestone (and Bridgestone) recall *all* of the dangerous tires or not. Defendants say they did, and submit testimony from experts. Plaintiffs say they did not, and also submit testimony from experts. This fundamental issue is the heart of the tire litigation, and is part of *every* Class member's claim. It can – and should – be decided once, in this Court, with all of the parties' evidence marshaled.

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rates of depreciation were statistically equivalent for all model lines of Explorer. H-H Report, at 17.

A. The Evidence Shows That All Tires Share Common Design Features.

1. There Are No Material Differences Between Tires of the Same Model Made At Different Plants.

Notwithstanding the distinctions Defendants now make among the Tire models at issue, their own employees and consultants have already admitted there are no material differences. For instance, Defendants now claim class certification is precluded by the variations between Tires of the same model made at different plants. Firestone's recently retired Vice President of Corporate Quality Assurance, Robert Martin, however, testified there are no design differences between Wilderness tires made at Firestone's Decatur, Illinois plant and those made in Wilson, North Carolina.

> Q: When we talk about these different plants and the tires being made in different plants, just to make sure everybody is crystal clear on this, each of those plants is making, for instance, if they're making the Wilderness AT P235/75R15, they're making the same tire. They're not making a different design tire in one plant than they are in the other plant. It's the same design basically, isn't it?
>
> A. Yes, it is.

Deposition of Robert O. Martin, at 118 (Pltfs' App., Tab 14). Martin also testified that each of the plants used the same manufacturing and quality-control processes and the same quality of materials. Id. at 118-19. Similarly, retired Firestone Senior Engineer James Gardner testified that the "three or four" plants that made the ATX II tire, as a general rule, followed the same fundamental manufacturing process. Deposition of James D. Gardner, at 36 (Pltfs' App., Tab 15). He further testified that although different plant equipment might result in some variations, the compounds used in the manufacture of the tires shared the same basic formula, and that the employee tire makers are given the same training regardless of the plant at which they work. Id. at 37-38.

2. There Are No Material Differences Between Tires of the Same Model But of Different Sizes.

Firestone claims it would be improper to treat similarly tires of the same model but of different sizes. Again, Firestone's own employees have undermined its current position. Mr. Martin, for instance, testified that he believed 15-inch and 16-inch tires of the same model shared the same design. "The materials that are used in the 15-inch and 16-inch tire, for example, the body ply, was probably the same polyester material. The steel belts could be the same steel. The tread compounds could be the same. The sidewall compounds could be the same. The inner liner could be the same. Many components could be common." Martin Depo. at 258-59.

3. There Are No Material Differences Between Tires of the Same Model Made in Different Years.

In addition, Firestone bemoans that the Tires were manufactured in different years. Until these class certification proceedings, however, neither Firestone nor NHTSA has ever made a distinction based on year of manufacture with respect to the recall or Consumer Advisory tires. Firestone's own recall covers all ATX and ATX II tires of size P235/75R15, wherever manufactured, and all Wilderness AT tires of size P235/75R15 manufactured at Firestone's Decatur, Illinois plant. Neither the recall nor the Consumer Advisory makes any reference to year of manufacture or any suggestion that the problems are restricted to or vary by particular years of manufacture. There is no basis for Firestone's current insistence that Plaintiffs must categorize or break down the subject tires by year of manufacture.

4. All of the Subject Tires Share Fundamental Design Features.

As for Firestone's contention that differences between Tire models are too great to permit class certification, even here, the company's employees have testified that the models can share

fundamental design features. For example, the testimony of Firestone Plant Section Manager Larry Hale, a process engineer who oversees the manufacturing of tires at the Decatur plant, shows that substantial similarities exist among the recalled ATX and Wilderness AT tires and the Wilderness AT, Wilderness HT, and FireHawk ATX tires on NHTSA's Consumer Advisory list. In particular, Mr. Hale testified that for a given site, all ATX, Wilderness AT, Firehawk ATX, Wilderness HT, and Wide Track Radial Baja tires share the same body ply compound. Deposition of Larry Hale, at 88-94 (Pltfs' App., Tab 16).

Mr. Martin attested to the construction and design similarities between ATX "flotation" tires and "light truck" tires. "Construction can be very similar, almost identical. The primary difference is the mold dimension or the tire dimension itself and the width of the tread." Martin Depo. at 101. Even when asked to compare what Firestone claims are two very different items – a "P-metric" (passenger) tire and an "LT" (light truck) tire – Mr. Martin testified they can share common materials. See id. at 259-60. When asked if there were any differences between Wilderness and ATX tires manufactured as original equipment or for aftermarket sales, Mr. Martin testified that "normally they are the same tire." Id. at 357.

Firestone cannot thwart a finding of predominance simply by insisting the Tires are not identical in every conceivable respect. Given the similarities among the Tires, the requirement of predominance is satisfied despite any immaterial differences. Mr. Gardner, for instance, explained that the Wilderness tire was essentially an ATX II with a new tread and shoulder design. Gardner Depo. at 36, 58-60. A typical radial tire has about 24 or 25 separate components and uses 12 or more compounds. Thus, changes in tread or shoulder design alone do not transform a tire model into a fundamentally different one.

B. The Evidence Shows That All Tires Manifest the Deterioration That Leads to Tread or Belt-To-Belt Separation and Fail at Similar Rates.

The testimony of Firestone employees about similarities among the Tires is confirmed by the failure analysis of Firestone's consultant, Dr. Sanjay Govindjee. Dr. Govindjee examined Firestone tires mounted on Ford Explorers, including 15-inch Wilderness tires manufactured in Joliette, Canada and Wilson, North Carolina, which are tires that have not been recalled but (Plaintiffs contend) should be. Dr. Sanjay Govindjee, Bridgestone/Firestone Root Cause Report, at 2 (Feb. 2, 2001) (Pltfs' App., Tab 17). Dr. Govindjee reported that tire adjustment rates for Wilderness AT tires manufactured at Wilson, North Carolina; Joliette, Canada; and Decatur, Illinois were virtually identical. Id. at 9.[46] Dr. Govindjee reported that the belt skim and wedge material compounds used were the same in the Wilderness AT and Radial ATX. Id. at 10. In fact, Dr. Govindjee found that the percentage of Decatur tires (singled out by Firestone as the bad apples among the purportedly otherwise sound bushel) showing signs of belt edge cracking (26 percent) was in fact lower than the percentages of Joliette and Wilson tires showing such deterioration (61 percent and 48 percent, respectively). Id. at 27, 50. Although Dr. Govindjee conjectured that differences in Decatur's early material-mixing stages might be responsible for disproportionate claims for Decatur tires, he stated there was insufficient evidence to substantiate this theory. Id. at 33.

Firestone's own expert statistical analysis, performed by Dr. Gary Liberson, further confirms the commonality of failure and failure rates of the recall and non-recall tires. For example, as demonstrated on Exhibit A to the Liberson Declaration, the Wilderness HT II

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[46]"Perhaps a more important database [than the number of lawsuit claims] for understanding the number of units that are failing is the warranty adjustment data which represents tires that have been deemed defective in some fashion after use." Id. at 8-9.

P235/70R16 manufactured at Firestone's Wilson plant — a non-recall and non-NHTSA advisory tire — shows a *higher* claims rate and a *higher* tread separation rate than two of the recall tires, the Decatur Wilderness AT P235/75R15 and the Joliette Radial ATX II P235/75R15. Similarly, the Wilson Wilderness AT P235/75R15 — a non-recall, non-NHTSA advisory tire — has essentially the same number of fatal events (six) as the recalled Decatur Wilderness AT P235/75R15 (seven). While Dr. Liberson inexplicably testified that these tires could not properly be compared, his testimony on this point is belied both by good statistical practice, and by the testimony of Firestone's own David Laubie, who testified that such comparisons are precisely what Firestone has done for many years. Deposition of David Laubie (Rough Draft), Pltfs' App., Tab 18. As explained in the Declaration of Geoffrey Vining, Pltfs' App., Tab 19, Dr. Liberson's analysis and testimony suffers from a host of problems from a statistical standpoint, and really says nothing about the reliability of the Firestone tires and whether Firestone recalled the "right" tires. Thus, at a minimum, even using Firestone's own statistical analysis, it is clear that at least two of the tires Firestone has not recalled share the same propensity for failure as those that were recalled. More importantly, the issue of whether Firestone recalled all of the dangerous tires — whether analyzed using Dr. Liberson's flawed analysis or the more complete analysis suggested by Plaintiffs' statistical experts — is a common issue that should be decided in a single proceeding.

NHTSA's failure and claims data further support a finding of commonality. NHTSA's database contains 1094 confirmed Wilderness AT tire complaints. Of the 1094 Wilderness AT tires, only 34, or 3%, were recall tires. The remaining 1060 Wilderness AT tires, or 97%, were manufactured in Wilson, North Carolina, Joliette, Canada, Aiken, South Carolina and Oklahoma

City, Oklahoma.[47] On September 1, 2000, NHTSA declared the findings of its investigation into approximately 47 million ATX, ATX II, and Wilderness tires. As a result of this review of hundreds of property damage claims, personal injury claims and lawsuits regarding the tires, NHTSA concluded that the rates of tread separations for approximately 24 tire models not included in the recall "exceed those of the recalled tires, sometimes by a large margin." NHTSA Consumer Advisory, Pltfs' App., Tab 21. Nearly one third of the failed Wilderness tires that NHTSA has reported in its database are 16-inch Wilderness tires. Spinning Their Wheels, at 21. Firestone has refused to openly acknowledge that these and all Consumer Advisory tires, which consist primarily of different size ATX and AT tires, suffer from the same propensity to catastrophic tread separation as the recall tires. Despite its recalcitrance, on September 12, 2000, Firestone agreed to replace, on a customer satisfaction basis only, "any of the tires covered by the [Consumer] Advisory dated Sept. 1." Firestone Customer Satisfaction Program ("CSP"), Sept. 12, 2000, Pltfs' App., Tab 22.

Additional evidence shows that non-recalled 16-inch Wilderness tires suffer from the same defect as 15-inch recalled tires. In Venezuela and Saudi Arabia, the 16-inch Wilderness tires failed at an even greater rate than did the U.S. recalled 15-inch Wilderness tires. Ford voluntarily recalled many of these tires in the Middle East and South America after a number of serious tread separation accidents occurred in Ford vehicles. Spinning Their Wheels, at 8. Firestone, however, has refused to recall 16-inch Wilderness tires in the United States, even though a significant number of the failed Venezuelan tires were made in Firestone's Wilson,

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[47]Data analyzed by Safetyforum.com and published in "Spinning Their Wheels: How Ford and Firestone Fail to Justify the Limited Tire Recall," Public Citizen and Safetyforum.com, January 4, 2001, at 17. ("Spinning Their Wheels"), Pltfs' App., Tab 20.

North Carolina plant and were identical to those tires manufactured for the American market.

Plaintiffs' tire expert H.R. Baumgardner has investigated well over 1000 tire and wheel related accidents and has inspected and analyzed over 50 of the Firestone tires at issue in this litigation. See Declaration of H. R. Baumgardner, ¶ 5 (filed with Pltfs' Opposition to Defendants' Motion To Dismiss). Mr. Baumgardner has opined that all 15-inch and 16-inch Firestone ATX, ATX II, and Wilderness AT tires and millions of non-recalled tires still on the road are inherently flawed regardless of tire size or place of manufacture. The flaw results in an unreasonably dangerous propensity for the tires to suffer catastrophic tread separation while operating at normal highway speeds. See id. ¶ 6. Moreover, this flaw manifests itself in all the tires from the start of usage, in the form of deterioration that develops into cracking and ultimately results, under the right circumstances (or wrong circumstances, depending on one's perspective), in tread or belt-to-belt separation. See id.

Furthermore, there is substantial evidence that Firestone and Ford have known or had reason to know for years that the tires are dangerously flawed, particularly when mounted on Ford Explorers. ATX separations began to appear not long after the tire was introduced in 1990, and after the Wilderness AT was introduced in 1995, tread separations in ATX and AT models began to mushroom. See Spinning Their Wheels at 8-9. Internal Firestone documents confirm they were aware of the drastic increase, 194 percent, in tread separation on Wilderness AT tires in the mid-1990s. Whether and when Defendants had knowledge of the tire flaw is also a question that bears on the claims of all putative class members, and further satisfies the predominance requirement.

C. The Evidence Shows That the Design Flaw in All the Tires Can Be Fixed by the Incorporation of a Nylon Cap Ply.

As for a "fix," Mr. Baumgardner declares that all of the tires lack a nylon belt-edge strip or cap ply, a technology well-known in the tire industry that, at the cost of under one dollar per tire, could have ameliorated the flaw in the tires. See Baumgardner Decl. ¶ 8. As part of the relief they seek, Plaintiffs ask that Firestone be ordered to incorporate the strip or cap ply in its tire designs going forward. Whether Plaintiffs are correct about the effectiveness of this component as a "fix" for all the tires is yet another common issue warranting class certification.

IV. COMMON FACTUAL ISSUES PREDOMINATE AS TO ALL EXPLORER-RELATED CLAIMS

Despite Ford's consistent presentation of the Explorer as a single product line, Defendants make substantial efforts to convince this Court that for the purposes of this case, different models or configurations of such vehicles have little in common. Beyond the obvious inconsistency between that assertion and Ford's conduct for more than a decade, Defendants' arguments on this subject are both misdirected and inaccurate. In this case, Explorer-related proof can and will be presented on a classwide basis. Thus, common issues of fact predominate as to all Explorer-related claims.

Defendants' recitation of numerous differences between model years or configurations of the Ford Explorer fails to advance their cause. Indeed, even NHTSA – to which Defendants point as the forum in which these issues should be resolved – and Defendants' own experts have recognized that there are no material differences among all Ford Explorers with regard to their stability, handling, and rollover resistance. As a result, the purported distinctions cited by Defendants are not pertinent and will not affect Plaintiffs' ability to establish the Explorer's

inherent flaws using classwide proof.[48]

A. Any Explorer Variation Is Immaterial To The Problems At Issue.

Based entirely upon the declarations of longstanding "experts" for the automobile industry, Defendants now claim that differences in the physical features of different model years or configurations of the Explorer are such that no common rollover propensity can be identified. But such differences were not deemed relevant to Ford or Firestone when making fundamental decisions on Explorer design or equipment.[49] For example, until December of 2000, Ford recommended a uniform tire inflation of 26 psi on 15 inch tires on Explorers, regardless of configuration, payload, or equipment upon which Defendants' brief now focuses. This recommendation was found in all Vehicle Owner Manuals and, subsequently, on stickers affixed to that door. As a result, in December of last year, Ford sent a form letter to all Explorer owners

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[48]As a preliminary matter, Defendants' rhetoric that they are unable to determine what Explorer flaws are addressed by this litigation shows that they have both failed to review the Master Complaint and apparently ignored media reports regarding Explorers for the past 8 months. The Master Complaint expressly avers that the Explorer's basic design engendered a propensity to roll over exceeding that reasonably expected of or appropriate for such a vehicle. Specifically, the vehicle's wheels would lift off the ground when cornering at 55 mph "due to a combination of the vehicle's high center of gravity, its fully inflated tires, and the suspension system structure." Id. ¶ 64. The Master Complaint further asserts that Ford tried to conceal this dangerous propensity – of all Explorers – by underinflating their tires. Id. ¶ 70. Thus, the Master Complaint has more than adequately informed Defendants of the nature of the Explorer's problems and the commonality of those flaws. Further, they are well aware of the problems with their products that have led to the current litigation. For example, John Lampe, CEO of Bridgestone/Firestone, conceded in an October 9, 2000 Washington Post article that "we have seen an alarming number of serious accidents from rollovers of the Explorer after a tire failure" due to Ford's insistence that Firestone tires be inflated at a level that left "little safety margin." See Pltfs' App., Tab 23.

[49]For example, Ford's report on rollover-related occupant crash protection tests on certain Explorers states that "These vehicles were selected as representative of all Explorer vehicles," and further recognizes that "all . . . vehicle combinations not tested will exhibit performance equivalent to or better than those tested." Pltfs' App., Tab 24, EXPA 1842.

with Firestone P235/75R15 tires enclosing a revised tire pressure label for the driver's door. Pltfs' App., Tab 25. The revised label recommended (1) 30 psi for front tires on all Explorers and (2) 30 psi for rear tires on most other Explorers (including the Explorer 2-door Sport) with 35 psi only for rear tires on the Explorer Sport Trac. See id. Thus, Ford made no great distinctions among the various models of the vehicle when setting its tire pressure, a factor that Ford had believed to be critical to rollover propensity when it initially set that pressure well below the tire manufacturer's original specifications. See Deposition of Lee Carr with selected exhibits at Pltfs' App., Tab 26, Ex. 18 at EXP4 1580 ("Engineering" recommends reduced tire pressure as a "stabilizing influence") ("Tab 26" or "Carr Depo.").

Likewise, internal Ford memoranda do not differentiate among Explorer model years or configurations in their discussions of Explorer rollover problems. For example, when Explorer rollovers were noted in the Gulf Coast Countries and Latin America, Ford did not link this to any specific configuration or suggest that the issue should be analyzed or addressed by model year or configuration. Instead, Ford's internal documents refer to this as a problem common to Explorers generically. See Pltfs' App., Tab 27, A-F. Furthermore, Ford has previously admitted that there are not substantial differences among model years or configurations of the Explorer with regard to stability and handling. For example, in a "Preliminary Statement" in response to certain discovery requests in an individual rollover case, Ford admitted as follows:

> The Explorer was introduced as a new vehicle in the 1991 model year and was treated as a major program (UN46). Although there were design changes during 1992-1994 model years, the Explorer was considered essentially a carryover vehicle. For the 1995 model year, the Explorer was redesigned and was again treated as a major program (UN105). The suspension chassis and frame of the Explorer were completely redesigned in the 1995 model year. In 1998, there was a "freshening" of the Explorer, which did not significantly alter the suspension, chassis & frame of the Explorer or significantly affect the handling characteristics of the Explorer.

Pltfs' App., Tab 26, Carr Ex. 8, 10.

Notably, in January 2001, in a development ignored in Defendants' brief, NHTSA issued a final rule establishing "rollover resistance ratings" for vehicles. See 66 Fed. Reg. 3388 (Jan. 12, 2001); 49 C.F.R. Pt. 575. NHTSA concluded that it is appropriate to group Explorers across model years and configurations both (1) to calculate the static stability factor ("SSF") upon which the ratings are based and (2) to advise the public on the vehicle's rollover resistance.[50] As a result, NHTSA had no reservations in analyzing the rollover resistance of Explorers by grouping all Explorers into two classes of model years – 1991-94 and 1995 forward. 66 Fed. Reg. at 3413.[51] Further, NHTSA expressly concluded that, for rollover resistance analysis, the only potentially relevant distinction among vehicle configurations was whether the vehicle had

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[50]A similar conclusion can be derived from NHTSA's February 6, 2001 database of complaints regarding Firestone's ATX, Wilderness, and other tire models, posted on the agency's website at <http://www.nhtsa.dot.gov/hot/Firestone/Update.html>. That database includes 6000 incidents, with 324 Explorer rollover crashes, involving a wide array of Explorer model years and configurations between 1990 and 2001. Although this database specifically tracks whether each incident involved a rollover, it does not distinguish among Explorers by configuration. Thus, there is no suggestion that the industry or government "experts" evaluating such data deem the model or make of Explorer to be pertinent to their analysis of the dangers associated with the Firestone tires, including the risk of vehicle rollover.

[51]It is well-recognized that the Explorer underwent only one major design revision between 1991 and 2001 – in 1995. As a result, the Insurance Institute for Highway Safety states that Ford Explorer 1995-2001 models and Mercury Mountaineer 1997-2001 models "are virtually identical except for their distinguishing styling and trim." Pltfs' App., Tab 26, Carr Ex. 11. From 1995 forward the Explorer used a short-long arm front suspension system. Prior to that time, the Explorer suspension "remained basically the same for model years '91 through '94." Pltfs' App., Tab 26 at 118-19, (concurring with Donald F. Tandy, Jr. testimony). Van Etten v. Bridgestone/Firestone, Inc., No. 298-069 (S.D. Ga. April 5, 1999). However, Carr has testified that – based solely on testing of a 1991 Explorer 4x4 and a 1996 Explorer 4x4 – that there was "little difference between the performance of the 1991 Explorer and the 1996 Explorer." Id. at 171 (concurring in paragraph 16 of Exhibit 20); Deposition of Lee Carr from Brockie v. Ford Motor Co., No. 95-C-06125, at 257 (Pltfs' App., Tab 29) ("Brockie Depo.") ("I can't find a difference between an SLA suspension on an Explorer and the twin I-beam on an Explorer"); Brockie Depo. at 294-97.

two-wheel or four-wheel drive. In fact, the agency explained:

> Finally, with regard to comments that options can cause wide difference in the rating for a specific model, over the years that we have been researching vehicle inertial parameters, four-wheel drive is the only equipment option for which we have observed a large potential effect on SSF.

66 Fed. Reg. 3399. Ford's statistician, Dr. Wecker, has similarly concluded that the only relevant distinction for purposes of rollover analysis is whether the vehicle is 2 wheel or 4 wheel drive. Pltfs' App., Tab 28, at 206-08. In other words, the federal agency which has analyzed this issue for many years, has concluded that the other alleged differences in Explorer configuration to which Defendants now point are not material to an analysis of the stability, handling and rollover propensity of such vehicles.[52]

Moreover, contrary to his current declaration – now attempting to show a lack of commonality to serve Ford's current goals – Ford's own "expert" on Explorers agrees that one can extrapolate from one model year of Explorer to another for a variety of purposes, including the evaluation of rollover resistance. Carr Depo. at 167-68. In fact, Mr. Carr and others from his engineering firm have regularly defended Ford against personal injury claims arising from rollovers of various model years and configurations of the Explorer based solely on a test of one 1993 Ford Explorer 4x2. Carr Depo. at 169-71; Carr Depo., Ex. 20 (opinion that 1994 Explorer 4x2 was safe and nondefective in rollover resistance, handling and stability based on tests of 1993 Explorer); see Brockie Depo. at 212-14, 220 (1997 deposition in which Carr stated his

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[52]Plaintiffs believe that the rollover propensity of Explorers is properly considered for all vehicles in that product line as a group – as reflected by the close similarity in the SSF for all such vehicles calculated by NHTSA. See Pltfs' App., Tab 26, Ex. 6 (range from 1.06 to 1.08). However, if this Court believes that subclasses are necessary on this issue, Plaintiffs would urge this Court to adopt the classifications used by NHTSA in its 2001 rating system, which would lead to four subclasses (*i.e.*, 1991-94 two-wheel drive; 1991-94 four-wheel drive; 1995-2001 two-wheel drive; 1995-2001 four-wheel drive).

intention to use the test of one 1993 Explorer in future rollover cases); Carr Depo. at 11-19. Remarkably, even in the present case, where he asserts that there are more than 20 pertinent differences among Explorer configurations in each of its 11 model years, Declaration of Lee Carr, ¶10 (submitted by Defendants), bases all such conclusions on measurements of only 12 Explorers from 6 model years and, for his analysis of vehicle SSF, distinguishes among Explorers solely on the basis of model year, number of doors, and whether the vehicle was equipped with 4-wheel or 2-wheel drive. Carr Decl. ¶ 12; Carr Depo. at 27-28, 44-45.

Further, Mr. Carr has testified that there are no substantial differences between Explorers across numerous model years that would have a bearing on stability and handling. Carr Depo. at 48-49, 161-63; Brockie Depo. at 138-39. Indeed, in a 1997 deposition in litigation arising from an Explorer rollover, Mr. Carr directly contradicted his current assertion that differences in model year and configuration are pertinent to rollover resistance:

> Q: And from '91 to 1994, were there any changes in the vehicle that would affect its handling and stability?
>
> A: I don't know of any that would have a substantial effect. Said a different way, there's different tires. There are different wheels on different models of the vehicle. There are different configurations of two-door, four-door, and different weight distributions.
>
> And you can measure subtle differences among all those in certain kinds of tests, but nothing that I think is so substantial as to make one unique versus another, at least not in the context of being safe or unsafe.

Brockie Depo. at 139.

Thus, in his declaration here, Mr. Carr only vaguely proposes that different configurations of the Explorer "may" have an effect on the vehicle's rollover propensity. However, as shown by his prior actions and statements, even he does not believe that such differences are material when evaluating the rollover resistance, stability, handling or suspension

of Ford Explorers.

Indeed, Mr. Carr categorically asserts that, in his engineering judgment Explorers are *uniformly* safe as a product line – an opinion for which he found no need to test or, even describe, every Explorer model or configuration. See Carr Depo. at 104, 106-08, 120-21, 189. In other words, the purported differences among models and configurations of the Explorer are purely hypothetical, with no relationship to its engineering or operating realities.

B. SSF Is Valid Evidence — But Not Plaintiffs' Exclusive Evidence — Of The Explorer's Dangers.

Defendants next create a "straw man" which they then purport to knock down. Specifically, Defendants assert that Plaintiffs' claims relating to the Explorer will be based solely on the Explorer's static stability factor or SSF. Carr Decl. ¶ 7. Relying entirely on that unfounded predicate, Defendants assert that SSF is unreliable as proof of rollover resistance, would vary materially by Explorer model year and configuration, and that several Explorer models have a higher SSF than other selected SUVs.

1. The Explorer's SSF Is Not Plaintiff's Sole Evidence of Significant Problems.

First, Plaintiffs have never claimed that the Explorer's flaws are evidenced only by a single parameter – SSF. As noted above, the Master Complaint never describes the "Rollover Defect" or its sources in such a limited manner. E.g., Master Complaint ¶ 64.

In addition to their evidence regarding specific design characteristics of all Explorers which contribute to its stability and handling problems, Plaintiffs have real world data confirming that Explorers uniformly suffer from a combination of inherent design flaws that create a dangerous risk of rollover in foreseeable driving conditions. For example, the NHTSA Tire Complaint Database examined 6,000 incidents involving all vehicles – not just Explorers –

on which Firestone ATX, Wilderness, and other Firestone tire models now under investigation have been used. Within that database are reports on thousands of incidents involving such tires on non-Explorer vehicles, including other Ford SUVs, trucks, and passenger cars as well as vehicles from other manufacturers. As shown more fully below, see Pltfs' App., Tab 30, this government compilation demonstrates powerfully that Explorers had far more rollovers than any other vehicle equipped with the Tires.

Similarly, a July 1999 report described tests on 12 light vehicles that were conducted as part of NHTSA's "Vehicle Rollover Research Program."[53] Pltfs' App., Tab 26, Ex. 6. Those vehicles were put through a battery of driving maneuvers in dynamic testing of rollover propensity.[54] Although the tested vehicles were equipped with outriggers to prevent actual rollover, with respect to the Explorer, the report stated:

> The J-Turn maneuver was limited to approximately 53 mph due to the vehicles [sic] tendency to oversteer or spin-out. For the higher speed tests the driver often had to counter-steer to keep the vehicle from spinning around. The J-Turn with Pulse Braking maneuver produced one case of minor TWL [two wheel lift], but this was due to a failure of the ABS [automatic braking system] during the course of testing. The right front tire de-beaded during this test and therefore testing for this maneuver was suspended. The Fishhook 1 maneuver produced minor TWL in the L-R steer direction. This test also resulted in a tire de-beading and therefore testing was suspended for this maneuver also. Several peak corrected lateral accelerations were above the TTR [tilt table ratio] value for this vehicle, but all were below the SSF value. The peak vehicle responses tended to increase with speed with the lateral acceleration values tending to be a little more scattered than

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[53]The tested vehicles were 1998 models of the Chevrolet Lumina, Chevrolet Metro, Chevrolet C-1500, Chevrolet S-10, Chevrolet Astro, Chevrolet Tahoe, Chevrolet Tracker, Dodge Neon, Dodge Caravan, Ford E-150 Club Wagon, and Ford Explorer, and a 1997 Ford Ranger.

[54]Of all tested vehicles, tire debeading, *i.e.*, where "all tire pressure was lost and the wheel rims made abrupt contact with the pavement," id. at 47, occurred on only three – once each on the Chevrolet Lumina and Ford Ranger (a close cousin of the Explorer), and twice on the Explorer. Each had manufacturer-recommended inflation pressures, for such tires, of less than or equal to 30 psi." Id. at 48.

those for roll angle.

Id. at 74. Thus, the Explorer had difficulties completing the rollover maneuvers due to tire failures, exacerbating already significant handling and braking system problems. It also had the lowest SSF of all tested vehicles and a very low Steering Maneuver score. Id. at 101. Although based on testing of a 1998 Explorer 4x4, the NHTSA report did not, in any manner, suggest that these conclusions were restricted to a single model year or configuration. On the contrary, one of the selection criteria for the vehicles to be tested was that such vehicles – including the 1998 Explorer – had not had a major redesign for at least 3 years. Id. at 5.

Comparable conclusions were reached in the Real Root Cause report. See Pltfs' App., Tab 10. The Real Root Cause report describes the stability and handling problems uniformly associated with Ford Explorers as a product line. In addition to information regarding the Explorer's high rollover fatality rates, id. at 4, the report describes testing of a late-model Explorer equipped with Firestone tires, id. at 39-43. The testing confirmed NHTSA's analysis that the Explorer's low SSF, tendency to oversteer at high levels of lateral acceleration, and rear suspension compression "bump-stop" influence[55] aggravated handling problems. See id. Tests of the Explorer's response to simulated tire tread separation showed that the vehicle would, in such circumstances, jerk uncontrollably and then roll over. Once the driver lost directional control, "the Explorer became unreasonably prone to vehicle rollover because of its high center of gravity, relatively narrow track width, short wheelbase and sensitive steering…." Id. at 43. These findings, like NHTSA's, are not limited to any particular model year or configuration On the contrary, the report describes these as problems inherent in all Explorers from 1990 to 2001.

[55]"Bump-stop" refers to an elastic component of the suspension that limits compression travel of the suspension system as the vehicle rolls.

Additional "real world" evidence that such problems affect Ford Explorers, as a class, is reflected in a report on the front page of the October 9, 2000 Washington Post, describing an analysis of both national and Florida statistics on fatal automobile crashes from 1997 to 1999.

> Explorers equipped with Goodyear[] [tires] had a higher rate of tire-related accidents than other SUVs in the national fatal accident records, though the 2,000 accidents involved are so few that the difference could be a statistical fluke. But an analysis of 25,000 fatal and nonfatal SUV accidents with 83 blown tires in Florida shows that *tire blowouts in Goodyear-equipped Explorers contributed to crashes at rates more than double those of other SUVs. (Explorers with Firestone tires crashed four times as often as other SUVs after tire failures.)*
>
> Explorers were no more likely than other SUVs to have brake problems, worn tires or most other equipment failures that contributed to an accident in Florida. However, *no other make or model of SUV has a pattern of equipment failure related as strongly to accidents as the Explorer's tire blowouts. Using two different ways of measuring accident rates, the Explorer was either three or four times as likely as other SUVs to have a tire blowout contribute to an accident.* Explorer's higher fatality rate in blowout accidents may be related to rollovers. In 5,870 single-vehicle accidents, where rollovers are most clearly recorded in the Florida statistics, *the Explorer was 13 percent more likely to roll than other compact SUVs, against which Ford likes to compare the Explorer's rollover record. The Explorer was 53 percent more likely than other compact SUVs to roll over when an equipment failure such as faulty brakes, bald tires or blowouts caused an accident.* The national data showed that in the 187 blown-tire accidents that killed someone in the SUV, the Explorer rolled over 95 percent of the time, compared with 83 percent for other SUVs.

Pltfs' App., Tab 23 (emphasis added). The article also notes that "James Fell, who retired last year as chief of research at the [NHTSA], said the findings give 'an indication that there may be a factor with the Ford Explorer beyond the tire issue. . . .'" Id.

Thus, Defendants' assertion that Plaintiffs will attempt to prove their Explorer-related claims solely on the basis of SSF is wrong. The Explorer's stability, handling, and rollover problems have been identified and documented through a variety of mechanisms, not just the static measurement of SSF. Plaintiffs' proof on these issues will offer classwide evidence relevant to all Explorers including all pertinent evidence, not just a single fact.

2. SSF is a Valid Indicator of Rollover Danger.

Defendants' effort to distance themselves from SSF should not be accepted at face value. Indeed, the automobile industry was a major proponent of SSF as the measure of rollover resistance which NHTSA should use. Moreover, as shown by NHTSA's extensive evaluation of the issue and recently-published findings, SSF is an appropriate factor to consider on the issue of rollover propensity.

As noted above, NHTSA's January 2001 final rule established "rollover resistance ratings" based on a vehicle's SSF. See 66 Fed. Reg. 3388 (Jan. 12, 2001); 49 C.F.R. Pt. 575. The agency's comments are highly informative on the significance and origins of SSF ratings.

First, as NHTSA pointed out:

> Static Stability Factor is not a measure of rollover resistance invented by the agency. It was introduced to the agency in 1973 by vehicle manufacturers as a scientifically valid potential substitute for the dynamic maneuver tests the agency wanted to develop regarding untripped on-road rollover. The Motor Vehicle Manufacturers Association (which has evolved into the present Alliance of Automobile Manufacturers) stated the following about SSF, "although this method does not embrace all vehicle factors relating to rollover resistance, it does involve the basic parameters of [sic] influencing resistance."

66 Fed. Reg. at 3389 (footnote omitted); see id. at 3389-90 (quoting 1973 GM submission extolling use of SSF as measurement of rollover propensity). NHTSA concluded that its Vehicle Rollover Resistance Program tests confirmed that use of SSF to evaluate rollover resistance of a vehicle "corresponded well to dynamic movement tests." Id. at 3390 (footnote omitted). This conclusion was further validated by NHTSA's statistical study of 226,117 single-vehicle crashes with 45,574 rollovers, and subsets of multi-state data which found that SSF was related to rollover propensity. Id. at 3392-95.

Mr. Carr admits that SSF is a measure of vehicle rollover resistance. Carr Depo. at 53-

54, 89; Brockie Depo. at 131. In fact, Ford, itself sets SSF goals for its vehicles and employs SSF as a measure of stability in its design and testing of vehicles. Carr Depo. at 58-59, 62-65; Carr Depo., Ex. 6 at FAAB 1102054.

Thus, there is now extensive evidence – most of which was unavailable when the Bronco II court denied certification – of a correlation between SSF and a vehicle's rollover propensity. See 177 F.R.D. at 372-73. Further, NHTSA – to which Defendants have asked this Court to defer – has expressly concluded that SSF is an appropriate measure of rollover propensity on which the American public can and should rely. As a result, Defendants' attempt to undermine this relevant evidence of the Explorer's fundamental deficiencies should be rejected.

3. Defendants' Claimed Differences in Explorer SSF's Are Inaccurate and Immaterial.

Mr. Carr claims that the SSF range he has calculated for different models of the Explorer is, in his view, quite broad – from 1.03 to 1.14 – a difference of 0.11. However, NHTSA calculated that range to be far narrower – 1.06 to 1.08 – a difference of only 0.02, or less than 1/5th the difference allegedly calculated by Mr. Carr.[56]

Furthermore, NHTSA's ratings system rests upon the premise that SSF calculations within a particular range reflect relatively comparable rollover propensities. NHTSA found that rollover propensity was properly correlated to SSF ranges as follows:

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[56]The Carr calculations of SSF are based upon track width measurements and center of gravity height measurements performed by his own firm on 12 unloaded Explorers under conditions not subject to independent review by the Plaintiffs. Due to the nature of the formula for calculating SSF, apparently small changes in center of gravity height – which can be substantially affected by vehicle loading – may have material effects on the calculation of SSF. Furthermore, as Mr. Carr recognized, vehicles have a lower "margin of safety" with regard to rollover resistance when they are loaded. Carr Depo. at 99-100. Therefore, Mr. Carr's failure to calculate SSF for loaded Explorers may have underestimated the rollover propensity of such vehicles and/or overstated the SSF differences among those vehicles.

SSF	Rollover Risk In Single Vehicle Crash
1.03 or less	40% or more
1.04 to 1.12	30% or more but less than 40%
1.13 to 1.24	20% or more but less than 30%
1.25 to 1.44	10% or more but less than 20%

See 66 Fed. Reg. at 3395. Thus, even using Mr. Carr's questionable calculations of SSF, almost all of the Explorers in his list have a 30% or greater rollover risk while three barely fall below that range. NHTSA's calculation of Explorer SSFs confirms that they all fall squarely within the range carrying a rollover potential of 30 to 39%. 66 Fed. Reg. at 3413; see Carr Depo. at 144 (if NHTSA's figures are used, the SSF range is very narrow). For these reasons, any distinctions between the SSFs of Explorers – which, as discussed above, is not Plaintiffs' sole evidence of Explorer problems – have been substantially overstated by Defendants and are relatively minor when placed in context.[57]

[57]Defendants' arguments that the SSF for other SUVs is equal to or lower than that of the Explorer is irrelevant both on the current motion and on the merits of this case. First, to the extent that this action is directed toward the Explorer, it will focus on the safety, reliability and roadworthiness of that vehicle, not other SUVs. Second, no other SUV combines the Explorer's high center of gravity, risk of overloading which increases the center of gravity height, narrow track width, oversteer propensity in emergency situations, and dangerously underinflated tires. Each of these factors contributed to the unreasonably dangerous design of the Explorer and its associated rollover risks, putting the Ford Explorer in a lethal class of its own. Third, the ultimate likelihood of success on the Plaintiffs' claims is irrelevant on a motion for class certification. Therefore, even if Plaintiffs' claims would fail with a finding that any other SUV has a lower SSF – which they would not – class certification is proper in that the common issues of fact and law, including any comparison to other vehicles that might be relevant, nevertheless, predominate.

C. Accident Data Show That Explorers Are Uniformly Prone To Rollover.

Defendants' contention that purported differences in fatal accident rates for different Explorer configurations creates a lack of factual commonality on the Explorer-related claims is both remarkable and incorrect. First, Ford has never suggested that any model or configuration of the Explorer is more prone to rollover than any other. Thus, Plaintiffs greatly doubt that Ford contends that any of these alleged statistical distinctions reflect material differences in the rollover propensity of different Explorer models or configurations. Moreover, Ford's statistical analysis is belied by NHTSA's Tire Complaint Database of February 2001.[58] Tables compiled from that database, show that Explorers equipped with Firestone ATX, Wilderness, and other Tires are much more prone to roll over than the many other vehicles on which such tires are used. See Pltfs' App., Tab 30. Although the database includes almost equal numbers of incidents involving Explorers and nonExplorers equipped with such tires, Explorers had significantly more overall crashes (474 of 617), rollover crashes (324 of 390), crashes with injuries (367 of 463) and fatal crashes (96 of 116) than all other vehicles combined. The Washington Post article cited above also found a heightened risk of death, injury, and accidents involving Explorers utilizing non-Firestone tires as compared to other vehicles. See Pltfs' App., Tab 23. Thus, Defendants' argument on this score is simply not credible.

Ford's statistical arguments rest solely on the work of Dr. William Wecker, a statistician who often testifies for the auto industry. However, Dr. Wecker's declaration rests entirely on a

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[58]This argument is also contrary to the testimony of Dr. Roger McCarthy, chairman of Exponent, Failure Analysis Associates, Inc., a consulting firm often used by Ford. In recent litigation relating to the Isuzu Trooper, Dr. McCarthy testified that, based on data from eight states, 1991-98 Explorers were more often involved in single-vehicle rollover accidents than comparable SUVs, such as the Jeep Cherokee, Chevrolet S-10 Blazer, Isuzu Trooper, or Ford Tahoe. That testimony is summarized at <http://www.safetyforum.com/tires/ mccarthy.html>

selective analysis of limited information in the federal Fatal Analysis Reporting System ("FARS"). Wecker Decl. ¶ 6; Wecker Depo. at 55. As a result, the conclusions he reaches are inherently flawed.

For example, Plaintiffs seek to recover for economic loss, not fatalities. FARS data, however, look only at *fatal* accidents and ignore those involving property loss or personal injury. Harless Depo. at 137(selection bias in FARS data). Thus, the data Dr. Wecker used underreport the Explorer's danger. Neither Defendants nor Dr. Wecker offer any basis upon which to believe that a database dealing only with fatalities offers a useful lens through which to evaluate economic losses. There is no justification for Dr. Wecker's exclusion of other, readily available data, such as the NHTSA Tire Complaint database or state accident databases used by the Washington Post and Dr. McCarthy, see note 57, supra, that cast a wider net.[59] See Wecker Depo. at 167 ("My work is mainly theoretical . . . ."). Indeed, Dr. Wecker's testimony based on FARS data has previously been excluded for just this reason. Wecker Depo. at 85.

Moreover, Dr. Wecker made no effort to evaluate any issue that could be relevant to this Court. For example, he concedes that he looked at no statistics relating to the Tires or use of the Tires on Explorers. Wecker Depo. at 49. Such incomplete analyses and equivocal conclusions were clearly introduced by the Defendants to "muddy the waters" on the issue of commonality and should receive no weight in the class certification calculus.

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[59]Dr. Wecker's analysis also rested on selective comparison of data that may not provide the most useful measure of rollover propensity. For example, he compared the Explorer only to other "compact utility vehicles" manufactured during 1991-99 and excluded vehicles no longer manufactured, but still on the road, during that period. Wecker Depo. at 109-112. He also made no effort to distinguish between single vehicle accidents, which starkly illustrate the inherent instability of a vehicle, without any outside forces, and those involving multiple vehicles. See e.g., Wecker Depo. at 55.

V. THE CLASSES AND SUBCLASSES QUALITY FOR CERTIFICATION UNDER RULES 23(b)(2) AND (b)(3)

Defendants argue at length that neither Rule 23(b)(2) certification, nor 23(b)(2) and (b)(3) "hybrid" certification, is appropriate here with respect the Class' claims. Defendants' arguments are not only substantively wrong, as explained here and in Class Plaintiffs' opening brief, but are based on a fundamental misconception of class certification as an "all-or-nothing" proposition. None of the Defendants' arguments address the fact that this Court has discretion to isolate and certify exclusively the Class' claims for injunctive relief under Rule 23(b)(2), or the Class' claims for damages under Rule 23(b)(3). To the extent that the Court finds certification of the entire Class and all claims inappropriate, at minimum the Court should hold that Plaintiffs here meet the requirements for either of the foregoing alternatives.

Indeed, it is well-settled that, wherever possible, a court should grant class certification with respect to a subset of common issues, claims, or defendants under Federal Rule of Civil Procedure 23(c)(4) rather than deny class certification altogether. See, e.g., Safran v. United Steelworkers, 132 F.R.D. 397 (W.D. Pa. 1989) (class certified with respect to one of two claims); Gatter v. Cleland, 87 F.R.D. 66 (E.D. Pa. 1980) (class certified as to only one defendant); see generally 2 Newberg on Class Actions § 7.33 (3d ed. 1992).[60] Thus, as aptly stated in Bolin v. Sears, Roebuck & Co., 231 F.3d 970, 976 (5th Cir. 2000), cited in Plaintiffs' opening brief:

> Certification on a claim-by-claim, rather than holistic, basis is necessary to preserve the efficiencies of the class action device without sacrificing the procedural protections it affords to unnamed class members. In a case such as this one, where claims for injunctive relief intermingle with claims for damages, certification of a (b)(2) class without individual treatment of the claims may deny unnamed class members the notice and opt-out protections of Rule 23(b)(3). On

[60]Rule 23(c)(4) provides that "[w]hen appropriate . . . an action may be brought or maintained as a class action with respect to particular issues. . . ."

> the other hand, denying certification or certifying under (b)(3) when (b)(2) certification is appropriate for part of a class eliminates the efficiencies and adjudication that Rule 23, and specifically (b)(2), create. Rule 23(c)(4) explicitly recognizes the flexibility that courts need in class certification by allowing certification 'with respect to particular issues' . . . .

VI. DEFENDANTS RAISE NO CREDITABLE "CONFLICT" OR ADEQUACY ISSUES.

The Master Complaint and its proposed class/subclass structure combines the claims of numerous Plaintiffs, from multiple suits, arising from the same fundamental safety and diminution in value issues raised by Defendants' joint and several conduct. Defendants' conduct has created the unique fact pattern giving rise to the class action segment of this multidistrict litigation, and Plaintiffs have joined together to pursue their claims in a coordinated, cooperative, and complementary fashion. While Defendants claim "conflicts" preclude class treatment, in fact they have identified no true conflicts among the Class representatives or Class members of the type that could justify denial of class certification, or a reduction in the scope of the classes and claims certified. The cases on which Defendants base their argument – the Supreme Court decisions overturning asbestos personal injury settlements, Amchem Products, Inc. v. Windsor, 521 U.S. 591 (1997) and Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999) – are inapposite. Defendants do not claim that this case presents a "limited fund," as in Ortiz, for which class members must compete and which cannot satisfy them all. Plaintiffs here seek certification, for purposes of trial, of equitable, injunctive and damages claims as to which no defense of inadequate resources has been raised.

Notwithstanding Defendants' suggestion to the contrary, no Class Plaintiff has testified that other Class or Subclass members should not recover. None has expressed any hostility or animus toward the merits of others' claims. Any differences in the nuances of various Class

members' claims are adequately addressed by the subclassing proposed by Plaintiffs. Indeed, this is precisely what Defendants argue should occur.

The "insurmountable" conflicts to which Defendants vaguely allude apparently occur because Plaintiffs are purportedly both too friendly toward one another, and not friendly enough. However, the appropriate degree of intra class hostility and harmony is not specified by Defendants.

Defendants claim that people suing Ford are in conflict with those suing Bridgestone and Firestone. But Plaintiffs have proposed two Classes to ensure the vigorous pursuit of all Defendants, and in fact both classes have sued all Defendants for their joint and several liability. While Defendants Firestone and Ford have, certainly, engaged in a public strategy of blaming each other, in fact their conduct and their products intertwine; Plaintiffs have proposed a class and subclass structure appropriate to these circumstances; and it will be for the trier of fact to determine where and in what proportion the responsibility lies. Collectively, the Classes and Subclasses have every incentive to discover and present all evidence pertinent to Defendants' liability.

Unlike personal injury or wrongful death claims, where states laws may result in real differences in outcome or recovery, here the choice of law proposal advanced by Plaintiffs enhances the manageability of this case as a class action, while fully protecting the legitimate interests of all Class members in obtaining the equitable and compensatory relief sought, which is available under all states' laws. Had Plaintiffs urged that this Court apply the laws of 51 jurisdictions to the class claims, Defendants would (and do) argue that such an approach is utterly unmanageable. How then, can it be in the best interests of the Classes to advance it? If Class Plaintiffs cannot structure their claims to enhance the prospects of class certification,

without which most claims will go unredressed, what *can* they do in the name of adequacy? In Defendants' view, the only adequate class representative is the one who so fragments the class claims, and so champions the purported interests of a small group at the expense of the whole, that she renders class treatment impossible. While this may be a class opponent's view of the ideal and "adequate" class representative, it is not the law's.

It is axiomatic that speculative or hypothetical "conflicts" of the sort claimed by Defendants do not constitute inadequacy, see 1 Newberg on Class Actions, § 3.25, and that to be disabling, a conflict must go to the heart of the controversy: "Only a conflict that goes to the very subject matter of the litigation will defeat a party's claim of representative status." Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d § 1768, at 327. There are myriad ways in which a defendant, preferring not to face a classwide claim, can conjure imagined antagonisms within a class that is, to its dismay, united in interest against it.

As this Court observed in Hill v. Priority Financial Services, Inc., No. 1P98-1319-6-815, 2000 U.S. Dist. LEXIS 18590 S.D. Ind. Dec. 22, 2000) (Pltfs' App., Tab 1M), the key issue on adequacy is whether the proposed representative "has interests antagonistic to those of the class-at-large." Id. at *2. Here, the common interest of the named Plaintiffs and the Class Members in pursuing their safety and damages claims against all Defendants and obtaining a classwide remedy is real, demonstrable, and unrefuted. While Defendants might prefer internal discord, and argue why it should exist, they have failed to show it. Defendants have deposed 38 class representatives/named plaintiffs, raise no challenge to the adequacy of 34, and complain only of mild purported confusion as to the Subclass designations of the remaining 4, in an attempt to topple the Subclass structure.

These speculations about theoretical conflicts cannot overcome the shared interest of Class members in obtaining redress from Defendants. See Foltz v. U.S. News & World Report, Inc., 111 F.R.D. 49 (D.D.C. 1986) (determining that class members' commonality of interest in demonstrating aggregate liability outweighed any interest of individual class members in pursuing theoretical recovery-maximizing positions that could create conflicts between subgroups in class); see also Hubler, 193 F.R.D. at 578 ("Despite GM's speculative-but-thorough description of the ways in which the interests of Indiana GM dealers could vary, we reject GM's argument that these differences constitute antagonistic interests that should prevent class certification.").[61]

The proposed Class representatives have demonstrated the knowledge and "genuine interest in the outcome of this litigation" that are sufficient to make them adequate representatives of the class, id. at *5, although they are not, and cannot be expected to be,

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[61]In Foltz, defendants moved, unsuccessfully, to decertify a retired employee class in a case involving benefits under two retirement plans. As here, defendants presented a scattershot of purported conflicts between and among members of the different plans, those who retired at different times, and other distinctions. See 111 F.R.D at 51-56. Under the heading "Equitable Considerations," the court considered the practical effect on the litigation if defendants' decertification motion were granted:

> There is more than a possibility that this litigation would be fragmented into individual claims, presenting an array of unwieldy and time-consuming proceedings brought by a host of individual claimants. The multiplicity of plaintiffs would generate a great deal of wasted effort and would impose heavily on the resources of the Court. At the other extreme, there is the not remote possibility that many of the claimants simply would not pursue the matter. Those persons would be deprived of the benefits and advantages of the class action and would be frustrated in their efforts to obtain relief. In short, decertification of the class . . . would serve at best a theoretical concern, while creating a morass of very real problems.

Id. at 56. So it is in this case. The need for and benefits of class treatment are real. Defendants' hypothetical "conflicts" are not.

lawyers who "understand intimately the legal nuances of the case," id. (citing Hubler, 193 F.R.D. at 578).[62] Here, as this Court observed in Hubler, the various named Plaintiffs "appear willing and able to preserve class interests against any adverse concerns." 193 F.R.D. at 578.[63]

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[62]In a misguided effort to show that the subclass definitions are fatally "amorphous" and in conflict, Defendants picked a handful of Plaintiffs whom Defendants claim were unable to specify their subclass membership, or who purportedly stated views at odds with other Class members. It is clear, however, that although there was understandable confusion regarding the subclass nomenclature in the context of a scattered, complicated and often tricky cross-examination by adverse counsel, they nevertheless articulated as best they could why they are involved in this matter and what they want for themselves and all members of the Class. E.g., Truoy Depo. at 35-39; see id. at 13, 14, 19, 21 (Truoy stated he has a Ford Ranger that had Firestone tires, made clear that he understands his role as a Class Representative, and that he seeks to have all Firestone truck tires, including non-recalled tires, removed and replaced, with compensation for any prior replacement or consequential property damages); Olson Depo. at 20, 24, 32, 35-36 (Mr. Olson knows he has a Ford Excursion, knows he replaced its Firestone tires with Michelins, can determine which type of Firestone tires he had, states he is a member of subclass C, states that he is taking an active role to "protect[] people's lives, including [his] own," and makes clear that he wants Firestone tires "removed from the vehicles they are currently on for the safety of the people that own those vehicles"); Simpson Depo. at 20, 28, 36, 41-42, 71, 75, 88-96 (Mr. Simpson knows he has a Ford Explorer, that he had 15-inch Firestone ATX tires, that he suffered tread separations, and that he seeks his own losses, those of "all the other victims," and for "all the dangerous tires [to] be taken off the road."); Stone Depo. at 13-14, 18, 38-39, 46, 72-73, 85, 107, 118 (Mr. Stone adopts the "Duties of Class Representatives", understands that he represents himself and others with Firestone tires and Ford vehicles, states that is a member of several subclasses *without* reference to the Master Complaint, knows he suffered a tire separation incident, believes that Firestone should recall "all the [tires] that are defective," and wants "Ford and Firestone to take responsibility and do what's is right . . . [t]o get them [sic] tires off the road that are bad, compensate everybody in all ways they're due."). These deposition excerpts are attached as Pltfs' App., Tab 31.

[63]The experience of tread separation incidents motivated many of the named Plaintiffs to come forward to represent the Class in this case. (E.g., Gaudet Depo. at 16-40; Glover Depo. at 58-67, 88-103; Hakker Depo. at 55-58; Pledger Depo. at 14-17, 20, 32-37, 102-04; Wallace Depo. at 14, 27-28, 31, 78-79, 97.) Several more Plaintiffs may not have suffered serious tread separation incidents, but are nevertheless motivated by concerned for their own safety and the safety of their loved ones and the public. (E.g., M. Hartman Depo. at 40; J. Hartman Depo. at 70-71; Devening Depo. at 53; Knapp Depo. at 15:23-31; Eberly Depo. at 150; Atkinson Depo. at 87, 115.) See Pltfs' App., Tab 31.

VII. A CLASS ACTION IS A SUPERIOR–INDEED, THE *ONLY*–METHOD OF RESOLVING THESE CLAIMS.

Defendants' superiority argument misses the mark for two reasons. First, the claims asserted by the Class are not high-value personal injury claims, with all of the attendant difficulties of establishing individualized causation and damages, but seek corrective and prophylactic injunctive relief. The damages claims are, from the standpoint of individual Class members, relatively modest economic loss claims that almost certainly could not and would not be brought individually due to the high cost of litigation. Not only is a class action a *superior* procedural means of resolving such claims, it is, as the Seventh Circuit has repeatedly observed, in reality the *only* way that the claims of the overwhelming majority of these Class members will ever be heard. Second, Defendants ignore the fact that, even if this Court denies class certification, it nonetheless must establish a procedure for litigating the claims of over 500 named Plaintiffs who are properly before this Court. Many of the procedures this Court likely would adopt for such litigation are essentially identical to those the Court would employ in a classwide proceeding, but would lack the significant added benefit of resolving Defendants' liability to *all* potential Plaintiffs once and for all, a benefit that can be provided *only* through class action structure.

A. This Is A Paradigmatic "Core" Class Action Case.

Both the Seventh Circuit and the Supreme Court have made it clear that cases like this are paradigms for class treatment, noting that Rule 23(b)(3) aims primarily at vindicating "the rights of groups of people who individually would be without effective strength to bring their opponent into court at all," and declaring:

> "The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to

> bring a solo action prosecuting his or her rights. The class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor."

Amchem, 521 U.S. at 617 (quoting Mace v. Van Ru Credit Corp., 109 F.3d 338, 334 (7th Cir. 1997)). This action is just such a "core" class action. Few of the Class members could afford to undertake individual litigation against Defendants to recover the relatively modest damages at issue here, but the failure to recover such damages is a real hardship to people of average means. If the class device were unavailable here, an economic injustice would result: The Class members would, as a practical matter, have no meaningful redress against Defendants, and Defendants would be unjustly enriched by the profits gained from their misconduct. As Judge Bucklo observed in Miller v. McCalla, Raymer, Padrick, LLC, 198 F.R.D. 503 (N.D. Ill. 2001):

> However, if class actions can be said to have a main point, it is to allow the aggregation of many small claims that would otherwise not be worth bringing, and best to help deter lawless defendants from committing piecemeal highway robbery, a nickel here and a nickel there, that adds up to real money, but which would not be worth the while of an individual plaintiff to sue on.

Id. at 506 (citing In re: American Reserve Corp., 840 F.2d 487, 489 (7th Cir. 1988)).[64]

The personal injury cases relied upon by Defendants serve only to highlight the propriety of class certification here. Far from supporting Defendants' opposition, Amchem and Ortiz serve as a critical reminder that while personal injury cases – which necessarily involve highly individualized issues of fact and law and high dollar value claims – often have been held not to

[64] Accord Christakos v. Intercounty Title Co., 196 F.R.D.496, 502 (N.D. Ill. 2000) (describing the classic 23(b)(3) case as one involving small damages by plaintiffs who allege "similar mistreatment by a comparatively powerful Defendant, one that, if the facts alleged were proved, otherwise might get away with piecemeal highway robbery by committing many small violations that were not worth the time and effort of individual plaintiffs to redress or were beyond their ability or resources to remedy.").

be appropriate for class treatment, cases such as this one – which involves two standardized products, each sharing uniform flaws, each manufactured by a single Defendant, working together with the other Defendants in a common fraudulent scheme – are ideal for class treatment. In Amchem, the Supreme Court distinguished cases such as this one from the unwieldy and unique asbestos exposure settlement class before it, which included:

> "Class members [who] were exposed to different asbestos-containing products, for different amounts of time, in different ways and over different periods. Some class members suffer no physical injury or have only asymptomatic pleural changes while others suffer from lung cancer, disabling asbestosis or from mesothelioma . . . . Each has a different history of cigarette smoking, a factor that complicates the causation inquiry."

521 U.S. at 624 (quoting Third Circuit decision affirmed by Supreme Court). Given the presence of such overwhelmingly individualized personal injury issues (in what it characterized as the most "sprawling" case ever brought to its attention), the Supreme Court concluded that class certification was inappropriate.

The other personal injury cases relied upon by Defendants are similarly inapposite. Rhone-Poulenc, 51 F.3d 1293, involved highly valuable personal injury claims arising out of transfusions of tainted blood, and implicated difficulties of establishing individualized causation and damages in the personal injury context that are not present here. Castano, 84 F.3d 734 (and the other tobacco cases cited by Defendants), also involved highly valuable personal injury claims that could be – and are being – brought by individual smokers, multiple products manufactured by multiple defendants over decades, and individualized causation and damages issues. In re American Medical Systems, 75 F.3d 1069 (6th Cir. 1996), similarly involved highly valuable personal injury claims, multiple products, and complex individualized causation and damages issues.

By contrast, in non-personal injury cases like this one, class certification long has been held to be proper.[65] As the Ninth Circuit noted in Valentino v. Carter-Wallace, 97 F.3d 1227 (9th Cir. 1996), another case relied upon by defendants, class certification in *non*-personal injury product defect cases like the building asbestos cases, and like this one, is proper partly because such cases are "much more manageable than a personal injury case would have been because, in essence, the effect of asbestos in different buildings is the same and the effect of asbestos on different people is not." Id. at 1232. The "effect" of Firestone tires and Ford Explorers on all Class members is also the same; the individualized differences attendant to personal injury claims simply do not arise.

In cases much more similar to this one (and all but ignored by Defendants), the Ninth Circuit and Third Circuit have recognized the important distinction between the personal injury cases cited by Defendants and classes like that sought here, and have affirmed certification of product defect and consumer fraud classes, respectively. In Hanlon, 150 F.3d 1011, the Ninth Circuit affirmed certification of a nationwide product defect class where plaintiffs alleged that millions of Chrysler minivans all had similar defective rear-gate latch designs. The Ninth Circuit reasoned that "each potential plaintiff has the same problem: an allegedly defective rear latch gate which requires repair or commensurate compensation. The differences in severity of personal injury present in Amchem are avoided here by excluding personal injury and wrongful death claims." Id. at 1021. Similarly, in Prudential, 148 F.3d 283, the Third Circuit affirmed certification of a consumer fraud class involving millions of insurance policy holders across the

[65] See, e.g., Hanlon, 150 F.3d 1011; In re Prudential Ins. Co., 148 F.3d 283; Central Wesleyan v. W.R. Grace & Co., 6 F.3d 177 (4th Cir. 1993) (upholding certification of claims for cost of removing asbestos from school and college buildings nationwide); In re School Asbestos, 789 F.2d 996.

country who alleged that they had been subjected to a variety of deceptive sales practices. The Third Circuit rejected the contention that Amchem barred certification of the proposed class, holding:

> The two cases are markedly different, and easily distinguished. The Amchem class failed . . . because of the disparate questions facing class members, based in part on their different levels of exposure, their differing medical histories, and the presence of exacerbating conditions such as smoking. Of course, the complexity of a case alleging physical injury as a result of asbestos exposure differs greatly from a case alleging economic injury as a result of deceptive sales practices. The elements of proof are less difficult when the vagaries of medical testimony and scientific expertise are removed from consideration.

Id. at 315.

The Seventh Circuit's opinion in Szabo does not compel a different conclusion. Class members in Szabo had individual claims worth about $200,000 each, clearly worth pursuing on an individual basis. By contrast, Class members' claims here are for relatively modest dollar amounts – the cost of replacing Tires or the diminution in value of their Explorers – hardly the sort of claims that could or would be litigated efficiently on an individual basis. Thus, while Szabo was *not* a "core" class action, this case is. Perhaps more importantly, here, unlike in Szabo, while Class members' individual damages claims are relatively modest, if Plaintiffs' allegations are correct, they are all at risk of personal injury or death from Defendants' products every day that they remain saddled with the Tires or Explorers. Rather than thousands of individual trials to determine this same issue again and again, a single, classwide trial provides the most efficient and fairest means of resolving this critical issue.

B. If the Class is Not Certified, the Court Still Must Organize and Manage the Claims of Hundreds of Plaintiffs.

Defendants also ignore that there are over 500 named Plaintiffs before this Court whose claims will have to be managed and tried even without class certification. Among the matters the Court would have to adjudicate for each individual Plaintiff are (1) Rule 12 motions to dismiss (indeed, by seeking dismissal on a class basis, Defendants highlight the propriety of classwide determination of myriad common legal issues); (2) individual (and potentially conflicting) motions for preliminary injunctive relief; (3) discovery disputes; (4) summary judgment; and (5) jurisdiction over Bridgestone Corp. In addition, making these determinations on a case-by-case basis raises the specter of thousands of motions for leave to file interlocutory appeals by the aggrieved party on each individual ruling.

Defendants have offered no meaningful alternative for the litigation of these claims. "Most courts hold that manageability difficulties cannot support denial of class certification when no other practical litigation alternative exists." Prudential, 962 F. Supp. at 525.

C. The Trial Plan for a Concurrent Bench/Jury Trial is Straightforward.

The key issues relating to liability and responsibility for damages, and the necessity, propriety, and scope of injunctive and equitable relief, are inherently matters of classwide proof that lend themselves to determination by unitary trial. The fact that many of the determinations relating to liability and relief in this matter arise under claims that sound in equity, and are thus for determination by the court at bench trial, vastly simplifies trial planning, trial structure, and trial conduct.

This is not a case in which any aspect of the individual personal injury and wrongful death actions that are part of the MDL 1373 will be determined in a class action context. Rather,

the class claims have been brought, in the federal and state systems, to obtain relief for the class, and protection for the public, in the form of an appropriately expanded Tire replacement program, occasioned by the claimed inadequacy of the voluntary "recall" initiated by Defendants, and to provide compensation for Explorer owners/lessees on the diminished market value of their vehicles caused by the market response to the debacle. The trial will be conducted as a classic "battle of the experts." Whether the Tires at issue are susceptible to tread separation, present an unacceptable risk to the Class and to the public, and should be removed and replaced at Defendants' expense, and whether Defendants' conduct renders them responsible for the reduction in Explorer value, need not and should not be determined, *seriatim*, by multiple courts in either individual suits or duplicative class actions.

This Court has the jurisdiction, the authority, and the opportunity, to conduct a trial of these issues, once and for all, in a manner that is binding on all who would assert such claims and seek such relief. There is no available procedure that will fully and fairly adjudicate this controversy in a more binding, more manageable, or more cost-efficient manner.

In personal injury class actions, such as the Castano and Carter-Wallace cases Defendants cite, it is necessary to design elaborate, multi-phased trial plans, to stage the initial adjudication of common issues of law and fact, to be followed by groups or waves of individual trials to determine the remaining individual issues of specific causation, injury, resulting damages. Accordingly, tort class actions involving personal injury and wrongful death utilize Rule 23(c)(4)(A) to designate those issues, such as general causation, defects, and defendants' knowledge and conduct, for classwide trial, with the outcome binding on all class members. If this outcome is favorable to the plaintiffs, they may then proceed to individual trials to prove their exposure to the product at issue, that such exposure was a substantial factor in their claimed

injuries, that such injuries in fact exist, that they are entitled to compensation therefore, and the measure of such damages. The fact that the class action cannot resolve all of these issues does not defeat the class action's superiority and manageability for the resolution of key common conduct, defect, and liability issues.

That is why, in such personal injury class actions, trial courts established detailed, multi-phased trial plans after determining the scope of class certification. See, e.g., multi-phase trial plans described in Telectronics, 164 F.R.D. 225 (class certified), 172 F.R.D. 271 (S.D. Ohio 1997) (decertification denied; trial plan established); Copley Pharmaceutical, 158 F.R.D. 485 (class certified), 161 F.R.D. 456 (D. Wyo. 1995) (decertification denied; trial plan established), 50 F. Supp. 2d 1141 (D. Wyo. 1999). Telectronics and Copley were MDL cases in which remands of the class members' personal injury/wrongful death claims to their home districts were expected at the close of the class case on common issues. For this reason it was of critical importance, at or shortly after the class certification stage, to determine which claims and issues would be tried in the MDL transferee court, and which would be reserved for full-on trials in the transferor courts.

In this litigation, by contrast, the individual personal injury/wrongful death cases are just that – individual cases – and they are not subsumed in the Master Complaint. The class claims present no injury or death issues and no issues of specific or individual causation and damages. Similarly, because in Telectronics and Copley, individual causation and damages were reserved for subsequent trials in the class members' home states, the MDL transferee courts assumed that common issues should be determined under the laws of all of these potential states and, accordingly, engaged in elaborate subclassing exercises, creating categories within each class to

correspond with variations in state laws, and dispensing with the choice-of-law analysis that is available to this Court, which vastly simplifies the class structure and trial plan.

In this case, the instruction of the jury is straightforward. First, as noted above, the key claims asserted under state law sound in equity, and will be determined by this Court sitting as trier of fact. There is no need for jury instructions on these issues. Second, all state law issues can be determined by reference to two states', rather than 51 jurisdictions', laws, further simplifying the process for the Court. Third, with respect to the federal claim for damages, asserted under civil RICO, there are no variations in state laws that complicate the process of drafting jury instructions and verdict forms. Indeed, the federal courts use pattern jury instructions and verdict forms for civil RICO, and these are readily available as a resource to this Court.[66]

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[66]See, e.g., 3A Devitt, Blackmar and Wolff, Federal Jury Practice and Instructions, Civil, § 100.01, et seq. (West Publishing Company 1987 and West Group 2000); Hon. Leonard Sand, et al., Modern Federal Jury Instructions, Civil, § 84.01, et seq. (LEXIS 2000); see also Seventh Circuit Federal Jury Instructions, Criminal (West Group 1999) (basic instructions under 18 U.S.C. § 1962 with respect to elements of racketeering). With respect to state law issues that are jury questions, both Michigan and Tennessee have pattern jury instructions.

Moreover, as to punitive damages, the recent trilogy of Supreme Court decisions on the factors to be considered by the jury, and the language to be employed in jury instructions as a matter of due process, has in effect created a common terminology, of punitive damages, jury instructions and verdict forms that, if applied by this Court, will be fully consistent with state law and pass federal constitutional muster. See BMW of N. Am., Inc. v. Gore, 517 U.S. 559 (1996); TXO Prod. Corp. v. Alliance Resources Corp., 509 U.S. 443 (1993); Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1 (1991). The Supreme Court's May 14, 2001 decision in Cooper Industries, Inc. v. Leatherman Tool Group, Inc., 532 U.S. ___, 2001 U.S. LEXIS 3520 (2001) (Pltfs' App., Tab 1N), further unifies the field: the degree of the defendant's reprehensibility or culpability; the relationship between the penalty and harm to the victim caused by the defendant's actions; and the sanctions imposed in other cases for comparable misconduct. Leatherman, at *23. These requisite factors predominate over the particulars of state law, must be considered by the factfinder and, as Leatherman now holds, are reviewed de novo by the trial and appellate courts to avoid both inconsistency and excessiveness. Id. Fragmentation for multiple trials and appeals of the class claims now unified in this Court through the Master Complaint, would violate both

Defendants castigate Plaintiffs for suggesting that the submission of a detailed trial plan is premature at this time. Certain elements of the trial plan are indeed known, as outlined above. It is already certain that a multi-phase trial plan, conducted under the laws of numerous states, is not necessary or appropriate in this case. It is also clear that many of the issues will be decided by the Court, and that a concurrent jury/bench trial, conducted in a single phase, is feasible. What is not known is the extent to which Plaintiffs' claims will be addressed by hearing on their motion for preliminary injunction, or will be deferred for an accelerated, unitary trial of all claims under Rule 65(a)(2) of the Federal Rules of Civil Procedure. The pending motions to dismiss, motion for preliminary injunction, and motion for class certification have converged, and questions such as the nature, scope, and payment for class notice, the timing of class notice, the timing and extent of an evidentiary hearing on the preliminary injunction, and the design of a trial for the issues that remain must await threshold rulings by the Court.

To the extent this Court certifies the claims and issues raised in the Master Complaint, such claims can properly and manageably be adjudicated and determined in a single trial, an outcome that is in the best interests of Plaintiffs, Defendants, and the court system. The federal cases were transferred to this District by the MDL Panel because it perceived common issues of fact for which coordinated proceedings were superior, in terms of consistency, cost-effectiveness, and judicial economy. To the extent this Court certifies class claims under the "mandatory" provisions of Rule 23, its determinations will be binding on the Classes and there will be no other competing or inconsistent adjudications. To the extent the Court certifies claims under

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norms articulated in Leatherman: avoiding capriciousness by finders of fact, and assuring "the uniform treatment of similarly situated persons that is the essence of law itself." Leatherman, at *24.

Rule 23(b)(3), its adjudication will be similarly binding on all Class members who do not elect to "opt out."

Conversely, to the extent this Court declines to certify class claims, the field is left open for other courts to grant certification. A federal court's decision to deny class certification is not *res judicata* on other courts. As the Fifth Circuit held in Clearwater v. Ashland Chem. Co., 93 F.3d 176 (5th Cir. 1996), federal courts cannot preclude or enjoin state courts from revisiting class certification, or from certifying classes federal courts have denied. See id. at 178. Indeed, as the Clearwater court observed, "it is our considered view that the wide discretion inherent in the decision as to whether or not to certify a class dictates that each court or at least each jurisdiction be free to make its own determination in this regard." Id. Thus, denial of class certification by this Court, as Defendants urge, could frustrate this Court's ability to play a central role in federal-state coordination, and may generate a serial revisitation of class issues that is non-conducive to judicial consistency and economy. As a practical matter, state courts' deference to this Court's grant of class certification may be presumed; similar deference to, or imitation of, an order of this Court denying class certification cannot be similarly presumed.

Defendants argue that Plaintiffs "urge the Court to certify now and worry later." But it is Defendants who ask the Court to worry now about extraneous and hypothetical matters, *e.g.*, how a class trial could be conducted under the laws of 51 jurisdictions. That was a problem faced – and a challenge solved – by the MDL transferee courts in, *inter alia*, the Copley and Telectronics cases, neither of which was settled until the triability of class claims had been demonstrated by actual trial. See, e.g., Copley, 50 F. Supp. 2d 1141; Telectronics, 2001 U.S. Dist. LEXIS 4035, at *18 n.8 (S.D. Ohio 2001). Here, Defendants' lengthy class opposition brief is a smokescreen in attempted obfuscation of the simple fact that in this non-injury class action, the trial will be

conducted as would any other trial, without multiple phases, and without the special considerations necessitated by the prospect of partial remands. The jury instructions are not exotic, and may be adapted from presently available and authoritative sources. The case deals not with individualized transactions or custom-made items, but with categories of mass-produced products, statistical risk and cost-benefit analysis on the part of Defendants, nationwide ad campaigns, uniform omissions of objectively material fact, corporate decision-making conducted without regard for Class, much less its individual members, and hard-fought, highly polarized positions on questions of common application to all claims. The trial plan on the Classes' claims against Defendants looks exactly like the trial of any single Class member's claims against Defendants.

Plaintiffs propose a single, concurrent bench/jury trial for the adjudication of all claims for final injunctive relief and damages that remain after the Court's disposition of the pending motions to dismiss and for preliminary injunctive relief. The injunctive and prophylactic relief Plaintiffs seek: replacement at Defendants' expense of all Tires, appropriate notification and implementation of the replacement program, and correction of the tread separation problem on a going-forward basis through the design and manufacturing changes detailed by Plaintiffs' experts, are inherently unitary. The causal connection between the Defendants' conduct and the diminution of market value of Plaintiffs' Explorers, the entitlement of Class members to recover for, and the quantum of, such damages (*e.g.*, the percentage of Explorer value diminution the market attributes to safety issues not shared by competing vehicles) is subject to expert, aggregate, formulaic proof. While, as with most class actions, a post-judgment administrative phase will be required for implementation and enforcement of injunctive relief, and a damages claims process for Class members, this does not complicate the trial itself, and is best designed

when the trial outcome is known. See, e.g., Manual for Litigation, Third, § 30.213, at 230; § 30.47.

Under the Plaintiffs' proposal, the jury would be instructed, under federal law, on the elements of civil RICO; and, on the state law claims, under Michigan law as to Ford and Tennessee as to Bridgestone and Firestone. Jury interrogatories would be provided to guide the jurors' deliberations, focus them on the factual determinations that are theirs to make, and provide a clear record for the parties. While disagreements over jury instructions and verdict forms are a feature of every case, class action or not, it is not an esoteric exercise to resolve them, and the claims for which such instructions will be presented, which sound in negligence, warranty[67] and state consumer law, are neither complex nor novel.

D. Plaintiffs Have Proposed Objectively Defined and Ascertainable Classes and Subclasses.

This Court determines the operative definitions of the classes and subclasses that it certifies; it is not bound by the proposed class definitions offered by either side. In Defendants'

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[67]Indeed, the most esoteric feature of the class trial in this litigation is the Redhibition claim under Louisiana law advanced by the Redhibition subclass. This claim is not considered exotic in its homeland, however. It is defined by codal provision, Louisiana Civil Code Articles 2520 and 2521. Berney v. Rountree Olds-Cadillac Co., Inc., 763 So.2d 799, 807 (La. App. 2000) succinctly states the law, from which a straightforward jury instruction may be derived:

> A seller warrants the buyer against redhibitory defects, or vices, in the thing sold. A defect is redhibitory when it renders the thing useless, or its use so inconvenient that it must be presumed the buyer would not have bought the thing if he had known of the defect. The existence of such a defect gives a buyer the right to obtain rescission of the sale. La. C.C. art. 2520. The implied warranty against redhibitory defects covers only hidden defects, not defects that were known to the buyer at the time of the sale, or defects that should have been discovered by a reasonably prudent buyer. La. C.C. art. 2521. Proof that a redhibitory defect existed at the time of sale can be made by direct or circumstantial evidence giving rise to a reasonable inference that the defect existed at the time of sale.

view, a class definition is fixed at the outset of the case, may not change as the case evolves, and may not be modified either upon a party's request, or *sua sponte* by the Court. Class action jurisprudence is precisely the opposite: Rule 23's implicit requirement that there be an ascertainable class is satisfied if the class description "is sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member." Wright, Miller & Kane, Federal Practice & Procedure: Civil 2d § 1760, at 121 (citing cases). "If the court decides that the class described in the complaint does not meet a minimum standard of definiteness, it need not dismiss the action. It has discretion to limit or redefine the class in an appropriate manner to bring the action within Rule 23." Id. at 128 (citing cases of redefinition by courts); see, e.g., Hagen v. Winnemucca, 108 F.R.D. 61 (D. Nev. 1985) (court constructed proper definition of class when plaintiffs' proposed definition would have required the court to determine whether person's constitutional rights had actually been violated in order to determine class membership). Class definitions are frequently subject to modification and amendment in the course of class-related discovery, briefing, and hearings. The subsection or subsections of Rule 23 under which a class is certified may affect the scope or language of its definition, as may the claims or issues for which the class is certified. See Manual for Complex Litigation, Third § 30.14.[68] Defendants' suggestion that the Court must deny class certification if it does not agree in all particulars with Plaintiffs' initial proposed definitions is therefore ill-founded. It is not for the Court to determine whether a party has composed the perfect class definition, but rather to

[68]As the Manual points out, "in the case of a Rule 23(b)(3) class, membership should ordinarily be ascertainable as of the time of judgment. There is no need to ascertain individual members in (b)(2) class actions for injunctive relief. When an action is certified as a class action under Rule 23(c)(4) with respect to a particular issue only, the class may be defined in ways that would not otherwise be appropriate if it were certified for all purposes." Id. at 218.

"determine whether a class exists that can adequately be defined." Singer, 185 F.R.D. at 685 (citing Simer v. Rios, 661 F.2d 655, 670 (7th Cir. 1981)). "[T]he only requirement is that the description of a class be sufficiently definite to enable the Court to determine if a particular individual is a member of the proposed class. While the definition of the class must not be vague or difficult to apply, the implicit definition requirement does not require an overly strict degree of certainty and is to be liberally applied." Singer, 185 F.R.D. at 685 (citation omitted).

In Singer, the defendant "ferociously oppose[d] class certification on the basis that . . . [plaintiff could not] adequately define a class." Id. At issue was a class definition describing "all persons and entities overcharged for key equipment by AT&T after January 1, 1984." Id. at 684. Defendant claimed that it could justify many of the overcharges that appeared in its records and that a clear class definition was thus impossible, or impermissibly mixed merits with class issues. See id. Nevertheless, the Singer court certified a class.

A similar dispute exists here, as Defendants claim that many of the Tires (for which they have not initiated public "voluntary recalls") do not suffer from the tread separation flaw alleged by Plaintiffs. This is, indeed, a merits issue that is irrelevant to the current motion but the list of Tires that Plaintiffs claim share the problem defect is not. Plaintiffs have, in fact, identified a list of 24 Tires in their Plaintiffs' Response to Defendants' Interrogatory No. 7, as Defendants concede.[69] Because discovery is not complete, Plaintiffs have, understandably, been unwilling to agree that the list of Tires is final; however, this element of discovery is expected to be completed – and the Court may order its completion, if necessary – prior to the determination on

[69]The list of 24 Tires as set forth in Plaintiffs' discovery response is found at Tab 32 of Pltfs' App. There is no question that all parties are aware of which Tires are at issue, and which characteristics Plaintiffs claim are pertinent for inclusion in the Tire category.

class certification. Notice to the Classes will thus contain a comprehensive list of the Tires and vehicles at issue, such that all may determine, by reference to the list whether or not they are members of one or both Classes. That is all that Rule 23, due process, and good practice require. See Singer, 185 F.R.D. at 685; Manual § 30.14, at 217-19.[70] Despite Defendants' attacks on Plaintiffs' proposed Class and Subclass definitions, Plaintiffs see no basis, at this time, on which to change them. The proposed definitions follow the prescription for objective and administratively feasible class definition set forth in the Manual.[71]

Defendants accuse Plaintiffs of "double-dipping," because the Class definitions encompass "persons and entities who own or lease, or owned or leased" Explorers. But it is beyond peradventure that class membership does not guarantee a recovery to every class

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[70]A similar technique was used to define and notify the class in Avery, 2001 Ill. App. LEXIS 249. At issue was the defendant's classwide practice of specifying and paying for non-original equipment ("non-OEM") "crash parts" on its policyholders' cars, under policies that guaranteed the use of replacement parts of "like kind and quality" to OEM parts. "Crash parts" was common industry parlance for a list of specific parts: Whether or not each of these categories of parts was inferior in quality to OEM parts was at issue in the case. Accordingly, the class definition proposed by the plaintiffs was refined by the court, in its February 11, 1998 amendment to the December 5, 1997 class certification order, to use the generic terms "non-OEM" and "crash parts" in the body of the definition, as plaintiffs had proposed, adding the list of the 25 specific crash parts to the class definition. The class description, definition, list of specific crash parts at issue, class certification, and ultimate trial of the case is described in the recent appellate decision affirming the classwide verdict and judgment on breach of contract, statutory consumer fraud, compensatory damages, and punitive damages. See 2001 Ill. App. LEXIS 249. Defendant has filed a petition for leave to appeal this decision to the Illinois Supreme Court.

[71]As the Manual suggests, "for example, the class may be defined as consisting of those persons and companies (other than the defendants) that purchased specified products from the defendants and other specified sellers during the specified time period." Id. § 30.14 at 217. Accordingly, the Tire Class, its Subclasses, and the Explorer Diminution Class are defined by reference to purchase, lease, and/or possession of the Tires and Explorers at issue. The current date references – the August 9, 2002 Recall, the NHTSA September 1, 2000 Consumer Advisory, and the 1990 start date for the Explorer Diminution Class – are included in the definition.

member. There must always be some proof of claim process to ensure that the dual requisites of (1) class membership, and (2) damage or injury for which relief has been awarded, are present. Not everyone in an objectively defined securities fraud class, for example, may have actually suffered a compensable loss during the class period. To assume that class membership equals individual recovery is to conflate the procedural and administrative role of the class definition with the ultimate determination on the merits. In every class action, the outcome of the case may be that some class members are entitled to recover, while others are not. The proposed class definition in this case is not an attempt at, nor could it ever result in, "double-dipping."

In Miller, 198 F.R.D. 503, Judge Bucklo certified a class for unfair debt collection claims. Defendants had argued that individual issues predominated and the class was fatally indefinite, because it was not obvious whether the loans of the class members were for consumer purposes (covered under the relevant law) or business purposes (not covered). However, as the court observed, "even if it is necessary to review the contracts individually to eliminate business purchases, 'such a task would be neither herculean, inhibiting, nor for that matter . . . unique.'" Id. at 506 (citing Haynes v. Logan Furniture Mart, Inc., 503 F.2d 1161, 1165 n.4 (7th Cir. 1974)). Likewise, here it can ultimately be determined whether persons had or have the Explorer or Tires to place them in the corresponding Classes and Subclasses. The documentation exists to establish such membership.

Defendants claim that it is Plaintiffs, not they, who are attempting to mix merits with class definition issues, referring in particular to the Property Damage Subclass, which is defined objectively as those "who own or lease, or owned or leased Vehicles that are or were equipped with Tires that failed, resulting in property damage." This is a claim of property damage, and Subclass membership is determined with reference to the fact of property damage, a failed Tire,

or Vehicle Rollover, and a claim of causation. Causation need not be determined, on an individualized or other basis, to determine Subclass membership. That is a post-judgment claims issue. As the Manual points out, class definitions may and should be crafted with reference to specific types of claims. At most, Defendants raise a semantic argument, one that is easily resolved by modifying the definition to refer to "claims" of property damage rather than damage itself. The fact is, however, that scores of classes have been defined by courts with reference to the ultimate damage or injury at issue in the case, rather than the more refined reference to claims of such damage or injury under either terminology the result is the same.[72]

E. Neither the Seventh Amendment Nor Due Process Will Be Violated by Class Certification.

Defendants have asserted for themselves, as well as absent Class members, that certification of the Classes would violate their constitutional rights to a trial by jury.[73] The specter of this Seventh Amendment violation is routinely raised by Defendants as an adjunct to manageability challenges. This case is no exception, as both Ford and Firestone contend that the class claims could not be successfully tried without completely bewildering a jury with unwieldy jury instructions, interrogatories, or bifurcation. Their argument ignores the well-established

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[72]For example, the class certified by the court in Copley Pharmaceutical was defined as "all persons throughout the United States and its territories who suffered damages as a result of the inhalation of Albuterol manufactured, supplied, distributed or placed in commerce by Coply Pharmaceutical, Inc." The class was certified "for the following issues of liability: strict liability, negligence, negligence per se, breach of warranties, and requests for declaratory relief . . ." 158 F.R.D. at 493.

[73]This altruistic concern for the class members' constitutional rights is suspect. See Eggleston v. Chicago Journeymen Plumbers Local Union #130 UA, 657 F.2d 890, 895 (7th Cir. 1981) ("it is often the defendant, preferring not to be successfully sued by anyone, who supposedly undertakes to assist the court in determining whether a putative class should be certified."), cert. denied, 455 U.S. 1017 (1982).

procedure and pattern jury instructions for trial of Civil RICO claims; the fact that a larger part of Plaintiffs' case involves no jury;[74] and that Plaintiffs did not propose or agree upon the necessity of bifurcation, as the classwide damages will be presented for aggregate proof, and there are no issues of specific causation or injuries. Furthermore, if this Court decided to bifurcate the trial or to proceed in stages, there would be no violation of the Seventh Amendment.

At the heart of the Defendants' argument is the Seventh Amendment's right of trial by jury. See U.S. Const. Amend. VII. Flowing from the Constitution comes the bedrock principle, elicited from Gasoline Products Co. v. Champlin Refining Co., 283 U.S. 494 (1931), that,

> All of vital significance in trial by jury is that issues of fact be submitted for determination with such instructions and guidance by the court as will afford opportunity for that consideration by the jury which was secured by the rules governing trials at common law. Beyond this, the Seventh Amendment does not exact the retention of old forms of procedure.

Id. at 498. The Supreme Court's ruling in no way implicates any requirement that all evidence be presented to the trier of fact at one hearing or in a unitary manner. See Rhone-Poulenc, 51 F.3d at 1302 ("Bifurcation and even finer divisions of lawsuits into separate trials are authorized in federal district courts."); Simon v. Philip Morris, Inc., 2001 U.S. Dist. LEXIS 1114, at *51 (E.D.N.Y. 2001) ("the Seventh Amendment does not always require unitary trial of

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[74]The role of the jury was further circumscribed by the Supreme Court in its May 14, 2001 Leatherman decision, in which the Court ruled, for the first time, that punitive damage awards are nonfactual determinations, and as a result are not subject to deference under the Seventh Amendment's guarantee of a jury trial in civil cases. The newly articulated right of *de novo* review of a jury punitive damages award underscores the unique utility and superiority of a classwide, unitary trial on the punitive damages issue as the best available procedure both for guarding against an excessive award, inconsistent multiple awards for the same conduct and assuring judicial economy by restricting *de novo* review to a single court. Here, Leatherman and the class mechanism converge to protect Defendants' Eighth Amendment right to protection against excessive punishment.

a cause of action."). Provided that issues are presented "without confusion and uncertainty," Gasoline Products, 283 U.S. at 500, no constitutional infirmity exists.

Defendants' arguments, therefore, run contrary both to the law and common sense. They assert that jury interrogatories and bifurcation are unworkable solutions to what remains an unconstitutional process. Such policy arguments is not a good ground for opposing class certification. See Coopers & Lybrand v. Livesay, 437 U.S. 463, 470 (1978) ("Such policy arguments [regarding class litigation], though proper for legislative consideration, are irrelevant to the issue we must decide."). Moreover, it is at odds with the Federal Rules of Civil Procedure, which expressly contemplate bifurcation of complex issues in several situations. See Fed. R. Civ. P. 23(c)(4), 42(b). As a result, the same argument was rejected by the court in In re Folding Carton Antitrust Litig., 75 F.R.D. 727 (N.D. Ill. 1977):

> Defendants' reliance on Gasoline Products Co. v. Champlin Refining Co., 283 U.S. 494 (1931), presupposes that the damages issues are inextricably intertwined with the liability issue. Moreover, the courts of this circuit have found bifurcated trials constitutional . . .

Id. at 735; see also Houseman v. United States Aviation Underwriters, 171 F.3d 1117, 1121 (7th Cir. 1999) (bifurcated trial did not violate Seventh Amendment); Rhone-Poulenc, 51 F.3d at 1303 (bifurcation permitted, provided that "the judge must not divide issues between separate trials in such a way that the same issue is reexamined by different juries."); Hosie v. Chicago and North Western Railway Co., 282 F.2d 639, 643 (7th Cir. 1960) (severing trial of damages from liability within bounds of Seventh Amendment); Manual for Complex Litigation, Third, § 30.17 ("The provision authorizing a class for specific common 'issues' does not require that an entire claim by or against a class be certified.").

Accordingly, courts have granted class certification in cases involving trail plans for far more complex and individualized claims than those asserted here. See Simon, 2001 U.S. Dist. LEXIS 1114 (direct and indirect smokers class action); Copley, 161 F.R.D. at 461 (class action involving drug Albuterol); In re Asbestos School Litig., 104 F.R.D. 422, 434 (E.D.Pa. 1984) (class action involving asbestos insulation), aff'd, 789 F.2d 996, 1101 (3d Cir. 1986); see also Arthur Young & Co. v. United States District Court, 549 F.2d 686, 692-997 (9th Cir. 1977) (federal securities fraud/state claims class action did not violate Seventh Amendment despite bifurcation of remaining issues of reliance, causation, duty, statute of limitations, other affirmative defenses, and damages from initial common trial of liability issues).

CONCLUSION

This case presents a paradigmatic situation for class certification. Millions of consumers are driving on and/or in potentially life-threatening Tires and Vehicles, yet their damages to date – relatively modest economic damages – are too small to justify individual lawsuits. If Plaintiffs' allegations prove true (as the evidence suggests they will), Defendants have long known of this danger and concealed it from all Class members. Without class certification, harm and damages resulting from Defendants' products will remain unredressed, Class members' rights unvindicated, and Defendants' misconduct unaccounted for.

Therefore, Plaintiffs respectfully ask that the Court certify the proposed Class and Subclasses.

Dated: May _____, 2001

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

In re: BRIDGESTONE/FIRESTONE, INC. ATX, ATX II and WILDERNESS TIRES PRODUCTS LIABILITY LITIGATION	)	MDL NO. 1373
	)	Master File No. IP 00-9373-C-B/S
This Document Relates to All Cases	)	

CERTIFICATE OF SERVICE

The undersigned Plaintiffs' Liaison Counsel certifies that a copy of the foregoing documents were served via hand delivery or facsimile upon the following local counsel for the Defendants and Intervenors in this MDL Proceeding, this ____ day of May, 2001:

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